

48 Op. Att'y Gen. No. 14

CITIES AND TOWNS - Authority of self-governing local government to acquire and operate electric and natural gas utilities;
CITY GOVERNMENT - Authority of self-governing local government to acquire and operate electric and natural gas utilities;
COUNTY GOVERNMENT - Authority of self-governing local government to acquire and operate electric and natural gas utilities;
LOCAL GOVERNMENT - Authority of self-governing local government to acquire and operate electric and natural gas utilities;
MUNICIPAL GOVERNMENT - Authority of self-governing local government to acquire and operate electric and natural gas utilities;
PUBLIC SERVICE COMMISSION - Authority of self-governing local government to acquire and operate electric and natural gas utilities;
MONTANA CODE ANNOTATED - Sections 1-2-106, 7-1-101 to -114, 7-1-4121(9), 7-2-4704(2), 7-3-302, -1103(1), -1104, -4313, 7-5-201(1), 7-6-4202(4), 7-15-4206(8), -4283(8), 69-2-101, 69-3-101, -102, 69-7-101 to -201;
MONTANA CONSTITUTION - Article XI, sections 4 to 6;
MONTANA LAWS OF 1981 - Chapter 607;
OPINIONS OF THE ATTORNEY GENERAL - 46 Op. Att'y Gen. No. 13 (1996), 46 Op. Att'y Gen. No. 12 (1995), 44 Op. Att'y Gen. No. 34 (1992), 37 Op. Att'y Gen. No. 68 (1977).

HELD:

The City and County of Butte-Silver Bow, a consolidated government with self-government powers, has the authority to acquire and operate electric and natural gas utilities within and outside the boundaries of the local government unit.

June 22, 2000

Mr. Robert M. McCarthy
Silver Bow County Attorney
155 West Granite Street
Butte, MT 59701

Dear Mr. McCarthy:

You have asked my opinion on the following question:

May a self-power city-county government operate an electric and natural gas utility under Montana law?

I understand from your letter that the consolidated city/county government of Butte-Silver Bow is considering trying to acquire electric and natural gas transmission systems offered for sale by Montana Power Company.

The nature of the local government unit known as the "City and County of Butte-Silver Bow" (herein, Butte-Silver Bow) should be clearly understood.

On May 2, 1977, the City of Butte and County of Silver Bow consolidated their local governments into one unified government under one charter. The new government was to have the status of a county and incorporated municipality

Butler v. Local 2033 Am. Fed'n of State, County & Mun. Employees, 186 Mont. 28, 30, 606 P.2d 141, 142 (1980). See Mont. Code Ann. § 7-3-1103(1).

Butte-Silver Bow is a charter form of government. A charter form of government possesses self-government powers [Mont. Code Ann. § 7-3-702], and it may exercise any power not prohibited by the constitution, law, or charter [Mont. Code Ann. § 7-1-101].

Butte-Silver Bow is neither a county nor a municipality. It is a consolidated government. A consolidated government must adopt either the county or municipality provisions whenever the existing provisions conflict [Mont. Code Ann. § 7-5-201(1)].

Bukvich v. Butte-Silver Bow, 215 Mont. 202, 204, 696 P.2d 444, 445 (1985).

The formation of Butte-Silver Bow did not limit the powers that the consolidated government could exercise, compared to the powers that the City of Butte and County of Silver Bow could exercise. "A consolidated local government has and may exercise all powers that are conferred on counties, cities, or towns by the constitution and laws of the state." Mont. Code Ann. § 7-3-1104.

The authority to create local governments with self-government powers is an important change brought about by Montana's 1972 Constitution. Under the 1889 Constitution, a county, city, or town only had those powers expressly conferred by law and doubts concerning powers were resolved against the local government. In contrast, the 1972 Constitution expanded the powers of local self-government. Mont. Const. art. XI, §§ 4-6. See, e.g., Tipco Corp. v. City of Billings, 197 Mont. 339, 344, 642 P.2d 1074, 1077 (1982); State ex rel. Swart v. Molitor, 190 Mont. 515, 517-18, 621 P.2d 1100, 1102 (1981). Mont. Const. article XI, section 6 provides:

Section 6. Self-government powers. A local government unit adopting a self-government charter may exercise any power not prohibited by this constitution, law, or charter. This grant of self-government powers may be extended to other local government units through optional forms of government provided for in section 3.

Under the 1972 Constitution, the assumption is that a local government with self-government powers possesses the power, unless the power has been specifically denied. D & F Sanitation Serv. v. City of Billings, 219 Mont. 437, 444-45, 713 P.2d 977, 981-82 (1986); 46 Op. Att'y Gen. No. 13 (Feb. 28, 1996).

The legislature has enacted several statutes setting forth the authority of local governments with self-government powers. Among the more pertinent are the following:

7-1-101. Self-government powers. As provided by Article XI, section 6, of the Montana constitution, a local government unit with self-government powers may exercise any power not prohibited by the constitution, law, or charter. These powers include but are not limited to the powers granted to general power governments.

7-1-102. Authorization for self-government services and functions. A local government with self-government powers may provide *any services* or perform any functions not expressly prohibited by the Montana constitution, state law, or its charter. These services and functions include but are not limited to those services and functions which general power government units are authorized to provide or perform. [Emphasis added.]

7-1-103. General power government limitations not applicable. A local government unit with self-government powers which elects to provide a service or perform a function that may also be provided or performed by a general power government unit is not subject to any limitation in the provision of that service or performance of that function except such limitations as are contained in its charter or in state law specifically applicable to self-government units.

7-1-106. Construction of self-government powers. The powers and authority of a local government unit with self-government powers shall be liberally construed. Every reasonable doubt as to the existence of a local government power or authority shall be resolved in favor of the existence of that power or authority.

Consistent with the Montana Constitution and these statutes, the Montana Supreme Court has recognized the "broad expanse of shared sovereignty given to self-governing local units." State ex rel. Swart, 190 Mont. at 518, 621 P.2d at 1102. See also Lechner v. City of Billings, 244 Mont. 195, 200, 797 P.2d 191, 195 (1990); D & F Sanitation, 219 Mont. at 445, 713 P.2d at 982.

The term "municipality" is defined in many different provisions of the Montana Code. Usually, "municipality" means an incorporated city or town. See, e.g., Mont. Code Ann. §§ 7-1-4121(9), 7-2-4704(2), 7-6-4202(4), 7-15-4206(8). Sometimes "municipality" expressly includes consolidated governments. See, e.g., Mont. Code Ann. §§ 7-13-2201(4), 17-15-4283(8). The term "municipality" is not defined in Mont. Code Ann. title 69, chapter 7, which pertains to municipal utilities. Nevertheless, the intent of the legislature is expressed in Mont. Code Ann. § 7-3-1104, which states in relevant part, "A consolidated local government has and may exercise all powers that are conferred on counties, cities, or towns by the constitution and laws of the state." Thus, a consolidated government has the powers of a "municipality" under Mont. Code Ann. title 69, chapter 7. Section 1.02(a) of the Butte-Silver Bow charter also states that "the consolidated unit of local government shall have the status of a county and an incorporated municipality for all purposes." Accordingly, I conclude that statutory provisions pertaining to the ownership and operation of utilities by municipalities apply to the Butte-Silver Bow consolidated government.

In determining whether a particular self-government power is authorized, numerous previous Attorney General's Opinions have engaged in a three-part analysis:

- (1) consult the local government's charter and consider constitutional ramifications;
- (2) determine whether the exercise is prohibited under the various provisions of Mont. Code Ann. title 7, chapter 1, part 1 or other statute specifically applicable to self-government units;
- (3) decide whether it is inconsistent with state provisions in an area affirmatively subjected to state control as defined by Mont. Code Ann. § 7-1-113.

See, e.g., 46 Op. Att'y Gen. No. 13 (1996); 44 Op. Att'y Gen. No. 34 at 140, 142 (1992); 37 Op. Att'y Gen. No. 68 at 272, 274 (1977).

With respect to the first factor, the charter of Butte-Silver Bow does not restrict the powers of the local government beyond recognizing those restrictions that exist in law. The charter provides in relevant part as follows:

SECTION 2.01--POWERS OF THE GOVERNMENT

The City-County shall have self-government powers as provided by Article XI, Sections 5 and 6 of the Montana Constitution and Part 1 of Chapter 1 of Title 7 of the Montana Code Annotated and may exercise any power not prohibited by the constitution, law, or this Charter. These powers include but are not limited to the powers granted to general power governments.

SECTION 2.04--INTERPRETATION OF POWERS

The powers and authority of this self-government unit shall be liberally construed. Every reasonable doubt as to the existence of this government's power shall be resolved in favor of the existence of that power or authority.

The charter has placed no restriction on Butte-Silver Bow's acquiring or operating electric and natural gas utilities. Similarly, I find no provision in the Montana Constitution that would prohibit a local government with self-government powers from exercising its authority under its charter to acquire and operate such utilities.

The second factor of the three-part analysis requires an examination of the relevant statutes to determine whether the actions being considered by the local government are prohibited by law. Mont. Code Ann. §§

7-1-111 and -112 set forth specific powers that a self-governing local government is prohibited from exercising. Mont. Code Ann. § 7-1-114 identifies the laws with which a local government with self-government powers must comply. In addition, this opinion presents the specific issue of the relative powers of a local government with self-government powers and of the Montana Public Service Commission (PSC), which is charged by statute with the supervision and regulation of public utilities. Mont. Code Ann. § 69-3-102.

My examination of Mont. Code Ann. §§ 7-1-111, -112, and -114 for provisions implicated by the operation of utilities by a local government found only one issue. Arguably, the following provision of Mont. Code Ann. § 7-1-111 should be considered in connection with a proposal that a local government operate an electric or natural gas utility:

A local government unit with self-government powers is prohibited from exercising the following:

. . . .
(5) any power that establishes a rate or price otherwise determined by a state agency

The PSC has broad power to regulate utility rates (Mont. Code Ann. § 69-2-101). The powers of the PSC with respect to municipal utilities were reduced by the enactment of chapter 607, 1981 Montana Laws, which amended the definition of public utility in Mont. Code Ann. § 69-3-101 and contained other provisions restricting the powers of the PSC over municipal utilities that were codified at Mont. Code Ann. title 69, chapter 7 (1981). However, before chapter 607 became effective, the power of the PSC to regulate utility rates was not perceived to be inconsistent with the ownership and operation of utilities by local governments. City of Billings v. Public Serv. Comm'n, 193 Mont. 358, 631 P.2d 1295 (1981); cf. State ex rel. Dep't of Highways v. City of Helena, 193 Mont. 441, 632 P.2d 332 (1981) (statute requiring utility to pay part of relocation costs caused by road construction did not violate local self-government doctrine as applied to city-owned utility facilities). Under chapter 607, section 5 (codified at Mont. Code Ann. § 69-7-102 (1981)), the PSC retained power to regulate certain large rate increases by municipal utilities. The existence of this power was not inconsistent with local self-government powers. City of Billings v. Department of Revenue, 270 Mont. 307, 314, 891 P.2d 1149, 1154 (1995) ("the City of Billings, as owner and operator of a municipal utility, must always pay the PSC . . . fees"); Lechner, 244 Mont. at 202, 797 P.2d at 196 ("§ 7-1-111(5), MCA does not preempt the City from exercising its self-governing powers in the area of municipal utilities").

Accordingly, I conclude that Mont. Code Ann. § 7-1-111(5) does not prevent Butte-Silver Bow from acquiring and operating electric and gas utilities.

The final part of the three-part analysis comes directly from Mont. Code Ann. § 7-1-113, which requires that a local government with self-government powers must exercise those powers consistent with state law and regulation:

7-1-113. Consistency with state regulation required. (1) A local government with self-government powers is prohibited the exercise of any power in a manner inconsistent with state law or administrative regulation in any area affirmatively subjected by law to state regulation or control.

(2) The exercise of a power is inconsistent with state law or regulation if it establishes standards or requirements which are lower or less stringent than those imposed by state law or regulation.

(3) An area is affirmatively subjected to state control if a state agency or officer is directed to establish administrative rules governing the matter or if enforcement of standards or requirements established by statute is vested in a state officer or agency.

In essence, § 7-1-113 allows a local government with self-government powers to enact any ordinance unless the ordinance (1) is inconsistent with state law or regulation and (2) concerns an area affirmatively subjected by law to state control. 46 Op. Att'y Gen. No. 13 (1996); 44 Op. Att'y Gen. No. 34 at 140, 143 (1992).

The legislature has enacted nearly 80 pages of laws that address in considerable detail the provision of certain utility services by local governments. These include such services as sewer, water, television translator stations, and solid waste disposal. Mont. Code Ann. title 7, chapter 13. With much less detail the legislature has specifically authorized municipalities to acquire natural gas systems:

7-13-4102. Authority to acquire natural gas system -- indebtedness permitted. (1) The city or town council has power to contract an indebtedness of a city or town upon the credit thereof by borrowing money or issuing bonds for the construction, purchase, or development of an adequate supply of natural gas and to construct or purchase a system of gas lines for the distribution thereof to the inhabitants of the city or town or vicinity.

(2) No money may be borrowed or bonds issued for the purposes specified in this section until the proposition has been submitted to the vote of the taxpayers of the city or town affected thereby and the majority vote cast in its favor.

The legislature employed broad language and provided little guidance in expressly granting municipalities under the commission-manager form of government the power to "acquire, construct, own, lease, and operate and regulate public utilities." Mont. Code Ann. § 7-3-4313. Finally, as noted above, state law expressly authorizes the operation of utilities by municipalities. Mont. Code Ann. tit. 69, ch. 7. Yet Mont. Code Ann. title 69, chapter 7 provides no definition of the term "municipal utility." In fact, the term "municipal utility" is not defined in the Code.

Words and phrases should be construed according to the context and the approved usage of the language. Mont. Code Ann. § 1-2-106. According to standard definitions, a "utility" is "a public service, as a telephone or electric-light system, a streetcar or railroad line, or the like" (Random House Dictionary of the English Language (2d ed. unabridged 1987)), or "one or more pieces of equipment . . . designed to provide a service (as heat, light, power, water, or sewage disposal)" (Webster's Third New International Dictionary (1986 unabridged)). Accordingly, I conclude that in relation to the power of a local government to operate a utility, the term "utility," whether modified by "public" or "municipal," includes electric and natural gas transmission systems.

Under Mont. Code Ann. § 7-1-103, if state law allows a general power government unit to provide a service or perform a function, a local government unit with self-government powers may also provide the service or perform the function. Thus, under Mont. Code Ann. § 7-13-4102, a local government with self-governing powers may operate a natural gas utility. A commission-manager form of local government may have general government powers or self-government powers. Mont. Code Ann. § 7-3-302. Under Mont. Code Ann. § 7-3-4313, a self-governing local government may acquire and operate public utilities, which, as discussed above, include natural gas and electric utilities. Therefore, I conclude that the acquisition and operation of electric and natural gas utilities by a municipality is consistent with state law and regulation. Moreover, the Supreme Court in an opinion concerning water and sewer systems ruled:

The legislature has given the right to control municipal utilities, including the right to establish rates and charges, to municipalities. [Mont. Code Ann. §§ 69-7-101 to -201.] Section 7-1-113, MCA, does not preempt the City from exercising this right.

Lechner, 244 Mont. at 203, 797 P.2d at 196.

MPC has electric and gas transmission systems in a large area of Montana. Butte-Silver Bow may attempt to acquire such facilities that are located outside of the geographical boundaries of the local government. Therefore, I must also consider whether a city-county government with self-government powers has the authority to acquire and operate electric and natural gas utilities outside of the boundaries of the local government. Applying the same three-part analysis set forth above, I first consider the constitution and the local government's charter. As discussed above, the charter of Butte-Silver Bow allows the local government to exercise all powers allowed by the Montana Constitution and state law. Some utility services are specifically identified in section 7.02 of the charter, which pertains to the Public Works Department. However, the legislative body of Butte-Silver Bow is allowed to establish additional responsibilities for the Department:

SECTION 7.02--PUBLIC WORKS DEPARTMENT

(a) There shall be a Public Works Department which shall be charged with the responsibility and administration of engineering: streets, roads and other public right-of-way; water and sewer; solid waste collection and disposal; parks and recreation; and maintenance and operation of related equipment.

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(c) The Council of Commissioners may establish by ordinance additional responsibilities for the Public Works Department.

The only geographical limitation in the charter of Butte-Silver Bow appears in a subsection of Section 1.02--Jurisdiction:

(b) COUNTY POWERS. The consolidated local government shall have and may exercise all powers that are conferred on counties by Montana law throughout the territorial limits of the consolidated City and County.

Plainly, this provision pertains to the exercise of political powers and does not limit or even address the operation of a utility or other proprietary activities outside of the geographical boundaries of the local government.

Construing the local government powers liberally, as I must, Mont. Code Ann. § 7-1-106, I conclude that the Montana Constitution and the charter of Butte-Silver Bow do not limit the authority of Butte-Silver Bow to acquire and operate electric and natural gas utilities outside of the boundaries of the local government.

Considering the second factor for any legal prohibitions, I note that in a previous opinion I found that the legislature intended to grant municipalities broad authority to operate municipal utilities. 46 Op. Att'y Gen. No. 12 (1995). In addition, Mont. Code Ann. § 69-7-201 expressly provides for utility service to be provided outside of the municipal boundaries:

69-7-201. Rules for operation of municipal utility. Each municipal utility shall adopt, with the concurrence of the municipal governing body, rules for the operation of the utility. The rules shall contain, at a minimum, those requirements of good practice which can be normally expected for the operation of a utility. They shall define or provide for use of meter or flat rate user charges, the classification of users, applications for service, and uses of the service. The rules shall outline the utility's procedure for discontinuance of service and reestablishment of service as well as *the extension of service to users within the municipal boundaries and outside the municipal boundaries*. The rule shall provide that rate increases for comparable classifications and zones outside the municipal boundaries may not exceed those set within the municipal limits under the provisions of this chapter.

(Emphasis added.) Mont. Code Ann. § 69-7-101 also recognizes that municipal utilities may serve persons who are not inhabitants of the local government:

69-7-101. Municipal utilities -- regulation by municipality. A municipality has the power and authority to regulate, establish, and change, as it considers proper, rates, charges, and classifications imposed for utility services to its inhabitants *and other persons* served by municipal utility systems. Rates, charges, and classifications must be reasonable and just.

(Emphasis added.) Mont. Code Ann. §§ 69-7-101 and -201 do not limit municipal utility services to the proximity of the municipality. In contrast, Mont. Code Ann. § 7-13-4102, quoted above, allows a city or town to provide natural gas utility services "to the inhabitants of the city or town *or vicinity*." However, Mont. Code Ann. § 7-13-4102 allows a city or town with general government powers to operate a natural gas utility. To the extent the vague term "vicinity" operates to limit the exercise of that authority by a general power local government, it would not so restrict a self-governing local government. Mont. Code Ann. § 7-1-103, quoted above, states that a self-governing local government that provides a service that may be provided by a general power government is not subject to any limitation in the provision of the service, "except such limitations as are contained in its charter or in state law specifically applicable to self-government units." Because the "or vicinity" language is not specifically applicable to self-government

units, it would only operate to restrict general power government units, not self-government units. In addition, since Butte/Silver Bow is a self-governing local government unit, Mont. Code Ann. § 7-1-106, quoted above, requires resolving any doubt in favor of the existence of a power. Thus, I conclude that a municipal utility of a self-governing local government may provide services to customers who are not in the vicinity of the municipality.

The preceding discussion also shows that the third factor of consistency with law and regulation is satisfied. Since municipal utilities may provide services outside of municipal boundaries, such provision of services is consistent with law.

Chapter 607, 1981 Montana Laws, and chapter 288, 1995 Montana Laws, reduced and then eliminated PSC regulation of municipal utilities. Review of the legislative history of both laws shows that PSC regulation was considered to be unnecessary because local voters could hold local officials accountable for their operation of municipal utilities. When municipal utilities provide services to customers who are not voters in the municipality, this political regulation of the municipal utility is absent. However, such nonresident customers are not without recourse. Under Mont. Code Ann. § 69-7-201, rate increases outside the municipal boundaries may not exceed those within the municipality. Under Mont. Code Ann. § 69-7-113, a person may appeal municipal utility rates and rules to district court.

Finally, under the Electric Utility Industry Restructuring and Customer Choice Act (Mont. Code Ann. tit. 69, ch. 8), a municipal utility that acquires electric utilities from Montana Power Company could be considered a public utility subject to PSC regulation under the act. Mont. Code Ann. § 69-8-103(2), (5), (23). Since the question you pose may be resolved without deciding that question, I express no opinion on it here.

THEREFORE, IT IS MY OPINION:

The City and County of Butte-Silver Bow, a consolidated government with self-government powers, has the authority to acquire and operate electric and natural gas utilities within and outside the boundaries of the local government unit.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/tgb/dm