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Administrative Law - Procedure - Consideration of Initial Rate in Natural Gas Act Sale Certification

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RECENT DECISIONS

ADMINISTRATIVE LAW — PROCEDURE — CONSIDERATION OF INITIAL RATE IN NATURAL GAS ACT SALE CERTIFICATION — In a Natural Gas Act sale certification proceeding[1] the Federal Power Commission twice refused to issue an unconditional certificate, finding public convenience and necessity unproved because the unprecedented initial contract rate was not "shown to be in the public interest."[2] Applicants declined to present evidence of the reasonableness of the initial contract rate. A commission proposal to certify at a lower rate, with increase to the contract price after twenty-four hours of delivery but under the public protection provisions of section 4 of the act, was refused. After being informed that the applicants would not dedicate the gas to the interstate market unless an unconditional permanent certificate was granted at their proposed rate, the commission on rehearing issued an unconditional certificate to prevent loss to the interstate market, which was found in great need. Public utilities purchasing gas from the certified vendee obtained review in the Court of Appeals for the Third Circuit, which reversed the commission's decision on the ground that the commission had power only to conduct a full hearing and therefore lost jurisdiction when the applicant circumscribed the scope of inquiry by refusing additional evidence.[3] On certiorari to the United States Supreme Court, *held,* affirmed. Although the commission did not lose jurisdiction, it was error not to consider the reasonableness of the initial rate. *Atlantic Refining Co. v. Public Service Commission of New York,* 360 U.S. 378 (1959).

This proceeding was pursuant to section 7 (e) of the Natural Gas Act,[4] which does not expressly require consideration of the initial rate as an element of public convenience and necessity.[5] Express rate provisions are

[1] Applicant-vendors are the Atlantic Refining Company, Cities Service Production Company, Continental Oil Co., and Tidewater Oil Co., known as CATCO. Their vendee is Tennessee Gas Transmission Co. This contract is the first significant transaction relating to the Continental shelf reserves below the seabed off the Louisiana coast. Moreover, the proposed price was "some 70% higher than the weighted average cost of gas to Tennessee." Principal case at 393.

[2] Continental Oil Co., 17 F.P.C. 563 at 575 (1957).

[3] Public Service Commission of New York v. Federal Power Commission, (3d Cir. 1958) 257 F. (2d) 717. "Congress has not given the Commission power to inquire into the issue of public convenience and necessity where, as here, the applicant circumscribes the scope of that inquiry by attaching a condition to its application requiring the Commission to forego the consideration of an element which may be necessary in the formulation of its judgment." 257 F. (2d) 717 at 723.

[4] 52 Stat. 821 at 825 (1938), as amended, 15 U.S.C. (1958) §717f (e).

[5] Section 7 (e) provides in part: "(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise

found only in sections 4 and 5 of the act. Section 4 (e)[6] empowers the commission to institute a hearing on the reasonableness of a proposed increase in an *existing* rate, the burden of proof being on the gas company. It further allows the commission, pending conclusion of such hearing, to suspend the new rate as to non-industrial consumers for a maximum of five months and thereafter require bond for reimbursement of so much of the increase as may not be shown reasonable. This section does not apply, however, to the filing of an *initial* rate.[7] Section 5 (a) permits the commission on its own initiative to institute hearings to determine whether an existing rate is "unjust, unreasonable, unduly discriminatory, or preferential" and to fix the "just and reasonable rate . . . to be thereafter observed."[8] This section was relied upon by the commission in the instant case to protect the public interest with regard to price.[9] However, "§5 (a) proceedings are notoriously long and complicated and no provision is made for even temporary suspension of rates or for refund of amounts received under such portions of rates as may ultimately be found to be unlawful."[10] Further, under this section the burden of proof is on the government, not the gas company. Therefore, having previously held that "Protection of consumers against exploitation at the hands of natural-gas companies was the primary aim of the Natural Gas Act,"[11] the Court finds that at least while section 5 proceedings are "nigh interminable"[12] the commission must consider initial rates as an important factor in determining public convenience and necessity.[13] It is not clear, however, whether a finding of public convenience and necessity must be supported by substantial evidence of a reasonable initial price. Dicta indicates that a finding of a "just and rea-

such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

6 52 Stat. 821 at 823 (1938), 15 U.S.C. (1958) §717c (e).

7 The rejected commission proposal was designed to invoke this section to review what technically would have been an "increase" from its proposed initial price to the original contract price. The commission was apparently willing to forego a five-month suspension, but not a requirement of bond.

8 52 Stat. 821 at 823-824 (1938), 15 U.S.C. (1958) §717d (a).

9 Continental Oil Co., note 2 supra, at 882.

10 Bazelon, J., dissenting in Oklahoma Natural Gas Co. v. Federal Power Commission, (D.C. Cir. 1958) 257 F. (2d) 634 at 649, contending that an express finding of a just and reasonable initial rate was necessary in certification of public convenience and necessity under §7 (e).

11 Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 at 685 (1954).

12 Principal case at 389. A recent writer estimates the commission's backlog at over 2,000 cases with consequent two to three years delay. Smith, "The Unnatural Problems of Natural Gas," FORTUNE, Sept. 1959, p. 120.

13 "It was formerly the practice of the Commissioners to 'condition' the initial price charged a pipeline by a producer. . . . More recently, however, a majority of the Commissioners have taken the position that if other requirements of a certification of service are met, that's enough. . . ." Smith, "The Unnatural Problems of Natural Gas," FORTUNE, Sept. 1959, p. 120 at 123.

sonable" initial rate may not be required.[14] If this is so, effective judicial enforcement of initial rate supervision probably will be difficult. The problem is delicate both because of statutory silence and because of the customary power of the commission to weigh for itself the various elements bearing on its determinations. However, if the limitation here placed upon gas companies in selection of initial rates does prove effective, their prerogatives will not unfairly be impaired. In rejecting the court of appeals' basis for decision the Supreme Court stated that "the filing of the application for a certificate did not constitute a dedication to the interstate market of the gas recoverable under these leases."[15] The applicants have complete "liberty to refuse conditional certificates proposed" by the commission.[16] Furthermore, in the recent *Sunray Mid-Continent* case[17] the court recognized an applicant's "right to have the Commission act upon its application with such certainty as to allow the exercise of choice" in deciding whether to dedicate.[18] Hence, the commission cannot postpone the consideration of initial rate forced upon it by the principal case. It remains to be seen, though, whether this consideration will constitute the searching exploration of reasonableness usually associated with proceedings under sections 4 (e) and 5 (a) of the act.

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14 "Nor do we hold that a 'just and reasonable' rate hearing is a prerequisite to the issuance of producer certificates." Principal case at 390-391.

15 Principal case at 387.

16 Ibid.

17 Sunray Mid-Continent Oil Co. v. Federal Power Commission, (10th Cir. 1959) 270 F. (2d) 404.

18 Id. at 409-410.