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May 25, 1971

DEPARTMENT OF LAW OPINION NO. 71-17 (R-52)

REQUESTED BY: HONORABLE RUSSELL WILLIAMS
Chairman
Arizona Corporation Commission

- QUESTIONS:
1. Does the Arizona Corporation Commission have jurisdiction to grant, to a public service corporation, an interim rate increase to be effective until the Commission establishes "permanent" rates and charges for the corporation?
 2. What procedural requirements must the Commission observe in the granting of interim rates?
 3. Must the grant of interim rates be preceded by a finding of the fair value of the property of the corporation?
 4. Under what conditions may the Arizona Corporation Commission grant interim rate increases?

- ANSWERS:
1. Yes.
 2. See body of opinion.
 3. See body of opinion.
 4. See body of opinion.

"Interim", "temporary" or "emergency" rates are rates or rate schedules governing charges to be made by a public service corporation pending the setting of "permanent" rates by the governmental agency charged with that responsibility. Interim rates are employed to fill a hiatus which occurs between the

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time that existing rates being charged by a public service corporation have been invalidated by a court or have been determined by the appropriate regulatory body to be confiscatory of the corporation's property, and the time that permanent rates which produce a fair return are established.

It is well established in Arizona that when the rates of a public service corporation have been determined by a court to be confiscatory, the court may authorize the corporation to set interim rates, under bond, to be charged until the Commission establishes reasonable rates. Arizona Corporation Commission v. Mountain States Telephone & Telegraph Co., 71 Ariz. 404, 228 P.2d 749 (1951).

The primary question to which this opinion is addressed is whether the Corporation Commission itself has jurisdiction to establish interim rates under certain conditions if it finds that the corporation is receiving a confiscatory rate of return under its present rate schedules. This opinion is limited to a discussion of the legality of the Commission's raising a rate on an interim basis. We express no opinion on the legality of lowering a rate on an interim basis.

In our opinion, the Arizona Corporation Commission may grant interim rate increases as an exercise of jurisdiction over the rates of public service corporations granted to the Commission by Article 15 of the Constitution of Arizona.

As we noted in our recent Department of Law Opinion No. 71-15, the rate-fixing jurisdiction of the Commission is full and exclusive and cannot be limited by legislative enactment. State v. Tucson Gas, Electric Light & Power Co., 15 Ariz. 294, 138 P. 781 (1914); Ethington v. Wright, 66 Ariz. 382, 189 P.2d 209 (1948). The Legislature cannot force upon the Commission a particular mode of accomplishing its constitutional rate-making duties. Ethington v. Wright, *supra*.

Furthermore, the Commission's powers are not limited to those expressly granted by the Constitution; the Commission may exercise all powers necessary or essential in the performance of

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its duties. Garvey v. Trew, 64 Ariz. 342, 170 P.2d 845 (1946), cert. denied, 329 U.S. 784 (1946). The Corporation Commission's rate-making functions are legislative in nature, and the Commission in exercising such power of necessity possesses a broad range of legislative discretion. Simms v. Round Valley Light & Power Co., 80 Ariz. 145, 294 P.2d 378 (1956). Finally, our Supreme Court very recently noted that "Article XV of Arizona's Constitution is unique in that no other state has given its commission the extensive power and jurisdiction that the Arizona Corporation Commission possesses." Arizona Corporation Commission v. Superior Court, ___ Ariz. ___, 480 P.2d 988, 990 (1971). (Emphasis supplied.)

After a discussion of the foregoing authorities in Opinion No. 71-15, we concluded that the Commission properly may exercise its constitutional rate-making functions by authorizing the use, by public service corporations, of automatic adjustment clauses. We also stated in Opinion No. 71-15 that the Commission's broad and exclusive legislative power to choose the modes by which it establishes rates

. . . should be construed broadly enough to permit the Commission to avail itself of concepts and procedures which are devised from time to time to permit effective utility regulation and to keep pace with constantly changing economic and social conditions.

In our opinion, the reasoning used and authorities cited in Opinion No. 71-15 apply with equal force to the authorization of interim rates by the Commission.

Use of interim rates by rate-making bodies has long been employed by such bodies and has received court approval for many years. The Oklahoma Supreme Court, in Muskogee Gas & Electric Co., 81 Okl. 176, 186 P. 730 (1920), found inherent authority in the Oklahoma Corporation Commission to establish interim rates:

Appellant contends that said order is invalid for the reason that it is temporary and experimental,

and was put into effect only until such time as the commission could secure data upon which to make a valuation of the property of the company and a permanent schedule of rates, and because the order goes beyond the complaint in prescribing rates for Ft. Gibson, and for the further reasons that the evidence fails to sustain the order.

The first contention strikes at the very foundation of the fundamental law creating the commission and defining its duties, and, if sustained, must work a result quite as surprising and disastrous to the appellant as to the patrons of the company and the general public, for, if the commission were limited to prescribing rates to instances where it had made a complete inventory and valuation, there could be little or no relief from rapidly fluctuating prices brought about by war conditions and incident to the reconstruction period.

This contention of the appellant fails to take into consideration the purpose for which the commission was created and the powers conferred upon it through the Constitution and the laws enacted by the Legislature. The Corporation Commission was created and endowed with legislative, executive, administrative, and judicial powers. [Citations omitted.]

* * *

The legislative powers of the Corporation Commission over rates is therefore not confined to prescribing permanent schedules, but may be exercised as the exigencies of the times and changing conditions demand.

State Public Utilities Commissions have generally recognized and sanctioned temporary rates to meet emergencies, or determine by experiment or trial what rates would be just, and such rates have been

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common during the war and the present reconstruction times. It would be impracticable to attempt an exhaustive list of such cases, but the following are typical: [Citations omitted.]

186 P. at 731-32.

Accord, Elliott v. Empire Natural Gas Co., 123 Kan. 558, 256 P. 114 (1927); Bartlesville v. Corporation Commission, 82 Okl. 160, 199 P. 396 (1921); Omaha & Council Bluffs Street Railway Co. v. Nebraska State Parkway Commission, 103 Neb. 695, 173 N.W. 690 (1919).

The statutes pertaining to the Commission's powers over rates and charges are written broadly enough to permit the Commission to choose the manner of giving effect to the powers granted. See A.R.S. §§ 40-203, -250, -251, -365, and -367.

As support for the proposition that the provisions of Title 40, Arizona Revised Statutes, do not conflict with exercise by the Commission of the power to establish interim rates, we note that the Supreme Court of Illinois has held that a statute substantially similar to A.R.S. § 40-367 (which authorizes the Commission to allow changes in rates to be effective without 30 days' notice) is sufficient authority for the Illinois commission to grant interim rates. Chicago Railways Co. v. City of Chicago, 292 Ill. 190, 126 N.E. 585 (1920).

Thus, we find no evidence of legislative intent to preclude the Commission from establishing interim rates. In any event, an attempt by the Legislature to prohibit the use of interim rates by the Commission would be an unconstitutional interference with the Commission's exclusive rate-making prerogatives. See Ethington v. Wright, supra.

By virtue of the Mountain States Telephone case, supra, the Arizona courts may authorize a public service corporation to fix its own rates on an interim basis after existing rates have been invalidated as confiscatory. If the courts and the corporation have this power, a fortiori, the governmental body

possessing full and exclusive legislative power to set rates must have discretion to determine that an existing rate is confiscatory and that interim rates should be established.

The California Public Utilities Commission, during hearings on a rate increase application by Pacific Telephone & Telegraph Company, granted an interim rate increase after presentation of the applicant's case but before the intervenors had been given a chance to cross-examine or to present their own evidence. Re The Pacific Telephone & Telegraph Co., 78 P.U.R. (N.S.) 491 (1949). The Commission invoked the following rule of law in rejecting the intervenors' challenges to the Commission's jurisdiction to institute interim rates:

Certain of the interested parties appearing in this proceeding have questioned the jurisdiction and authority of this Commission to grant an interim rate increase. The argument in support of this position is that there is nothing specific in the Public Utilities Act that authorizes the grant by the Commission of that type of rate relief. It is an elementary rule of law that the power to grant a particular relief carries with it all the incidental, necessary, and reasonable authority to grant that which is less. It is apparent that the authority delegated to this Commission by the Public Utilities Act to award rate relief to a public utility carries with it the incidental and implied power to grant interim rate relief, if the facts warrant such summary relief.

78 P.U.R. (N.S.) at 493.
(Emphasis supplied.)

This statement is equally applicable to the Arizona Corporation Commission's constitutional rate-making jurisdiction.

In answer to Question Two, it is our opinion that under court opinions to date no notice of proceedings held on the application of a public service corporation for interim rate relief need be given to any person. The corporation and the

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Commission are the only necessary parties to such proceedings.

In Department of Law Opinion No. 71-15, we recently observed that, although at present there are no constitutional or statutory requirements that notice of, and opportunity to be heard at, general rate-making proceedings be given to consumers,

. . . because of many recent judicial decisions recognizing increased individual rights vis-a-vis corporations and governmental entities, we have previously advised the Commission that in the future courts may reverse their stand and hold that utility consumers do have a constitutional right to notice and opportunity to be heard in general rate-fixing proceedings.

Assuming, arguendo, that consumers have the right to notice and opportunity to be heard in general rate-making proceedings, in our opinion such a right does not extend to interim rate proceedings, at least if the Commission limits the granting of interim rates to situations of true emergency (as discussed at length in answer to Question Four).

In a true emergency situation the necessity for giving a public service corporation interim rate relief would, in our opinion, outweigh any person's right to be heard in rate proceedings, for the following reasons.

First, to permit such intervention would have the effect of negating the benefit of interim rate relief, the rationale for allowing interim rate relief being that the company needs immediate, emergency relief to avoid serious damage. (See answer to Question Four.) If intervention were permitted, in all likelihood the proceedings would be so protracted that the needed relief could not be given. More than fifty years ago the Illinois Supreme Court, in the Chicago Railways case, supra, recognized that proceedings to determine whether public service corporations need emergency rate relief cannot be based upon the full investigation and hearings normally preceding the establishment of permanent rates:

Complaint is made that the city was not given a reasonable opportunity to be heard and to have a full and fair investigation. The City appeared and protested against proceeding with the hearing on the ground that there should be a full investigation and that the books of the company should be produced showing the expenditures made by the petitioners, and each of them, for the past 12 years for maintenance, repairs, salaries, dividends paid to the stockholders, and all other matters bearing on the determination of a reasonable rate. The attitude of counsel for the city was the same then as now: That before the temporary rate could be fixed there must be a full and complete investigation of the valuation of the petitioners' property and a thorough examination of their books. It was shown such a hearing and examination would be impossible, and would defeat the object of the application for the temporary rate to meet increased expenses and save the petitioners from bankruptcy.

126 N.E. at 590.
(Emphasis supplied.)

Secondly, interim rate proceedings may be conducted ex parte because an interim rate order provides that, in the event permanent rates are established which are lower than the interim rates, the excessive amount collected under the interim rates must be refunded to the consumers.

However, if interim rate relief is granted in non-emergency situations, we anticipate that courts may find the corporation's need for rate relief is not paramount to the consumers' right to notice and opportunity to be heard, in which event ex parte interim rate proceedings would be invalid.

Finally, there is precedent for the approval of interim rates ex parte. The Arizona Corporation Commission on many occasions in the past has granted interim rate relief ex parte. In addition, the California Public Utilities Commission, in the

Pacific Telephone case, supra, in effect, gave Pacific Telephone an ex parte increase by denying intervenors the right to cross-examine company witnesses and to put on a case-in-chief before entry of the interim order. The California Commission cited Saunby v. Railroad Commission, 191 Cal. 226, 215 P. 904 (1924), for the proposition that interim rates may be established on a summary showing.

In answer to Question Three, the Corporation Commission need not establish the fair value of the property of a public service corporation prior to establishing interim rates.

As the Commission is well aware, the determination of fair value follows lengthy proceedings involving in most cases a "battle of the experts" over appropriate accounting, depreciation and engineering methods. The determination of fair value is a matter of judgment for the Commission, which weighs the various expert opinions.

Under A.R.S. § 40-251 the Commission's findings relating the value of a public service corporation's property ". . . shall be reduced to writing and certified under the seal of the commission." A.R.S. § 40-251.B. Subsection C of that statute provides:

The original or supplemental findings, so made and filed, when properly certified under seal, shall be admissible in evidence in any action, proceeding or hearing before the commission or any court in which the commission, the state, or any officer, department or institution thereof, or any county, city, municipality or other body politic, and the corporation affected, is interested, whether arising under the provisions of this article or otherwise. Such findings, when received in evidence in any action or proceeding arising under this article, shall be conclusive evidence of the facts therein stated as of the dates therein stated under conditions then existing, and such facts may only be controverted by showing a subsequent change in conditions bearing upon the facts therein determined.

(Emphasis supplied.)

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In all probability in an ex parte rate proceeding, the only available evidence of property valuation will be the opinions of the corporation's expert witnesses. At the time of the final rate hearing, however, experts sponsored by the Commission staff or by intervenors may reach very different conclusions, even though all experts utilize the same raw data and test period. If the Commission has made findings of property valuation at the time of the interim rate proceeding, it may be precluded during the permanent rate proceeding from considering testimony of other experts who have reached different conclusions from the same test period data, absent a showing of "changed circumstances."

For the foregoing reasons, we think the Commission would be ill-advised to make, at the time of an interim rate proceeding, written findings as contemplated in A.R.S. § 40-251. Furthermore, we find no legal requirement that a "temporary fair value" be established prior to the establishment of interim rates. For example, in Mountain States Telephone, supra, no fair value had been established for the company prior to the setting of interim rates. See also Muskogee Gas & Electric Co. v. State, supra.

We do not wish to imply, however, that interim rate determinations should be made without reference to the valuation testimony of the company and any other relevant testimony the Commission may permit.

In answer to Question Four, in our opinion the Commission may approve interim rates only upon a finding that an emergency exists.

Our Supreme Court, in Simms v. Round Valley Light & Power Co., supra, held that

* * * under our constitution as interpreted by this court, the commission is required to find the fair value of the company's property and use such finding as a rate base for the purpose of calculating what are just and reasonable rates.

80 Ariz. at 151.

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Only if the Commission finds that an emergency exists may it approve general changes in the rates of a public service corporation without first establishing, in an appropriate proceeding, the fair value of the corporation's property.

Furthermore, the Commission has, as a matter of policy, recently recognized the right of consumers to have adequate notice of, and to participate fully in, general rate-making proceedings. It would be contrary to this policy for the Commission to grant interim rates ex parte, without first finding the existence of an emergency.

Finally, our research indicates that courts and administrative bodies in other jurisdictions have generally concluded that interim rates may be granted only upon a finding that an emergency exists.

In the Pacific Telephone case, supra, the California Public Utilities Commission found the test to be as follows:

Of course, there must be a prima facie showing of an emergency condition before the Commission would be justified in granting rate relief on an interim basis.

78 P.U.R. (N.S.) at 493.
(Emphasis supplied.)

The Oklahoma Supreme Court, in the Muskogee Gas & Electric case, supra, also spoke in terms of granting interim rates to meet emergencies. Accord, Chicago Railways Co. v. City of Chicago, supra.

In Omaha & Council Bluffs Street Railway Co. v. Nebraska City Railway Commission, supra, the Supreme Court of Nebraska approved, in general, the test applied by the Railway Commission:

At the hearing the commission ruled that emergency rates would not be justified, except as a condition is shown which, if not relieved from, will imperil

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the property of the company and its service to the public, such as might subject the company at once to proceedings in bankruptcy or receivership; that mere inability to make profits or pay dividends would not create an emergency.

173 N.W. at 691.

In that case the company's request for temporary rates was based upon large and unexpected cost increases as a result of World War I. In light of this unusual situation, the Nebraska Court noted a possible exception to the rule followed by the Railway Commission:

Even though present financial conditions, prices, and wages (showing almost unprecedented changes), together with the financial condition of the plaintiff company, do not show a situation which would be technically denominated an emergency, yet, if they do show a situation which makes it altogether probable that the past and present rate is insufficient to yield a revenue which will pay that fair average return which the law supposes, the commission is empowered, and it may be its duty, to permit a temporary rate, limited to the time required for making an investigation and finding of the value of the property.

173 N.W. at 691.

The Court directed the Commission to approve interim rates on the following conditions:

We are of opinion that the commission was right in ordering that a hearing be had for the purpose of taking evidence, with a view to fixing the valuation of the property for rate-making purposes, and that, pending such hearing, the commission should award such raise in fares as would make the company

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secure against possible insolvency; * * *

173 N.W. at 692.

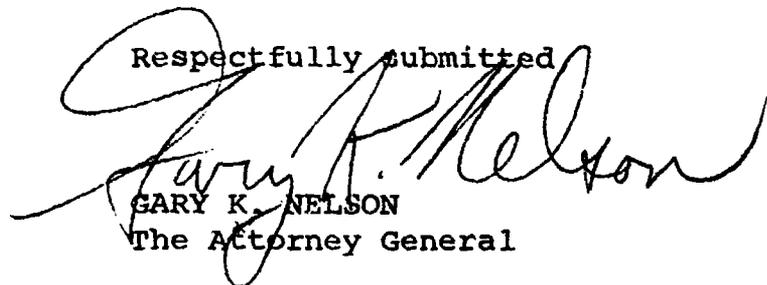
Considered in its entirety, the Nebraska opinion does not contradict the California, Oklahoma and Illinois tests discussed, supra.

The foregoing authorities make it clear that, in general, courts and regulatory bodies utilize interim rates as an emergency measure when sudden change brings hardship to a company, when the company is insolvent, or when the condition of the company is such that its ability to maintain service pending a formal rate determination is in serious doubt.

In addition, under the Mountain States Telephone case, supra, the inability of the Commission to grant permanent rate relief within a reasonable time would be grounds for granting interim relief.

Perhaps the only valid generalization on this subject is that interim rate relief is not proper merely because a company's rate of return has, over a period of time, deteriorated to the point that it is unreasonably low. In other words, interim rate relief should not be made available to enable a public service corporation to ignore its obligations to be aware of its earnings position at all times and to make timely application for rate relief, thus preserving its ability to render adequate service and to pay a reasonable return to its investors.

Respectfully submitted



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