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FILED IN THE
SUPREME COURT
OF THE STATE OF COLORADO

MAR 11 1987

Mac V. Danford, Clerk

COLORADO SUPREME COURT

Case No. 86 SA 347

REPLY BRIEF OF THE COLORADO MUNICIPAL LEAGUE

Appeal from the District court, City and County of Denver
Case No. 85 CV 13192

COLORADO MUNICIPAL LEAGUE,

Petitioner-Appellant,

v.

MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY; THE PUBLIC
UTILITIES COMMISSION OF THE STATE OF COLORADO; COMMISSIONERS
EDYTHE S. MILLER, ANDRA SCHMIDT AND RONALD D. LEHR,

Respondents-appellees.

ON APPEAL FROM THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY
OF DENVER NO. 85-CV-13192

THE HONORABLE ROBERT P. FULLERTON, DISTRICT COURT JUDGE

GORSUCH, KIRGIS, CAMPBELL,
WALKER AND GROVER

By: 

Leonard M. Campbell, #3085
1401 - 17th Street, Suite 1100
P.O. Box 17180 TA
Denver, Colorado 80217
303/534-1200

Date Due: March 9, 1987

Date Submitted: March 9, 1987

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COLORADO SUPREME COURT

Case No. 86 SA 247

REPLY BRIEF OF THE COLORADO MUNICIPAL LEAGUE

Appeal from the District court, City and County of Denver
Case No. 85 CV 13192

COLORADO MUNICIPAL LEAGUE,

Petitioner-Appellant,

v.

MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY; THE PUBLIC
UTILITIES COMMISSION OF THE STATE OF COLORADO; COMMISSIONERS
EDYTHE S. MILLER, ANDRA SCHMIDT AND RONALD D. LEHR,

Respondents-Appellees.

The Colorado Municipal League ("League"), through its Special Counsel, respectfully submits this Reply Brief in the captioned matter. Succinctly, the arguments offered by the Mountain States Telephone and Telegraph Company ("Mountain Bell") and the Public Utilities Commission ("Commission") are not persuasive and are not responsive to the primary issues. This Court should reverse the action of the Commission that was affirmed by the District Court. The Trial Court apparently misconstrued the applicable law as requiring it to give great deference to the Commission rather than recognizing that the Commission's error was an error of law for which there is neither a presumption of validity nor deference relevant to fact-finding expertise.

I. FACTS

The relevant facts are set forth in the Statement of the Case in the League's Opening Brief. No supplement is required herein.

II. SUMMARY OF ARGUMENT

- A. The Record in this Matter Does Not Support the Decision of the Commission and Requires Reversal of the District Court Order of Affirmance.
- B. The Record Discloses a Predisposition of the Commission for Self Vindication.

III. ARGUMENT

- A. The Record in this Matter Does Not Support the Decision of the Commission and Requires Reversal of the District Court.

The responses filed by Mountain Bell and the Commission in this matter contain lengthening citations to authorities setting forth numerous principles which guide courts during judicial review of factual issues in Commission decisions. However, the two controlling principles central to the determination of this matter: (1) that the Commission decision must be supported by the record; and (2) the failure of the Commission in this case to follow this Court's original decision of remand constitute errors of law.

The acts of the Commission evaluated under this record require reversal by this Court. The scope of judicial review of Commission decisions is defined by C.R.S. § 40-6-115(3) which states, in part, that:

The review shall not extend further than to determine whether the Commission has regularly pursued its authority, including a determination of whether the decision under review violates any right of the petitioner under the Constitutions of the United States or the State of Colorado, and whether the decision of the Commission is just and reasonable and whether its conclusions are in accordance with the evidence.

In prior judicial review proceedings, this Court has continually held that the evidence in the record must support the findings of fact reached by the Commission. Home Builders Assoc. of Metropolitan Denver v. Public Util. Comm'n, 720 P.2d 552 (Colo. 1986); Colorado Transportation Co. v. Public Util. Comm'n, 141 Colo. 203, 347 P.2d 505 (1958); Public Util. Comm'n v. City of Loveland, 87 Colo. 556, 289 P. 1090 (1930). Where the findings of the Commission are not supported by substantial evidence, the Court must set aside the Commission decision. Home Builders Assoc. v. Public Util. Comm'n, supra, 720 P.2d at 560; Morey v. Public Util. Comm'n, 629 P.2d 1061 (Colo. 1981); City of Montrose v. Public Util. Comm'n, 629 P.2d 619 (Colo. 1981). The measure of substantial evidence which must be contained within the record is "more than merely 'some evidence in some particulars.'" Home Builders Assoc. v. Public Util. Comm'n, supra, 720 P.2d at 562 (emphasis in original). This evidence must be contained within the record as certified to the District Court for, although the Commission may take notice of other evidence in its files or gathered through its own investigation,

such evidence must be before the court upon review or the Commission's decision must fail. Home Builders Assoc. v. Public Util. Comm'n, supra, 720 P.2d at 562. In this case the record on remand, which was in the original record that caused this Court to reverse the Commission neither supports the Commission's original annualization treatment, nor the Commission's action on remand. Nothing could be more clear from the record, or reading of Mr. Cavaliere's advice to the Commission, that there was no evidence "acceptable to the Supreme court" in this record to support the Commission's action on remand.

In its Answer Brief, counsel for the Commission provides a litany of hornbook regulatory guidelines and lists of case decisions, all of which apply to the original procedure before this Court. Justice Lohr in his original opinion written for the Court applied all these rules, including deference to the Commission and reversed the Commission. On the Commission's error of law -- failure to follow the remand decision -- no further deference or presumption is available to the Commission and none should be created.

In its Answer Brief, Mountain Bell concedes that the Company, in its original argument before this Court, misperceived the issue then before this Court. It makes a similar misperception now -- failure to recognize that it was an error of law of the Commission in not following the remand decision. Mountain Bell engages in a lengthy hypothetical dissertation as

to the various means by which annualizations may occur. In reversing and remanding, this Court determined that the Commission had acted arbitrarily by annualizing wage expenses and failed to offset the result of increased labor productivity. This Court found that there was an abuse of discretion.

The Commission was on notice that under the remand order it must make explicit findings of fact, supported by the record, justifying its annualization of only wage expense components of the test year or set aside its partial annualization program that allowed a wage adjustment as an artificial increase in operating expense without offsetting for increased labor productivity. Relative to this mandate, the analysis of differing modes of annualization undertaken by Mountain Bell in its Response Brief are not persuasive based on this record and are intended only to reposition the Company's argument. The assumptions made by the Company as a hypothetical example neither change the record, nor remedy the Commission's error.

Faced with its listed and limited choices, the Commission reissued its original decision, nunc pro tunc, thereafter seeking in its order justification by eleven illusory "findings of fact." The refusal of the Commission on remand to remove the artificial wage expenses it had allowed the Company; or to annualize the offsetting effect of increased labor productivity as an annualized revenue-related test year component, flaunted this Court's determination that the

Commission's actions in its original order were not justified by the evidence before the Commission.

The written statements by Deputy Attorney General Cavaliere are particularly important and persuasive in confirming the original error of the Commission in its decision that was reversed by the Court and demonstrate the Commission's obsession in the remand proceeding to vindicate the Commission's original order. Mr. Cavaliere is uniquely familiar with the record developed in this case and forthrightly informed the Commission that the record contained no evidence acceptable to the Court to support an annualization of wage adjustment finding as ultimately adopted by the Commission. Mr. Cavaliere, who tried this case before the Commission and this Court, was inevitably driven to this conclusion under the Supreme Court's decision that there was no evidence acceptable to the Court to support what the Commission originally ordered. It follows logically that there is no new, or original, evidence to support the Commission's latest error.

A review of the decision and Mr. Cavaliere's statements vindicates this Court's original finding of an abuse of discretion by the Commission. It is interesting to note that not only did Mr. Cavaliere file his statement before the Commission, counsel for the the Company now confesses in the appellate brief in this case that the Company misperceived the primary issue in the original case. If only these statements of counsel for the

Company and the Commission had been made in the original oral argument, the case could then have been completely disposed of by this Court without requiring the years of delay and improper collection by the Company of excess revenues from the ratepayers.

Consistent with its initial 1980 decision, the Commission continues to this date to rely upon statements made by Mountain Bell witness Monte Schriver. The weakness of this continued erroneous reliance is evident from reading this Court's analysis in the original case. This Court unequivocally characterized Mr. Schriver's statements as "an estimation of the legal effect of our holding in Mountain States Tel. & Tel. Co. v. PUC, 182 Colo. 269, 513 P.2d 721 (1973), that productivity gains must be offset against out-of-period wage increases, [rather than] a statement of fact or expert opinion." Colorado Municipal League v. Public Util. Comm'n, 687 P.2d 416, 425-26 (Colo. 1984). Nevertheless, the Commission insists on its orders on the rationale of Monte Schriver as though it constitutes factual evidence. Moreover, the Commission attempts to bolster its untenable reliance upon an "estimate of legal effect" as a finding of fact by creating alleged new findings -- findings which the District Court charitably characterized as "skimpy," but which more cogently should be characterized as, and are, insufficient.

Upon analysis, the Commission's "findings of fact" on remand are nothing more than rationalizations and references to

examples of treatment accorded to other regulatory issues, not now the subject of appeal in this case, some of which are not even within the original record. The treatment of other issues not in this appeal is irrelevant, as is the treatment accorded annualization in other dockets two years after the original record in this case. See League Opening Brief at 10-12.

In order to annualize wage expenses in this docket the Commission must have before it a record which justifies such annualization and findings of fact which are based on such evidence. The starkest criticism which can be made of the instant decision is in its extensive quote from a proceeding two years later than the original record in this case. The Commission mistakenly relies upon this later record and decision for vindication (Decision No. C85-1080 at 5-7, Vol. XI, Folio 151-157). Clearly, review of the record in the current decision contains no such improper justification.

Only in paragraph 6 in the remand decision (Vol. XI, Folio 151-157) does the Commission attempt a statement akin to the required finding of fact related to this record. Without any additional explanation, the Commission assumes that all increased labor productivity has been reflected in collected revenues, thus alleging there has been a regulatory matching of the test year revenues with annualized wage expenses. As Mr. Cavaliere states, the record in this case simply does not support this finding.

This conclusion of the Commission appears wholly a result of the Commission's transference of its findings in another docket from that issue and evidence then before it in the prior docket. Such action is in total derogation of the original record upon which the Commission must make its decision subject to this judicial review. In the circumstances, the District Court affirmance of the Commission order must be reversed.

This matter must be again remanded to the Commission or these issues must be decided by this Court in this appeal.

B. Predisposition of the Commission for Self-vindication

Upon remand, this matter was presented to a Commission which contained only one Commissioner who presided at the original hearing. By the Commission's own admission, the issues presented in Docket No. 1400 involved extended and complex litigation. It is only natural that the new Commission members would defer to the one Commissioner, and those individuals on Staff, who were involved in the initial litigation. That this deference occurred is clear from a reading of the decision at issue and the reasonable inferences following the statements contained in the Robin Mitchum affidavit. (V.I., pages 51-52). However natural was this inclination of the Commission, the material facts in the Robin Mitchum affidavit were never contradicted by counter-affiant, and constitute error if these Commissioners based their decision on extra-record information as indicated by the affidavit. The League should have been allowed

to take a deposition to prove conclusively the matters so described in the affidavits.

On remand the Commission is bound to consider only the record as it was previously established, Caldwell v. Public Util. Comm'n, 200 Colo. 134, 613 P.2d 328 (1980); Haney v. Public Util. Comm'n, 194 Colo. 481, 574 P.2d 863 (1978).

Consequently, it is important under these circumstances for the parties, and this Court, to be able to determine whether the Commission so limited itself. The League has supported -- through affidavit -- that certain of the Commissioners indicated that they may have considered extra-record material in reaching this decision. Peoples Natural Gas Co. v. Public Util. Comm'n, 626 P.2d 159 (Colo. 1981) stands for the proposition that under normal circumstances discovery as to the Commission's extra-record considerations would normally not be allowed. This rule, however, is not controlling if there has been illegal or inequitable conduct. The affidavits provided in this case clearly infer, if not directly describe, the presence of impermissible considerations under the doctrines set forth in Caldwell and Haney. It was error for the District Court to refuse to allow the deposition of Chairman Lehr. This error requires reversal where, as here, it impedes the ability of the District Court, and this Court, to fulfill adequately the responsibilities of proper judicial review.

IV. CONCLUSION

For the reasons stated herein, and in its Opening Brief, the League again respectfully requests this Court to reverse and remand this proceeding to the Commission with specific instructions to refund that amount allowed the Company as annualized wage adjustments, together with excess earnings (\$506,000 annually) of the Company, or in the interest of expediting justice delayed for seven years, this Court should issue an order directing that a refund plan for these amounts should be forthwith instituted by the Commission.

Respectfully submitted this 9th day of March, 1987.

GORSUCH, KIRGIS, CAMPBELL,
WALKER AND GROVER

By: 

Leonard M. Campbell, #3085
1401 - 17th Street, Suite 1100
P.O. Box 17180 TA
Denver, Colorado 80217
303/534-1200

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing REPLY BRIEF OF THE COLORADO MUNICIPAL LEAGUE was hand-delivered on this 9th day of March, 1987, to:

John Archibold, Esq.
1585 Logan Street
Denver, Colorado 80203

Coleman M. Connolly, Esq.
1801 California Street, No. 5100
Denver, Colorado 80202

A handwritten signature in cursive script, reading "Judith R. Grace", with a horizontal line drawn through the middle of the signature.