1978

Common Cause of Utah et al v. Utah Public Service Commission et al : Reply Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

COMMON CAUSE, a District of Columbia, non-profit Corporation and MARJORIE J. Thomas, an individual,

Plaintiffs and Respondents,

vs.

UTAH PUBLIC SERVICE COMMISSION, [illegible] MILLY O. BERNARD, OLOF E. [illegible] KENNETH RIGTRUP, in their capacities as Commissioners of the PUBLIC SERVICE COMMISSION OF UTAH,

Defendants and Appellants,

MOUNTAIN FUEL SUPPLY COMPANY,

Defendant-Intervenor and Appellant.

REPLY BRIEF OF

MOUNTAIN FUEL SU[illegible]

Appeal from Declaratory Judgment [illegible] in and for Salt Lake [illegible] The Honorable Peter F. Leary

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Plaintiffs and Respondents,	:	
vs.	:	Appeal No. 15685
UTAH PUBLIC SERVICE COMMISSION and MILLY O. BERNARD, OLOF E. ZUNDEL and KENNETH RIGTRUP, in their capacities as COMMISSIONERS of the PUBLIC SERVICE COMMISSION OF UTAH,	:	
Defendants and Appellants,	:	
MOUNTAIN FUEL SUPPLY COMPANY,	:	
Defendant-Intervenor and Appellant.	:	

REPLY BRIEF OF APPELLANT

MOUNTAIN FUEL SUPPLY COMPANY

ISSUES RAISED BY THE COMMON CAUSE BRIEF

This Reply will be directed to those issues as to which new matter, citation of authority or argument has been raised by COMMON CAUSE in its Brief for the first time. The Reply will focus on the following issues:

1. The attempt of COMMON CAUSE to raise for the first time in this appeal the Administrative Rule Making Act as a basis for the jurisdiction of the District Court.

2. The claim of COMMON CAUSE that the Administrative Rule Making Act excuses it from pursuing its administrative remedies.

3. The claim that Utah case law prohibits the COMMISSION from acting in a quasi-judicial, adjudicatory manner.

4. The contention that the protection of due process does not apply to the COMMISSION.

5. The argument that MOUNTAIN FUEL's construction of the Open and Public Meetings Act requires this Court to engage in "judicial law making".

ARGUMENT

POINT I

THE ADMINISTRATIVE RULE MAKING ACT DOES NOT PROVIDE A BASIS FOR JURISDICTION OF THE DISTRICT COURT

With total disregard for the long standing rule of this Court that issues which were not raised before the trial court cannot be presented for the first time on appeal, [1] COMMON CAUSE suggests in its Brief that the jurisdiction of the District Court was predicated upon the provisions of the Administrative Rule Making Act, found in Title 63, Chapter 46 of the Utah Code. Such argument fails as a result of a fatal procedural flaw. The Administrative Rule Making Act was at no time cited to the Court

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1/ E.g., DeBry and Hilton Travel Serv., Inc. v. International Airways, Inc., (Utah No. 15219 Aug. 10, 1978); American Oil Co. v. The General Contracting Corp., 17 Utah 2d. 330, 411 P.2d 486 (1966); North Salt Lake v. Saint Joseph Water & Irr. Co., 118 Utah 600, 223 P.2d 577 (1950).

below as the jurisdictional basis for the claim, COMMON CAUSE having relied exclusively on the provisions of the Utah Declaratory Judgment Act.[2/] That change in theory cannot be raised now for the first time.

Even the long standing prohibition against raising an issue for the first time on appeal aside, however, the Administrative Rule Making Act would not have provided COMMON CAUSE with a jurisdictional basis had it been raised in the Court below. It is apparent from even the most casual reading of the Act that it was intended to prescribe the procedures to be utilized by public agencies in exercising their formal rule making powers. For example, notice of intent to adopt a rule must be given and all interested parties must be provided an opportunity to submit their views.[3/] Copies of the rules so adopted are to be filed with the State Archivist, who must then compile, index and publish them.[4/] Interested persons may petition the public agency for amendment or repeal of a rule,[5/] and the validity or applicability of such a rule may be challenged by declaratory judgment action before a District Court.[6/] The COMMISSION determination of which

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2/ Section 78-33-1 et. seq., Utah Code Ann. (Repl. vol. 1977)

3/ Sections 63-46-4 & 5 Utah Code Ann. (Repl. vol. 1978)

4/ Sections 63-46-4, 6 & 7 Utah Code Ann.. (Repl. vol. 1978)

5/ Sections 63-46-8 Utah Code Ann. (Repl. vol. 1978)

6/ Section 63-46-9 Utah Code Ann. (Repl. vol. 1978)

the Appellants now complain, on the other hand, was not a rule adopted under this formal procedure but had its genesis in quite a different environment.

The application of the 1977 amendments to the Open and Public Meeting Act to the deliberative sessions of the COMMISSION following an open adjudicatory hearing first arose as a procedural issue during the pendency of several general rate cases in the summer of 1977 (including the MOUNTAIN FUEL General Rate case, P.S.C. Docket No. 77-057-03). The COMMISSION requested and obtained on August 15, 1977 a written legal opinion from the Attorney General of the State of Utah advising it that open deliberative sessions in the pending matters were not required by the Act. (R. 255-60). When the issue was again confronted in the MOUNTAIN FUEL-Wexpro Litigation, P.S.C. Docket No. 76-057-014, the Attorney General reiterated his opinion orally before the COMMISSION on September 12, 1977. (R. 69). In compliance with the position of the Attorney General, the COMMISSION conducted its deliberative sessions in those proceedings in the historical fashion.

When viewed against this procedural backdrop, it is clear that the decision of the COMMISSION to continue its past practice of holding its deliberative sessions in private after a full adversarial hearing was not the making of a "rule" within the meaning of the Administrative Rule Making Act. To the contrary, it was nothing

more than an intermediate procedural ruling made during the course of an adjudicatory hearing. It is a long established principal of appellate review that such intermediate and interlocutory rulings and orders entered by a lower tribunal are not to be attacked piecemeal, but are rather merged into and become part of the final decision from which the appeal is then taken. 5 Am Jur 2d, Appeal and Error, §856; Attorney General v. Pomeroy, 93 Utah 426, 73 P.2d 1277 (1937). There is nothing to suggest that these fundamental principles of orderly procedure are any less applicable simply because the adversarial and adjudicatory hearing was held before an administrative agency rather than a Court.

The Administrative Rule Making Act itself, recognizes that such determinations do not come within the definition of a rule. In §63-46-3 (4) Utah Code Ann. (Repl. vol. 1978) "declaratory rulings" are expressly excluded from the Act. Section 63-46-10 defines declaratory rulings as agency determinations of the "validity or applicability of any statutory provision" to their proceedings. Such determination has "the same status as agency decisions or orders in cases disposed of by the agency after hearing" and would not, therefor, be subject to an action for declaratory judgment but would be reviewable, in the case of COMMISSION rulings, only in accordance with the provisions of the Public Utilities Code.

The exclusion of "declaratory rulings" from the operation of the Administrative Rule Making Act is entirely consistent with prior holdings of this Court narrowing the scope of judicial appellate review of administrative interpretation of statutes affecting the agencies procedures. Colman v. Utah State Land Board, 17 Utah 2d 14, 403 P.2d 781, 784 (1965).

On the other hand, that policy of limited review would be entirely frustrated if the interpretation of the Act advanced by COMMON CAUSE were adopted. No longer would the decision of the COMMISSION be prima facie correct with the scope of review limited to a determination of whether the decision of the COMMISSION was in conformity "with the general objectives [of] the agency" and was founded upon a "rational basis". Rather, under the system of review advanced by COMMON CAUSE, the attempt of the District Court to second guess the wisdom of the COMMISSION would be on appeal, and the decision of the lower court and not the COMMISISON would be entitled to the presumption of validity. Such a result is out of harmony with the long standing public policy of this State and was clearly not intended.

It is apparent that the arguments of COMMON CAUSE simply will not withstand critical analysis. At pages 10 and 11 of its Brief, COMMON CAUSE takes the position that

Section 54-7-16 Utah Code Ann. (Repl. vol. 1974), which grants the exclusive jurisdiction to review orders and decisions of the COMMISSION to this Court, is inconsistent with the later provisions of the Administrative Rule Making Act and that the exclusive jurisdiction of this Court must therefor yield to the jurisdiction of the District Court to render a declaratory judgment as provided for in the latter statute.[7/] This artifically created conflict is merely illusory. Decisions and orders of the COMMISSION are not covered by the Administrative Rule Making Act. A declaratory ruling which is sought during the course of an administrative hearing is to be treated as a decision or order and is, therefore, appealable only to this Court. Where is the inconsistency or conflict? The question provides its own answer.

POINT II

THE ADMINISTRATIVE RULE MAKING ACT DID NOT EXCUSE APPELLANTS FROM THE REQUIREMENT OF PURSUING THEIR ADMINISTRATIVE REMEDIES

As discussed in Point I hereinabove, the Administrative Rule Making Act has no application to the determination of the COMMISSION challenged herein. As a result, the provisions of §63-46-9 Utah Code Ann. (Repl. vol. 1978) excusing an interested party from seeking a ruling from the agency before filing a declaratory judgment

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7/ Section 63-46-2 Utah Code Ann. (Repl. vol. 1978) expressly provides that "all other provisions of law, to the extent they are inconsistent or in conflict with this Act are repealed and superceded by this Act."

action with the District Court, have no application.

Since the COMMISSION determination on the application of the Open and Public Meetings Act must, in fact and law, be viewed as a decision or order, it is the administrative remedy provision of the Public Utility Code which is controlling. The policy enunciated in said Code regarding the judicial review of decisions and orders of the COMMISSION is quite clear. There, the exhaustion of administrative remedy through a petition for rehearing is an absolute prerequisite to review by this Court. §54-7-15 Utah Code Ann. (Repl. vol. 1974).

POINT III

THE CASE LAW CITED BY COMMON CAUSE DOES NOT SUPPORT ITS POSITION THAT THE COMMISSION MAY NOT ACT QUASI-JUDICIALLY

COMMON CAUSE spends a good part of its argument creating a straw man over which there is no dispute while missing the entire point of this appeal. With great elan COMMON CAUSE parades before this Court decisional precedent ranging from 1918 to 1941 in support of the unremarkable declaration that the COMMISSION, as a creation of the legislature, may exercise only such powers as the legislature has delegated to it. MOUNTAIN FUEL certainly has no quarrel with that pronouncement. Neither does MOUNTAIN FUEL take exception with the maxim enunciated by these cases that as a matter of the Constitutional separation of powers, the legislature cannot delegate to the COMMISSION

those powers which belong to the judiciary. These cases do not, however, bridge the final chasm which COMMON CAUSE attempts to cross.

Contrary to the inference which COMMON CAUSE tries to draw, this Court has never declared that in exercising legislatively granted powers the COMMISSION may not proceed quasi-judicially. COMMON CAUSE misses this critical distinction. In summarizing the general case law, one commentator has noted that the holding of a quasi-judicial proceeding does not make the agency action "judicial in the restrictive constitutional sense" nor does it constitute an invasion of the "judicial powers". 1 Am Jur. 2d, Administrative Law, §172. This does not prevent, however, said proceeding from being characterized as judicial or quasi-judicial for other purposes. The Am Jur citation goes on to provide:

> "The presence or absence of the power to hear and determine in the sense of a power and duty to receive evidence and to exercise judgment and discretion in reaching a decision on such evidence, especially in connection with the presence or absence of adverse parties, compulsory attendance and examination of witnesses, etc., is an important element in determining whether a particular act is judicial or quasi-judicial for procedural and other purposes. . . . A quasi-judicial proceeding is complete with notice, hearing, findings, order and other requisites such as the right to appeal. Thus, a function or proceeding may be held judicial in nature or quasi-judicial where a hearing is required by the constitution or a statute, the requirement of a hearing having reference to the tradition of judicial proceedings." [Emphasis added.]

Even our legislature, which it must be presumed was aware of the prior pronouncements of this Court that the Public Service Commission could not exercise the powers of the judiciary in the constitutional sense, has recognized that in exercising the functions delegated to it by the legislature, the COMMISSION acts in a quasi-judicial manner.[8/] In Section 13-1-1.3 Utah Code Ann. (Repl. vol. 1973), the legislature declared that the COMMISSION was not to be subject to the jurisdiction of the executive director of the Department of Business Regulation when exercising its "quasi-judicial or rule making functions" and that the COMMISSION was to exercise its "quasi-judicial and rule making powers" in conformance with the provisions of the Public Utilities Code.

The straw man of COMMON CAUSE simply misses the point. The issue here is not whether the legislatively created COMMISSION can exercise only those powers constitutionally delegated to it by the legislature, but rather, whether the Open and Public Meetings Act applies to the COMMISSION when it sits as a quasi-judicial body

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8/ It is a well settled principal of statutory construction that in the reenactment, modification or amendment of statutory provisions it is presumed that the legislature has in mind and is aware of prior judicial construction of those statutory provisions. Anderson v. Cook, 102 Utah 265, 130 P.2d 278 (1912); Hirath v. Pierce, 506 P.2d 548 (Okla. 1973). Therefore, in recognizing that the Commission exercises certain "quasi-judicial powers" the legislature was not referring to the delegation to the Commission of powers reserved to the judicial branch of the government in violation of the doctrine of separation of powers, but must have been referring to the judicial like procedures engaged in by the Commission in the exercise of its legislatively delegated powers.

in the conduct of an adjudicatory and adversarial hearing. As set forth in the opening Brief of MOUNTAIN FUEL, answer to that query is clear. The Act has no application.

POINT IV

COMMON CAUSE HAS MISAPPREHENDED AND MISAPPLIED THE PRINCIPLES OF DUE PROCESS TO ADMINISTRATIVE HEARINGS

COMMON CAUSE argues at pages 24 and 25 of its Brief that the due process arguments of MOUNTAIN FUEL exalt form over substance and ignore the fact that the ultimate object of the administrative proceeding is a legislative act. It is COMMON CAUSE and not MOUNTAIN FUEL, however, who disregards the real substance of COMMISSION proceedure. Rate making hearings before the COMMISSION are conducted in a quasi-judicial setting and the strictures of due process are applicable. That issue was finally laid to rest in Utility Consumer Action Group v. Public Service Commission, (No. 15049, Aug. 7, 1978) where this Court held that denial by the COMMISSION of the right to present evidence during a Utah Power & Light rate making proceeding was an abridgement of due process.

Virtually acknowledging that it may have overstated its case, COMMON CAUSE, goes on to contend that even if due process is applicable to an administrative rate making proceeding before the COMMISSION, such constitutional mandate does not require closed door deliberative

sessions by the trier of fact. As support for its position, COMMON CAUSE cites Christiansen v. Harris, 109 Utah 1, 163 P.2d 314 (1945) as the sine qua non on the issue of due process. This case, it is argued, delineates each and every element of due process and that unless specifically mentioned therein, a procedural defect cannot rise to the level of the Constitutional proscription.

It is clear upon closer examination, however, that the Christiansen case was not intended nor can it be construed as a catalog of each and every element of procedural due process. This Court has found a number of due process elements which find no place in the Christiansen list. For example, in State v. Musser, 110 Utah 534, 175 P.2d 724 (1946), vacated on other grounds, 333 U.S. 95 (1948), it was held that the failure to render a judgment on evidence which is competent, relevant and material, is a denial of due process. Similarly, in Alirers vs Turner, 22 Utah 2d. 118, 449 P.2d 241 (1969) the failure of the Defendant to obtain effective representation of counsel in a criminal case was found to be a denial of due process. Again, no mention of that requirement can be found in the four corners of the Christiansen opinion. Finally, in State v. Stewart, 544 P.2d 477 (Utah 1975) this Court concluded that the deliberate suppressing of evidence by a prosecutor violated due process. Again, the Christiansen case is silent on this principle.

Contrary to the attempt of COMMON CAUSE to fix a set shopping list of the elements of due process, it is apparent that this Constitutional concept must remain flexible in its application and reach. The basic element of due process is fairness. That concept simply cannot be meted out through the application of some artificially fixed standard. As noted in Hannah v. Larche, 363 U.S. 420, 440 (1960):

> "Due process is an illusive concept. It's exact boundaries are undefinable, and its content varies according to specific factual contexts." [Emphasis added.]

As set forth in the opening Brief of MOUNTAIN FUEL, the right to a fair and impartial tribunal is foundational to the principles of due process. The case law there cited by MOUNTAIN FUEL demonstrates that to require the trier of fact to conduct its deliberations in the open, subject to the external pressures which would necessarily follow, so offends the basic requirement of a fair and impartial tribunal as to be prohibited by the Constitutional due process mandate.

As a last gasp COMMON CAUSE attempts to turn the argument around by contending that due process does not prohibit but rather fosters open deliberations. In so arguing, COMMON CAUSE commits the fundamental error of confusing the right to an open and fair hearing with the right of the trier of fact to conduct its deliberations in

chambers after such an open hearing. If the demand of due process were to the contrary, then why not demand that the parties be admitted to the jury room to listen to and offer comment and instruction upon the jury's consideration of the evidence; or why not subject our trial judges to the requirement that they delineate in detail their thought processes and deliberations in reaching their Findings of Fact in a non-jury case? Such an argument must crumble under the weight of its own absurdity.

Finally, COMMON CAUSE attempts to avoid the impact of the prevailing case law by declaring that such decisions[9/] do not address the constitutional issue of due process in holding that the Sunshine Statutes enacted in those jurisdictions do not apply to private deliberations after a quasi-judicial public agency hearing simply ignores the facts. Each of those cases expressly adopts the dissent in the Canney decision[10/] so vigorously relied upon by COMMON CAUSE. Said dissent directly confronts the issue of due process, arguing that the application of an Open Meeting statute to such private deliberations would constitute a denial of due process and return us to "the

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9/ Jordan v. District of Columbia, 362 A.2d 114 (D.C. 1976); Bernstein v. District of Columbia Bd. of Zoning Adjustment, 376 A.2d 816 (D.C. 1977); DuPont Circle Citizens Assoc. v. District of Columbia Bd. of Zoning Adjustment, 364 A.2d 610 (D.C. 1976); Arizona Press Club v. Arizona Bd. of Tax Appeals, 113 Ariz. 545, 548 P.2d 697 (1976).

10/ Canney v. Bd. of Public Instruction of Alachua County, 278 So.2d 260 (Fla. 1973).

Roman arena for a thumbs-up or a thumbs-down result by the public clamor" (278 So.2d 264).

POINT V

CONTRARY TO THE ALLEGATION OF COMMON CAUSE MOUNTAIN FUEL HAS NOT ASKED THIS COURT TO ENGAGE IN JUDICIAL LAWMAKING

COMMON CAUSE argues that in urging this Court to recognize that the deliberative sessions of the COMMISSION following a quasi-judicial adjudicatory hearing are exempted from the Open and Public Meetings Act, MOUNTAIN FUEL is seeking the exercise of judicial lawmaking. The basis for the exemption of such deliberative sessions from the Act is set forth in detail in MOUNTAIN FUEL's opening Brief, and that portion of the argument will not be repeated herein. It is sufficient to note that the construction of the Act advanced by MOUNTAIN FUEL arises from and is consistent with the clear and unambiguous language of the statute and does not require the judicial lawmaking suggested by COMMON CAUSE.

Quite to the contrary, it is COMMON CAUSE which falls prey to its own argument. Its analysis of the Act is conducted in a vacuum without any reference to purpose or history. To read the COMMON CAUSE Brief is to reach the erroneous conclusion that the concept of open and public meetings first broke upon the Utah Legislative scene in 1977. Its argument simply ignores the fact that Utah had an Open and Public Meetings Act on its books for some 22

years prior to the convening of the 1977 legislature and that the Act upon which COMMON CAUSE now relies was nothing more than an amendment and modification to the already existing statute. COMMON CAUSE fails to even feign a response to the exposition of the legislative history, the administrative agency construction of the original Act and the intended impact of the 1977 Amendments as set forth in the opening Brief of MOUNTAIN FUEL. Such failure is understandable, however, since an examination of that legislative background strips COMMON CAUSE of its argument.

CONCLUSION

Declaratory rulings of the COMMISSION pertaining to the application of the Open and Public Meetings Act to COMMISSION proceedings is not a rule and the attempt of COMMON CAUSE to belatedly, for the first time on this appeal, pin its jurisdictional hopes upon the coat tails of the Administrative Rule Making Act will not work.

Even assuming arguendo that the trial court did have jurisdiction, the Brief of COMMON CAUSE falls far short of providing the foundational material so necessary to shore up the ill advised decision of the Court below. While the legislative delegation of authority to the COMMISSION did no violence to the doctrine of the separation of powers inasmuch as the COMMISSION did not assume the functions of

the judiciary, there is no question that in exercising its legislatively delegated powers, the COMMISSION acts quasi-judicially.

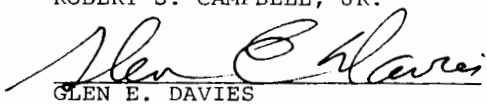
Moreover, it does not require judicial lawmaking to exclude the quasi-judicial deliberative sessions of the COMMISSION from the coverage of the Open and Public Meetings Act. To the contrary, the clear language of the Statute and an examination of its legislative history require nothing less.

Finally, the due process mandate of a fair and impartial tribunal is equally at home in the setting of a quasi-judicial administrative hearing as it is in the courtroom. In fact, there is little difference in the procedures employed or the safeguards applied. It is fundamental to both that the trier of fact be free from external pressure and influence and that the sanctity of private deliberations which promote the open and free exchange of ideas and the candid examination of the evidence be safeguarded whether the fact finding body be a public agency or a jury. These basic principles of fairness cannot be skirted by drawing artificial lines of demarcation between a legislatively created quasi-judicial body and a court. Neither the Constitution of this State nor of the United States make such a distinction in guarantying to their citizens the protection of their property by due process of law.

The sophistry of the COMMON CAUSE argument that the legislature may do as it wishes in establishing the procedures for the public agencies which it creates must not be permitted to blur this Court's focus on the fundamental issues of fairness and justice presented by this case.

Respectfully submitted,

ROBERT S. CAMPBELL, JR.



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