6023

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-190630 DATE: April 14, 1978

MATTER OF: Payment of Costs by the United States for Intervening in Proceeding of Alaska Public Utilities Commission

DIGEST: Pursuant to statute, Alaska Public Utilities Commission (Commission) assessed cost of telephone ratemaking proceeding among participants including the petitioner utility and the Commission itself. U.S. as intervenor to proceeding may pay portion assessed against it by Commission where assessment was not unreasonable in relation to cost of proceeding and was equitably distributed among participants, since assessment is not part of a judgment against one party in favor of another. Furthermore, participants are on notice that they are subject to assessment for a share of the cost which they voluntarily assume the duty to pay by participation in the proceedings.

This is in response to a request from R. F. Benjamin, Special Disbursing Agent, U.S. Army Finance and Accounting Center, for an advance decision on whether costs assessed by the Alaska Public Utilities Commission (Commission) against participants in proceedings before the Commission can be paid by Federal Government agencies when they intervene and participate in such proceedings.

The request indicates that this issue first arose as a result of the Department of Army's participation on behalf of the Department of Defense (DOD) and all other executive agencies in Commission Dockets U-71-86 and U-71-89, relating to intrastate telephone service rendered by the City of Anchorage d/b/a Anchorage Telephone Utility.

The Army participated pursuant to authority delegated by the Administrator of General Services, who is authorized by law to represent executive agencies in proceedings before State regulatory bodies (40 U.S.C. § 481(a)(4) (1970)) and to delegate that authority to the head of any other Federal agency (40 U.S.C. § 486 (1970)).

Following the close of the hearings in those cases, the Commission issued orders (U-71-86, Order No. 6; U-71-89, Order No. 15), assessing costs against the several participants in the proceedings, including the DOD and Federal executive agencies. The combined order was served June 17, 1975, and included an invoice for the costs assessed.

On July 2, 1975, the Regulatory Law Office, Office of the Judge Advocate General, Department of the Army, petitioned the Commission for reconsideration of its order, insofar as it purported to assess a portion of the costs of the hearings against the Federal Government agencies. This petition, again on behalf of DOD and all Federal executive agencies, set forth the Department of Army's legal opinion that it had no authority to make a disbursement for this purpose. On April 14, 1977, the Commission wrote to the Regulatory Law Office, calling its attention to the unpaid invoice. On April 22, the Regulatory Law Office responded by letter, referring to its earlier Petition and requesting the Commission to find that such costs were not apportionable to Federal Government agencies. On May 4, 1977, the Regulatory Law Office received a further letter from the Commission, advising that the Commission had referred the matter to its Staff Legal Counsel for his review and further action.

On August 5, 1977, the Regulatory Law Office, on behalf of the Federal executive agencies, petitioned for leave to intervene in Commission Docket No. U-77-53, a case involving an interim rate increase in RCA Alascom's intrastate telephone rates. At the opening of the hearings on August 21, 1977, in Anchorage, the Commission inquired of the DOD Regulatory Law Office Counsel, Peter Q. Nyce, Jr., whether the DOD, on behalf of the Federal executive agencies, would state on the record that it would bear its fair assessment of the costs of the proceeding as a condition of granting DOD's Petition for leave to intervene. Mr. Nyce advised the Commission that it was the legal opinion of the DOD that such costs could not be paid.

After consultation with the Commission's Staff Counsel, it was agreed on the record that this legal issue would be submitted to the Comptroller General of the United States, and the intervention of DOD was allowed.

The Commission order of June 17, 197 , allocating costs for hearing Dockets U-71-86 and U-71-89, was issued pursuant to Alaska Statute 42.05.651 which provides as follows:

"Expenses of investigation or hearing. After completion of a hearing or investigation held under this chapter, the commission shall allocate the costs of the hearing or investigation among the parties, including the commission, as is just under the circumstances. In allocating costs, the commission may consider the results, ability to pay, evidence of good faith, other relevant factors and mitigating circumstances. The costs allocated may include the costs of any time devoted to the investigation or hearing by hired consultants, whether or not the consultants appear as witnesses or participants. The costs allocated may also include any out-of-pocket expenses incurred by the commission in the particular proceeding. The commission shall provide an opportunity for any person objecting to an allocation to be heard before the allocation becomes final."

The order states that the total costs assignable to the proceedings are $3,723.16 (representing Court Reporter's fees of $2,224.41 and legal counsel in the amount of $1,498.75) to be allocated as follows:

"(a)	Commission	$558.49
(b)	City of Anchorage d/b/a Anchorage Telephone Utility	558.47
(c)	Department of Defense and All Executive Agencies of the United States	260.62
(d)	Alyeska Pipeline Company	260.62
(e)	AMOCO Production Company	260.62
(f)	Atlantic Richfield Company	260.62
(g)	BP Alaska, Inc.	260.62
(h)	Cook Inlet Pipe Line Company	260.62
(i)	Marathon Oil Company	260.62
(j)	Mobil Oil Corporation	260.62
(k)	RCA Alaska Communications, Inc.	260.62
(l)	Standard Oil Company of California	260.62

The question is whether an invoice (number 7829) from the Commission in the amount of $260.62 may be paid.

It is noted that the allocation ordered was an equal division of costs among all parties, and thus there is no issue of unfair or inequitable assessment.

In arguing before the Commission that the United States is precluded by law from paying the fees assessed, the Secretary of the Army relied on 28 U.S.C. § 2412 (1970) which provides that:

> "Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. A judgment for costs when taxed against the Government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation. Payment of a judgment for costs shall be as provided in section 2414 and section 2517 of this title for the payment of judgments against the United States."

The Secretary also cited Cassata v. Federal Savings and Loan Insurance Corp., 445 F.2d 122 (7th Cir. 1971), in which the Court reversed an order by a district court assessing attorney's fees against the Federal Savings and Loan Insurance Corporation because such an award would be void and unenforceable under 28 U.S.C. § 2412 (1970). The court reasoned that:

> "Section 2412, supra, as presently constituted is a 1966 amendment of its predecessor Section 2412, enacted June 25, 1948, c. 646, 62 Stat. 973. The reviser's notes make it clear that the limitations imposed upon the liability of the United States for the payment of costs follows the established common-law rule that a sovereign is not liable for costs unless specific provision for such liability is made by law. This is a corollary to the rule that a sovereign cannot be sued without its consent.

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> "It has long been held that 'in the absence of a statute directly authorizing it, courts will not give judgment against the United States for costs or expenses' and that this is a sovereign prerogative which cannot be waived." 445 F. 2d at 125-26.

We do not believe that 28 U.S.C. § 2412 and the Cassata doctrine is applicable to the present case. 28 U.S.C. § 2412 relates to the award of costs against the losing party to a litigation in favor of the prevailing party. In the State regulatory proceeding here at issue, the costs assessed are not part of a judgment against one party in favor of another. Rather, pursuant to the State statute, the Commission has assessed costs against all the participants in the ratemaking proceeding, including the petitioning utility and the Commission itself. The allocation is not based on the same rationale which lies behind a judicial award of costs; that is, to make the prevailing party whole at the expense of the other party. Under the Alaska Statute, it is the Commission which receives the payment, and the prevailing party (e.g., the successful petitioner for a rate increase) is no less liable for costs than are the opposing parties.

Moreover, under the Alaska Statute, a participant in a ratemaking proceeding before the Commission is on notice that it may be subject to assessment of costs, upon completion of the proceeding. Any intervenor not willing to accept the duty to share the costs, would not normally be able to participate in the proceeding. A decision to participate is a voluntary assumption of the responsibility to pay what amounts to a cost of doing business with the Commission. The Alaska regulatory agency is not asserting any regulatory power over the United States and no substantive rights of the United States are impaired by the cost-assessment statute. The United States has chosen to intervene in this proceeding, in its capacity as a consumer of services for which rates are being set. In this posture, it appears to us that no issue of sovereign immunity or of Federal supremacy is present. This is not a situation where an attempt at State regulation interferes with the performance of a Federal function. Having chosen to participate in the State's ratesetting procedure and hence having accepted the conditions of financial responsibility attaching to that participation, the United States should not now be heard to argue that those conditions interfere with its supremacy. U.S. v. Thekla, 266 U.S. 328 (1924). Cf. United States v. Public Service Commission

of Maryland, 422 F. Supp. 676 (1976) (State rule limiting cross-examination by intervenor United States, and hence impairing mandate of Administrator under 40 U.S.C. § 481(a)(4), was invalid under the supremacy clause).

The Department of the Army participated in the proceedings before the Commission pursuant to authority delegated to it by the General Services Administration (GSA) under 40 U.S.C. § 481(a)(4), on behalf of itself and all other executive agencies. Expenditures to pay the costs of such participation are therefore authorized as necessary to implement this statutory authority, if otherwise proper. While we have not received the formal views of GSA on this matter, we have been advised informally by a respresentative of the Regulatory Law Division, Office of General Counsel, GSA, that his office does not object to payment of the assessment in the circumstances here presented.

In the case before us, the United States and all other intervenors have been assessed equal amounts, with the Commission and the petitioner also being assessed in amounts larger than the assessments against the intervenors. Accordingly, where assessments under the Alaska Statute are not unreasonable in relation to the costs of the proceeding and where they appear to have been assessed equitably among the participants, we would not be required to object to the proposed payment.

R. F. Keller

Deputy Comptroller General
of the United States