

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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In the Matter of:

APPLICATION OF KENTUCKY WATER SERVICE)
COMPANY, INC. TO CONTINUE SHORT-TERM)
FINANCING OF \$2,300,000; AND NOTICE) CASE NO. 7867
OF ADJUSTMENT OF RATES IN SOMERSET,)
MIDDLESBORO, AND CLINTON, KENTUCKY)

O R D E R

On August 20, 1982, the Court of Appeals of Kentucky affirmed the judgment of the Franklin Circuit Court which had remanded this case to the Commission for a rehearing. In its opinion, the Court of Appeals held that Kentucky Water Service Company had been denied due process when the Commission refused to grant it a rehearing on the issues of Job Development Investment Tax Credit ("JDITC") and interest rates. The Court of Appeals, therefore, directed this Commission to hold a rehearing for the purpose of receiving Kentucky Water Service's testimony and arguments on these two issues.

On September 30, 1982, Kentucky Water Service filed a "Motion on Mandate" in which it asked the Commission to provide the names of all staff personnel who worked on this case; make all such persons available to Kentucky Water Service for cross examination; and provide copies of all staff work papers relating to the issues of purchased electric power, rate case expenses, interest on short term debt and adjustments to equity capital.

Kentucky Water Service has misread the opinion of the Court of Appeals. First, only two issues were remanded for further consideration: JDITC and interest rates. This is clear from this statement by the Court on the last page of its opinion:

We hold that the circuit court did not err in remanding this case for a rehearing on the issues of the treatment of the Job Development Investment Tax Credit and the treatment of interest rates. (Court of Appeals Opinion, page 6.)

Second, the Court of Appeals did not order that the Commission's staff be subject to cross examination by the Applicant or that the work papers of the staff be available for public inspection. The Commission is aware of the following language in the opinion of the Court of Appeals: "The company had no opportunity for a hearing to examine staff members performing the calculations, or to present oral arguments or evidence as to the propriety of the action prior to the issuance of the order." (Court of Appeals Opinion, page 4.) Kentucky Water Service argues that this mandates cross examination of the staff members who assisted the Commission with this case. We disagree. The Court of Appeals here was simply enumerating the various methods the Commission might choose to allow Kentucky Water Service to fully present its position on the two disputed issues. The Commission will allow Kentucky Water Service to present oral arguments on the issues of JDITC and interest rates as well as to present evidence as to the propriety of our decision on these two issues.

Staff is an arm of this Commission; it is not an adversary party to a proceeding before us. Commission staff could no more be subject

to cross examination than could the law clerks of a judge or the staff attorneys of an appellate court. To allow such a procedure at this Commission would inhibit the free flow of ideas between staff members and Commissioners which is crucial to the functioning of our agency.

It is appropriate for the Commission to state its perception of the role of the staff by referring to the following comments by Professor Davis:

The institutional decision often reaches a level which is higher than that attainable by the ablest of administrators who are cut off from their advisers. The administrative process builds on the principle that is used by a large medical clinic, which often can provide medical services superior to what any individual physician can provide, by bringing many kinds of specialists into an organization which is planned so as to provide a maximum of effectiveness to the aptitudes of each individual. The institutional mind has insights that are as profound as those of any individual and may be much more comprehensive, for the appropriate specialists collaborate, checking the judgment of each other, each drawing upon his own peculiar knowledge and skills.

Group work at its best may involve a good deal more than consultation by deciding officers with reviewers of records and with specialists. A system of internal checks and balances may develop. Two minds are often much better than one, for the second may catch errors and rectify the faults of the first, and the interplay between the two may illuminate dark areas into which neither one alone can penetrate.

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The role of an agency's staff is usually a vital part of the administrative process. It is a source of special strength of the administrative process, and it also introduces elements of special weakness. The strength springs from the superiority of group work--from internal checks and balances, from cooperation among specialists in various disciplines,

from assignment of relatively menial tasks to low-paid personnel so as to utilize more economically the energies of high-paid personnel, and from capacity of the system to handle huge volumes of business and at the same time maintain a reasonable degree of uniformity of policy determinations. The weakness stems from the tendency toward anonymity of the advisers, from reliance on extrarecord advice, from frustration of parties' desire to confront those whose reactions are crucial in the decisionmaking, and from the failure to use opinion writing as a discipline for thinking out every facet of the decisionmaking. ^{1/}

Cross examination of the staff would be tantamount to inquiry into the decision-making processes of the members of the Commission. This is not required.

The Supreme Court of the United States long ago established the principle that the deliberative processes by which regulators reach their decision must be insulated from public scrutiny if the integrity of the administrative process is to be protected. In Chicago, Burlington & Quincy Ry. v. Union Pacific R.R., 204 U.S. 585, 593 (1907), Justice Holmes had this to say about cross examination of members of the state tax board by parties before it:

The members of the board were called, including the governor of the state, and submitted to an elaborate cross-examination with regard to the operation of their minds in valuing and taxing the roads. This was wholly improper. In this respect the case does not differ from that of a jury or an umpire, if we assume that the members of the board were not entitled to the possibly higher immunities of a judge. Jurymen cannot be called, even on a motion for a new trial in the same case, to testify to the motives and influences that led to their verdict. So, as to arbitrators. (Citations omitted.)

^{1/} K.C. Davis, Administrative Law Treatise § 17.1, at 277-79 (2d ed. 1980).

Indeed, in more recent opinions, the Supreme Court has stated that there is no difference between cross examining members of an administrative agency and a judge, as seen in United States v. Morgan, 313 U.S. 409, 422 (1941):

The proceeding before the Secretary 'has a quality resembling that of a judicial proceeding.' Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held in this very litigation that 'it was not the function of the court to probe the mental processes of the Secretary.' Just as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected. (Citations omitted.)

Likewise the Supreme Court has rejected attempts to obtain the working papers of an administrative board on the ground that such a procedure would be equally disruptive of the agency work. This point was emphasized in United States ex rel. St. Louis Southwestern Ry. v. ICC, 264 U.S. 64, 78 (1924):

[T]he work of the Commission must go on, and cannot be stopped, as it would be if many of the railroads concerned undertook an examination of all its papers to see what they could find out.

Just as the courts have rejected attempts to obtain the papers of the members of an administrative body and cross examine such members, so also has this protection been extended to the staff serving such commission or board members. The reasoning behind this salutary rule was well stated in T.S.C. Motor Freight Line, Inc. v. United States, 186 F. Supp. 777, 790 (S.D. Texas 1960), aff'd sub nom. Herrin Transportation Co. v. U.S., 366 U.S. 419 (1961):

Congress is aware of the tremendous volume of business which is the ultimate responsibility of the Commission, and hence the Commissioners. . . . Congress did not mean to leave this small group of Commissioners bereft of staff assistance in the assimilation of the great flood of formal cases requiring decision. The decision is still that of the Commissioners. Each bears full legal and personal accountability for that which bears his name or concurrence. The system requires a full public report of reasons and conclusions. With these safeguards Congress deemed the question of the identity and actions of staff assistants to be matters beyond question by the parties. (Emphasis supplied.)

The procedure which we have chosen preserves the integrity of the relationship between the Commissioners and their staff assistants, while according Kentucky Water Service the benefit of a trial type hearing on the two disputed issues. The essential ingredient in an adjudicatory hearing is the right to present evidence in one's own behalf and to present argument from such evidence. This clearly gives Kentucky Water Service its "opportunity to be heard" which is due process in an administrative hearing. Our conclusion here is buttressed by Professor Davis' treatise on this subject:

The most important principle about requirement of opportunity to be heard . . . is that a party who has a sufficient interest or right at stake in a determination of governmental action is ordinarily entitled to opportunity for a trial type of hearing on issues of adjudicative facts. ^{2/}

Based upon our consideration of this matter and being advised, the COMMISSION HEREBY ORDERS that a public hearing be scheduled in this matter on November 18, 1982, at 10:00 a.m., Eastern Standard Time, in the Commission's offices in Frankfort, Kentucky. At such hearing, Kentucky Water Service Company will have the opportunity


^{2/} K.C. Davis, I Administrative Law Treatise § 7.11, at 452 (1958).

to present evidence and oral argument in support of its position on the Commission's treatment of JDITC and interest rates.

The Commission FURTHER ORDERS that Kentucky Water Service Company's motion to obtain our staff's working papers and cross examine our staff regarding their recommendations to the Commission in this matter, be and it hereby is denied.

Done at Frankfort, Kentucky, this 5th day of November, 1982.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:

Secretary