

1966

Utah Gas Service Company v. 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 :
Brief of Plaintiff, Utah Gas Service Company

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IN THE SUPREME COURT
of the
STATE OF UTAH

UNIVERSITY 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.

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Case No.

~~10284~~

10624

BRIEF OF PLAINTIFF,
UTAH GAS SERVICE COMPANY

Appeal from the Order of the Public Service Commission
of Utah

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Public Service Commission of Utah,
and MOUNTAIN FUEL SUPPLY
COMPANY, a corporation,

Defendants.

Case No.
10264

BRIEF OF PLAINTIFF,
UTAH GAS SERVICE COMPANY

The plaintiff, Utah Gas Service Company, will hereafter be referred to as Utah Gas, and the defendants, Public Service Commission of Utah, Donald Hacking, Hal S. Bennett and D. Frank Wilkins, Commissioners, will be hereafter referred to as Commission, the defendant Mountain Fuel Supply Company will be referred to hereafter as Mountain Fuel.

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 that the Commission enter an 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

Utah Gas seeks a reversal of the order of the Commission dated the 23rd day of March, 1966, and an order requiring Mountain Fuel to deliver gas to Utah Gas as requested, or in the alternative, that a rehearing

be granted to permit additional evidence to be introduced as set forth in the petition for rehearing presented to the Commission.

STATEMENT OF FACTS

The community of Bonanza is approximately 46 miles southeast of Vernal, Utah, and is located in a remote area. American Gilsonite Company owns all of the buildings and facilities at Bonanza. (R. 132) The inhabitants of Bonanza, and the American Gilsonite Company, have been interested in gas since it was first discovered in 1952. No one had ever offered to render gas service to the community. (R. 137) Mr. Borden, superintendant at Bonanza, Utah, (R. 128) had never requested gas service from Utah Gas and as far as he knew, no one else had requested them to serve the community. (R. 138) According to Mr. Borden, Mountain Fuel was the only one in the area that served gas close to the community. (R. 141) According to Mr. D. J. Simon, Vice President of Mountain Fuel and a petroleum engineer, (R. 164) it was not known whether there was gas economically available to service Bonanza other than that purchased from Cascade. Mountain Fuel never offered to supply gas to Bonanza. The American Gilsonite Company approached Mountain Fuel when it saw or knew that a gas line of Mountain Fuel was going to be near Bonanza. (R. 140) The line is one mile from Bonanza, Utah and is a sixteen inch high pressure pipeline. (R. 147 Exhibit 1)

The Commission in its finding No. 8 on page 4 states:

“The facilities were constructed in the summer and completed in the fall of 1965. American Gilsonite Company (which owns the entire community of Bonanza, Utah) thereafter, by letter of September 22, 1965, to this Commission, sought to receive gas service, noting the new Cascade facilities which delivered gas to Mountain Fuel's facilities a short distance from the community of Bonanza, Utah.” (R60)

The letter referred to in said finding was not introduced into evidence. Following the hearing, a copy of the letter was furnished to Utah Gas by the Commission, which letter states as follows:

“September 22, 1965

Public Service Commission
 Department of Business Regulation
 First Security Building
 Salt Lake City, Utah
 Attention: Mr. Donald Hacking, Chairman

Gentlemen:

Our company operates gilsonite mines at Bonanza, Utah (45 miles southeast of Vernal, Utah), and owns all of the homes and facilities at Bonanza.

We have wanted to use natural gas for fuel in these homes and for our industrial facilities but heretofore, no supply of gas has been available in the area. Mountain Fuel Supply Company is now in the process of installing a gas trunkline through Bonanza to their Salt Lake City network, which should be available as a source of fuel for us.

Since no utility is now supplying natural gas in the vicinity of Bonanza we are hereby making application to you for this service.

Very truly yours,
S/ E. H. Owen" (R.9)

The Commission, in addition to receiving the above letter, received a telephone call on October 25, 1965 and another letter on November 17, 1965, which letter states as follows:

"November 17, 1965

Public Service Commission
Department of Business Regulation
First Security Bank Building
Salt Lake City, Utah
Attention: Mr. Donald Hacking, Chairman
Gentlemen:

This is in regard to our letter of application, dated September 22, 1965, and my telephone inquiry on October 25, for natural gas service to our mining and housing facilities at Bonanza, Utah.

We have noticed that the gas line owned by Mountain Fuel Supply Company that borders on the south side of Bonanza is now handling gas and we presume it is now available.

With the heavy-fuel-demand season now starting, we are anxious to convert to gas as soon as possible and we will appreciate very much anything you can do to expedite this application.

Very truly yours,
S/ T. C. Mosley
Admin. Asst.
to the President" (R.10)

This letter was not offered and received in evidence.

The only party contacted by the American Gilsonite Company and the Public Service Commission of Utah in reference to gas service to Bonanza, Utah was Mountain Fuel.

Utah Gas furnishes gas in four counties: Daggett, Uintah, Grand and San Juan. On March 13, 1956, the Commission after hearing made and entered its order in Case No. 4213, granting to Utah Gas Service Company (Utah Gas), intervenor herein, a Certificate of Public Convenience and Necessity to supply natural gas in the cities of Monticello, Moab and Vernal, Utah. The Order in that case 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)

It has a complete service operation at Vernal, capable of servicing facilities in the event of a breakdown. (R. 170)

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. (R. 170) The only available supply of gas is from the new line recently constructed by Cascade and Mountain Fuel in the fall of 1965. (R. 112, 171)

Provided this gas is made available to Utah Gas, it could serve the area of Bonanza. (R. 171)

The only reason Utah Gas has never offered the service to the users of Bonanza is due to the fact that they did not indicate any need or desire therefor and because there was no gas available which could be used economically. (R. 175, 185)

The statement:

“Utah Gas made no contacts with American Gilsonite or other possible users at Bonanza, or with Cascade, in an endeavor to provide gas service to that community before this hearing.” (R. 112)

and upon which the Commission finds that Utah Gas was not willing and able to promptly furnish adequate service within a reasonable time, ignores the facts as contained in the record. 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. If permitted, Utah Gas is willing to apply to the Federal Power Commission for an application requiring Cascade to deliver gas to it for service to Bonanza. (R. 174)

Concerning other gas within the area, the record discloses that Loran L. Laughlin, President and General Manager of Utah Gas, was acquainted with the Pacific Natural Gas Exploration Company, which com-

pany has an interest in wells producing within a mile or two of Bonanza, Utah. Efforts to obtain said gas were not made by reason of the fact that said company did not want to tie up their gas supply to small retail operations. (R. 177-179) In the year 1963 the Walco Corporation sought a certificate of public convenience and necessity to deliver gas to Mountain Fuel Supply Company. Mr. Laughlin advised the principals of Walco Corporation that in the event they had gas for sale, his company might be interested. He did not discuss directly with them or with the producers of gas in the Red Wash oil field, gas available for Bonanza, Utah, due to the fact that his company's requirements were so small that it was difficult to induce said parties to consider selling gas on a long-term basis. In addition, the Red Wash field is a substantial distance from Bonanza over rough and rugged country. (R. 181-183)

Mountain Fuel has not in the past served Uintah County except for ranch houses or farm houses and its service operations in connection with Bonanza would have to come from Emery County, Utah. (R. 160) The American Gilsonite was not approached by Mountain Fuel concerning supplying gas, but to the contrary, it approached Mountain Fuel when they first saw the gas line or knew that the gas line was going by Bonanza. (R. 140). No effort was made to contact anyone other than Mountain Fuel since so far as American Gilsonite knew, it was the only one in the area that served gas or had any. (R. 141)

Mountain Fuel has sufficient reserves to serve Bonanza customers and all of the customers on its lines at the end of 1965 for a period between seventeen and eighteen years. (R. 166)

Utah Gas is of the opinion that if Mountain Fuel is allowed to break into its territory it is likely to have a very serious effect on its future operations. Utah Gas started its operations in eastern Utah in 1956 (R. 175) when no one else was interested. It depends considerably upon industrial business to carry on its earnings and if its future industrial business is cut off by reason of Mountain Fuel's entry into the territory, it would have a bad effect upon the future of Utah Gas. (R. 173)

There is no question as to the need and necessity of the gas service to Bonanza nor is there any dispute as to the qualifications and financial ability of Mountain Fuel to supply such service, and we have, therefore, not mentioned any of the testimony offered by Mountain Fuel in connection with these different matters.

ARGUMENT

POINT I

FINDING NO. 8 TO THE EFFECT THAT UTAH GAS WAS NOT WILLING AND ABLE TO PROMPTLY FURNISH ADEQUATE SERVICE WITHIN A REASONABLE TIME IS CONTRARY TO THE EVIDENCE, UNWARRANTED, UNJUST, ARBITRARY AND CAPRICIOUS.

The first economically available gas for service to Bonanza, Utah came into existence in the fall of 1965, a period of four to six months prior to the date of hearing. The first request for service by American Gilsonite

and the inhabitants of Bonanza, Utah was pursuant to a letter under date of September 22, 1965, which said letter points out the fact that as of said date no supply of gas has been available in the area, and that Mountain Fuel is in the process of installing a gas trunk line through Bonanza, Utah.

With full knowledge that Utah Gas held the necessary authority to render service to Bonanza, Utah, and notwithstanding, the Commission failed to notify Utah Gas of the request of Mr. E. H. Owen of the American Gilsonite Company and in lieu thereof, advised the Mountain Fuel Supply Company. It was on November 17, 1965, approximately two months and eight days prior to the date of the hearing that the Commission was advised by letter that the Mountain Fuel Supply Company gas line was completed and handling gas. At this time a further request was made to the Commission by American Gilsonite Company for gas service. Like the earlier request, the Commission failed in its duty to recognize Utah Gas or to otherwise advise them of the request of the American Gilsonite Company. It was not until the 7th day of December, 1965, a date approximately one and one-half months prior to the date of the hearing that Utah Gas first learned of any effort to obtain gas service. Recognizing its willingness and ability to perform the proposed service, Utah Gas then caused to have filed its protest to the application of Mountain Fuel and its petition for intervention, the latter to compel Mountain Fuel to supply gas to Utah Gas for service to Bonanza, Utah.

Even though the letter of September 22, 1965 never found itself into the record at the time of the hearing, it nevertheless was made a part of the findings of the Commission, thus depriving Utah Gas from its right of cross-examination and further discovery incident to these proceedings. It is apparent that Mountain Fuel was advised of the letter as it filed its petition in October, 1965.

Following the issuance of its Report and Order and as a part of the record on appeal, is the letter of November 17, 1965. The Commission, upon receipt of said letter request, kept the same quiet sofar as the Utah Gas is concerned. Its failure to advise Utah Gas of the request for service, the failure to give it an opportunity to render the service, and a record which discloses that the first time gas was economically available was immediately prior to the 17th day of November, 1965, and the finding that Utah Gas did not display promptly and within a reasonable time its willingness and ability to furnish the service, constitutes an action on the part of the Commission which is arbitrary, capricious, unlawful and unwarranted and an award of a certificate to Mountain Fuel based on such a finding should be reversed.

The case of *State Ex Rel. Kansas City P & L Co. v. Public Service Commission of Missouri*, 8 PUR (NS) 192, 76 S. W. 2d 343, cited by the Commission in support of its erroneous finding that Utah Gas was not diligent or willing to serve Bonanza, Utah, is factually not in point and points to the fact that the Commission's finding is unwarranted, arbitrary and capricious.

In *State Ex Rel. Kansas City P. & L. Co. v. Pacific Service Commission of Missouri, supra*, the facts disclose that St. Joseph Railroad, Light, Heat and Power Company made an application for a certificate or permit to build and operate an electrical transmission line to a pumping station of Great Lakes Pipeline Company. Kansas City Power & Light Company, Missouri Power and Light Co., and Missouri Gas and Electric Service Company intervened. Prior to the filing of the application by St. Joseph Railroad, Light, Heat and Power Co., the Great Lakes Pipeline Company applied to Kansas City Power and Light Company for service. This was on March 1, 1932. Negotiations between them terminated April 10, with Kansas City Power offering an unsatisfactory rate agreement. The pipeline company then approached Missouri Gas and Electric Service Company, but the service company made no reply or offer and on April 30th, the pipeline company wrote a letter to find out if Missouri Gas and Service Company was interested. Missouri Gas and Service Company refused to make a definite offer and on May 9, 1932, its Vice President advised the pipeline company that it would give service on a rate schedule, which Kansas City had already offered. This offer was also made conditional upon Kansas City furnishing the electricity. It was on May 21st the pipeline company contacted the St. Joseph Company who filed the application. In this case, affirmative acts were taken by the party desiring the electricity, and when it was unable to obtain satisfactory service from the certificated holders in that locality, it then approached the other company.

Neither the inhabitants of Bonanza, Utah, American Gilsonite Company or the Public Service Commission of Utah made a request to Utah Gas for service. The Commission after receiving the letter of September 22, 1965, from American Gilsonite requesting service should have advised Utah Gas. Had Utah Gas been approached by Bonanza, American Gilsonite Company or the Commission and refused or failed to render the service or attempted to render the service, then the case above quoted might be in point and been appropriate to put in the findings of the Commission. Before a new certificate holder should be created, it is the duty of the Commission to protect the interests of the existing certificate holder as far as can be done without injury to the public. In this connection, we call your attention to the case of *Mulcahy v. Public Service Commission*, 101 Utah 245, 117 P.2d 298, wherein the court states:

“Yet the interest of the existing certificate holder should be protected so far as that can be done without injury to the public, either to its present welfare or hindering its future growth, development and advancement.”

Had the Commission advised Utah Gas concerning the requested need for service on the 22nd day of September, 1965, it could then have made immediate application to the Federal Power Commission to obtain gas from Cascade at its pipeline in the immediate vicinity of Bonanza, Utah, in order to serve the territory it was certificated to serve. Having failed to so advise Utah

Gas, the Commission has failed to protect the interests of existing certificated holders and as a result has hindered the future growth, development and advancement of Utah Gas.

POINT II

THE COMMISSION HAS THE POWER TO REQUIRE MOUNTAIN FUEL TO SELL GAS TO UTAH GAS

Mr. Kastler, one of the attorneys for Mountain Fuel, made the following statement:

“Now, if the Commission please, Mountain Fuel Supply Company would be willing to stipulate that in the Federal law under which the Federal Power Commission operates, there are provisions for selling gas at wholesale from interstate pipeline companies, provided they have the gas to sell.” (R. 198)

The Natural Gas Act, 15 *U.S. Code Annotated* 717, was amended in 1954, the amendment being the addition of (c) to this section. 717(c) reads as follows:

“The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this sub-

section are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction."

As the Senate Committee on Interstate Foreign Commerce put it in its report on the amendment, 2 *U.S. Cong. & Adm. News* 1954 at page 2102:

"The difficulty giving rise to the need for this bill is that * * * the Commission has undertaken regulation of some activities of certain companies engaged in the distribution of natural gas whose operations take place wholly within a single State and *which can be completely regulated* by the respective States. * * *" (italics ours)

The report further states:

"The provisions apply, however, only if (1) all the natural gas received in the state by such person is ultimately consumed in such state, and (2) the rates charged, the service performed, facilities used by such persons are subject to the regulation by a State Commission."

From the foregoing, it is apparent that in order for Mountain Fuel to be exempt from the Federal Power Commission under section 717 (c), the Utah Commission should have taken complete control of Mountain Fuel and required Mountain Fuel to deliver gas to Utah Gas the same as the Federal Power Commission could under

section 7 (a) of the Natural Gas Act, 15 *U.S. Code Annotated* 717f (a) which states :

“Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: PROVIDED, That the Commission shall have no authority to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.”

The above section does not limit the Commission to regulating the sale of gas at wholesale from interstate pipeline companies but it gives the Commission power to regulate the sale by a “natural-gas company” and a “natural-gas company” is defined by 15 *U.S. Code Annotated* 717a, subdivision (6) as follows :

“Natural gas company” means persons engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.”

If the State Commission has complete regulatory powers over the utilities claiming an exemption under

section 717(c) of the Natural Gas Act, the Commission does have power to direct and provide for the selling at wholesale, not only by interstate pipeline companies but anyone else dealing in the business of transporting and selling natural gas for the ultimate distribution to the public. You cannot construe these provisions otherwise without permitting a utility to escape the control and jurisdiction of the Federal Power Commission over its acts and then escape supervision by the State Commission. In other words, it could do as it pleased to sell or not sell gas to this individual, town or customer.

If the Commission claims they do not have complete jurisdiction, then a rehearing should be granted to permit evidence that would show that Mountain Fuel is not exempt under 1(c) and should be controlled by the Federal Power Commission or receive authority from that Commission to serve Bonanza or who else the Federal Power Commission may order.

The authorities cited by Mountain Fuel in its Memorandum of Authorities which has been made a part of the record discloses that none of the cases therein cited were after the amendment to the Natural Gas Act in 1954.

The Commission is fully vested with the power and jurisdiction to require Mountain Fuel to sell to Utah Gas under the provisions of 54-4-1, *Utah Code Annotated*, 1953, which reads as follows:

“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.”

CONCLUSION

We respectfully submit the order of the Commission should be reversed, the application of Mountain Fuel for a certificate of convenience and necessity to serve Bonanza should be denied and the Commission should order Mountain Fuel to sell gas to Utah Gas at a reasonable rate so that it may serve Bonanza.

Respectfully submitted,

**EDWARD F. RICHARDS
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