

Memorandum

To: Energy & Telecommunications Interim Committee

From: PSC

Date: October 31, 2003

Re: PSC authority over utility transactions

Background

Currently, the PSC asserts under its general supervisory powers the implicit authority to review significant transactions involving regulated public utility property. In contrast, public utility commissions in 45 states have explicit statutory authority to review utility sales and transfers. State commissions in our region (North Dakota, South Dakota, Wyoming, Idaho, Colorado, Utah, Oregon and Washington) are among the majority of states with explicit statutory authority to approve utility sales and transfers. Copies of the relevant statutes from those states are attached to this memo.

In most cases where the Montana PSC asserts its authority to review a sale or transfer of assets, the utility concerned challenges the assertion as being without clear statutory authority. Clarification of the PSC's authority over these transactions is advisable to avoid future disputes and litigation regarding PSC authority. PSC review under clear statutory authority will streamline the process.

The current arrangement produces substantial uncertainty about authority to review and produces weaker results for all concerned. In one case, Pacificorp's sale to Flathead Electric Co-op, the PSC had to obtain a court order slowing the sale for 30 days while conducting a cursory review. In particular, the PSC was unable to conduct any meaningful review of the sale price. Subsequently, a former PacifiCorp manager confirmed to the Flathead Co-op board what many believed – the sales price was many millions too high. A transaction that was, as a general matter, clearly in the public interest saddled the purchaser and its members with substantial excess debt with which they are still struggling.

Also, current law specifically prevented the PSC from conducting any review of the MPC generation sale to PPL. At the time, many argued that a sale of all generation to one purchaser would create substantial local market power in supply. The PSC was powerless even to evaluate that question.

PSC review of utility transactions produces substantial benefits both to the purchaser and to the customers, ensuring an acceptable purchaser and a transaction that does not harm the utility, the

customers, or the public interest. Good review should not be prolonged, but must be long enough to examine the financial underpinnings on which a transaction will succeed or fail.

Key elements of statutory authority

The key elements of the express statutory authority the PSC seeks are straightforward:

- A requirement for prior PSC approval of public utility property sale, transfer, merger, disposition, etc.
- Exceptions from the PSC approval requirement for: (1) sales/transfers of utility property in the ordinary course of business that the commission determines is not necessary or useful in the performance of the utility's duties to the public; and (2) sales/transfers of utility property valued at less than \$200,000 or 10% of the value of the utility's jurisdictional property, whichever is less.

These elements are present in similar laws in surrounding states concerning state commission authority over utility sales.

Attachments (relevant laws from surrounding states)