05/14/82 Puerto Rico Maritime v. Federal Maritime

1982.CDC.0000124 (1982) | Cited 0 times | D.C. Circuit | May 14, 1982

Before WALD, MIKVA and GINSBURG, Circuit Judges.

1. See Pub.L.No.95-474, 92 Stat. 1494 (1978); S.Rep.No.1240, 95th Cong., 2d Sess. 1 (1978), reprinted in 1978 U.S.Code Cong. & Ad.News 3331.

2. The legislation ... specifies that for the purposes of the act and the Administrative Procedures Act it is unnecessary to hold a full evidentiary hearing with the opportunity to present oral testimony and cross-examine witnesses. It provides instead that it is sufficient to provide an opportunity to submit written statements, file briefs, or hold conferences. Moreover, it is expected that steps will be taken to expedite discovery. It had been suggested that the 180-day deadline could not be met because of the requirements imposed by the Administrative Procedures Act. These features are designed to remove that objection. However, constitutional due process may require an opportunity for a short oral presentation and opportunity for cross-examination. That, of course, could still be provided where appropriate. H.R.Rep.No.474, 95th Cong., 1st Sess. 10 (1977).

3. See S.Rep.No.1240, 95th Cong., 2d Sess. 2 (1978).

4. 46 C.F.R. §§ 502.67, 512.2.

5. Id. § 512.2(f)(1)(ii).

6. Order of Investigation, Docket No. 81-10, 46 Fed.Reg. 11037 (Feb. 5, 1981).

7. PRMSA's rate increases as originally filed on December 5, 1980 were based upon an eight-vessel complement, reflecting the anticipated acquisition of a new roll-on/roll-off vessel. When this acquisition fell through, PRMSA was given special permission to refile its application with all materials showing projected results under two possible vessel configurations. This Special Permission also granted PRMSA a new effective date of February 27, 1981. The investigation of the rate increases of the other carriers was expanded to include PRMSA. See 46 Fed.Reg. 15212 (March 4, 1981).

8. The order adding PRMSA to the investigation announced for consideration the additional issue of whether the fixed-charges-coverage-rationale standard of reasonableness set out in 46 C.F.R. § 512.6(d)(3) should be used for PRMSA in light of its unique financial structure.

9. Initial Decision at 65-70; J.A. at 123-28.

10. Our recent decision in Arizona Elec. Power Coop., Inc. v. ICC, 675 F.2d 303 (D.C.Cir.1982), does not resolve this

question. In that case we declined to review a decision by the ICC not to investigate or suspend a general rate increase filed by rail carriers. We relied on the well-settled principle that an ICC decision not to suspend or not to investigate is unreviewable by the courts of appeals. See At 333. See also Southern Ry. v. Seaboard Allied Milling Corp., 442 U.S. 444, 99 S. Ct. 2388, 60 L. Ed. 2d 1017 (1979). We also relied on Alabama Power and Atlantic City Electric because the general rate increase had not received full agency consideration, but we did not reach the question of whether this court could properly review the agency's plenary consideration of a general rate increase.

11. "The Commission's exercise of its regulatory authority must be assessed in light of its purposes and consequences, and not by reference to isolated phrases from previous cases." Permian Basin Area Rate Cases, 390 U.S. at 791 n.60, 88 S. Ct. at 1372 n.60.

12. See 45 U.S.C. § 845(b); S.Rep.No.1240, 95th Cong., 2d Sess. 9-10 (1978).

13. I.D. at 76-79; J.A. at 134-37. A close reading of the ALJ's decision reveals that he did not so much accept the methods and results proffered by PRMSA as reject the various criticisms of the forecast by other participants.

14. This correlation established that the two prices tended to vary together, e.g., a change in one could be used to explain most of the change in the other.

15. The Commission noted that PRMSA's fuel forecast was inconsistent with that of the other carriers. See FMC Brief at 54 n.15. It apparently concedes at this point that it improperly attempted to compare the price of Bunker C fuel and diesel fuel.

16. GVI/PRMA had presented an alternative trend analysis based on updated ARAD forecast data. This was rejected by both the ALJ and the Commission as adequately rebutted by PRMSA's testimony. See C.D. at 33 n.36; J.A. at 33 n.36.

17. The Commission referred to Exhibit C of the rebuttal testimony of PRMSA witness Vasquez. See J.A. at 825. This data sheet shows the relevant PRMSA fuel prices in dollars per barrel for 1980 to be 19.26, 20.60, 21.39, and 28.03, and hence shows quarterly increases of 1.34, .79 and 6.64. From this, PRMSA forecast a steady quarterly increase of 2.74. Given the wide variance of changes from quarter to quarter in 1980, it was not unreasonable for the Commission to question a forecast methodology that assumed a constant increase per quarter.

18. For example, a high correlation between height and weight of a group of people would show whether increases and decreases from the average in height are paralleled by similar increases and decreases from the average weight. The matching changes would not be equal in amount (one pound for one inch), but rather would show, for example, similar increases in weight for each increase in height. The correlation coefficient will indicate how much of the variation in weight can be explained by the variation in height. See generally F. Kohout, Statistics for Social Scientists 152-67 (1974).

19. J.A. at 916.

20. In I & M, the test year was 1976 and the FERC issued its opinion in March 1980. See 559 F.2d at 1194, 1197. In

Chatham & Riverton, the test period spanned mid-1976 through mid-1977, the Initial Decision of the ALJ was issued in January 1979, and the Commission promulgated its decision in March 1980. See 662 F.2d at 26, 28.

21. We intimate no opinion as to the proper time to measure reasonableness in a proceeding more closely aligned to the FERC cases above.

22. PRMSA urges that Copan's 7-percent figure should also be rejected as unsupported in the record. The Commission's decision finds support here in the estimate of an expert. The expert need not always give additional support beyond his expertise, although the quantum of support offered by the expert is, of course, to be considered by the Commission as it evaluates the reliability of the expert's testimony. PRMSA also urges that the Commission erred when it reversed its ALJ without evidentiary support. It relies on an inapposite case steeped with first amendment issues and other complications not relevant here. See Meehan v. Macy, 129 U.S. App. D.C. 217, 392 F.2d 822, 839 (D.C.Cir.1968) (review of discharge of a Panama Canal Zone employee who protested policies of the Zone commander), modified and aff'd en banc, 425 F.2d 472 (D.C.Cir.1969) (per curiam). As we stated in Greater Boston Television Corp. v. FCC, 143 U.S. App. D.C. 383, 444 F.2d 841 (D.C.Cir.1970), cert. denied, 403 U.S. 923, 91 S. Ct. 2229, 29 L. Ed. 2d 701 (1971): The agency's departures from the Examiner's findings are vulnerable if they fail to reflect attentive consideration to the Examiner's decision. Yet in the last analysis it is the agency's function, not the Examiner's, to make the findings of fact and select the ultimate decision, and where there is substantial evidence supporting each result it is the agency's choice that governs. Id. at 853 (footnotes omitted). Here the Commission's conclusion is adequately supported in the record by Mr. Copan's testimony.

23. The Commission first explained that it found the 7-percent figure reasonable for long-term debt because much of this debt was incurred prior to the current high rates. We see no error in this reasoning. It then stated that Copan's additional 2 percent would reduce the effect of any inaccuracy. Since the Commission had found the figure reasonable, an inaccurate statement about compensation for any possible distortion has little significance. The Commission did not err when it found Dr. Ileo's testimony compatible with and possibly supportive of Copan's figure. Finally, the Commission stated it was unmoved by the arguments in PRMSA's brief. It is unimportant that, as PRMSA notes, the brief included a citation of PRMSA's witness and not mere legal argument. The FMC was not required to be convinced. We also note that PRMSA's brief cites its witness for the number estimated by Copan, not the proposition that the figure was too low. See PRMSA Opening Brief Before FMC 38-39; J.A. at 216-17. Further, the cited portion of the Silberman testimony does not criticize the figure as too low, but only as an estimate without basis. See Silberman Surrebuttal at 23; J.A. at 936. On the following page the estimate is termed "apparently an incorrect, low interest rate." Id. at 24; J.A. at 937. The testimony gives no support or reasoning for the conclusion that the estimate was "apparently" low. Thus, the fine shred of expert testimony on which PRMSA would have us reverse the agency was not even cited to the agency in the brief that was putatively more than a brief. There is no indication that the Commission failed to consider properly the testimony of PRMSA's expert, and no indication of abuse of discretion in the Commission's rejection of the arguments in PRMSA's brief.

24. See 46 C.F.R. § 512.6(d)(2)(ii).

25. PRMSA attempts to show that Copan, the BIE's witness, agreed that a carrier could not compete for capital if it held nonoperating assets with a lower rate of return and had its operating return restricted to the total rate of return of the reference group. Mr. Copan agreed to this assertion assuming any later adjustment for risk. See J.A. at 543. The

risk-spreading effect of the nonoperating assets, typically of lower return and lower risk, will normally give the reference group a different risk profile than if only its operating assets are considered. Thus adjustments for risk will tend to take into account the difference between "total capital" and the carrier's rate base.

26. See Leventhal, Vitality of the Comparable Earnings Standard for Regulation of Utilities in a Growth Economy, 74 Yale L.J. 989, 1001 (1965) ("Not only may the difficulties of finding non-regulated enterprises of corresponding risk be finessed by taking unregulated businesses of different risk and by making practical adjustments for differences in risk with the exercise of judgment, but the comparable-earnings test also permits the use of groups of other companies, rather than individual companies, for purposes of providing a comparison of range of returns.").

27. See 46 C.F.R. § 512.6(d)(2)(ii).

28. See J.A. at 749, 751.

29. GVI/PRMA also argue that the FMC did not adequately explain its acceptance of Copan's calculations. As the Commission points out, however, its decision accepts the conclusion of the ALJ who did discuss his reasons for accepting Copan's estimates over those of the other witnesses. See Northeast Broadcasting Co. v. FCC, 130 U.S. App. D.C. 278, 400 F.2d 749, 759 (D.C.Cir.1968) (Commission may adopt ALJ's initial decision).

30. In its brief to this court, the FMC adds one additional argument: there was no evidence of collusion on the record. We do not consider this argument in light of our disposition.

31. But cf. Conway Corp. v. FPC, 167 U.S. App. D.C. 43, 510 F.2d 1264, 1274 (D.C.Cir.1975), aff'd, 426 U.S. 271, 96 S. Ct. 1999, 48 L. Ed. 2d 626 (1976) (an agency may consider price-squeeze effects of wholesale and retail rates in setting rates within the "zone of reasonableness"); City of Batavia v. FERC, 672 F.2d 64 at 86 (D.C.Cir.1982) (same).

32. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229, 59 S. Ct. 206, 216, 83 L. Ed. 126 (1938). See also Trailways, Inc. v. ICC, 218 U.S. App. D.C. 123, 673 F.2d 514 at 517 (D.C.Cir.1982).

33. See Puerto Rico Maritime Shipping Auth. v. ICC, 207 U.S. App. D.C. 177, 645 F.2d 1102 (D.C.Cir.1981); Trailer Marine Transp. Corp. v. FMC, 602 F.2d 379 (D.C.Cir.1979).