BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * *

{PRIVATE **}**TRACY N. JOHNSON	)	
	)	DOCKET NO. 90F-475G
Complainant,	)	
v.	)	
	)	
ROCKY MOUNTAIN NATURAL GAS AND	)	
K N ENERGY, INC.,	)	
	)	
Respondent	)	

ORDER ON EXCEPTIONS:

- -
Mailing Date: October 23, 1992
Adopted Date: October 7, 1992
- -

BY THE COMMISSION

This matter comes before us for consideration of Complainant Tracy Johnson's Exceptions to "Recommended Decision No. R91-795." Complainant has timely filed his exceptions, and Respondent Rocky Mountain Natural Gas and K N Energy, Inc. has filed its reply. Being duly advised in the premises, we now grant the exceptions, in part.

Except as noted in this order, we largely agree with the findings made and conclusions reached by the Administrative Law Judge ("ALJ") in Decision No. R91-795. In that decision, the ALJ noted that there is an apparent inconsistency between two provisions in a gas line extension contract between Respondent Rocky Mountain and Complainant. That contract required Mr. Johnson, a customer of Respondent, to pay $11,000 to Rocky Mountain for a certain gas main line extension. Paragraph 1 of

the contract, in typed language, required Rocky Mountain to reimburse Mr. Johnson $300 for each meter set in Complainant's development and in any new development within a mile on the line extension. In Paragraph 3, in form language, Respondent agreed to refund to Mr. Johnson $300 for each meter connected directly to the extension paid for by Complainant.

At hearing, Rocky Mountain argued that the District Manager who signed the contract for Respondent was acting in excess of his authority, and, therefore, the contract, to the extent it was inconsistent with Company policy, was not binding upon it. The ALJ correctly ruled that the District Manager did have authority to bind Rocky Mountain to the contractual provisions. Additionally, the ALJ was correct in concluding that, for the stated reasons and in the absence of other factors, Paragraph 1 of the contact would prevail over Paragraph 3. In this case, however, the ALJ went on to determine that the provisions of Paragraph 3 were the controlling refund provisions in light of the "filed rate doctrine." That is, the ALJ concluded (Paragraph 9 of Recommended Decision) that the refund provisions in Paragraph 1 of the contract are inconsistent with Rocky Mountain's tariff, and are therefore void.

We now rule that the ALJ misapplied the relevant tariff provisions when he concluded that, pursuant to Paragraph 3 of the contract, Complainant was entitled to reimbursement only for those meters connected directly to his line. We take administrative notice of the Rocky Mountain tariff which was in effect at the time the contract was signed.[1] That gas main extension tariff provided:

> For each additional customer connected to said gas main extension within a period of five (5) years after completion of the extension, where service has not been previously rendered and where only a gas service connection to said extension is required, a refund of Three

[1] The relevant tariff, Colorado P.U.C. No. 3, had an effective date of March 30, 1970, and was cancelled on September 10, 1987. The contract between Mr. Johnson and Rocky Mountain was entered into on April 8, 1987. We note that the pertinent refund provisions are essentially the same under the old tariff and the tariff in effect at the time of hearing.

> Hundred Dollars ($300.00) shall be made, provided that in no case shall total refund exceed original deposit. Refund shall be made to applicants pro-rata on the basis of advance made by each to total amount . . . .

(Emphasis added.)

We interpret the underlined portion of this tariff provision to mandate some refund to Complainant. Further, we interpret Paragraph 1 of the contract to be an attempt to incorporate the concept in the underlined portion into the contract which Paragraph 3 failed to do. See page 17 of the transcript. The record indicates that Rocky Mountain and a developer made extensions from the line Mr. Johnson paid for, and three meters were connected to the new extensions.[2] Respondent argues that since there was no direct connection to Complainant's line, no refund is due. We disagree. The above-cited tariff requires a pro-rata refund to Mr. Johnson using the formula set out for the meters connected by other extensions to the extended line Mr. Johnson paid for. The amount of this refund shall be the proportion of Complainant's costs ($11,000) to the sum of Complainant's, Rocky Mountain's, and other developers' costs, times $300.[3] Respondent shall make pro-rata refunds to Mr. Johnson for each meter connected to the extended lines (e.g., where Rocky Mountain makes an extension from the Johnson line and connects new meters to the new extension) during the period of the contract.

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[2] One of the disputed meters was referred to by the parties as "the meter in question." The record indicates that two other meters in the Wildwood subdivision were indirectly connected to Complainant's line.

[3] For example, the record indicates that Respondent's cost for one extension from the Johnson line was $765, and that the "meter in question" was connected to this extension. Complainant's extension costs were $11,000. Therefore, the refund due Mr. Johnson for that meter indirectly connected to the line he paid to extend is $300 x $11,000/11,765. The record also indicates the other developer paid $4350 for an extension from the line Mr. Johnson paid for. Therefore, the refund due Mr. Johnson for each meter connected to this line during the period of the contract is $300 x $11,000/15,350.

THEREFORE THE COMMISSION ORDERS THAT:

1. The Exceptions are granted in accordance with the above discussion.

2. Rocky Mountain is ordered to make refunds to Complainant in accordance with the tariff in effect at the time the contract was entered into. Refunds shall include pro-rata refunds for meters connected to the Johnson line consistent with the above discussion.

3. The 20-day time period provided for by section 40-6-114 (1), C.R.S. to file applications for rehearing, reargument or reconsideration begins on the first day after the mailing or serving of this Decision.

This Order is effective on its mailing date.

ADOPTED IN OPEN MEETING October 7, 1992

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners

COMMISSIONER GARY L. NAKARADO SPECIALLY CONCURRING
COMMISSIONER CHRISTINE E. M. ALVAREZ DISSENTING

SPECIAL CONCURRENCE OF COMMISSIONER GARY L. NAKARADO

While I concur in the reasoning and result of the majority opinion, I believe it is time for the commission to explicitly permit equitable exceptions to the so called "filed rate doctrine." While this appears to me to be implicit in the commission's opinion, I will be explicit.

I. The Past

The history of the filed rate doctrine has been ably presented by the United States

Supreme Court in Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 110 S.Ct. 2759, 2766 (1990),[4]

which provided in part:

> The duty to file rates with the Commission, . . . and the obligation to charge only those rates, . . . have always been considered essential to preventing price discrimination and stabilizing rates. "In order to render rates definite and certain, and to prevent discrimination and other abuses, the statute require[s] the filing and publishing of tariffs specifying the rates adopted by the carrier, and ma[kes] these the *legal* rates, that is, those which must be charged to all shippers alike." *Arizona Grocery Co. v. Atchinson, T. & S.F.R. Co.*, 284 U.S. 370, 384, 52 S.Ct. 183, 184, 76 L.Ed. 348 (1932). . . . this Court has read the statute to create strict filed rate requirements and to forbid equitable defenses to collection of the filed tariff. . . . The classic statement of the "filed rate doctrine", . . . is explained in *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94 (1915).

. . . Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination." . . . .

This rigid approach was deemed necessary to prevent carriers from intentionally "misquoting" rates to shippers as a means of offering them rebates or discounts. . . . As the Commission itself found, "past experience shows that billing clerks and other agents of carriers might easily become experts in the making of errors and mistakes in the quotation of rates to favored shippers, while other shippers, less fortunate in their relations with carriers and whose traffic is less important, would be compelled to pay the higher published rates." *Poor v. Chicago, B. & Q. R. Co., 12 I.C.C. 418, 421 Grain Co. (1907)*; see also *Western Transp. Co. v. Wilson & Co.*, 682 F. 2d 1227, 1230-1231 (CA7 1982). Despite the harsh effects of the filed rate doctrine, we have consistently adhered to it.[5]

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[4] Direct reference to Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 110 S.Ct. 2759, 2766 (1990), *action of bankruptcy trustee for carrier against shipper to recover difference between filed rate and the amount charged the carrier . . . where judgment in favor of the shipper* . . . was reversed and remanded by the U.S. Supreme Court which held *that the ICC could not preclude collection of a filed rate on the ground that carrier had engaged in an unreasonable practice by agreeing to a lower rate and then seeking to recover the higher rate.* (Annot. p. 2759).

[5] Ibid.

> . . . The filed rate doctrine, however, contains an important caveat: the filed rate is not enforceable if the ICC finds the rate to be unreasonable. *Maxwell, supra*, 237 U.S. at 97, 35 S.Ct., at 495 . . . . [6]

(Emphasis added.)

There is nothing sadder than a judicial system which intones, "Despite the harsh effects of the . . . doctrine, we have consistently adhered to it". When a decision maker hears the words, "Despite the harsh effects . . . we have consistently adhered to it.", it is time to review the doctine's purpose. Yes, the issue may be complex. Yes, unintended consequenses lurk everywhere. Yes, hard cases make bad law. This case, however, is not a hard case.

I believe that whenever the regulated entity attempts to rely on the filed rate doctrine, the proper question between the two parties is, who should bear the burden of a misapplication of the tariff? The answer, in the absence of collusion, (which the Administrative Law Judge specifically found lacking in this case), must of course be that the party responsible for filing and maintaining such tariffs should not be allowed to then deny the purchasing party the benefit of its bargain on the grounds of constructive notice or administrative convenience. That was not the genesis of the filed rate doctrine, as noted by Justice Stevens in his powerful dissent in Maislin:

> The "filed rate doctrine" was developed in the 19th century as part of a program to regulate the ruthless exercise of monopoly power by the nation's railroads. . . . [7]
>
> The filed rate doctrine has been a part of our law during the century of regulation of the railroad industry by the Commission. In 1935, when Congress decided to impose economic regulation on the motor carrier industry, partly if not primarily in order to protect the railroads from too much competition, the filed rate doctrine was applied . . . . the doctrine was for the most part applied to reinforce the policies and the decisions of the regulatory agency.[8]

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[6] Ibid. p. 2767.

[7] Ibid. p. 2772.

[8] Ibid. p. 2775.

(Emphasis added.)

Thus, the doctrine exists to assist commissions in preventing unlawful and unfair discrimination, not to allow regulated utilities to back out of bargains entered into in good faith by their customers.[9] Colorado is not bound by the majority opinion in Maislin, and I would specifically hold that in the absence of collusion, a regulated entity may not utilize the filed rate doctrine to set aside a bargain entered into with a customer.

Commissioner

[9] I refer also to the official comments of the Colorado Uniform Commercial Code at 4-2-302 and the doctrine of unconscionability, which provides, in part,

Purposes:

> *1. This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability . . . .*

DISSENTING OPINION BY COMMISSIONER ALVAREZ:

I dissent from that portion of the majority opinion which concludes that the Administrative Law Judge misapplied the relevant tariff, and I would uphold the Recommended Decision in all respects. In Paragraph 10 of his decision, the Administrative Law Judge found, correctly in my view, that Rocky Mountain was entitled to extend Complainant's line without compensation to Mr. Johnson.

Moreover, I believe that Rocky Mountain's policy of refunding monies only for meters directly connected to Complainant's extension is the correct interpretation of the tariff. The majority opinion ignores that part of the tariff language which describes the type of new service for which a $300 refund is applicable. That language states that a refund shall be made for each additional customer connected to a gas main extension within five years, first, "Where service has not been previously rendered" and second, "Where only a gas service connection to said extension is required". Rocky Mountain made a determination that its own extension from Mr. Johnson's line was required for service to "the meter in question" and other customers, not "only a gas service connection." Rocky Mountain's decision was based on more than a mere measure of distance from Mr. Johnson's line, and is not questioned by the majority. These facts, as applied to the filed rate doctrine require the outcome rendered by the Administrative Law Judge.

For these reasons, I would deny the Exceptions.

Commissioner

{PRIVATE }Appendix to Decision No. C92-1293
ORDER ON EXCEPTIONS

DOCKET NO. 90F-475G
TRACY N. JOHNSON v. ROCKY MOUNTAIN NATURAL GAS AND
K N ENERGY, INC.,

Mailing Date: October 16, 1992
Adopted Date: October 7, 1992

C.R.S. 4-2-302. Unconscionable contract or clause.C.R.S. 4-2-309. Absence of specific time provisions - notice of termination.

C.R.S. 4-2-719. Contractual modification or limitation of remedy.

C.R.S. 4-2-309. Absence of specific time provisions - notice of termination.

C.R.S. 4-2-719. Contractual modification or limitation of remedy.

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