1980

Utah Department of Business Regulation, Division of Public Utilities v. Public Service Commission of Utah et al : Reply Brief on Rehearing

Utah Supreme Court

Robert S. Campbell, Jr.; Gregory B. Monson; R. G. Groussman; Attorneys for Respondents;
Bill Thomas Peters; Stephen R. Randle; Attorneys for Petitioner;

IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH DEPARTMENT OF BUSINESS REGULATION, DIVISION OF PUBLIC UTILITIES,	:	
Petitioner,	:	
vs.	:	
PUBLIC SERVICE COMMISSION OF UTAH; MILLY O. BERNARD, Chairman; OLOF E. ZUNDEL, Commissioner; and KENNETH RIGTRUP, Commissioner,	:	Appeal No. 16241
Respondents,	:	
MOUNTAIN FUEL SUPPLY COMPANY, a Utah corporation,	:	
Intervenor-Respondents.	:	

REPLY BRIEF ON REHEARING OF MOUNTAIN FUEL SUPPLY COMPANY TO BRIEF IN OPPOSITION OF DIVISION OF PUBLIC UTILITIES

ROBERT S. CAMPBELL, JR.

GREGORY B. MONSON
WATKISS & CAMPBELL
310 South Main, Suite 1200
Salt Lake City, Utah 84101

R. G. GROUSSMAN
180 East First South
Salt Lake City, Utah 84139

Attorneys for Mountain Fuel Supply Company

BILL THOMAS PETERS
220 South 200 East
Salt Lake City, Utah 84111
Attorney for Public Service Commission and Commissioners

STEPHEN R. RANDLE
Assistant Attorney General
State Capitol Building
Salt Lake City, Utah 84114
Attorney for Division of Public Utilities

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MOUNTAIN FUEL SUPPLY COMPANY TO BRIEF

IN OPPOSITION OF DIVISION OF PUBLIC UTILITIES

Mountain Fuel Supply Company (hereinafter Mountain Fuel) herewith files its Reply Brief incident to Rehearing, to the Brief in Opposition of the Division of Public Utilities (hereinafter sometimes Division) under date of September 8, 1980.

PRELIMINARY STATEMENT

In filing this Reply Brief, Mountain Fuel is aware that a reply in a case on rehearing is not the usual practice. But the Brief in Opposition to Rehearing of the Division of Public

Utilities in this matter is not in any sense usual. It contains testimonial remarks of Division counsel and new material which have never been raised or urged by any party at an earlier time.

Accordingly, this Reply Brief is mandated in order that this Court may not be deceived or misled. A reply is proper under the attendant facts.

POINT I

THE ANSWERING BRIEF OF THE DIVISION IS REPLETE WITH TESTIMONIAL STATEMENTS OF DIVISION COUNSEL.

The Division Brief in Opposition to the petitions for rehearing of Mountain Fuel and the Public Service Commission is a remarkable if not novel document. The Division counsel, Mr. Randle, proffers his personal testimony and experience throughout his Brief with respect to the practice and procedure before various federal and state regulatory commissions.[1/] This testimonial display is both improper and ironic --- improper for a lawyer to become a witness in a brief and then argue his own credibility to the Court[2/] --- ironic because counsel's testimony is based upon his own personal observation of the Utah Public Service Commission in his role as Commission staff counsel.

1/ Pages 2, 5, 6, 7, 12, 14, 15 and 16 of the Division's Brief in Opposition are examples of the extraordianry, gratuitous evidence offered by Mr. Randle in this Case.

2/ See Canons of Professional Responsibility of Utah State Bar DR 5-102.

Division counsel calls attention in footnotes 1 and 2 of his Brief to the appearance of the Commission on Rehearing and of the alleged impropriety of that appearance because of purported "influence" exerted by Mountain Fuel. As will be noted hereafter, the appearance of the Commission is completely proper at any phase in this Case, including Rehearing. As to the accusation of influence peddling, such is an attack upon the integrity and independence of the Commission to act on its own. It retained its own legal counsel and submitted its own position to this Court on Rehearing. Such was not altogether surprising, for the Commission had been patently and wrongfully abandoned by its own legal counsel who had opted to represent the Division staff on appeal rather than the Commission, itself.[3/]

The conduct of the Commission on Rehearing was of its own undertaking and not of Mountain Fuel. In light of the abandonment by staff counsel and the attack by that counsel on the Commission Order, it was neither improper nor surprising that the Commission would discuss with Mountain Fuel the issues raised by the Opinion of the Court under date of June 19, 1980.

The testimonial account and personal observation of the Division counsel in its Brief are not only procedurally improper, but are, in most respects, substantively inaccurate. Counsel's diatribe must be addressed in this Reply in order that this

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3/ The statute makes it mandatory for the Attorney General to attend the Supreme Court of Utah in behalf of the Public Service Commission. 67-5-1(1) U.C.A. 1953 (Repl. Vol. 7A)

Honorable Court is not deceived or misled on the issues squarely presented in the Mountain Fuel Petition for Rehearing.

POINT II

THE APPEARANCE OF THE PUBLIC SERVICE COMMISSION IS ENTIRELY PROPER AND AUTHORIZED ON AN APPEAL AND REHEARING OF ITS ORDER.

The Division, at page 2 of its Brief in Opposition, reaches the quite astonishing conclusion that the Commission's appearance in this Case on rehearing is contrary to law. After reciting the Commission statement in its Petition for Rehearing that it does not normally enter every appeal from its Orders, the Division Brief states that such Commission expression is "fully consistent with the Supreme Court's Opinion herein and is the law."

The Division position is patently wrong and wrong for the wrong reason. The Statute, 54-7-16 U.C.A. 1953 (Repl. Vol. 6A) under which an appeal to the Supreme Court is taken from a Commission Order, expressly states that the Commission shall have standing to appear and be heard before this Court:

> "* * * The Commission and each party to the action or proceeding before the Commission shall have the right to appear in the review proceedings."

The Commission's statement on page 2 of its rehearing Brief that it does not, itself, appear before the Supreme Court "under normal circumstances" is no doubt due to the fact that its staff counsel has, in the past, "normally appeared" on the appeal of a Commission Order and defended and represented the Commission position.

The Division counsel is quick to cite in his personal testimony on page 14 of the Brief in Opposition the proceedings of the Federal Energy Regulatory Commission (formerly Federal Power Commission or FPC and hereinafter "FERC"). It turns out that FERC regularly appears in federal courts and takes an active role, through its staff counsel, in appeals of FERC decisions. See for example, Federal Power Commission v. Louisiana Power & Light Co., 406 U.S. 621, 92 S.Ct. 1827, 32 L.Ed.2d 369, 375 (1972); Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333, 336 (1944); Blanco Oil Co. v. Federal Energy Regulatory Commission, 598 F.2d 152, 154 (D.C. Cir. 1979).

It is not too much to suggest that if the Utah Commission were to exercise its statutory right and appear in proceedings before this Court with regard to an appeal of its own Order, this Court would have a better foundation and base upon which to gauge the regulatory policy and procedure of the Commission. Such would have been unquestionably of significant aid to this Court on the main appeal in the Case at Bar.

POINT III.

CONTRARY TO THE DIVISION BRIEF, THE LITTLE HOOVER COMMISSION REPORT DOES NOT EXPRESS LEGISLATIVE INTENT.

The Division Brief relies upon and quotes extensively from the Report of the Commission on the organization of the Executive Branch of Government (January 15, 1966) in support of the

Division claim that the Utah Legislature, in the 1969 reorganization of the Department of Business Regulation, intended to transfer prosecutorial and investigatorial functions of the Commission to the Division of Public Utilities. See Division Brief in Opposition, pp. 9-11. The Division reliance is misplaced and its quotations flatly erroneous.

Contrary to the testimony of Mr. Randle and the Division Brief, the Little Hoover Commission Report of 1966 was neither a study nor the work of a legislative committee of this State and, therefore, does not express any "legislative intent". Rather, the Report was only a recommendation of a citizen task force. Much of it was rejected outright by the 1969 Legislature. In point of fact, several recommendations of the Little Hoover Report called for the replacement of the Utah Public Service Commission with a "Public Service Division", the latter to be solely an executive agency without power to hear and decide regulatory matters effecting public utilities.[4/] The Little Hoover Report further recommended that the Utah Commission, while temporarily in existence during a phase-out period, possess no rule-making authority.[5/] The stubborn fact is that the intent of the Little Hoover Report was to replace the Utah Commission with an executive agency and transfer its quasi-judicial jurisdiction to the very type of administrative court which this Court's Opinion of June 19, 1980 will create if that Opinion is not

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4/ Report of the Commission on the Organization of the Executive Branch of the Government (1966), pp. 212, 214, 265.

5/ Ibid. at p. 257.

reconsidered and modified in this Rehearing.

It is without contest that the 1969 Legislature, in the enactment of the Reorganization Act of the Department of Business Regulation, fundamentally disagreed with the major policy recommendations of the Little Hoover Report as they related to utility regulation. The proposed "Public Service Division" was never created and the quasi-judicial and rule-making authority of the Utah Commission was reaffirmed under 13-1-1.1 and 13-1-1.3 U.C.A. 1953 (Repl. Vol. 2A).

The fact that the Legislature acted precisely opposite to the Little Hoover recommendations is the strongest indication that it had a contrary intent with regard to the continuing viability of the Commission as an investigatory and prosecutorial body as well as a quasi-judicial and rule-making agency. The testimony of Division counsel and the position of the Division in its Brief in Opposition is patently flawed.

POINT IV

CONTRARY TO THE DIVISION BRIEF, OTHER REGULATORY COMMISSION STAFFS DO NOT APPEAL THEIR COMMISSIONS' ORDERS.

On page 14 of the Division Brief in Opposition, Mr. Randle testifies with regard to his "broad familiarity" with the regulatory practice and procedure of FERC. The apparent purpose of this testimony is to buttress the Division position herein that, even though it is admittedly staff to the Utah Commission, it has standing to appeal a Commission Order because of an

otherwise resulting conflict between prosecutorial and quasi-judicial functions.

Regardless of whether FERC maintains separate staffs for internal administrative functions, the whole point is that staff counsel of FERC has absolutely no authority to and has never undertaken an appeal to the Court of Appeals or otherwise from a final order of FERC.[6/] While staff counsel of FERC will often advocate a position before FERC and oppose before the agency a decision or recommendation of an administrative law judge, once FERC has decided the case by final order, the function of staff counsel as to that position is at an end. Thereafter, it is the responsibility of staff counsel for FERC to support the agency adjudication on appeal. For example, in Public Service Commission of West Virginia v. Federal Power Commission, 437 F.2d 1234 (4 Cir. 1971), the staff of the FPC supported the agency final order, a case in which it, at the administrative level, had proposed an opposite result. Mountain Gas Co., 42 F.P.C. 305 (1969), reh. den. 43 F.P.C. 317 (1970).

1. Reliance on the Missouri Case is Misplaced.

The Division Brief in Opposition further relies upon State ex rel Missouri Power & Light Co. v. Riley, 546 S.W. 2d 792 (Mo. Ct. App. 1977) for the proposition that staff and quasi-judicial functions should be divided and that the staff has standing to appeal its Commission's order. In Missouri Power

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6/ A review of the decisions of the FPC or of FERC and of the opinions issued by Circuit Court of Appeals reflect no instance in which staff counsel of FERC has attempted to appeal an order of the agency.

& Light, the Missouri Legislature had specifically created a separate agency to represent consumers, apart from the Missouri Utilities Commission, because it was recognized by the Missouri courts that the Commission staff and counsel could not challenge Commission decisions by way of an appeal. See 546 S.W. 2d at 794→ 5. Missouri Power & Light is authority for the position of Mountain Fuel on Rehearing, not the Division of Public Utilities.

2. Reliance Upon an Appearance Before the Commission in a Mountain Fuel Case is Fundamentally Misplaced.

The Division, at pages 16-17 of its Brief in Opposition, points to a position taken by staff counsel for the Utah Commission in P.S.C. v. Mountain Fuel Supply Company, P.S.C. Docket No. 2906 (1947) as evidence that staff has, in the past, taken positions of "vigorous advocacy". The whole trouble with the Division's argument in this regard, of course, is that the "vigorous advocacy" of staff counsel was before the Utah Commission, itself, and not before the Supreme Court of Utah in an appeal from a Commission Order. Mountain Fuel has no quarrel with the proposition that Commission staff does and should take contentious positions before the Commission during the course of an administrative rate hearing. But that misses the point of this contest before this Court on Rehearing. It is the standing to appeal an order of the Commission to this Court, not the standing to appear before the P.S.C. that is pivotal.

The fact that the Division is required to rely upon a proceeding before the Utah Commission vis-a-vis this Court in a statutory appeal from a Commission Order to make its argument, demonstrates the enormous fallacy of its position on Rehearing.

POINT V

THE DIVISION POSITION ON THE COMPOSITION OF THE SUPREME COURT IN THIS MATTER IS SUPERFICIAL AND INVALID.

The Division argues simplistically that because Justice Stewart was not disqualified before oral argument in the Case but chose to disqualify himself after oral argument, there was no constitutional defect in the Court composition. Such is a remarkable argument for the Attorney General of Utah to advance in any case. It is to say under such theory, that as long as there are five Justices at the time of oral argument of a given case, any Justice or two Justices may recuse himself or themselves thereafter without notice to the parties for whatever reason the Justice may have; so long as there are three Justices left to form a quorum, the Attorney General's argument is that there is a validly constituted court to render a decision.

The rationale of the Division is not only specious, it poses a clear and present danger to the judicial process. Under such arrangement, a Justice could recuse himself sua sponte after a matter has been submitted for determination because of the difficulty or delicacy of the appeal and leave the matter to the remaining Justices to the prejudice of the

judicial system. That is not at all to suggest that the recusal of Justice Stewart in the Case at Bar was in any way prompted by such motive. But it is to say that the constitutional mandate of Article VIII, Section 2 means what it plainly says -- that the Supreme Court "shall consist of five Justices" for the decision making process in the appellate review. Under the attendant facts, a quorum of the Court of sitting Justices will not do.

Mountain Fuel, and to that end all the parties, were denied the constitutional right to a full Court in the resolution of this highly important case in public utility law. The Court was improperly constituted as a result of the post-argument recusal of Justice Stewart without the consequent calling of a district judge to sit in his place, and, ergo, the Court could not constitutionally act.

C O N C L U S I O N

The Brief in Opposition of the Division does not attempt to meet the Petition for Rehearing of Mountain Fuel or the Commission on the basis of the law or the facts in the record, but rather upon the personal remarks and testimony of Division counsel. For reasons not apparent, Division counsel takes the liberty to exposit his special facts and remarks as though they were part of the record of this Case. Regardless of the privileged position which the Division believes it may have reached before this Court, it has no license or favor to ignore the traditional and established rules of appellate advocacy and

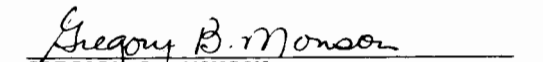
review. The time to stop that type of tactic is now. The Brief of the Division should be disregarded in preponderant part.

The Division Brief does not squarely face the issues raised by the Petition for Rehearing of Mountain Fuel. It is respectfully submitted that the June 19, 1980 Opinion of this Court should not and must not stand. The Court was improperly constituted. The determination therein that adjustments in rates in an abbreviated or summary proceeding must be supported by "evidence concerning every significant element in the rate-making components" is internally inconsistent, implausible, and erroneous. The judicial transfer of the investigatory and prosecutorial functions of the Commission to the Executive Director of Business Regulation is interpretive and substantive error. The Division, as the support staff of the Commission, lacks standing to appeal an order of its own Commission. This Court should so conclude on Rehearing, it is respectfully submitted.

The Petition for Rehearing of Mountain Fuel should be granted, the matter reheard, and the main Opinion of June 19, 1980 should be revised, consistent with the principals at large, to affirm the Order of the P.S.C.

RESPECTFULLY SUBMITTED this 17th day of September, 1980.

ROBERT S. CAMPBELL, JR.



GREGORY B. MONSON
WATKISS & CAMPBELL
310 South Main, Suite 1200
Salt Lake City, Utah 84101

R. G. GROUSSMAN
180 East First South
Salt Lake City, Utah 84139

Attorneys for Mountain Fuel
Supply Company