DA 22-0035

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 227

BROAD REACH POWER, LLC and
NORTHWESTERN ENERGY,

Petitioners and Appellants,

v.

MONTANA DEPARTMENT OF PUBLIC
SERVICE REGULATION, PUBLIC
SERVICE COMMISSION,

Respondent and Appellee.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause No. CDV-2020-27
Honorable Kathy Seeley, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

Michael J. Uda, Uda Law Firm, P.C., Helena, Montana

Clark Hensley, Shannon Heim, NorthWestern Energy, Helena, Montana

For Appellee:

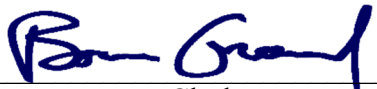
Benjamin W. Reed, Lucas R. Hamilton, Aimee Hawkaluk, Montana Public Service Commission, Helena, Montana

---

Submitted on Briefs: September 28, 2022

Decided: November 15, 2022

Filed:



Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Appellants Broad Reach Power, LLC, and NorthWestern Energy (Appellants) challenge the order entered by the First Judicial District Court, Lewis & Clark County, granting summary judgment to Appellee Public Service Commission (PSC), on the ground the Appellants lacked standing to bring their claims. We address the following issue and affirm on general justiciability grounds:

¶2 *Did the District Court err by dismissing Appellants' claim that § 69-2-102, MCA, is unconstitutional?*

FACTUAL AND PROCEDURAL BACKGROUND

¶3 In January 2020, Appellants petitioned the District Court for a judgment declaring the PSC's contested case procedures were unconstitutional. Appellants alleged that the agency's procedures, which allowed the PSC to "issue discovery, issue a Notice of Additional Issues, cross-examine witnesses, move evidence into the evidentiary record, and, at the same time, serve as the tribunal, decide the case, and receive deference on the record that it created," violated Appellants' "due process right to a fair and impartial tribunal and a fair hearing." Noting that § 69-2-102, MCA, makes provision for or refers to, among other things, "the commission or its staff. . . . investigating and interrogating in any hearing to clarify the case or present an issue," Appellants alleged that "[t]he Commission's *application* of Section 69-2-102, MCA is unconstitutional *as applied* . . ." (Emphasis added.) The Petition further set forth that "[t]he statute is *not facially* unconstitutional because the Commission could, in theory, participate as a party before an

independent tribunal without violating due process if staff is adequately separated from the Commission and the tribunal is adequately separated from the Commission and its staff to guarantee impartiality." (Emphasis added.)

¶4 Appellants also alleged that A.R.M. 38.2.601(n), which defines "party" for purposes of PSC hearings, "and the Commission's *application* of that definition" (emphasis added), violated statutes, including the Montana Administrative Procedure Act, and "violate[d] Montana's constitutional provisions regarding due process of law and the right to an impartial tribunal." The Petition noted that the Commission had noticed two proposed rules "to codify its practice of issuing discovery," but acknowledged such a rule had not yet been promulgated. Also stating a constitutional challenge to unspecified additional administrative regulations, the Appellants alleged that, "[t]o the extent the Commission relies upon any of its other administrative rules, as allowing the Commission to participate as a party while serving as the tribunal, those rules are unconstitutional *as applied* as well." (Emphasis added.) Appellants then prayed for an order declaring "the Commission's reliance upon § 69-2-102, MCA is unconstitutional as applied," and further declaring "the Commission's reliance upon ARM 38.2.601(n) is unconstitutional as applied."

¶5 Without engaging in discovery, Appellants moved for summary judgment, contending there were no genuine issues of material facts, specifically, because "all parties to Commission adjudications are entitled to due process as a matter of law," and that they

were entitled to judgment as a matter of law.[1] The District Court concluded Appellants had failed to meet their burden to allege a due process violation and thus had failed to establish standing. Regarding their challenge to A.R.M. 38.2.601(n), the District Court noted that revisions to the Rule promulgated since the filing of the Petition had removed the commission staff from the definition of "party," as well as the exception that had permitted staff to have contact with the parties, and concluded the challenge had been mooted. Thus, it granted summary judgment to the PSC, dismissing Appellants' claims against § 69-2-102, MCA, on justiciability grounds. Appellants appeal.

STANDARDS OF REWIEW

¶6 We review summary judgment orders de novo. *Arnone v. City of Bozeman*, 2016 MT 184, ¶ 4, 384 Mont. 250, 376 P.3d 786. Summary judgment is appropriate when, based on the record, there exists "no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." M. R. Civ. P. 56(c)(3). We review a district court's decision to deny declaratory relief for abuse of discretion. *Northfield Ins. Co. v. Mont. Ass'n of Counties*, 2000 MT 256, ¶ 8, 301 Mont. 472, 10 P.3d 813. Further, a district court's determination on the justiciability of a claim is reviewed for correctness. *Northfield*, ¶ 8.

[1] Appellants attached to their Petition for Declaratory Judgment a copy of a Procedural Order the Commission had issued in an unrelated case in 2019, and a Notice of Additional Issues the Commission had issued in an unrelated case in 2017.

DISCUSSION

¶7 *Did the District Court err by dismissing Appellants' claims that § 69-2-102, MCA, is unconstitutional?*

¶8 Appellants challenge the summary judgment entered against them by arguing the District Court erred in concluding they lacked standing to challenge, on due process grounds, the constitutionality of § 69-2-102, MCA. Appellants do not challenge the District Court's ruling that their challenge to A.R.M. 38.2.601(n), was mooted by the agency's adoption of revisions to the Rule during the pendency of the litigation, nor continue their challenge to other, unspecified, regulations adopted by the PSC. We conclude Appellants' remaining claims do not present a justiciable controversy at this juncture, and thus affirm the judgment entered by the District Court, on slightly different grounds.

¶9 The purpose of an action under the Uniform Declaratory Judgments Act (UDJA or Act) is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." Section 27-8-102, MCA. Any interested party may seek a declaratory judgment to determine questions about their rights, status, or other relations regarding their interests. Section 27-8-202, MCA. While the UDJA is construed liberally to effectuate these purposes, the Act's use is "tempered by the necessity that a *justiciable controversy* exist before courts exercise jurisdiction." *Northfield*, ¶ 10. (Emphasis added.)

¶10 Justiciability is a threshold issue—without it, this Court cannot adjudicate a dispute. *State v. Whalen*, 2013 MT 26, ¶ 40, 368 Mont. 354, 295 P.3d 1055. "This Court may raise

questions of justiciabil[i]ty *sua sponte* because we lack jurisdiction over non-justiciable matters." *Not in Montana: Citizens Against CI-97 v. State*, 2006 MT 278, ¶ 7, 334 Mont. 265, 147 P.3d 174 (citation omitted). To be justiciable, a "controversy" must be appropriate for judicial determination, "definite and concrete" such that it "touch[es] legal relations of parties having adverse legal interests," and be "a real and substantial controversy" that enables "relief through [a] decree of conclusive character." *Chovanak v. Matthews*, 120 Mont. 520, 526, 188 P.2d 582, 585 (1948). Such a "controversy" is distinguishable "from an opinion advising what the law would be upon a hypothetical state of facts, or upon an abstract proposition." *Chovanak*, 120 Mont. at 526, 188 P.2d at 585. "[C]ourts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise, or give abstract opinions. The Uniform Declaratory Judgment Act does not license litigants to fish in judicial ponds for legal advice." *Brisendine v. Dep't of Commerce*, 253 Mont. 361, 365, 833 P.2d 1019, 1021 (1992) (quoting *Montana Dept. of Natural Resources & Conservation v. Intake Water Co.*, 171 Mont. 416, 440, 558 P.2d 1110, 1123 (1976)). Consequently, this Court has "refused to entertain a declaratory judgment action on the ground that no controversy is pending which the judgment would affect." *Hardy v. Krutzfeldt*, 206 Mont. 521, 524, 672 P.2d 274, 275 (1983).

¶11 Appellants are seeking a declaratory judgment that § 69-2-102, MCA, is unconstitutional because it authorizes the PSC, as it has applied the statute, to take hearing

actions that violate their due process rights. A statute can be either facially unconstitutional or unconstitutional as applied. *City of Missoula v. Mt. Water Co.*, 2018 MT 139, ¶¶ 21-25, 391 Mont. 422, 419 P.3d 685. To be facially unconstitutional, it must be demonstrated there is no set of circumstances in which the statute could be constitutionally applied; as such, facial challenges are not dependent on the facts of a particular case, because the statute would be unconstitutional in all cases. *Mt. Water Co.*, ¶ 21. Conversely, a statute may be unconstitutional as applied in a particular case, and the moving party must show, under the facts of their case, that application of the statute violates their rights. *Mt. Water Co.*, ¶ 25.

¶12 Appellants concede in their Petition and summary judgment briefing that § 69-2-102, MCA, "is not facially unconstitutional," which is consistent with the other contentions of their Petition, quoted above. According to Appellants, the PSC could apply the statute in a manner that would "guarantee impartiality" and not violate Appellants' due process rights, and thus they contend the statute is unconstitutional in the way the PSC is currently applying it.

¶13 However, Appellants have essentially brought their as-applied challenge in a vacuum. Within this declaratory action there is no record of how the PSC applied § 69-2-102, MCA, to the Appellants as parties in a proceeding before the Commission, and no factual demonstration of how such an application of the statute violated their due process right to a fair and impartial hearing. While Appellants referenced procedural orders issued by the PSC in other cases, these do not establish application of the statute by

the PSC to Appellants and, further, the contents of the orders primarily indicate the PSC "may" employ certain hearing actions pursuant to the statute. This does not establish how the PSC acted with regard to Appellants, and to what prejudice. Thus, there are simply no facts within this record on which to adjudicate an as-applied constitutional challenge to the statute. Consequently, the declaratory request is speculative, and would require issuance of an advisory opinion. *See In re Big Foot Dumpsters & Containers, LLC*, 2022 MT 67, ¶ 13, 408 Mont. 187, 507 P.3d 169 ("An opinion we would render. . . here would constitute an advisory opinion about 'what the law would be upon a hypothetical state of facts [and] upon an abstract proposition' regarding potential actions the PSC *may take* in a potential future case before it.") (citation omitted) (emphasis added). Consequently, we conclude this matter lacks a justiciable controversy.

¶14 Affirmed.

/S/ JIM RICE

We concur:

/S/ MIKE McGRATH
/S/ BETH BAKER
/S/ LAURIE McKINNON
/S/ DIRK M. SANDEFUR