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Public Utilities

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PUBLIC UTILITIES


During the survey period, the West Virginia Supreme Court of Appeals held the Public Service Commission of West Virginia had jurisdiction to require a public utility to provide an opportunity for communication of contrasting or opposing viewpoints via its billing process when the public utility used the billing process as a forum to promote its own view concerning the effect of pending legislation. However, this holding should be narrowly construed.

In West Virginia-Citizen Action Group v. Public Service Commission, Appalachian Power Company (APCO), a public utility providing electric service in West Virginia, inserted in its March 1982 billing envelopes a pamphlet concerning acid rain. In this pamphlet APCO asserted the enactment of certain legislation pending before the United States Congress would result in greatly increased electric bills for the consumer. The pamphlet concluded with the statement "Paid for by Shareowners of American Electric Power Company, Inc." The appellant non-profit corporations, West Virginia-Citizens Action Group, National Wildlife Federation, West Virginia Wildlife Federation and Coalition of American Electric Consumers, requested an opportunity to enclose an insert in a future APCO billing presenting contrasting views of the acid rain controversy. APCO denied this request.

The appellants then filed a complaint with the Public Service Commission requesting the Commission to direct APCO to enclose in its billing envelopes a reply to APCO's assertions regarding acid rain. Alternatively, the appellants requested the Commission to formulate a procedure in instances where a utility billing is used as a forum for controversial issues. APCO moved to dismiss the complaint. The Commission granted the motion, contending that the Commission had no jurisdiction to grant the relief sought. The appellants appealed this decision to the West Virginia Supreme Court of Appeals.

The Public Service Commission (PSC) is a regulatory agency created by the West Virginia Legislature to safeguard the interests of the public and the utilities, with its primary purpose being to serve the public interests. However, the West Virginia Supreme Court of Appeals has recognized that the PSC does not have unlimited authority and can exercise only such jurisdiction, power, and authority

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2 West Virginia Citizen Action Group, 330 S.E.2d 849.
3 Id. at 850.
4 Id. at 851.
5 Id. at 850-51.
6 Id. at 851.
as has been statutorily authorized. West Virginia Code section 24-1-1 recognizes that the PSC was created to exercise powers delegated by the legislature. Section 24-2-7 concerns the PSC's power to regulate the practices, acts, or services of public utilities. Section 24-2-2 grants the Commission power to investigate all rates, methods, and practices of public utilities subject to the provisions of Chapter 24 of the West Virginia Code and section 24-3-2 of the West Virginia Code regulating discriminatory practices of public utilities.


9 W. Va. Code § 24-1-1(a) (1980) provides:
   It is the purpose and policy of the legislature in enacting this chapter to confer upon the public service commission of this State the authority and duty to enforce and regulate the practices, services and rates of public utilities in order to:
   (1) Ensure fair and prompt, regulation of public utilities in the interest of the using and consuming public;
   (2) Provide the availability of adequate, economical and reliable utility service throughout the State;
   (3) Encourage the well-planned development of utility resources in a manner consistent with state needs and in ways consistent with the productive use of the State's energy resources, such as coal;
   (4) Ensure that rates and charges for utility services are just, reasonable, applied without unjust discrimination or preference and based primarily on the costs of providing these services; and
   (5) Encourage energy conservation and the effective and efficient management of regulated utility enterprises.

10 W. Va. Code § 24-2-7(a) (1980) provides:
   Whenever, under the provisions of this chapter, the commission shall find any regulations, measurements, practices, acts or services to be unjust, unreasonable, insufficient or unjustly discriminatory, or otherwise in violation of any provisions of this chapter, or shall find that any service is inadequate, or that any service which is demanded cannot be reasonably obtained, the commission shall determine and declare, and by order fix reasonable measurements, regulations, acts, practices or services, to be furnished, imposed, observed and followed in the State in lieu of those found to be unjust, unreasonable, insufficient, or unjustly discriminatory, inadequate or otherwise in violation of this chapter, and shall make such other order respecting the same as shall be just and reasonable.

   The commission may change any intrastate rate, charge or toll which is unjust or unreasonable or any interstate charge with respect to matters of a purely local nature which have not been regulated by or pursuant to act of Congress and may prescribe such rate, charge or toll as would be just and reasonable, and change or prohibit any practice, device or method of service in order to prevent undue discrimination or favoritism between persons and between localities and between commodities for a like and contemporaneous service.

12 W. Va. Code § 24-3-2 (1980) provides in pertinent part:
   It shall be unlawful for any public utility subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular character of traffic or service, in any respect whatsoever, or to subject any particular person, firm, corporation, company or locality, or any particular character of traffic or service, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

13 West Virginia-Citizen Action Group, 330 S.E.2d at 853.
In determining the extent of the PSC's power to regulate practices of public utilities, the West Virginia Supreme Court of Appeals, in an opinion written by Justice McHugh, looked to similar decisions in other jurisdictions. Although several courts, including the United States Supreme Court, have upheld a public utility's right to communicate through its billing process, the West Virginia court found one case particularly relevant to the action before it:  

Brooklyn Union Gas Co. v. Public Service Commission.  

In Brooklyn Union Gas Co., the Public Service Commission of New York ruled that if a utility providing gas service relied on the lower price of natural gas in its advertising, a disclaimer stating the price of natural gas could increase as the result of deregulation must be included. This ruling was affirmed by the Appellate Division of the Supreme Court of New York, relying upon a provision of New York Public Service Law which stated "(t)he commission shall further ensure periodic explanation of applicable rates and rate schedules for the purpose of assisting customers in making the most efficient use of energy."  

The West Virginia Supreme Court of Appeals found the action taken by the New York Public Service Commission analogous to the appellants' request of the West Virginia PSC. The court stated although West Virginia did not have the specific statutory language of the New York Public Service Law, West Virginia Code Chapter 24 did give the PSC fundamental authority to ensure that the public had available complete information regarding utility service costs.  

The court pointed out that this holding should not be so broadly construed  

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14 See Consolidated Edison Co. of N.Y., Inc. v. Public Serv. Comm'n of N.Y., 447 U.S. 530 (1980) (holding that a regulation prohibiting utilities from using bill inserts to discuss political matters violated the right of free speech protected by the first and fourteenth amendments to the Constitution of the United States and stating the inclusion of bill inserts by the utility would not preclude the insertion of other opinions); Washington Water Power Co. v. Kootenai Environmental Alliance, 99 Idaho 875, 591 P.2d 122 (1979) (holding that under a statute authorizing the Public Utilities Commission to investigate and establish rates, fares, tolls, rentals, charges, classifications, rules, regulations, practices or contracts of public utilities, the PUC was not authorized to order a utility to refrain from inserting political advocacy inserts in their billings).  

15 West Virginia-Citizen Action Group, 330 S.E.2d at 856.  


17 Id.  

18 N.Y. PUB. SERV. LAW § 66(12-a) (McKinney 1983), provides in full that the "commission shall":  

Have power to fix and alter the format and informational requirements of bills utilized by public and private gas corporations, electric corporations and gas and electric corporations in levying charges for service, to assure simplicity and clarity and to require indication of any adjustment charges, including but not limited to fuel adjustments, in monetary amounts.  

The commission shall further ensure periodic explanation of applicable rates and rate schedules for the purposes of assisting customers in making the most efficient use of energy.  

19 West Virginia-Citizen Action Group, 330 S.E.2d at 855.  


21 West Virginia-Citizen Action Group, 330 S.E.2d at 856.
as to suggest the PSC could involve itself with other political issues, as previously discussed in United Mine Workers of America International Union v. Parsons.\(^{22}\) Rather, the holding should be narrowly construed to concern only utility customers and the PSC’s authority regarding information about utility service costs received by customers via the billing process.\(^{23}\)

The court concluded the PSC of West Virginia had jurisdiction to safeguard the public interests and to regulate public utilities in order to establish methods by which customers may receive contrasting or opposing viewpoints concerning costs.\(^{24}\) The court limited its holding to the particular factual situation before it.\(^{25}\) Therefore, the PSC could regulate information sent to customers in the billing process and required that an opportunity to express opposing views be provided.

The court also relied on language in Parsons,\(^{26}\) which states “[a]lthough it is normally within a state agency’s discretion to determine the appropriate spokesman for the presentation of opposing viewpoints, it must, under the standards of reasonableness and good faith, consider legitimate requests by those wishing to express opposing views.” The court held that Parsons was binding regarding the question of an “appropriate spokesman” to set forth views contrasting with the utility’s.\(^{27}\) The court did not address the question of whether the APCO insert was paid for by shareholders or ratepayers.\(^{28}\)

The Court did not address the question of whether the APCO insert was paid for by shareholders of ratepayers.\(^{28}\)

A second decision of the West Virginia Supreme Court of Appeals held a state may establish a price for an intrastate producer’s sale of gas in intrastate commerce at a level lower than the federal ceiling price. In Pennzoil Co. v. Public Service Commission,\(^{29}\) Pennzoil contended that the Public Service Commission (PSC) did not have the authority to set the price of that portion of Pennzoil’s West Virginia gas production sold to retail consumers in the state. Pennzoil based its argument on a recent United States Supreme Court opinion, Public Service Commission of New York v. Mid-Louisiana Gas Co.,\(^{30}\) and an order by the Federal Energy Regulatory Commission (FERC).

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\(^{22}\) United Mine Workers of America International Union v. Parsons, 305 S.E.2d 343 (W. Va. 1983) discussed the concept of the “public forum doctrine” which protects the rights of citizens to use certain governmental property for the exercise of free speech, and the “fairness doctrine” which requires the discussion of public issues to be presented on broadcast stations, with each side given fair coverage.

\(^{23}\) West Virginia-Citizen Action Group, 330 S.E.2d at 858.


\(^{25}\) West Virginia-Citizen Action Group, 330 S.E.2d at 858.

\(^{26}\) Parsons, 305 S.E.2d at 343.

\(^{27}\) West Virginia-Citizen Action Group, 330 S.E.2d at 858.

\(^{28}\) Id.


Pennzoil claimed that under the FERC order and *Mid-Louisiana*, its gas price was controlled solely by the Natural Gas Policy Act[^11] (NGPA) with no control by a state agency permitted. In an opinion written by Justice Miller, the court disaged.[^12]

The court stated *Mid-Louisiana* did not involve an attempt by a state to regulate the price of gas produced and sold to retail customers within its borders. Rather, *Mid-Louisiana* pertained to interstate pipeline companies who claimed FERC had issued two regulations under the NGPA causing them to be excluded in certain instances from the higher prices available under NGPA.[^13]

The court explored the historical development of the NGPA and concluded it had been adopted to maintain intrastate gas prices at a level equal to or lower, than interstate gas prices, thus preventing producers from holding their gas off the interstate market to sell on the more lucrative intrastate market and causing a national market shortage. The court pointed out that an important qualification was contained in section 602(a) of the Natural Gas Policy Act[^14] which gave every state authority to establish a price for intrastate sales lower than that mandated under the NGPA, despite adoption of the NGPA.[^15] The court's interpretation of this statute was supported by several United States Supreme Court decisions.[^16]

The court next addressed Pennzoil's assertion that a recent FERC order foreclosed any further jurisdiction by the West Virginia PSC over pricing. The court stated that the order was irrelevant to the question in this case since it had nothing to do with section 602(a) of the Natural Gas Policy Act.[^17]

Pennzoil further argued that commingling interstate and intrastate gas at the wellhead prevents separate pricing on the intrastate level. The court dismissed this argument, looking to *Exxon Corp. v. Eagerton*[^18] where the facts stipulated that a larger portion of the gas at issue was sold in interstate markets, and the United States Supreme Court still held a state severance tax valid as to the intrastate portion of production.[^19] The West Virginia Court distinguished *Eagerton* from cases[^20]

[^12]: *Pennzoil*, 327 S.E.2d at 445-46.
[^13]: *Id.* at 445.
[^15]: *Pennzoil*, 327 S.E.2d at 446.
[^16]: *Mid-Louisiana Gas Co.*, 463 U.S. 319 (1983) (stating that § 602(a) allows the states to establish price ceilings for the intrastate market lower than the federal ceilings); *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983) (holding that § 602(a) authorized lower state prices); *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400 (1983) (holding that a state can establish a price lower than the NGPA).
[^17]: *Pennzoil*, 327 S.E.2d at 447.
[^18]: *Exxon*, 462 U.S. 176.
[^19]: *Id.* at 186.
in which intrastate gas had commingled and crossed state lines at some point, so as to fall under the NGPA.\footnote{Pennzoil, 327 S.E.2d at 448.}

Pennzoil also argued that even if section 602(a) of the Natural Gas Policy Act did apply, the authority to set lower prices was given to the legislature and not the PSC. The court dismissed the argument that the term "states" should be narrowly defined to mean only the state legislature and not state agencies. The court further stated that Pennzoil's argument that price setting must be done by a uniform, rather than case-by-case, system had been rejected on both the federal and state level.\footnote{Lo-Vaca, 379 U.S. 366; Chesapeake and Potomac Tel. Co. of W. Va. v. Public Serv. Comm'n, 300 S.E.2d 607 (W. Va. 1982).} The court reiterated it was again rejecting this argument.\footnote{Pennzoil, 327 S.E.2d at 448.}

The court also rejected the argument that the PSC had no authority to regulate wellhead prices under West Virginia Code section 24-2-1.\footnote{W. Va. Code § 24-2-1 (1980) provides in pertinent part:

The jurisdiction of the commission shall extend to all public utilities in this State, and shall include any utility engaged in any of the following public services:

Common carriage of passengers or goods, whether by air, railroad, street railroad, motor or otherwise, by express or otherwise, by land, water or air, whether wholly or partly by land, water or air; transportation of oil, gas or water by pipeline; transportation of coal and its derivatives and all mixtures and combinations thereof with other substances by pipeline. . . .}

The court stated there was no question that part of Pennzoil's gas is sold to the public which brings Pennzoil within the jurisdiction of the PSC under section 24-2-1 and section 24-2-3.\footnote{W. Va. Code § 24-2-3 (1980) provides in pertinent part:

The commission shall have power to enforce, originate, establish, change and promulgate tariffs, rates, joint rates, tolls and schedules for all public utilities. . . .}

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