MINUTES OF THE MEETING
BUSINESS & INDUSTRY COMMITTEE
MONTANA STATE SENATE

MARCH 1, 1979

The meeting of the Business and Industry Committee was called to order by Chairman Frank Hazelbaker on the above date in Room 404 of the State Capitol Building at 10:00 a.m.

ROLL CALL: All members were present with the exception of Senator William Lowe who was excused.

HOUSE BILL 92: Chairman Hazelbaker called on Representative Hershel Robbins, sponsor of House Bill 92, to explain the bill to the Committee. This bill is an act to revise and clarify laws relating to the issuance of duplicate bonds, warrants, and coupons; amending sections 7-7-2104 and 7-7-2106, MCA; and repealing section 7-7-2105, MCA.

PROPONENTS OF HOUSE BILL 92: Representative Robbins called on Judith Carlson, representing SRS, to explain the bill further to the Committee.

There were no other proponents or opponents present at the hearing.

There was a question and answer period from the Committee, after which Chairman Hazelbaker closed the hearing on House Bill 92.

DISPOSITION OF HOUSE BILL 92: Senator Goodover moved that House Bill 92 be concurred in. Senator Dover seconded the motion. Senator Regan moved that House Bill 92 be placed on the Consent Calendar. The Committee voted unanimously that HOUSE BILL 92 BE CONCURRED IN and placed on the Consent Calendar.

Senator Goodover will carry House Bill 92 on the floor.

HOUSE BILL 39: This bill is by request of the Code Commissioner. This bill generally revises and clarifies the law relating to credit transactions.

PROPONENTS OF HOUSE BILL 39: Representative Manuel, sponsor of HB 39 was unable to be present at the hearing, so Chairman Hazelbaker called on Mr. David Cogley of the Legislative Council to explain the bill to the Committee. Mr. Cogley went through changes in the bill with the Committee.

There were no other proponents or opponents to House Bill 39 present at the hearing.

DISPOSITION OF HOUSE BILL 39: Senator Dover moved that House Bill 39 be concurred in. The Committee voted unanimously that HOUSE BILL 39 BE CONCURRED IN and be placed on the Consent Calendar.

Senator Dover will carry House Bill 39 on the floor.

HOUSE BILL 16: Representative Quilici, sponsor of House Bill 16, explained the bill to the Committee. This bill is by request of the Public Service Commission. This bill provides that witnesses before the Commission are to be paid the same fees as are paid to witnesses in civil actions before the district courts.

PROPONENTS OF HOUSE BILL 16: Representative Quilici called on Mr. Wayne Beidt, representing the Montana Public Service Commission, to explain the bill further to the Committee. Mr. Beidt presented an exhibit which is attached to the minutes.

DISPOSITION OF HOUSE BILL 16: Senator Regan moved that House Bill 16 be concurred in. The Committee voted unanimously that HOUSE BILL 16 BE CONCURRED IN and placed on the Consent Calendar.

Senator Regan will carry House Bill 16 on the floor.

HOUSE BILL 21: This bill is by request of the Public Service Commission. This bill deletes the provision allowing the introductio in an appeal to district court from a commission decision, of evidence not covered in the transcript of commission proceedings.

PROPONENTS OF HOUSE BILL 21: Representative Quilici, sponsor of House Bill 21, called on Eileen Shore, representing the Public Service Commission. Her testimony is attached.

Mr. Bill Opitz, representing the Public Service Commission, stated that they unanimously support House Bill 21.

Mr. Geoffrey Brazier, representing the Montana Consumer Counsel, stated they support HB 21. He offered an exhibit which is attached to the minutes.

OPPONENTS OF HOUSE BILL 21: Mr. George Bennett, representing Mountain Bell, stated that the bill will not do what it says it will do. He recommended leaving the law the way it is. He stated there have been few rate cases over the past 20 years. He told the Committee you take away from a lot of people who may not be represented by the consumer counsel the right to introduce evidence.

Mr. Gene Phillips of Kalispell, Montana, representing Pacific Power & Light and Northwestern Telephone, stated that they feel this bill is a detriment to the consumers. Mr. Phillips stated that most of the cases they hear are not rate cases. He recommended that House Bill 21 do not pass.

Mr. Bob Gannon from Butte Montana, representing Montana Power Company, stated they oppose HB 21. He submitted seven proposed amendments which are attached. He proposes the amendments as a middle ground.

Mr. Les Loble, representing Montana-Dakota Utilities and General Telephone of the Northwest, Inc., stated this statute does not apply just to utilities and the bill should either be killed or amended.

There was a question and answer period from the Committee.

Senator Goodover asked how often a dissatisfied party has gone through the second procedure and had a ruling reversed from the original procedure.

Mr. Bennett stated he had never seen any rulings reversed.

Senator Kolstad asked about the consumer impact.

Mr. Opitz stated the utility companies are not worried about the little guy.

Senator Goodover asked Ms. Shore from the Public Service Commission if they consider themselves an administrative agency.

Ms. Shore stated they did consider themselves an administrative agency.

Representative Quilici made concluding remarks to the Committee in support of House Bill 21.

Chairman Hazelbaker closed the hearing on House Bill 21.

No executive action was taken on HB 21 or on HJR 21 at this meeting.

ADJOURN: There being no further business, the meeting was adjourned at 11:15 a.m.

Senator Frank Hazelbaker, Chairman

ROLL CALL

BUSINESS & INDUSTRY COMMITTEE

46TH LEGISLATIVE SESSION - - 1979 Date March 1

NAME	PRESENT	ABSENT	EXCUSED
Pat Goodover, Vice Chairman	✓		
Chet Blaylock	✓		
Harold Dover	✓		
Tom Hager	✓		
Allen Kolstad	✓		
Bill Lowe			✓
John Mehrens	✓		
Bob Peterson	✓		
Pat Regan	✓		
Frank Hazelbaker, Chairman	✓		

STANDING COMMITTEE REPORT

March 1, 1979

MR. President:

We, your committee on Business and Industry

having had under consideration House Bill No. 16

Respectfully report as follows: That House Bill No. 16
was unanimously passed and was unanimously placed on the Consent Calendar.

BE CONCURRED IN
XXX PASS

Chairman

STATE PUB. CO.
Helena, Mont.

STANDING COMMITTEE REPORT

March 1, 19 79

MR. President:

We, your committee on Business and Industry

having had under consideration House Bill No. 39

Respectfully report as follows: That House Bill No. 39

was unanimously passed and was unanimously placed on the Consent Calendar.

BE CONCURRED IN

DO NOT PASS

Chairman.

STATE PUB. CO.
Helena, Mont.

STANDING COMMITTEE REPORT

March 1, 19 79

MR. President:

We, your committee on Business and Industry

having had under consideration House Bill No. 92

Respectfully report as follows: That House Bill No. 92
was unanimously passed and unanimously placed on the
Consent Calendar.

BE CONCURRED IN
REMARK 94

Chairman.

STATE PUB. CO.
Helena, Mont.

Montana Legislative Council
State Capitol
Helena, 59601
(406) 449-3064

LC 0031

1979 Legislature
Code Commissioner Bill - Summary

H Bill No. 39

TO GENERALLY REVISE AND CLARIFY THE LAW RELATING TO CREDIT TRANSACTIONS AND RELATIONSHIPS; AMENDING 31-1-231, 31-1-243, 31-1-301, 31-2-218, 31-2-224, and 31-2-226.

(This summary does not include discussion of routine form or grammatical changes.)

Section 1. 31-1-231. The proposed amendment clarifies the meaning of 31-1-231(5)(k) by specifically requiring retail installment contracts to state the period of installments.

Section 2. 31-1-243. The proposed amendment deletes the reference to "an acquisition cost under 31-1-242". There is no mention of an "acquisition cost" in 31-1-242.

Section 3. 31-1-301. In R.C.M. 1947 the statute read "from and after the passage of this act." Recodification required the deletion of "this act". The proposed amendment eliminates the phrase "From and after February 27, 1911" as temporary and unnecessary. Also minor grammatical changes.

Section 4. 31-2-218. In recodification, former R.C.M. sections 73-201 through 73-204 were placed in 70-21-102 and in part 3, Chapter 21 of Title 70 of the MCA. Amendment is required because other former R.C.M. sections (16-2908, 39-132, 73-206, and 73-213) are also included in part 3, Chapter 21 of Title 70. Thus the reference to part 3, Chapter 21 of Title 70 is not an accurate statement of existing law. The proposed amendment would not change substantive law.

Section 5. 31-2-224. "upon" is deleted as redundant.

Section 6. 31-2-226. The reference "in the manner prescribed by [title 93]" is deleted because there is no procedure in the former Title 93 for an accounting by an assignee of an assignment for the benefit of creditors. The method and procedure is left to the discretion of the district court.

NAME: Judith H Gibson DATE: 3/1
Phil Gouveia

ADDRESS:

PHONE:

REPRESENTING WHOM? SRS

APPEARING ON WHICH PROPOSAL: HB 92

DO YOU: SUPPORT? X AMEND? OPPOSE?

COMMENTS:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

Submitted by Keith Carlson

TESTIMONY BEFORE THE SENATE BUSINESS & INDUSTRY COMMITTEE
THURSDAY, MARCH 1, 1979 AT 10 A.M.

H.B. 92--"AN ACT TO REVISE AND CLARIFY LAWS RELATING TO THE ISSUANCE OF DUPLICATE BONDS, WARRANTS AND COUPONS; AMENDING SECTIONS 7-7-2104 AND 7-7-2106, MCA; AND REPEALING SECTION 7-7-2105, MCA."

THIS IS A SIMPLE BILL. STATE GOVERNMENT WILL NEITHER RISE NOR FALL DEPENDING UPON ITS PASSAGE. HOWEVER, IT WILL SIMPLIFY AND ELIMINATE UNNECESSARY PAPERWORK. TO MY KNOWLEDGE, IT HAS NO OPPOSITION.

UNDER PRESENT LAWS, WHEN A COUNTY WARRANT IS LOST, THE STATE MUST POST A DOUBLE INDEMNITY BOND BEFORE THE COUNTY CAN ISSUE A DUPLICATE WARRANT. THIS HAS HAPPENED SEVERAL TIMES TO THE DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES. IT HAS ALSO HAPPENED TO THE DEPARTMENT OF REVENUE. COUNTIES SEND WARRANTS FOR REIMBURSEMENT OR PAYMENT TO THE STATE, AND ON A FEW OCCASIONS THOSE WARRANTS DO NOT ARRIVE. THE EXISTING LAW DOES NOT ALLOW THE COUNTY TREASURER TO ISSUE A DUPLICATE WARRANT UNTIL SOME STATE OFFICIAL POSTS A BOND FOR DOUBLE THE AMOUNT OF THE ORIGINAL WARRANT. FOR PRIVATE PARTIES, THE INTENT IS TO PREVENT PERSONS FROM GETTING DUPLICATE PAYMENT IN THE EVENT THAT THE LOST WARRANT IS FOUND. FOR THE STATE, THIS IS UNNECESSARY. THE STATE IS CONSIDERED SOLVENT, AND DUPLICATE PAYMENTS CANNOT BE ACCEPTED.

THE PROCESS OF OBTAINING A BOND REQUIRES TIME AND PAPERWORK THAT CAN BE ELIMINATED. IT IS ONE WAY OF SIMPLIFYING GOVERNMENT.

NAME: Wayne Biedt DATE: 3/1/79

ADDRESS: 1227 11th Ave

PHONE: 449-2549

REPRESENTING WHOM? Mont Public Service Comm

APPEARING ON WHICH PROPOSAL: HB 16

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENTS: A Hachel

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

THIS BILL ALSO MAKES CONSISTENT STATE STATUTE SECTIONS REGARDING WARRANTS WITH SECTIONS REGARDING BONDS AND COUPONS. THERE IS NO REASON FOR DIFFERENT PROCEDURES FOR THESE SIMILAR SITUATIONS.

WE SOLICIT YOUR SUPPORT FOR THIS BILL.

Submitted by
Wayne Beilt

H B 16

Bill to bring fees for subpoenaed witnesses in line with those provided for witnesses in civil actions before District Court.

Reasons: 1. Up date statute

2. Make fees more compensable.

NAME: Eileen Shore DATE: 3/1/79

ADDRESS: 1227 11th Ave., Helena - PSC

PHONE: 449-3007

REPRESENTING WHOM? Public Service Commission

APPEARING ON WHICH PROPOSAL: H.B. 21

DO YOU: SUPPORT? ✓ AMEND? _____ OPPOSE? _____

COMMENTS: WRITTEN testimony offered

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

PUBLIC SERVICE COMMISSION 1227 11th Avenue • Helena, Montana 59601
Telephone: (406) 449-3007 or 449-3008

March 1, 1979

H. B. 21

TESTIMONY OF THE PUBLIC SERVICE COMMISSION

Before the Senate Committee on Business and Industry

Mr. Chairman and Members of the Committee, my name is Eileen Shore. I am a staff attorney for the Public Service Commission and appear today on its behalf. The Commission supports H.B. 21.

As the laws are now written, a person dissatisfied with a Public Service Commission decision can seek judicial review under two very different statutes - The Montana Administrative Procedure Act (MAPA), and the provisions which would be repealed by H.B. 21. In other words, by passing this bill the Legislature will limit dissatisfied parties to seeking judicial review under MAPA.

The sections we are asking you to repeal are part of Montana's basic law regulating public utilities passed in 1913. Until the Montana Administrative Procedure Act was passed in 1971, judicial review was available only because of this statute.

A quick comparison of the major differences between the two statutes will illustrate why judicial review should be available only under MAPA:

MAPA	Sections 69-3-402 and 404, MCA
1. In court, party may introduce additional evidence if the judge is satisfied that it is material and that there were good reasons for it not being presented to the administrative agency.	1. Party has the right to introduce evidence different from or in addition to what was presented to the PSC.
2. Review of a Commission decision is based on the record which has been developed by parties at the agency level-appellate review similar to review by the Supreme Court of district court decisions.	2. Review of a Commission decision is based upon evidence which the Commission may never have seen or which is in conflict with evidence which the Commission did see- a trial type procedure.

MAPA reflects the modern development in administrative law. Roger Tippy, in his book on the law, quoted an American Bar Association statement of the principles behind that development:

> Procedural rights in state adjudicative hearings [should be] set forth ... in order to secure fairness coupled with efficiency....
>
> * * * *
>
> Adequate judicial review of agency action [should be] provided.

The judicial review provisions of the original utility regulation law has outlived its usefulness. Specifically, the law should be repealed for the following reasons:

1. It causes substantial expense, both in terms of money and time, for the Public Service Commission, for the Montana Consumer Counsel and for private parties;

2. It is unnecessary; the Commission rules and the Montana Administrative Procedure Act allow any party more than adequate opportunity to introduce evidence;

3. It allows a form of judicial review which seriously violates the underlying intent behind having a professional administrative agency;

4. It is in conflict with sound public utility regulation.

1. Expenses

It is expensive for anyone to participate in a rate case before the Public Service Commission. Testimony and exhibits must be prepared, usually by a highly paid expert witness. There is usually extensive discovery, which is designed to help each party thoroughly understand the case other parties will present to the Commission. Finally, there is a hearing which may last up to a week. At the hearing, each party has the opportunity to present its witnesses and to cross-examine witnesses of the other parties. The result of all this effort is a large administrative record, including a full transcript of the hearing.

The law we are asking you to repeal allows a dissatisfied party to go to district court to try again -- to take his highly technical case before a judge. Once again we have discovery, testimony and a trial. And the statute allows not only additional evidence but also evidence that is different from that presented to the Commission. In addition to adding to the caseload burden of the courts, this process requires a great deal

of attorney's time by the Public Service Commission staff and the Consumer Counsel's staff, as well as expenditures by the Consumer Counsel to hire its expert witnesses to testify.

By comparison, under MAPA, the parties base their case on the administrative record. The court case basically consists of legal briefs and oral argument. This usually results in a considerable savings, both in terms of time and money.

2. Modern Legal Developments Make This Law Unnecessary

No one's legal rights are threatened by repeal of this law.

Under the Commission's rules any party may ask the Commission to reconsider or rehear any issue which has been presented. The Commission has been very liberal in granting such requests when the facts warrant. Under these rules, additional evidence has been accepted.

In addition, under the Montana Administrative Procedure Act a judge has the discretion to accept additional evidence during the court proceedings, with the only requirement being that there be a good reason why the evidence wasn't offered to the Commission.

3. Judicial Review of Administrative Decisions - The Montana Supreme Court View

Section 69-3-404 violates sound principles of the proper role of the courts in the administrative process.

Justice Gene Daly, in a very recently decided unanimous Supreme Court decision eloquently discussed the proper role of a

court reviewing a Public Service Commission's decision. In summary, he stated:

-- Limited judicial review (as opposed to the wide open review allowed by the utility regulation law) strengthens the administrative process.

-- Limited review encourages the free and complete presentation of evidence to the agency.

-- To allow parties to re-try their cases at the court level encourages them to save their evidence until it really counts. "The result is that an agency which has the knowledge and experience in its substantive field does not hear all the evidence, making it difficult to make a proper decision."

-- The agency and the court should do what each does best: The agencies are specialists in the substantive matter that the legislature designated it to regulate; the courts are specialists in constitutional issues, statutory interpretation, requirements of a fair hearing and the determination that a finding is supported by the evidence.

-- Agencies need a balancing check to assure that their decisions are proper. The court can do this by reviewing the administrative record.

-- The Montana Administrative Procedure Act reflects these principles.

This unanimous decision is the most thorough statement by the Supreme Court to date about the proper relationship between the Courts and the Public Service Commission. It is a solid statement by the Supreme Court that it, and district courts, should act as appellate courts and not trial courts, as is allowed under the laws which would be repealed by H.B. 21.

In summary, I think this case sets out very clearly and comprehensively the Supreme Courts position that the courts should review Public Service Commission decisions only under the kind of provisions contained in MAPA.

(The relevant portions of Justice Daly's opinion are attached.)

4. Section 69-3-404 Conflicts with Accepted Principles of Utility Regulation

Utility regulation requires that the PSC get a comprehensive look at all aspects of a utility's financial situation at a given time. In order for it to do this, each rate application is based on a "test year." The utility will try to demonstrate that, based on expenses, revenues and investments of a given year, it is entitled to higher rates. (Adjustments are made in these figures for known changes which will take place in the near future.)

This approach is necessary in order to assure that the various expenses, revenues and expenses "match" each other to give the Commission a fair "snapshot" of the actual workings of

the utility. If this is not done -- for example, if expenses are taken from one year and revenues are taken from another -- the Commission cannot get an accurate picture of the utility's financial situation.

In the past, utilities have tried to accomplish exactly this mismatch which the Commission seeks to avoid, by introducing new evidence under Sections 69-3-402 and 69-3-404: The utilities have asked the court to change a Commission decision because an expense, which it incurred long after the end of the test year, was not considered by the Commission.

correctly held that the PSC had erroneously ordered a confiscatory accounting to determine original cost of this property.

3. Whether the District Court correctly affirmed the Commission's use of an average-year rate base and related property taxes, adjusted to include a major new facility (Colstrip Unit I), rather than a year-end rate base.

Before proceeding to a discussion of the specific issues raised by this appeal, we find it helpful to make some prefatory remarks regarding the relative roles and functions of the Montana Public Service Commission, the District Court and this Court in utility rate cases.

In Chapter 1, Title 70, Revised Codes of Montana 1947, now Chapters 1-3, Title 69 MCA, the legislature created the Public Service Commission of Montana and delegated to it the "duty . . . to supervise and regulate the operations of the public utilities." Section 70-101, R.C.M. 1947, now section 69-1-102 MCA. As part of these duties, the Commission is given the power to "investigate and ascertain the value of the property of every public utility actually used and useful for the convenience of the public." Section 70-106, R.C.M. 1947, now section 69-3-109 MCA. It is the proper exercise of this power that forms the basis of each of the issues in this appeal.

A utility dissatisfied with an order of the Commission has two statutory routes of appeal for judicial review: Section 70-128, R.C.M. 1947, now section 69-3-402 MCA, and section 82-4216, R.C.M. 1947, now sections 2-4-701 through -704 MCA, of the Montana Administrative Procedures Act. Montana Power has chosen the latter of these routes.

This statute strictly limits the scope of judicial review of an administrative agency decision. Under section 82-4216(1)(a), now sections 2-4-701, -702 MCA, only final agency decisions in a contested case may generally be reviewed. Only if review of the final decision would not provide an adequate remedy is a preliminary or intermediate agency action or ruling immediately reviewable.

Subsection (7), now section 2-4-704 MCA, of the same statute further limits the scope of review. Under that subsection a District Court is not allowed to substitute its judgment for that of the agency as to the weight of evidence on questions of fact. The court may reverse or modify the administrative decision only if substantial rights of the aggrieved party have been prejudiced by virtue of enumerated agency violations or errors.

In Vita-Rich Dairy, Inc. v. Department of Business Regulation (1976), 170 Mont. 341, 553 P.2d 980, we examined the underlying rationale of this limited review statute and stated three basic principles in determining what the scope of review should be:

> "First. The Court recognizes that limited judicial review strengthens the administrative process. Limited review encourages the full and complete presentation of evidence to the agency by the participants in the administrative process by penalizing those who attempt to add new evidence or new lines of argument at the judicial review level. A de novo review encourages the participants to save their evidence until it really counts and present it first to the reviewing court rather than to the agency which has the knowledge and experience in the field it regulates. The result is that the agency which has the knowledge and experience in its substantive field does not hear all the evidence, making it difficult to make a proper decision. It also results in the decision being made by a reviewing court which does not have the specialized knowledge or experience in the area.
>
> ". . .

"Second. Judicial economy requires that the various functions involved in the administrative process must be divided on the basis of comparative abilities and qualifications of each body. Courts are specialists in constitutional issues, statutory interpretation, the requirements of a fair hearing, and the determination that a finding is supported by substantial evidence. The agency is a specialist in the substantive matter that the legislature delegated to it to regulate.

"Third. The agency's actions need a balancing check. In the absence of a body within the agency which is separated from the actual decision and in which all parties have confidence, a limited judicial inquiry to see (a) that a fair procedure was used, (b) that questions of law were properly decided and, (c) that the decision is supported by substantial evidence, is necessary." 170 Mont. at 343-45, 553 P.2d at 982-83.

Returning to our discussion of the roles of each participating governmental entity, we note that further review of an agency decision and District Court final judgment may be had on appeal to this Court. Section 82-4217, R.C.M. 1947, now section 2-4-711 MCA. While that section does not spell out our scope of review of an administrative agency action, that matter is fully settled by our cases:

"This court has recognized that the regulatory commissions of this state are invested with broad powers within their sphere of administration authorized by the legislature. Tobacco River Power Co. v. Pub. Service Comm'n, 109 Mont. 521, 98 P.2d 886. Even in quasi-judicial proceedings their informed and expert judgment receives proper consideration by the courts of this state when such judgment has been reached with due consideration of constitutional restraints. Baker Sales Barn, Inc. v. Montana Livestock Comm'n, 140 Mont. 1, 367 P.2d 775. Much that is done by these administrative agencies of the state, within the realm of administrative discretion, is exempt by the legislature from supervision by the courts if those restraints are obeyed.

". . .

". . . this court is always confronted in rate-making cases with the question of how far the court can go in interfering with, or directing the exercise of power, by an equal department of the government. We have repeatedly held that there will be no interference with the orders of the Commission unless:

"(1) they go beyond the power constitutionally given; or,

"(2) beyond their statutory power; or

"(3) they are based upon a mistake of law." Cascade County Consumers Ass'n v. Public Service Comm'n (1964), 144 Mont. 169, 185-86, 192, 394 P.2d 856, 865, 868.

and

"Even if we were so disposed by our personal views, we cannot substitute our discretion for that of the board unless we can say clearly that the order is unreasonable." Chicago, M., St. P. & P. R. Co. v. Board of Railroad Commissioners (1953), 126 Mont. 568, 575, 255 P.2d 346, 351.

We too are constrained in our review of agency actions by the principles enunciated in Vita-Rich Dairy, Inc.

In addition, the findings of a District Court come to us with a presumption of correctness:

"'. . . We have consistently held under such circumstances that this Court cannot substitute its weighing of the evidence for that of the trial court. When there is a conflict in the evidence, the findings of the trial court are presumed to be correct if supported by substantial evidence.' Sedlacek v. Ahrens (1974), 165 Mont. 479, 485, 530 P.2d 424.

"We have also held that the findings of the trial court, in a nonjury trial, will not be reversed on appeal, unless there is a clear preponderance of evidence against the findings." Montana Farm Service Co. v. Marquart (1978), ___ Mont. ____, 578 P.2d 315, 316, 35 St.Rep. 631, 633.

With these principles in mind, we now proceed to an analysis of each specific issue.

The elimination of $5.7 million from rate base. The Commission eliminated from Montana Power's rate base $5.939 million on the ground that the amount, by definition of the accounts, represented an investment in excess of original cost. The Commission did allow Montana Power to recover this amount itself, without any return, through amortization over a twenty-year period.

(2) As a condition to the granting of such injunction, the court shall require of the party seeking such injunction an undertaking entered into on the part of the plaintiff, supported by responsible corporate surety, in such reasonable sum as the court shall direct, to the effect that the plaintiff will pay all damages which the opposite party may sustain by reason of the delay or prevention of the order of the commission becoming effective if said order is sustained in the final determination, or in proceedings involving rates, the court may in the alternative require the difference between the existing rate and the commission ordered rate to be impounded under the direction of the court, pending the final determination of the action.

History: En. Sec. 26, Ch. 52, L. 1913; re-en. Sec. 3906, R.C.M. 1921; re-en. Sec. 3906, R.C.M. 1935; amd. Sec. 1, Ch. 56, L. 1937; amd. Sec. 1, Ch. 475, L. 1977; R.C.M. 1947, 70-128(part).

69-3-404. Effect of introduction of new evidence — resubmission to commission. (1) If upon the trial of such action evidence shall be introduced by the plaintiff which is found by the court to be different from that offered upon the hearing before the commission or additional thereto, the court, before proceeding to render judgment, unless the parties to such action stipulate in writing to the contrary, shall transmit a copy of such evidence to the commission and shall stay further proceedings in said action for 15 days from the date of such transmission. Upon receipt of such evidence, the commission shall consider the same and may modify, amend, or rescind its order relating to such rate, fare, charge, classification, joint rate, regulation, practice, or service complained of in said action and shall report its action thereon to said court within 10 days from the receipt of such evidence.

(2) If the commission shall rescind its order complained of, the action shall be dismissed. If it shall alter, modify, or amend the same, such altered, modified, or amended order shall take the place of the original order complained of and judgment shall be rendered thereon as though made by the commission in the first instance. If the original order shall not be rescinded or changed by the commission, judgment shall be rendered upon such original order.

History: En. Sec. 26, Ch. 52, L. 1913; re-en. Sec. 3906, R.C.M. 1921; re-en. Sec. 3906, R.C.M. 1935; amd. Sec. 1, Ch. 56, L. 1937; amd. Sec. 1, Ch. 475, L. 1977; R.C.M. 1947, 70-128(3), (4).

69-3-405. Appeal of court decision. Within 60 days after service of a copy of the order or judgment of the court, either party to said action may appeal or take the case up on error as in other civil actions. Where an appeal is taken to the supreme court of Montana, the cause shall, on the return of the papers to the higher court, be immediately placed on the calendar of the then pending term and shall be assigned and brought to a hearing in the same manner as other causes on the calendar.

History: En. Sec. 26, Ch. 52, L. 1913; re-en. Sec. 3906, R.C.M. 1921; re-en. Sec. 3906, R.C.M. 1935; amd. Sec. 1, Ch. 56, L. 1937; amd. Sec. 1, Ch. 475, L. 1977; R.C.M. 1947, 70-128(5).

Part 5

Issuance of Securities and Creation of Liens

69-3-501. Regulation of issuance of securities and creation of liens by utilities. (1) The right of every public utility, as defined in 69-3-101, furnishing electric or gas service in the state to issue, assume, or guarantee securities and

NAME: William J. Opitz DATE: 3/1/79

ADDRESS: 2 Wood Ct.

PHONE: 443-3624

REPRESENTING WHOM? Mont PSC

APPEARING ON WHICH PROPOSAL: HB-21

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENTS: The Commission unanimously supports the passage of HB-21. If a bad bill can be amended, how can a "bad statute" be amended? An agrieved party can present new evidence through,

(a.) Comm'n's Rules & Regs 9/0

(b.) MAPA.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: Geoffrey L. Beaman DATE: March 1979

ADDRESS: 341 E4 Helena

PHONE: 449-2771

REPRESENTING WHOM? Montana Power Co.

APPEARING ON WHICH PROPOSAL: #

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? _____

COMMENTS: Power Siting

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

Submitted by
Geoffrey L. Brazier

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS & CLARK.

INDEXED

MONTANA-DAKOTA UTILITIES CO.,

Plaintiff,

vs.

GORDON E. BOLLINGER, P. J. GILFEATHER, THOMAS J. SCHNEIDER, JAMES R. SHEA and GEORGE TURMAN, being the members of, and constituting, the PUBLIC SERVICE COMMISSION OF MONTANA, and GEOFFREY L. BRAZIER, being and constituting the Montana Consumer Counsel,

Defendants.

No. 41741

FINDINGS OF FACT, OPINION AND CONCLUSIONS OF LAW.

This is an appeal from an order of the Montana Public Service Commission. Petitioner is the Montana-Dakota Utilities Co. Respondents are Gordon E. Bollinger, P. J. Gilfeather, Thomas J. Schneider, James R. Shea, and George Turman, being the members of, and constituting, the Public Service Commission of Montana, and Geoffrey L. Brazier, being and constituting the Montana Consumer Counsel.

Petitioner is represented by Lester H. Loble,II, Esq. Respondent, Montana Public Service Commission, is represented by Dennis L. Lopach, Esq., and respondent, Montana Consumer Counsel, is represented by Geoffrey L. Brazier, Esq.

The contested order (Order No. 4369) resulted from contested administrative proceedings in Docket No. 6441, the application of MDU for authority to establish increased rates for natural gas and electric service. MDU selected §70-128, R.C.M. 1947 and §82-4216, R.C.M. 1947, if deemed applicable, as the vehicles for obtaining review of the Commission's Order.

From the record, the Court makes the following findings of fact:

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FILED May 16 1978
CLARA SMITH, Clerk of District Court
By Mary Ann Deputy

FINDINGS OF FACT

1. Defendants are the individual members of the Montana Public Service Commission, which was created by an act of the Montana legislature.

2. The Commission is vested with certain powers of supervision, regulation and control of public utilities within the State of Montana, and as such has jurisdiction over the rates and charges for public utility service of plaintiff MDU, a public utility operating within the State of Montana. The Commission's powers and jurisdiction over MDU are set forth and contained in R.C.M. 1947, §70-101, et seq.

3. Defendant Geoffrey L. Brazier holds the position of Montana Consumer Counsel (MCC), an office created by the 1972 Constitution of the State of Montana (Article XIII, Section 2). MCC is charged by law with the responsibility of representing the utility and transportation consuming public before the PSC. R.C.M. 1947, Section 70-701, et seq.

4. MDU filed its application, prepared testimony and exhibit in this matter with the PSC on August 11, 1976. The application sought an additional $2,549,000 in electric revenues and $2,434,000 in gas revenues over the rates then in effect. The application was assigned Docket No. 6441. Following notice, a prehearing conference was held on October 7, 1976. This order established procedures and a timetable for the disposition of the case. On March 14, 1977, pursuant to proper legal notice, a public hearing commenced in the offices of the Commission in Helena. Following conclusion of the hearing on March 18, 1978, briefs were submitted by MDU, the Montana Consumer Counsel (MCC) and the Commission staff. In addition, MDU and MCC submitted proposed findings of fact and conclusions of law.

5. On August 17, 1977, the PSC issued Order No. 4369 in Docket No. 6441, granting some but not all the increase requested. MDU was authorized by this Order to increase its revenue for

electric service by $1,522,000 and its revenue for natural gas service by $658,000.

6. On September 16, 1977, MDU filed with this Court its complaint, which sought review of the Commission's treatment in Order No. 4369 of four specific matters. Leave was also sought to present additional evidence concerning a fifth area of dispute. The complaint was brought under R.C.M. 1947, Section 70-128 and R.C.M. 1947, Section 82-4216, if the Court should find that section applicable.

7. MCC moved to dismiss the complaint on October 7, 1977, and MDU moved to strike that motion on October 13th. Following the exchange of briefs on the motions to dismiss and to strike, MCC filed an answer on October 19th. The Commission's answer was filed on October 20th.

8. A pre-trial conference was conducted by the Court on October 24, 1977, at which time a deadline for completion of discovery was established. At the same time, the Court fixed a briefing schedule regarding the relevancy of MDU's proposed evidence of its mid-year 1977 industrial sales in the State of Montana. On October 25, 1977, MDU filed its "Notice of Readiness for Trial".

9. During ensuing weeks the parties conducted their discovery and prepared the record of the Commission proceeding for submission to the Court. A second pre-trial conference was held on December 2, 1977 for the purpose of discussing the procedural complexities of the case.

10. On December 22, 1977, the Court heard the arguments of counsel regarding the relevancy of MDU's curtailment evidence. At the conclusion of the argument it was the Court's decision to receive the disputed evidence, subject to the right of opposing counsel to move to strike those portions deemed to be irrelevant or otherwise improper.

11. A trial was conducted on January 16, 1978, and on the afternoon of January 17th. Barrie A. Wigmore and David P. Price

testified for MDU, and George F. Hess appeared for MCC. Following an additional conference with the Court, on January 19th, the parties agreed that the Commission would receive the transcript of the evidence offered at trial as soon as the transcript was completed. The Commission was given until February 21, 1978, in which to issue its order rescinding, modifying or affirming Order No. 4369. The transmittal of the full record to the Commission was to be effected prior to the Court's addressing of the objections of the parties to th receipt of this evidence, and without prejudice to their right to make motions to strike at a later time.

12. On February 17, 1978, the Commission served Order No. 4369a upon the parties. The Order was filed with the Court on February 21, 1978, and, as discussed below, granted MDU a total reven increase of slightly over $100,000 per year. The increase resulted from the Commission's acceptance of MDU's allocated capital structure evidence, the only evidence produced at trial by MDU which was deemed of any merit.

13. Initial briefs and motions to strike directed to the evidence offered at trial were filed on March 20, 1978. Following the filing of reply briefs and proposed opinions and orders on March 29, 1978, and oral argument on April 11, 1978, the motion was submitted for decision.

14. The Court has reviewed the record to the extent directed by the parties and being fully advised in the premises renders the following Opinion and Conclusions.

OPINION AND CONCLUSIONS OF LAW

As to the adequacy of the Commission's order, MDU asserts error upon five separate grounds:

1. The adequacy of the return on equity allowed by the Commission;

2. The Commission's failure to allow a higher return on equit for the gas utility (now converted into a question of the adequacy of

the differential return allowed in Order No. 4369a;

3. The Commission's refusal to allow so-called compensating balances to be included in rate base;

4. The attribution of certain revenues to MDU's participation sales in the Mid Area Power Pool;

5. The Commission's refusal to utilize a 40% curtailment figure for industrial sales.

Because of the confusion over the inter-relationship between review under §70-128 R.C.M. 1947 and the Montana Administrative Procedure Act this Court before reaching the merits must rule upon the defendant's motion to strike and make a determination as to the standard of review to apply. Section 70-128, R.C.M. 1947 allows for the admission of different or additional evidence upon review of an order of the Public Service Commission. Citing this section, Tobacco River Power Co. v. Public Service Commission 98 P2d 886 (1940) held that all evidence of any changes in valuations, additions to a plant or other evidence that might affect the determination of the question may be properly offered upon the trial. The evidence submitted in the trial of this matter falls within this purview of additional or different. The motion to strike is denied.

In bringing this action MDU chose Section 70-128, R.C.M. 1947 as its vehicle for securing review while pleading Section 82-4216 if deemed applicable. In Section 82-4216(a) R.C.M. 1947 the Montana legislature in adopting the Administrative Procedure Act preserved other statutory means of obtaining judicial review of agency action.(1) One of those existing means of review was provided in Section 70-128, R.C.M. 1847. Therefore it appears that there are two means of seeking judicial review of an order of the Public Service Commission either under Section 70-128, R.C.M. 1947 or under MAPA either avenue being mutually exclusive of the other.

The standard of review the Court is to employ under Section

(1) "This section does not limit utilization of or the scope of judicial review available under other means of review,redress,relief,or trial de novo provided by statute."

70-128, R.C.M. 1947 differs from the standard of review to be employed under the Administrative Procedure Act.

Montana, under MAPA,has adopted the "clearly erroneous" standard of judicial review and has accepted the definition that "a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Brurud v. Judge Moving & Storage,_____Mont._____, 563 P2d 558,559 (1977).

The standard of review under Section 70-128 is that if there b "substantial evidence" in the record sustaining the order of the Board the Court will not interfer with its conclusion. State ex rel Olsen Public Service Commission, 131 M 104,_____P2d_____(1958).

A comparison of the two standrds indicated that, to affirm the conclusion of the Commission, the "clearly erroneous" test is broader than the "substantial evidence" test. If there is substantial evidence supporting the conclusion of the Commission its conclusion cannot be "clearly erroneous". On the other hand, if the evidence supporting the conclusion is less than substantial then the Court may reject the conclusion only if on the entire record it is "clearly" demonstrated that a mistake has been committed. Nothing in either standard authorizes the Court to perform the function imposed by the legislature upon the Commission.

The five allegations of error will be discussed in the order in which they were raised.

MDU first requests this Court to reverse the decision of the Commission regarding the adequacy of the return on equity allowed.

The utility is in a position not common with other business enterprises in that the utility is allowed to charge rates which will assure profits after matching revenue with expenses. The rate of return on equity is the amount returned to the investors on their investment in the company. In general it may be said that "high ris

enterprises should provide a greater return and a "low risk" a lesser return.

As to the rate of return allowed in the present case the record discloses the testimony of expert witnesses. There is a conflict in the testimony between the experts testifying on the rate. Generally the experts relied on a comparison with other companies and gave an analysis of the data relied upon for their conclusions. The Commission accepted the conclusions of witness Wilson The record discloses that such conclusions were based upon substantial evidence. The order of the Commission as to the rate of return allowed on equity should be affirmed.

Secondly, MDU assigns error to the Commission's refusal to find that the company's natural gas utility was a higher risk enterprise than the electric utility, requiring a higher return on equity.

In Order No. 4369a the Commission, on remand of the evidence adduced at trial, granted a one-quarter of one percent higher return on natural gas equity than electric equity. The Commission in its amended order has allowed for a greater risk factor even though MDU presented no evidence quantifying the risk differential or explaining its basis. With little basis in the record to justify the differential, the Court would only be second-guessing the Commission if it were to adjust this rate of return. The Commission's treatment in Order No. 4369a of the risk differential is affirmed.

Thirdly, MDU contends that the Commission erred in excluding compensating balances. MDU asked the Commission to include in rate base the amount of its compensating balances on deposit with various banks. These balances are maintained as a part of MDU's agreements concerning line of credit arrangements, and generally result in short-term loans being made available to support construction work.

The record reveals that there are several methods of recovering the cost of these balances.

The Commission in its findings determined that the best method of recovering the cost of compensating balances is to factor them into the "allowance for funds used during construction" rate (AFUDC).

The rationale for AFUDC treatment is that short term borrowings made available under a line of credit are ordinarily used to finance construction work in progress (CWIP). The utility recovers the cost of construction funds through the capitalized allowance for funds used during construction.

If the AFUDC method is used at completion the plant which is constructed with these short term borrowings is calculated and factored into the AFUDC rate. The cost of compensating balances therefore are recovered from the rate payers who actually use the plant.

This treatment is supported by the testimony of Montana Consumer Council's witness George Hess who argued that these costs were properly a rate of return consideration. The treatment given compensating balances is supported by "substantial evidence" which precludes the court from further review.

Fourthly, MDU requests this Court to reverse the decision of the Commission regarding MDU's sale of excess power from its Big Stone generating plant. The Commission made a revenue attribution which had the effect of reducing the revenue deficiency associated with these sales.

In allowing this attribution the Commission adopted the conclusions and rationale of Montana Consumer Council's witness George Hess.

In Hess' opinion, Montana retail customers should not be forced to make up a substantial revenue deficiency arising from a non-jurisdictional sale and that MDU's profits would increase as the wholesales were withdrawn and the formerly excess capacity diverted to meet growing retail loads.

The Commission's position was therefore supported by "substantial evidence" and must be affirmed.

MDU's final contention of error stems from the Commission's refusal to utilize a 40% gas curtailment figure for industrial sales.

The function of the Commission in rate making is to view the business affairs of the utilities and to make such rates as will secure to the utilities a fair rate of return and to protect the rate payers from the effects of lack of competition, a position the utility enjoys. In order to accomplish the task fairly, a test year is adopted. In this case the year 1975 was adopted. The test year provides the whole picture of the business wherein the utilities income and expense are analyzed. Since the business of the utility is a continuing one, the admissable evidence (after the test year) allowed by the Tobacco River case should be considered if it is close enough in point of time to the test year so that it may be concluded that there are no other changes which would render the test year no longer accurate as a test year.

Witness Hess testified at the trial that he was aware that the curtailment level was going to increase in 1977 but that since future sales could not be measured precisely, he used actual sales for the twelve months ending November 1976 in arriving at a 21.4% curtailment. He further testified that to make an adjustment for curtailments in 1977 would be improper because the adjustment would go to just one aspect of all the items involved in a rate case, without taking into consideration all other changes that may take place subsequent to the end of the test year which would affect revenue, expense. Hess testified that adjustments for known changes in items should not be made beyond six to nine months beyond the test year.

This Court adopts the reasoning of Witness Hess and concludes that there is substantial evidence to support the Commission's finding as to the curtailment issue.

The findings and conclusions of the Public Service Commission are affirmed.

Let judgment issue in accordance with these findings and conclusions.

Dated this 16 day of May, 1978.

District Judge

NAME: GEORGE T. BENNETT DATE: 3/1/79

ADDRESS: 406 FULLER AVE.

PHONE: 442-3690

REPRESENTING WHOM? MOUNTAIN BELL

APPEARING ON WHICH PROPOSAL: H.B. 21

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? X

COMMENTS:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: Gene Phillips DATE: 3/1/79

ADDRESS: Kalispell, Mont.

PHONE: 755-6644

REPRESENTING WHOM? Pacific Power & Light
Northwestern Telephone

APPEARING ON WHICH PROPOSAL: HB 21

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? X

COMMENTS:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: _____ DATE: _____

ADDRESS: _____

PHONE: _____

REPRESENTING WHOM? _____

APPEARING ON WHICH PROPOSAL: _____

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? _____

COMMENTS: _____

_____

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PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

Bob Harrison

HOUSE BILL 21 Third Reading

1. Amend page 1, line 7.
Following: "REGULATION"
Strike: the remainder of line 7 and line 8 up to and including the word "COMMISS

2. Amend page 1, line 9.
Following: "69-3-402, MCA"
Strike: the remainder of line 9
Insert: "TO REQUIRE PARTIES SEEKING JUDICIAL REVIEW OF A PUBLIC SERVICE COMMISSION ORDER TO ELECT TO PROCEED UNDER EITHER SECTION 2-4-702 OR SECTION 69-3-402."

3. Amend page 2, line 3.
Following: "for"
Strike: "ARGUMENT"
Insert: "trial"

4. Amend page 2, line 8.
Following: "for"
Strike: "ARGUMENT"

5. Amend page 2, line 9.
Following: "actions."
Insert: "Any party to such action may introduce evidence in addition to the transcript of the evidence offered to such commission."

6. Amend page 2, line 15.
Following: "be."
Insert: a new subsection (5), which reads:
"(5) Parties seeking judicial review of a Commission order shall elect to proceed either under this section or Section 2-4-702, MCA."

7. Amend page 2, lines 16 and 17.
Strike: lines 16 and 17 in their entirety

NAME: Les Lobie II DATE: 2-1

ADDRESS: 716 Power Helena

PHONE: 442 0070

REPRESENTING WHOM? Mont-Dak Util Co
Gen. Tel of the Northwest, Inc

APPEARING ON WHICH PROPOSAL: HB 21

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? _____

COMMENTS: Either the bill should be killed or amended as suggested by the Dept Commerce & PSC.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: Jim Hughes DATE: 3-1-79

ADDRESS: 560 N. Park Helena

PHONE: 449-3585

REPRESENTING WHOM? Mountain Bell

APPEARING ON WHICH PROPOSAL: HB 21

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? ✓

COMMENTS:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE BUSINESS & INDUSTRY COMMITTEE

BILL HB21 VISITORS' REGISTER DATE 3/1/79

Please note bill no.

NAME	REPRESENTING	BILL #	(check one) SUPPORT	OPPOSE
Gene Phillips	Pacific Power & Light Northwestern Telephone	HB21		X
Eileen Shore	PUBLIC SERVICE COMMISSION	HB 21	✓	
Judith H Carlson	SRS	HB 92	✓	
PHIL GOUVEIA	SRS	HB 92	✓	
Wm. J. Opitz	MPSC	HB-21	✓	

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY