1969

Cottonwood Mall Shopping Center, Inc v. Public Service Commission of Utah, And Frank S. Warner And Olof E. Zundel, Commissioners, And Utah Power And Light Company : Brief of Defendant Utah Power & Light Company

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

COTTONWOOD MALL SHOPPING CENTER, INC.,	:	
Plaintiff,	:	
v.	:	
PUBLIC SERVICE COMMISSION OF UTAH and FRANK S. WARNER and OLOF E. ZUNDEL, Commissioners, and UTAH POWER & LIGHT COMPANY,	:	Case No. 14568
Defendants.	:	

BRIEF OF DEFENDANT UTAH POWER & LIGHT COMPANY

REVIEW OF A DECISION
OF THE
PUBLIC SERVICE COMMISSION OF UTAH

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NATURE OF THE CASE

This case originated in a proceeding before the Public Service Commission of Utah wherein the plaintiff, Cottonwood Mall Shopping Center, Inc., filed an application seeking a certificate of convenience and necessity to operate as a public utility supplying electric service to its shopping center and to the individual offices and stores located therein, or, in the alternative, for a finding by the Commission that such proposed service would be exempt from application of the public utility laws of this state and would not be subject to regulation by the Commission.

DISPOSITION OF THE CASE BY THE PUBLIC SERVICE COMMISSION

A motion to dismiss the application was filed by defendant Utah Power & Light Company, a duly certificated supplier of electric service in Salt Lake County and the present supplier of all electric service to plaintiff's shopping center and the stores and offices located therein. Said motion was heard by the Commission on February 24, 1976, and the Commission, by its order dated March 10, 1976, granted same with respect only to the alternative prayer of the application which seeks a determination that the proposed service would not be subject to regulation. The Commission did not grant or deny the motion to dismiss with respect to the remaining prayer of the application which seeks the grant to applicant of a certificate of convenience and necessity to operate as a public utility, and ruling on that issue was deferred. Plaintiff thereafter filed a motion for rehearing and reconsideration and same was denied by the Commission by its order dated April 15, 1976. Plaintiff thereupon sought this review.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks a reversal of the Commission's order which granted defendant's motion to dismiss with respect to that portion of plaintiff's application which sought a determination by the Commission that plaintiff's proposed supplying of electric service would be exempt from regulation by the Commission.

STATEMENT OF FACTS

Plaintiff's brief contains almost six pages of gratuitous recitations, comments, explanations, assertions and theories under the index heading "Statement of Fact." Defendant does not agree with such statement or any portion thereof. There are no facts to be submitted for the Court's review in this case. This proceeding is based solely on an order of the Commission issued after argument of a motion to dismiss. The hearing on said motion involved only arguments by counsel. No testimony was presented and no exhibits were offered or received in evidence. There have been no proceedings in the matter other than the aforesaid argument of this defendant's motion to dismiss, and there is no evidence whatever appearing in the record of this case before the Commission. The status of the case was clearly explained on the record by the Chairman of the Public Service Commission when, near the end of the hearing, he stated as follows:

> I might just say so the record is clear that these allegations of fact made by either party really have no force or effect on the Commission's ruling in this matter because this is not a fact hearing. Nobody's attempted to present any evidence. This is simply an argument of law and the Commission is only looking at the law in determining how to rule in this matter. (Transcript, p. 34)

ARGUMENT

POINT I

THE PUBLIC SERVICE COMMISSION OF UTAH CORRECTLY HELD THAT A RULING OF THE FEDERAL COURT IN AN ACTION INVOLVING THE SAME PARTIES AND THE SAME ISSUES AS INVOLVED IN THE INSTANT PROCEEDING IS DETERMINATIVE OF THE ISSUES PRESENTED HEREIN UNDER THE DOCTRINE OF RES JUDICATA

The pending case before the Court represents another phase of a long-standing controversy between the parties. Such controversy has involved various actions and proceedings before state and federal courts and the legislature of the state of Utah.

In 1968 the plaintiff herein filed an action against this defendant in the United States District Court for the Distr of Utah (Cottonwood Mall Shopping Center v. Utah Power & Light Company, Civil No. 229-68). Such action, based on an alleged violation of federal anti-trust laws, contended that the defenda herein conspired to supress and eliminate competition from the plaintiff by various alleged actions designed to prevent plainti from operating its power plant and supplying electric service to defendant's present customers and prospective customers located in the Cottonwood Mall Shopping Center. Defendant filed a motio to dismiss said action and on July 11, 1969, the court issued it decree which granted summary judgment against plaintiff and dismissed the complaint with prejudice and on its merits. The findings of fact, conclusions of law and decree of the United

States District Court are set forth in full in the appendix hereto.

An inherent issue in the federal court case was whether or not the plaintiff was entitled, under the laws of the state of Utah, to furnish electrical power to the Cottonwood Mall Shopping Center without having first acquired a certificate of public convenience and necessity, as required by statute, permitting it to supply such service as a public utility. In that regard, the court found and concluded that plaintiff was not so entitled and that if plaintiff was permitted to generate and distribute electric energy, as it proposed to do, it would be an "electrical corporation" and "public utility" as defined in §54-2-1, Utah Code Annotated, 1953, as amended, and could not legally construct or operate an electrical system without first securing a certificate of public convenience and necessity as required by §54-4-25(1), Utah Code Annotated, 1953, as amended. Such determination relates to the same issue subsequently presented in the instant proceeding to the Public Service Commission; that is, whether or not under Utah law the plaintiff's proposed supplying of electric service would be exempt from application of the state's public utility laws and therefore exempt from regulation by the Commission. The Commission, by its order, held that such issue had already been specifically determined by a court of law and therefore refused to further consider same and granted defendant's motion to dismiss as same related to that issue.

The decision of the federal district court was appealed by plaintiff to the Circuit Court of Appeals for the Tenth Circuit, and that court, in a decision issued on March 12, 1971 (440 F.2d 36), fully considered the applicable Utah statutes and cases and affirmed the federal district court decision. At this point, then, a federal district court and a federal court of appeals had both determined that plaintiff's proposed supplying of electric service would not be exempt from application of the state's public utility laws and the regulation attendant thereto.

Plaintiff then sought to have the matter further reviewed by the United States Supreme Court and on October 12, 1971, plaintiff's petition for a writ of certiorari was denied. (30 L.Ed 2d 99).

The order of the Public Service Commission (R. 123) was based on the doctrine of res judicata in that the issue presented by plaintiff to the Commission had been specifically reviewed and determined by a court of law in a prior action involving the same parties and the same issues, among others, as are involved in the instant action.

The doctrine of res judicata is well established in Utah and has been repeatedly recognized and applied by this Court as in, for instance, Mathews v. Mathews, 132 P.2d 111 (Utah, 1942), where the Court quoted at length from Ruling Case Law as follows:

> The foundation principle upon which the doctrine of res judicata rests is that parties ought not to be permitted to litigate

> the same issue more than once; that, when a right or fact has been judicially tried and determined by a court of competent jurisdiction, or an opportunity for such trial has been given, the judgment of the court, so long as it remains unreversed, should be conclusive upon the parties, and those in privity with them in law or estate. * * * Public policy and the interest of litigants alike require that there be an end to litigation, and the peace and order of society demand that matters distinctly put in issue and determined by a court of competent jurisdiction as to parties and subject matter shall not be retried between the same parties in any subsequent suit in any court. 15 R.C.L. 953, Sec. 430.

The applicability of the doctrine is unaffected by the fact that the initial proceeding was before a federal court and the subsequent proceeding was before a state administrative agency. While there does not appear to be a Utah precedent on the subject, it is well established that a determination in a federal action may be res judicata in a subsequent state action. The following cases have so held: Harrell v. Rockett (La. 1953), 65 So.2d 670, King v. Grindstaff (N.C. 1973), 200 SE 2d 799, Ham v. Holy Rosary Hospital (Mont. 1974), 529 P.2d 361, Robinson v. Brown (Ala. 1976), 328 So.2d 291, Chamberlin of Pittsburgh v. Fort Pitt Chemical Co. (Pa. 1976), 352 A.2d 176.

The Ham v. Holy Rosary Hospital case, supra, is a 1974 Montana decision that, while factually different, is very similar to the instant case in its procedural aspects. That case involved a suit filed in federal district court in Montana seeking an order compelling the hospital to permit a doctor to perform a surgical sterilization. The court dismissed the same and in its

opinion made certain findings on constitutional issues. Plaintiff then filed a complaint in state district court seeking the same relief and raising the same constitutional issues. The state district court granted the hospital's motion to dismiss on the basis of res judicata and on appeal the Montana Supreme Court affirmed and held that the federal court's determination of the subject constitutional issues was conclusive and such determinatio by the federal court was res judicata in the state action.

While it may be argued that res judicata is not applicable here because the two actions involved were based on different claims for relief, the doctrine nevertheless applies insofar as the same specific issues were involved in both actions. 46 Am. Ju 2d, Judgments, Section 415. H. Knight v. Flat Top Mining Company 305 P.2d 503 (Utah, 1957). A specific issue in both the federal court and Public Service Commission proceedings was whether or not plaintiff's proposed supplying of electric service was exempt from application of the state's public utility laws.

Further, the rule of res judicata applies to all judici determinations whether made in actions or in special or summmary proceedings. Braine v. Stroud, 385 P.2d 428 (Oklahoma). Application of the doctrine is not dependent on the form of litigation in which the adjudication was made. The rule is well stated in 46 Am. Jur. 2d, Judgments, Section 467, as follows:

> It is also worthy of notice that, with respect to the preclusion of the relitigation of identical issues in a subsequent action between the same parties, or their privies, it is immaterial that the two actions have a

> different scope, involve different forms of a proceeding, are based on different grounds, are tried on different theories, are instituted for different purposes, or seek different relief.

This court, in a quiet title action involving mining claims (H. Knight v. Flat Top Mining Company, supra) found that certain issues with respect to such claims had been determined in a prior action and were therefore binding even though one of the parties to the second action was not a party to the prior action but was a successor in interest to one of such prior parties. The court quoted with approval from 30 Am. Jur., Judgments, Section 920, as follows:

> It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action between the same parties or their privies, regardless of the form the issue may take in a subsequent action, * * *

Plaintiff's brief indicates that the federal court decision of the prior litigation between the parties was made without the hearing of any evidence. While such decision was made pursuant to defendant's motion and summary judgment granted thereon, it should be noted that the decree (Appendix, A-5) specifically states that depositions, affidavits and memoranda of law were received and same were examined by the court.

Plaintiff's brief, in Point I of the Argument thereof, contends that the Commission was in error in applying res judicata,

especially "since some of the facts upon which the ruling was based have changed." Plaintiff's argument in Point I then proceeds to recite certain "facts" with reference to changes of ownership of certain property located within the shopping center. Such recitation is purely gratuitous inasmuch as no evidence whatever has at this stage of the proceeding been presented to or received by the Commission. As the record indicates, this appeal was taken following a ruling and order on defendant's motion to dismiss. The hearing consisted only of oral arguments by counsel and submission by plaintiff of a document entitled "Argument on Petition to Find Applicant a Nonutility and Answer to Protestant's Motion to Dismiss." No witnesses have testified in the proceedings thus far, and no depositions, affidavits, exhibits or other evidence has been presented. Accordingly, no new evidence has been submitted for consideration by the Commission by this Court, and the only evidence that has been submitted in the long-standing controversy between the parties was duly considered and a determination made thereon by a court of law in the prior federal court action.

Plaintiff's brief cites Lloyd Corp. Ltd. v. Tanner, 407 U.S. 551, 31 L.Ed. 2d 131, as a United States Supreme Court case which completely overrules the decision in Cottonwood Mall Shopping Center v. Utah Power & Light Company, supra. That case deals with the denial by a shopping center of a right to distribute within the center handbills protesting the draft and the Viet Nam war. It was held in a five to four decision that there had been

no dedication of the Mall property to public use so as to permit the distribution therein of handbills unrelated to the shopping center operations and such denial, therefore, did not constitute a violation of constitutional safeguards of the right of free speech.

The Lloyd case is vastly different from the instant proceeding both from a factual standpoint and in the very nature of the controversy involved and certainly cannot be regarded as a precedent applicable to the case now before the Court. At the outset, an essential element set forth in the Supreme Court decision in Lloyd was that the claimed First Amendment rights of those desiring to distribute handbills were totally unrelated to the shopping center's operations and had no relation to any purpose for which the center was built and being used. The narrow scope of the Lloyd case holding would be unduly broadened if, as plaintiff contends, such holding should be extended to include the present situation involving the supply of a state regulated public service to the shopping center and its lessees and tenants. Such circumstance is clearly related to the shopping center's operation and to the purpose for which it was built and is being used. An equally important distinction is apparent in that in the Lloyd case there were no state statutes bearing upon the respective rights of the parties while in the instant proceeding such rights are clearly dependent upon the application and interpretation of this state's public utility laws.

In view of the foregoing, it is apparent that the decision in the Lloyd case is clearly not applicable to the present controversy before the Court and offers no escape from application of the doctrine of res judicata to the issue upon which this appeal is based.

POINT II

THE ORDER OF THE PUBLIC SERVICE COMMISSION OF UTAH CORRECTLY DETERMINED THAT PLAINTIFF'S PROPOSED SUPPLYING OF ELECTRIC SERVICE WOULD NOT BE EXEMPT FROM APPLICATION OF PUBLIC UTILITY LAWS OF THE STATE OF UTAH

While the Court, at this stage of the proceeding, does not have the benefit of reviewing any evidence bearing on this controversy, an examination of applicable statutes, as applied to issues raised by the pleadings, clearly confirms that the subject Public Service Commission order correctly determined, irrespective of res judicata, that plaintiff's proposed supply of electric service would not be exempt from regulation.

The law relative to regulation of public utilities in this state has been well defined during the long period of time since creation of the Public Service Commission in 1917. During that extended period there have been few changes in the law regarding jurisdiction of the Commission over electric utilities. This area of the law, therefore, has been basically unchanged, for a period of almost sixty years, during which time fundamental regulatory concepts in the state of Utah have become well establish

Although plaintiff's brief comments at length regarding the pro-free enterprise and anti-regulation attitudes of the framers of the state's constitution, the inescapable fact remains that subsequent legislatures have, in the public interest, adopted a policy of governmental regulation in many areas and have established and continue to establish broad layers of state regulation of a variety of business, individual and public pursuits. Such regulation and the need for same is well established in the area of public utilities. This Court's recognition of the regulatory structure in Utah is apparent in many cases, and a particularly exhaustive analysis of "public convenience and necessity" was made in Mulcahy v. Public Service Commission, 117 P.2d 298 (Utah, 1941).

The basic purpose and intent of the public utility laws that were adopted by Utah and its sister states early in this century were clearly and succinctly stated in the case of Idaho Power & Light Company v. Blomquist, 141 P. 1083, as follows:

> The general impression has been that competition was supposed to be a legitimate and proper means of protecting the interests of the public and promoting the general welfare of the people in respect to service by public utility corporations; but history and experience has clearly demonstrated that public convenience and the necessities of the community do not require the construction and maintenance of several plants or systems of the same character to supply a city of the same locality, but that public convenience and necessity require only the maintenance of a sufficient number of such instrumentalities to meet the public demands. If more than one instrumentality is to be sustained when one is amply sufficient, the actual cost to the public served is not only necessarily greater than it would be under one system, but also less convenient. If public convenience and necessity do not

> demand a duplication of power systems, why should the public be burdened with the expense of maintaining such duplicate systems, and the annoyance of perpetual solicitation to make or break contracts for service, and the inconvenience to the people of the occupation of the streets and alleys of a town or city by such corporations in constructing and keeping in repair the two systems?
>
> The public utilities act merely declares the will of the people, as expressed through the Legislature, to the effect that competition between public utility corporations of the classes specified shall be allowed only where public convenience and necessity demand it, and in any case the commission is thereby given power to fix the rates to be charged, which cannot be varied by such corporations. The Legislature has concluded by the passage of said act that it is not for the best interests of the people or the public welfare to permit public utility corporations to compete with each other where public convenience and necessity do not require such competition. * * *

The Utah Code defines the term "electrical corporation" and then defines "public utility" as including an "electrical corporation" and declares that any such public utility is subject to regulation by the Commission under §54-2-1(30), Utah Code Annotated, 1953, as amended. Initially, therefore, a determination must be made as to whether or not the plaintiff by providing its proposed electric service would be an "electrical corporation" and, as such, a "public utility". Section 54-2-1(20), Utah Code Annotated, 1953, as amended, defines electrical corporation as follows:

> (20) The term "electrical corporation" includes every corporation, cooperative association and person, their lessees, trustees and receivers or trustees appointed by any court whatsoever, owning, controlling,

> operating or managing any electric plant, or in anywise furnishing electrical power, for public service or to its consumers or members for domestic, commercial or industrial use, within this state except where electricity is generated on or distributed by the producer through private property alone, i.e., property not dedicated to public use, solely for his own use, or the use of his tenants, or by an association of unit owners under the "condominium ownership act," chapter 11, Laws of Utah, 1963 (57-8-1 to 57-8-35), and not for sale to others.

The only significant changes in the above section since enactment in 1917 were 1965 amendments that included cooperative associations within the definition of electrical corporation and created an exemption from the definition for associations of condominium unit owners. It is noted that to be an "electrical corporation," an entity need not sell electric power, it need only furnish same, and further, it need not be furnished to the general public but only to "consumers." Since plaintiff proposes to operate an electric plant and furnish electric power to consumers for commercial use, plaintiff clearly falls within the basic definition of an electrical corporation as set forth in the statute. Therefore, unless plaintiff can come within the recognized exception to that definition, plaintiff cannot provide the proposed service to defendant's customers in the Cottonwood Mall without obtaining a certificate of convenience and necessity. The key phrase of the foregoing definition of electrical corporation upon which plaintiff relies for its claimed exempt status is ". . . except where electricity is generated on or distributed by the producer through private property above, i.e., property not

dedicated to public use, solely for his own use or use of his tenants. . . ."

In order to uphold plaintiff's contention, the broad assumption must be made that the Utah Legislature in 1917 intended to exempt an electrical power production and distribution operation on the scale contemplated by plaintiff. Such an assumption would be unwarranted and unjustifiable. Suburban shopping malls were unknown in 1917. Condominium ownership was likewise unknown at that time, but the Legislature in 1965 appropriately amended the statute to provide for same. No such amendment has been enacted with reference to shopping malls and in this regard the 1917 language remains intact. A reasonable construction of such language, considering the date of enactment of the statute, is that the Legislature intended to exempt service to certain types of facilities then existing, such as apartment and office buildings from application of the statute. It does not appear reasonable to assume that the 1917 Legislature intended the "tenant" exemption to apply to a large multi-building complex of some seventy retail stores and offices encompassed in a facility that conducts not only general retail merchandising but also engages in a wide variety of nonmerchandising civic and social activities open to the public without charge. The nature of these activities are set forth in the Tenth Circuit Court opinion in Cottonwood Mall Shopping Center v. Utah Power & Light Company, supra, where at 440 F.2d page 39 the Court states:

> In the past the Board (of Cottonwood Mall Merchants' Association) has authorized a whole gamut of activities including automobile shows, small car races, sidewalk sales, garden shows, boat shows, stamp shows, Indian dances, a circus, art displays, and handicraft shows. Also, the auditorium at the Center has been used by many religious, civic, social and political groups to hold gatherings, dances, and the like, a large number of which took place after store closing hours.

A footnote to the foregoing excerpt states that "Cottonwood's brief gives a more complete list" and then sets forth a long list of activities similar to those enumerated in the Court's opinion. It is clear from the nature of the shopping mall operation that the electrical power proposed to be there generated and distributed would not be used solely by the mall owner and its tenants, which sole use is essential for application of the exemption upon which plaintiff relies.

Defendant's contention that the 1917 Legislature did not contemplate an exemption for the electric service proposed to be supplied by plaintiff, particularly since the type of facility for which such service is contemplated was then unknown, appears fully warranted in view of amendments that have been made to the definition of "electrical corporation." Prior to 1965, the condominium form of ownership was not a factor that required legislative attention with regard to utility service. Such was also the case with regard to electrical service being supplied by a cooperative association to its members, and this Court held in Garkane Power Co. v. Public Service Commission, 100 P.2d 571, that

such organizations were not subject to the jurisdiction of the Commission. As circumstances changed with regard to condominiums and cooperative associations, and with the inability of the existing statute to accommodate such changes, the Legislature enacted amendments for that purpose. In 1965 the narrow exception from the definition of "electrical corporation" were broadened to include an association of condominium owners, and the entities to be included in the definition were expanded to include cooperative associations. Further, where the former statute termed "electrical corporation" as one who furnished electrical power for public service, the 1965 amendment added language to include also one who furnishes electric power to its "consumers or members for domestic, commercial or industrial use." The Legislature obviously intended by such amendments (1) to expand the jurisdiction of the Commission to provide that any organization, other than those specifically exempted, supplying electric power for public service or for use by consumers and members would be an "electrical corporation" and as such subject to regulation as a public utility by the Public Service Commission, and (2) to provide a specific exemption for electric service supplied to a new form of property ownership, which exemption was not covered by the language of the narrow existing exception to those entities classified as "electric corporations."

Construing the reach of §54-2-1(20), Utah Code Annotated 1953, as amended ("electrical corporation" definition) broadly, and strictly limiting the scope of the exeptions thereto, would

seem to be consistent with the basic rationale of public utility regulation and the intent of the Legislature as manifest by the history of the statute. Such an interpretation would also be consistent with the well established rule of statutory construction enunciated by the court in Bird & Jex Co., et al., v. Funk, et al., 85 P.2d 831, 96 Utah 450 (1939), that:

> A proviso which operates to limit the application of the provisions of a statute, general in their terms, should be strictly construed to include no case not within the letter of the proviso.

or as stated by the Supreme Court of Kansas in Broadhurst Foundation v. New Hope Baptist Society, 397 P.2d 360 (Kansas, 1964):

> . . . The statutes must, of course, be construed in their entirety with a view of giving effect to the legislative intent. It must be remembered that ordinarily a strict or narrow interpretation is applied to statutory exceptions. (50 Am. Jur., Statutes, Section 431, p. 451). In construing a statute, any doubt should be resolved against the exception, and anyone claiming to be relieved from the statute's operation must establish that he comes within the exception. (Crawford, Statutory Construction, §299, p. 610).

The intent of the Legislature, with respect to the subject statute, appears clear. Having amended the statute in two respects relative to new or changed conditions (condominiums and cooperative associations) which have occurred or developed since enactment of the statute, and the absence of any similar action with respect to another new condition (suburban shopping centers) would indicate the intention to retain and preserve a broad category of electric suppliers classified as "electrical

cooperatives" and to strictly limit those suppliers excepted from such classification.

CONCLUSION

The Public Service Commission of Utah, by its order dated March 10, 1976, correctly determined, under Utah law, that defendant's motion to dismiss should be granted insofar as it related to the alternative prayer of plaintiff's application seeking a determination by the Commission that the electric service proposed to be supplied by plaintiff would not be subject to regulation by the Commission, and the Commission's order dismissing that portion of the application should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The foregoing Brief of Defendant Utah Power & Light Company was served this 9th day of August, 1976, by mailing copies of same, postage prepaid, to Keith E. Sohm, Attorney for Plaintiff, Suite #81, Trolley Square, Salt Lake City, Utah 84102, and to G. Blaine Davis, Assistant Attorney General, Attorney for the Division of Public Utilities, 236 State Capitol Building, Salt Lake City, Utah 84114.

Robert Gordon

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

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COTTONWOOD MALL SHOPPING CENTER INC., a Utah corporation,	:	
Plaintiff,	:	FINDINGS OF FACT AND CONCLUSIONS OF LAW
vs.	:	
UTAH POWER & LIGHT COMPANY, a Maine corporation,	:	Civil No. C-229-68
Defendant.	:	

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Defendant's motion to dismiss came on for hearing the 8th day of May, 1969, before the Honorable Willis W. Ritter, Chief Judge. Plaintiff and third party defendants were represented by Brigham E. Roberts of the firm of Rawlings, Roberts & Black; the defendant was represented by Marvin J. Bertoch and Thomas A. Quinn of the firm of Ray, Quinney & Nebeker and by Sidney G. Baucom and Robert Gordon of the firm of Baucom, Gordon & Porter.

Depositions, affidavits and memoranda of law were presented and not excluded, and arguments were made by counsel. Having examined the depositions, affidavits and memoranda of law and listened to the arguments of counsel, the Court hereby makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The plaintiff owns a shopping center in Salt Lake County, State of Utah, and with the exception of an area located within the center which is owned by Eldredge Furniture Company. The plaintiff constructed the buildings located in the shopping center and leases them to approximately seventy different tenants, and has sold one of the properties to the Eldredge Furniture Company.

2. Since 1961, defendant has supplied electrical power to the tenants and owners occupying the Cottonwood Mall Shopping Center.

3. Plaintiff in 1968 and 1969 installed a power plant on the premises, and by this lawsuit seeks to compete with the defendant in supplying electrical power for use in the shopping center.

4. Defendant, having expended approximately $558,000.00 in capital investment to supply the center with electricity, is equipped and able and desires to continue to provide all of the electrical power needed for present and future use in the shopping center.

5. The sole issue submitted to this Court by defendant's motion to dismiss, which the Court under Rule 12(b), Federal Rules of Civil Procedure, will treat as a motion for summary judgment, is whether or not the plaintiff has the right under Title 54, Utah Code Annotated, to compete with the defendant in the furnishing of electrical power in the Cottonwood Mall Shopping Center.

6. The Cottonwood Mall Shopping Center consists of approximately seventy stores and offices, which sell merchandise of various types and supply professional services to thousands of members of the general public. The stores include such large department stores as Z.C.M.I and J. C. Penney Company, plus grocery stores, clothing stores, drug stores, restaurants and various other types of stores commonly found in a large shopping center. The premises include a large electrically lighted parking lot. In addition, numerous persons other than shoppers are attributed to and use the facilities of the center for such activities as automobile shows, Junior Achievement fairs, garden and flower shows, boat shows, Go-Kart shows, stamp shows, Indian dancers, art and ceramic shows, bazaars, Halloween parades and other similar activities classified by the manager of the Cottonwood Mall Merchants Association as "traffic building events." Other activities are routinely allowed on the premises such as high school seminary dances, dances sponsored by the Latter-day Saints Church stakes, square dances, firemen's balls and Easter sunrise services, all of which are carried on when the stores are not open and are not considered by the manager of the Cottonwood Mall Merchants Association as "traffic building events."

7. If plaintiff were permitted to furnish electric power as it proposes to do, it would not be providing electric power "solely for its own use, or the use of its tenants" in contemplation of 54-2-1(20), Utah Code Annotated, 1953.

Based on the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1. 54-2-1(20), 54-2-1(29) (now 54-2-1(30)), and 54-4-25(1), Utah Code Annotated, 1953, are the controlling statutes. They read as follows:

Statutes omitted in this Appendix.

54-2-1(20) - Definition of "electrical corporation"

§54-2-1(29) (now §54-2-1(30)) - Definition of "public utility"

§54-2-25(1) - Requirement for Certificate of Convenience and Necessity

2. The plaintiff, if permitted to generate and distribute electric power as it proposes to do, would be an "electric corporation" in contemplation of 54-2-1(20), Utah Code Annotated, 1953, and would be a "public utility" in contemplation of 54-2-1(29) (now 54-2-1(30)), Utah Code Annotated, 1953, and could not legally construct an electrical plant or system or generate or distribute electricity without first acquiring a certificate of public convenience and necessity as required by 54-4-25(1), Utah Code Annotated, 1953.

3. Plaintiff has not been granted a certificate of public convenience and necessity and is not entitled under the law to be granted such a certificate for the generation or distribution of electricity to serve the Cottonwood Mall Shopping Center.

4. It was not the intention of the Utah Legislature in adopting 54-2-1(20), Utah Code Annotated, 1953, to allow persons to avoid the supervision and regulation of the Public Service Commission in connection with supplying electrical service to large shopping centers. It is a purpose of Utah law involving public utilities to protect users of electricity with respect to rates and quality of service. The legislature and the law intend that such protection be supplied to such users as those occupying the Cottonwood Mall Shopping Center.

5. The defendant is authorized by law to serve the users of electricity in the Cottonwood Mall Shopping Center and is entitled under the law to provide the exclusive electrical service to all users of electricity in the Cottonwood Mall Shopping Center, and accordingly is not in violation of any antitrust law

and not illegally interfering with or violating any of plaintiff's rights in so doing.

6. Defendant is entitled to summary judgment against the plaintiff dismissing the plaintiff's complaint and for its costs incurred herein.

DATED this 11th day of July, 1969.

/s/ Willis W. Ritter

Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

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COTTONWOOD MALL SHOPPING CENTER INC., a Utah corporation,	:	
Plaintiff,	:	D E C R E E
vs.	:	
UTAH POWER & LIGHT COMPANY, a Maine corporation,	:	Civil No. C-229-68
Defendant.	:	

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Defendant's motion to dismiss came on for hearing on the 8th day of May, 1969, before the Honorable Willis W. Ritter, Chief Judge. Plaintiff and Third party defendants were represented by Brigham E. Roberts of the firm of Rawlings, Roberts & Black; the defendant was represented by Marvin J. Bertoch and Thomas A. Quinn of the firm of Ray, Quinney & Nebeker, and by Sidney G. Baucom and Robert Gordon.

Depositions, affidavits and memoranda of law were presented and not excluded, and arguments were made by counsel. Depositions and affidavits having been received, defendant's motion, in accordance with the provisions of Rule 12(b), Federal Rules of Civil Procedure, will be treated as a motion for summary judgment and disposed of under the provisions of Rule 56, Federal Rules of Civil Procedure.

The Court, having examined the depositions, affidavits and memoranda of law, and having listened to the arguments of counsel, and good cause appearing therefor,

And the Court expressly determined that there is no just reason for delay, and the Court expressly directs that this Decree be entered as a final decree pursuant to the terms and provisions of Rule 54(b), Federal Rules of Civil Procedure,

IT IS HEREBY ORDERED that defendant, Utah Power & Light Company, be, and is hereby granted summary judgment against plaintiff, the complaint of the plaintiff is hereby dismissed with prejudice and on its merits, costs to be paid by the plaintiff.

Dated this 11th day of July, 1969.

/s/ Willis W. Ritter

Judge