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IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH GAS SERVICE COMPANY,
a corporation,

Plaintiff

— vs. —

PUBLIC SERVICE COMMISSION OF UTAH, DONALD HACKING, HAL S. BENNETT, and D. FRANK WILKINS, Commissioners of the Public Service Commission of Utah, and MOUNTAIN FUEL SUPPLY COMPANY, a corporation,

Defendants

BRIEF OF DEFEN[illegible]

Public Service Commission of Uta[illegible]
Hal S. Bennett, and D. Fra[illegible]
Mountain Fuel Supply Co[illegible]

[illegible]IT OF REVIEW OF [illegible]
PUBLIC SERVICE CO[illegible]

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IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH GAS SERVICE COMPANY, a corporation,
Plaintiff

— vs. —

PUBLIC SERVICE COMMISSION OF UTAH, DONALD HACKING, HAL S. BENNETT, and D. FRANK WILKINS, Commissioners of the Public Service Commission of Utah, and MOUNTAIN FUEL SUPPLY COMPANY, a corporation,
Defendants.

Case No. 10264

BRIEF OF DEFENDENTS

STATEMENT OF THE KIND OF CASE

This action involves an application of Mountain Fuel for a certificate of convenience and necessity authorizing Mountain Fuel to extend its natural gas distribution system for the service of natural gas to the inhabitants of the community of Bonanza, and other areas in Uintah County in the vicinity of said facilities. Utah Gas filed a protest and petition of intervention requesting that Mountain Fuel's application be denied and for affirmative relief in the form of a Commission order directing Mountain Fuel to deliver to Utah Gas from its pipeline

system at its location near the unincorporated community of Bonanza, sufficient gas at a reasonable rate to supply the inhabitants of the community of Bonanza and other areas in Uintah County in the vicinity of its facilities as gas service is needed there.

DISPOSITION BY THE PUBLIC SERVICE COMMISSION OF UTAH

The Commission issued its report and order granting to Mountain Fuel a certificate of convenience and necessity and denying the request of Utah Gas for an order directing Mountain Fuel to deliver to Utah Gas from its pipeline system, sufficient gas at reasonable rates to supply inhabitants of the community of Bonanza, Utah, and other areas in Uintah County in the vicinity of the facilities as gas service is needed.

RELIEF SOUGHT

Defendants seek a dismissal of the Writ of Review herein.

STATEMENT OF FACTS

Defendant Mountain Fuel Supply Company disagrees sharply with Plaintiff's statement of the facts in the following particulars:

(1) On page 6 of its brief, Plaintiff states that:

> "Utah Gas has never been approached by the Commission or anyone from Bonanza or the American Gilsonite Company concerning the supplying of gas service to Bonanza, Utah."

This falls way short of presenting the full picture. What Plaintiff fails to point out is that Plaintiff at no time approached American Gilsonite Company or anyone else at Bonanza to see if gas service was desired (R. 175). Plaintiff did not make a survey of requirements there, nor did it know of the industrial market which American Gilsonite operations offered (R. 184). This seems even more incredible when contrasted with Laughlin's testimony that Plaintiff relies heavily on industrial business (R. 173).

(2) On page 7 of its brief, Plaintiff states:

> "It was not until December 7, 1965, the date of notice of the application of Mountain Fuel, that Utah Gas learned of the need for service to Bonanza, Utah (R. 111). It was only within four to five days prior to the hearing that Utah Gas learned that Cascade was under the full jurisdiction of the Federal Power Commission."

This statement seriously distorts the picture of Plaintiff's awareness of what was happening. In cross-examination, Plaintiff's president, Mr. Laughlin, (however reluctantly) admitted that he at least was aware of the Cascade project (R. 176). As we point out in the argument below, there were many other items contributing to Laughlin's awareness of what was happening. As far as the 'need for service' is concerned, it is hard to see how anyone in the gas business could even wonder about the 'need' in any community lacking gas service. (See the comparison of the cost of available fuels (R. 27), and the testimony of Mr. Borden (R. 135)).

(3) On pages 7 and 8, Plaintiff offers its alibi for not serving Bonanza from other gas sources in the area.

It states that Pacific Natural Gas Exploration Company:

> ". . . did not want to tie up their gas supply to small retail operations."

and that with reference to Walco Corporation and the Red Wash producers:

> ". . . . his company's requirements were so small that it was difficult to induce said parties to consider selling gas on a long term basis."

Plaintiff did not actually ask any of them for a gas supply for Bonanza! (See testimony of Mr. Laughlin, R. 179, 181.) **Nothing in the record indicates that gas could** not have been obtained from any of the suggested sources.

Furthermore Mr. Laughlin stated that the Cascade-Mountain Fuel Supply source offered an economically feasible gas supply for serving Bonanza (R. 172). He then admitted that Plaintiff never contacted either company regarding a supply to enable it to serve Bonanza (R. 175, 176).

(4) On page 8 of its brief, Plaintiff asserts that Defendant Mountain Fuel Supply Company would have to use employees from Emery County, Utah, to service Bonanza. This ignores the testimony of Witness Allen (R. 160, 161) to the effect that these requirements would be met from "our personnel in this area."

(5) Plaintiff claims (at page 9 of its brief) that for Mountain Fuel Supply Company to serve Bonanza would jeopardize Plaintiff's ability to finance its operations. Yet, the record shows (R. 187) that Plaintiff refinanced on three different occasions, even though it was not then serving Bonanza. Thus service to Bonanza by

Defendant Mountain Fuel Supply Company could have no effect on Plaintiff's borrowing capacity. Such loans are made on the basis of Plaintiff's existing system (R. 192-195).

We submit that the following statement correctly represents the facts:

(1) Ever since 1952, the people in Bonanza have been seeking gas service, according to the testimony of Mr. Paul Borden, American Gilsonite manager at Bonanza (R. 137).

(2) On March 13, 1956, Defendant Utah Public Service Commission granted a Certificate of Public Convenience and Necessity to Plaintiff Utah Gas to serve natural gas in the cities of Monticello, Moab and Vernal, Utah. Its order also provided:

> "It is further ordered, That Utah Gas Service Company, a corporation, without obtaining additional authority threfor, may build additional distribution facilities in the counties of San Juan, Grand, and Uintah where there is a demand for natural gas service and which may be economically served."

(3) At no time since March 13, 1956, did Plaintiff ever:

(a) Contact any gas supplier in the area to find out whether it could acquire gas to provide economically sound service to Bonanza, nor

(b) make any efforts to find out whether the people at Bonanza were interested in natural gas service.

(4) Prior to July 23, 1963, efforts were commenced to bring western Colorado gas to Utah. On July 23, 1963, Defendant Mountain Fuel Supply Company entered into a contract with Garfield Gas Gathering Company to build facilities to bring western Colorado gas to Utah for sale to Defendant Mountain Fuel Supply Company. (See R. 75. This letter was introduced into the record as a portion of Plaintiff's Petition for Rehearing.)

(5) On March 31, 1964, Garfield Gas Gathering Company filed with the Federal Power Commission an application to serve Defendant Mountain Fuel Supply Company with gas (R. 53, 76).

(6) On July 31, 1964, the Federal Power Commission issued a Certificate of Convenience and Necessity to Garfield Gas Gathering Company (R. 53, 54). It should be born in mind that the Federal Power Commission has declared that Defendant Mountain Fuel's facilities which receive gas from Cascade are exempt from that agency's jurisdiction. (See R. 88, which entered the record via Plaintiff's Petition for Rehearing.)

(7) Prior to August 23, 1965, Garfield commenced the construction of the facilities authorized by the Certificate (R. 85). These were completed in September or October, 1965, according to Witness Laughlin (R. 184).

(8) On September 16, 1965, Cascade Natural Gas Corporation moved the Federal Power Commission to amend the above certificate by substituting Cascade as applicant successor in interest to Garfield (R. 81-87).

(9) On October 21, 1965, the Federal Power Commission issued the order substituting Cascade for Gar-

field (R. 55, 56).

(10) When the American Gilsonite people first saw the engineers checking rights of way for the construction of the line by Bonanza, they approached Defendant Mountain Fuel Supply Company and requested gas service (R. 140).

(11) On September 22, 1965, and November 17, 1965, American Gilsonite wrote Defendant Utah Public Service Commission alluding to the Mountain Fuel Supply Company line and asking for natural gas service. (Plaintiff seems to object that these letters are in the record without having been introduced in evidence. However, their subject matter was brought out in full detail by Witness Paul Borden, and he was thoroughly cross-examined by Plaintiff's Counsel at the hearing.)

(12) On October 19, 1965, Defendant Mountain Fuel Supply Company filed its application for a certificate to serve Bonanza (R. 1).

(13) On December 7, 1965, notice was mailed to L. L. Laughlin, President, Utah Gas Service Company (Plaintiff herein) and to Plaintiff's Counsel, Edward F. Richards, indicating that hearing would be had on the Mountain Fuel application on January 25, 1966 (R. 11, 12, 13).

(14) Not until January 18, 1966 (seven days before the hearing) did Plaintiff file its Protest and Petition of Intervention herein (R. 16). Furthermore, this petition not only asked that Mountain Fuel's application be denied, but went much further, and asked that the Commission act affirmatively and order Defendant Mountain Fuel

to sell sufficient gas to Plaintiff to supply Bonanza (R. 17-18).

(15) On January 25, 1966, the hearing was conducted, and Plaintiff participated fully therein and produced testimony in support of its request for a gas supply from Mountain Fuel, despite the protest of Mountain Fuel that the Commission could not properly consider the affirmative relief requested by Plaintiff in the proceeding (R. 20).

ARGUMENT

POINT I.

PLAINTIFF'S REQUEST FOR AFFIRMATIVE RELIEF WAS NOT PROPERLY BEFORE THE PUBLIC SERVICE COMMISSION.

As part of what it referred to as its protest, Plaintiff asked Defendant Public Service Commission to compel Defendant Mountain Fuel to serve Plaintiff gas for resale in Bonanza.

Such affirmative relief must be sought by an Applicant (Rules of Practice and Procedure of the Public Service Commission of Utah, Rule 6.3) or a Petitioner (Rule 6.5) under circumstances where this Commission may give adequate notice to all parties concerned pursuant to its usual procedure (Rule 14.1).

To properly invoke the jurisdiction of the Defendant Commission to issue the order in question, Plaintiff is required by law to file an original petition seeking such affirmative relief, demonstrating economic feasibility, and showing that the public convenience and necessity requires the relief sought.

Rather than this, Plaintiff attempted on seven days' notice to convert the hearing on Defendant Mountain Fuel's application into its own affirmative proceeding. We submit that this was improper.

POINT II.

PLAINTIFF HAD NO EXCLUSIVE CERTIFICATE FOR UINTAH COUNTY.

After granting a Certificate of Public Convenience and Necessity to supply natural gas in the cities of Monticello, Moab, and Vernal, Utah, the order of Defendant Public Service Commission in Case No. 4213 provides:

> "It is further ordered that Utah Gas Service Company, a corporation, without obtaining additional authority therefor, may build additional distribution facilities in the counties of San Juan, Grand and Uintah, where there is a demand for natural gas service and which may be economically served." (R 59)

Yet in this case the record reveals no approved rates nor does it include any showing of economic feasibility for the service Plaintiff seeks to provide. It certainly does not show that Plaintiff had at that time any source of natural gas to supply Bonanza. In fact, the above order of Defendant Public Service Commission is merely a repetition of the contiguity provisions of Section 54-4-25 UCA, meant to allow a utility, which is serving a given area, to expand beyond its original limits. The order, itself, adds nothing to the staturorily granted power.

In the absence of a clear showing of rates and sources of supply (together with the cost thereof), the conditions

of the above provision are obviously not met. The Commission was certainly not barred by its prior language from granting the instant certificate.

Without regard to the geographic extent of Plaintiff's certificate, it is still not exclusive. Plaintiff could not hold the area open for future possible development as against the application of a company ready to act. In State Ex. Rel. *Kansas City Power & Light Company* v. *Public Service Commission of Missouri,* 8 P.U.R. (NS) 192, 76 S.W. 2d. 343 the Court said:

> "Neither the Commission nor the courts should protect a utility company in its attempt to reserve a certain area unto itself as its exclusive territory, unless the company is willing and able to promptly furnish adequate service to consumers in that territory within a reasonable time and at fair and reasonable rates for the type of service required."

See also: *Commercial Motor Freight* v. *Public Utilities Commission,* 87 P.U.R. (N.S.) 348, 154 Ohio St. 388, 95 N.E. 2d 758; *Re American Louisiana Pipe Line Co.* (F.P.C.) 6 P.U.R. 3rd 476; *Philadelphia-Pittsburgh Carriers* v. *Penn. Pub. Utility Com.,* 185 Pa. Superior Ct. 588, 138 A. 2d 693.

POINT III.

(IN ANSWER TO POINT I OF PLAINTIFF'S BRIEF.) FINDING NO. 8 OF THE COMMISSION SHOULD BE UPHELD.

Plaintiff objects to the Commission's finding that it was not willing and able to promptly furnish adequate service within a reasonable time to the community of Bonanza.

Much of the Plaintiff's argument is based upon the assertion that the representatives of American Gilsonite Company *did not seek out Plaintiff and request gas service.* We feel strongly that since Plaintiff was in the gas business, claimed a right to operate in the territory involved and had the technical knowledge of what steps could be taken to obtain and market gas, it was incumbent on it to locate the available gas sources and to make sales overtures to potential customers at Bonanza. Even Mr. Laughlin admitted at the hearing (R. 175) that he did not customarily promote gas sales simply by waiting for customers to hunt him up.

At the same time plaintiff excuses itself from making any effort to request gas service from such sources as Pacific Natural Gas Exploration Company, Walco and the Red Wash Oil Field on the grounds that Pacific "did not want to tie up their gas supply to small operations," and that Plaintiff's requirements were so small that it was difficult to induce said parties to consider selling gas on a long term basis. It is clear that none of Plaintiff's officers or agents actually requested any of the nearby sources to provide gas for Bonanza during the ten years Plaintiff has been located in Uintah County (R. 179, 181).

Plaintiff chose to ignore the following significant series of events:

First came the Garfield Gas Gathering Company project. Prior to July 23, 1963, efforts were commenced to bring western Colorado gas to Utah (R. 75). These negotiations and efforts continued without let-up until September or October of 1965, when they were culminated in successful completion of the project (R. 184).

It is not conceivable that a man of Laughlin's experience, who was present in Uintah County managing Plaintiff company, would not have heard of these negotiations and construction projects. As an excuse for not asking Cascade to supply Plaintiff with gas for resale in Bonanza, Mr. Laughlin claimed that he did not know until a few days before January 25, 1966, that Cascade was subject to the jurisdiction of the Federal Power Commission. However, on cross-examination, he admitted he could have contacted Cascade for gas regardless of its status before the Federal Power Commission, yet he made no such contact (R. 177).

When asked if he had known about the Cascade project for a long time, Laughlin replied, "Not very much about it, no" (R. 176). These are transparently evasive answers, which were made to conceal a thorough knowledge of events in which he and his company were not interested at the time, or demonstrates an utter disregard of the welfare of the people whom Plaintiff seeks the exclusive right to supply with gas.

On March 31, 1964, the Garfield Gas Gathering Company applied to the Federal Power Commission for a Certificate to serve Mountain Fuel (R. 53, 54). Later, on September 16, 1965, Cascade filed its application to be substituted for Garfield (R. 55, 56). Plaintiff ignored the notices of these proceedings which were published in the Federal Register.

Even when notice of the Mountain Fuel Supply Company application before Defendant Public Service Commission was received, Plaintiff coasted along for six weeks, and reacted with its pleading seeking interven-

tion, protest, and affirmative relief, only on January 18, 1966, barely seven days before the hearing. The only sign of interest in the distribution of gas to Bonanza which Plaintiff has shown occurred after Mountain Fuel Company sought authority to bring gas into that area, and several years after the Cascade-Mountain Fuel project was initiated.

It was certainly proper for the Commission to certify the applicant, Mountain Fuel Supply Company, simply because it moved expeditiously in response to the request for service by American Gilsonite, and as Plaintiff admits in its brief, ". . . nor is there any dispute as to the qualifications and financial ability of Mountain Fuel to supply such service. . . ."

At the same time Plaintiff has not met the test prescribed in State Ex Rel. *Kansas City P. & L. Company* v. *Public Service Commission of Missouri*, 8 P.U.R. (NS) 192, 76 S.W. 2d 343, (Supra, page 10). In attacking the applicability of the *Kansas City P. & L. Company* case to the instant situation, Plaintiff attempts to distinguish it on the grounds that neither American Gilsonite nor the Commission requested Plaintiff to provide gas for Bonanza. This again reflects Plaintiff's distorted view of the sales responsibility and promotional efforts which are properly expected of a utility allowed to serve a given area.

We submit that it would prejudice service to new areas to hold, as Plaintiff urges on Page 13 of its brief, that the Public Service Commission has a duty to procure such new service by prodding adjacent utilities into action.

POINT IV.

(IN ANSWER TO POINT II OF PLAINTIFF'S BRIEF.) THE COMMISSION COULD NOT LAWFULLY REQUIRE MOUNTAIN FUEL TO SELL GAS TO PLAINTIFF, UTAH GAS.

The Commission stated in Finding Number 8 that it did not believe it should compel Mountain Fuel Supply to make a supply of gas available to Utah Gas to serve Bonanza. It went on to say: "Even if we were so inclined, we believe we are without authority so to do."

Plaintiff, in attacking this ruling, concentrates on the last sentence and in effect discusses the statutory powers and obligations of the Commission in the jurisdictional sense. Obviously, the Commission was referring to its power to make a substantive determination on these particular facts. Undoubtedly on the proper facts, it would have power to order one utility to wholesale to another.

The Public Utility Act of Utah does not contain a provision granting authority to the Commission to compel one utility to render wholesale service to another utility *when the former has not undertaken this type of public service.* Where a utility has only held itself out to serve retail customers and has by its own rules always forbidden resale, it cannot be required to furnish wholesale service.

The Oklahoma Supreme Court followed this general rule in the case of *Oklahoma Natural Gas Company v. Corporation Commission et al.*, 88 Okla. 51, 211 Pac. 401, 31 A.L.R. 330, in which it held,

"The authorities are harmonious in holding that one enters the public business by professing or undertaking to serve the public and that his public obligation is limited by the extent of his profession. Thus, in Wyman on Public Service Corporations, Vol. I § 250, it is said: 'Public profession not only establishes public obligation, but it largely determines the extent of the public duty. Just as people cannot be forced to serve unless they have made public profession, so they cannot be forced to serve beyond what their profession covers.'

"* * *

"While the Corporation Commission may within constitutional and reasonable limitations compel appellant to extend its service within the boundaries of those cities it is now serving or those it may undertake to serve, it is without power or authority to compel appellant to serve a city not included within its profession of service. To compel appellant to extend its service to a city, town or community it has not undertaken or professed to serve, it is tantamount to an appropriation of private property for public use without just compensation."

The North Carolina Supreme Court followed the rule in the case of *Salisbury & S. R. Co.* v. *Southern Power Company*, 179 N. C. 18, 101 S. E. 593, 12 A.L.R. 304, wherein Walker J. stated on rehearing, 179 N. C. 330, 102 S.E. 625, as follows:

"I candidly admit that as a general proposition one public service corporation cannot be made to supply a competitor, another public service corporation of like character, with the material necessary to enable the latter to discharge its duty to the public. . . .

> "In my opinion the defendant had the right originally to confine its sales and contracts to those desiring electricity for direct personal consumption, and thereby retain control of the number of its customers, limiting them to that number it could adequately serve. . . .
>
> "If the defendant in the beginning had elected to supply only the individual consumer, I am satisfied it could not have been compelled to supply smaller corporations engaged in retailing the electric current. . . .

The rule is also stated in *Pond "Public Utilities,"* Vol. 1, P. 593, as follows:

> "Unless a public utility holds itself out as offering wholesale service, it cannot be required to furnish service to another utility for distribution to individual customers, because the effect of forcing it to do so would be to make it a party to the creation and support of a competitor in the same line of service."

For similar holdings, see *Gnagy Electric Co.* v. *Indiana Utility Co.,* P.S.C. (1917), P.U.R. (1918B) 209: Re *Ohio Fuel Supply Co.,* P.U.R. (1921A) 628; *Tower Operating Co.* v. *Wisconsin Electric Power Co.* (1950), 87 P.U.R. (N.S.) 381; and *Halls Electric Co.* v. *Carolina Light & Power Co.* (1929), 197 N. C. 766, 150 S.E. 621.

In the case of *Utah Power & Light Co.* v. *Public Service Commission,* 249 P. 2d 951, The Utah Supreme Court sustained an order of the Public Service Commission, under which the Power Company was required to sell electricity for resale to the town of Nephi. This case is easily distinguished from the present case, because the power company had a rate schedule providing for

sales "... at wholesale to municipalities, governmental agencies or public service companies the high voltage electric energy for resale to inhabitants of cities, towns or villages." There was no question of the power company's ability to perform this service, nor that it had professed to do so; therefore, the court concluded that the Commission acted within its power in ordering the power company to serve the type of customer 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.

The Court used this language:

> "... the Commission acted within its power in ordering that company to serve the type of customer 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." (italics ours)

The Federal laws and the discussion of factors related to the jurisdiction of the Federal Power Commission cited by Plaintiff on pages 14, 15, 16 and 17 of its brief do not apply to this case. The question here concerns local distribution to Bonanza, Utah, a matter exempted from the natural gas act (U. S. Code, Title 15, Sec. 717 (b), which provides that the act "... shall not apply to ... the local distribution of natural gas or to the facilities used for such distribution. ...") The Utah Public Service Commission has full jurisdiction here to deal with the question before it.

That this is recognized by the Federal Power Commission is apparent from the letter of July 15, 1966, which

it forwarded to the Supreme Court of Utah. Plaintiff, when denied Mountain Fuel gas by the Utah Public Service Commission, petitioned the F. P. C. to order Cascade to supply it with gas for Bonanza. Until the Utah Supreme Court acts on the pending Writ of Review, the F.P.C. refuses to act on Plaintiff's petition.

CONCLUSION

In conclusion, we stress the fact that the need of the Bonanza people went unmet for many years during which Plaintiff claimed authority to operate in the vicinity. Now Mountain Fuel Supply Company has done something about it, and should not be prevented from carrying its worthwhile effort to completion because Plaintiff belatedly concerned itself with service to Bonanza. The writ of review should be dismissed.

Respectfully submitted,

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