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FILED IN THE
SUPREME COURT
OF THE STATE OF COLORADO
JUN 15 1979

David W. Beggs

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

) ANSWER BRIEF
) OF APPELLEES
) EMPIRE ELECTRIC
) ASSOCIATION, INC.
) AND HOLY CROSS
) ELECTRIC ASSOCIATION,
) INC.

GORSUCH, KIRGIS, CAMPBELL,
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STATEMENT OF THE CASE

Empire Electric Association, Inc. (hereinafter "Empire Electric") and Holy Cross Electric Association, Inc. (hereinafter "Holy Cross") would clarify the "Statement of the Case" appearing in the opening brief of appellant Colorado-Ute Electric Association, Inc. (hereinafter "Colorado-Ute") in the following respects:

1. On pages 3-4 of its "Statement of the Case", Colorado-Ute points out that the Commission made the thirteen distribution cooperatives which were members of Colorado-Ute and purchased power from it, "additional respondents" in the proceeding. Three of these member cooperatives including Holy Cross, Empire Electric, and Southeast Colorado Power Association (hereinafter "Southeast") actively opposed the rate increase proposed by Colorado-Ute. In its opening brief, Colorado-Ute refers to these three associations as "intervenors". They were not "intervenors", however, but were respondents who protested Colorado-Ute's rate increase. As such, Holy Cross and Empire Electric will be referred to properly herein as "Protestants" rather than as "intervenors".

2. On page 3 of its opening brief, Colorado-Ute states that notice of its proposed rate increase was given by Colorado-Ute to its thirteen members. However, it should be known that no notice was given to Colorado-Ute's ultimate consumers, even though Colorado-Ute seeks an order from this Court allowing its member cooperatives to pass through an asserted rate increase to the ultimate consumer, without any notice or hearing allowed to those ultimate consumers (See page 59 of Colorado-Ute's opening brief.).

SUMMARY OF ARGUMENT

I. APPLICABLE EVIDENCE AND LEGAL PRINCIPLES REQUIRE THAT THE DECISION OF THE PUBLIC UTILITIES COMMISSION BE AFFIRMED IN ALL RESPECTS.

A. Introduction.

B. Standards of Review to Be Applied By the Court.

C. Application of the Standards of Review to the Commission's Decisions:

1. Deleting Certain Membership Dues and Fees from Colorado-Ute's Test Year Expenses.
2. Reducing Colorado-Ute's Test Year Expenses for the Costs of Purchased Power.
3. Deleting Colorado-Ute's Costs Associated with One Aircraft.
4. Requiring Colorado-Ute to Charge Its Members for Their Use of Colorado-Ute Computer Services.
5. Adopting a Rate of Return for Colorado-Ute.

D. Award of Expert Witness Fees, Attorneys' Fees and Costs was Proper.

1. Introduction.
2. Expert Witness Fees.
3. Attorneys' Fees.

II. CONCLUSION.

ARGUMENT

I. APPLICABLE EVIDENCE AND LEGAL PRINCIPLES REQUIRE THAT THE DECISION OF THE PUBLIC UTILITIES COMMISSION BE AFFIRMED IN ALL RESPECTS.

A. Introduction.

Empire Electric and Holy Cross, as previously stated, are two of the thirteen distribution associations which buy all of the electrical energy produced by Colorado-Ute. Both Empire Electric and Holy Cross are affected by any increased rates which the Colorado Public Utilities Commission (hereinafter "Commission" or "PUC") may permit Colorado-Ute to charge, since increased

rates allowed to Colorado-Ute will be paid by its members and, presumably, ultimately by the consumers of the member distribution cooperatives.

Because of their concern over any increased rates to be paid by them and ultimately by their own customers, Empire Electric and Holy Cross actively participated in the PUC proceedings relating to Colorado-Ute's application for a rate increase. That participation included active participation by counsel for Empire Electric and Holy Cross throughout the proceeding, provision of the cooperatives' own expert witnesses, cross-examination of Colorado-Ute witnesses, active participation in the District Court proceedings to review the Commission's decision and successfully urging affirmance of the decision, and active participation in this appeal.

While the Attorney General has the primary obligation of seeking to sustain the Commission's order, Empire Electric and Holy Cross urge the Court to affirm the Commission's decision in all respects. Applicable legal principles and the evidence presented in the proceedings before the Commission demand such affirmance.

B. Standards of Review to Be Applied By the Court.

The scope and standards of judicial review applicable to PUC rate decisions are well settled in Colorado and may be summarized 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); and, C. B. & Q. R. R. Co. v. Public Utilities Commission, 68 Colo. 475, 190 P. 539 (1920). See, Public Utilities Commission v. Northwest Water Corporation, 168 Colo. 154, 451 P.2d 266 (1969).

2. The burden of showing the impropriety or illegality of a Commission order is upon Colorado-Ute, the one attacking the order. Public Utilities Commission v. Weicker Transp. 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); 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); Public Utilities Commission v. Northwest Water Corporation, supra; and, North Eastern Motor Freight, Inc. v. Public Utilities Commission, 178 Colo. 433, 498 P.2d 923 (1972).

4. A reviewing court will not substitute its judgment for the Commission where there is conflicting testimony and disputed issues of fact. Answerphone, Inc. v. Public Utilities Commission, 185 Colo. 175, 522 P.2d 1229 (1974); Contact-Colorado Springs, Inc. v. Mobile Radio Telephone Service, Inc., supra; and, North Eastern Motor Freight, Inc. v. Public Utilities Commission, supra.

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. 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.

7. 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.

8. With respect to determining a rate of return, in particular, the Court has recognized that the determination is not an exact science, but rather 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); and, Colorado Municipal League v. Public Utilities Commission, 172 Colo. 188, 473 P.2d 960 (1970). Of particular interest and application to this case, is the Court's statement in Mountain States Telephone and Telegraph Company v. Public Utilities Commission, supra, 513 P.2d at 726:

"It is of significance here to also observe that rate fixing involves more than finding of facts and applying them. It involves also to a considerable extent many questions of judgment or discretion on the part of the PUC. Public utility rate making is a legislative matter, and to the PUC, under our statutory scheme, has been delegated this task. It is true, of course, that in pursuing this task, the PUC must have before it evidence on the subject matter, but the determination as to what is a fair, just and reasonable rate is a matter of judgment or discretion. This judgment or discretion on the part of the PUC must be based upon evidentiary facts, calculations, known factors, relationship between known factors, and adjustments which may affect the relationship between known factors. We find there is evidence in the

record pertaining to all of these items upon which this judgment or discretion must be grounded. As stated previously, it is our view that the PUC demonstrated a high degree of expertise in this rate case and therefore we have no basis for holding that in this case the PUC's judgment was erroneous or that it abused its discretion either in the methods utilized to calculate the basis for the rates or in the consequent level of rates authorized."

Empire Electric and Holy Cross submit that this presents a classic case for application of the above-stated principles. A careful review of the record from the Commission will reveal competent and substantial evidence throughout to support the Commission's decision. Conflicting evidence and testimony of witnesses will appear, requiring the Court to rely upon the Commission's decision as to the credibility of the witnesses and the weight to be accorded their evidence. And the record will clearly show that the Commission exercised its judgment, discretion and expertise in a reasonable fashion and within the scope of its authority. Consequently, the Commission's decision must be affirmed by this Court.

C. Application of the Standards of Review to the Commission's Decisions.

As an initial matter, the Court should note that many of Colorado-Ute's arguments rely on evidence and testimony presented in its cross-examination of the witnesses. Colorado-Ute often ignores the evidence presented on direct examination of the Commission witnesses and the witnesses presented by Empire Electric and Holy Cross. The Commission obviously gave different emphasis than that given by Colorado-Ute to the testimony of the witnesses, as it properly may do.

Moreover, Colorado-Ute argues at least twice in its opening brief that the Commission should not reverse certain prior decisions, even though Colorado-Ute acknowledges that the

Commission is not bound by stare decisis. This argument ignores the fact that new evidence, new witnesses and a completely different record supports the more recent decision of the Commission reflected in this proceeding. If the Court accepts Colorado-Ute's arguments on this issue, it would unnecessarily limit the ability of the Commission to adjust its decisions to the evidence before it in a particular case. The key factor in any instance is whether evidence in the record exists to support the Commission's decision, and such evidence does appear in the record of this case as specifically noted below.

1. Deleting Certain Membership Dues and Fees from Colorado-Ute's Test Year Expenses.

Contrary to the assertions of Colorado-Ute, competent evidence and testimony in the record supports the PUC's decision to delete certain membership dues and fees from Colorado-Ute's test year expenses. See, e.g., Exhibits 126-127; and, the testimony of Commission staff witness Craig Merrell who stated that the adjustments were based upon an assessment of the value of the expenditures eliminated from the rate base.

2. Reducing Colorado-Ute's Test-Year Expenses for the Costs of Purchased Power.

Again contrary to the assertions of Colorado-Ute, competent evidence and testimony exists in the record to support the PUC's decision to reduce Colorado-Ute's test year expenses for the cost of certain power purchased from Public Service Company. PUC Decision No. 89865, at page 21, reduces Colorado-Ute power supply expenses by \$228,941 and transmission expenses by \$19,219 to reflect an expense level based upon a settlement agreement signed by Colorado-Ute and Public Service Company before the Federal Power Commission. Evidence and testimony

in support of the Commission's decision is found in the direct testimony and cross-examination of Louis Drees and in his exhibits. While Colorado-Ute attempted to create an illusion of uncertainty as to the settlement being completed, it was admitted during the course of the proceeding that settlement was completed.

In Decision No. 90016, at page 2, the Commission found that the settlement became known and certain as of November 8, 1976, before the date of the Commission's initial order on December 17, 1976. Colorado-Ute seeks to offset this known change in the level of expenses with other changes; however, evidence exists in the record to support the Commission's decision and thus it must be affirmed.

3. Deleting Colorado-Ute's Costs Associated with One Aircraft.

Competent evidence also appears in the record to support the Commission's decision to delete Colorado-Ute's costs associated with one aircraft. See the testimony of Commission staff witness Craig Merrell, who used information supplied by Colorado-Ute in Appendix "A", Exhibit 48 and Exhibit 44, from which Mr. Merrell developed his own Exhibit 126 or 127. See also, Exhibit 11, page 15.

Colorado-Ute appears to argue that the Commission should not have reversed its earlier decision regarding proper aircraft costs, although Colorado-Ute also recognizes that the Commission is not bound by stare decisis. As previously stated, however, Colorado-Ute's argument ignores the fact that new evidence, new witnesses, and a completely different record exists in this case, and that this new record supports the Commission's decision.

4. Requiring Colorado-Ute to Charge its Members
for their Use of Colorado-Ute Computer Services.

Again, evidence in the record supports the Commission's decision to require Colorado-Ute to charge those members who use the computer system for that use, and reduce its wholesale rates resulting from the charge. In particular, see the supportive testimony and exhibits of Louis F. Drees concerning adjustments in the rate base and operating expenses for the non-utility activity of the computer services, Exhibit 86 (pages 14-15); Exhibit 91; and Vol. X of the transcript (pages 63-64). Also, see the computer testimony and exhibits of Paul J. Vajdic, Exhibit 93 (pages 7, 9, 10, 11, 13-15), and Vol. IX of the transcript (pages 121-145).

Colorado-Ute again argues that no change in the fact situation before the Commission supports its order in this proceeding requiring charges to members using the computer system. See page 35 of Colorado-Ute's opening brief. As stated previously, however, this argument ignores the obvious fact that new evidence, new witnesses and a completely different record exists in this case, and that the new record in fact supports the Commission's decision.

5. Adopting a Rate of Return for Colorado-Ute.

Finally, evidence in the record supports the Commission's rate design and rate of return decision: testimony of Commission staff witness Gerald E. Hager and the authority of NARUC's Electric Utility Cost Allocation Manual; James A. Richard, Commission staff witness (Exhibit 125); deposition and exhibit of J. K. Smith, Governor of CFC, as well as correspondence between Colorado-Ute and CFC (Exhibit 83); final report and recommendation of Capital Credits

Study Committee (Exhibit 71, particularly pages 35 and 41); testimony of John C. Dunn (Exhibit 99, pages 6-15, 20-25, 26-32); relationship of G&T REA's to Distribution Associations (Exhibit 71, page 41; Exhibit 99, pages 14, 17-19 and particularly page 18; Exhibit 124). Moreover, the Commission gave little weight to the testimony of Colorado-Ute witness Gene Harris (Exhibit 10) or to his comparative analysis as relied upon by Robert Vold. And, Colorado-Ute's argument on capitalization of interest is contradicted in the record by the testimony of Louis F. Drees.

Colorado-Ute adds to its rate of return argument other complaints regarding the Commission's elimination of the fuel cost adjustment and what Colorado-Ute characterized as "extraordinary" regulatory lag permitted by the Commission. Colorado-Ute, however, specifically proposed elimination of the fuel cost adjustment in its direct case. And, the Commission found in Decision No. 90016 that Colorado-Ute's regulatory lag argument did not merit a response. Colorado-Ute does not appear to -- and cannot -- argue that any of the delays were unlawful. Rather, Colorado-Ute simply complains of delays such as those occasioned by the Protestants wishing to file and argue statements of position before the Commission -- hardly solid grounds for reversal of the Commission's decisions!

In general, application of the previously established standards of review to the record as it exists in this case, demands that the Commission's decision be upheld on each of the above matters. Additionally, the Commission's decision to award expert witness fees and attorneys' fees and costs to Protestants Empire Electric and Holy Cross was proper and supported by the record, and therefore should be affirmed as discussed below.

D. Award of Expert Witness Fees, Attorneys' Fees and Costs was Proper.

1. Introduction.

In its Decision No. 89865 , at folio 138-147, 164 and 172, as modified by Decision No. 90016, the PUC determined that Empire Electric, Holy Cross and Southeast should be reimbursed a portion of their expert witness fees, and that Empire Electric and Holy Cross should be reimbursed a portion of their attorneys' fees. The fees were to be charged as an operating expense of Colorado-Ute and as such would be paid by Colorado-Ute's ratepayers, its thirteen member distribution system. In making its decision, the PUC applied three criteria (folio 139):

"(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."

In its application of these criteria, the Commission determined that only a portion of the expert witness fees and attorneys' fees at issue herein met the criteria and thus the PUC ordered reimbursement of only a portion of the fees. (Folio 141-146.) The only dissent among the Commissioners as to the amount of the award was from Commissioner Zarlengo who, at folio 181 and 182, argued that the Commission should have awarded full reimbursement of expert witness and attorneys' fees to the Protestants.

Holy Cross and Empire Electric did not appeal from the Commission's decision to order reimbursement of only a portion of their expert witness and attorneys' fees. However, both do contest Colorado-Ute's assertion that the order was "inappropriate" and instead urge the Court to uphold the award.

Initially, the Court should note that the PUC's authority to award expert witness and attorneys' fees and costs, as it did in this case, has been clearly established and recognized by this Court. Mountain States Telephone and Telegraph Company v. Public Utilities Commission, Colo., 576 P.2d 544 (1978); and, Colorado Municipal League v. Public Utilities Commission, Colo., 591 P.2d 577 (1979). Moreover, the criteria applied by the PUC in this proceeding to determine whether and to what extent expert witness and attorneys' fees should be awarded were specifically approved in Mountain States Telephone and Telegraph Company v. Public Utilities Commission, supra.

Nevertheless, despite this established authority, Colorado-Ute continues to challenge the PUC's reimbursement order as "improper". As grounds for its "improper" argument, Colorado-Ute claims on page 38 of its opening brief that the rationale of the Commission in awarding the fees was that the attorneys and witnesses were "helpful to the Commission." Colorado-Ute then states that its interpretation of the Commission's rationale is not a sufficient reason to make the award. Colorado-Ute's description of the Commission's rationale misstates the facts, however, as the record itself clearly demonstrates. (Folio 138-146 and folio 181-182.)

Moreover, Colorado-Ute was specifically ordered to charge as an operating expense the reimbursed expert witness

and attorneys' fees allowed by the Commission. In doing so, the amount of the expense will be paid by Colorado-Ute's members, none of whom have challenged the award even though all were made parties to the proceedings before the PUC, the District Court and this Court! Surely, Colorado-Ute's standing to challenge the reimbursement award is questionable when it merely passes the costs on to its member associations, none of whom protested the award although each had the opportunity to do so. See, Wimberly v. Ettenberg, Colo., 570 P.2d 535 (1977); and, Wilson v. Board of Regents, 46 Colo. 100, 102 P. 1088 (1909).

In addition to the above arguments, Empire Electric and Holy Cross also would point out to the Court the following with respect to the expert witness and attorneys' fees and costs issue.

2. Expert Witness Fees.

Colcrado-Ute cites no case supporting its statement that the award of expert witness fees was "inappropriate". In fact, the award of expert witness fees clearly was within the authority of the Commission, was made pursuant to appropriate criteria, and was reasonable in amount -- although less than Empire Electric or Holy Cross had sought. Mountain States Telephone and Telegraph Company v. Public Utilities Commission, supra; and, Colorado Municipal League v. Public Utilities Commission, supra.

Contrary to Colorado-Ute's unsupported statements, the validity of an award of expert witness fees does not depend upon agreement or advisement as to the engagement of the experts, but on a determination by the PUC that the expert's expenses related to general consumer interest, that the expert's testimony, evidence and exhibits materially assisted

the Commission in fulfilling its duty, and that the fees and costs incurred were reasonable charges for services rendered on behalf of general consumer interests. See folio 139-142; Mountain States Telephone and Telegraph Company v. Public Utilities Commission, supra; and, Colorado Municipal League v. Public Utilities Commission, supra. The Commission properly made such determinations in this proceeding. See folio 38-39.

3. Attorneys' Fees.

Colorado-Ute argues that an allowance for attorneys' fees is improper where all thirteen of Colorado-Ute's members appeared in the proceeding and were represented by counsel of their own. In support of its argument, Colorado-Ute cites cases from other jurisdictions on page 37 of its opening brief, which, for the most part, rest upon an equitable "common fund" theory for the award of attorneys' fees. The PUC's authority to award attorneys' fees, however, does not rest upon any similar equitable "common fund" theory as this Court specifically recognized in Mountain States Telephone and Telegraph Company v. Public Utilities Commission, supra. Rather, the PUC's authority to award reimbursement of reasonable attorneys' fees rests upon broad constitutional and statutory authority. Mountain States Telephone and Telegraph Company v. Public Utilities Commission, supra; and, Colorado Municipal League v. Public Utilities Commission, supra. Thus, the cases cited by Colorado-Ute are inapplicable to this proceeding.

Additionally, other Colorado-Ute member cooperatives could have sought and been awarded reimbursement of reasonable attorneys' fees upon meeting the PUC criteria for such reimbursement. Certainly, the PUC's rule of allowing reimbursement of reasonable attorneys' fees to any general consumer

representative meeting the PUC's established criteria makes more sense than trying to enforce a rule that consumers represented by their own counsel are not required to share in the payment of reasonable attorneys' fees ordered reimbursed by the Commission. The impossibility of enforcing the latter rule becomes apparent upon consideration of the many interests represented and unrepresented in a major rate proceeding involving companies such as Mountain States Telephone and Telegraph Company.

Finally, even where the equitable "common fund" theory is the basis for reimbursement of attorneys' fees, some courts allow reimbursement of particular attorneys' fees even where a large percentage of those interested may have employed their own counsel, and even where those interested may have actively opposed the suit who's institution benefitted them. Wallace v. Fisk, 80 F.2d 897 (8th Cir. 1936); and, Buford v. Tobacco Growers' Co-op Association, 42 F.2d 791 (4th Cir. 1930).

In any event, the award for reimbursement of attorneys' fees in this proceeding was authorized by and consistent with established Colorado law.

II. CONCLUSION

Based on the reasons stated and authorities previously cited, Empire Electric and Holy Cross urge this Court to affirm the decision of the PUC in all respects. A judgment of affirmance is warranted by:

A. The limited scope of judicial review over PUC decisions;

B. The abundant evidence in the record of the proceedings before the PUC to support its decision;

C. The appropriate and lawful exercise by the Commission of its discretion, judgment and expertise in performing its regulatory responsibilities in this proceeding; and,

D. The fact that the PUC acted in all respects in conformity with applicable and established legal principles.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that on this 15th day of June, 1979,
true and correct copies of the foregoing ANSWER BRIEF OF
APPELLEES EMPIRE ELECTRIC ASSOCIATION, INC. AND HOLY CROSS
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