E-00000W-13-0135

Retail Electric Competition

Legal Issues

"He can compress the most words into the smallest idea of any man I know."

—Abraham Lincoln

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G|K
Gallagher&Kennedy
Michael M. Grant

Primary Legal Problems

1. Commission has to set rates, not markets or indices – Ratepayers must be protected from "harsh extremes" of the rates spectrum.
2. Fair value must be found and used in a meaningful way.
3. Constitution requires no rate discrimination between and among similarly situated customers.
4. Law requires rates to be open and on file with Commission – Deals must be disclosed.

Primary Legal Problems 1 and 2

Commission must set rates and find and use fair value in meaningful way.

Guidance Points

Arizona Supreme Court, *US West v. ACC*, 201 Az. 242, 246 and 247 (2001)

> "The fair value of a [competitive provider's] Arizona property may be important in determining and avoiding the harsh extremes of the rate spectrum... Set too high, [a competitive provider's rates] can lead to state-sanctioned price gouging."

* * *

> "We recognize that some competitors may have little, if any, physical property in Arizona. The Commission can consider this in setting rates."

Phelps Dodge v. Arizona Electric Power Cooperative, Inc., 207 Ariz. 95, 107 and 108 (App.) 2004

"[T]he Commission may not abdicate its constitutional responsibility to set just and reasonable rates by allowing competitive market forces alone to do so.

We reject the Commission's contention that its approval of a broad range of rates within which the competitive marketplace can operate satisfies the Commission's obligation to set just and reasonable rates... '[s]uch an approach retains the false illusion that a government agency is keeping watch over rates, pursuant to the statute's mandate, when it is in fact doing no such thing.'" (Emphasis added.)

Primary Legal Problem 3

No rate discrimination between similarly situated customers.

"All charges made for service rendered, or to be rendered, by public service corporations within this state shall be just and reasonable, and no discrimination in charges, service or facilities shall be made between persons or places for rendering a like and contemporaneous service."

Article XV, § 12, Az. Const.

Residential Customer X with index rate + markup on Monday = 9¢/kWh

Event on Wednesday affects index

Residential Customer X^1 with index rate + markup on Friday = 15¢/kWh

Primary Legal Problem 4

Law requires rates to be open and on file with Commission. Deals must be disclosed.

> "Under rules and regulations the Commission prescribes, every public service corporation shall print and keep open to public inspection all rates, tolls, rentals, charges and classifications to be collected or enforced, together with all... contracts... which in any manner affect or relate to rates..."

A.R.S. § 40-365. Reason why it dates to Arizona's very first Laws of 1912. Power providers—utility or competitive suppliers—should not be allowed to pick winners or losers in secret.

Limbo

- Arizona's electric future will hang in limbo for many years.
  - 1st Application for Rehearing, Jan. 15, 1997
  - *Phelps Dodge v. Arizona Electric Power Coop.*, Jan. 27, 2004
- *Seven years despite every attempt to expedite.*

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BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission
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JAN 15 1997

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Chairman
JAMES M. IRVIN
Commissioner
RENZ D. JENNINGS
Commissioner

IN THE MATTER OF THE COMPETITION IN THE PROVISION OF ELECTRIC SERVICES THROUGHOUT THE STATE OF ARIZONA	DOCKET NO. U-0000-94-165 **APPLICATION FOR REHEARING AND REQUEST FOR STAY**

The Arizona Electric Power Cooperative, Inc. ("AEPCO"), pursuant to A.R.S. § 40-253, submits this Application For Rehearing and Request for Stay of Decision No. 59943 dated December 26, 1996 ("Application"). Rehearing and a stay pending Commission determination of the issues raised is requested as to all aspects of Decision No. 59943 and its appendices including the Rules set forth in its Appendix A (collectively, the "Decision").

I. INTRODUCTION

This Application presents a final opportunity for this Commission to alter the hastily charted course embarked upon by its predecessor concerning these issues of tremendous statewide and regional importance. In less than five months - from early August to December 26, 1996 - the previous Commission moved from an issues outline to a final Rules "framework." Along the way, it ignored constitutional provisions, statutes, well established case law, the powers of other branches and levels of government, the input of all parties to this proceeding and the procedural and substantive safeguards guaranteed participants in this process.

JOHNSTON MAYNARD GRANT AND PARKER
PLC
ATTORNEYS AT LAW
1200 NORTH CENTRAL AVENUE • SUITE 2300 • PHOENIX, ARIZONA 85004
TELEPHONE (602) 274-8100 • FACSIMILE (602) 263-8585

factual theory must be rejected. The stipulation was in a separate proceeding on reasonableness of the amount in the *Damron/Morris* agreement. The stipulation was that "there is no *fraud* going to be alleged as part of this case." This argument fails because this is not a fraud action, but a claim for intentional interference with contractual relations in which the *conceded* element is that Roush "acted improperly." Even if relevant, the stipulation would only go to the weight of all the other facts when applied to the seven factors set forth above.

¶ 55 To conclude, we note that *Wells Fargo* made clear that the standard of proof for this intentional tort is one of preponderance of the evidence and that "[i]nferences arising from the evidence are sufficient to go to the jury under the preponderance standard." 201 Ariz. at 496, ¶ 86, 38 P.3d at 34. We hold that there are facts of record, as described herein, sufficient to allow this matter to proceed to a jury.

Conclusion

¶ 56 For the foregoing reasons, the summary judgment of the trial court is reversed. The case is remanded to the trial court for proceedings consistent with this opinion.

CONCURRING: JON W. THOMPSON, Presiding Judge, and JEFFERSON L. LANKFORD, Judge.

85 P.3d 573

PHELPS DODGE CORPORATION; Phelps Dodge Morenci, Inc.; Phelps Dodge, formerly known as Cyprus Climax Metals Corporation and formerly known as Cyprus Sierrita Corporation and formerly known as Cyprus Bagdad Copper Corporation and formerly known as Cyprus Mineral Park Corporation; Ajo Improvement Company; Morenci Water & Electric Company; ASARCO Incorporated; Arizona Mining Association; Arizona Association of Industries and Arizonans for Electric Choice and Competition (collectively "AECC"), Intervenors–Appellants, Cross Appellees,

Residential Utility Consumer Office, Intervenor–Appellant,

The Arizona Corporation Commission, an agency of the State of Arizona, Defendant–Appellant, Cross Appellee,

v.

ARIZONA ELECTRIC POWER COOPERATIVE, INC.; Duncan Valley Electric Cooperative, Inc.; Graham County Electric Cooperative, Inc.; Sulphur Springs Valley Electric Cooperative, Inc.; and Trico Electric Cooperative, Inc., Plaintiffs–Appellees, Cross Appellants,

Arizona Consumers Council, Plaintiff–Cross Appellant.

No. 1 CA-CV 01-0068.

Court of Appeals of Arizona, Division 1, Department B.

Jan. 27, 2004.

Background: Cooperatives made up of public service corporations and Consumers Council filed actions challenging rules promulgated by Corporation Commission to implement competition in electric industry, and actions were consolidated. The Superior Court, Maricopa County, No. CV1997-03748, Colin F. Campbell, B. Michael Dann, JJ., granted and denied parties' motions and cross-motions for summary judgment, and parties appealed and cross-appealed.

Holdings: The Court of Appeals, Timmer, P.J., held that:

(1) while commission had to consider fair value of in-state property of competitive electric service providers (ESPs) in setting rates, commission had discretion to determine weight to be given fair-value factor in each case;

Conclusion

"Some cause happiness wherever they go; others, whenever they go."

—Oscar Wilde