LEXSEE 163 A.D. 705

The People of the State of New York ex rel. C. Perceval, a Corporation, Relator, v. The Public Service Commission for the First District and Edward E. McCall and Others, as Commissioners Thereof, and The New York Edison Company, Respondents

[NO NUMBER IN ORIGINAL]

Supreme Court of New York, Appellate Division, First Department

163 A.D. 705; 148 N.Y.S. 583; 1914 N.Y. App. Div. LEXIS 6955

July 10, 1914

PRIOR HISTORY: [***1] Certiorari issued out of the Supreme Court and attested on the 4th day of April, 1914, directed to the Public Service Commission for the First District and Edward E. McCall and others, as commissioners thereof, commanding them to certify and return to the office of the clerk of the county of New York all and singular their proceedings had in dismissing the complaint of the relator against the New York Edison Company.

DISPOSITION: Writ sustained, determination reversed, matter remitted to the Commission to make such order as may be proper in the premises, with fifty dollars costs and disbursements to relator to be paid by the defendant New York Edison Company. Order to be settled on notice.

HEADNOTES

Corporation -- public service corporation -- duty of electric company to furnish current -- contracts -- reasonable regulations.

SYLLABUS

A provision in the contracts of a public service corporation furnishing electric current that no other electric service will be permitted in connection with its equipment without its previous written consent is in no sense a reasonable regulation and is contrary to public policy and invalid.

The duty of an electric company furnishing current for general [***2] purposes does not rest upon section 62 of the Transportation Corporations Law alone, which refers only to the furnishing electricity for lighting purposes, but upon its common-law obligation as a public service corporation, which requires it to serve impartially every member of the community.

Hence, such a corporation cannot refuse to supply current to a customer for refrigerating purposes during the night time upon the ground that he has made other arrangements for service during the day.

COUNSEL: *Nelson S. Spencer*, for the relator.

Henry J. Hemmens, for the respondents.

JUDGES: Scott, J. Ingraham, P. J., McLaughlin, Dowling and Hotchkiss, JJ., concurred.

OPINION BY: SCOTT

OPINION

[*706] [**584] This is a proceeding by writ of certiorari to review the action of the Public Service Commission for the First District in dismissing the complaint of the relator against the New York Edison Company for its refusal to supply electric current.

The relator occupies, as tenant, premises known as Nos. 2, 4 and 6 Ninth avenue in the city of New York. On July 30, 1913, it made application to the Edison Company for a supply of electric current. This application was made upon three forms, [***3] furnished by the company, one being an application for electricity for lighting purposes, one for power purposes and the third for storage and refrigerating purposes. Each of these application forms when presented to relator contained the following clause, after a provision that no change should be made in the equipment, etc.: "Nor other electric service introduced or permitted in connection with the equipment, without the previous written consent of the New York Edison Company." These words relator struck out of the application before sending it to the company, explaining that it had done so because it had made other arrangements for service during the day from seven A. M. to five-thirty P. M., and proposed to use the Edison service only at night.

The other arrangements above referred to were as follows: Adjoining the building occupied by relator was another large building occupied by a tenant named Wing, in which was installed a private electrical plant intended primarily for the benefit of the Wing building but which was capable of generating more electricity than was required for that building. Relator had arranged with Wing to use his surplus electricity during the day, but [***4] it would not be available at night. Relator deals largely in perishable edibles necessitating a continuous use of electricity during the [**585] entire twenty-fours of the day both for light and for the operation of its refrigerating plant. Its plan was to use the current obtained from Wing during the day and that obtained from the Edison Company during the night. The Edison Company refused to supply any electric [*707] current under these circumstances, placing itself squarely upon the position that it was under no obligation to furnish electric current to any one unless that person agreed to take from the company all the current which it required. In this position it has been upheld by the Public Service Commission.

The Edison Company is a public service corporation holding a franchise from the State, and enjoying by reason of its public character certain valuable privileges not usually accorded to a private individual or corporation for its own individual benefit, not the least of which is the right to use the public streets and highways for carrying its conduits. Having undertaken to perform a public service and accepted special privileges in consideration of such [***5] undertaking, it is bound to serve impartially every member of the community who demands its service and stands ready to pay therefor and to comply with proper and reasonable regulations respecting such service. (*Gibbs* v. *Baltimore Gas Co.*, 130 U.S. 396; *Central New York Tel. & Tel. Co.* v. *Averill*, 199 N. Y. 128.) Not only is the company under this obligation at common law, but it is expressly required by statute to furnish electricity for lighting upon the application of the occupant of any building or premises within 100 feet of its main or wires, as it is conceded that relator's premises are. (Transp. Corp. Law [Consol. Laws, chap. 63; Laws of 1909, chap. 219], § 62.) The same duty is imposed by section 65 of the Public Service Commissions Law (Consol. Laws, chap. 48; Laws of 1910, chap. 480). As was held by the Supreme Court of the United States of a public service company, it "must render the service for which it obtained its charter to those within reach of its facilities without distinction of persons." (*Consumers' Company* v. *Hatch*, 224 U.S. 148.)

It is of course the rule that such a corporation may establish reasonable regulations respecting the [***6] use of the service which it proposes to furnish, and each customer requiring the service is called upon to comply with such regulations. In our opinion, however, the requirement that a consumer must take all of its electricity from one company, or receive none at all, is not in any proper sense a regulation respecting the use of the service [*708] but is a purely arbitrary attempt on the part of the company to insure to itself a monopoly of furnishing electrical current. If the company can lawfully decline to furnish any current to this relator because it also proposes to obtain electricity from a neighbor (not a competing company) it can equally well refuse to furnish electrical current to a consumer who himself generates a part of the current which he uses. Such a limitation upon the company's obligation would as it seems to us be quite unreasonable. An exclusive clause similar in purport and intention to the one insisted upon by the defendant company was severely condemned upon grounds of public policy in *Central New York Tel. & Tel. Co.* v. *Averill (supra)*. An attempt, not thoroughly successful, was made before the Public Service [**586] Commission to establish [***7] the fact that relator sought to use the company's current only during those hours that it would be most expensive to produce it. If that be so the situation could be readily met by

establishing a rate for such service, but it is probably not so, for it surely must be that a very large proportion of the company's customers use electricity only at night and not at all in the day time, and yet no one would say that it would be reasonable for the company to refuse to furnish current unless the customers would undertake to use it during the whole twenty-four hours of each day.

It is urged by the company, and apparently agreed by the Commission, that the company in any event is not obliged to furnish electricity for power and refrigerating purposes. This contention is based upon the language of section 62 of the Transportation Corporations Law, above cited, which refers only to the furnishing of electricity for lighting purposes. In our opinion, however, the company's duty to furnish service does not rest upon the statute alone, but upon the commonlaw obligation as a public service corporation which requires it to serve impartially every member of the community. It may be that if it [***8] did not undertake to furnish electricity for power purposes to any one it could not be coerced to do so. Upon that question we express no opinion. It does, however, profess and undertake to furnish electric current for power purposes, and this it does by virtue of its franchise as a public service company. So professing and undertaking, it cannot [*709] arbitrarily pick and choose whom it will serve and whom it will not.

To sum up our conclusion we are of opinion that the company's reasons for refusing to furnish electrical current to the relator are untenable, and that the restrictive clause which it insists in inserting in its contracts, and to which relator objects, is contrary to public policy and invalid and constitutes in no proper sense a reasonable regulation respecting the use of the service which relator demands.

The writ is, therefore, sustained, the determination of the Public Service Commission reversed and the matter referred back to said Commission to make such order in the premises as may be proper, with fifty dollars costs and disbursements to the relator to be paid by the defendant the New York Edison Company.