Montana Legislative Services Division

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Senator Debbie Shea
100 Moon Lane
Butte, Montana 59701

Dear Senator Shea:

I am writing in response to your inquiry concerning whether Montana law would allow or prohibit a municipality or group of municipalities from acquiring a statewide natural gas and electrical energy distribution system.

Section 7-13-4102, MCA, specifically authorizes a city or town council to incur debt for the construction, purchase, or development of an adequate supply of natural gas and to construct or purchase a distribution system for supplying the residents of the city, town, or vicinity. The debt must be authorized by the taxpayers of the city or town. There are no Montana cases interpreting this section. The normal definition of "vicinity" is the region or area surrounding a particular place. While I am fully cognizant of the fact that Butte is the center of the universe, it would be difficult to argue that all of the remainder of Montana is in the "vicinity" of Butte. However, other local governments may want to cooperate in purchasing an adequate supply of natural gas for their residents.

Title 7, chapter 11, part 1, MCA, provides for interlocal agreements that permit local governments to cooperate on a basis of mutual advantage to provide services and facilities in a manner that is in accord with geographic, economic, population, and other factors influencing the needs and development of local communities. Section 7-11-104, MCA, provides for contracts for any public infrastructure facility, project, or service that any of the public agencies entering into the contract is authorized by law to perform. Section 7-11-103, MCA, defines a "public agency" as any political subdivision, including municipalities, counties, school districts, and any agency or department of the state of Montana. Title 7, chapter 11, part 11, MCA, also provides for multijurisdictional service districts. Municipalities and counties are authorized to form multijurisdictional service districts to provide a higher level of service than is available through the local governments or to provide services that are not available through the

local government forming the district. Section 7-11-1102(2)(j), MCA, provides that a multijurisdictional service district may provide any public infrastructure facility, project, or service. The ordinary meaning of "infrastructure" is the basic installations and facilities on which the continuance and growth of a community or state depend, including roads, schools, power plants, transportation, and communication systems. Natural gas installations and distribution systems should fall within the definition of infrastructure.

It appears that because cities and towns are specifically authorized to purchase a distribution system for supplying natural gas to their residents, an appropriate group of cities and towns may be able to enter into an interlocal agreement to purchase a statewide natural gas distribution system for the purpose of supplying the cooperating cities, towns, and vicinities. There would be obvious tax consequences if a group of local governments purchased a privately owned natural gas distribution system, including a loss of local property taxes to the local governments comprising the group. Those consequences could be addressed in a manner similar to the manner that will be discussed in the electrical energy portion of my analysis.

A slightly different analysis is necessary to address the issue of whether Butte or a group of local governments could purchase an electrical energy distribution system. There is no specific statutory authority for a city or town to provide or purchase a distribution system for electrical energy similar to that contained in section 7-13-4102, MCA, concerning natural gas. However, providing electrical energy to residents or purchasing an electrical energy distribution system for the purpose of providing electrical energy to its residents is not included in the powers denied to self-governing local governments in section 7-1-111, MCA, and is not included in the powers requiring delegation in section 7-1-112, MCA. Therefore, an argument can be made that a self-governing local government could acquire an electrical energy distribution system for the purpose of supplying the residents of the local government. See D&F Sanitation Service v. City of Billings, 219 Mont. 437, 713 P.2d 977 (1986). Accordingly, under section 7-11-104, MCA, which provides for contracts for any public infrastructure facility, project, or service that any of the public agencies entering into the contract is authorized by law to perform, an interlocal agreement could be entered into with other local governments, even those that did not possess self-governing powers.

It is also interesting to note that a municipal electric utility actually exists in Montana. That fact appears to indicate that it is permissible for a local government to supply electrical energy to the local government's residents. Section 69-8-103, MCA, providing definitions for the Electric Utility Industry Restructuring and Customer Choice Act, defines a "cooperative utility" as including a municipal electric utility existing as of May 2, 1997. Apparently the town of Troy meets that test. The Act also contains definitions of "distribution facilities", "distribution services provider", "transmission facilities", and "transmission services provider". It appears that those definitions would encompass the statewide electrical energy distribution system being considered for acquisition. Section 69-8-304, MCA, contemplates a cooperative utility being a distribution services provider, and section 69-8-308, MCA, contemplates a cooperative utility being a transmission services provider. A "public utility" is defined in section 69-8-103(23), MCA, as including any electric utility regulated by the Public Service Commission pursuant to Title 69, chapter 3, on May 2, 1997, including the public utility's successors or assignees. Therefore, a cooperative utility purchasing the electrical energy distribution system of a public utility would be a public utility for that purpose. A public utility's distribution services are subject to the

provisions of section 69-8-208, MCA, and the transmission services are subject to the provisions of section 69-8-209, MCA.

Under this particular scenario, the town of Troy, as a cooperative utility, is authorized to provide transmission and distribution services. Because Troy is authorized by law to provide those services, an interlocal agreement could be entered into with other local governments under section 7-11-104, MCA, even though those other local governments may not be authorized to provide those services. Once the town of Troy and other cooperating local governments purchased the electrical energy transmission and distribution services, the local governments would be a public utility for the purposes of Title 69, chapter 8, MCA.

With regard to the taxation issue, section 69-8-309(3), MCA, provides that in the case of a cooperative utility that offers electricity supply service competitively to customers using a public utility's distribution facilities, the cooperative utility is required to form a for-profit entity to serve those customers that allows the entity to be taxed at the same level as other for-profit electricity suppliers. This mechanism allows state and local governments to be made whole and prevents a cooperative utility from gaining a competitive advantage over other suppliers.

Another alternative allowing local governments to acquire an electrical energy or natural gas distribution system would be through the enactment of legislation authorizing public utility districts in a manner similar to Title 54 of the Revised Codes of Washington.

If you have any questions or if I can provide additional information, please feel free to contact me.

Sincerely,

Gregory J. Petesch
Director of Legal Services

cc: Alec Hansen
Jack Lynch

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