1980

Committeee of Consumer Services; Parowan Valley Pumpers association, Cedar Valley Pumpers association and Beryl Pumpers association; Enterprise Valley Pumpers , Inc. v. Public Service Commission of Utah; Milly 0. Bernard, Chairman; Kenneth Rigtrup, Commissioner; and Pavid R. Irvine, Commissioner : Reply Brief of Appellants

Utah Supreme Court

James L. Barker; Attorney for AppellantsElliott Lee Pratt; Attorney for Respondents

IN THE SUPREME COURT OF
THE STATE OF UTAH

OMMITTEE OF CONSUMER SERVICES; AROWAN VALLEY PUMPERS ASSOCIATION, CEDAR VALLEY PUMPERS ASSOCIATION and BERYL PUMPERS ASSOCIATION; ENTERPRISE VALLEY PUMPERS, INC.,	:	SUPREME COURT Case No. 16891
Appellants,	:	
-vs-	:	P.S.C.U. Case No. 76-023-04
PUBLIC SERVICE COMMISSION OF UTAH; MILLY O. BERNARD, Chairman; KENNETH RIGTRUP, Commissioner; and DAVID R. IRVINE, Commissioner,	:	
Respondents.	:	

REPLY BRIEF OF APPELLANTS

An Appeal of the Supplemental Report and Order of January 11, 1980, of the Public Service Commission.

JAMES L. BARKER
Assistant Attorney General
Attorney for Committee of Consumer Services

ELLIOTT LEE PRATT
Clyde & Pratt
Attorney for Portestants, Plaintiffs herein

TABLE OF CONTENTS

IN THE SUPREME COURT OF
THE STATE OF UTAH

COMMITTEE OF CONSUMER SERVICES; PAROWAN VALLEY PUMPERS ASSOCIATION, CEDAR VALLEY PUMPERS ASSOCIATION and BERYL PUMPERS ASSOCIATION; ENTERPRISE VALLEY PUMPERS, INC.,	SUPREME COURT
Appellants,	Case No. 16891
-vs-	P.S.C.U.
PUBLIC SERVICE COMMISSION OF UTAH; MILLY O. BERNARD, Chairman; KENNETH RIGTRUP, Commissioner; and DAVID R. IRVINE, Commissioner,	Case No. 76-023-04
Respondents.	

The Appellants respectfully submit this Reply to the Brief of C.P. National.

POINT I.

APPELLANTS ARE PROPERLY BEFORE THIS COURT IN CONTESTING THE ACTIONS OF THE COMMISSION AND IN REQUESTING THAT A REFUND BE GRANTED.

Respondent's brief contends and initially argues that Appellants have improperly stated a claim for relief and because this court is not allowed to order a refund, Appellants action should be barred.

Respondent's argument is a misconception, and misses the mark by misconstruing the language contained in appellants brief. Appellants are properly before this court inasmuch as they are requesting and arguing, (1) that rates placed into effect by the February 18 Order were not just and reasonable, (2) that the findings of the Commission were unsupported by the evidence, (3) that the Commission improperly exercised its authority according to law, and (4) that the constitutional rights of appellants have been invaded.

Section 54-3-1, U.C.A. 1953, declares that "Every unjust or unreasonable charge made, demanded or received for such product or commodity or service is hereby prohibited and declared unlawful." Implicit in appellants original brief in the statement of facts and in Points I, II, III, and VI is the showing that the rates allowed were unlawful and by clear analysis unjust and unreasonable

Points III and VI of Appellants original brief argue that the findings of fact made by the Commission are not supported by any evidence.

Point III of Appellants original brief argues that the Commission improperly exercised its authority when it imposed retroactive rates on customers and likewise Point VI asserted that the conclusions of law by the Commission were arbitrary.

The issue of a violation of Constitutional rights is clearly raised in Point V of Appellant's brief.

One issue that presently deserves greater attention than was afforded in Appellants initial brief is the question of who has the power under Utah Statutes to grant a rate refund in this matter. The recent decision in Utah Department of Business Regulation v. Public Service Commission, Case No. 16241, filed June 19, 1980, prompts this discussion.

Under the above case, this court refused to grant a refund inasmuch as it would involve an entanglement with the legislative power of ratemaking. Under the facts of that proceeding the Department of Business Regulation entertained the request for a refund for the first time on appeal and it had never requested the Commission to grant a refund either at a hearing or by way of petition for rehearing.

Under the present factual setting, appellants initial request for a refund was addressed to the Commission. That request has been repeated in a long string of hearings, re-hearings and appeals.

Our understanding of the language of the Utah Department of Business Regulation case, supra, (as yet unreported), insofar as "refunds" are concerned, is that the amount thereof is to be determined by the Public Service Commission, not this court. With this we agree. Hearings to determine the facts should only be held before the commission. However, this court can properly determine as a matter of law whether or not a refund is required and can then direct the Commission to establish the amount of the same and how and to whom it is to be paid.

In many jurisdictions the question of court or Commission ordered refunds is explicitely mandated by statute. In other jurisdictions though, the matter has been of some dispute. The Supreme Court of the State of Minnesota when confronted with questions of whether the court could under certain circumstances order a refund stated that there was no statutory impediment to requiring a utility to refund to consumers charges it had made pursuant to an order of the Commission which was subsequently reversed. Northwestern Bell Telephone Co. v. State Minn. Sup. Ct. No.130 1/2, 1974, 216 N.W. 2d, 841. The court in providing its reasoning stated at p. 858:

> We recognize that there is authority for the proposition that ratemaking is a legislative process with some of the attributes of a statute and that rates which have been approved by a commission are valid until set aside. In jurisdictions adopting this rule, the reversal of a commission order increasing rates has only prospective effect. However, we think the better view was expressed in Mountain States T.&T. Co. v. Pulbic Utilities Comm., Colo., 502 P.2d 945, 949 (1972), where the court allowed benefits, accruing as a result of a revision in its public utilities commission's order, to be passed on to telephone subscribers.
>
> [17] In scrutinizing the Minnesota statutes which govern telephone rates, we find no impediment to authorizing a refund. Minn.St. 237.06 declares that "[a]ll unreasonable rates, tolls, and charges are hereby declared to be unlawful." Section 237.08 prohibits a telephone company from collecting or receiving a greater or lesser rate than that on file with the Public Service Commission. We do not construe that statute to prevent a refund if the commission's order is ultimately found to be invalid. Section 237.25 deals with the trial court's scope of review.

It provides in part: "[I]f the court finds that the order appealed from is unjust, unreasonable, and not supported by the evidence, it shall make such order to take the place of the order appealed from as is justified by the record before it."

Finally, § 237.26 provides:

> If no appeal is taken from any order of the department, as above provided, then in all litigation thereafter arising between the state and any telephone company or between private parties and any telephone company, the order shall be deemed final and conclusive.

> [18] Nothing in our statutes, unlike those in Illinois, for example, expressly deals with the question of whether new rates shall be enforced or suspended pending appeal. Nor do the statutes provide for segregating in a special fund amounts received under a new rate schedule pending a final decision on appeal. We conclude that the Minnesota statutes contemplate that only rates ultimately found to be reasonable shall be charged against subscribers and that amounts collected by a utility pending appeal enjoy no unique immunity from the claims of those to whom they rightfully belong.

> [19] We leave to the Public Service Commission the mechanics of determining the amount of refund which is due and the precise manner of its distribution.

Utah statutory language as it applies to utilities is analagous to that of Minnesota's. Section 54-3-1, U.C.A. 1953, (as previously cited) states as does the Minnesota statute that unjust and unreasonable charges are prohibited and declared unlawful. Section 54-7-12, U.C.A. 1953, generally prohibits a utility from changing or increasing rates unless on file with the Commission, and Utah's Rules of Civil Procedure, Rule 76, (Commission Rule of Practice Under Rule 21, Section 21.6) like Minnesota's allows this

court to "reverse, affirm or modify any order or judgment appealed from."

Irregardless of whether it is a court or commission ordered refund, appellants contend that the Commission has no alternative but to order a refund of revenues collected by C.P. National pursuant to an order which was subsequently reversed by this court.

Section 54-7-17(4) U.C.A. 1953, providing for a stay of commission orders and other procedures on appeal, contemplates such requested refunds and it has been shown in Mountain States Tel. & Tel. v. Public Utilities Commission, 502 P.2d 945 (Colo. 1972), that the stay provisions of this section are separable from the refund provisions and are not mandatory.

It is for these reasons that relief should be granted and a refund ordered in this proceeding.

POINT II.

THE CONCEPT OF "OFFSET AND PASS-THRU" CASES HAS NO APPLICATION TO THIS CASE SETTING.

It is appellants initial and repeated position that at the time this court reversed and remanded the case of Parowan Pumpers Ass'n v. Public Service Commission, 586 P.2d 407, (Utah, 1978), the prior rates imposed by the commission became invalid and that any attempt to reinstate by amendment such rates would constitute retroactive rate making.

While some courts have held that rates approved by a Commission are valid until set aside, current authority has more consistently held that an invalid order is void from its inception, and

rates collected pursuant thereto are therefore subject to refund. In Gulf, C.& S.F.R.Y. Co. v. American Sugar Refining Co., 130 S.W. 2d 1030 (1939), the Texas Supreme Court stated:

> Manifestly, to hold that either the shipper or carrier could be required to pay or collect an illegal rate pending the statutory proceeding in which the illegality of the rate is determined, would be unfair to both the shipper and the carrier; and the constitutionality of such a rule is seriously doubted.
>
> * * *
>
> When the court exercises this statutory jurisdiction and declares the rate order invalid from its inception, and the rate order must be regarded as if it never existed. (emphasis added)

Further in support of this proposition, appellants cited in their initial brief the decision of City of Los Angeles, et al. v. Public Utility Commission, et al., 102 Cal. Rptr. 313, 497 P.2d 785 (1972), which held that:

> When the rates set in the decision before us are annulled, the only lawful rates are those which were in existence prior to the instant decision. We are satisfied that to permit the commission to fix new rates for the purpose of refunds, as requested by Pacific, would involve retroactive rate making in violation of the principles recognized in Pacific Tel. & Tel. Co. v. Public Util. Comm. supra, 62 Cal. 2d 634, 649-656, 44 Cal. Rptr. 1, 401 P.2d 353.

Respondent's argue in their brief that the above California holding is limited by the California rule which "in effect" allows retroactive ratemaking in "Offset and Pass Thru" cases. By analysis they argue that the present fact setting involves an

"offset or pass-thru" type proceeding and as such should not be subject to the non retroactive rate making rule.

In support of their position that the California courts allow this type of procedure, they cite the 1978 decision in Southern California Edison Company v. Public Utility Commission, 144 Cal. Rptr. 905, 576 P.2d 945 and the 1979 decision California Manufacturers Association v. Public Utility Commission, Southern California Gas Company and San Diego Gas and Electric Company, 155 Cal. Rptr. 664, 595 P.2d 98, and conclude the following:

> Thus, the most recent decisions of the California Supreme Court have limited the rule prohibiting retroactive rate making to a general rate case and have determined that the rule has no application to the abbreviated "offset" or "pass-thru" proceedings.

The above assertion of Respondent is highly misleading. Both of the above California cases dealt exclusively with abbreviated proceedings concerning "narrowly restricted" and "semi-automatic" fuel cost adjustment clauses. Here, the California court language dealing with retroactive rate making is taken out of context by respondent when it is construed to have application to other than a fuel cost adjustment proceeding. Respondents are clearly aware that the California courts confined such "non-retroactive" language only to fuel adjustment proceedings and to none other.

Hence, respondents are involved in purely speculative reasoning when they state that the case now before this court is an "offset or pass-thru" proceeding.

This present case is not a fuel adjustment clause proceeding, but is one that more clearly resembles a general rate proceeding. Because of this, rates should be allowed to take effect only on a prospective basis and respondents argument that the California rule should apply should be totally disregarded.

DATED this 28th day of August, 1980.

JAMES L. BARKER
Assistant Attorney General

ELLIOTT LEE PRATT
Clyde & Pratt
Attorney for Protestants,
Plaintiffs herein

Mailed copies of the foregoing brief, postage prepaid, on September 2nd, 1980, to the parties of record:

Elliott Lee Pratt, Esq.
F. Robert Reeder, Esq.
Bruce Plenk
Grant Macfarlane, Esq.
Public Service Commission
Robert Gordon, Esq.

Secretary