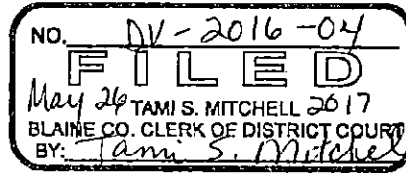


1 Hon. Yvonne Laird
2 District Judge
3 17th Judicial District
4 P.O. Box 470
5 Malta, MT 59538
6 Telephone: (406) 654-1062



7 MONTANA SEVENTEENTH JUDICIAL DISTRICT, BLAINE COUNTY

8 HAVRE PIPELINE COMPANY, LLC	No. DV-2016-04
9 Plaintiff,	
10 vs.	ORDER GRANTING DEFENDANTS' JOINT MOTION FOR DISMISSAL
11 THE MONTANA DEPARTMENT OF 12 PUBLIC SERVICE REGULATION, 13 MONTANA PUBLIC SERVICE COMMISSION, and the MONTANA CONSUMER COUNSEL,	
14 Defendants.	

15
16 This action is before the Court on a complaint filed by Plaintiff Havre Pipeline
17 Company, LLC ("Havre Pipeline") on April 12, 2016. Pursuant to § 69-3-402, MCA, Havre
18 Pipeline seeks a court ruling on whether Defendant Montana Public Service Commission
19 ("PSC") exceeded its regulatory jurisdiction when it issued Order 7413b on March 15, 2016. In
20 its complaint, Havre Pipeline alleges that Order 7413b "effectively contends that the PSC has
21 jurisdiction over Havre Pipeline's gas gathering lines, and purports to prohibit Havre Pipeline
22 from abandoning a gas gathering line with a farm tap without PSC approval." Pl. Compl. ¶ 19.
23 Furthermore, Havre Pipeline alleges, "Order 7413b is unlawful and unreasonable because the
24

1 Commission was legally bound by its 1995 Declaratory Ruling that it does not have regulatory
2 authority over Havre Pipeline's gas gathering lines." Pl. Compl. ¶ 21. Thus, Havre Pipeline
3 seeks a decree and judgment "that the PSC does not have jurisdiction over the gas gathering
4 lines owned by the Havre Pipeline, and cannot condition or control the abandonment of the gas
5 gathering lines." Pl. Compl. ¶ 24. Havre Pipeline also seeks a decree and judgment that PSC's
6 jurisdiction over the farm tap service is limited to ratemaking and seeks an order vacating
7 Order 7413b and remanding the matter to PSC. Pl. Compl. ¶¶ 25-26.

8
9 Pending before the Court is PSC and Defendant Montana Consumer Counsel's
10 ("MCC"; collectively, "Defendants") *Joint Motion for Dismissal* pursuant to Rule 12(b)(6),
11 M.R.Civ.P. Under this motion, Defendants argue that Havre Pipeline's complaint should be
12 dismissed due to the doctrine of collateral estoppel (hereinafter "issue preclusion"¹). In
13 response, Havre Pipeline contends Defendants' motion fails because, under Rule 8(c),
14 M.R.Civ.P., collateral estoppel is an affirmative defense to be asserted in an answer.
15 Defendants reply that Rule 12(b)(6) allows the defense to be asserted in a motion to dismiss.

16 The Court found that Rule 12(b)(6) allows a party to seek dismissal of an action either
17 by motion before an answer is filed or within the answer itself. Ord. Supp. Br. p. 2. However,
18 the Court ordered further briefing and oral argument on the issue of whether PSC's 1995
19 Declaratory Ruling represented a prior adjudication and final judgment for purposes of issue
20 preclusion. Ord. Supp. Br. p. 5.

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22
23
24 ¹ The modern trend identifies "collateral estoppel" as "issue preclusion." See *McDaniel v. State*, 2009 MT 159, ¶
27 n. 2, 350 Mont. 422, 208 P.3d 817.

1 A hearing was duly held on January 23, 2017, in the courtroom of the Blaine County
2 Courthouse, the undersigned judge presiding. Montana Special Assistant Attorney General
3 Jeremiah Langston appeared in person on behalf of PSC. Attorney Jason T. Brown appeared
4 via JVN on behalf of MCC. Attorney John Alke appeared via JVN on behalf of Havre
5 Pipeline. Attorney Sarah Norcott appeared via JVN on behalf of Havre Pipeline's parent
6 company, NorthWestern Energy. The attorneys presented oral argument supplementing their
7 briefs concerning Defendants' motion to dismiss.
8

9 In its supplemental brief and at the hearing, Havre Pipeline alleged that PSC has not
10 forwarded the administrative record to the Court for review. Havre Pipeline apparently
11 overlooked the *Notice of Transmittal of Administrative Record* filed June 17, 2016, and listed
12 in the register as Docket No. 5. On that date, the Court received a certified copy of the
13 administrative record from PSC. Thus, the Court ignores Havre Pipeline's arguments insofar as
14 they concern the absence of the administrative record.

15 Additionally, Havre Pipeline argues that § 69-3-402(2), MCA, requires PSC to file an
16 answer within twenty days of service of the complaint and that the Montana Rules of Civil
17 Procedure do not override this requirement. In other words, Havre Pipeline argues that,
18 contrary to what the Court found in its order for supplemental briefing, PSC may not move to
19 dismiss this case without first filing the statutorily-required answer. Havre Pipeline cites Rule
20 81(a), M.R.Civ.P., in support of its contention.
21

22 Rule 81(a), M.R.Civ.P., states in whole:

23 (a) Appeals to District Courts. These rules do not supersede the provisions of
24 statutes relating to appeals to or review by the district courts, but shall
25

1 govern procedure and practice relating thereto *insofar as these rules are not*
2 *inconsistent with such statutes.* (emphasis added)

3 Rule 12(b)(6), M.R.Civ.P., provides in pertinent part:

4 Every defense to a claim for relief in any pleading must be asserted in the
5 responsive pleading if one is required. But a party may assert the following
6 defenses by motion:

7 ...

(6) failure to state a claim upon which relief can be granted. . . .

8 Section 69-3-402(2), MCA, states in whole:

9 (2) The commission and other parties defendant shall file their answer to said
10 complaint within 20 days after the service thereof, whereupon such action
11 shall be at issue and stand ready for hearing upon 20 days' notice to either
12 party.

13 The Court holds that, pursuant to Rule 81(a), M.R.Civ.P., Rule 12(b)(6) is not
14 inconsistent with § 69-3-402(2), MCA. Section 69-3-402(2), MCA, is a statute that requires a
15 responsive pleading (i.e., an answer from PSC) after the complaint is filed. Rule 12(b) provides
16 that, where a responsive pleading is required, the defense of failure to state a claim may be
17 asserted by motion, i.e., it may be asserted in *either* a motion before an answer is filed *or*
18 within the answer itself.² Seeing no inconsistency with § 69-3-402(2), MCA, the Court finds
19 that the Montana Rules of Civil Procedure govern procedure and practice relating to §§ 69-3-
20 401, *et seq.*, MCA. Therefore, Defendants' motion to dismiss for failure to state a claim is
21 properly before the Court.

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23
24 ² See Ord. Supp. Br. p. 2.

1 Mont. 391, 372 P.3d 466 (citation omitted). It also conserves judicial resources and fosters
2 reliance on adjudication by preventing inconsistent judgments. *Id.* (citation omitted).

3 **A. The issues raised here are identical to those that were raised – or that could**
4 **have been raised – in the 1995 Declaratory Ruling.**

5 Of all the elements of issue preclusion, the first element – whether the issues are
6 identical – is the most important. *Planned Parenthood v. State*, 2015 MT 31, ¶ 13, 378 Mont.
7 151, 342 P.3d 684. Matters raised in the second suit must be identical in all respects to those
8 decided in the first proceeding. *Mt. Water Co.*, ¶ 46 (citing *Planned Parenthood*, ¶ 23). To
9 determine the identity of issues, courts compare the pleadings, evidence, and circumstances
10 surrounding the two actions. *McDaniel*, ¶ 33. Consistent with the purpose of promoting
11 judicial economy, issue preclusion applies when the issues are so intertwined that to decide the
12 issue before it, the district court would have to rehear the precise issue previously decided. *Id.*
13 (citations omitted). These include issues that *could* have been raised even if they were not
14 expressly pleaded. *Id.* (citation omitted).

15
16 For purposes of issue preclusion, the issues raised here are identical to the issues raised
17 in the 1995 Declaratory Ruling. In 1995, Havre Pipeline petitioned PSC for a determination of
18 the latter’s regulatory jurisdiction over the assets and services the former would acquire in its
19 transaction with Northern Natural Gas Company. Pl. Compl. Ex. 1, ¶ 1. PSC found it could
20 regulate the farm tap service as a profession of public utility. Pl. Compl. Ex. 1, ¶¶ 29, (3).
21 Additionally, PSC disclaimed jurisdiction over the “gathering function” of Havre Pipeline’s
22 gas gathering lines. Pl. Compl. Ex. 1, ¶ 16. PSC expressly made clear that it “would not
23 regulate the gathering portions of the pipeline system, *so long as producers are acting like*
24

1 *producers, collecting the gas at the well-head and gathering it to the . . . compression*
2 *facilities.”* Pl. Compl. Ex. 1, ¶¶ 16, (1) (emphasis added).

3 PSC’s Order 7413b, the order about which Havre Pipeline complains, reiterates PSC’s
4 finding from its 1995 Declaratory Ruling that PSC maintains regulatory jurisdiction over
5 Havre Pipeline’s farm tap service. Pl. Compl. Ex. 3, ¶¶ 7, 10. PSC explained that “. . . whether
6 the farm tap pulls from the gathering system or transmission lines, it is regulated by [PSC] as a
7 public utility.” Pl. Compl. Ex. 3, ¶ 6. PSC reasoned “. . . that any other conclusion is illogical,
8 as it would allow a public utility with a gas gathering system to escape regulation.” Pl. Compl.
9 Ex. 3, ¶ 6. PSC then ordered Havre Pipeline to refrain from discontinuing any farm tap service
10 absent express approval from PSC. Pl. Compl. Ex. 3, ¶ 33.

12 Havre Pipeline complains that Order 7413b effectively asserts PSC’s jurisdictional
13 authority over the abandonment of Havre Pipeline’s gas gathering lines, contradicting PSC’s
14 1995 ruling expressly disclaiming jurisdiction over the lines themselves. What Havre Pipeline
15 ignores, however, is that the issue of PSC’s jurisdiction over Havre Pipeline’s abandonment of
16 its gas gathering lines could have been raised at the district court upon petition for review of
17 the 1995 ruling. Using Havre Pipeline’s logic, if Havre Pipeline abandoned its gas gathering
18 lines without a replacement source of gas, it would effectively abandon its farm tap service, a
19 service over which PSC declared its jurisdiction in the 1995 ruling and for which Havre
20 Pipeline would need PSC’s permission to abandon. *See Great N. Ry. v. Bd. of R.R. Comm’rs*,
21 130 Mont. 250, 252, 298 P.2d 1093, 1094 (1956) (“. . . a public utility may not discontinue its
22 service without approval of the public service commission.”).

1 **B. The 1995 Declaratory Ruling is a final judgment on the merits in a prior**
2 **adjudication.**

3 The second element of issue preclusion is whether there has been a final judgment on
4 the merits in a prior adjudication. *Mont. Env'tl Info. Ctr.*, ¶ 17. Defendants maintain that PSC's
5 1995 Declaratory Ruling represents a prior adjudication and a final judgment, citing *Auto Parts*
6 *of Bozeman v. Employment Rels. Div. Uninsured Employers' Fund*, 2001 MT 72, 305 Mont.
7 40, 23 P.3d 193. Because of this case, the Court finds that, for purposes of issue preclusion, the
8 1995 Declaratory Ruling is a final judgment on the merits in a prior adjudication.

9 In the federal courts, administrative proceedings may be given preclusive effect. Such
10 effect is given when the agency, while acting in a judicial capacity, resolves disputed issues of
11 fact properly before it which the parties have had an adequate opportunity to litigate. *Miller v.*
12 *Cnty. of Santa Cruz*, 39 F.3d 1030, 1033 (9th Cir. 1994) (citing *United States v. Utah Constr.*
13 *& Mining Co.*, 384 U.S. 394, 422, 86 S. Ct. 1545, 1559 (1966)).

14 Although the Montana Supreme Court has not expressly adopted the *Miller* rule, the
15 Court believes the outcome of *Auto Parts* compels its adoption here. In *Auto Parts*, an
16 employer requested a hearing before the Department of Labor and Industry ("DLI"),
17 complaining that the Montana State Fund wrongfully canceled the employer's insurance
18 policy. *Auto Parts*, ¶ 11. The DLI hearing officer ordered the hearing dismissed for DLI's lack
19 of subject matter jurisdiction over the dispute. The order gave either party 30 days to appeal to
20 the Workers' Compensation Court ("WCC"). *Id.* Instead of appealing the order, the employer
21 requested another hearing before DLI and raised issues related to the initial proceeding. *Id.*, ¶
22 12. When the hearing officer dismissed the case based on DLI's prior finding of lack of
23
24

1 jurisdiction, the employer appealed this second order to the WCC. *Id.*, ¶ 13. The WCC
2 reversed the order, finding that the DLI did have jurisdiction over the employer's dispute with
3 the Montana State Fund. *Id.*, ¶¶ 14-15.

4 On appeal, the Montana Supreme Court reversed the WCC. The Supreme Court held
5 that the employer failed to timely appeal DLI's initial order finding a lack of jurisdiction, and
6 therefore relitigation of the issue in the second proceeding was barred by issue preclusion. *Id.*,
7 ¶¶ 27, 33-35.

8 Like the first DLI order in *Auto Parts*, here the 1995 Declaratory Ruling constitutes a
9 final judgment on the merits in a prior adjudication because Havre Pipeline failed to timely
10 appeal the ruling. Although § 69-3-402, MCA, specifically divests PSC of judicial powers, to
11 hold that such divestiture means that a PSC declaratory ruling can never be a "final judgment"
12 in a "prior adjudication" would render an absurd result. Under that interpretation, a person
13 dissatisfied with a PSC ruling or order could lodge a complaint pursuant to §§ 69-3-401, *et*
14 *seq.*, MCA, years past the 30-day limit set forth in § 69-3-402(1), MCA, to challenge the ruling
15 or order. To avoid that result, the Court finds that, at least for the application of issue
16 preclusion, § 69-3-402, MCA, does not prevent a PSC ruling from becoming a final judgment
17 on the merits in a prior adjudication.

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19
20 **C. Havre Pipeline had a full and fair opportunity to litigate the issues.**

21 The final element of issue preclusion is whether the party challenging dismissal of its
22 complaint had a full and fair opportunity to litigate the issue. *Mont. Env't'l Info. Ctr.*, ¶ 17. The
23 burden lies with the party defending against the application of issue preclusion to establish the
24 absence of a full and fair opportunity to litigate. *McDaniel*, ¶ 42 (citation omitted).

1 Havre Pipeline fails to demonstrate that it lacked a full and fair opportunity to litigate
2 the issues it raises here. The Court found in Part A, *supra*, that the issue Havre Pipeline alleges
3 in its complaint is an issue it could have raised at the district court after the effective date of
4 the 1995 ruling. As Havre Pipeline alleges no facts demonstrating that it lacked a full and fair
5 opportunity to litigate the issue, it fails to meet its burden. Therefore, the final element of issue
6 preclusion is met.

7
8 Based on the foregoing, **IT IS HEREBY ORDERED** that:

- 9 1. Defendants' *Joint Motion for Dismissal* is GRANTED.
10 2. Havre Pipeline's complaint is DISMISSED.
11 3. The Clerk shall send a copy of this Order to counsel of record.

12 DATED this 26th day of May, 2017.

13 
14 Yvonne Laird
15 District Court Judge

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MONTANA SEVENTEENTH JUDICIAL DISTRICT COURT, BLAINE COUNTY

HAVRE PIPELINE COMPANY, LLC,

CAUSE DV-2016-04

vs.

THE MONTANA DEPARTMENT OF
PUBLIC SERVICE REGULATION,
MONTANA PUBLIC SERVICE
COMMISSION, and the MONTANA
CONSUMER COUNSEL.

CERTIFICATE OF SERVICE

Tami Mitchell, being duly sworn, says that she is the Clerk of the District Court of Blaine County, Montana, that on May 26, 2017, sent or delivered, correct and true copies of:

ORDER GRANTING DEFENDANT'S JOINT MOTION FOR DISMISSAL

E-MAILED

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Clerk of Court