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Utah Supreme Court

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Keith Bo Sohm; Attorney for the PlaintiffG. Blaine Davies; Attorney for Utilities Division

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

BRIEF OF THE PLAINTIFF

Review of a decision of the Public Service Commission

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FILED

JUL 12 1976

Clerk, Supreme Court, Utah

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INDEX

Page

Statement of the Case 1

Disposition by the Public Service Commission of Utah 2

Relief Sought on Appeal 3

Statement of Fact 3

Argument 8

Points. 8

I. THE PUBLIC SERVICE COMMISSION OF UTAH ERRORED IN HOLDING THAT A RULING OF THE FEDERAL COURT IS RES JUDICATA BINDING THE STATE OF UTAH ESPECIALLY SINCE SOME OF THE FACTS UPON WHICH THE RULING WAS BASED HAVE CHANGED 8

II. THE PUBLIC SERVICE COMMISSION OF UTAH ERRORED IN NOT DECIDING THAT PLAINTIFF'S PLAN OF OPERATION WAS WITHIN THE EXCEPTIONS TO THE DEFINITION OF "ELECTRICAL CORPORATION", AND IN HOLDING, THEREFORE, THAT IT WAS NOT NECESSARY FOR PLAINTIFF TO OBTAIN A CERTIFICATE OF CONVENIENCE AND NECESSITY BEFORE IT COULD GENERATE AND DISTRIBUTE ELECTRICAL SERVICES TO THE COTTONWOOD MALL. . . . 13

III. THE PUBLIC SERVICE COMMISSION OF UTAH ERRORED IN HOLDING A PRIVATE CORPORATION, WAS SUBJECT TO PUBLIC SERVICE COMMISSION JURISDICTION AND REGULATION IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTIONS 7 AND 22 OF THE UTAH CONSTITUTION. 20

Conclusion 23

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CASES CITED

Page

Cottonwood Mall Shopping Center v. Utah Power & Light Company, Civil No. 229-68, Federal District Court for the District of Utah, affirmed Circuit Court of Appeals 9th Circuit, 440 F. 2d 36, Certiorari denied U.S. Supreme Court 30 L. Ed. 2nd 99. 2,8

Cottonwood Mall vs. Utah Power and Light, 1971 440 F. 2d 36 (40) . 9

Mutual of Omaha vs. Russell, 402 F. 2d 339 (343) 9

Golding vs. Schubach Optical Company, 93 Utah 32 10

Salt Lake-Kanab Freight Lines v. A. B. Robinson, 339 P 2nd 99 Utah, 1959 11

Cantlay & Tanzola, Inc. v. Public Service Commission, 233 P 2nd 344 (Utah, 1951) 12

State Ex. Rel. Public Utilities Commission v. Nelson, 65 Utah 457, 238 P. 237, 239 (1925) 12,19

Medic-Call Inc. v. Public Service Commission, 24 Utah 2nd 273, 470 P 2nd 258 (1970) 12,19

Garkane Power Company v. Public Service Commission, 98 Utah 466, 100 P. 2nd 571 (1940). 12,18

McCarthy v. Public Service Commission of Utah, 111 Utah 489 . . . 12,13

Lake Shore v. Welling 9 Ut. 2 114 339 P. 2nd 101 12

Commercial Life Ins. v. Wright, 64 Ariz. 129, 166 P. 2nd 943 . . . 12

Union Pacific vs. Public Service Commission of Utah, 103 Ut. 186 134 P. 2 469 12

McMullan vs. Public Service Commission of Utah, 7 Ut. 1 157, 320 P. 2 1107. 13

Gilmer v. Public Utilities Comm., 67 Utah 222, at page 238, 247 P. 284, at page 290 13

Lloyd Corporation, Ltd. vs. Donald M. Tanner, et. al., 407 U.S. 551 31 L Ed 2 131, 92 Sup Crt 2219, decided June 22, 1972 16

City of Sun Prairie v. The Public Service Commission of Wisconsin, 37 Wis. 2d 96, 154 N.W. 2d 360 (1967) 19,21,22

Cawker v. Meyer 147 Wis. 320, 123 N.W. 127 (1911) 19

Drexelbrook Associates v. Pennsylvania Public Utility Commission, 418 Pa. 430, 212 A. 2d 237, (1965) 19

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Cases Cited Continued....

Jonas v. Swetland Co., 119 Ohio St. 12, 162 N.E. 45 (1928) 19

Producers Transportation Company vs. Railroad Commission of California, 251, U.S. 228 (1919) .20

Michigan Public Utilities Commission vs. Duke, 266 U.S. 570 (1925) . .20

Frost vs. Railroad Commission, 271 U.S. 583 (1926) 20

N. L. Industries, Inc., Case No. 6954 issued November 7, 1974 11

State v. Nelson, 65 Utah page 462, 238 P. at page 239, 42 A.L.R. 849 .13

Frank Properties, Inc. (1968) 72 PUR 3d 305. 14

Garkane Power Company vs. Public Service Commission of Utah, 98 Utah, 466, 100 P. 2d 571, 132 A.L.R. 490 (1940) 18

Story v. Richardson, 186 Cal. 162, 198 Pac. 1057, 18 A.L.R. 750 (1921) . .19

STATUTES AND REGULATIONS

Utah Law Section 54-2-1 (20) 9,14,23

Utah Law Section 54-2-1 (30) 23

Utah State Constitution in Article 1 Section 1 10

LEGAL SERVICES

1 Barren and Holtzoff Federal Practice and Procedure Section 8 page 40 9

Wayne Stout, History of Utah, Volume 1, 1870-1896, 1967 pages 490-495) 11

43 Am. Jr., 571 Public Utilities and Services, Section 2 20

43 Am. Jr., 574, Public Utilities and Services, Section 5. 21

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IN THE SUPREME COURT OF

THE STATE OF UTAH

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

BRIEF OF PLAINTIFF

Hereafter the Cottonwood Mall Shopping Center, Inc. will be called "plaintiff" or "mall", the Public Service Commission of Utah will be called "Commission" and the Utah Power and Light Company will be called "Utah Power".

This action involves an action before the Commission wherein the plaintiff applied for a certificate of convenience and necessity to operate as a public utility to provide electrical power to its tenants only or, in the alternative, that the commission find the applicant is not a public utility thereby allowing it to provide electrical power to its tenants without regulation from the commission. This proceeding deals only with the second aspect of the case. The commission set the matter of determining the status of the plaintiff's special petition (R.10). The hearing was held February 24, 1976. The only matters presented at the hearing were in

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regards to whether or not the plaintiff would be a public utility and this is the only matter before the Honorable Court. The matter of plaintiff's application for a certificate of convenience and necessity was deferred pending the outcome of this appeal. Utah Power moved to dismiss the application.

DISPOSITION BY THE COMMISSION

Arguments were presented by the applicant's attorney, Keith E. Sohm, by counsel for Utah Power and Light Co., Robert Gordon, and by G. Blaine Davis, Assistant Attorney General, on behalf of the Division of Public Utilities. The argument by the Public Utilities Division questioned that the Tenth Circuit Court of Appeals decision accurately protrayed Utah law and seems to support the plaintiff's position. (R. 3-5). After hearing arguments and without reading the memorandum provided by the applicant (R. 19-121) the Commission ruled from the bench that the applicant's operations would be that of a public utility and that a certificate would be required. The commission's written order, dated March 10, 1976 (R. 123), granted Utah Power's motion to dismiss "insofar as said motion relates to the alternative prayer of said application that the commission determine that the proposed electric service to be supplied by applicant is not subject to regulation by the commission...". The commission further stated:

> "2. That said Motion to Dismiss is granted, with respect to the issue of whether or not the applicant's proposed service would be subject to regulation by this Commission, on the grounds and for the reason that such issue has been specifically determined by a court of law, in litigation involving the same parties hereto, wherein it was found that the proposed electric service was not exempt from application of the public utility laws of this State and the same could not be supplied unless the supplier first obtained a certificate of public convenience and necessity and the doctrine of Res Judicata is, therefore, applicable and determinative of such question (Cottonwood Mall Shopping Center v. Utah Power & Light Company, Civil No. 229-68, Federal District Court for the District of Utah, affirmed Circuit Court of Appeals 9th Circuit, 440 F. 2d 36, Certiorari denied U. S. Supreme Court 30 L. Ed. 2nd 99)."

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Thereafter a timely motion for Rehearing and Reconsideration was filed by the plaintiff and duly denied by the Commission in its order dated April 15, 1976.

RELIEF SOUGHT BY APPEAL

The plaintiff seeks to have the Commission's order reversed and seeks a finding and an order holding that the Cottonwood Mall Shopping Center, Inc. can operate its own power plant providing electrical power to itself and its own tenants and that such operations are not that of a public utility and do not require regulation by the Public Service Commission.

STATEMENT OF FACT

The plaintiff owns and maintains the entire Cottonwood Mall facility including buildings, land, roadways, sidewalks and parking areas without exception. There are approximately 70 tenants occupying the buildings, stores, and offices including merchants and professional people. The leases provide that the lessees lease a particular area of the shopping center "together with the use with other lessees of said shopping center." The leases provide that the merchant shall share in the expense of lighting the parking lot and exterior of the building, for the painting of automobile parking stalls and sweeping and cleaning the parking area including the removal of snow and ice and the maintenance of green areas of the shopping center including shrubs, trees, lawn, flowers and other plantings. The mall and parking area are owned and maintained by plaintiff for the benefit of its tenants.

An association of the merchants of the Cottonwood Mall has been organized as a nonprofit corporation for the purpose of satisfying and aiding the promotion of business at the mall, and to assist in making a determination of the activities which should be conducted in the shopping center and parking area. The board of directors of this association consists of persons elected by the merchants and of Mr. Sidney M. Horman, president of the

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plaintiff corporation. All of the activities held at the mall must have the approval of the board of directors of the association and of Mr. Horman. All of the activities permitted have for their ultimate function the promotion of traffic and business at the Cottonwood Mall for the merchants who conduct their business there.

THE COTTONWOOD MALL PLANT

The Cottonwood Mall Power plant was commenced by Horman Construction Company only after its President and Manager, S. M. Horman, discussed the matter thoroughly with the Commissioners of the Public Service Commission of Utah and was reassured that the plant would not be a public utility and that no certificate would be required as long as service was provided to its tenants only. In arranging tentative agreements with Mountain Fuel Supply, a public utility, that company also concluded that the operation would not be that of a public utility.

Pursuant to these assurances, the applicant built and completed the construction of its electrical power plant consisting among other things of five nearly new large 1000 KW generators as more fully described in Exhibit 2 (Engineering report R. 32-49 and pictures of the plant R. 50-53). The plant was completed in 1968 at a cost of about $1,500,000 and is located in a building just south of the shopping center. The entire plant and transmission system is located entirely on and through the private property of the Mall and all transmission lines and control facilities are installed and ready for operation. The plaintiff owns the entire mall facility including buildings and land, roadways, sidewalks and parking areas without exception.

THE MALL PLANT IS ADEQUATE AND ENERGY-CONSERVING

The whole system has been carefully engineered to cover all the needs of the tenants. The maximum electrical needs of the mall and its

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tenants is about 3200 KW. Three of the five units, running with a slight overload, or three and a half units on light load could fully supply the peak electrical demands of the whole Mall. There would always be at least one power plant always available for emergency service. These are the very finest heavy duty high quality power plants that money can buy - worth many times more now than the price paid for them years ago. The chance of a breakdown or failure of even one unit is very remote and the chances of an electrical outage is far less since the plant and transmission lines are all together. Most outage problems come from exposed substations and transformers and long distance transmission lines such as operated by Utah Power and Light Company. A good example is the eastern blockout a few years ago and the recent July 4, 1976 Utah Power and Light Company outage.

The carefully designed "total-energy" system of the Cottonwood Mall would be 70 to 75 percent efficient if not better because it uses nearly all of the energy developed by burning natural gas. Heat recovery equipment has been installed to capture waste heat from the engines. Heat, which is a natural by-product from burning gas to produce electricity, would be fully utilized in the Mall plant for hot water, space heating and air conditioning or, we could say electricity would be a welcome energy conserving by-product from the present burning of gas for hot water, heat and air conditioning as presently being done wasting, of course, all of the energy that would normally be used up in producing electricity. In other words, the Cottonwood Mall electrical plant would be 75% efficient in use of energy because it would provide all the buildings and the tenants with all of their electrical, hot water, space heating, and airconditioning needs.

On the other hand, the generating plants of Utah Power and Light are only about 30% efficient since only a small part of the energy is captured,

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that which goes into electricity, the rest is dissipated into the air or into the nearby streams and lakes. In the Utah Power system another five percent is lost in the transmission system reducing its overall efficiency to some 25-30%. In the Mall system most of what would be wasted in the Utah power system is recaptured and utilized. In these days when energy conservation is so vitally necessary, waste should not be permitted when there is a better alternative. The protestants have shown their concern about power shortage as reflected in news notes Exhibits 6, 7 and 8 (R. 104-106) and Case No. 7167 and others. The Federal government is also gravely concerned.

A minimal trained staff has been retained to care for the equipment and regularly test it. The gas furnaces and boilers are now in regular use to produce heat, hot water and air conditioning. Presently the energy that would go into turning the generator is being wasted - the generator could be in full operation with very little extra gas fuel usage. The generators have been fired up and operated briefly every week or so since their installation to keep them in operating condition. The whole system could be placed in operation within a few days.

Plaintiff intends to furnish electrical power only to itself and its tenants in the Cottonwood Mall Shopping Center and it does not intend to furnish electrical power to any other person than a tenant.

Plaintiff intends to include the charges for electrical power, heating and air conditioning in the monthly rental rates of the tenants. The buildings, stores, malls, parking lot, plant and the land on which they stand and the land on which the electrical wires, ducts and equipment are placed are private property owned by plaintiff and have not been dedicated to a public use.

COMPARABLE SYSTEMS

There are now literally hundreds of "total-energy" systems in operation in the United States (R. 77 gives 1966 summary and R. 78-103 gives

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1972 directory of total energy plants and R. 101 shows eight such plants in operation in Utah.) Total energy is a fact of life that Utah Power and Light Company and all power companies have come to accept. Some other power companies like Utah Power and Light Company will not give up easily but nevertheless recognize that "total-energy" developments cannot be stopped and, as a matter of fact, are advantageous and becoming more and more necessary because of the heavy demands for electrical power which the protestant acknowledged repeatedly in recent hearings before this Commission.

Utah has its share of total energy systems including the Canyon Crest Apartments in the mouth of Emigration Canyon which is a 17-floor 125 unit high rise dwelling that is completely independent of outside power sources (R. 55,56). In almost ten years of experience there have been very few outages and then generally only for seconds. The savings on utility costs have been phenominal while power costs continue to rise to the extent of two or three increases a year.

The Mountain Fuel Supply Company office building on 1st South and 2nd East is another total energy building. If the law turns on the building being used by the public as well as the owner or tenants, both of these Utah "total-energy" buildings are comparable to the Cottonwood Mall. The gas company building has the public coming in and out all of the time to pay bills and conduct business. The public use the heated sidewalks, the lighted parking areas and are allowed to use the company's auditorium for seminars, various meetings and many other purposes.

The Harrisburg East Shopping Mall in Harrisburg, Pennsylvania is a "total-energy" system (R. 57-59). There are total energy shopping centers in Massachusetts, New York, Florida, Illinois, Wisconsin, Minnesota, Ohio, Kentucky, Missouri, Nebraska, Arkansas, Oklahoma, South Dakota and Pennsylvania as of 1968. (R. 61). There are probably many more now. The Pennsylvania

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Public Service Commission, like many other Commissions, have ruled these total energy projects are not utilities. The Pennsylvania Commission in answer to my questions stated as follows:

> "5. It is the opinion of this Commission that utility services furnished to tenants of private property and not to the public in general are exempt from the provisions of the Pennsylvania Public Utilities Law."
>
> "6. This Commission has for some time recognized an energy crises and encouraged utility companies and their customers to participate in conservation programs that will extend our natural gas and petroleum resourses. We have ordered the electric and gas utilities to discontinue promotional advertising. Gas utilities are generally not permitted to add new customers but are permitted to accept replacement customers. (R.110)

The Florida Commission stated as follows:

> "5. The shopping centers do not meet the qualifications of a public utility under Florida statute 355 since they do not offer service to the public generally but serve only their own tenants. They are, therefore, exempt from regulations by the Public Service Commission. (R. 113)

Other Commissions gave similar answers. (R. 107-121)

POINT I

THE PUBLIC SERVICE COMMISSION OF UTAH ERRORED IN HOLDING THAT A RULING OF THE FEDERAL COURT IS RES JUDICATA BINDING THE STATE OF UTAH ESPECIALLY SINCE SOME OF THE FACTS UPON WHICH THE RULING WAS BASED HAVE CHANGED.

In the case of Cottonwood Mall Shopping Center, Inc. vs. Utah Power and Light Company, C 229-68 affirmed 440 F. 2d 36, the Honorable Judge Willis W. Ritter, without hearing any evidence granted the defendants motion to dismiss and treated the matter as a motion for Summary Judgement and found in favor of the defendants, Utah Power and Light.

In making this ruling the Court noted that Eldredge Furniture Company had purchased its store area so that it was not a tenant. The Court also noted some activities were allowed on the premises.

The Court should note that conditions have changed since that ruling was handed down. Eldredge Furniture Company sold its store unit back

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to the plaintiff so that the plaintiff owns all of the mall area.

We respectfully submit that the Federal Court errored anyhow since diverse activities could not convert private property into public property.

Federal Courts are bound to follow the laws and rulings of the state in which the Court sits. Both the lower and upper Federal Court, in absence of a case interpreting the Utah law Section 54-2-1 (20) defining an electrical corporation, undertook to determine what the Utah Legislature intended and what Utah Courts would have held. The Court of Appeals put it this way:

> "We begin our analysis by recognizing that there are few if any Utah lampposts to light our Erie way. But as this is a case in which there is no specific "state law" we need not be dismayed since the Federal Court may look to all resources including "the decisions of other states, federal decisions or the general weight of authority" the goal being "that the Federal Court reach the result that would probably be reached were the question to be litigated in a state Court" "1 Barren and Holtzoff Federal Practice and Procedure Section 8 page 40. Cottonwood Mall vs. Utah Power and Light, 1971 440 F. 2d 36 (40).

The Court cited its own decision in Mutual of Omaha vs. Russell, 402 F. 2d 339 (343). "This is deciding what /Utah/ would decide on a question they have never decided". Then the Court goes on to conjecture as to what the Utah Courts would have done. Clearly the Public Service Commission could have and should have interpreted Utah law and do exactly what the Federal Court found lacking that is to create a Utah decision. In this day when the federal government has usurped so much of the states perrogatives neither the Utah Commission nor the Utah Court should concede so graciously to a federal courts interpretation as to what we would do. Because it was ill informed on the nature of Utahns and Utah Courts, the Federal Court made very vital wrong presumption when it found that "we must give a liberal reading to provisions subjecting the activity to

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regulation while simultaneously giving a more narrow scope to the exceptions."

Obviously the court doesn't know that Utah was founded by people looking for free agency and freedom from controls. Our state and our schools fight constantly against controls and restraints of government, our state, of all states, clings as much as possible to the free enterprise system and bows only reluctantly to regulation of any kind. No one could claim Utah holds to strict construction in favor of regulation.

The Utah State Constitution in Article 1 Section 1 affirms the inherent right to freedom and opportunity saying:

> "All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property . . . "

One Supreme Court case in Utah has held the rights guaranteed by this section are invaded when one is not at liberty with others with respect to the use to which he may subject his property or use or employ his time or talents (Golding vs. Schubach Optical Company, 93 Utah 32). The intent of the framers of the Constitution of the state of Utah, the unique history of the intent of the framers and the adoption of the provisions of protection of property in the Utah Constituion show what strong feelings they had about free enterprise. The constitution of the state of Utah was adopted in convention in 1895 by 107 state delegates, 74 percent of were members of the Mormon faith and 32 delegates of which were "high officials of the Mormon Church." Unique in the history of the adoption of state constitutions is the fact that the 1895 convention was the sixth convention over a period of nearly a one-half century experience in drawing up various Utah Constitutions. Utah citizins had met in constitutional conventions in 1849, 1856, 1862, 1872 and 1887 before their sixth effort in 1895 which was accepted by the United States Congress and afterwhich statehood

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was granted (Wayne Stout, History of Utah, Volume 1, 1870-1896, 1967 pages 490-495). The Mormon faith, then and now, had strong and clearly declared views with respect to the Constitution of the United States and those feelings clearly reflect the intentions of the framers of the Utah Constitution to allow a large degree of free enterprise.

Even our Public Service Commission has ruled against its own jurisdiction over certain air carriers, over motel shuttle buses, over certain motor vehicle services as being incidental to river trips, over Judds Recreational Bus as being incidental to therapy, over feed and fertilizer carriers, and restricting its own jurisdiction over wrecker vehicles.

Our land and Utah particularly are founded and thrive on the theory of free enterprise. Regulation is at the best a poor substitute though sometimes admittedly necessary.

In the matter of the application of N. L. Industries, Inc. Case No. 6954 issued November 7, 1974 the Commission held the applicant was not a public utility. The Commission reaffirmed its definition of a public utility as it has done so many times before in stating:

> "...the parties in question were not public utilities because they did not hold themselves out to offer services to the public generally."

To further show the liberal view of our Commission toward regulation it further stated:

> "As can be observed from the foregoing findings we have not specifically found that existing transportation facilities do not provide adequate or reasonable service. Nor, do we believe it is necessary to so find in this case where applicant's proposed service would substantially reduce the burden on the highway, promote conservation of fuel, eliminate unnecessary wasteful practices, decrease air pollution, and provide transportation services for applicant's employees at a cost to the employee which should encourage their use of such service. See Salt Lake-Kanab Freight Lines v. A.B. Robinson, 339 P 2nd 99 (Utah, 1959) and Cantlay & Tanzola, Inc. v. Public Service Commission,

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233 P 2nd 344 (Utah, 1951)."

The cases of State Ex. Rel. Public Utilities Commission v. Nelson, 65 Utah 457, 238 P. 237, 239 (1925); Medic-call Inc. v. Public Service Commission, 24 Utah 2nd 273, 470 P 2nd 258 (1970); and Garkane Power Company v. Public Service Commission, 98 Utah 466, 100 P. 2nd 571 (1940), McCarthy v. Public Service Commission of Utah, 111 Utah 489 all deal with the definition of "Public Utility". The court in each of those cases held that the parties in question were not public utilities because they did not hold themselves out to offer their services to the public generally.

I think the Commission clearly errored in not making Utah Law in this case but even though the Commission may be reluctant, certainly the Utah's highest Court has the perogative and duty of deciding what Utah's holding would be in such a case as this and is not bound by the principle of Res Judicata. As the good Federal Court Judge has pointed out the Federal must follow Utah law, not visa versa.

Contrary to the opinion of the Federal Court there are obviously numerous cases in Utah both as a result of Commission ruling and as a result of this Courts decisions which court have enlightened the Courts "Erie" path and improved its "Erie" decision.

The Courts have held that Commissions have no inherit powers only as expressly granted by the legislature. There must be a strict construction of the constitution and statutes to find jurisdiction. Lake Shore v. Welling 9 Ut. 2 114 339 P. 2nd 101 also Commercial Life Ins. v. Wright 64 Ariz. 129, 166 P. 2nd 943.

Where statutes confer specific powers on a commission with limited powers such as the Public Service Commission of Utah, its powers are limited to those specifically mentioned in the statute. Union Pacific vs. Public Service Commission of Utah, 103 Ut. 186, 134 P. 2 469.

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The Public Service Commission has a duty to supervise use of natural resources by a utility so that they will be neither wasted nor misused to assure adequate and continued service to the public. McMullan vs. Public Service Commission of Utah, 7 Ut. 2 157, 320 P. 2 1107.

POINT II

THE PUBLIC SERVICE COMMISSION OF UTAH ERRORED IN NOT DECIDING THAT PLAINTIFF'S PLAN OF OPERATION WAS WITHIN THE EXCEPTIONS TO THE DEFINITION OF "ELECTRICAL CORPORATION", AND IN HOLDING, THEREFORE, THAT IT WAS NOT NECESSARY FOR PLAINTIFF TO OBTAIN A CERTIFICATE OF CONVENIENCE AND NECESSITY BEFORE IT COULD GENERATE AND DISTRIBUTE ELECTRICAL SERVICES TO THE COTTONWOOD MALL.

Though we are not here before the Court as a result of finding by the Commission the effect of the Commissions failure to make a finding is the same. As stated in the case, McCarthy vs. Public Service Commission of Utah 111 Utah 489 (491):

> "The only question we have is: Did the commission by its order convert "private contracts or a mere private business into a public utility or make its owner a common carrier?" State v. Nelson, cited above 65 Utah at page 462, 238 P. at page 239, 42 A. L. R. 849. Or in issuing these orders did the commission act "arbitrarily or capriciously?" Gilmer v. Public Utilities Comm., 67 Utah 222, at page 238, 247 P. 284, at page 290. As far as classifying defendants correctly is concerned it makes no difference whether defendants object to the classification or some one else objects so long as the party objecting has standing before this court to object."

Obviously both theCommission and the Court have the right to classify public utilities but cannot convert a private business into a public utility. Neither can the legislature convert a private business into a public utility.

The Massachusetts commission under a similar matter ruled as follows:

> "A shopping center landlord is not a gas or electric company subject to regulation under a statute subjecting to regulation "all . . . operate works . . . for the manufacture and sale or distribution and sale of gas . . . or of electricity" where the landlord, using gas either directly or converting it, proposed to provide total energy service -- heating, electric current, domestic

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hot water, and chilled water for air conditioning -- for which each tenant initially will pay 55 cents per annum per square foot as an additional component of the rental, and where the landlord will make meter readings of such service to tenants for two years, on which to establish charges for the remainder of 10-year leases without regard to the quantity of energy consumed by the tenants during such period; the commission found that the arrangement was "rent inclusion." Re Frank Properties, Inc. (1968) 72 PUR 3d 305."

The key provision of the Utah Code to be interpreted here is Section 54-2-1 (20) which provides a definition of an"electrical corporation". This section excludes from the term "electrical corporation" and hence from regulation by this Commission, operations which meet the following test: "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 . . .".

The three elements necessary to qualify under the exception in the above cited statute are as follows:

(1) That the electricity be generated and distributed through private property alone, i.e., property not dedicated to public use.

(2) The generation and distribution by the producer must be solely for his own use or the use of his tenants.

(3) That the electricity must not be for sale to others.

There can be no dispute that the Mall property is private property upon which this electricity is generated and distributed and that it has not been dedicated to public use.

As to (1) above -- Property does not become public property merely because the public uses the property but it requires a formal dedication such as a subdivision formally turning over its roads to the county. The county then owns the property, repairs and cares for it with public taxes.

As to (3) above -- There is no contention or dispute that the electricity will not be for sale to anyone except tenants, in fact it will not be sold to tenants but given to the tenants as part of their rental contracts.

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As to (2) above -- The generation and distribution of electricity by the Mall is solely for the Mall's own use or the use of its tenants. The Judge Ritter ruling turned on this subsection. The court considered two factors to defeat the exception. The first factor was that Eldredge Furniture Company was privately owned and not a tenant. This condition is no longer in existence since Eldredge sold its holdings back to the Mall. All companies and stores in the Mall are now tenants and no electricity will go to anyone or any firm except the Mall or its tenants. The second factor was really stretching out when the court in effect found that people coming in and out of the Mall and not buying anything were benefitting from or having the use of this electrical distribution. Of course, the electricity will be used for lighting the stores, the parking lot and the common facilities. Who could possibly argue this is not exclusively for the mall or the use of its tenants. The fact a ray of light shines on a customer when the customer parks his car, or another ray of light hits the customer as he comes in the main entrance or the fact that he may be bathed in light as he looks at merchandise in a store doesn't mean the customer has been benefitted or provided with service. Any sound mind must reason that the benefit and service is provided to the tenant merely to attract the customers and induce them to make purchases from or procure services of the Mall tenants. Likewise, the practice of the Mall in allowing displays to be set up, civic and church groups to use the Mall facilities is likewise service to the tenants as part of a well organized advertising and promotional program for the benefit of the tenants. Without the tenants there would be absolutely no reason for the existence of this plant. The electricity could only be used for plaintiff's own purposes and for the purposes of the tenants. The customers who come to the Mall and the persons who come to dance and to the various shows and attractions that are put on at theMall are people who take advantage of these

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facilities only because they were of use to the tenants in furtherance of their business. To interpret the statute and its application any more strictly would mean the statute was converting a private business into a public utility which in turn means either the statute is unconstitutional or the Court errored in construing it.

The fact that electricity is provided to a home for heating, cooking and inside and outside lighting and someone drives in the lighted driveway, walks to a lighted entry and enters a lighted house does not mean the visitor is being provided with electrical service. Likewise, a visitor to the "total-energy" Canyon Crest Apartments or the "total-energy" gas company building is not a user of the electricity. If the Commission considers single visitors, church groups, or civic groups as users of electricity then the Commission must attack the Mountain Fuel Supply Company as not qualifying the exemption, require it to shut down its total-energy plant, bring in the power company lines and commence buying its electricity from the all powerful Utah Power and Light Company. There is no way theCommission could indulge in such a discrimination.

The other vital point that the court overlooked is that the electrical services must be sold or purchased and neither the casual customer nor the church group nor civic group are paying the Mall for electricity. The tenants are the only users and they will be receiving electricity as a part of their rental agreement.

THE NEW LAW

All of this brings us to the new law of the land - a ruling by the United State's Supreme Court which completely overrules the Ritter case.

In the case of Lloyd Corporation, Ltd. vs. Donald M. Tanner et. al., 407 U.S. 551,31 L Ed 2 131, 92 Sup Crt 2219, decided June 22, 1972, Tanner sought to distribute handbills in the plaintiff's large privately owned shopping center

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in Portland, Oregon. The lower court said he could on grounds of the First Amendment. The Circuit Court of Appeals affirmed the ruling (similar to the Ritter and 10th Circuit Court ruling) but the Supreme Court reversed the ruling on the grounds that the decision below violates the rights of private property protected by the Fifth and Fourteenth Amendments.

The Lloyd Shopping Center, similar to the Cottonwood Mall in size, covers 50 acres including 20 acres of parking which would accommodate over 1000 automobiles. It is crossed by several public streets and public sidewalks. Lloyd owns all land and buildings within the center, except these public streets and sidewalks. There are some 60 tenants including small shops and several major department stores. There are gardens, auditoriums and a skating rink. Some stores even opened directly on the outside public sidewalks.

"The Center is open generally to the public, with a considerable effort being made to attract shoppers and prospective shoppers, and to create 'customer motivation' as well as customer good will in the community." "Groups and organizations are permitted, by invitation and advance arrangements, to use the auditorium and other facilities. Rent is charged for use of the auditorium except with respect to certain civic and charitable organizations..."

The District Court said the Center "is open to the general public" and found that it is "the functional equivalent of a public business district".

The Supreme Court went on to reason much as we have reasoned above:

> "It is noteworthy that respondent's argument based on the Center being 'open to the public' would apply in varying degrees to most retail stores and service establishments across the country. They are all open to the public in the sense that customers and potential customers are invited and encouraged to enter. In terms of being open to the public, there are differences only of degree - not principle - between a free standing store and one located in a shopping center, between a small store and a large one, between a single store with some malls and open areas designed to attract customers and Lloyd Center with its elaborate malls and interior landscaping."
>
> "Respondents contend, however, that the property of a

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large shopping center is 'open to the public', serves the same purposes as a business district of a municipality, and therefore has been dedicated to certain types of public use. The argument is that such a center has sidewalks, streets, and parking areas which are functionally similar to facilities customarily provided by municipalities. It is then asserted that all members of the public whether invited as customers or not, have the same right of free speech as they would have on the similar public facilities in the streets of a city or town."

"The argument reaches too far. The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use. The closest decision in theory, Marsh vs. Alabama, supra, involved the assumption by a private enterprise of all of the attributes of a state-created municipality and the exercise by that enterprise of semi-official municipal functions as a delegate of the State. In effect, the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State. In the instant case there is no comparable assumption or exercise of municipal functions or power."

"Nor does property lose its private character merely because the public is generally invited to use it for designated purposes. Few would argue that a free standing store with abutting parking space for customers, assumes significant public attributes merely because the public is invited to shop. Nor is size alone the controlling factor. The essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center."

"We do say that the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected."

"We hold that there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights. Accordingly, we reverse the judgment and remand the case to the Court of Appeals with directions to vacate the injunction."

Compare this well reasoned language with the shallow consideration of the Cottonwood Mall case by the Circuit Court as exposed by its flippant language that it had no Utah lamp posts to light its "Erie" way - this shows a lack of consideration of the merits of this case.

In the case of Garkane Power Company vs. Public Service Commission Utah, 98 Utah 466, 100 P. 2d 571, 132 ALR 490 (1940) the Court ruled against public regulation. The court held in that case that an association that

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solicited membership from the public was not subject to regulations so long as it only sold electricity to members of the association so solicited.

In State ex rel Public Utilities Commission of Utah vs. Nelson, 65 Utah 457, 238 Pac. 237 (1925), the Utah Supreme Court held that a private corporation could not be subjected to public regulation by mere legislative fiat or edict. The language used in that case is very clear and concise. That court stated:

> "No one may successfully contend that it is competent for the Legislature to regulate and control in such respect a mere private business or to declare a private business to be public service or a public utility. In other words, the state may not, by mere legislative fiat or edict or by regulating orders of a commission, convert mere private contracts or a mere private business into a public utility or make its owner a common carrier. (Citations omitted.) So, if the business or concern is not public service, where the public has not a legal right to the use of it, where the business or operation is not open to an indefinite public, it is not subject to the jurisdiction or regulation of the commission . . ."

This language and holding was reaffirmed in Medic-Call Inc. vs. Public Service Commission, 24, Utah 2d. 273, 470 P. 2d 258, (1970). In that case the Court quoted the foregoing language from the Nelson case and reaffirmed the principle that private corporations are not subject to public regulation.

Other cases have held in similar fact situations, under similar statutes, the operation of large complexes, such as petitioner's, are not subject to public regulation. See City of Sun Prairie v. The Public Service Commission of Wisconsin, 37 Wis. 2d 96, 154 N.W. 2d 360 (1967), Cawker v. Meyer 147 Wis. 320, 123 N.W. 127 (1911). Drexelbrook Associates v. Pennsylvania Public Utility Commission, 418 Pa. 430, 212 A. 2d 237, (1965), Story v. Richardson, 186 Cal. 162, 198 Pac. 1057, 18 A.L.R. 750 (1921), Jonas V. Swetland Co., 119 Ohio St. 12, 162 N.E. 45 (1928).

OBVIOUSLY THE RITTER CASE HAS BEEN OVERRULED AND THE LAST FACTOR ON WHICH THE POWER COMPANY CAN RELY HAS BEEN ANALIZED BY THE HIGHEST COURT OF THE LAND AND FOUND WANTING. THE COTTONWOOD MALL PROPERTY IS <u>NOT</u>

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DEDICATED TO PUBLIC USE.

We submit that theCircuit Court has decided an important question involving substantive state law in a manner which directly conflicts with the express language of a state statute wherein it failed and refused to recognize the fact that petitioner's operation, being clearly a private operation for its own use and that of its tenants, placed it within the statutory exception to the definition of "electrical corporation" and thus rendered it not subject to the state regulatory requirement of obtaining a certificate of oonvenience and necessity.

POINT III

THE PUBLIC SERVICE COMMISSION OF UTAH ERRORED IN HOLDING A PRIVATE CORPORATION, WAS SUBJECT TO PUBLIC SERVICE COMMISSION JURISDICTION AND REGULATION IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTIONS 7 AND 22 OF THE UTAH CONSTITUTION.

The Courts have clearly ruled that it would be a violation of the U.S. Constitution of the Fourteenth Amendments and Article 1 Section 7 of the Utah Constitution to deny the Mall the right to operate its own power plant in that it would be deprivation of property without due process of law.

In the case of Producers Transportation Company vs. Railroad Commission of California, 251 U.S. 228 (1919), this court stated:

> "It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts and never was devoted by its owner to public use, that is, to carrying for the public, the state could not, by mere legislative fiat or by any regulating order of a commission, convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the Fourteenth Amendment . . ."

The general text statements agree with the foregoing cases. In 43 Am. Jr., 574, Public Utilities and Services, Section 2, it is stated:

> "As its name indicates, the term 'public utility' implies a public use and service to the public; and indeed, the principal determinative characteristic of a public utility is that of service to,

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or readiness to serve, an indefinite public (or portion of the public as such) which has a legal right to demand and receive its services or commodities. The term precludes the idea of service which is private in its nature and is not to be obtained by the public."

A state does not have the power to call a private business a public utility. The rule is stated in 43 Am. Jr., 574, Public Utilities and Services, Section 5, as follows:

"The legislature cannot, by its mere declaration, make something a public utility which is not in fact such; and a private business, operated under private contracts with selected customers and not devoted to a public use cannot, by legislative fiat or by order of a public service commission, be declared a public utility, since that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the Fourteenth Amendment to the Federal Constitution."

This statement of the rule is upheld in the following cases from the Supreme Court of the United States: Michigan Public Utilities Commission vs. Duke, 266 U.S. 570 (1925); Frost vs. Railroad Commission, 271 U.S. 583 (1926). In this latter case the court stated:

"That consistently with the due process clause of the Fourteenth Amendment, a private carrier cannot be converted against his will into a common carrier by mere legislative command, is a rule not open to doubt and is not brought into question here".

The Supreme Court not only cited the Duke case but also the case of State vs. Nelson, heretofore cited Utah Case.

In the case of City of Sun Prairie vs. The Public Service Commission of Wisconsin, the court stated the tenants of a landlord are not the public; neither are a few of his neighbors or a few isolated individuals with whom he may choose to deal, though they are a part of the public. The word 'public' must be construed to mean more than a limited class defined by the relation of landlord and tenant or by nearness of location, as neighbors, or more than a few who by reason of any peculiar relation to the owner of the plant can be served by him.

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The Wisconsin Supreme Court held:

> "A landlord of a large apartment complex furnishing heat, water, light, and power to all tenants, but not serving any adjoining landowners or the public generally, is not a public utility and therefore not subject to commission jurisdiction. City of Sun Prairie vs. Wisconsin Pub. Service Commission."

In so saying, the Wisconsin Supreme Court recently handed down the most clear-cut decision yet as to what constitutes and - more importantly - what does not constitute a public utility. The case under judgement involved the owner of a large apartment development housing upwards of a thousand persons. The owner had installed a gas total energy plant, was supplying electricity and a full range of comfort services to his tenants, with cost of these services being included in the rents he collected. The local utility had sought to have the Wisconsin Public Service Commission classify the operation as a public utility subject to commission regulation as such. This theCommission refused to do, with the Circuit Court, and now the State Supreme Court upholding that decision.

The decision clearly is another in a growing number of landmark determinations for the total energy concept, where a definite landlord - tenant relationship which sets the 'customer' apart from the popular definition of 'the public' can be shown.

The Wisconsin Supreme Court thus joins those of Ohio, Pennsylvania, Missouri and California and probably many others in stating that a landlord may provide electricity and comfort services to his tenants without being classed a 'public utility' as defined by the statutes of those states. In all such decisions handed down to date, the determining factor appears to have been whether a particular - or 'special' - relationship existed between owner and tenant, as opposed to a similar provision of such services 'to whoever may require them.'

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Under this definition, it is difficult to imagine a situation under which a total energy plant in an apartment complex, an office building, a shopping center or motel could ever be classed as a public utility.

We again call the Courts attention to the growing hundreds of total energy plants throughout the nation as shown in the record.

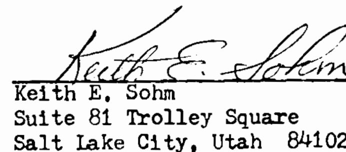
I cannot help but take this opportunity to be severely critical, on behalf of my client, the Cottonwood Mall, Mr. Horman, and myself personally each as Utah Power and Light Company rate payers for such a utility to cry poverty and demanding repeated increases in rates but at the same time maintaining round-the-clock lobbyist to hound the unsuspecting legislators to pound through their "special interest" legislation such the amendments to 54-2-1 (20 and to 54-2-1 (30) enacted in 1965 with the obvious and specific intent to stop the Cottonwood Mall total-energy program.

CONCLUSION

The State Courts are not bound by a Federal decision but rather the State Courts are charged with the duty to declare the law and the Federal Courts are required to follow theState law. The law and logic clearly shows that Electrical generating plants like the plaintiff's are exceptions and are not for public use and not subject to commission regulation and to hold otherwise would be unconstitutional.

Dated this 10th day of July, 1976.

Respectfully submitted,



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