

IN THE SUPREME COURT OF THE STATE OF MONTANA
SUPREME COURT CAUSE NO. DA 20-0313

LEO G. & JEANNE R. BARSANTI,)	
Petitioners/Appellants,)	
vs.)	
MONTANA PUBLIC SERVICE COMMISSION,)	
Respondent/Appellee.)	
and)	
NORTHWESTERN ENERGY.)	
Respondent/Appellee.)	
)	

**APPELLANTS'
PETITION TO
REHEAR**

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Court's decision conflicts with a controlling statute, namely Section 2-4-506(3), MCA,³ which indicates exhaustion of administrative remedies is not required when a declaratory judgment is sought.

In addition, the **Court overlooked facts material to a question presented** by incompletely quoting § 2-4-702(1)(a), MCA,⁴ and by not acknowledging the facts in three cases cited by appellees, making those cases inapplicable to this situation.

Section 2-4-506(3), MCA, was overlooked When evaluating the PSC ruling on Rule of Professional Ethics 3.7, the Court’s overlooked § 2-4-506, MCA, which says:

¹ For text of M.R.App.P. 20(1)(a), see Appendix A(i).
² *Barsanti v. Mont. Pub. Serv. Comm'n*, 2021 MT 54N (Mont. 2021).
³ For full text of § 2-4-506, MCA, see Appendix A(ii).
⁴ For full text of § 2-4-702(1)(a), MCA, see Appendix A(iii).

1
2 Quoting Petitioners District Court Response Brief seeking reconsideration,

3 Appellants' Opening Brief to this Court says the statute, § 2-4-506(3), MCA:

4 ... takes precedence over the PSC's rule § 38.2.4806, ARM.

5 Therefore, § 38.2.4806, ARM⁵ cannot prevent the Court from having
6 jurisdiction to issue a declaratory ruling on Rules of Professional
7 Ethics 3.7. The attempt to apply the rule to prevent a determination on
8 issue 1b denies due process.⁶

9
10 **Considering § 2-4-702(1)(a), MCA.** Further proof that § 2-4-506(3), MCA,
11 is paramount becomes apparent when one considers § 2-4-702(1)(a), MCA, in its
12 entirety. However, when relying on the first sentence in § 2-4-702(1)(a), MCA, this
13 Court overlooked the last sentence which clarifies:

14 This section does not limit use of or the scope of judicial review
15 available under other means of review, redress, relief, or trial de novo
16 provided by statute.

17
18 Since § 2-4-702(1)(a), MCA, does not limit "review," etc. provided by § 2-4-
19 506, MCA, review is ripe for the requested issue 1a and 1b declaratory judgment
20 concerning whether Rule of Professional Ethics 3.7 is applicable only in jury trials
21 and not administrative proceedings. In addition, declaratory requests for review in

⁵ For § **38.2.4806**, ARM see Appendix A(iv).

⁶ Appellants' Amended Opening Brief, Docket DA 20-0313, (Op.Br.), p. 19:4-7. Also Referenced in Doc. Seq. 11, pp. 1:18-4:8; Doc. Seq. 15, pp. 2:9-22 – p. 3:1-9; Doc. Seq. 2, District Court Issue 3, ¶ 19 & 20; and Doc. Seq. 6, fn. 6 & p. 7:22-23.

1 Appellants’ issues 2, 3c, 5a, and 5b also are ripe for review. Issue 4 was mooted
2 when appellees conceded that Order 7604u was final.

3 Because the statute does not require an administrative “agency to pass upon
4 the validity or applicability of the rule in question,” § 2-4-506, MCA conflicts with
5 the incomplete application of § 2-4-702(1)(a), MCA, and misapplication of §
6 38.2.4806, ARM.

7 **The Court overlooked facts in decisions it relied on that are material to**
8 **the exhaustion question presented. That makes those cases inapplicable here.**

9 Including the fact that the PSC has no expertise to apply Rule 3.7,
10 Appellants briefed reasons why *Bitterroot River Protection Ass’n v. Bitterroot*
11 *Conservation District*, 2002 MT 66, 11 22, 309 Mont. 207, 45 P.3d 24,⁷ is not
12 applicable here.^{8 9}

13 Dismissal of this appeal relied on *Art v. Montana Dept. of Labor and*
14 *Industry*, 2002 MT 327, 60 P.3d 958, 313 Mont. 197 (Mont. 2002). Appellants
15 detailed¹⁰ why *Art* is not analogous to the facts here because the statute mandating
16 a contested case in *Art* uses the word ‘must’ while the reconsideration after a

⁷ *Barsanti*, fn. 8.

⁸ Op.Br., p. 23:5-11.

⁹ Brief Opposing Motion to Dismiss Appeal of PSC Order 7604u, p. 13:3-14.

¹⁰ Appellants’ Brief Opposing Motion to Dismiss Appeal of PSC Order 7604u, pp. 13:15 – 14:19.

1 contested case rule § 38.2.4806, ARM, here uses the word “may.” *Art*:

2 ... involved failure to exhaust one part of a two-tiered determination
3 process involving two administrative bodies—here the only administrative
4 body is the PSC.

5 ...

6 An additional part of the [*Art*] process (not a part of the PSC process)
7 is set forth in [§] 39-3-216(3)[, MCA]. Unlike the PSC law and rule, the
8 Department of Labor statute uses the word “must” to require a contested
9 case if the department’s determination is appealed. Subsection 3 [of the
10 DOL law] says:

11
12 (3) ... If a party appeals the department's determination ..., **a**
13 **hearing must be conducted** according to contested case procedures
14 [Emphasis and bracketed material added]

15
16 [Thus, *Art* did not complete the administrative process by seeking a
17 contested case hearing.] ...

18
19 Here Complainants participated in days of [contested case] hearings
20 and many reconsideration motions when those motions were required. ... As
21 indicated above, the word “must” is not included in the relevant permissive
22 reconsideration statute governing the procedure here. In addition, according
23 to footnote 1 of *Art*:

24
25 The 1999 Legislature repealed § 39-3-217, MCA, which
26 removed the Board from the administrative appeals process. [So,] ...
27 an appeal of the decision resulting from a contested case hearing may
28 be taken directly to district court.....

29
30 Since the convoluted *Art* appeal process was improved by subsequent
31 legislation, and because the word “must” governed the *Art* ruling, that case
32 is not precedential here.

33 This Court and Appellees also rely on *Flowers v. Bd. of Personnel Appeals*,
34 2020 MT 150, 400 Mont. 238, 465 P.3d 210. *Flowers* requires exhaustion of

1 administrative remedies while following legitimate, unambiguous agency rules set
2 forth for doing so. In *Flowers*, administrative rules for exhaustion were clear. The
3 *Flowers* Court examined them thoroughly. In this case the PSC's rule is confusing
4 and denies due process. Appellants document that confusion.¹¹

5 For example:¹²

6 Appellees acknowledge that the first part of the rule this Court based
7 its dismissal on, namely § 38.2.4806(1), ARM, uses the permissive "may."
8 However, Appellees believe:

9
10 Even though the regulation contemplates parties "may" file
11 (sic.) reconsideration, this does not excuse parties from seeking
12 reconsideration. Rather "may" refers to parties that are seeking
13 reconsideration and outlines the process for doing so.¹³

14
15 Appellees' [construction of] ... 'may' is not supported by any caselaw
16 citation. Appellees' interpretation also flies in the face of well accepted
17 usage of 'may' to confer a discretionary right, privilege, or power cited by
18 Appellants.¹⁴

19
20 Therefore, Barsantis did not "...excuse their failure to file a
21 reconsideration motion by claiming reconsideration is not mandatory," as
22 argued by Appellees. Not seeking additional reconsideration was not a
23 "failure."¹⁵ Rather it was a careful decision made after sensible consideration
24 of § 38.2.4806, ARM, leading to the conclusion reconsideration is
25 permissive as it has always been.

26
27 Appellees' Response Brief does not dispute Barsantis' quotation of the only

¹¹ Op.Br., pp. 29:7-35:12.

¹² Appellants' Reply Brief, (Rep.Br.), pp13:21-17:17.

¹³ Res.Br., 8.

¹⁴ Op.Br., 29:13-15.

¹⁵ Op.Br., 34-35.

1 reason given for amending § 38.2.4806(6), ARM. That quote does not contain
2 wording indicating post-order reconsideration will be required.¹⁶ This Court also
3 avoided analyzing the stated reasons for that amendment. It is essential for this
4 Court to consider the fact that the PSC did not reveal “requiring reconsideration”
5 as a reason for its 2016 amendment because it would prove the PSC’s current §
6 38.2.4806, ARM, interpretation is not borne out by the record in the rule-change
7 proceeding. Due process is violated by failure in that proceeding to give notice of
8 the intended meaning of the change. As Appellants’ Reply Brief continues:

9 Thus, the only stated reason for the rule change was to give the PSC 20 days
10 to respond to a permissive motion to reconsider. It was not to require a
11 motion for reconsideration after a final order.
12

13 The PSC amendment also struck the words: “~~When order final for~~
14 ~~purpose of appeal.~~”-from the front of § 38.2.4806(6), ARM.¹⁷ If the reason
15 for amending § 38.2.4806(6), ARM, was to clarify the processes necessary
16 to determine when an order is final for purpose of appeal, why strike the
17 wording stating that?
18

19 Further, Appellees now bring § 38.2.4806(8), ARM, into their
20 argument.¹⁸ That subsection was not before the District Court. And PSC
21 comments indicate “RESPONSE: The commission does not agree that the
22 previous version of the rule intended to give parties an optional
23 reconsideration process.”¹⁹
24

25 That PSC rulemaking response is not consistent with the following

¹⁶ Op.Br., 32-34.

¹⁷ Op.Br., 31-32.

¹⁸ Appellees’ Response Brief (Res.Br.), 5-7.

¹⁹ See Op.Br. Appendix D, Bates #000009.

1 argument made in Appellees' brief:

2 Prior to 2016, Mont. Admin. R. 38.2.4806(6) provided that if a
3 party did not file for reconsideration, the order was final and
4 appealable thirty days after service. 7 Mont. Admin. Reg. 583 (Apr. 8,
5 2016). The Commission removed this option when it amended the
6 rule in 2016. 20 Mont. Admin. Reg. 1966 (Oct. 28, 2016).²⁰

7
8 While it is true that prior to the 2016 PSC rulemaking, reconsideration
9 was permissive, it is not correct that addition of § 38.2.4806(8), ARM,
10 changed the permissive nature of 38.2.4806(1)—because 38.2.4806(1) was
11 not amended.

12
13 Thus, *Flowers* is good law, but its facts are much different from the facts
14 here. So, *Flowers* works as precedent when citing it for the proposition that
15 administrative remedies must be exhausted when those exhaustion procedures are
16 clearly defined. However, here that analysis must be completed by recognizing
17 Appellants sought reconsideration multiple times only when those requirements
18 and procedures were clearly defined. Here § 38.2.4806, ARM, is confusing. Here
19 nothing in § 38.2.4806, ARM, says the only time reconsideration “may” occur is
20 after the final order.

21 **Court decision conflicts with controlling case precedent.** However,
22 *Flowers*, ¶15, is applicable precedent making Appellants' unconstitutionality claim
23 reviewable because Order 7604u is a “final order” and the challenge to the PSC's
24 new and unique application of § 38.2.4806, ARM, was not ripe to be challenged

²⁰ Res.Br., 7-8.

1 until after Order 7604u was issued.

2 Appellant's reply brief continues:

3 Subsection 38.2.4806(8), ARM was not in the March 28, or
4 May 9, 2016, public hearing notices on changes to 38.2.4806, ARM.²¹
5 It was not until after comments on the original proposal that an
6 October 17, 2016, amended notice adding 38.2.4806(8), ARM, was
7 revealed.²² The October 17, 2016, document also made the rule, as
8 modified, final without any further comment on the added [subsection
9 8] wording to the rule. This is the first challenge²³ to the
10 constitutionality of the proposed application of that rule which denies
11 due process as amended by shaving "20 to 50 days off from the
12 generally known timing rules for appeals...."²⁴
13

14 Appellees contend²⁵ "... the Commission noted the **reconsideration**
15 **requirements** in Order 7604u. App. A, Order 7604u, ¶ 403. [Emphasis
16 added.]"²⁶

17 [Not true,] ... nothing in Order 7604u, ¶ 403 ... says § 38.2.4806,
18 ARM, reconsideration is a "requirement."^{27 28}
19

20 As Appellants briefed:

²¹ Verification for facts in this sentence is in Op.Br. Appendix D, Bates # 000005.

²² Op.Br. Appendix D, Bates # 000008.

²³ Op.Br., 33.

²⁴ Rep.Br., p. 16:1-8.

²⁵ Res.Br., 5-6.

²⁶ Res.Br., 7.

²⁷ Appellees' Appendix A, ¶ 403: "The Commission waives the 10- and 20-day deadlines for reconsideration contemplated in Mont. Admin. R. 38.2.4806. The deadline for all reconsideration motions is **January 10, 2020**. The deadline for response briefs to all reconsideration motions is **January 24, 2020**. The deadline for all reply briefs is **January 31, 2020**."

²⁸ Rep.Br., p. 16:12-15.

1 Section 38.2.4806(1), ARM, does not limit reconsideration to final
2 orders. It allows reconsideration of any “order or other decision”....²⁹

3
4 So, it makes sense to seek reconsideration prior to the *fait accompli* of the
5 final order. Waiting until after the final order to correct mistakes leaves the PSC
6 with the untenable option of negating its entire hearing. The preferred course is to
7 raise reconsideration early in a proceeding as appellants did multiple times.

8 Appellants listed 30 pages of transcript detailing reconsideration requests
9 (preserved here as offers of proof in this footnote).³⁰

10 Also, Appellants Statement of Facts ¶¶ 3, 6, 11, and 21 document Barsantis’
11 many reconsideration requests. Appellees Response Brief did not rebut those
12 paragraphs which must now be accepted as fact. Since Final Order 7604u did not
13 modify prior PSC decisions resolving these admitted reconsideration requests, yet
14 another request for reconsideration would have been superfluous.

15 Appellants asserted “... a party need not continually renew the objection to
16 preserve alleged errors for appeal,” citing *State v. Ankeny*, 2010 MT 224, ¶ 37, 243

²⁹ Rep.Br., p. 17:3-6.

³⁰ The transcript contains a long colloquy just prior to the hearing conclusion at Tr. 2353-2360 seeking PSC reconsideration of issue 3 on appeal. Tr. 2349-2350 contains evidence of Appellants’ requests to reconsider Tr. 1614, 1618 & 1627 rejection of Barsanti-14 (LB-14). Tr. 2346-2348 contains evidence of Appellants’ requests to reconsider Tr. 731-737, 757, & 761-766 rejection of Barsanti-7 (LB-7). Tr. 1041 evidences Appellants’ reconsideration request regarding the ruling on LB-4; Tr. 1053 evidences reconsideration of LB-2 and LB-3 rulings; and Tr.1055 evidences reconsideration requests of LB-2B2 and LB-2B3 rulings.

1 P.3d 391, 358 Mont. 32 (Mont. 2010).³¹

2 *Ankeny* was briefed further as controlling in the District and this Court.³²

3 However, neither court distinguished *Ankeny* nor gave a reason why multiple
4 requests to reconsider are not sufficient to preserve issues for appeal. *Ankeny* is
5 controlling law appellants hoped this Court would embrace; that it would follow
6 rather than making reconsideration mandatory, even when that certainly was not
7 contemplated in the rules proceeding that resulted in last minute insertion of §
8 38.2.4806(8), ARM. That is why Appellants are challenging this interpretation as
9 being unconstitutional. Unconstitutional determinations are ripe for appeal under
10 this fact situation.

11 CONCLUSION

12 Deep down the Justices must realize that there is a reason to make non-
13 citable the order for which rehearing is requested. It simply does not address the
14 issues by following the law. Making this ruling non-citable does not protect the
15 law from corruption. It leaves practitioners uncertain of when they can rely on
16 statutes that afford the right to a declaratory judgment—leaves us worried about
17 when the Court will decide that a clear “‘may’ seek reconsideration” means “must”
18 seek it.

³¹ Op.Br., p. 38:1-6.

³² Appellants in “Response & Objection to Motion to Strike Transcript, pp. 4:9–5:4, and Res.Br., p18:12-20:9.

1 The PSC’s misapplication of Rule of Professional Ethics, 3.7 is thoroughly
2 briefed.³³ Please give guidance on the application of Rule 3.7.

3 Art. II, § 16, Montana Constitution guarantees that:

4 Courts of justice shall be open to every person, and speedy remedy
5 afforded for every injury of person, property, or character.
6

7 The PSC ignored advice from Montana ethics counsel creating an injury of
8 person to Mr. Doty and to Montanans because he was not allowed to testify. Only
9 the courts can resolve this issue.

10 Your honors, please skip making the law non-citable—instead please make
11 it better.

12 Respectfully submitted,

13 By: /s/ Russell L. Doty Dated: March 17, 2021
14 Attorney for Appellants
15

16 **CERTIFICATE OF COMPLIANCE**

17 I hereby certify that the foregoing brief is proportionally spaced typeface of
18 14 points and does not exceed 2,500 words. /s/ Russell L. Doty
19

³³ OP.Br., pp. 18 -27.

1 **CERTIFICATE OF SERVICE**

2 I, Russell L. Doty, certify that on March 17, 2021, a true and accurate copy
3 of the foregoing Appellants Opening Brief was served upon the parties listed
4 below by e-filing it with:

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5 /s/ Russell L. Doty

6 **APPENDIX A**

7
8 **(i) M.R.App.P., Rule 20. Petitions for rehearing.**

9 (1) Criteria for petitions for rehearing.

10 (a) The supreme court will consider a petition for rehearing presented only upon
11 the following grounds:

12 (i) That it overlooked some fact material to the decision;

13 (ii) That it overlooked some question presented by counsel that would have
14 proven decisive to the case; or

15 (iii) That its decision conflicts with a statute or controlling decision not addressed
16 by the supreme court.

17
18 **(ii) § 2-4-506, MCA. Declaratory judgments on validity or application**
19 **of rules.** (1) A rule may be declared invalid or inapplicable in an action for
20 declaratory judgment if it is found that the rule or its threatened application
21 interferes with or impairs or threatens to interfere with or impair the legal rights or
22 privileges of the plaintiff.

23 (2) A rule may also be declared invalid in the action on the grounds that the
24 rule was adopted with an arbitrary or capricious disregard for the purpose of the
25 authorizing statute as evidenced by documented legislative intent.

26 **(3) A declaratory judgment may be rendered whether or not the**
27 **plaintiff has requested the agency to pass upon the validity or applicability of**
28 **the rule in question.**

1 (4) The action may be brought in the district court for the county in which
2 the plaintiff resides or has a principal place of business or in which the agency
3 maintains its principal office. The agency must be made a party to the action.
4 [Emphasis added]

5
6 (iii) § 2-4-702, MCA. *(Temporary)* **Initiating judicial review of contested**
7 **cases.** (1) (a) Except as provided in **75-2-213** and **75-20-223**, a person who has
8 exhausted all administrative remedies available within the agency and who is
9 **aggrieved by a final written decision** in a contested case is entitled to judicial
10 review under this chapter. This section does not limit use of or the scope of judicial
11 review available under other means of review, redress, relief, or trial de novo
12 provided by statute.

13 (b) A party who proceeds before an agency under the terms of a particular
14 statute may not be precluded from questioning the validity of that statute on judicial
15 review, but the party may not raise any other question not raised before the agency
16 unless it is shown to the satisfaction of the court that there was good cause for failure
17 to raise the question before the agency.

18 (2) (a) Except as provided in **75-2-211**, **75-2-213**, and subsections (2)(c) and
19 (2)(e) of this section, proceedings for **review must be instituted by filing a petition**
20 **in district court** within 30 days after service of the final written decision of the
21 agency or, **if a rehearing is requested, within 30 days after the written decision**
22 **is rendered**. Except as otherwise provided by statute or subsection (2)(d), the
23 petition must be filed in the district court for the county where the petitioner resides
24 or has the petitioner's principal place of business or where the agency maintains its
25 principal office. Copies of the petition must be promptly served upon the agency and
26 all parties of record.

27 (b) The petition must include a concise statement of the facts upon which
28 jurisdiction and venue are based, a statement of the manner in which the petitioner
29 is aggrieved, and the ground or grounds specified in **2-4-704(2)** upon which the
30 petitioner contends to be entitled to relief. The petition must demand the relief to
31 which the petitioner believes the petitioner is entitled, and the demand for relief may
32 be in the alternative.

33 ...

34 (4) Within 30 days after the service of the petition or within further time
35 allowed by the court, the agency shall transmit to the reviewing court the original
36 or a certified copy of the entire record of the proceeding under review. By
37 stipulation of all parties to the review proceedings, the record may be shortened. A
38 party unreasonably refusing to stipulate to limit the record may be required by the
39 court to pay the additional costs. The court may require or permit subsequent

1 corrections or additions to the record. (*Terminates September 30, 2025--sec. 6, Ch.*
2 *126, L. 2017.*)

3
4 (iv) § 38.2.4806 RECONSIDERATION

5 (1) Within ten days after an order or decision has been made by the
6 commission, any party **may apply** for a reconsideration in respect to any
7 matter determined therein. Such motion shall set forth specifically the
8 ground or grounds on which the movant considers said order or decision to
9 be unlawful, unjust, or unreasonable. [Emphasis added]

10 ...

11 (3) If, after such motion for reconsideration is filed, the commission is of
12 the opinion that the original order or decision is in any respect unjust or
13 unwarranted, or should be changed, the commission may abrogate, change,
14 or modify the same.

15 ...

16 (5) A motion for reconsideration shall be deemed denied when it has not
17 been acted upon within 20 days of its filing.

18 (6) A commission order is final for purpose of appeal upon the entry of a
19 ruling on a motion for reconsideration, or upon the passage of 20 days
20 following the filing of such a motion, whichever event occurs first.

21 ...

22 (8) If and only if a party applies to a court for an injunction staying or
23 suspending the operation of a commission order, within the applicable
24 statutory deadlines, does the filing of a motion for reconsideration become
25 optional for the purpose of finalizing a commission order for appeal.

CERTIFICATE OF SERVICE

I, Russell L. Doty, hereby certify that I have served true and accurate copies of the foregoing Petition - Rehearing to the following on 03-17-2021:

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