{PRIVATE } (Decision No. C92-1294)

BEFORE THE PUBLIC UTILITIES COMMISSION{PRIVATE } OF THE STATE OF COLORADO

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{PRIVATE }

JEROME L. SHAIN, et al., Complainants, v. SAN MIGUEL POWER ASSOCIATION, INC., Respondent.	)	DOCKET NO. 91F-231E
EARL LEONARD BOLAND, et al., Complainants, v. SAN MIGUEL POWER ASSOCIATION, INC., Respondent.	)	DOCKET NO. 91F-056E

FINAL COMMISSION ORDER DENYING RECONSIDERATION OF DECISION NO. C92-762.

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Mailing date: October 20, 1992
Adopted date: October 7, 1992

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On July 21, 1992, the Colorado Public Utilities Commission ("commission") granted rehearing of Decision No. C92-762 (June 5, 1992), in order to fully consider the important matters raised in the application for rehearing, reargument, or reconsideration,

filed on June 25, 1992 by the Colorado Office of Consumer Counsel ("OCC"). After careful review, the commission denies reconsideration of Decision No. C92-762, and affirms its findings in full. This Decision constitutes a final and appealable order for the purpose of judicial review.

Upon further review, we conclude that the record in this case clearly demonstrates that there was a finding that the Complainants failed to meet their burden to prove that the rates were unjust or unreasonable. The OCC attached a "legislative history" to its application for rehearing, reargument, or reconsideration. The "legislative history" presented, consists of a transcription of partial tape recordings of part of a committee debate, and a affidavit by Senator Al Meiklejohn. This is relied on to support the argument that the wrong standard of review was applied.

The tape transcripts and affidavit by Senator Al Meiklejohn convince us even more that the standard of review for a cooperative which has voted to partly deregulate is not the same as for a public utility subject to traditional regulation. Although the OCC presents Senator Meiklejohn's Affidavit (attached to the OCC's application for rehearing) as support for its position, we find that the affidavit in fact supports the inference that the PUC is not free to "pick and choose" among various reasonable rates for entities such as San Miguel which have opted out of traditional regulation. Senator Meiklejohn's Affidavit states, ". . . The purpose of Article 9.5 was to prevent the Colorado Public Utilities Commission from reviewing the justness and reasonableness of the association's rates on its own initiative . . . ." Meiklejohn Affidavit at ¶ 3. We believe the Legislature intended to prevent the PUC from selecting among reasonable rates, as it can for fully-regulated utilities, unless it was first proved that the rates being applied are unjust or unreasonable.

We interpret Senator Meiklejohn's statement later in his affidavit that article 9.5 provided the same remedy and the same standard of review of a utility's rates for traditional, fully regulated utilities, and for cooperatives such as San Miguel to refer to C.R.S. § 40-6-108(1)(b) concerning complaints. Consumers of either type of utility can file a formal complaint, and the burden of proof is on the Complainant, P.U.C. v. District Court, for either type to prove that the rates are unlawful. In that sense the standard of review is the same, i.e., did the Complainant prove the complained of rates were unlawful? Here we have the express finding that the Complainants failed.

The statutory scheme implies a difference and the wording ("unjust and unreasonable") is different. The OCC argues that C.R.S. § 40-3-111 and other sections of article 3 provide support for its position. C.R.S. § 40-6-111(4)(b)(I) specifically makes those sections inapplicable to cooperative electric associations that have voted to exempt themselves from regulation. If we followed the argument of the OCC, C.R.S. § 40-9.5-103 which exempts associations such as Respondent from articles 1 to 7 of Title 40, C.R.S. would be meaningless, and these cooperative associations would have to comply with the particular regulatory theories adopted by this Commission even though other reasonable regulatory theories could be applied to justify the actions taken. That is exactly the case we have before us. To adopt the theory advanced by the OCC would mean that Complainant would not have to prove the rates were unjust or unreasonable. They would merely file a complaint, and then regulatory theories adopted by this Commission would apply, even though those theories were adopted pursuant to articles 1 to 7. This is not what was intended by article 9.5 of Title 40 C.R.S. Accordingly, we reaffirm our original decision, Decision No. C92-762, and the administrative law judge's decision, Decision No. R92-38, as discussed in detail in Decision No. C92-762.

THEREFORE THE COMMISSION ORDERS THAT:

1. The Colorado Public Utilities Commission hereby denies the application for reconsideration of Decision No. C92-762, filed on June 5, 1992 by the Colorado Office of Consumer Counsel. In all respects, we affirm Decision No. C92-762.

2. This Decision constitutes a final and appealable order for the purpose of judicial review.

3. This Order is effective on its date of mailing.

ADOPTED IN OPEN MEETING October 7, 1992

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

_____ Commissioners

COMMISSIONER CHRISTINE E. M. ALVAREZ
DISSENTING

Dissent of Commissioner Christine E.M. Alvarez

I would grant reconsideration of, and modify commission Decision No. C92-762. I would adopt the standard of review suggested by Messrs. Boland and Shain and the Office of Consumer Counsel, and would remand the matter to the administrative law judge for findings consistent with the modified judgment.

According to Colorado case law regarding interpretation of statutory language, where the statutory language itself is ambiguous, the trial court may turn to the legislative history to determine the legislative intent. Colorado Common Cause v. Meyer, 758 P.2d 153, 160 (Colo. 1988). In several Colorado cases the Supreme Court has been required to review tape recording of hearings held by the various committees of the Senate and House to determine legislative intent. See e.g., People v. Winters, 765 P.2d 1010 (Colo. 1988); Colorado Dept. of Social Services v. Bd. of County Commissioners of the City of Pueblo, 697 P.2d 1 (1955); Archer Daniels Midland Company v. State of Colorado, 690 P.2d 177 (1984). While some may argue that the quality of legislative history in our state is less than optimal, it is nonetheless a valid and valuable indicator upon which a court may base its decision. The Supreme Court of Colorado has relied upon the type of legislative history which was submitted by the OCC in this case.

The language at page 5 of Decision No. C92-762 was important to my final decision to sign the opinion. It states:

> As the commission views the Cooperative electric association deregulation law, these cases present a close question of law. There are two plausible interpretations of the . . . law -- one interpretation argued by the OCC, Mr. Boland, and Mr. Shain, and supported by number of ratepayer letters to the commission; and the other interpretation argued by San Miguel Power's Board of Directors, and agreed with by the administrative law judge.

By this statement, and in the discussion following, the commission admitted that the statute is ambiguous on the question of the standard of review. And, because it had no information

regarding legislative intent, the commission applied that doctrine of statutory interpretation which looks to "the entire statutory framework", and chooses a construction that it believes serves the purposes of that legislative scheme, and does not strain to give language other than its plain meaning. See, Colo. Dept. of Sec. Serv. v. Brd. of Cty. Commissioners, 697 P.2d 1 (Colo. 1985). A review of the various statutory provisions in the Public Utilities Law governing the regulation of rates and charges shows language even within a single statutory section (See e.g., C.R.S.§ 40-3-101(1), which is internally inconsistent and possibly conflicting. What is clear, however, is that the legislature has required that all public utilities--motor vehicle carriers, telephone, and electric companies--charge "just and reasonable" rates, and that it has made illegal the establishment and maintenance of unjust and unreasonable rates. Clearly, whether the rate requirements language is written in the affirmative or negative, unjust and unreasonable rates are unlawful, and the legislature has never intended to leave the public without an adequate procedure for redress of their complaints. Every public utility including cooperative electric associations, is declared by law "to be affected with the public interest". And except as specifically modified by Title 40 of the Colorado statutes, is subject to the oversight jurisdiction of the PUC. See generally, C.R.S. § 40-1-103.

When article 9.5 of the Public Utilities Law governing Cooperative Electric Associations, and articles 6 and 7 regarding hearings, investigations and enforcement, are read in light of the legislative history provided to the commission by the Office of Consumer Counsel,[1] it becomes

[1] The sworn affidavit, after the fact, of Senator Meiklejohn is entitled to little weight in the determination of legislative intent. Colo. Dept of Social Services, supra. The majority's reluctant reliance on this affidavit is therefore misplaced. Nevertheless they have ignored the last part of Senator Meiklejohn's statement that says the purpose of article 9.5 was to present commission review "on its own initiative." However, the transcriptions of the committee hearings, including Senator Meiklejohn's statements during committee debate, are entitled to considerable weight in this regard. This is especially so where the discussion of the provision by the sponsor of the provision in question is used. People v. Wells, 775 P. 2d 563 (Colo. 1989); People v. Guenther,

clear that the legislature intended that customers of cooperative electric associations, even where they have voted to exempt themselves from commission regulation, were intended to ultimately have "the same remedies that they had" before the passage of article 9.5 with respect to "relief for unjust and unreasonable practices or rates, or discrimination or preferences".[2] Clearly the primary concern of the legislature was to relieve cooperatives from the time-consuming suspension process which other public utilities are required to follow. It is stated repeatedly and forcefully in the committee hearing transcripts, and is beyond question, that it was the legislature's intent that the customers of these cooperatives not be excluded from protections provided by the public utilities law.

My colleagues and San Miguel Electric Association argue that the interpretation propounded by the OCC makes no sense because it renders meaningless the cooperative electric association exemption. The argument is that such an interpretation results in no differences between exempt and non-exempt electric cooperatives. The differences that remain, even after affording the customers of the associations full protection, are straight forward and obvious. Where a cooperative electric association is exempt, the commission may not suspend and review a proposed rate on its own motion. It may only review a rate set by a cooperative according to the hearings and investigations procedure of articles 6 and 7, when it receives a complaint about such rate from a cooperative member which is signed by not less than twenty-five customers or prospective customers of such association.

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740 P. 2d 971 (Colo. 1989).

[2] See, Legislative History, Senate Business Affairs and Labor Committee, March 13, 1985, Regarding HB 1123, Dialogue between Senators Robert Pflager and Alvin Meiklejohn. Attachment B to the Office of Consumer Counsel's Application for Rehearing, Reargument, and Reconsideration.

The primary objective stated in the legislative declaration is that the cooperatives are regulated by the member-consumers acting through an elected governing body, and that therefore it "*may be* duplicative" of this self-regulation, and not cost-effective, to also be regulated by the PUC. See, C.R.S. § 40-9.5-101. So, where the cooperatives elect to exempt themselves from PUC regulation, pursuant to C.R.S. § 40-9.5-103 and 104, they are presumed to be protected from unlawful [discriminatory, preferential or unreasonable] rates by their elected board. However, the legislature did not leave the cooperative members without the ability to overcome this presumption. Cooperatives are not free to operate without any statutorily-imposed standards or accountability.

A brief discussion contrasting and comparing the law governing regulated electric utilities and cooperatives is most helpful in attempting to discern the relief procedure intended by the legislature.

First, contrast the filing and notice provisions for regulated utilities and electric cooperatives. Section 40-3-103 requires all regulated public utilities to file with the commission according to the commissions rules, schedules showing all rates, etc. that they charge. Section 40-3-104(1)(a) states that no change in rates can be effected except after 30 days notice to the commission and the public. Exempt cooperatives need not file rate changes with the commission under this statutory mandate, but rather, need only provide thirty days public notice prior to the day their proposed change is to take effect. See, C.R.S. § 40-9.5-106(1).

The differences between regulated utilities and electric cooperatives are also transparent with respect to the procedures statutorily available for a challenge to the rates proposed by a utility. Under C.R.S. § 40-6-111(1)(a):

Whenever there is filed with the commission any tariff or schedule stating any new or changed individual or joint rate, . . . the commission has power, either upon complaint or upon its own initiative and without complaint, at once, and, if it so orders, without answer or other formal pleadings by the interested public utilities, but upon reasonable notice, to have a hearing concerning the propriety of such rate . . . if it believes that such a hearing is required and that such rate . . . may be improper.

This is in contrast to customers of cooperatives who must first register their displeasure with proposed rates through the complaint procedure established by the cooperative association pursuant to C.R.S. § 40-9.5-109. Since the commission cannot review a cooperative's rates on its own motion, complainant members of an exempt cooperative who are unsatisfied with the cooperative's resolution of their complaint, and who wish to invoke the rate review jurisdiction of the commission may do so solely in the manner provided in article 9.5 of Title 40. Section 40-9.5-106(3) states:

[n]o rates, charges, rules, or regulations of a cooperative electric association shall be unjust or unreasonable. Any complaint under this subsection (3) shall be resolved by the PUC in accordance with the hearing and enforcement procedures established in articles 6 and 7 of this title if the complaint alleging a violation is signed . . . by not less than twenty-five customers or prospective customers of such association.

The question thus becomes: what hearing and enforcement procedures are established for cooperatives in articles 6 and 7 ?

Articles 6 and 7 of the public utilities law set forth hearings, investigations and enforcement provisions to be used by the PUC in administering the law prohibiting discriminatory, preferential or unreasonable rates. The articles set forth clearly which of the procedures do not apply to exempt cooperatives.

Section 40-6-111 governs hearings on new rates. Section 40-6-111(1)(a) states that the commission has power:

> either upon complaint [fully regulated utilities and cooperative electric association] or upon its own initiative and without complaint [fully regulated utilities only] . . . upon reasonable notice, to have a hearing concerning the propriety of such rate . . . .

Subsection (1)(b) goes on to state that:

> [p]ending the hearing and decision thereon . . . such rate . . . shall not go into effect; but the period of suspension of such rate . . . shall not extend beyond one hundred twenty days beyond the time when such rate . . . would otherwise go into effect unless the commission, in its discretion, . . . extends the period of suspension for a further period not exceeding ninety days.

Although the commission may hold a hearing as to the propriety of rates of either fully regulated utilities or cooperative electric associations as discussed above, C.R.S. § 40-6-111(4)(a) makes it clear that while:

> [t]he provisions of this section relating to suspension of rates pending the hearing and decision thereon . . . shall not apply to cooperative electric associations . . . this subsection (4) shall not be construed to exempt such associations from any other provision of this section.

Subsection (4)(b)(I) makes (4)(a) inapplicable to exempt cooperative electric associations, the regulation of which is governed by article 9.5. As discussed above, article 9.5 through C.R.S. § 40-9.5-106(3) invokes C.R.S. § 40-6-111.

Other than the suspension procedure, the complaint procedure for cooperatives, and the provisions governing who may initiate a complaint for review by the commission, the sections of article 6 governing hearings and investigations apply. According to these provisions, and once the requirement for cooperative associations regarding an allegedly unjust or unreasonable rate complaint is filed by not less than twenty-five consumers,

> **the commission shall establish the rates, in whole or in part, or others in lieu thereof, which it finds just and reasonable**. In making such finding . . . the commission may consider current, future, or past test periods or any reasonable combination

> thereof and any other factors which may affect the sufficiency or insufficiency of such rates . . . .

C.R.S. § 40-6-11(2)(a), (emphasis added).

Contrary to Judge Kirkpatrick's conclusion, C.R.S. § 40-9.5-106(3) does not require that the commission make a finding as the Administrative Law Judge implies, that there is no rational basis for a cooperative's rates before it acts to establish rates "which it finds just and reasonable". Even without reviewing the entire record,[3] it is clear from the Complainants' pleadings requesting review that: (1) substantial arguments and evidence demonstrating illegal rates was marshalled by Complainants; and, (2) the judge's improper reading of the commission's power of review skewed, and distorted the burden of proof against Complainants.

The commission had the authority, indeed the obligation, to "pick and choose" rates which it found to be just and reasonable for the cooperative electric association.

CHRISTINE E. M. ALVAREZ, COMMISSIONER

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[3] As discussed in the commission's original decision, the factual findings of the Administrative Law Judge are not reviewable since Complainants could not afford to file a transcript of the proceedings.