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DUAL STANDARDS OR DOUBLE STANDARD: DOES A FINDING OF PUBLIC NEED FOR A UTILITY AUTOMATICALLY SATISFY THE "USED AND USEFUL" REQUIREMENT?

Kristine L. Foot

I. INTRODUCTION

The Montana Major Facility Siting Act (Siting Act)¹ requires that before a power generating facility is constructed, the utility must apply for and receive a certificate of environmental compatibility and public need.² The Montana Power Company (MPC)³ applied for the requisite certificate for Colstrip 3 in 1973.⁴ The Board of Natural Resources and Conservation (BNRC) issued the certificate on July 22, 1976.⁵

1. MONT. CODE ANN. §§ 75-20-101 to -1205 (1983).

2. The application is filed with the Department of Natural Resources and Conservation (DNRC) and the Department of Health. MONT. CODE ANN. § 75-20-211(3) (1983). The application must contain: (1) a description of the preferred location; (2) a summary of any relevant studies on the facility's impact; (3) a statement explaining the need for the facility; (4) a discussion of all reasonable alternatives; (5) baseline data for primary reasonable alternatives; (6) proof of service to necessary parties; and (7) a filing fee. MONT. CODE ANN. § 75-20-211(1)(a) (1983). After an acceptable application is submitted, state agencies study the impact the facility will have in their areas of expertise. MONT. CODE ANN. § 75-20-216(2) (1983). The agencies' reports are sent to the Board of Natural Resources and Conservation (BNRC). *Id.* Based on the information gleaned from these reports and from public hearings, MONT. CODE ANN. §§ 75-20-220 to -222 (1983), the BNRC decides whether it will issue the certificate. MONT. CODE ANN. § 75-20-201 (1983). The BNRC is not statutorily authorized to issue the certificate unless it finds that: (1) the facility will have minimal environmental impact; (2) the location of the facility conforms to state and local laws and regulations; and, (3) the utility will serve the public interest, convenience, and necessity. MONT. CODE ANN. § 75-20-301 (1983).

For a more complete discussion of the application process, see Comment, *The Montana Major Facility Siting Act*, 45 MONT. L. REV. 113, 118-121 (1984).

3. The application was filed by five Pacific Northwest utility companies: MPC, Puget Sound Power and Light Company, Portland General Electric Company, Washington Water Power Company, and Pacific Power and Light.

4. Comment, *supra* note 2, at 114-115 citing *Montana Board of Natural Resources and Conservation v. Montana Power Co.*, 166 Mont. 522, 536 P.2d 758 (1975):

The applicants proposed two 700 megawatt coal-fired generating plants (Units 3 and 4), a thirty-mile pipeline to carry water from the Yellowstone River to the location of the project at Colstrip, and two parallel 500 kilo-volt transmission lines connecting the Colstrip project with terminal facilities at Hot Springs. All four units of the Colstrip project were projected to have capacity to produce enough power to light a city of 1,500,000 people. Only Units 3 and 4 were constructed pursuant to the Siting Act because construction on Units 1 and 2 had commenced prior to 1973 and therefore did not fall within the purview of the Siting Act.

Montana Power Co. v. Public Service Commission [hereinafter *MPC v. PSC*], ____ Mont. ____, 692 P.2d 432, the subject of this casenote, was only concerned with Unit 3. *Id.* at ____, 692 P.2d at 433.

5. The decision was appealed twice, but neither appeal addressed the BNRC's determination of need. *Northern Plains Resource Council v. Board of Natural Resources and Conservation*, 181 Mont.

Upon completion of Colstrip 3 in 1983, MPC filed an application to increase its electric service rates to reflect the inclusion of Colstrip 3 in its rate base.⁶ During the Public Service Commission's (PSC's) hearings on the requested rate increase, extensive evidence was presented regarding whether Colstrip 3 was "actually used and useful" for Montana ratepayers.⁷ MPC moved to strike all such evidence, arguing that the BNRC's finding of public need precluded the PSC from applying its "used and useful" standard.⁸ The PSC denied MPC's motion, and later ruled that Colstrip 3 could not be included in MPC's rate base as the facility was not used and useful to Montana ratepayers.⁹

MPC requested the Montana Supreme Court to assume original jurisdiction of its petition for declaratory judgment or for an appropriate writ.¹⁰ In a case of first impression,¹¹ the Montana Supreme Court squarely addressed the apparent conflict between the statutory authority granted the BNRC and PSC in *Montana Power Co. v. Public Service Commission*.¹²

II. THE CONFLICTING POSITIONS

A. MPC's Stance

In essence, MPC contended that legislative enactment of the Siting Act precluded the PSC from determining whether Colstrip 3 was "actually used and useful" for Montana ratepayers.¹³ The crux of this contention was that the BNRC had already certified that Colstrip 3 was needed and would serve the public convenience.¹⁴ MPC asserted that the BNRC's determination of need was "tantamount to deciding that Colstrip Unit 3 [was] used and useful."¹⁵

In support of its contention that the "used and useful" standard was one of the considerations that was fully addressed by the BNRC in its certification process, MPC pointed to the statutory duties imposed on the

500, 594 P.2d 297 (1979); Northern Plains Resource Council v. Board of Natural Resources and Conservation, 183 Mont. 540, 601 P.2d 27 (1979).

The BNRC's action was contrary to the recommendation of the PSC and the DNRC.

6. MPC requested the PSC to increase electric rates to Montana consumers by \$86,367,013 per year. A substantial amount of this requested increase was to recover the cost of its coal-fired generating unit at Colstrip 3. Brief of Respondent at 2-3, *MPC v. PSC*, ___ Mont. ___, 692 P.2d 432 (1984).

7. *MPC v. PSC*, ___ at ___, 692 P.2d at 433-434.

8. *Id.*

9. *Id.*

10. *Id.* at ___, 692 P.2d at 432-433.

11. The existence of this potential conflict was noted in Comment, *supra* note 2, at 124-125.

12. ___ Mont. ___, 692 P.2d at 432 (1984).

13. *Id.* at ___, 692 P.2d at 435.

14. *Id.*

15. Brief of Petitioner at 2, *MPC v. PSC*, ___ Mont. ___, 692 P.2d 432 (1984).

BNRC by the Siting Act.¹⁶ Pursuant to Section 75-20-301(2) of the Montana Code Annotated, the BNRC is not authorized to issue a certificate unless it finds that a need exists for the facility and “that the facility will serve the public interest, convenience, and necessity.” Through a series of semantic steps, MPC argued that the Siting Act’s use of the word “serve” embodied the twin concepts of “used” and “useful.”¹⁷ Since a facility is needed if it will *serve* the public, MPC asserted that the Siting Act’s “more stringent” determination included a “used and useful” requirement.¹⁸ MPC argued that the PSC’s “used and useful” inquiry was a needless duplication of the BNRC’s hearing process.¹⁹

To bolster this assertion, MPC highlighted the “monumental proportions” of the certification proceeding for Colstrip 3: “255 witnesses appeared before [the BNRC] in the 49 days of hearings.”²⁰ On brief, MPC stated that two witnesses and one report addressed the impact Colstrip 3 would have on Montana ratepayers.²¹

MPC’s position was that legislative enactment of the Siting Act was intended to transfer the determination of whether a utility was “used and useful” to the BNRC.²² According to the MPC, this transfer of functions reflected “legislative recognition that additional generation facilities may be needed,” and paved the way for “[expeditious] construction of new facilities to meet growing energy demands.”²³ Since no facility may be constructed or operated in Montana without a certificate of environmental compatibility and public need, MPC urged that the Siting Act gave the BNRC the sole responsibility of balancing environmental, social and economic concerns with energy needs.²⁴ MPC posited that this advance determination of a facility’s “used and useful” status would accord with public policy concerns by justifying investors’ capital commitment and precluding the construction of unneeded facilities.²⁵

MPC’s arguments were statutorily grounded on two provisions contained in the Siting Act: one provision calling for supremacy of the Siting Act over conflicting laws or rules²⁶ and another provision disallowing any state agency, other than the BNRC, from requiring any certifica-

16. *Id.* at 6, 7, 10, 11, and 19.

17. *Id.* at 23-24.

18. *Id.*

19. *MPC v. PSC*, ___ Mont. at ___, 692 P.2d at 436.

20. Brief of Petitioner, *supra* note 14, at 11-13.

21. *Id.* at 13-15.

22. *MPC v. PSC*, ___ Mont. at ___, 692 P.2d at 435-436.

23. *Id.* at ___, 692 P.2d at 435.

24. *Id.* at ___, 692 P.2d at 435-436.

25. *Id.* at ___, 692 P.2d at 436.

26. Brief of Petitioner, *supra* note 14, at 7-8 citing MONT. CODE ANN. § 75-20-103 (1983).

tion procedure for the construction or operation of a facility.²⁷ MPC urged that, at the very least, there was a reasonable doubt as to whether the PSC was authorized to inquire into the need for Colstrip 3.²⁸ Under Montana case law, "any reasonable doubt as to the grant of a particular power [to the PSC] will be resolved against the existence of the power."²⁹

In sum, it was MPC's position that the Siting Act envisioned the BNRC serving as a quasi-public service commission to determine the need for a proposed energy facility.³⁰ The MPC reasoned that since the finding of need addressed the "used and useful" inquiry, the PSC was relegated to the role of a rate-setting body.³¹ In light of the PSC's limited function, MPC urged that the PSC lacked jurisdiction to determine whether Colstrip 3 was "used and useful" to Montana ratepayers.³² It was MPC's position that the matter had been conclusively decided by the BNRC's issuance of a certificate of environmental compatibility and public need.³³

B. *The PSC's Position*

The PSC resisted MPC's attempt to limit its regulatory power through a reasoned application of rules of statutory construction. The PSC placed strong reliance on the Plain Meaning Rule:³⁴ a rule that requires courts to interpret statutes according to their terms, unless there is an ambiguity in the statutory language.

The central theme of the PSC's argument was that the purpose of the Siting Act, as divined from its language, was to ensure environmental planning and protection.³⁵ The PSC maintained that the Siting Act was

27. Brief of Petitioner, *supra* note 14, at 7-8 citing MONT. CODE ANN. § 75-20-401(1) (1983).

28. *Id.* at 32; *MPC v. PSC*, ___ Mont. at ___, 692 P.2d at 436.

29. Brief of Petitioner, *supra* note 14, at 32, citing *Montana Power Co. v. Public Service Commission*, ___ Mont. ___, ___, 671 P.2d 604, 611 (1983).

30. Brief of Petitioner, *supra* note 14, at 24.

31. *Id.* at 20-22.

32. *MPC v. PSC*, ___ Mont. at ___, 692 P.2d at 436.

33. *Id.*; Brief of Petitioner, *supra* note 14, at 17.

MPC also argued that the doctrine of collateral estoppel precluded the PSC from considering whether Colstrip 3 was "used and useful" for Montana ratepayers. *MPC v. PSC*, ___ Mont. at ___, 692 P.2d at 438-439. For this doctrine to come into play, "identity of issues requires that the 'precise question' has been litigated in the prior action." *Id.*, citing *Stapleton v. First Security Bank*, ___ Mont. ___, ___, 675 P.2d 83, 88-89 (1983). The Court rejected MPC's argument, finding that the BNRC's determination of need was not identical to the PSC's "used and useful" inquiry. *MPC v. PSC*, ___ Mont. at ___, 692 P.2d at 439.

As a corollary, MPC contended that it had relied on the BNRC's determination of public need for the energy produced by Colstrip 3 when it built the facility; the doctrine of promissory estoppel required the PSC to increase MPC's ratebase to include the costs of Colstrip 3. *Id.* The Court rejected this assertion because the Siting Act did not contain a "clear and unambiguous promise" that would justify the MPC's reliance. *Id.*

34. Brief of Respondent, *supra* note 6, at 4, 8.

35. *Id.* at 10.

designed "to avoid unnecessary environmental impacts caused by construction of clearly unneeded utility facilities."³⁶ In contrast, the PSC interpreted its statutory purpose to be consumer oriented, "protect[ing] utility ratepayers from paying for investments that do not benefit them, that are not 'actually used and useful' to them."³⁷

In view of these distinct purposes, the PSC rejected MPC's assertion that the Siting Act had granted the BNRC sole responsibility for both the environmental and ratemaking functions. The PSC contended that if the BNRC could determine that a utility would be used and useful to Montana ratepayers before the facility was constructed, then BNRC's issuance of a certificate of environmental compatibility and public need would, in effect, guarantee the utility a return on its investment.³⁸ The PSC maintained that this guarantee would preclude on-going planning.³⁹ Furthermore, the PSC noted that once the certificate was issued, the inclusion of the facility in the rate base would never be subject to review.⁴⁰ Even though the power was not needed by Montana consumers, the facility "would remain in the rate base for the life of the plant."⁴¹

To support its position that the legislature did not intend this series of results, the PSC pointed to the language of the Siting Act, noting that the Act makes no mention of ratemaking treatment.⁴² In accord with Montana case law, the PSC contended that absent a strong showing of legislative intent, the court should not find that the statute authorizing the PSC to make the "used and useful" inquiry had been repealed by implication.⁴³ Instead, the PSC urged the court to find that the "used and useful" inquiry made by the PSC was distinct from the BNRC's determination of public need for a utility.⁴⁴

III. THE COURT'S HOLDING

The Montana Supreme Court adopted the PSC's position, holding that legislative enactment of the Siting Act was apparently not intended to strip the PSC of its regulatory power.⁴⁵

The court's uncertainty as to legislative intent sprang from the recognition that the Siting Act did call for the BNRC to consider some

36. *MPC v. PSC*, ___ Mont. at ___, 692 P.2d at 436.

37. Brief of Respondent, *supra* note 6, at 10.

38. *Id.* at 25.

39. *Id.*

40. *Id.* at 28.

41. *MPC v. PSC*, ___ Mont. at ___, 692 P.2d at 436.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at ___, 692 P.2d at 438.

factors that “[could] be associated with the used and useful concept of the utility regulation statutes.”⁴⁶ However, the court resolved the issue by referencing the fact that the BNRC was not required to address other key ratemaking concerns such as the “cost of the facility, the proportion of energy production to be devoted to Montana consumers, or MPC’s share of the power to be generated by Colstrip.”⁴⁷ The court also relied on the Siting Act’s failure to make any provision for future ratemaking procedures.⁴⁸ Absent a clear legislative statement of intent, the court followed precedent and declined to find an implied repeal of the PSC’s regulatory powers.⁴⁹

To harmonize the dual standards, the court spelled out a two-step process. In the first phase, the utility is required to obtain a certificate of environmental compatibility and public need from the BNRC before construction is commenced.⁵⁰ Then upon completion of the facility, the PSC is charged with determining whether the energy produced is used and useful to Montana ratepayers. If so, the cost of the facility can be included in the utility’s rate base.⁵¹

IV. ANALYSIS

The legal question decided by the Montana Supreme Court in *MPC v. PSC* was “whether the certificate issued by the BNRC [was] conclusive and binding on the PSC.”⁵² The court answered in the negative, holding that enactment of the Siting Act was not intended to transfer the PSC’s regulatory function to the BNRC.⁵³ While the issue decided was a narrow one, its ramifications will most likely be far-reaching.

Critics will argue that the ruling not only subjects the BNRC’s determination of need to the PSC’s review, but opens the door to PSC review of the BNRC’s determination of what kind of facility is best-suited to fit Montana’s energy needs. Under the Siting Act, the BNRC is charged with making this determination based on the economic, environmental and social impacts of the proposed facility.⁵⁴ Under *MPC v. PSC*, the PSC could effectively overrule the BNRC’s facility choice by employing its “used and useful” standard. Clearly, this result was not intended. The PSC is to look only at the usefulness of the energy to Montana ratepayers, not to the source of that energy.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at _____, 692 P.2d at 433.

53. *Id.* at _____, 692 P.2d at 438.

54. MONT. CODE ANN. § 75-20-211(1)(a) (1983).

The court's holding may also impact on the utility's service to its customers. Pursuant to Section 69-3-201 of the Montana Code Annotated, the utility has a duty to provide "reasonably adequate service." In the past, it was always assumed that the utility had a duty to provide the needed power. Once the utility predicted the need, it applied for a certificate of environmental compatibility and public need. The *MPC v. PSC* decision could put the utility in the uncomfortable position of forecasting a potential energy need that it has a duty to fulfill, but not beginning construction on a new facility until that need actually exists. Hence, forecasting might become so cautious that it becomes useless.

Finally, it is probable that MPC will be hesitant to construct new energy producing facilities in Montana since the utility will have no assurance that the PSC will allow the cost of the facility to be included in its rate base. This, in turn, may have a negative impact on Montana's economic picture by deterring outside companies that have high energy demands from locating in Montana.

Although the court's analysis failed to address the potential ramifications of the *MPC v. PSC* ruling, the decision was legally correct. The matter is now the province of the legislature.

