6-14-1984

Colorado Energy Advocacy Office v. Public Service Co.

SUPREME COURT, STATE OF COLORADO

Case No. 83 SA 476

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

COLORADO ENERGY ADVOCACY OFFICE and ANN CALDWELL,

Plaintiffs-Appellants,

v.

PUBLIC SERVICE COMPANY OF COLORADO, PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; and COMMISSIONERS EDYTHE S. MILLER, DANIEL E. MUSE and ANDRA SCHMIDT,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT, CITY AND COUNTY OF DENVER

The Honorable Gilbert Alexander, Judge

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On Behalf of Plaintiffs-Appellants

DATED: June 14, 1984

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II. STATEMENT OF THE CASE

This Reply Brief is submitted in response to the Answer Briefs filed in this appellate matter by Public Service Company of Colorado (hereinafter "PSCO" or "Company") and by the Colorado Public Utilities Commission (hereinafter "PUC" or "Commission").

The statement of Relevant Facts in the Opening Brief of Plaintiffs-Appellants is adopted herein for all purposes. Transcript and Folio references for the record on appeal to this Court will be cited in the body of this Brief as follows: (Folio____, line____) and (Transcript____, __19___, p. _____, line_____).

III. ARGUMENT

A THE COMMISSION UNLAWFULLY RELIED ON EX PARTE EVIDENCE TRANSMITTED BY ITS STAFF MEMBER AFTER THE RECORD WAS CLOSED TO GRANT EXCEPTIONS REVERSING EXAMINER TRUMBULL'S RECOMMENDED REFUND ORDER.

Arguments made by Defendants-Appelles to justify Commission reliance on ex parte evidence boiled down to the following:

a. That the Commission has the duty to use its Staff for the purpose of ascertaining facts which are important to justify a conclusion in the case, and this independent of, or in addition to testimony produced by other parties. Ohio and Colorado Smelting and Refining Company v. Public Utilities Commission, 68 Colo. 137 (1920);

b. That no ex parte prohibition of any nature, therefore, applies to the Commission in proceedings before it, including the quasi-judicial complaint proceeding on appeal here;

c. That the ex parte to which CEAO and Caldwell object was communicated by the Staff of the Commission, and while the Staff was at the time a formal party to the complaint proceeding, it was not a serious or very active party.

In addition to the foregoing summary, the Commission Answer Brief asserts that so great is Commission discretion to receive, rely, and rule upon evidence, without prior notice and after the record is closed, that no post-judgment hearing of any nature is required and if held, is merely "frosting on the cake".

It is apparent that these arguments, largely unsupported by any recitation of legal authority, do little to counter the clear statutory and judicial authorities prohibiting Commission receipt and ruling on ex parte evidence. Defendants-Appelles' presentation of the Ohio and Colorado Smelting case is illustrative. CEAO and Caldwell have no quarrel with the assertion that the Commission has a duty, or at least the discretion, to have its staff participate in proceedings before it. The Commission in its

Answer Brief would stretch the Court's holding in Ohio and Colorado Smelting considerably further: that not only may the Staff participate, but if it does obtain new facts ultimately transmitted to the Commission, these facts need not be disclosed to the other parties in the hearing before becoming the basis for the PUC's ruling.

A plain reading of the opinion in Ohio and Colorado Smelting provides no support for this leap taken by the Commission. That opinion merely asserts that the Commission has a duty to develop facts from its Staff on which to base its ruling. Contrary to the Commission's interpretation, the clear import of the Court's discussion is that facts from Staff should be presented, as evidence from other interested parties, by testimony or formal introduction in the hearings. It is also noteworthy that C.R.S. §24-4-105(14), the section of the State Administrative Procedure Act prohibiting consideration of ex parte evidence, was enacted in the year 1969. L. 69, P.85. Any contrary interpretation from Ohio and Colorado Smelting was thereby overruled and, has since remained in a defunct posture. Peoples Natural Gas v. Public Utilities Commission, _____Colo._____, 626 P.2d 159 (1981).

PSCO in its Answer Brief places substantial faith in the contention that it was the Staff that directly transmitted the ex parte evidence to the Commission; and that the Staff was a party,but not really a very serious party, so that any contact with the Commission by the Staff was merely a legitimate exercise of its administrative functions.

In presenting this argument to the Court, PSCO, like the Commission, is understandably reluctant to make any mention of the role played by the Company in delivering facts, after the record was closed, to the Commissioners for their decision. The record shows that the Staff not only provided facts to the Commission which the Staff had developed on its own, but also that the Staff acted as conduit in providing a new report expressly prepared by the Company in response to Staff/Commission inquiry while exceptions were pending on Examiner Trumbull's recommended decision. The PSCO employee who prepared and transmitted this report was present on the formal occasion, prior to Commission decision, where his report results were delivered into the hands of the Commissioners and a discussion of same ensued by them.

Whether the Staff was a participating party, a participating but not serious party, or no party at all in the CEAO and Caldwell complaint proceeding, does not alter the gross impropriety and unlawfulness of the Company's actions and Commission reliance on evidence known to be ex parte from parties in the complaint proceeding. PSCO knowingly prepared and submitted additional data which it also knew had reached the Commissioners after the record was closed in the proceedings before Examiner Trumbull. The Company also knew that its report was in fact being relied upon to reverse the recommended order for refund. In addition, the Company was aware that these activities were being conducted without any notice served to complainants and certainly no opportunity for

complainants to review and rebut,prior to judgment. The secrecy with which these activities were allowed to be carried out may go a long way to explain the sloppiness and shallowness of the PSCO "study" and basic mistakes in arithmetic, which were subsequently conceded, in the Staff development of figures given to the Commission after the record was closed.

Certainly, no stretch of the decision in Ohio and Colorado Smelting, nor any other authority cited by PSCO, would condone Respondent's activities in a complaint proceeding knowingly to supply ex parte evidence upon which the Commission bases its ruling. In such instances, the source of the information is dispositive of the ex parte issue, not the status of the messinger known to be acting as conduit for delivering the objectionable information.

The data developed by the Staff and delivered to the Commission stands on little better footing than that originating with the Company. It is an unimportant distinction whether participation by the Staff in the complaint hearings was as substantial as by other parties. By entering its appearance and having at least its counsel present at all times, it is uncontroverted that the Staff put itself in a position to exercise the same rights as other parties in the proceeding. Mr. Carlson, the staff expert on gas cost matters, stated that he had reviewed Examiner Trumbull's decision and he was considering whether to submit formal exceptions on behalf of the Staff to the recommended refund. Obviously, the filing of exceptions

is reserved to only those entities which acquired the rights and status of parties in the case. Once electing to become parties, it cannot be fairly held that the Staff may submit comments on the record in hearings as well as behind closed doors after the record is completed.

Moreover, there is an abundance of authority that administrative staff, whether parties or not, may not lawfully affect agency decisions by submission of evidence outside of hearings. In construing the prohibition in the Federal Administrative Procedure Act against ex parte contact, the United States Supreme Court, stated:

> Nor may a hearing examiner consult any person or party, including other agency officials, concerning a fact at issue in the hearing, unless on notice and opportunity for all parties to participate. (emphasis supplied)
> Butz v.Economou, 438 U.S. 478, 514 (1978)

It is fundamental that administrative adjudications must be made upon known evidence in the record. In Colorado, the General Assembly has mandated that exceptions to a examiner's recommended decision at the PUC may only be reconsidered by the Commission "either upon the same record or after hearing". C.R.S. §40-6-109(2). This language does not allow for additional information to be provided by Staff, without hearing,to supplement the record below.

In support of this principle, 2 Am. Jur. 2d, Administrative Law, Section 385, states:

> (T)hat administrative adjudications must be made upon known evidence applies to any kind of information obtained by the administrative agency secretly and at a time, or place other than that appointed for a hearing, including ex parte testimony and affidavits, evidence taken prior to the time the one against whom the decision runs was made party to the proceeding, an individual's own record, undisclosed statements or views of subordinates within the agency, the report of a hearing officer to the agency, and the recommendations of advisors to the determining agency.

The Court's discussion in Carroll v. Public Utilities Commission, 25 Conn. Sup. 459, 207 A.2d 278 (1964) is also directly relevant.

Wherefore, ex parte evidence, originating with the Company or the Staff, in this case was unlawfully relied upon by the Commission to reverse Examiner Trumbull's recommended order for refund.

B. COLORADO LAW PROHIBITS COMMISSION APPROVAL OF UTILITY RATES BASED ON RETROACTIVE CHARGES FOR PAST LOSSES/PROFITS, ADDED TO OTHERWISE FULLY COMPENSATORY RATE LEVELS TO BE COLLECTED PROSPECTIVELY.

The arguments presented by the Commission and PSCO are also flawed with respect to the retroactive rate making issue. As a preliminary matter it should be observed that neither Answer Brief filed for this appellate matter contains any real discussion of the Colorado Constitutional provision, Article II, Section 11, (prohibiting retrospective legislation), as applied to the legislative rate making authority of the Commission. See generally, Opening Brief of Plaintiffs-Appellants, pp. 22-25.

Rather than address this legal issue expressly left open by the Court in Peoples Natural Gas Division v. Public Utilities Commission, 197 Colo. 152, 590 P.2d 960 (1979), both the Commission and PSCO urged this Court to adopt blithely the "holding" alleged to exist in federal court decisions construing the Federal Power Act. Both the Commission and PSCO direct this Court to the "leading case" of Public Service Company of New Hampshire v. Federal Power Commission, 600 F.2d 944 (DC Cir. 1979). At issue in that case was Federal Power Commission (FPC) refusal, as retroactive rate making, to approve a surcharge sought by the utilities. The specific controversy involved a surcharge resulting when a transition was made between two different types of fuel adjustment tariffs. An

argument made by the utilities in the Public Service Company of New Hampshire case was that the FPC should not object to this particular type of retroactive rate making since it was willing to allow fuel adjustment tariffs which permitted "after the fact matching". The Court in Public Service Company of New Hampshire, however, rejected the argument that the existence of the "after the fact matching" tariffs also justified the transition surcharges at issue. There was simply no controversy at all in Public Service Company of New Hampshire about whether the "after the fact matching" tariff was lawful or not. The Court itself explicitly states in this regard:

> The question before us is not whether cost of service clauses with their after the fact matching can be approved. 600 F.2d at 960

To urge the Public Service Company of New Hampshire opinion as a "holding" in a "leading case" to guide this Court's determination of applicable Colorado law, is, against this backdrop, to lean on the weakest of reeds.

PSCO further justifies the over/under recovery provision in its Revised GCA mechanism (and the monthly tariffs submitted thereunder) by attempting to distinguish the contrary opinions in State ex rel Utilities Commission v. Edmisten, 232 SE. 2d 184 (NC 1977) and In re Vermont Central v. Public Service Corporation, Docket No. S82-460 and 83-240, entered January 13, 1984 (copy attached to the Opening Brief in this appeal).

The Court in Edmisten did rule that the adjustment clause under attack was not "technically" retroactive rate making, as it defined the term, but rather that the prospective surcharge for uncollected fuel costs in the past period was unlawful as discriminatory rate making. Regardless of technical nomination, the analysis made by the North Carolina court is no the less applicable to the instant Colorado situation. The Edmisten opinion starts from the proposition that rates should be fixed at a level which will recover the cost of service to which the rate is applied, plus a fair return to the utility. This same standard has been approved as the law in Colorado. Public Utilities Commission v. District Court, 186 Colo. 278, 527 P.2d 233 (1974); Mountain States T & T Company v. Public Utilities Commission, 182 Colo. 269, 513 P.2d 721 (1973). In reaching its finding of "discriminatory" rate making, the Edmisten court found that adjustments in prospective tariffs to collect past deficits in addition to otherwise fully compensatory rate levels was contrary to the cost of service standard. The fundamental problem targeted by the Edmisten court was:

> Such rate making throws the burden of such past expense upon different customers who use the service for different purposes than did the customers for whose service the expense was incurred. For example, the surcharge here in question requires Duke's customers in the winter

> months to pay more than they otherwise should pay for their service because of the cost of coal burned in July and August in supplying electricity for air conditioning.
> 232 S.E. 2d at 195.

This situation created an obvious issue of unfairness for the Edmisten court. It is the same "unfairness" to which the ex post facto analysis applies for retroactive (or discriminatory) rate charges in Colorado. Peoples Natural Gas Division v. Public Utilities Commission, 197 Colo. 152, 590 P.2d 960 (1979).

To distinguish the adverse holding in In re Vermont Central v. Public Service Corporation, supra, PSCO argues that the Vermont commission's authority to approve retroactive rate making in an adjustment mechanism, almost identical to the Revised GCA tariff here, is more limited than the Colorado PUC's authority. In Vermont, the commission's power extends only as far as its statutory authority; in Colorado, the Commission enjoys a very wide latitude of discretion, unless limited by statute or constitutional provision. PSCO apparently overlooks the fact that it is the ex post facto provision of the Colorado Constitution, Article II, Section 11, that is being argued by Plaintiffs-Appellants to restrict the Commission's rate making activities. The Vermont court's disposition of the "true-up" or "over/under recovery" provision in utility adjustment clauses remains, therefore, highly relevant.

Finally, the Commission in its Answer Brief now contends that:

> (T)he resulting GCA charge which appears on a customer's bill is a charge for energy used after the new GCA tariff is permitted to become effective by Commission order.

This statement is not accurate. The resulting GCA charge is a charge assessed on not "for" energy used after the new GCA tariff becomes effective. There is no dispute with the Commission's express finding in the administrative proceeding below that the over/under recovery increment in the resulting GCA charge "is not intended to predict gas prices in the future", but rather to allow additional "collection or credit" for energy used prior to the GCA tariff becoming effective. And, it is this feature which makes the Revised GCA unlawful.

C. THE COMMISSION UNLAWFULLY DELEGATED ITS RATE MAKING AUTHORITY BY ALLOWING PSCO TO DETERMINE "APPROPRIATE" RATE ADJUSTMENTS IN ANY ONE MONTH WITHOUT MEANINGFUL TARIFF STANDARDS OR PRIOR DISCLOSURE OF ESSENTIAL INFORMATION TO THE COMMISSION.

The Commission asserts in its Answer Brief that the language of the GCA Revisions allowing "any appropriate adjustments" does not constitute a grant of unfettered discretion to PSCO. Specifically, the Commission points to language in the tariff that restricts adjustments to "the actual cost the Company pays its suppliers for natural gas".

It is obvious in the Company's mind, however, that the restriction to actual cost of gas is not quite the definitive standard suggested by the Commission. In PSCO's Answer Brief the following discussion is found:

> Because the "quoted" cost of gas may not be appropriate for regulatory purposes (it may be too high or too low), the "any appropriate adjustments" provision allows flexibility in adjusting said quoted price. Thus, if gas is purchased during the summer for storage purposes to be drawn down the following winter, the "quoted" cost of gas is reduced accordingly so that rate payers do not pay for such gas until it is used.
> (at page 27)

If the Company's "actual cost of gas" standard is so loose as to encompass the sort of permutations quoted above, than there is no real standard against which Company "adjustments" can be measured for fidelity to Commission authority.

PSCO also protests that Complainants' Opening Brief is replete with comments about the inadequacy of the data provided to the Commission concerning "appropriate adjustments"prior to their summary approval by the PUC. According to the Company's Answer Brief these comments about inadequate information are wholly unsupported in the record and amount to nothing more than mere allegations or postulations by CEAO and Caldwell.

To evaluate this criticism by the Company, the Court is properly referred to an example of the actual applications submitted by the Company, including all supporting exhibits, and which were summarily approved by the Commission. An illustrative application appears in full in the record before the Commission below and has been Folio indexed for appeal as 960. In paragraph 5 (Folio 960) of that Application No. 32140, dated September 12, 1979, the Company makes reference to an adjustment for "a major increase in rates of CIG (Colorado Interstate Gas) that will occur on October 1, 1979". Nowhere else in this Application (requested to become effective September 24, 1979) nor in its accompanying exhibits is the magnitude of this "major" change revealed.

When confronted with the omission of such essential information to the rate making function, the Company's Manager of Rates and Tariffs, James Ranniger, admitted that such information was not provided in the monthly Applications, but that it was available for the quarterly audits by the Staff, done after tariff approval and

rate collections have occurred. Tr., Aug. 18, 1980, p. 96, line 25-p. 102, line 22.

So long as there are no definite standards nor essential information required to be filed with the Commission prior to rate collection, determination of the GCA level in any one month has been for all practical purposes delegated to the Company. Under Colorado law, this is an unlawful practice. Whether now corrected or not, the rates collected previously under such unlawful tariffs are still invalid and subject to customer refund.

IV. CONCLUSION

Wherefore, the Court should grant the relief requested by CEAO and Caldwell in their Opening Brief in this appellate proceeding.

Respectfully submitted,

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June 14, 1984

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Reply Brief of Plaintiffs-Appellants has been duly served by placing same in First Class United States Mail, postage prepaid on this 14th day of June, 1984 and addressed to the following:

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