6-23-1979

Colorado Ute Elec. Ass'n, Inc. v. Public Utilities Commission of the State of Colo.

IN THE SUPREME COURT

OF THE

STATE OF COLORADO

Case No. 79SA 156

COLORADO-UTE ELECTRIC ASSOCIATION, INC.,

Petitioner - Appellant,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; EMPIRE ELECTRIC ASSOCIATION, INC.; HOLY CROSS ELECTRIC ASSOCIATION, INC.; GUNNISON COUNTY ELECTRIC ASSOCIATION, INC.; LA PLATA ELECTRIC ASSOCIATION, INC.; SAN ISABEL ELECTRIC SERVICES, INC., a/k/a SAN ISABEL ELECTRIC ASSOCIATION, INC.; SOUTHEAST COLORADO POWER ASSOCIATION; DELTA-MONTROSE ELECTRIC ASSOCIATION; SAN MIGUEL POWER ASSOCIATION, INC.; YAMPA VALLEY ELECTRIC ASSOCIATION, INC.; GRAND VALLEY RURAL POWER LINES, INC; WHITE RIVER ELECTRIC ASSOCIATION, INC.; SANGRE DE CRISTO ELECTRIC ASSOCIATION, INC.; SAN LUIS VALLEY RURAL ELECTRIC COOPERATIVE, INC.; and THE CITY OF MONTROSE, COLORADO.

Respondents - Appellees

Appeal from the
District Court in and for
the County of Montrose,
State of Colorado

Trial Court No. C-13287

Honorable
Frederick B. Emigh
Judge

ANSWER BRIEF OF RESPONDENT APPELLEE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

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IN THE SUPREME COURT

OF THE

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COLORADO-UTE ELECTRIC ASSOCIATION, INC., Petitioner - Appellant, v. THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; EMPIRE ELECTRIC ASSOCIATION, INC.; HOLY CROSS ELECTRIC ASSOCIATION, INC.; GUNNISON COUNTY ELECTRIC ASSOCIATION, INC.; LA PLATA ELECTRIC ASSOCIATION, INC.; SAN ISABEL ELECTRIC SERVICES, INC., a/k/a SAN ISABEL ELECTRIC ASSOCIATION, INC.; SOUTHEAST COLORADO POWER ASSOCIATION; DELTA-MONTROSE ELECTRIC ASSOCIATION; SAN MIGUEL POWER ASSOCIATION, INC.; YAMPA VALLEY ELECTRIC ASSOCIATION, INC.; GRAND VALLEY RURAL POWER LINES, INC; WHITE RIVER ELECTRIC ASSOCIATION, INC.; SANGRE DE CRISTO ELECTRIC ASSOCIATION, INC.; SAN LUIS VALLEY RURAL ELECTRIC COOPERATIVE, INC.; and THE CITY OF MONTROSE, COLORADO. Respondents - Appellees	Appeal from the District Court in and for the County of Montrose, State of Colorado Trial Court No. C-13287 Honorable Frederick B. Emigh Judge

ANSWER BRIEF OF RESPONDENT APPELLEE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PRELIMINARY STATEMENT

In this Answer Brief the parties will be referred to as follows: Petitioner-Appellant Colorado-Ute Electric Association will be referred to as "Colorado-Ute"; Respondent-Appellee, The Public Utilities Commission of the State of Colorado, will be referred to as "the Commission" or the "PUC"; other Respondent Appellees will be referred to as their respective names appear in the caption.

References will be made in the following manner:

To the record certified to the District Court by folio number as (f.___).

References to transcript of testimony will be cited as (T. Vol.____, p.____).

LEGAL ISSUE PRESENTED FOR REVIEW

Whether or not the District Court within and for the County of Montrose erred in its decision and judgment affirming the Commission's Decisions Nos. 89865, 90016 and 90147 in Investigation and Suspension Docket No. 1050 before the Commission, which decision held that there was competent evidence in the record to support the decisions of the PUC, that the Commission's Orders were supported by findings of fact, that the Commission did not act in an arbitrary and capricious manner, and that no constitutional rights were violated, and that, accordingly, the decision, or decisions, of the Commission were correct and should be sustained.

STATEMENT OF THE CASE

The PUC generally adopts the statement of the case as has been set forth in the STATEMENT OF THE CASE in the Opening Brief of Colorado-Ute, as modified by the STATEMENT OF THE CASE in the Answer Brief of Appellees Empire Electric Association, Inc. and Holy Cross Electric Association, Inc., and no further purpose would be served by expanding thereon.

SUMMARY OF ARGUMENT

I. THE DISTRICT COURT'S REVIEW OF THE COMMISSION'S DECISIONS FOLLOWED ESTABLISHED STANDARDS OF REVIEW PREVIOUSLY ENUMERATED BY THE COLORADO SUPREME COURT, AND IN SO APPLYING THE PROPER STANDARDS OF REVIEW, THE DISTRICT COURT PROPERLY CONCLUDED THAT THE DECISIONS OF THE COMMISSION SHOULD BE AFFIRMED.

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II. THE DISTRICT COURT PROPERLY AFFIRMED THE COMMISSION'S AWARD OF EXPERT WITNESS FEES, ATTORNEYS' FEES AND COSTS.

III. CONCLUSION.

ARGUMENT

I. THE DISTRICT COURT'S REVIEW OF THE COMMISSION'S DECISIONS FOLLOWED ESTABLISHED STANDARDS OF REVIEW PREVIOUSLY ENUMERATED BY THE COLORADO SUPREME COURT, AND IN SO APPLYING THE PROPER STANDARDS OF REVIEW, THE DISTRICT COURT PROPERLY CONCLUDED THAT THE DECISIONS OF THE COMMISSION SHOULD BE AFFIRMED.

A. Introduction.

The matter under review by the District Court initially, and by the Supreme Court at this time, are decisions of the Commission in a rate increase filing made by Colorado-Ute. It first must be emphasized that rate making is a legislative function. The City and County of Denver vs. People ex rel Public Utilities Commission, 129 Colo. 41, 266 P.2d 1105 (1954); Public Utilities Commission vs. Northwest Water Corporation, 168 Colo. 154, 451 P.2d 266 (1969). It should also be emphasized that rate-making is not an exact science. Northwest Water, supra, at 173. In the lodestar case of Federal Power Commission vs. Hope Natural Gas Company, 320 U.S. 591, 602-603 (1944) Justice Douglas, speaking for the United States Supreme Court, stated that the "ratemaking process under (The Natural Gas) Act, i.e., the fixing of 'just and reasonable' rates, involves a balancing of the investor and consumer interests." The Hope case further stands for the proposition that under "the statutory standard of 'just and reasonable', it is the result reached, not the method employed, which is controlling." See also Bluefield Water Works and Improvement Company vs. P.S.C. of West Virginia, 262 U.S. 679 (1923) wherein the United States Supreme Court defined the "comparable earnings" test for utility ratemaking.

The procedural process by which public utility rates are established should be explained. Under current law, when a public utility desires to charge a new rate or rates, it files the same with this Commission, and the proposed new rate or rates are open for public inspection. Unless the Commission otherwise orders, no increase in any rate or rates may go into effect except after thirty (30) days' notice to the Commission and the customers of the utility involved.

If the thirty (30) day period after filing goes by without the Commission having taken any action to set the proposed new rate or rates for hearing, the new rate or rates automatically become effective by operation of law.[1/] However, the Commission has the power and authority to set the proposed new rate or rates for hearing, which, if done, automatically suspend the effective date of the proposed new rate or rates for a period of 120 days.[2/]

On May 14, 1976, as already indicated in the Colorado-Ute STATEMENT OF THE CASE, Colorado-Ute filed tariffs which would increase its revenues from its distribution members by approximately $4,105,590, approximately 19.6%. The Commission set Colorado-Ute's filed tariffs for hearing, suspended the effective date of the same and ultimately found that a revenue increase of $3,392,010 was required. The operative decision under review is Decision No. 89865, dated December 17, 1976, which is found in the record at folio 00603 et seq.

B. Standards of Review Applicable to Commission Decision.

The scope and standards of judicial review applicable to Commission rate decisions have been well settled in Colorado law for a number of years and are as follows:

1. The orders of the PUC are presumed to be reasonable. Contact-Colorado Springs, Inc. v. Mobile Radio Telephone Service, Inc., ___Colo.___, 551 P.2d 203 (1976); Public Utilities Commission v. Northwest Water Corporation, supra; Public Utilities Commission v. District Court, 163 Colo. 462, 431 P.2d 773 (1967); and, C.B. & Q. R. R. Co. v. Public Utilities Commission, 68 Colo. 475, 190 P. 539 (1920).

1/ Under CRS 40-3-104, most fixed utilities file rates on thirty (30) day notice; however, thirty (30) days is a minimum notice period, unless otherwise ordered by the Commission. A utility may select a longer notice period. In any event, if the Commission elects to set the proposed rate or rates for hearing, it must do so before the proposed effective date.

2/ CRS 40-6-111

2. The burden of showing the improprieties or illegality of the Commission order is upon the party attacking the order. See Public Utilities Commission vs. Weicker Transportation Co., 102 Colo. 211, 78 P.2d 633 (1938).

3. Where there is competent evidence in the record to support the orders of the Commission, those orders will not be modified or set aside by the courts, nor may any reviewing court substitute its judgment for that of the Commission. Sangre De Cristo Electric Association v. Public Utilities Commission, 185 Colo. 321, 524 P.2d 309 (1974); North Eastern Motor Freight, Inc. v. Public Utilities Commission, 178 Colo. 433, 498 P.2d 923 (1972); Public Utilities Commission v. Northwest Water Corp. supra; Airport Limousine Service, Inc. and Public Utilities Commission v. Cabs, Inc., doing business as "Zone Cab Company", et al, 167 Colo. 378, 447 P.2d 978 (1968); Southeast Colorado Power Association v. Public Utilities Commission, 163 Colo. 92, 428 P.2d 939 (1967); Public Utilities Commission v. City of Loveland, 87 Colo. 556, 289 P. 1090 (1930).

4. A reviewing court will not substitute its judgment for the Commission where there is conflicting testimony and disputed issues of fact. Contact-Colorado Springs, Inc. v. Mobile Radio Telephone Service, Inc., supra; Answerphone, Inc. v. Public Utilities Commission, supra; North Eastern Motor Freight, Inc. v. Public Utilities Commission, supra; and Yellow Cab, Inc. v. Public Utilities Commission, 169 Colo. 357, 455 P.2d 877 (1969).

5. The evidence in the record must be viewed in the light most favorable to the PUC's findings and decision. Peoples Natural Gas Division of Northern Natural Gas Company v. Public Utilities Commission, ___Colo. ____, 567 P.2d 377 (1977).

6. A court may not set aside findings of fact made by the Commission and supported by substantial evidence. Public Utilities Commission v. City of Loveland, 87 Colo. 556, 289 P. 1090 (1930).

7. The court cannot make new findings in a proceeding to review a Commission Decision. Public Utilities Commission v. Colorado Interstate Gas Co., 142 Colo. 361, 351 P.2d 241 (1960).

8. The court may not overturn the Commission's decision on a disputed factual question. Eveready Freight Service, Inc. v. Public Utilities Commission, 167 Colo. 577, 449 P.2d 642 (1969).

9. The credibility of the witnesses and the weight to be accorded their testimony is peculiarly within the province of the Commission. North Eastern Motor Freight, Inc. v. Public Utilities Commission, supra; and, Contact-Colorado Springs, Inc. v. Mobile Radio Telephone Service, Inc., supra.

C. Other Special Rules.

In addition to the general standards of review enumerated above, there are other applicable legal principles or rules which are set forth as follows:

1. The burden of showing confiscation is upon the utility when such utility is seeking a rate increase. Ohio & Colorado Smelting and Refining Co. v. Public Utilities Commission, 68 Colo. 137, 187 P. 1082 (1920).

2. A reviewing court will defer to the expertise of the Commission in its exercise of judgment, evaluation and analysis. Atchison, Topeka and Santa Fe Railway Company v. Public Utilities Commission, ___ Colo. ___, 572 P.2d 138 (1977); and, Peoples Natural Gas Division of Northern Natural Gas Company v. Public Utilities Commission, supra.

3. The finding of a rate of return, and the setting of rates, is not an exact science, but requires the exercise of the Commission's

expertise, judgment and discretion to which a reviewing court should defer. Mountain States Telephone and Telegraph Company v. Public Utilities Commission 182 Colo. 269, 513 P.2d 721 (1973); Colorado Municipal League v. Public Utilities Commission, 172 Colo. 188, 473 P.2d 960 (1970); Denver & Salt Lake Railway Co. v. Chicago, Burlington & Quincy Railroad, 64 Colo. 229, 471 P. 74 (1918); Public Utilities Commission v. Northwest Water Corp., supra; Bluefield Water Works and Improvement Company v. Public Service Commission of West Virginia, supra; Federal Power Commission v. Hope Natural Gas Company, supra.

4. The Commission can take notice of other evidence in its files, annual statements, and data gathered through its own investigation. Consolidated Freightways Corp. v. Public Utilities Commission, 158 Colo. 239, 406 P.2d 83 (1965).

5. Even though evidence presented to the Commission may not be contradicted, the Commission is not bound to believe it. Mountain States Telephone and Telegraph Company v. Public Utilities Commission, ___Colo.___, 576 P.2d 544, 553 (1978).

6. The Commission is not bound by one of its prior decisions, or by any doctrine similar to that of stare decisis. Rumney v. Public Utilities Commission, 172 Colo. 314, 472 P.2d 149 (1970); B.D.C. Corp. v. Public Utilities Commission, 167 Colo. 472, 448 P.2d 615 (1968); B & M Service, Inc. v. Public Utilities Commission, 163 Colo. 228, 429 P.2d 293 (1967).

D. Application of Foregoing Standards of Review and Special Legal Principles or Rulings to the Commission's Decisions.

1. Deletion of certain membership dues and fees.

Colorado-Ute complains that the removal of certain membership fees was adopted as a Commission policy in another case not involving Colorado-Ute. Colorado-Ute specifically raises a red herring that

inasmuch as Staff Witness Merrell did not specifically refer to an earlier Commission decision involving Gunnison County Electric Association, that apparently it somehow was wrong for the Commission itself to refer to the Gunnison County Electric Association case as a precedent for removing certain membership fees with respect to Colorado-Ute. The argument, of course, is specious. The Commission found in the Colorado-Ute case before it that the adjustment to remove certain membership dues was based upon the absence of any value of these expenditures to the rate payers.

Colorado-Ute further complains that no attempt was made by the Commission to ascertain the benefit of these membership dues expenses. It goes without saying that the Commission is not obligated to try and find out what public benefits certain membership dues might have to the rate payers. Rather, it is incumbent upon Colorado-Ute to prove that the membership dues were proper expenses to be borne by the rate payers. The Commission, by eliminating a certain portion of the membership dues, obviously did not believe that Colorado-Ute had sustained its burden of proof in this regard. It should be pointed out that in the 1978 case of Mountain States Telephone and Telegraph Company v. The Public Utilities Commission and Colorado Municipal League v. The Public Utilities Commission, supra, the Supreme Court upheld the Commission's disregard of a so-called "repression" study made by the telephone company even though there was nothing specifically in the record to contradict it. By the same token, the Commission is not compelled to accept as a rate payer expense certain expenses which may be set forth by a utility just because the utility itself believes that it is a proper rate payer expense. In this case, however, there was the direct testimony of a staff witness in opposition to certain membership dues, and, accordingly, there is competent evidence in the record to support the Commission's action in this regard.

2. Reduction of Colorado-Ute test year expenses for the costs of purchased power.

With respect to the reduction of power supply expenses and transmission expenses, the District Court was quite correct in stating that there was ample competent evidence in the record to support such reduction as a result of the direct testimony and cross examination of Louis Drees in his exhibits. As the District Court points out, where there is conflicting evidence the findings of the Commission cannot be disturbed upon review. As the Commission pointed out, the reduction of Colorado-Ute's revenue requirement as an out-of-period adjustment with respect to wholesale rates applicable to purchases from Public Service Company of Colorado was based on an adjustment that was known and certain as of November 8, 1976. The Commission pointed out that out-of-period adjustments with respect to interest expense was not in the same category inasmuch as out-of-period interest expenses would be based upon projections rather than known figures.

3. Disallowance of costs associated with one aircraft.

Colorado-Ute also complains that the Commission disallowed costs associated with one of Colorado-Ute's corporate aircraft. It is quite clear that there was competent Commission staff testimony with respect to the issue of one of Colorado-Ute's aircraft not being a proper rate payer expense. The staff witness pointed out that Colorado-Ute was operating two expensive airplanes at one-half capacity. Colorado-Ute did not argue with Staff Witness Merrell's testimony and alleges that if the calculation is made in some other fashion (involving trips rather than trip dates), the utilization figure of the aircraft would appear to be higher. Boiled down to its essentials, the District Court correctly stated that there was evidence of non-consumer benefit in the use of airplanes and that the decision to make an adjustment was not arbitrary or capricious and was approved by the Court.

As indicated in Special Rule No. 6 above, the Commission is not bound by stare decisis. In any event, the evidence in Investigation

and Suspension Docket No. 1050 is different from that evidence which was presented in the prior case involving Colorado-Ute in which the issue of aircraft was discussed.

4. Utilization of Colorado-Ute's computer service.

One is hard put to understand just what Colorado-Ute is complaining about with respect to the Commission's decision with regard to utilization of Colorado-Ute's computer service. Basically, the Commission ordered Colorado-Ute to negotiate with those members who are currently utilizing the system, to evaluate the expenses for providing that service to those using members, and to discuss a charging plan to provide for reimbursement of those expenses outside of the cost of wholesale power. The fact that the Commission's decision in Investigation and Suspension Docket No. 1050 may not be in complete accord with one of the Commission's earlier decisions is of no account. As Colorado-Ute itself points out, the Commission is not bound by the doctrine of stare decisis. Again (as was true with respect to the evidence regarding the aircraft), new evidence, new witnesses, and a different record exists in Investigation and Suspension Docket No. 1050. In this docket the Commission succinctly pointed out discrimination occurs by six members creating expenses that are paid by all 13 members including those not utilizing the service. It is hard to find upon what basis such a conclusion is characterized as being unjustified and an abuse of the Commission's discretion.

5. Elimination of the fuel cost adjustment.

Colorado-Ute complains that the Commission eliminated fuel cost adjustments which Colorado-Ute itself had proposed, albeit subject to certain conditions (namely, that the rate increase would be granted in substantially the amount sought, the increased financial risk occasioned by the elimination of the fuel cost adjustment be recognized in the TIER, and that regulatory lag would not become a more significant problem than it has been in the past). Colorado-Ute states that the Commission ignored these conditions completely. It should be pointed out, of course, that the

responsibility of the Commission is to set rates, not to haggle, like a near-eastern rug merchant, with a utility about "conditions." Colorado-Ute makes the gratuitous assumption that the Commission "permitted regulatory lag to be stretched to its maximum limits." Such a remark impunes the good faith of the Commission in procedurally fulfilling its regulatory responsibilities and should be totally disregarded by this Court.

Colorado-Ute also complains that the Commission utilized some "off-the-record" information with respect to fuel costs. What Colorado-Ute is referring to, of course, are the fuel escalation sheets which are furnished to the Commission on a monthly basis. It should be pointed out that the Commission is permitted by CRS 1973, 40-6-113(6) to consider information secured by it on its own initiative in rendering its order and decision. See Consolidated Freightways Corp. v. Public Utilities Commission, supra.

6. Rate of return.

When an enterprise raises capital, it may do so in various ways. Theoretically, an enterprise could raise all of the capital it needs or wants by issuing stock to stockholders, in which case the capitalization of the enterprise would be 100% equity. Of course, most utility enterprises do not operate on this basis; rather, there is issued a combination of stock and debt. However, Colorado-Ute is not an investor-owned utility, but a rural electric generation and transmission cooperative, and is almost exclusively financed by borrowings from governmental and quasi-governmental bodies. That being the case, the Commission has determined that an appropriate measure of financial safety is the times interest earnings ratio (TIER). If the earnings are less than the interest that must be paid on debt, the TIER will be less than 1.0. If the earnings are more than the interest payable, the TIER will be more than 1.0. The Commission determined that a TIER of 1.92 would be reasonable under the circumstances. The entire rationale is set forth in Commission Decision No. 89865 on pages 25

through 32 (f. 00626-00633). Needless to say, there is plenty of evidence in the record to support the Commission's judgment in this matter even though Colorado-Ute might have preferred a higher TIER.

Colorado-Ute complains that Witness Louis Drees failed to make an adjustment in rate base for the additional amount of interest capitalized in the sum of $467,480 and that, accordingly, Colorado-Ute will never be able to recover this amount of interest. Factually, this is not true inasmuch as the interest which is capitalized will be recovered subsequently when the plant to which it relates "comes on line", that is goes into service. In other words, the total interest that Colorado-Ute has to pay will be recovered by it and whether the interest is expensed or capitalized has nothing to do with its recovery but only the timing of its recovery.

II. THE DISTRICT COURT PROPERLY AFFIRMED THE COMMISSION'S AWARD OF EXPERT WITNESS FEES, ATTORNEYS' FEES AND COSTS.

On pages 37 through 40 of Commission Decision No. 89865 (f. 00638-00641) the Commission set forth the three requirements that must be met before the Commission will order any utility to reimburse an intervenor for attorneys' fees, witness fees, and costs incurred. That part of the decision also indicated wherein the criteria were met.

The criteria are as follows:

> "(i) The representation of the protestant-intervenor and expenses incurred relate to general consumer interests and not to a specific rate or preferential treatment of a particular class of ratepayers.
>
> (ii) The testimony, evidence and exhibits introduced in this proceeding by the protestant-intervenor have or will materially assist the Commission in fulfilling its statutory duty to determine the just and reasonable rates which Mountain Bell shall be permitted to charge customers.
>
> (iii) The fees and costs incurred by protestant-intervenor for which reimbursement is sought are reasonable charges for the services rendered on behalf of general consumer interest."

It is quite clear that this Commission has the authority to award expert witness fees or attorneys' fees inasmuch as this authority was specifically affirmed by this Court in Mountain States Telephone and Telegraph v. Public Utilities Commission, supra and Colorado Municipal League v. Public Utilities Commission (1979). The Commission in its Decision No. 89865, dated December 17, 1976, set forth in specific detail its findings wherein a portion of expert witness fees and attorneys' fees fulfilled the above three criteria. Colorado Ute argues that the Commission may not award attorneys' fees in a manner that essentially amounts to taxation -- a power reserved to the legislature. In view of the Mountain Bell case above cited and the specific fulfillment of the three criteria set forth above, Colorado-Ute's argument is without merit.

III. CONCLUSION.

The District Court carefully and appropriately applied the standards of review set forth in this brief and did not violate any of the special legal principles or rules as set forth above. The District Court was correct in performing its statutory duty of review set forth in CRS 1973, 40-6-115. Accordingly, the District Court did not succumb to the temptation to "re-try" the case or to substitute its judgment for that of the Commission with respect to matters in which there was conflicting evidence and which calls for the expertise and judgment of the Commission in rendering an appropriate decision. It is true, of course, that Colorado-Ute may be dissatisfied on a number of issues that were contested matters in the proceeding before the Commission, but individually, and in the aggregate, they form no sufficient legal basis to overturn the decision of the Commission in Investigation and Suspension Docket No. 1050.

In conclusion, it is clear that the District Court was legally correct in affirming the Commission, and it is prayed that this Court will do likewise.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Answer Brief of Respondent-Appellee The Public Utilities Commission of the State of Colorado were deposited in the United States mail, postage prepaid, on the 28th day of June, 1979, to the following parties of record:

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