Service Date: November 1, 1982

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

IN THE MATTER of the Complaint of	) UTILITY DIVISION
MALMSTROM AIR FORCE BASE Regard-	) DOCKET NO. 82.5.34
ing its Classification for Electric	) ORDER NO. 4943
Service from the Montana Power Co.	)

FINDINGS OF FACT

1. This complaint proceeding was commenced by Complainant (Malmstrom) in a letter dated May 5, 1982. Although the letter was styled "Motion for Reconsideration" the Commission decided to proceed under its rules governing complaints and issued a Notice of Complaint on May 25, 1982. Both parties waived a factual hearing and agreed to submit the matter on briefs. The Montana Power Company (MPC) filed a motion to dismiss the complaint.

2. The complaint involves a controversy about what is the lawful electric service rate for Malmstrom Air Force Base from the effective date of Commission Order No. 4714a in Docket No. 80.4.2, until the rates resulting from Order No. 4714d in the same docket become effective.

3. The Defendant maintains that the General Service rate was the lawful rate. Malmstrom Air Force Base contends that the special contract rate in the tariff approved by the Commission on May 15, 1978, pursuant to Order No. 4350D in Docket No. 6454 was the lawful rate for its electric service.

4. By letter dated March 5, 1980, MPC notified Malmstrom that, pursuant ro the provisions of the contract for electric service between Malmstrom and MPC, Malmstrom's appropriate rate classification was the General Service rate and, accordingly, billings for service rendered on and after May 20, 1980, would be in accordance with the General Service Rate schedule then in effect, rather than at the previous special contract service rate for Malmstrom.

5. In April, 1980 the Company filed an application with this Commission to increase both its electric and gas rates. The Commission assigned Docket No. 80.4.2 to the application. The rates proposed by the Company in its application were designed by including $205,193 as an adjustment in then present rates due to a known increase in revenues which resulted from Malmstrom's change in class to General Service. This can be seen by looking at John D. Haffey's testimony, work papers, and proposed rate schedules filed as part of the application .

6. The Company proposed in John D. Haffey's testimony and exhibits that the revenue increase requested by the Company be allocated as follows: (1) $553,383 to be assigned to two contract customers, $205,193 to Malmstrom and $348,190 to Hoerner-Waldorf (Champion International); (2) $17,340,000 was to be allocated to rate classifications of customers on a uniform mills/kwh basis; and (3) $18,361,061 was to be added on a uniform percentage basis after first adding the $553,383 and $17,340,203 to the then present rate level of revenues. The $553, 383 adjustment was explained in the testimony of John D. Haffey, JDH-10, where he stated the following: $553,383 was assigned to two contract customers whose contract rates are being changed during this test period. The change of rates at present levels increased revenues

$553,383.

And . . .

The remainder of the requested increase, $18,361,061, was added on a uniform percentage of revenue basis after first adding $553,383 and $17,340,203 to the present level of revenues.

7. The two contract customers referred to in the pre-filed testimony were identified in the work papers No. S14680. On page 10, the two customers are identified as Malmstrom and Hoerner-Waldorf (Champion International). Page 12 of the worksheets shows the calculations of Malmstrom's revenues, which result in $205,193 being a known adjustment in revenues at then present rates.

8. In a procedural order dated May 13, 1980, the Commission determined that there would be a separate procedure and hearing for electric rate structure issues at a later date (Phase II).

9. After the filing of the Application in Docket No. 80.4.2, Malmstrom filed a Petition to Intervene in the proceeding and the Commission approved the intervention on July 8, 1980. Copies of the Gas and Electric Statements and work papers in the Application were provided to Malmstrom. Further, as the testimony of William Lewis in the Phase II Hearings shows, Malmstrom engaged a consultant sometime in September, 1980 to evaluate the Company's Application .

10. A hearing was held October 7-10, 1980 on the issue of whether the Company was entitled to increases in its electric and gas rates and, if so, the level of that increase. During

the hearing, the following exchange took place between Captain Weigle, representing Malmstrom in the proceedings, and Company witness, John D. Haffey.

Q. Mr. Haffey, would you refer to your original testimony JDH, page 10, line 10? Would you identify the two customers that are listed in that paragraph one?

A. The two customers that I referred to in that paragraph are Malmstrom and Hoerner-Waldorf.

Q. And could you give me the amounts for each customer?

A. Of the $553,383 referred to on line 10 of page 10 $348,190 is related to the Hoerner-Waldorf contract with Montana Power and $205,193 is related to the Malmstrom contract with Montana Power (Transcript p. 516)

11. When the Commission made its decision concerning the Application for the rate increase in Order No. 4714a the Commission determined that the Company was entitled to additional annual revenues in the electric utility in the amount of $21,707,000.

12. The Company prepared rate schedules in accordance with the Commission's Order No. 4714a and provided those proposed schedules along with the worksheets upon which the schedules were based to the Commission for its review and approval. The Commission gave written notice to all parties on the Service List, including Malmstrom, that on December 30, 1980, representatives of the Company would present tariffs complying with Order No. 4714a and that "all parties are welcome to come. "

13. The worksheets submitted to the Commission were clear and obvious in adding in the Malmstrom and Hoerner-Waldorf adjustments for known changes. On the first page of the rate schedule worksheets entitled "Uniform Percentage of Revenue Increase Calculation" are the Malmstrom and Hoerner-Waldorf (Champion International) adjustments deducted from the increased annual revenue increase allowed by the Commission. The allowed increase was thus adjusted downward to reflect the two known changes. Again, on page 2 entitled "Rate Design Summary, at Revenue Level" of the worksheets, the Malmstrom and Hoerner-Waldorf known adjustments are specifically explained in a footnote.

14. The rate schedules approved by the Commission contained a Schedule of Electric Contract Rates. The schedule implemented the uniform increase in electric rates as ordered by the Commission. The schedule contained two categories: industrial and government customers. Under the category of government customers, there is no rate to be applied to Malmstrom .

15. Although a party to the proceedings in Docket No. 80.4.2, Malmstrom raised no objection in testimony or in the hearing to the adjustment to revenues which resulted from Malmstrom revenues being calculated at the General Service rate. Nor did it file a motion to reconsider Order No. 4714a, nor an appeal to District Court challenging the Order. Finally, Malmstrom never complained to the Commission of the rate schedules either before or after they were approved by the Commission.

16. On March 19, 1982 the Commission, in response to MPC's request that it be allowed to terminate service to Malmstrom, discussed the issue of whether Malmstrom should have been paying the General Service rate after the effective date of

Order No. 4714a. The Commission interpreted the tariffs as requiring Malmstrom to pay MPC according to the General Service rate after the effective date of Order No. 4714a. A letter was written notifying Malmstrom of the Commission's interpretation on March 19, 1982.

17. Malmstrom had been paying the rate approved by the Commission in rate case Docket No. 6454 even though it had been billed at the General Service rate, each month calculating its own bill from the Company's statement. After the Commission's determination on March 19, 1982, however, Malmstrom paid, under protest, to MPC, the full amount unpaid but billed from the effective date of Order No. 4714a.

18. By letter dated May 5, 1982, Malmstrom complained to the Commission of this result. The Commission on May 25, 1982, notified the Company that it would treat Malmstrom's letter of May 5, 1982, as a Complaint under its Rules of Procedure § 38.2.2101 et seq. A. R.M.

DISCUSSION

19. Montana law is unambiguous in providing that the Commission's authority to change or modify rates is purely prospective. MCA § 69-3-110, specifically so provides: All rates, fares, charges, classifications and joint rates fixed by the Commission shall be enforced and are prima facie lawful from the date of the Order until changed or modified by the Commission or in pursuance of Part 4.[Emphasis added.]

20. This section states that all rates in effect and approved by the Commission are the lawful rates and even if later determined by the Commission or a court to require change, neither the Commission nor a court can go back and order

additional payments from customers or refunds to customers, if the customers paid the rates fixed by the Commission .

21. This interpretation of the statute is reinforced by Montana case law. In Montana Horse Products Co. v. Great Northern Railway, 91 Mont. 194, 7 P.2d 919 (1932) the Court was called upon to explore the Railroad Commission's authority to award reparation to a shipper who had paid rates which the Commission determined were unreasonable. The Court stated the Montana law as follows:

Under our statutes, so long as the rates established by the Commission are in force, they are presumed to be reasonable, and neither the Commission nor the Court have power retroactively to declare such established rates unreasonable, and thus permit the recovery of damages to the extent of the overplus paid by a shipper or an undercharge collected by the carrier. [Emphasis added] 91 Mont. 209, 7 P.2d 925

22. The law leaves no room for argument. There is no relief for either the ratepayer or the regulated utility for rates paid in the past when such rates were fixed by the Commission and, therefore, the "lawful" rate. See also, Billings Utility Co. v. Public Service Commission, 62 Mont. 21, 33, 203 P. 366 (1921); and Great Northern Utilities Co. v. Public Service Commission, 88 Mont. 180, 202, 293 P. 294 (1930).

23. In the present case Malmstrom was charged the only effective rate which could be applied to its electric service - the General Service rate. The General Service rate was, therefore, the lawful rate. Malmstrom apparently contends that the rate approved by the Commission in Order No. 4350D in Docket No. 6454 and which appeared in the tariffs of the Company approved by the Commission on May 15, 1978, was its

rate. Malmstrom had continued to pay this special contract rate after the Company gave notice, pursuant to the service contract, that Malmstrom was properly classed as a General Service customer and should pay the General Service rate. Then, even after the new rates from Order No. 4714a went into effect, Malmstrom continued to pay the old special contract rate. However, under no circumstances could the old rate have been the lawful rate. The Commission, in Order No. 4714a, ordered an increase in rates and approved new rate tariffs which became effective December 19, 1980. The old rates, including Malmstrom's special contract rate which as part of the rate schedules, were no longer the lawful rates; the Commission's order wholly invalidated them for the future. As this Commission's predecessor stated in Re: Thompson Falls 22 P.U.R. (N.S.) 337, 343-344 (1938), no utility rate, unless it is filed with and approved by this Commission, is a legal one.

24. Additionally, the Schedule of Electric Contract Rates which was effective after December 19, 1980, contained no special contract rate for Malmstrom. Nor was there any electric rate schedule, besides the General Service Schedule, which could have applied to service to Malmstrom.

25. Finally, the rates initially proposed by the Company specifically contemplated that Malmstrom would be a General Service customer and Malmstrom had notice that the Company's Application contemplated this. The rate schedules approved by the Commission to implement Order No. 4714a openly and specifically contemplated Malmstrom's rate as the General Service rate.

26. The facts are then that (1) the old special contract rate ceased being a lawful rate, (2) there was no special

rate for Malmstrom in the Schedule of Electric Contract Rates developed in compliance with Order No. 4714a and (3) the Company's rate design, both as proposed in its application and in its compliance rates, explicitly provided that Malmstrom's rate was the General Service rate and the Commission approved the Company's rate design and tariffs. Under these circumstances, the lawful rate for Malmstrom's electric service was the General Service rate and neither the Commission nor the courts have any power to change that rate for past service.

27. It should be noted in passing that Malmstrom has already been granted the relief it requests for the future in Order No. 4714d, although that rate has not gone into effect as of the date of this order because its effect has been stayed by Judge Blair.

28. The Company's Application in Docket No. 80. 4.2 and the worksheets supporting the Application made the Malmstrom's rate an issue in the case. John D. Haffey's testimony which was presented and cross-examined in Phase I of the docket explained that the Company's proposed rates were calculated by first subtracting out the known increases in revenue. Specifically, as the work papers supporting Haffey's testimony point out, $205,193 was a known change of additional revenues resulting from Malmstrom because of the change in classification to General Service.

29. Malmstrom's attorney, Captain Wiegle, cross-examined Haffey in the Phase I hearing and Haffey's answers reinforced what Weigle must have already known from Haffey's work papers, that $205,193 of the $553,383 Haffey testified were known changes in revenues resulting from increases in revenue from Malmstrom.

30. This evidence in the record was not controverted by Malmstrom, even though it was an intervenor in the proceedings. Malmstrom introduced no evidence either through its own witnesses or cross-examination which suggested that the adjustment was improper. Malmstrom's complaint states that it introduced no such evidence in Phase I because "electric rate structure" issues were reserved for Phase II of the Docket. The fact is, however, that Malmstrom's rate was an issue in Phase I because of Haffey's testimony, exhibits and supporting work papers. If Malmstrom believed that its revenues should not have been calculated at the General Service rate, it should have introduced evidence to that effect. Because Malmstrom did not introduce such evidence, MPC's assumptions remained uncontroverted in the record. Therefore, when the Commission approved MPC's rate design implementing its Order No. 4714a, it necessarily approved MPC's continued treatment of Malmstrom as a General Service customer. The Commission had no basis upon which to approve anything but the Company's proposed special contract rate schedule which contained no special rate for Malmstrom.

31. Having failed to raise any questions concerning its rate in Phase I, Malmstrom further failed to protect itself by evaluating the Order No. 4714a which resulted from the rate case, and even more importantly, by evaluating the implementing rate schedules. A quick look at the rate schedules would have immediately revealed that Malmstrom was assigned no special contract rate, and if Malmstrom believed that this was wrong, it had an obligation to challenge the rate schedule, as provided in the Commission rules. Thus, even if Malmstrom was confused about whether the issue of its rate treatment was part of the Phase I proceedings, it cannot claim that it was confused about its rate treatment in the

rate schedules. In any case, it had a means for challenging the rate schedules through a request for reconsideration and/or appeal to District Court. Malmstrom, however, did not challenge the Company's rate treatment of it by requesting reconsideration or appeal the Commission's order, or of the proposed or approved rate schedules, within the time limits prescribed by statute and the Commission's Procedural Rules (MCA § 69-3-402 and A. R.M. 38.2.4806).

32. Malmstrom's Complaint (letter of May 5, 1982) purports to be a "Motion for Reconsideration" of the Commission's "Order" of March 19, 1982, "placing Malmstrom Air Force Base on the general service tariff."

33. Assuming the Commission's interpretation of March 19, 1982, that "Malmstrom became subject to the General Service tariff on December 19,1980" is an "order or decision" for the purposes of the Commission Procedural Rules (ARM 38.2.4806), Malmstrom's Motion for Reconsideration is untimely. ARM 38.2.4806 provides that a Motion for Reconsideration of a decision or order of the Commission must be made within ten days after the order was made. Since the Commission's interpretation was made on March 19, 1982, and the Motion for Reconsideration was dated May 5, 1982, it is untimely.

34. Malmstrom has contended that a rate change of a contract customer can only be accomplished by agreement between the parties, which is then submitted to the Commission for approval. This is erroneous, both from the standpoint of the terms of Malmstrom's electric service contract in effect when Order No. 4714a was issued and the law concerning the jurisdiction of the Commission.

35. The contract for electric service to Malmstrom in effect

at the time of Commission Order No. 4714a contains no provision whatsoever requiring that the parties agree to a change in a rate when a change in rate application is flied with the Commission. In fact, the contract provides specifically that a change in rates duly filed with the Commission automatically effects an amendment to the contract, as follows:

(b) Change of Rates.

(I) If, during the term of this contract, the public regulatory commission having jurisdiction receives f for filing in authorized manner any change in the rate schedule stipulated herein directly or by reference which result in higher or lower charges for service, the Contractor shall continue to furnish as stipulated in this contract and the Government shall pay for service at the higher or lower charges from the effective date thereof, subject to judicial appeal . [Emphasis added.]

36. The above is exactly what occurred in Docket No. 80.4.2 Phase I. An application for a rate increase was filed "in authorized manner" with the Commission and in Order No. 4714a and the implementing rate schedules the rate was changed. Thus, Malmstrom became obligated by the contract to pay the higher rate.

37. The Montana Supreme Court has held since the early days of public utility regulation that the Commission has jurisdiction to change contract rates without the concurrence of the parties. See Billings v. Public Service Commission, 631 P.2d 1295 (Mont. 1981). Thus, Malmstrom's contention that the parties to the contract had to agree upon a rate to be submitted to the Commission for approval before the rate

could change, has no basis in either the contract or in the law.

CONCLUSIONS OF LAW

1. The Commission properly exercises jurisdiction over the parties in this proceeding, pursuant to Title 69, MCA.

2. The Complainant has not timely filed its motion for reconsideration.

3. The Commission is without power to retroactively determine the reasonableness of rates it has approved.

4. The Commission may prospectively change contractual rates.

ORDER

NOW, THEREFORE, IT IS ORDERED that the complaint of Malmstrom Air Force Base is HEREBY DISMISSED.

DONE IN OPEN SESSION this 12th day of October, 1982 by a vote of: 4-0 .

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION.

_____
GORDON E. BOLLINGER, Chairman

_____
HOWARD L. ELLIS, Commissioner.

_____
CLYDE JARVIS, Commissioner

_____
THOMAS J. SCHNEIDER, Commissioner

ATTEST:

Madeline L. Cottrill
Secretary
(SEAL)

NOTE: You may be entitled to judicial review of the final decision in this matter. If no Motion ,or Reconsideration is filed, judicial review may be obtained by filing a petition for review within thirty (30) days from the service of this order. If a Motion for Reconsideration is filed, a Commission order is final for purpose of appeal upon the entry of a ruling on that motion, or upon the passage of ten (10) days following the filing of that motion. cf. the Montana Administrative Procedure Act, esp. Sec. 2-4-702, MCA; and Commission Rules of Practice and Procedure, esp. 38.2.4806, ARM.