

No. 25048 -- West Virginia Highlands Conservancy, Inc. v. Public Service Commission of West Virginia, and Allegheny Power System, Inc.

Starcher, J., dissenting:

I begin with a quotation that seems to me to be highly relevant to the instant case. It is an excerpt of the March 4, 1893 inaugural address of Governor William A. MacCorkle:

There are several matters, however, of great importance to the State and to the people, upon which is due the information as to the policy of this administration for the next four years.

First among these questions of interest to the State is the question of the ownership of lands.

The State is rapidly passing under the control of large foreign and non-resident land owners. We welcome into our State the immigrant who comes to us with the idea of home seeking and home building with all its profits to the State, with its family ties, with its clearing of the forests, its building of church and school houses, its expenditure of all that is made in our State, and its exercise of citizenship. But the men who to-day are purchasing the immense areas of the most valuable lands in the State, are not citizens and have only purchased in order that they may carry to their distant homes in the North, the usufruct, of the lands of West Virginia, thus depleting the State of its wealth to build grandeur and splendor in other States. In a few years at the present rate of progress, we will occupy the same position of vassalage to the North and East that Ireland does to England, and to some extent, for the same reasons.

Public Papers of Governor William A. MacCorkle, 9-10 (1897).

One hundred and five years later, the question of the ownership and sale of the lands of this State is still pressing upon us. In the instant case, our State is being

depleted of its wealth to build the grandeur and splendor of a foreign holding company that calls itself an electric utility, acts like an electric utility, and has reorganized itself so that it functions as one, unified electric company. Yet this company still evades public scrutiny because, before the Public Service Commission, it claims that it is not really an electric utility.

In its 1995 reorganization, Allegheny Power employed “smoke and mirrors” -- an illusion done on paper -- so that it could operate as a single utility company, but claim it was a conglomerate of small, independent companies. Allegheny Power operates as a single corporate body, using electricity generated by the right hand to supply customers who are sitting at the left. Allegheny Power holds itself out to the public as one, unitary public utility company -- but when the public asks, “are you really acting for our benefit?” Allegheny Power smiles and says “none of your business -- we’re not a public utility company.”

The majority opinion not only begrudgingly gives its blessing to that illusion, the majority says that the Public Service Commission, the public agency charged with making sure public utilities act in the public’s best interests, cannot look behind the smoke and mirrors.

The result is that Allegheny Power gets the milk without having to buy the cow -- it gets to drink in profits from selling electricity to the citizens of West Virginia, without having to submit its activities to the scrutiny of the Public Service Commission.

This is wrong, because in this case, the illusion has concrete, permanent, and in my judgment, devastating consequences for the people of this State. I therefore dissent.

A.

Allegheny Power Holds Itself out to the Public as a Public Utility

Allegheny Power's sale of the Blackwater Canyon should be subject to the jurisdiction of the Public Service Commission for a simple reason: Allegheny Power holds itself out to the public as a single, unified public utility company. I am at a loss to understand how a company can act and make profits under the guise of being one company, but, when it comes to taking responsibility, say that its smaller subsidiary companies -- companies that exist only on paper -- should be the focus of attention. This is an illusion, and justice demands that the people be allowed to look behind an illusion.

We said in Syllabus Point 3 of *Wilhite v. Public Service Commission*, 150 W.Va. 747, 149 S.E.2d 273 (1966) that the test as to whether or not a corporation is a public utility involves "look[ing] at *what is being done*, not to what the utility or person says it is doing." (Emphasis added). Basically, the Public Service Commission should look at whether the corporation is holding itself out as being "engaged in the business of supplying . . . its product or services to the public as a class. . . ." In this case, when it is to its own benefit, Allegheny Power holds itself out as being engaged in the business of supplying electricity to West Virginia consumers.¹ Conversely, when it wants to avoid

¹Allegheny Power's Internet home page (www.alleghenypower.com), states that

government regulation, Allegheny Power claims that it is only a holding company that has never been involved in the electricity business.²

Allegheny Power says that West Penn Power Company (the owner of West Virginia Power and Transmission Company, and thus the owner of the Blackwater Canyon property) was once a separate, independent company -- but West Penn has now been replaced by a company called "Allegheny Power." On its Internet home page (<http://www.alleghenypower.com>), Allegheny Power says that "Some of you have known us in the past as Monongahela Power, Potomac Edison, or West Penn Power. . . . *Now we're Allegheny Power. We changed our name and the way we do business so we can remain strong and competitive among the nation's electric utility companies.*" (Emphasis added).

Thus, in its own writings, Allegheny Power calls itself an "electric utility compan[y]." Allegheny Power also acts like an electric utility company. Still, the Public Service Commission ignored Allegheny Power's public statements and actions.

"Allegheny Power serves an area of about 29,000 square miles, and about 1.4 million customers in parts of Maryland, Ohio, Pennsylvania, Virginia and West Virginia. . . . Our customers include more than a million residences from central West Virginia to the New York border. . . ."

²Allegheny Power argues that it is not a public utility because it is prohibited by federal law from engaging in public utility services. This argument makes no sense -- people are prohibited by law from running stop signs, but they do it every day. Allegheny Power could be operating as a public utility and could be in violation of federal law, but we will never know, because the Public Service Commission denies it has jurisdiction over Allegheny Power, and has kept the Highlands Conservancy from conducting the discovery necessary to prove that the Public Service Commission has

Instead, the Public Service Commission relied upon Allegheny Power's courtroom statements that it isn't an electric utility company, but rather is merely a holding company that owns stock in several utility companies.

Applying the Public Service Commission's reasoning, when the king says he is fully clothed, we must all agree -- even though he is standing there buck naked.

In other Allegheny Power writings, the company discusses its "commitment to the environment" in West Virginia. Each time Allegheny Power talks about itself as one utility company, not as a holding company for several smaller utilities. For example, one brochure posted on Allegheny Power's Internet home page states that, "At Allegheny Power, environmental stewardship and leadership is not just something we talk about, it's our commitment. . . . Because at Allegheny Power, we believe it's our responsibility to protect the environment for our Company, our customers, and for future generations."

Allegheny Power, before this Court and the Public Service Commission, claims it owns no power generating plants, sells no electricity, and is therefore not a public utility. Yet, when it is to the benefit of Allegheny's public image, the company says about a power plant located in Haywood, West Virginia, "Harrison Power Station, *Allegheny Power's largest generating plant*, is home to some of the most sophisticated air pollution-control equipment. . . ." (Emphasis added). At another point in the same

jurisdiction.

brochure, Allegheny Power touts a program that “*takes place in our West Virginia service territory.*” (Emphasis added)

Power plants typically make electricity for public consumption. The term “service territory” implies that public service is being supplied to a region. I am therefore at a loss to understand how Allegheny Power can claim to own a large power generating plant and have a West Virginia service territory, and still not be a public utility subject to Public Service Commission jurisdiction.

B.

Allegheny Power holds itself out as the owner of the Blackwater Canyon

When it's good for public relations, Allegheny Power takes credit for donating part of its Blackwater Canyon properties to the State for the creation of Blackwater Falls State Park. On its Internet home page, in a public-relations brochure discussing the environment, Allegheny Power claims:

The majestic Blackwater Falls area in West Virginia became part of the public landscape in 1953 when *Allegheny Power donated 600 acres to the state of West Virginia*, ensuring that the natural beauty of this area would be preserved.

Amazingly, while Allegheny Power claims on the one hand that it donated 600 acres of the Blackwater Canyon to the State in 1953, it claims on the other hand before the Public Service Commission and before this Court that it never owned that land. Which is true?

I recognize that the donation of the Blackwater Canyon land in 1953, and the later sale of 3,000 acres in 1996, were ostensibly performed under the name of the

West Virginia Power and Transmission Company. However, I'm curious to know where the money went from that sale -- if Allegheny Power management made the actual decision to sell the Canyon land, and if Allegheny Power's treasury received the money from the sale, or if Allegheny Power's in-house lawyers negotiated and oversaw the sale, then that sale should be open to scrutiny by the Public Service Commission.

C.

The Sale of the Blackwater Canyon Property is Subject to Scrutiny by the Public Service Commission

The Public Service Commission exists to regulate public utilities, and oversee how services are provided and rates charged. As part of that oversight, our laws say that a public utility must get the Public Service Commission's approval every time it tries to "assign, transfer, lease, sell, or otherwise dispose of its . . . property or any part thereof. . . ." *W.Va. Code*, 24-2-12 [1984].

The reason should be obvious: when a public utility buys or sells property, it normally makes or loses money. That affects the total assets of the public utility, and thus affects the rates that consumers pay for utility services. Every transaction that affects services to the public should be subjected to public scrutiny.

It is a fundamental rule of law that "[A] public service commission may look through the corporate form of affiliated corporations and probe for economic realities. . . . [W]hen an operating public utility which is subsidiary to a holding company is seeking a rate increase, all of the various ways in which the parent company receives

profits from the subsidiary should be considered in establishing the rate of return that the owner of the subsidiary should receive.” 64 Am.Jur.2d § 202, “Public Utilities.”

By selling the Blackwater Canyon property, Allegheny Power disposed of land that might have been used for building hydroelectric generating facilities, might have been used for the construction of power transmission lines, or might have been judiciously timbered, to generate income for the utility -- or might have been sold to the National Park Service, which wants to buy the land for public recreation. The sale, which is the subject of the instant case, has generated income that could be used to lower the price of electricity paid by West Virginia consumers. That sale affects the West Virginia utility-buying public -- and therefore is subject to review by the Public Service Commission.

Furthermore, the Public Service Commission has been charged with “balancing the interests of current and future utility customers, the general interests of the State’s economy and the interests of the utilities. . . .” *W.Va. Code*, 24-1-1(b) [1986]. Tens of thousands of tourists visit Blackwater Falls State Park, and look out across the land sold by Allegheny Power. That land is now being scalped clean of all trees, and the run-off is polluting the Blackwater River and killing the remaining flora and fauna.³

³It appears that history is repeating itself in the Blackwater River region. The Blackwater Canyon has previously sustained massive ecological damage from the cutting of trees. At the turn of the century, the Canyon was devastated by the uncontrolled cutting of timber, and the environment suffered from the pollution caused by the resulting

Tourism to the Blackwater Falls State Park region is certainly in the “general interests of the State’s economy,” and will likely suffer when the Blackwater Canyon is gutted of all

lumber, pulp and paper industries.

Stephen B. Elkins, the owner of several railroads and pulp and paper mills in the Blackwater River region, disputed that industry had caused any damage to the environment in a December 20, 1909 letter to William A. MacCorkle:

Dear Governor MacCorkle: --

You are on the Commission, and I believe the Chairman, appointed to look into and make investigation of the pollution of the Kanawha and Gauley rivers. Under this authority I believe your Commission has undertaken some investigation into Cherry river at Richwood, where there are situated some pulp and paper mills.

At first it occurred to me perhaps your authority to look into the pollution of the Kanawha and Gauley rivers did not authorize you to go up as far as Cherry, in any event, I want to assure you that the pulp and paper mills at Richwood are doing all they can to avoid the pollution of the river at that place.

Prior the establishment or building at that point, there were never any use made of the water and there were no fish in the stream.

The investigation of your Commission has caused some uneasiness at Richwood and vicinity, and affects to some extent the development of that part of the State; I mean the extension of a branch line of the B. & O. Railroad. Now, you know it would be a great damper on future industries if these mills were compelled to close down on account of the supposed pollution of the streams.

Will you kindly look into this matter and write me, so that I may know what to say to some Railroad friends. I think it important that nothing occur which would prevent the extension of a railroad in that vicinity.

Very truly yours,

/s/ S.B. Elkins

Elizabeth M. Hulett, *The Elkins Letters* (1995), citing 99 *Stephen B. Elkins Letter Books* 341-42 (Davis & Elkins College Collection, Elkins, West Virginia).

vegetation. But the Public Service Commission has ignored the general interests of the State's economy and denies that it has jurisdiction over Allegheny Power. The Commission has allowed the sale of West Virginia's "Grand Canyon" to a timber company, without public scrutiny. The Commission has thereby cut off its nose to spite its face -- or, in this case, is allowing the trees of the Blackwater Canyon to be cut down to spite West Virginia's tourism industry.

D.
Conclusion

Allegheny Power looks, sounds, and acts like a public utility. Accordingly, it is a public utility. I therefore disagree with the majority opinion holding it is not.

I believe that the Public Service Commission clearly had jurisdiction in this case, or at a minimum, should have allowed the Highlands Conservancy the right to conduct discovery, to see what was hidden in the smoke and mirrors. By holding that Allegheny Power isn't a power company, the majority opinion has allowed an illusion of corporate law to defeat the obvious reality -- that the sale of the Blackwater Canyon has adversely impacted West Virginia citizens.

Are we right back where we started a century ago? A foreign corporation is "depleting the State of its wealth to build grandeur and splendor in other States," and doing so to the detriment of West Virginia consumers. It appears that some things

change; some things don't. As happened a century ago, are we willing to sit back and letting it happen? I pray not.

I therefore dissent.