No. 29989 - The Affiliated Construction Trades Foundation, a division of the West Virginia State Building and Construction Trades Council, AFL-CIO v. The Public Service Commission of West Virginia and Big Sandy Plant, LLC

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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Davis, Chief Justice, concurring, in part, and dissenting, in part:

In this proceeding, the Affiliated Construction Trades Foundation (hereinafter referred to as "ACT") challenged a ruling by the Public Service Commission (hereinafter referred to as "PSC"), which concluded that ACT had no standing to litigate issues involving a certificate of convenience and necessity that was issued to Big Sandy Peaker Plant (hereinafter referred to as "Big Sandy"). The majority opinion determined that granting relief to ACT was impossible because the project complained of had been completed. Therefore, the majority opinion properly affirmed the PSC's dismissal of ACT's complaint. With this part of the majority opinion, I concur.

Although the majority opinion found that completion of the project by Big Sandy rendered ACT's complaint moot, the majority nevertheless proceeded to address the merits of the issues raised. In so doing, the majority opinion ruled that ACT had standing to file a complaint against Big Sandy. For the reasons set out below, I dissent from the majority opinion's ruling on the standing issue.

ACT had no standing because ACT Failed to Intervene During the Pendency of Big Sandy's Request for a Certificate of Convenience and Necessity

The PSC maintained that ACT sought to revoke the certificate of convenience and necessity issued to Big Sandy. Consequently, the PSC argued, ACT had no standing to file a complaint in the matter. To justify addressing this case on the merits, the majority opinion stated that "[i]f ACT sought only the revocation of the permit, the finality argument might be considered more viable." In other words, the majority opinion agreed that ACT had no standing to revoke the certificate of convenience and necessity. However, to support its finding that ACT did have standing in this case, the majority opinion disingenuously concluded that ACT did not actually seek to revoke the certificate of convenience and necessity. Unfortunately, the record fails to support the majority's conclusion. In fact, the record *clearly* reveals that ACT indeed sought to revoke the certificate of convenience and necessity issued to Big Sandy.

Pursuant to W. Va. Code § 24-2-11(a) (1983) (Repl. Vol. 2001), the PSC is required to provide notice to the public of a request for a certificate of convenience and necessity.[1] The notice requirement is intended to allow any interested party to attend a scheduled hearing to voice any concerns regarding a third party's request for a certificate of

[1]The pertinent language of W. Va. Code § 24-2-11(a) states:

> Notice shall be given by publication which shall state that a formal hearing may be waived in the absence of protest, made within thirty days, to the application. The notice shall be published as a Class I legal advertisement in compliance with the provisions of article three, [§§ 59-3-1 et seq.], chapter fifty-nine of this code.

convenience and necessity. The record revealed that the PSC *required* Big Sandy to make two legal publications advising the public of the pendency of its request for a certificate of convenience and necessity. As a result of the legal publications, two parties intervened and were given an opportunity by the PSC to voice their concerns. *ACT did not attempt to intervene while the PSC was considering Big Sandy's request for a certificate of convenience and necessity.* Had ACT so intervened and objected to the PSC's ruling, ACT could then have appealed an unfavorable ruling. However, rather than intervening as authorized by W. Va. Code § 24-2-11(a), ACT waited nearly six months *after* the PSC had granted the certificate of convenience and necessity to raise its objections. At that point, ACT filed a complaint seeking to revoke the certificate of convenience and necessity.

ACT relied upon W. Va. Code § 24-4-6 (1923) (Repl. Vol. 2001) in order to file its complaint. W. Va. Code § 24-4-6 permits a party to enforce compliance with the statutory, regulatory, and other requirements that are imposed upon an entity that obtains a certificate of convenience and necessity.[2] This statute, as conceded to by the majority opinion, cannot be

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[2]W. Va. Code § 24-4-6 reads in full:

> Any person, firm, association of persons, corporation, municipality or county, complaining of anything done or omitted to be done by any public utility subject to this chapter, in contravention of the provisions thereof, or any duty owing by it under the provisions of this chapter, may present to the commission a petition which shall succinctly state all the facts. Whereupon, if there shall appear to be any reasonable ground to

(continued...)

used to revoke the issuance of a certificate of convenience and necessity. A party seeking to revoke the issuance of a certificate of convenience and necessity must appeal the order granting such certificate.

The complaint filed by ACT pursuant to W. Va. Code § 24-4-6 expressly sought the following relief from the PSC:

> i. That the Commission *revoke* the Certificate of Convenience and Necessity it issued on June 23, 2000 concerning [Big Sandy's] facility and Order all construction and other work to cease.
>
> ii. That the Commission issue an Order *revoking* the waiver of the requirement to provide information listed in paragraphs 5 through 9 of Form 5 of the Commission's Tariff Rules and the Information required by Rule 42 of the Tariff and Ordering [Big Sandy] to provide said information.
>
> iii. That the Commission investigate the circumstances under which [Big Sandy] applied for and obtained said Certificate.

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[2](...continued)

> investigate such complaint, a statement of the charges thus made shall be forwarded by the commission to such public utility, which shall be called upon to satisfy such complaint or to answer to the same in writing within a reasonable time to be specified by the commission. If such public utility within the time specified shall make reparation for the injury alleged to have been done, or correct the practice complained of and obey the law and discharge its duties in the premises, then it shall be relieved of liability to the complainant for the particular violation of the law or duty complained of. If such public utility shall not satisfy the complainant within the time specified, it shall be the duty of the commission to investigate the same in such manner and by such means as it shall deem proper.

> iv. That the Commission *not issue* a new Certificate of Convenience and Necessity for said facility unless and until it determines that [Big Sandy] has met its burden and complies with all aspects of West Virginia Code Section 24-2-11 including its burden to demonstrate an improved economy in light of the impact on the economic health of the community and the State through the use of revenue bonds and a PILOT plan.
>
> v. That the Commission Order [Big Sandy] to meet its obligations to the economic health of the State and the Community through the exclusive hiring of local workers and contractors for the construction and operation of the facility.

(Emphasis added).

In its opinion, the majority states that ACT had standing in this case because ACT was not seeking to revoke the certificate of convenience and necessity issued by the PSC to Big Sandy. However, as indicated above in paragraph *i*, ACT specifically requested "[t]hat the Commission *revoke* the Certificate of Convenience and Necessity it issued on June 23, 2000 concerning [Big Sandy's] facility[.]" (Emphasis added). Moreover, in paragraph *iv*, ACT specifically requested "[t]hat the Commission *not issue* a new Certificate of Convenience and Necessity for said facility unless and until it determines that [Big Sandy] has met its burden and complies with all aspects of West Virginia Code Section 24-2-11[.]" (Emphasis added).

It is simply illogical for the majority opinion to conclude that ACT was not seeking to revoke the certificate of convenience and necessity issued to Big Sandy. ACT was crystal clear in its complaint. It requested the certificate of convenience and necessity be "revoked," and that no "new" certificate of convenience and necessity be issued until Big Sandy

met the requirements imposed by ACT. I submit that the majority opinion is a calculated distortion of the record and is imposing greater, nonstatutory, duties upon the PSC. These new duties, as outlined by the majority opinion, permit *any* future entities[3] to have uncontrollable power in challenging the issuance of a certificate of convenience and necessity. It is unfortunate that the majority opinion has resorted to such legislative authorship rather than staying within the confines of our constitutional role as the judicial branch of government.

For the reasons stated, I concur, in part, and dissent, in part, from the majority opinion. I am authorized to state that Justice Maynard joins me in this opinion and reserves the right to author a separate opinion.

[3]Here, ACT argues that the purpose of its complaint was to save union jobs for West Virginia working people. However, the next entity which might use the majority opinion to revoke a certificate of convenience and necessity may very well be a non-union entity that is seeking to have non-union workers employed on a project. In other words, the majority opinion has opened the door for relentless challenges to validly issued certificates of convenience and necessity by pro-labor and pro-business organizations, as well as by union and non-union advocates. *See In re Burks*, 206 W. Va. 429, 432 n.1, 525 S.E.2d 310, 313 n.1 (1999) ("'[S]auce for the goose' is also 'sauce for the gander.'").