Service Date: March 29, 1979

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER of the Public Utility Status of BURLINGTON NORTHERN, INC. as Regards Water Service to the Nutting II Subdivision, Laurel, Montana.	)))))	DOCKET NO. 6533 ORDER NO. ~~2699~~ 4497

By Show Cause Order, Service Date September 2, 1977, Burlington Northern, Inc., home office St. Paul, Minnesota was ordered to appear before the Commission to show cause, if any there be, why Burlington Northern, Inc. should not be required to file with the Commission schedules of its rates and charges for its water utility service in the Nutting II subdivision near Laurel, Montana and why it should not comply with all other statutory obligations of a water utility.

Hearing on this matter was subsequently set for Wednesday, October 26, 1977 at 10:00 a.m. in the basement of the Masonic Hall, Laurel, Montana. Notice of said hearing was issued to known parties of interest.

APPEARANCES

FOR THE RESPONDENT:

KURT W. KROSCHEL, Regional Counsel, Burlington Northern, Inc., Suite 1003 First Northwestern Bank Center, Billings, Montana 59101

OTHER APPEARANCES:

JOHN DOUBEK, on behalf of the Montana Consumer Counsel, 34 West Sixth Avenue, Helena, Montana 59601

THOMAS L. BRADLEY, City Attorney, City of Laurel, Laurel, Montana 59044

BEFORE:

THOMAS J. SCHNEIDER, Commissioner & Hearing Examiner
GORDON E. BOLLINGER, Chairman
P. J. GILFEATHER, Commissioner
JAMES R. SHEA, Commissioner

* * *

HELD: Respondent-Burlington Northern, Inc. found to be a water utility under Montana law; Respondent ordered to file schedule of its rates and charges for providing water service.

* * *

After considering the record before this Commission, including the testimony and evidence, oral and written, the Commission makes the following Findings of Fact, Conclusion of Law, and Order:

FINDINGS OF FACT

Respondent

1. Burlington Northern, Inc. (BN or Respondent) is a railroad common carrier providing intrastate and interstate service in the State of Montana. Respondent owns certain property in the State of Montana and, as pertinent to this proceeding, respondent owns a car shop facility, a heavy repair shop and extensive yards to accommodate their trains in the Montana and Wyoming regions near Laurel, Montana.

Burlington Northern, Inc. and its predecessor Northern Pacific have for many years had water supplied to its Laurel Yard complex by the City of Laurel, Montana. BN has a 100,000 gallon water storage tank within the confines of its Laurel Yard. The source of water for the complex has been a 10-inch main (owned by BN) extending south of the BN roundhouse to the City Water Plant and to the Yellowstone River (See Exh. No. 1, Map of area).

The storage tank and the 10-inch main are very old and are badly in need of repair. BN intends to construct a new water main (10-inch) along the Roundhouse road in a westerly direction to connect with a recently constructed Laurel City water main. Respondent intends to connect with the new city main at a point near the eastern city limit boundary near Railroad Street (See Exh. Nos. 1 & 2). This proposed construction will eliminate the railroad's need for the aforementioned water storage tank and the railroad's water main which runs in a southerly direction to the City water plant.

2. Located generally south of the Respondent's roundhouse are a number of homes, many adjacent to one another. Many were constructed by Northern Pacific employees some years ago. Some, although not all, of the present residents are current BN or retired railroad employees.

Near the Laurel complex the following structures or facilities are also located:

(a) north of the yard; land owned by former Laurel Mayor, Mr. Louie Yovetich;

(b) facilities leased from BN by Union Tank Car Co.;

(c) facilities leased from BN by a livestock company.

All of the above mentioned residences or other facilities (19 in number) receive their water supply from the previously-mentioned 10-inch water main owned and maintained by BN. BN maintains that they do not now, as a policy matter, allow any new connections or hookups to their water main.

The City of Laurel bills BN for supplying water to the railroad by use of a master meter located on the 10-inch line south of the complex near the city pump house. This water is then delivered by BN to the nineteen "customers."

3. Respondent has required all water users to enter into an agreement entitled "Agreement to Permit Connection with Burlington Northern Water Lines" which contains the following clause (See Exh. 4):

> 5. The Permittee understands that the Company is not engaged in the business of furnishing water and that the Company constructed its water supply system at Laurel, Montana to satisfy its own requirements, and the Permittee agrees to stop at once the taking of water through such connection upon receipt of notice to that effect from the Company. It is further understood and agreed that the Company does not contract to supply any given quantity or quality of water nor does it assume any responsibility of any kind or description on account of the water supplied as provided herein being impure or unfit for either domestic or commercial purposes, and if for any reason the supply of water should be inadequate or should be impure or unfit for either domestic or commercial purposes, the Company shall not be liable for any damage or injuries arising therefrom and the Permittee will indemnify,

> protect and save harmless the Company from any and all claims, demands and causes of action for any such damage or injury.

The agreement is a new BN form and all user agreements are dated in the year 1975.

The agreement also provides that the user will pay for the installation and maintenance of the connection, for any meters installed and for any other appurtenances needed.

In the event the Company (BN) finds it necessary to move the pipeline, permittees are obligated by the terms of the contract to pay for any costs incurred by such relocation.

The contract provides for a flat monthly fee or for a metering fee commensurate with the current City charges. Users are billed and fees are collected by BN.

The agreement further contains several "hold harmless" clauses as well as specific procedures for termination of service.

4. Respondent maintains that it is not in the water utility business. BN maintains that the above-mentioned water users are within the City of Laurel's service area and that the true water supplier for many years for each user described above has been, and is, the City of Laurel. If BN is found to be a utility, the railroad is concerned about an adequate water supply.

City of Laurel

5. The Laurel Yard Complex is outside of the Laurel city limits. For some years the City has refused to serve any further

areas outside of the city limits for the following reasons (See Exh. 4):

(a) once an outside party obtains city water service, that party resists any annexation moves in order to avoid paying city taxes; therefore, such a policy tends to impede the citys growth;

(b) major municipal water improvements have traditionally been financed by general, not revenue, bond issues. Outside users do not pay taxes to support these bonded facilities while in-city residents do, although the outside users benefit from the improvement;

(c) policing problems--it is very difficult to prevent additional connections (without payment for same) in areas outside the city;

(d) the City adopted an ordinance several years ago which states that the City would no longer grant services outside the city limits;

(e) BN's new proposed lines would lie for a considerable portion of its length on private property (BN's), not on public right-of-way. This is unacceptable to the city.

Nutting II Subdivision Occupants

6. The occupants of this area must have a continuing source of water. They cannot take over the railroad's old line because of the massive investment in repairs that would be necessary to undertake.

Montana Consumer Counsel

7. It is the contention of the Consumer Counsel that Burlington Northern, Inc., by its own acts (the construction and maintenance of the 10-inch main from the Yellowstone River to the Complex; the allowance of connections on the main; the billing and collecting of monthly fees from the water users by BN) is a public utility within the meaning of Section 70-103 R.C.M. 1947 (now 69-3-101 MCA).

ANALYSIS

Section 69-3-101 MCA provides:

> Meaning of term public utility. The term 'public utility,' within the meaning of this chapter, shall embrace every corporation, both public and private, company, individual, association of individuals, their lessees, trustees, or receivers appointed by any court whatsoever, that now or hereafter may own, operate, or control any plant or equipment or any part of a plant or equipment within the state for the production, delivery, or furnishing for or to other persons, firms, associations, or corporations, private or municipal.
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> (5) water for business, manufacturing, household use, or sewerage service, whether within the limits of municipalities, towns, and villages or elsewhere;
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> * * *

If Respondent-Burlington Northern, Inc. is deemed a public utility, one of the immediate ramifications would be that it would have an obligation to serve its customers. This would not,

however, be an "open-ended" obligation to serve for the obligation is coextensive with the scope of dedication to or profession of a public service:

> It is a fundamental principle of public utility law that a public utility is required to serve only within the scope of its undertaking, or profession of service. Weyauwega Tel. Co. v. PSC, 111 N.W.2d 559, 562 (Wisc., 1961).
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> Regardless of peculiar service configurations, the scope of dedication is not determined by mechanical formulas but ultimately by the fact that the utility has dedicated its resources to a particular enterprise, venture or undertaking. And cases treating utilities of diverse natures have so recognized. (See, e.g., Pacific Telephone, etc., Co. v. Eshleman, 166 Cal. 640, 699, 137, P. 1119, 1142 ('The purveyor of a *** public service *** is not bound to undertake a service different from that which he has professed to render. ***') (concurring opinion); *** Hollywood Chamber of Commerce v. Railroad Commission, supra, 198 Cal. 311-312, 219 P. 983, 985. ('[A] public utility cannot be required to dedicate its property to a new and additional enterprise not theretofore undertaken by it, ***'); [additional citations and quotations omitted]. Greyhound, 438 P.2d 801, 805-806. Emphasis added.

The evidence of record shows that Burlington Northern, Inc. is a corporation that owns and operates certain water mains near Laurel, Montana and utilizes said mains to deliver and furnish to approximately nineteen (19) persons, firms or corporations water for business or household use. The Respondent is, therefore, a public utility under Montana law. BN has dedicated certain of its assets to providing water to certain customers. The railroad

bills the customers for and collects fees for this service. The railroad is the City of Laurel's customer, not each of the 19 customers served by BN. Respondent is billed by the City of Laurel based on the master meter reading. The City of Laurel does not own or maintain any of the lines or rights-of-way near the above-mentioned 19 customers. None of the land owned or leased by the 19 entities is contiguous to the City of Laurel nor is any of this property within Laurel's city limits. Burlington Northern, Inc., as a water utility, has an obligation to serve these 19 customers. The customers, in turn, must pay rates and charges sufficient in amount to allow Respondent a reasonable return on the railroad's investment.

THE CONTRACT

Having determined that Respondent is a water utility, the Commission must determine what effect, if any, the "agreement" that each water customer has with BN may have on Respondent's status.

This Commission does not possess judicial powers to interpret contracts. It does, however, pursuant to the police regulatory power have the power to modify the operation of contracts of public utilities under certain conditions.

The fact that utilities enter into contracts is no shield to intervention by the State Public Service Commission in the interests of protecting utility customers in the areas of rates and conditions of service.

In Montana, the precedent was established by 1918 that the Public Service Commission could exercise its power even if it meant changing a contract entered into prior to the Commission's creation. The Montana Supreme Court said a franchise contract made in 1912 between a city and a gas company must be presumed to have been entered into with knowledge that the state could thereafter enact legislation in 1913 toward exercising the power of rate regulation reposed in it, and thus change the rate fixed by contact. The act creating the Public Service Commission was not open to attack on the ground that it impaired the obligation of the contract made the year before. State ex rel. City of Billings v. Billings Gas Co., 55 Mont. 102, 111 173 P. 799 (1918), distinguished in 99 Mont. 465, 478, 44 P.2d 735 (1935). See also Great Northern Utilities Co. v. Public Service Commission, 88 Mont. 180, 207, 293 P. 294 (1930) for discussion of constitutionality of the Public Service Commission Act.

U.S. Supreme Court Chief Justice Hughes stated in Home Building & Loan Assn. v. Blaisdell, 189 Minn. 422, 425, 249 N.W. 334, Aff'd 290 U.S. 398, 435, 54 S. Ct. 231, 78 L.Ed. 255 (1933):

> Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of soverign power is also read into contracts as a postulate of the legal order.

And Hughes went on to quote from an earlier Supreme Court Case,

> 'But into all contracts, whether made between States and individuals, or between individuals only, there enter conditions which arise not out of the literal terms of the contract