

**MONTANA FOURTH JUDICIAL DISTRICT COURT
MISSOULA COUNTY**

<p>350 MONTANA, ERIC HUSETH, ABIGAIL HUSETH, and JEROME WALKER,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">vs.</p> <p>STATE OF MONTANA; THE MONTANA DEPARTMENT OF PUBLIC SERVICE REGULATION, MONTANA PUBLIC SERVICE COMMISSION; NORTHWESTERN CORPORATION; and DOES I THROUGH V,</p> <p style="text-align: center;">Defendants.</p>	<p>DEPT NO. 4 Hon. Jason Marks Cause No. DV-32-2021-0000684-IJ</p> <p>ORDER RE MOTIONS FOR SUMMARY JUDGMENT</p>
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This matter comes before the Court on cross-motions for summary judgment. Plaintiffs filed a motion for summary judgment, to which defendants NorthWestern Corporation and the State of Montana/Public Service Commission responded. Defendants NorthWestern Corporation and the State of Montana/Public Service Commission filed motions for summary judgment, to which Plaintiffs responded. The moving parties filed replies in support of their motions.

Plaintiffs filed a motion to strike exhibits first filed by NorthWestern in reply. NorthWestern responded to the motion.

ORDER

Plaintiffs' motion for summary judgment is **GRANTED**.

The motions for summary judgment by defendants Northwestern Corporation and the State of Montana/Public Service Commission are **DENIED**.

Plaintiffs' motion to strike exhibits first filed by NorthWestern in reply is **GRANTED**.

I. BACKGROUND

Plaintiff 350 Montana and three individual plaintiffs filed a complaint seeking declaratory and injunctive relief. Plaintiffs allege section 69-8-421 MCA (“pre-approval statute”) is unconstitutional under Article 12, section 31 and Article 5, section 12 of the Montana Constitution. Plaintiffs allege the pre-approval statute violates Article 2, section 31 by an irrevocable grant of a special privilege to NorthWestern Corporation for approval by the commission of rate recovery of its cost of acquisition of an electricity supply resource. Plaintiffs allege the pre-approval statute violates Article 5, section 12 because the statute is a special act for NorthWestern when a general act can be made applicable to all regulated public utilities.

Defendants NorthWestern Corporation and the State of Montana/the Public Service Commission filed answers to the complaint, admitting or denying the various allegations made in the complaint.

NorthWestern Corporation filed a motion to dismiss alleging plaintiffs lacked standing to bring the action. Plaintiffs and the State of Montana/Public Service Commission responded, with plaintiffs opposing the motion, and the State of Montana/Public Service Commission agreeing with it. The Court denied the motion to dismiss, finding plaintiffs have standing to bring the claims alleged in the complaint.

The Court heard oral argument on all motions for summary judgment, following which counsel submitted proposed orders for the Court's consideration.

II. THE MOTIONS FOR SUMMARY JUDGMENT

A. ARGUMENTS OF THE PARTIES

The arguments of the parties in support of the three motions for summary judgment are too voluminous for the Court to recount in this order.

From the Court's perspective, plaintiffs' primary argument is the pre-approval statute violates Article 2, section 31, because alone among the regulated public utilities only Northwestern is afforded the opportunity to apply for and obtain pre-approval by the commission of its cost of acquiring an electricity supply resource, which is made irrevocable by the plain meaning of the statute.

Defendants argue the pre-approval statute does not violate Article 2, Section 31, because the statute does not grant NorthWestern a franchise, and the statute only provides for a procedure by which NorthWestern can apply to the commission for

pre-approval, which, if granted, is not irrevocable under the language of subsection (9) of the statute.

As to Article 5, section 12, plaintiffs primarily argue the pre-approval statute is a “special act,” because the statute permits only NorthWestern and not the other regulated public utilities in Montana to apply to and obtain from the Commission an order pre-approving the rate basing of its cost of acquiring an electricity supply resource. Plaintiffs argue a general act, permitting pre-approval to all utilities, can be made.

Admitting the pre-approval statute applies only to NorthWestern, Defendants argue the statute does not violate Article 5, section 12, because it is reasonably related to a legitimate legislative purpose to vertically reintegrate NorthWestern alone. Defendants argue Montana Power Company, NorthWestern’s predecessor, was the only public utility to divest its generation assets in response to the 1997 “Restructuring Act,” 1997 Montana Laws Ch. 505, and therefor the only public utility subject to vertical reintegration under the 2007 “Reintegration Act,” 2007 Montana Laws Ch. 491.

III. APPLICABLE STANDARDS

A party moving for summary judgment must demonstrate the absence of genuine issues of material fact. *Williams v. Plum Creek Timber Company*, 362 Mont. 368, 371 (2011). Once accomplished, the burden shifts to the opposing party

to prove by more than mere denial and speculation the existence of a genuine issue of material fact. (*Ibid.*) A fact is material if it involves the elements of the claims or defenses at issue to an extent necessitating resolution of the issue by a trier of fact. (*Ibid.*) Summary judgment should be rendered if the materials on file show there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. Rule Civ. Proc. 56(c)(3).

The constitutionality of a statute is presumed unless it conflicts with the constitution, in the judgment of the Court, beyond a reasonable doubt. *Montana Cannabis Industry Association v. State*, 382 Mont. 256, 261 (2016). The party challenging the constitutionality of a statute bears the burden to establish its unconstitutionality. (*Ibid.*) The constitutional standard of review differs between the two constitutional provisions, which the Court addresses in the analyses below.

Constitutional provisions and statutes are interpreted by use of the same rules. *City of Missoula v. Cox*, 346 Mont. 422, 424 (2008). The intent of the framers of the constitution and of the legislature enacting a statute should be determined from the plain meaning of the words used. (*Ibid.*) If it is possible to discern the plain meaning of a constitutional provision or a statute from its language, no other means of interpretation are proper. (*Ibid.*) The Court must reject any interpretation that would leave without effect any part of statutory language. *Montco v. Simonich*, 285 Mont. 280, 287 (1997).

IV. THE PRE-APPROVAL STATUTE

The parties agree the pre-approval statute, 69-8-421 MCA, has a gateway provision limiting the availability of the preapproval process to NorthWestern Corporation alone.

(1) A public utility that removed its generation assets from its rate base pursuant to this chapter prior to October 1, 2007, may apply to the commission for approval of an electricity supply resource that:

(a) is not yet procured; and

(b) is subject to a competitive solicitation process when applicable in accordance with 69-3-1207.

(69-8-421(1) MCA.)

An electricity supply resource includes plants owned by a utility or equipment used to generate electricity. (69-8-103(9)(b) MCA.) It is undisputed NorthWestern is the only public utility to have applied for and received from the commission pre-approval under the subject statute to rate-base its cost of acquisition of electricity generating resources.

Two subsections of the statute address the issue of commission disallowance of costs claimed by the utility subsequent to commission pre-approval of the cost of acquisition:

(7) Notwithstanding any provision of this chapter to the contrary, if the commission has issued an order containing the findings required under subsection 6(c), the commission may not subsequently disallow the recovery of costs related to the approved electricity supply resource based on contrary findings.

(69-8-421(7) MCA.)

And,

(9) Nothing limits the commission’s ability to subsequently, in any future rate proceeding, inquire into the manner in which the public utility has managed, dispatched, operated, or maintained any resource or managed any power purchase agreement as part of its overall portfolio. The commission may subsequently disallow rate recovery for the costs that result from the failure of a public utility to reasonably manage, dispatch, operate, maintain, or administer electricity supply resources in a manner consistent with 69-3-201 and commission rules.

V. ANALYSIS: ARTICLE 2, SECTION 31

Article 2, Section 31, provides: “No ex post facto law nor any law impairing the obligation of contracts, or making any irrevocable grant of special privileges, franchises, or immunities, shall be passed by the legislature.”

A. STANDARD OF REVIEW

Article 2 of the Constitution is a “Declaration of Rights,” which are fundamental individual rights. *Wadsworth v. State*, 275 Mont. 287, 299 (1996). When a statute implicates a fundamental right found in the Declaration of Rights the Court must apply the most stringent level of scrutiny, which is “strict scrutiny.” *Driscoll v. Stapleton*, 401 Mont. 405, 415 (2020). “Under strict scrutiny, statutes will be found unconstitutional “unless the State can demonstrate that such laws are necessary to promote a compelling governmental interest.” (*Ibid.*) Any compelling state interest intruding on a fundamental right set forth in the Declaration of Rights

must be closely tailored to effectuate only that compelling state interest and be the least onerous path that can be taken to achieve the state objective. *Wadsworth v. State, supra* at 302.

Accordingly, the Court applies strict scrutiny to determine the constitutionality of the pre-approval statute under Article 2, section 31.

B. THE PRE-APPROVAL STATUTE GRANTS A SPECIAL PRIVILEGE TO NORTHWESTERN

The material facts are undisputed. It is undisputed the pre-approval statute permits only NorthWestern and not any other regulated public utility to apply for and obtain pre-approval by the commission of rate basing its acquisition of electricity supply resources. At the time the statute was enacted, and now, four public utilities were regulated by the Public Service Commission: NorthWestern Corporation, Montana Dakota Utilities Company, Black Hills Power, Inc., and Avista Corporation. But among them only Montana Power Company (MPC), NorthWestern's predecessor, removed its generation assets from its rate base prior to October 1, 2007.

The statutory limitation of pre-approval to NorthWestern, alone among the regulated public utilities, constitutes a "special privilege" within the plain meaning of Article 2, section 12. A "special privilege" is one "conferred by the government on an individual which does not belong to the citizens generally." *D&F Sanitation*

Service v. City of Billings, 219 Mont. 437, 441 (1986). A “privilege” is a “right, advantage, favor, or immunity specially granted to one.” (Webster’s New World College Dictionary (4th Ed.).)

The statute grants a special privilege to NorthWestern in two respects. NorthWestern is the only public utility which may apply for pre-approval, and NorthWestern is the only public utility which may obtain pre-approval. The pre-approval process offers NorthWestern alone the substantial financial benefit of rate basing its acquisition of an energy supply resource before or at the time the resource is acquired.

It is immaterial whether the statute grants NorthWestern a franchise, because Article 2, section 12 is phrased in the disjunctive (franchise “or” special privilege). Interpreting the provision to prohibit only the grant of a franchise would make the phrase “special privilege” surplusage, contrary to the rules of statutory interpretation.

Nor does the fact the statute contemplates the commission to grant or deny pre-approval change the nature of the special privilege. Only NorthWestern can apply for and obtain pre-approval. Other utilities are not eligible to even apply to the commission for pre-approval.

It is not material whether any of the other public utilities wanted or want to avail themselves of the benefits of pre-approval. None of the other utilities

provided evidence one way or the other on this contention. The statute permits, but does not require, NorthWestern to apply for pre-approval. The world of regulated public utilities in Montana is not static. Utilities or parts of them are sold or transferred, and managements and operating philosophies change over time, as in any corporate environment. It is reasonable to contemplate a public utility other than NorthWestern seeking pre-approval for acquisition of an electricity supply resource. But the statute precludes any utility other than NorthWestern from the pre-approval process, regardless of need or identity.

The pre-approval statute confers a special privilege on NorthWestern within the meaning of Article 2, Section 31.

C. THE SPECIAL PRIVILEGE GRANTED NORTHWESTERN BY THE PRE-APPROVAL STATUTE IS IRREVOCABLE

The special privilege granted NorthWestern by 69-8-421 MCA is “irrevocable.” Nothing in the statute permits the commission to deny NorthWestern the right to apply for pre-approval. And the plain meaning of subsection (7) prohibits the commission from subsequently revoking its prior approval of the cost of acquiring an electricity supply resource. Subsection (7) is unequivocal: “Notwithstanding any provision of this chapter to the contrary...the commission may not subsequently disallow the recovery of costs related to the approved electricity supply resource based on contrary findings.” (69-8-421(7) MCA.)

Subsection (9) does not permit the commission to disallow the pre-approved costs of acquisition. The subsection permits the commission in a future rate proceeding to disallow rate recovery for costs incurred after the resource is acquired - “that result from the failure of a public utility to reasonably manage, dispatch, operate, maintain, or administer electricity supply resources...” (69-8-421(9) MCA.) Subsection (7) prevails over subsection (9) by virtue of its prefatory language “[n]otwithstanding any provision of this chapter to the contrary...”

Harmonized, subsections (7) and (9) mean the commission cannot disallow the preapproved costs of acquisition but can disallow subsequent costs of management and operation. Defendants’ reading of subsection (9) as permitting revocation of the cost of acquisition makes subsection (7) a nullity, contrary to the rules of interpretation.

The special privilege granted NorthWestern by the pre-approval statute is irrevocable.

There is no compelling government interest to grant the irrevocable special privilege of preapproval to NorthWestern.

The pre-approval statute, MCA 69-8-421, violates Article 2, Section 31 of the Montana Constitution.

VI. ANALYSIS: ARTICLE 5, SECTION 12

Article 5 section 12, of the Constitution provides: “The legislature shall not pass a special or local act when a general act is, or can be made, applicable.”

A. STANDARD OF REVIEW

The standard of review under Article 5, Section 12 is whether the statute is rationally related to a legitimate legislative interest. *Rohlfs v. Klemenhausen, LLC*, 354 Mont. 133, 141 (2009). A statute is rationally related to a legislative interest if it embraces the entire class served by that interest. (*Ibid.*) A statute that applies to less than an entire class is a “special act,” while a statute applying to all members of a class is a “general act.” *Leuthold v. Brandjord*, 100 Mont. 96, 47 P.2d 41, 45 (1935).

Article 5, Section 12 requires a law apply equally to all persons embraced within the class to which it is addressed, provided such classification is made upon some natural, intrinsic, or constitutional distinction between the persons within the class and others not embraced within it. *Leuthold v. Brandjord, supra*, 47 P.2d at 45. The Supreme Court has framed the question as follows: “Does [the statute] operate equally upon all of a group of objects which, having regard to the purpose of the legislature, are distinguished by characteristics sufficiently marked and important to make them a class by themselves?” *D&F Sanitation Service v. City of Billings, supra* at 442.

B. THE PRE-APPROVAL STATUTE IS A “SPECIAL ACT”

The parties agree 69-8-421 MCA creates a class of one – NorthWestern – but disagree whether the class of one constitutes a special act.

Section 421 was part of the 2007 Electric Utility Industry Generation Reintegration Act, 2007 Mont. Laws Ch. 491. The parties agree the purpose of the 2007 act was to vertically reintegrate the electric utility industry by permitting public utilities to own and operate generation as well as transmission and distribution assets.

The act’s title addresses the entire industry: “Electric Utility-Industry Generation Reintegration Act.” The act imposed duties on all public utilities to plan for, manage, and procure electricity supply resources when needed.

The public utility shall:

- (a) plan for future electricity supply needs;
- (b) manage a portfolio of electricity supply resources; and
- (c) procure new electricity supply resources.

(2007 Reintegration Act, MCA 69-8-419(1)(a-c), repealed 2019.)

“Public utility” is defined in the act as all public utilities operating in the state as of 1997 and their successors and assigns. (MCA 69-8-103(21).)

These provisions confirm the parties’ understanding of the legislative purpose of the Reintegration Act, which was to remove the 1997 Act’s prohibition of a utility owning and/or operating generation as well as transmission and distribution facilities. (1997 Restructuring Act, 1997 Mont. Laws Ch. 505, section

8.) The class served by the legislative purpose of the Reintegration Act consists of all public utilities, not just NorthWestern.

The inclusion of all public utilities in the class is consistent with the regulatory jurisdiction of the commission, which is to regulate all public utilities and not just NorthWestern. (69-3-102 MCA.)

Section 421 is part of the 2007 act, but it departs from the legitimate legislative purpose of reintegrating the industry by granting an exclusive and lucrative financial benefit only on NorthWestern. All public utilities can benefit from pre-approval, not just NorthWestern. And there is no legitimate legislative purpose to financially favor only one corporate owner of a public utility.

The exclusion of MDU from several of provisions of the 2007 Act and the ability of utilities with less than 50 Montana customers to opt out does not mean section 421 is not a “special act.” The plain meaning of the act’s title and language of 69-8-419(1)(a-c) MCA encompassed all public utilities. In a non-static environment, where corporate owners of public utilities and management philosophies change over time, the exclusion of all but NorthWestern from pre-approval restricts the class to less than its entirety.

The pre-approval statute is a “special act” within the meaning of Article 5, Section 12 of the Montana Constitution.

C. A GENERAL ACT CAN BE MADE

The parties do not dispute a general act can be made, granting all public utilities the right to apply for and obtain pre-approval.

Accordingly, the pre-approval statute, 69-8-421 MCA, also violates Article 5, Section 12 of the Montana Constitution.

VII. PLAINTIFFS' MOTION TO STRIKE AND OBJECTIONS TO EVIDENCE

Plaintiffs filed a motion to strike exhibits which NorthWestern first filed in reply. The exhibits are the entire transcript of the deposition of NorthWestern's expert witness John Alke as well as several documents purportedly filed with the commission. The motion is granted. A party may not submit new evidence in reply, because doing so unfairly deprives opposing parties of the opportunity to respond. *Worledge v. Riverstone Residential Group LLC*, 379 Mont. 265 265, 271-2 (2015).

VII. SEVERABILITY

NorthWestern urges the Court to sever the following language in subsection (a) in the event the Court finds section 421 unconstitutional: "that removed its generation assets from its rate base pursuant to this chapter prior to October 1, 2007..." The apparent effect would be to make pre-approval available to all public utilities.

Although the original version of the 2007 Reintegration Act contained a severability clause (section 23), neither section 421 nor the current version of Title 69 Chapter 8 MCA contains such a provision. Regardless, the Court must determine whether the unconstitutional provisions are necessary for the integrity of the statute or were an inducement to its enactment. *Williams v. Board of County Commissioners of Missoula County*, 371 Mont. 356, 376 (2013); *Finke v. State ex rel. McGrath*, 314 Mont. 314, 323 (2003). When unconstitutional provisions are severed, the remainder of the statute must be complete in itself and capable of being executed in accordance with the apparent legislative intent. *Williams v. Board of County Commissioners of Missoula County*, *supra* at 376.

These considerations militate against severance. The unmistakable legislative intent was to grant only NorthWestern the right to apply for and obtain pre-approval. Making pre-approval available to all public utilities by severing the suggested language will be contrary to the legislature's intent. The integrity of the statute and the inducement for its enactment will be destroyed by the severance suggested by NorthWestern. At its core, amendment of section 421 is a political question for the legislature. It is the role of the legislature, not this Court, to determine if all public utilities should have the benefit of the pre-approval process or if, as Plaintiffs clearly believe, pre-approval is bad policy and no public utility should have the benefit of pre-approval.

The Court declines to sever the suggested language from the remainder of the statute.

VIII. DECLARATORY JUDGMENT

As requested by plaintiffs in their complaint, the Court declares under the Uniform Declaratory Judgment Act, 27-8-201, 202 MCA, the pre-approval statute, 69-8-421 MCA, is unconstitutional in violation of Article 2, Section 31 and Article 5, Section 12 of the Montana Constitution. Judgment will so issue.

Dated this 6th day of May, 2022

Electronically signed below _____

Jason Marks
District Judge