Opinion No. 69-81

July 23, 1969

BY: OPINION OF JAMES A. MALONEY, Attorney General Ethan K Stevens, Assistant Attorney General

TO: Public Service Commission, State Capitol Building, Santa Fe, New Mexico 87501

QUESTIONS

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1. Would a disconnection by a public utility of a customer's electric service, in compliance with the terms of a rule of the Public Service Commission, permitting the public utility to immediately discontinue service in the event of a condition determined by the utility to be hazardous, be a defense to a criminal action against the utility under Section 40A-13-2, N.M.S.A., 1953 Comp., as amended, for refusing to furnish electrical power?

2. Does the public utility have a positive duty to refuse to deliver electric power to a customer whose electrical installation is known to be in a dangerous and hazardous condition?

CONCLUSIONS

1. Yes, but see analysis.

2. Yes.

OPINION

*{*124}* ANALYSIS

Section 68-5-4, N.M.S.A., 1953 Comp., as amended (1967 P.P.) gives the Public Service Commission:

"General and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its **rates and service regulations** * * * and to do all things necessary and convenient in the exercise of its power and jurisdiction."

Section 68-5-24, N.M.S.A., 1953 Comp., as amended (1967 P.P.) provides:

"The commission shall have the right and is hereby empowered to adopt, promulgate and enforce such reasonable rules and regulations as may be required to protect users of gas or electricity from damage to their persons or property through the use of

defective gas or electrical appliances or equipment, or improper installation thereof; and to require discontinuance by a consumer of the use of any defective appliance or equipment or the removal forthwith of any unsafe condition incident to the distribution of gas or electricity."

As we understand it, you have enacted a Section 23 of your Second Revised General Order No. 5 which reads in part as follows:

"Section 23 -- **Reasons for Denying or Discontinuing Service..** Service may be denied or discontinued for any of the reasons listed below. Unless otherwise stated, the customer shall be allowed a reasonable time in which to comply *{*125}* with the rule before service is discontinued except as provided in a, b, c and d below.

a. Without notice in the event of a condition determined by the utility to be hazardous.

b. Without notice in the event of customer use of equipment in such matter as to adversely affect the utility's equipment or the utility's service to others.

c. Without notice in the event of customer's tampering with, damaging, or deliberately destroying the equipment furnished and owned by the utility.

d. Without notice in the event of unauthorized use."

It appears that the utility, after it had had one of its employees badly burned due to the dangerous lack of maintenance and defective wiring of the customer's installation, discontinued service to the customer on the ground that his equipment and installation was in a condition determined by the utility to be hazardous. It further appears the customer was reselling electricity over such defective wiring that in all probability the customer's installation would not pass electrical inspection. In **Carroway v. Carolina Power & Light Company,** 226 S.C. 237, 84 S.E. 2d 728, 7 Pur 3rd 545, the South Carolina Supreme Court had for consideration a case in which the plaintiffs brought an action for damages against the power company for unlawfully entering his premises and removing his electric meter and for wilfully and wantonly discontinuing his electrical service. Defendant denied committing a trespass and asserted it was justified in removing the meter and cutting off the current because of the dangerous condition of the electric wiring in plaintiff's residence. It appeared from the evidence that on Saturday, July 12, 1952 the wiring in another house owned by plaintiff's landlord next door to the one in which plaintiff lived caught fire. The Fire Department was called. The blaze was promptly extinguished. The Chief of the Fire Department requested the electrical inspector of the City of Florence to examine the wiring of houses in the vicinity and he concluded that the wiring in plaintiff's residence was defective and notified the power company to "immediately discontinue service" which it did.

After trial resulting in verdict and judgment for plaintiff, defendant appealed. The appellate court then considered the effect of the rules of the Public Service Commission and said:

"In addition to the foregoing Service Regulations, Rule 9 of the Public Service Commission authorizes any public utility to discontinue the service to a customer, without notice 'where a dangerous condition is found to exist on the consumer's premises'.

"The foregoing rules and regulations have the **force and effect of law and were binding on the plaintiff** regardless of whether or not he agreed with them (citing cases).

"We think the only reasonable inference warranted by the evidence is that a situation existed which was dangerous to life and property within the contemplation of the foregoing rules and regulations.

"Not only was the defendant authorized to discontinue the service under the foregoing rules and regulations, but was justified in doing so under the instruction of the Electrical Inspector."

The South Carolina Supreme Court then cited the provisions of the city ordinance giving the inspector authority to order the immediate removal of defective *{*126}* equipment and went on to hold that the power company committed no trespass in removing the electrical meter, revealing the judgment of the court below. As in the South Carolina case the rules and regulations of the Public Service Commission of New Mexico duly adopted under Sections 68-5-4 and 68-5-24, supra, have the force and effect of law which the utility must obey.

Somewhat the same situation appears in the case of **State v. Chicago & St. P. R. Co.,** 130 Minn. 144, (1915) 153 N.W. 320. Here the Minnesota Legislature enacted a law requiring railroads not to charge more than two cents a mile for intra-state passenger travel, and provided a penalty of fine and imprisonment for violation. Stockholders of the railroad brought suit to enjoin enforcement of the rate as unreasonable and confiscatory, and an injunction was issued by the Minnesota Federal District Court restraining the railroad from compliance with the statute pending litigation.

Later, the railroad was indicted by a grand jury, charging it with a violation of the law. The Minnesota Supreme Court said:

"The railroad company was made a party to the action, and therein the company and its agents were confronted with the command of the court on the one hand, and prohibition of the statute on the other; to be punished, if the contention of the State be sustained, whether the injunction was obeyed or disobeyed, -- by the state courts if obeyed, by the Federal court if disobeyed. The administration of the law should not result in or lead to a conflict or confusion of that sort. Every person is entitled to his day in court, **a constitutional right to be heard before he is condemned, and should not be deprived of freedom of action and at the same time exposed to punishment for not acting.** * * *

"It is clear * * * that the court below erred in excluding the injunction from consideration, for it constituted a complete defense to the prosecution, the injunction being in force at the time of the trial, and imposed upon the state court the duty of protecting defendant from the cross-fire to which it and its agents were exposed."

As in the foregoing railroad case, the public utility in the question here presented has to comply with the rules of the Public Service Commission. Such compliance would be a defense to a criminal action upon a refusal to render electric service, but the burden would be upon the utility to produce some evidence that the condition was actually hazardous if the criminal action was brought against it, in order to show compliance with the Commission's rules, and to prove the existence of the rule itself. It is the Commision's duty to protect not only the utility but also its patrons. See (Montana) **Re Big Horn Oil & Gas Development Co.,** (1938) 27 P.U.R. (N.S.) 41. As in the Minnesota case, a utility by reason of its having to abide by the commission's rules, would, if a demand was made upon it by the customer to furnish service anyhow, be faced with a situation where it was deprived of freedom of action. Abiding by the commission rules is a necessity due to the poor condition of the customer's electrical installation, and such refusal would be a defense to a criminal action. See Criminal Law, 21 Am.Jur. 2d, § 99, p. 179. Where the utility obeying the commission's regulation is avoiding an even greater peril possibly, in that if it did furnish the customer the electricity, a fire or injury to third persons might ensue making the company liable, this would certainly make compliance with the customer's request for service entirely unacceptable. Under the facts as given, the utility here knows that the customer's wiring installation is dangerous. As stated in Electricity, Gas and *{*127}* Steam, 26 Am.Jur. 2d, § 118, p. 328:

"Where the company has knowledge of such defective conditions, it has the duty to cut off service, and it is said that in such a case it is the energizing of wires or appliances with knowledge of the conditions, and not the conditions themselves, which forms the basis of liability."

See **Carroway v. Carolina Power & Light Co., supra,** and **Alabama Power Co. v. Sides,** (1934) 229 Ala. 84, 155 S. 686.

It was the intent of the legislature that the Public Utility Act be liberally construed, and Section 68-3-1.1, N.M.S.A., 1953 Compilation, declares in part:

"It is the intent of the legislature in enacting this statute to bring up to date the laws pertaining to public utilities and rural electric co-operatives, so that the rural electric co-operative is subject to all the burdens and entitled to all the benefits which apply to public utilities generally to insure more rigid public regulation and supervision of public utilities, to "facilitate the prevention of unnecessary duplication and economic waste between utility systems, and to establish a system which will more adequately provided for the development and extension of reasonable and proper utility services at fair, just and reasonable rates. The accomplishment of this intent is necessary and vital to the preservation of the public health, safety and welfare.

"B. This 1967 act shall be liberally construed to carry out its purposes."

It appears therefore that since the public utility must comply with the rules and regulations of the Public Service Commission, which have the force of law, this would be a defense to a refusal to serve a customer who has a dangerous and hazardous electrical installation where the customer brings such prosecution under Section 40A-13-2, N.M.S.A., 1953 Compilation, which reads in part:

"Denial of service by a utility consists of any utility refusing to furnish service to another in the area served by such utility."

Then the statute provides the utility may lawfully refuse its services if the person to be served has not tendered an amount of money required for the expense of construction, if construction is necessary for furnishing the utilities or the person has not tendered the amount of money due for the use of such utilities. However, this statute assumes that the customer has the right to demand service. If the fact is that the customer's installation has not passed or would not pass electrical inspection, then he would certainly have no right to demand service of the utility in any event. If the utility made an inspection and determination that his installation was hazardous and refused service in accordance with the rules established by the Public Service Commission, such inspection and determination by the utility if made in good faith could certainly be shown in defense of such criminal action and would be a good defense.

Consequently the first question is answered in the affirmative.

As to the second question, it appears clear from the adjudicated cases that a utility has a positive duty to refuse service to a customer whose wiring is known by the utility to be in a dangerous or defective condition. See **Alabama Power Company v. Jones,** 212 Ala. 206, 101 S. 898 and **International Electric Co. v. Sanchez,** (Tex. Civ. App.) 203 S.W. 1164, error ref. The second question is therefore answered by stating that the company has the positive duty to refuse service to a *{*128}* customer whose installation is known to be dangerous and defective.