

1988

Hi Country Estates Homeowners Association v. Public Service Commission of Utah : Brief of Appellant

Utah Supreme Court

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BRIEF

880178

IN THE SUPREME COURT OF THE STATE OF UTAH

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HI-COUNTRY ESTATES HOMEOWNERS
ASSOCIATION, a Utah Corporation

Petitioner,
vs.

Case No. 880178

PUBLIC SERVICE COMMISSION OF UTAH
Brent H. Cameron, Commissioner;
James M. Byrne, Commissioner,
Brian T. Stewart, Commissioner,
and FOOTHILLS WATER COMPANY

Respondents.

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PETITIONER'S BRIEF

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Appeal from the Order of the Public Service Commission
of the State of Utah denying Petitioner's request for
a Declaratory Order

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Argument Priority Classification 9

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STATEMENT OF JURISDICTION OF COURT

Jurisdiction of this Court is invoked under Rule 3(a) of the Rules of Appellate Procedure and specific constitutional and statutory authority for this Court to hear this appeal is granted by Article VIII, Section 2 Constitution of the State of Utah and Utah Code Annotated 78-2-2(3)(e)(i). At issue is requested review of certain Orders of the Public Service Commission of the State of Utah.

STATEMENT OF ISSUES PRESENT ON APPEAL

1. Whether "standby fees" or other similar charges are unreasonable, unlawful and/or unconstitutional under the 14th Amendment to the United States Constitution and/or Article 1 Section 2 of the Utah State Constitution as being violative of the equal protection clause contained therein.

2. Whether such fees exceed the scope of statutory authority given to the Public Service Commission to set reasonable and just utility rates.

3. Whether such fees constitute an unjust and unreasonable standard and classification of service as prohibited by Utah Code Annotated 54-3-8.

STATEMENT OF THE CASE

Petitioner is a Utah non-profit corporation consisting of the homeowners of Hi-Country Estates subdivision, Phase I located a few miles southeast of Heriman, in Salt Lake County, Utah. Pursuant to the Articles of Incorporation, Bylaws and Protective Covenants of the Association, all lot owners, whether developed or

undeveloped, are members of the association. The association is likewise charged with the duty of representing the interests of all lot owners regardless of their status of development.

The tariff of Foothills Water Co., the publicly regulated utility which supplies culinary water service to the residents of the above subdivision, makes provision for certain "standby fees". A standby fee is a charge or assessment levied against property adjacent to a water main but not usually connected to it. The utility remains "standing by" ready to serve the property at the request of the owner, although it does not at present provide any utility service to the lot owner.

On or about July 17, 1988 Respondent, Foothills petitioned the Public Service Commission in Docket No. 87-2010-T03 for approval of various changes and amendments to its tariff, some of which dealt directly with the assessing of standby fees to lot owners not receiving regular water service by Foothills. Petitioner filed objections to those proposed changes and a hearing was held before the Commission on March 1, 1988.

On or about March 9, 1988 the Commission granted in part and denied in part Foothills proposed changes. Each of the parties filed motions for review and rehearing and the Commission issued an Order on Motions for Review or Rehearing on April 7, 1988. Said Order in paragraph two (2) denied the Petitioners request that standby fees be eliminated from the proposed tariff.

On or about March 10, 1988 Petitioner also filed a Petition for Declaratory Order in re Standby fees before the Public Service

Commission in Docket No. 88-2010-01, (proceedings were subsequently transferred and undertaken in Docket No. 85-2010-01). Said Petition was argued before the Commission on March 22, 1988 following which the Commission took the matter under advisement. Respondent Commission has failed and refused to enter a decision in that case insisting that its ruling in the above reference tariff case (Docket No. 87-2010-T03) was sufficient and disposed of the matter without need for a specific Order denying the Petition for a Declaratory Order.

SUMMARY OF ARGUMENTS

The Petitioner alleges that standby fees are an improper regulatory revenue generating devise and are further unconstitutional. Although there is no Utah authority directly on point and this matter is one of first impression for this Court, there is clear and overwhelming authority from other jurisdictions that absent a specific enabling statute or contractual basis, such fees are unreasonable and unconstitutional in that they deny the payees procedural due process.

Petitioner further alleges that Utah has no specific enabling statute which would authorized the Public Service Commission to allow such fees in the tariffs of publicly regulated water companies. The general grant of authority to the Commission to set "just and reasonable" utility rates is not specific enough to allow this innovative method of generating revenue for a utility from is prospective customers.

In addition, Petitioner alleges that such fees apart from not

being statutorily authorized are in fact prohibited by specific state statute in Utah Code Annotated 54-3-8 in that such fees constitute an "unjust and unreasonable standard and classification of service to be furnished."

ARGUMENT

I. STANDBY FEES ARE UNREASONABLE, UNLAWFUL AND
UNCONSTITUTIONAL AND SHOULD NOT BE ALLOWED IN THE TARIFFS OF
PUBLICLY REGULATED UTILITIES.

This is a case of first impression in the State of Utah and the issue of the lawfulness of "standby", "availability" or "readiness to serve" charges has never been considered by a Utah Court of record. There is however a well defined body of law dealing with this issue which has been developed in other jurisdictions which is worthy of recognition here.

The seminal case is Forest Hills v. Public Utilities Commission 285 N.E. 2d 702 (Ohio 1972). In Forest Hills the Ohio Supreme Court considered a challenge to standby fees assessed to owners of unoccupied lots. At the administrative level the Ohio Public Utilities Commission had allowed an "availability fee" to be charged against nonusers of a water system in order to generate additional operating revenue for the utility. On appeal from the Commission's ruling a unanimous Court held:

The assessment by the Public Utilities Commission of an availability fee charged against nonusers of a water and sewer system utility, who are not connected to those systems but to whom such service is available, is unreasonable and unlawful. Ibid at 709.

The broad invalidation of standby fees in Forest Hills was partially undercut two years later in the case of Mohawk Utilities v. Public Utilities Commission 307 N.E. 2d 261 (Ohio 1974). Following the decision in Forest Hills, such fees were attacked in the tariffs of other utilities and the Ohio Public Utilities Commission following the authority of Forest Hills held that:

This commission rules in favor of the complainant and declares the "available for use" classification and charge in the respondents rate schedule unreasonable and unlawful. Mohawk at 262.

The Public Utilities Commission in its Order and opinion directed Mohawk Utilities to cease collecting the water-availability charges, and to file new tariffs eliminating such charges. In partially overruling Forest Hills the Court in Mohawk noted that a significant difference in the facts between the two cases was that the sales contracts entered into between the parties in Mohawk specifically authorized the standby fees in dispute.

In Forest Hills, we held that, since the commission had no statutory authority to impose an availability fee, the order imposing such a charge was unreasonable and unlawful. In the instant case, the commission was considering a water-availability charge which was part of a sales contract entered into between the parties... Therefore, the decision of the commission that Mohawk Utilities availability-for use charges are per se contrary to law is unreasonable and unlawful. Ibid at 263.

The distinction between the two cases is critical since parties can contractually agree to be bound to greater restrictions than can be imposed in the absence of their consent. The contractual issue takes on a constitutional dimension in this case

since it invokes questions of procedural due process. In Aughenbaugh v. Board of Supervisors of Tuolumne County 188 Cal. Rptr. 523 (App. 1983), owners of unimproved lots in a subdivision brought suit seeking a refund of water standby charges claiming that they were denied procedural due process by the collection of the charges. In Aughenbaugh, like Mohawk, there was a contractual basis for the charges. The Court held as follows:

Appellant's only constitutional challenge to the validity of the water standby charges is one of procedural due process, i.e., they have been deprived of their property (money) without proper notice. The argument is without merit.

Procedural due process safeguards are designed to provide an individual with the right to be heard before being condemned to suffer serious loss of property. (Tribe, American Constitutional Law (1978) p.502) Fair notice requirements were met in the instant case. When appellants purchased their lots they were required to sign that they had received and read a copy of the Final Subdivision Public Report issued by the California Real Estate Commissioner on September 16, 1969. This report specifically recited that the revenue bonds; 'are secured by a lien upon revenue to be derived from water standby and other charges to be prescribed, revised, and collected by the community services district from lot owners within the district. Water standby charges, if delinquent, may be collected on the county tax role and may result in a lien upon your lot subjecting it to foreclosure proceedings... The stand-by charge is payable by the lot owners whether or not any water is used.' Ibid at 528.

In like regard is the Court of Appeals of North Carolina which in the syllabus to State Utilities Commission v. Carolina Forest Utilities Inc., 21 N.C. App. 146 (1974) stated as follows:

Utilities Commission had jurisdiction and authority to allow use of availability charge, in rate schedule, should any be deserved, where availability charge had been agreed to in contracts between the parties, i.e., where each purchaser of lot in recreational development had agreed to pay annual water service fee whether or not he actually tapped onto line or used any water.

Thus, there has come to be two lines of cases affecting the lawfulness of standby fees. Such fees are generally invalid under Forest Hills analysis, unless they qualify for a Mohawk type exception by the presence of a specific state enabling statute or a contract binding the party sought to be charged. Absent this type of notice such fees are unconstitutional as violative of the notice requirements of procedural due process. This potential defect was succinctly stated in Smith v. Township of Norton 2 Mich.App. 17 (1965) wherein the Court of Appeal of Michigan invalidated standby fees holding as follows:

Anyone using services of township water system by implication contracts to pay but to charge nonusers for services made available by its presence without regard to whether any use is made of the services or facility is in legal effect a tax and can be effected only by complying with statutory requirements and not be creation of a charge within the rate structure of the public service. Ibid at 525.

It is important to note that the instant case falls clearly under the Forest Hills line of authority. There is simply no contract between the parties which could authorize the charges and absent such a contract, the Mohawk exception does not apply. Petitioners were unsuccessful in finding a single case upholding

standby fees absent a specific state enabling statute or contract.

Petitioners represent owners of unimproved vacant lots as well as developed lot owners who have their own independent source of water through on site wells. Said individuals, who are subject to the standby fees in the Respondent utilities tariff are "standby customers" only the most general and tortured sense of the term. They are not standing by waiting for service from the utility and in fact actively maintain that they do not want any service from the utility. It is only the utility which is "standing by" and it is waiting for customers that may never materialize. At best, the vacant lot and well owners can be said to be only prospective customers, who may never connect to the water system and make use of the utilities services.

It is difficult under such circumstances to say that the lot owners receive any benefit from the utility standing by ready to serve them. Any benefit they do receive is incidental and should not be charged to them. In Smith the parties stipulated that the availability of a water system added to the value of the property and in fact conferred a material benefit but that was held to be insufficient to justify the imposition of standby fees on such owners. The Court quoted The Law of Revenue Bonds, Chernak (1954) with approval stating: "The rates, of course, must be based upon use and not special benefit or other similar criteria, unless special assessment proceedings are accepted." Ibid at 200.

It is natural and expected that any property owner will obtain some benefit from his surroundings and the services readily

available in the vicinity. Said services may increase the value of his property and subject him to greater property taxes but he should not be liable to the vendor, as a mere prospective customer, until he actually utilizes the services the vendor is standing by ready to provide.

II. THE ASSESSMENT OF STANDBY FEES EXCEEDS AND IS OUTSIDE THE LEGISLATIVE GRANT OF AUTHORITY GIVEN TO THE PUBLIC SERVICE COMMISSION.

The Public Service Commission is a creature of the legislature and it is well established that the Commission has no inherent regulatory power other than those expressly granted or clearly implied by statute. Basin Flying Service. v. Public Service Commission 531 P.2d 1303, 1305 (Utah 1975).

The Commission has two specific applicable grants of authority. The first is found in Utah Code Annotated 54-4-1 (1969) which states:

The Commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in this state, and to supervise all of the business of every such public utility in this state, and to do all things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction...

This very broad statute does not however authorize the type of rate making challenged herein. This Court in interpreting the statute recently stated:

... this statute has never been interpreted by this Court as conferring upon the Commission a limitless right to act as it sees fit. Explicit or clearly implied statutory authority

for any regulatory action must exist. Mountain States Telephone v. Public Service Commission 81 Utah Adv. Rep. 7 at 8. Citing Utah Dep't of Business Regulation v. Public Serv. Comm'n, 720 P.2d 420, 423 (Utah 1986) Kearns-Tribune Corp. v. Public Serv. Comm'n 682 P.2d 858, 859 (Utah 1984); cf. Basin Flying Serv., 531 P.2d at 1305.

As argued above, a standby fee when not based upon use constitutes a tax, which is not permissible within the rate making authority of the Public Service Commission. (See Smith v. Norton, Supra). In like regard this Court in Mountain States stated:

Similarly, not one of the statutes granting the Commission more specific powers authorizes, either explicitly or implicitly, the kind of pooling arrangement adopted by the Commission in this case. Ibid at 8.

Although Mountain States dealt with telephone carrier surcharge pooling as a means of funding a discounted telephone service, its analysis is directly applicable to water standby fees, which like the Lifeline rates invalidated in Mountain States, are neither explicitly or implicitly authorized by any state statute.

The only other applicable state statute is found in Utah Code Annotated 54-3-1 (1977) which provides:

All charges made, demanded or received by any public utility, or by any two or more public utilities for any product or commodity furnished or to be furnished, or for any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge made, demanded or received for such product or commodity or service is hereby prohibited and declared unlawful. Every public utility shall furnish, provide and maintain such service, instrumentalities, equipment and facilities as will promote the safety, health, comfort and convenience of its patrons, employees and the public, and as will be in all respects adequate, efficient, just

and reasonable. All rules and regulations made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable. The scope of definition 'just and reasonable' may include, but shall not be limited to, the cost of providing service to each category of customer, economic impact of charges on each category of customer, and on the well-being of the state of Utah; methods of reducing wide periodic variations in demand of such products, commodities or services, and means of encouraging conservation of resources and energy.

The "just and reasonable" standard incorporated in the above statute is the cornerstone and controlling concept in utility rate making. It is difficult however to imagine a more unjust and unreasonable rate than one which is artificially low because it is subsidized by nonusers.

It is undisputed that the sole purpose for standby fee, as used by the Utah Public Service Commission, is to generate additional revenue for the utility. In effect the nonusers of the water system underwrite and support artificially low rates for the users. Thus, neither the "standby customers" nor the active users pay a "just and reasonable rate". The standby customers pay for something for which they receive no consideration or chargeable benefit, while the users pay an artificially low rate due to the standby subsidy.

Although no Utah Court has had the opportunity to address this statute in this context, other Courts have had such an opportunity when construing similar statutes. In fact, it was in part this very problem with the requirement for "just and reasonable rates" which lead the Ohio Supreme Court to invalidate standby fees in

Forest Hills.

Under R.C. §4909.39, the commission shall fix and determine 'the just and reasonable rate' to be charged by such public utility. Nowhere has the General Assembly empowered the Public Utilities Commission to fix dual rates to be charged according to a customer's use or nonuse of the utility's service. Therefore, the commission acted both unreasonably and unlawfully in establishing two rates. Ibid at 708.

III. THE ASSESSMENT OF STANDBY FEES TO NONUSERS CONSTITUTES AN UNJUST AND UNREASONABLE STANDARD AND CLASSIFICATION OF SERVICES AND IS PROHIBITED BY STATUTE.

Utah Code Annotated 54-3-8 (1953) provides:

No public utility shall, as to rates, charges, service, facilities or in any other respect, make or grant any preference or advantage to any person, or subject any person to any prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, charges, service or facilities, or in any other respect, either as between localities or as between classes of service. The commission shall have power to determine any question of fact arising under this section.

This statute has rarely been interpreted by this Court, however in the case of Cedar City Corporation v. Public Service Commission 290 P.2d 454 (Utah 1955) the Court stated the purpose of the statute to be as follows:

The statute empowers the Commission to prevent the granting of any preference or advantage to any person, or subject any person to any prejudice or disadvantage. Ibid at 457.

In spite of this instruction, standby fees by their very nature grant one class of users a preference and advantage while

subjecting another class, the standby customers, to prejudice and disadvantage. As argued above, the existence of standby fees allows active users to enjoy artificially low rates due to the subsidy by standby customers. This Court long ago declared such a practice to be unlawful.

This section prohibits a utility from establishing or maintaining discriminatory or preferential rates or charges, or any unreasonable difference as to rates, charges, or service between localities or classes of service. Logan City v. Public Utilities Commission 77 U. 442, 296 P. 1006.

Petitioners do not dispute that a utility should be compensated for the unused capacity it must maintain in order to meet the service requirements of new customers, however that compensation should come from connection fees rather than standby fees. The tariff at issue allows the assessment of a \$750.00 connection fee at the time a lot owner comes "on system" and becomes an active user. That fee is in excess of the actual costs of connection and is the best way of passing the cost of maintaining unused capacity to those who have made it necessary. Only connection fees directly pass the cost on to those who have received the benefit of the utility standing by to serve them.

CONCLUSION

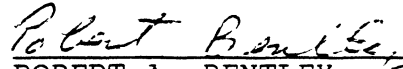
For the reasons set forth above, it is submitted that:

1. This Court should declare standby and other similar fees to be improper, unlawful and outside the scope of authority granted to the Public Service Commission for utility rate making, and
2. Order an accounting of all standby fees paid by nonusers

and order a refund of said amounts to them.

WHEREFORE, it is requested that the Order of the Public Service Commission upholding the lawfulness of standby fees be reversed, that said fees be declared invalid and that any sums paid as standby fees be returned to the payees and that Petitioners receive its fees and costs incurred on this appeal.

DATED this 21st day of March, 1989.


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MAILING CERTIFICATE

I hereby certify that on the 21st day of March, 1989, I mailed ten (10) copies of the Petitioners Brief to the Supreme Court Clerk at 332 State Capitol, Salt Lake City, Utah 84114 and four (4) copies to each of the following by depositing the same in the United States mail, postage prepared, address to:

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