

1952

Utah Power & Light Company and Telluride Power Company v. Public Service Commission of Utah and Nephi City : Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

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Recommended Citation

Petition for Rehearing, *Utah Power & Light Co. v. Public Service Comm. Of Utah*, No. 7803 (Utah Supreme Court, 1952).
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IN THE SUPREME COURT OF THE STATE OF UTAH

FILED

UTAH POWER & LIGHT COM-
PANY and TELLURIDE POWER
COMPANY,

Plaintiffs,

— vs. —

THE PUBLIC SERVICE COMMIS-
SION OF UTAH and NEPHI
CITY,

Defendants.

DEC 6 - 1952

Clerk, Supreme Court, Utah

Case No.

7803

PETITION FOR REHEARING and BRIEF IN SUPPORT THEREOF

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STATEMENT OF POINTS RELIED ON

I.

THE COURT WHICH PURPORTED TO RENDER THE DECISION IN THIS CASE WAS NOT LEGALLY CONSTITUTED AND THE DECISION FILED NOVEMBER 7, 1952, IS, THEREFORE, A NULLITY.

II.

THE MAJORITY OPINION ERRONEOUSLY DECIDES THAT NEPHI CITY IS WITHIN THE AREA UTAH COMPANY HAD PROFESSED TO SERVE.

III.

THE MAJORITY OPINION IS ERRONEOUS BECAUSE IT PERMITS A TAKING OF UTAH COMPANY'S PROPERTY WITHOUT DUE PROCESS OF LAW, IN VIOLATION OF THE UTAH STATE CONSTITUTION AND THE CONSTITUTION OF THE UNITED STATES.

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Case No.
7803

PETITION FOR REHEARING and BRIEF IN SUPPORT THEREOF

PETITION FOR REHEARING

Comes now the plaintiff, Utah Power & Light Com-
pany, (Utah Company) in the above entitled case and
petitions the court for a rehearing upon the following
grounds:

I.

The court which purported to render the decision in this case was not legally constituted and the decision filed November 7, 1952, is, therefore, a nullity.

II.

The majority opinion erroneously decides that Nephi City is within the area Utah Company has professed to serve.

III.

The majority opinion is erroneous because it permits a taking of Utah Company's property without due process of law, in violation of the Utah State Constitution and the Constitution of the United States.

A brief in support of this petition is filed herewith.

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CHAS. L. OVARD

*Attorneys for Plaintiff,
Utah Power & Light
Company*

BRIEF IN SUPPORT OF PETITION FOR REHEARING

I.

THE COURT WHICH PURPORTED TO RENDER THE DECISION IN THIS CASE WAS NOT LEGALLY CONSTITUTED AND THE DECISION FILED NOVEMBER 7, 1952, IS, THEREFORE, A NULLITY.

The opinion as filed November 7, 1952, states that Chief Justice Wolfe disqualified himself and did not participate in the opinion. Immediately prior to argument Justice McDonough, presiding in the absence of the Chief Justice, made a statement to the effect that although Chief Justice Wolfe was not present to hear the oral argument he would participate in the decision. It was not until the decision was received that Utah Company had any knowledge of the disqualification. This plaintiff would have raised objection to submitting the case to a four man court because of the possibility of an affirmance of the Commission's order by an equally divided court and on the further ground that four members do not make a legally constituted court.

Article VIII, Section 2, of the Constitution of Utah, provides inter alia as follows:

“* * * If a Justice of the Supreme Court shall be disqualified from sitting in a cause before said court, the remaining judges *shall* call a district judge to sit with them on the hearing of such cause.” (Emphasis added.)

This is not *permissive* language. It is mandatory that a district judge *shall* be called to sit. The court has apparently always recognized it to be so and has called in a district judge except where the parties have stipulated to have the matter submitted to less than a full court. This practice has been clearly stated by the court on several occasions. See *In Re Thompson's Estate*, 72 Utah 17, 269 P. 103 at page 128, quoting Justice Straup:

“* * * Since statehood, and for more than 30 years, when a member of this court was ill or otherwise unable to be present at the hearing of a cause, it has been the uniform practice to call in a district judge to sit in place of such absent member, unless the parties consented to submit the case to the remaining members of the court.”

It may be stated as a universal rule of law that the question as to the number of judges required to be present and necessary to authorize the legal transaction of business by a court, is to be determined from the constitutional or statutory provisions creating or regulating the courts; and further that in the absence of a quorum or the number of judges required by law to hold court, a judgment rendered by the remaining judges would be regarded as a nullity because in such case there would be no authority to render the judgment.

14 Am. Jur., Courts, Section 57, at page 282, reads in part as follows:

“In the absence of a quorum *or the number of judges required by law to hold a court*, a judgment rendered by the remaining judges would be

regarded as a nullity because in such case there would be no authority in the court to render the judgment." (Emphasis added.)

See also Long vs. State, 127 S.W. 551 at page 558; 59 Texas Criminal Reports, 103.

Under the above constitutional requirement, Chief Justice Wolfe should have announced his disqualification prior to oral argument so that a district judge could have been called to sit in his place with the other four Justices hearing the cause. Since this was not done the court was not legally constituted and the decision is a nullity. The case, therefore, should be set down for reargument before a court constituted as required by the Constitution of the State of Utah.

II.

THE MAJORITY OPINION ERRONEOUSLY DECIDES THAT NEPHI CITY IS WITHIN THE AREA UTAH COMPANY HAS PROFESSED TO SERVE.

The majority opinion concedes that there is ample authority cited for the proposition that it is beyond the powers of a public service commission to compel a public utility without its consent to extend lines into *or serve areas* it has not professed or agreed to serve. The opinion then states "By its finding the Commission has determined as a fact that Utah Power & Light Company has held itself out as giving the very service which Nephi City is requiring" and based on this alleged finding the

majority opinion referring to Utah Company, holds
“* * * the Commission acted within its powers in ordering that Company to serve the type of customers within its territory which it has professed to serve, i.e., to sell electric energy at wholesale to a municipality for resale to its inhabitants.”

It is not disputed that Utah Company has such a schedule, and it is not disputed that any customer *within* the professed service area of Utah Company requiring the type of electrical service provided by this schedule, would be entitled to receive it and Utah Company would have the *duty* to furnish this service. The Commission finding merely went to the existence of the schedule. It did not find that Nephi City was within the professed service area of Utah Company and, therefore, entitled to be served under said schedule. And how could it be said that Nephi City is within the professed service area of Utah Company? Nephi City argues that it is a “no man’s” land, belonging to no one. Geographically Nephi City is not within Utah Company’s professed service area, but some seven or eight miles beyond any area Utah Company has ever professed to serve.

To establish the area which a utility professes to serve, it must of necessity be based on more than a mere physical connection of facilities. More important than any physical connection is the fact that the power supplied will be *used* in the service area. If this were not true an electric utility would never be able to determine what its obligation to the public might be. There must

of necessity be some limit as to the professed service area and this limit must be established by not less than two factors: First, a geographic limit; and Second, that *use* of electric power will be confined *within* the geographic limit. Nephi City is not within the geographic limit of Utah Company's professed service area and it must be crystal clear to all concerned that the electric power will not be *used* within any area Utah Company has professed to serve. The device of building a line into Utah Company's territory is not enough to qualify Nephi City as a customer within Utah Company's professed service area. Such procedure attempts to circumvent the law and would place a burden to supply electrical power on Utah Company, in an area which it has never professed to serve and in fact has refused to serve.

The court's attention is directed to the case of Benwood-McMechen Water Company vs. City of Wheeling, West Va., 4 S.E. (2) 300; 31 P.U.R., N.S., 433. In this case the Water Company received complaints from its customers that its service was not satisfactory. At the suggestion of the Commission the Water Company negotiated a contract with the City of Wheeling, Va., for a supply of healthful water. The connection between the pipes of the Water Company and the City of Wheeling, was made within the corporate limits of the City. A dispute later arose between the two and the City indicated its intention to terminate the contract. The Commission denied the City's right to terminate. The West Va. Supreme Court of Appeals reversed the Com-

mission on this point. On page 437 of the P.U.R. above cited, the court makes the following comment:

“We do not understand it to be directly contended that the Public Service Commission had the power in 1927 to require the City to furnish water to the Water Company. Such contention if made would run contrary to a long line of cases which restrict the right of the Commissions authorized to regulate utilities to require the extension of service beyond the zone undertaken to be served in the franchise or charter.” (Citing cases.)

The problem in that case was almost identical with the one now before this court. The Water Company had established a point of connection within the corporate limits of the City of Wheeling. The water was to be used beyond the corporate limits. In the case at bar Nephi City proposes to establish a point of connection within Utah Power & Light Company territory and the electricity delivered at this point will be used in Nephi City. The conclusion reached by the West Va. Supreme Court of Appeals, and the comment above quoted, certainly apply with equal force and effect in the instant case.

See also J. A. Baker, et al., Directors and Trustees of Rainbow Lake Outing Club vs. Happy Valley Water Company, a California Railroad Commission decision reported in 33 P.U.R., N.S., at page 126, wherein it is said at page 127:

“* * * One claiming a right to utility service must establish that he is a beneficiary of the public use which the owner of the water supply

is administering, and 'is within the district and of the class for which such dedication is made'." (Citing *Del Mar Water, Light & Power Company vs. Eshleman*, 167 Cal. 666 at page 681; 140 P. 591.)

The extension of service means more than the mere extension of transmission or distribution lines. Construction of such lines is one of the minor items of expense incurred by an electric utility in supplying electric service to its customers. The major item of expense is incurred in building and operating the plants which produce the electrical energy. Each time the area served by an electric utility is enlarged a portion of the generating capacity of these plants is required to supply the electricity used in the new area. This is true in the case at bar as is also the fact that a portion of the transmission line capacity installed by Utah Company between its Hale-Olmsted Plants and Mona, will also be required to furnish Nephi City's requirements. For these reasons it is of prime importance for the utility company to have its service area defined within definite limits. Use of its service confined within these limits is of even greater importance. Without the limitation of use within the professed service area there can in fact be no determination as to what constitutes the professed service area. If Nephi City can qualify for Utah Company's service merely by building a line into Utah Company's territory any other City or Town in Telluride's territory, or any other place, should be permitted to do likewise, and if a City or Town can do so there appears to be no logical reason why any other user of electricity

in Telluride's territory, or any other place, should not have the same right. By this process Utah Company could have forced upon it an unlimited duty to supply electricity for consumption and use in areas it has never professed to serve. It appears to be admitted that Utah Company could not legally be ordered to build a line to Nephi City, or any other City or Town, or other potential user, outside its professed service area. The majority opinion fails to consider that the place of use and consumption of electrical power and energy must also be confined within the area professed to be served. Without such a limitation as to use and consumption there in fact can be no meaning at all to professed service area. Under the rule supported by the majority opinion Utah Company would be obliged to serve any customer building a line into its territory without regard as to where the power is to be used. Certainly it cannot be contended that Utah Company has professed to serve the entire State of Utah.

III.

THE MAJORITY OPINION IS ERRONEOUS BECAUSE IT PERMITS A TAKING OF UTAH COMPANY'S PROPERTY WITHOUT DUE PROCESS OF LAW, IN VIOLATION OF THE UTAH STATE CONSTITUTION AND THE CONSTITUTION OF THE UNITED STATES.

It should not be necessary to burden the court on this point. The rule that it is beyond the authority and power of a public service commission to compel a public utility without its consent to extend lines into *or serve*

areas it has not professed or agreed to serve, is too well established to need much urging here. It is likewise well established that any order issued by a commission which requires extension of lines, or compels a utility to *serve an area* it has not professed to serve, constitutes a taking of property without due process of law and violates not only the Constitution of the United States but the Constitution of the State of Utah as well. The following authorities are cited in support of the foregoing statements:

Northern Pac. Ry. v. North Dakota, 236 U.S. 585;
Interstate Commerce Commission v. Oregon-
Washington R.R. & Navigation Co., 288 U. S.
14, 77 L. Ed. 588;

Hollywood Chamber of Commerce v. Railroad
Commission of Calif., 192 Cal. 307, 219 P. 983;
Okla. Natural Gas Co. v. Corp. Comm., 88 Okla.
51, 211 P. 401, P.U.R. 1923B, 823;

Okla. Natural Gas Co. v. Scott, 115 Okla. 8, 241 P.
164, P.U.R. 1926B, 67;

Atchison T. & S.F.R. Co. v. Railroad Com., 173
Cal. 577, 160 P. 828, P.U.R. 1917B, 336.

43 Am. Jur., Public Utilities and Services, Sec. 22 at
page 588, says in part:

“ * * * Furthermore, the obligation of a public utility to serve the public is limited by the extent of the profession or undertaking by the utility to serve the public. To require a public utility to devote its property to a service which it has never professed to render or to the service of a territory which it has never undertaken to serve is tantamount to taking that property for public use without just compensation. In this respect

the duty to furnish service to a particular city or locality rests upon the public utility's franchise or contractual obligations; * * *'' (Citing cases.)

Nephi City recognizes that it is a *territory* within itself. It does not belong to Telluride Power Company and certainly doesn't belong to Utah Company.

Utah Company doesn't profess to serve the territory surrounding or contiguous to the corporate limits of Nephi City. Telluride Power Company does. It is admitted that Utah Company cannot legally be ordered to build a line to Nephi City and yet the majority opinion holds it is within the Commission's power to order Utah Company *to serve* Nephi City, provided Nephi City builds the necessary line into Utah Company's territory. There is no question about where the electric power will be *used*. This use and consumption will take place within the corporate limits of Nephi City. Thus Utah Company is required *to serve an area* it has never professed to serve. To the extent of Nephi City's requirements Utah Company's generating plants and transmission facilities will be taken to supply the inhabitants of Nephi City. This constitutes a taking of Utah Company's property without due process of law.

It is respectfully submitted that a rehearing should be granted.

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FILED

Clerk, Supreme Court, Utah

Re: Utah Power & Light Company v. Public Service
Commission, Case No. 7803

Nephi City does not desire to file a formal reply brief to the petition for rehearing. Every issue, except the one relating to the disqualification by Chief Justice Wolfe was fully discussed in the briefs initially filed.

Supplemental Exhibit C-9 *Quinn-Smith Library, Franklin Templeton Foundation, University of Utah Libraries, Special Collections*

As to the disqualification of Chief Justice Wolfe, petitioners cite In Re Thompson's Estate, 72 Utah 17, which states that it has been a "practice" to ask district judges to serve for a judge who is ill. This is correct. It has also been a uniform practice at ~~the state bar~~.

The only other authority before us is the brief on page 382. It states that if the number of judges rendered by the court do not do so, the judgment rendered would be a nullity. They fail to cite any authority to the effect that four judges are not authorized by law to hold the court. Article VIII Section 2 of the Constitution expressly says: "A majority of the judges constituting the court shall be necessary to form a quorum or render a decision." The article was adopted when the court consisted of only three members. It goes on to authorize the appointment of a district judge, but it does not require that every case be heard by a five-man court. To the exact contrary it expressly authorizes "a majority of the judges" to form a quorum or render a decision. Petitioners in this case had a majority of the court render a decision. This is all they were entitled to.

In view of the express constitutional authorization for three members to form a quorum and render a decision, and the uniform practice of the court and the complete lack of contrary authority in support of petitioners' position, we respectfully submit that petitioners were not deprived of any rights in this regard.

Respectfully submitted,

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