

1978

# Common Cause of Utah et al v. Utah Public Service Commission et al : Brief Amicus Curiae

Utah Supreme Court

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Alan E. Walcher; Randolph L. Dryer; Robert S. Campbell; Attorney for Intervenor;  
Robert B. Hansen; Michael L. Deamer; Joseph P. McCarthy; Attorneys for Appellants;

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IN THE SUPREME COURT OF THE STATE OF UTAH

COMMON CAUSE OF UTAH, an unincorporated  
association by MARJORIE J. THOMAS, on  
behalf of its members, and MARJORIE J.  
THOMAS, an individual,

Plaintiff and Respondents,

vs-

UTAH PUBLIC SERVICE COMMISSION and MILLY  
BERNARD, OLOF E. ZUNDEL and KENNETH  
GERTUP, in their capacities as Commissioners  
of the PUBLIC SERVICE COMMISSION, real  
parties in interest,

Appeal No. 15685

Defendants and Appellants,

MOUNTAIN FUEL SUPPLY COMPANY,

Defendant-Intervenor and Appellant.

BRIEF AMICUS CURIAE OF THE SOCIETY OF PROFESSIONAL JOURNALISTS,  
SIGMA DELTA CHI, IN SUPPORT OF  
RESPONDENTS COMMON CAUSE AND MARJORIE J. THOMAS

FILED

Appeal from Declaratory Judgment of the Third District Court,  
in and for Salt Lake County  
The Honorable Peter F. Leary, District Judge

NOV 18 1978

Clk. Supreme Court, Utah

AN E. WALCHER  
8 Kearns Building  
5 South Main Street  
Salt Lake City, Utah 84101  
Attorneys for Respondents

R. G. GROUSSMAN  
180 East First South  
Salt Lake City, Utah 84139  
General Counsel  
Mountain Fuel Supply Company

ROBERT B. HANSEN - Attorney General  
MICHAEL L. DEAMER  
SEPH P. McCARTHY  
6 State Capitol  
Salt Lake City, Utah 84114  
Attorneys for Appellants  
Commission and Commissioners

JAMES G. WATT  
1845 Sherman Street  
Denver, Colorado 80203

ROBERT S. CAMPBELL, JR.  
LENN E. DAVIES  
WATKISS & CAMPBELL  
20 South Main - 12th Floor  
Salt Lake City, Utah 84101  
Attorneys for Appellant  
Mountain Fuel Supply Company

CARMAN E. KIPP  
THOMAS N. ARNETT JR.  
of KIPP AND CHRISTIAN  
600 Commercial Club Building  
32 Exchange Place  
Salt Lake City, Utah 84111  
Attorneys for Amicus Curiae  
The Society of Professional  
Journalists, Sigma Delta Chi

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IN THE SUPREME COURT OF THE STATE OF UTAH

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COMMON CAUSE OF UTAH, an :  
unincorporated association by :  
MARJORIE J. THOMAS, on behalf :  
of its members, and MARJORIE J. :  
THOMAS, an individual, :

Plaintiff and Respondents, :

-vs- :

UTAH PUBLIC SERVICE COMMISSION :  
and MILLY O. BERNARD, OLOF E. :  
ZUNDEL and KENNETH RIGRTUP, in :  
their capacities as Commissioners of the :  
PUBLIC SERVICE COMMISSION, real :  
parties in interest, :

Appeal No. 15685

Defendants and Appellants, :

MOUNTAIN FUEL SUPPLY COMPANY, :

Defendant-Intervenor and :  
Appellant. :

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BRIEF OF AMICUS CURIAE

THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI

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STATEMENT OF THE CASE

This is an action for declaratory judgment brought by the plaintiffs-respondents (hereinafter referred to as "Common Cause") against the Utah Public Service Commission (hereinafter referred to as the "Commission") seeking a judicial determination of only one issue,

to wit: whether or not the Utah Open and Public Meetings Act is applicable to the Utah Public Service Commission when the Commission deliberates, votes upon, establishes, or otherwise evaluates existing or proposed utility rates.

#### DISPOSITION IN THE LOWER COURT

Common Cause filed suit against the Commission in October, 1977, seeking the judicial determination referred to above. Mountain Fuel Supply Company (hereinafter referred to as "Mountain Fuel") was allowed to intervene as a party defendant in November, 1977. Thereafter, all parties move for Summary Judgment, which Motions were heard by the trial court on December 19, 1977. On January 24, 1978, the Honorable Peter F. Leary, Judge of the Third District Court, granted Summary Judgment to Common Cause and denied the Motions of Mountain Fuel and of the Commission. Judgment was entered declaring that the Utah Open and Public Meetings Act applies to and governs the meetings of the Commission when the Commission deliberates, votes upon, establishes, or otherwise evaluates existing or proposed utility rates. Mountain Fuel and the Commission have brought this appeal from that Judgment.

#### RELIEF SOUGHT ON APPEAL

Amicus Curiae The Society of Professional Journalists, Sigma Delta Chi (hereinafter referred to as "Journalists") supports the

respondents in this matter and respectfully requests that this court affirm the declaratory Judgment entered by the trial court.

#### INTEREST OF AMICUS CURIAE

The Society of Professional Journalists, Sigma Delta Chi, is a non-profit, voluntary association of more than 30,000 men and women engaged in every field of journalism. Its active members represent every branch of print and broadcast journalism and include all ranks from student and beginning reporter to editor, publisher and broadcast executive. Its purpose includes advancement of the cause of freedom of information and the freedom of the press, to preserve the public's right to know, to require that the public's business be conducted in public, and to keep governmental records open to public inspection.

The Utah Chapter of The Society of Professional Journalists, Sigma Delta Chi, contains approximately 70 members in the journalism field. These members are directly affected by the decision which this court will render in this case. The Society, and particularly its Utah Chapter, believes that the trial court's ruling that the Utah Open and Public Meetings Act applies to and governs the Utah Public Service Commission is correct and should be upheld by this court. The Society is dedicated to preserving the public's right to know and the Society

believes that the Utah Public Service Commission should be required to comply with the Open and Public Meetings Act and to conduct the public's business in public, so that the Journalists may attend and report the facts to the public.

#### STATEMENT OF FACTS

Amicus Curiae Journalists agree with and adopts the statement of facts set forth in the brief of the Commission and in the brief of Common Cause.



## ARGUMENT

THE DELIBERATIONS OF THE COMMISSION ARE SUBJECT TO THE UTAH OPEN AND PUBLIC MEETINGS ACT.

1. THE LEGISLATIVE INTENT AND PUBLIC POLICY BEHIND THE ACT DICTATE THAT THE COMMISSION MUST COMPLY WITH THE ACT.

The first paragraph of the Utah Open and Public Meetings Act, Section 52-4-1, Utah Code Annotated (1953 as amended), expressly states the legislature's purpose in enacting the Act and sets forth the public policy behind it:

Declaration of public policy. -In enacting this chapter, the legislature finds and declares that the state, its agencies and political subdivisions, exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.

It is difficult, if not impossible, to cite another Utah statute which more clearly expresses both the legislative intent and the public policy behind the particular law. Yet the Utah Legislature went further. In Section 52-4-3, U.C.A. (1953 as amended), the legislature clearly sets forth the broad and all encompassing coverage of the Act: "Every meeting is open to the public unless closed pursuant to Sections 52-4-4 and 52-4-5."

Section 52-4-4, U.C.A., sets forth the requirements and procedure necessary to hold a closed meeting. Section 52-4-5, U.C.A., sets forth the only purposes which justify a closed meeting:

"(l) A closed meeting may be held pursuant to Section 52-4-4 for any of the following purposes:

(a) Discussion of the character, professional, competence, or physical or mental health of an individual;

(b) Strategy sessions with respect to collective bargaining, litigation, or purchase of real property;

(c) Discussion regarding deployment of security personnel or devices; and

(d) Investigative proceedings regarding allegations of criminal misconduct."

As set forth in the brief of Common Cause, both the Commission and Mountain Fuel have already stipulated that none of the statutory exceptions to the application of the openness requirements of the Act are relevant or applicable to this case. Therefore, it would appear that both the legislative intent and public policy dictate that the meetings of the Commission, a public body as defined in the Act, should be open to the public, whether the Commission is hearing evidence, or deliberating upon that evidence in reaching its decision.

The Journalists take the position that this is the most convincing and telling point in this controversy and that the arguments advanced by the Commission and Mountain Fuel have not and cannot controvert this point. If the Legislature had intended that the deliberations of the Commission should not be governed by the requirements of the Act, the Legislature certainly had the opportunity to include in the Act an additional exception covering that situation. The Legislature obviously chose not to do so and the Journalists respectfully submit that the clear intent and policy of the Act govern the disposition of this case.

2. THE PRESS MUST HAVE ACCESS TO THE DELIBERATIONS OF THE COMMISSION IF THE PUBLIC POLICY BEHIND THE ACT IS TO BE ACHIEVED.

The public policy underlying the Utah Open and Public Meetings Act is set forth in Section 52-4-1, U. C. A., quoted above. That policy is an outgrowth of the basic principle that the public has a right to know how its business is being transacted. This has always been a principle of our system of government and served as the basis upon which the town meeting was founded. However, the complexity and size of our modern society does not permit the entire public to attend any meeting held by any arm of government and the vast majority of the public must depend

upon the media, both print and broadcast, to perform that function for them, thereby preserving the public's right to know. Thus, as representatives of the public, the Journalists occupy a special position in this matter, since they must have access to the workings of government, including the deliberations of the Commission, in order to inform the public concerning its government.

3. THE COMMISSION, AS A CREATURE OF THE LEGISLATURE, IS SUBJECT TO THE SAME RESTRICTIONS AND REQUIREMENTS THAT THE LEGISLATURE HAS CHOSEN TO IMPOSE UPON ITSELF BY THE ADOPTION OF THE ACT.

It is uncontroverted that the Legislature was within its powers to adopt and enact the Utah Open and Public Meetings Act and that the provisions and requirements of the Act apply to the Legislature itself as well as the other political subdivisions named in Section 52-4-2, U. C. A., defining a "public body." The rate making function of the Commission, as well as the other functions it performs, are clearly legislative functions which have been delegated to it by the Utah Legislature. If the activities of the Utah Legislature are governed by the provisions of the Act, it seems axiomatic that the Commission, in carrying out the duties delegated to it by the Legislature, is also governed by the provisions of the Act.

The Commission and Mountain Fuel have argued at length in their briefs that the Commission, in performing its rate making function and including the deliberations that are a part of that process, acts in a quasi-judicial capacity, and that the Legislature did not intend to include this quasi-judicial role within the scope of the Open and Public Meetings Act. As set forth above, this argument fails initially when confronted with the clear legislative intent contained in the Act itself. Beyond that, however, this Court has consistently held that the Commission is an arm of the Legislature and, as such, fulfills no judicial role in carrying out its functions.

The leading Utah case in this regard is Jeremy Fuel & Grain Company v. Public Utilities Commission, 63 Utah 392, 226 P. 456 (1924). In that case, the plaintiff sought relief from the Public Utilities Commission against a railroad which allegedly had over-charged the plaintiff in shipping the plaintiff's products. The Commission denied the relief sought by the plaintiff and the plaintiff appealed to this Court. This Court dealt first with the issue of the extent of its power to review the actions of the Commission in fixing and promulgating rates. This court stated as follows:

In arriving at a proper conclusion in this proceeding it is of the utmost importance that we keep in mind that the Commission, in fixing or promulgating rates or charges for services rendered by the public utilities of this state acts merely as an arm of the

Legislature and that in discharging its duties the Commission cannot, and does not, exercise judicial functions.

. . .

The fixing of rates is a legislative and not a judicial function.

The Utah Supreme Court has held to this position. See Salt Lake City v. Utah Light & Traction, 52 U. 210, 173 P. 556 (1918); U.S. Smelting, Refining and Milling Company v. Utah Power & Light, 58 U. 168, 196 P. 902 (1921); Utah Copper Company v. Public Utilities Commission, 59 U. 191, 203 P. 727 (1921); Logan City v. Public Utilities Commission, 72 U. 63, 271 P. 961 (1928); Mulcahy v. Public Service Commission, 101 U. 245, 117 P. 2d 298 (1941).

The Appellants have placed great reliance on the case of Arizona Press Club v. Arizona Board of Tax Appeals, 558 P. 2d 697 (Ariz. 1976). The Journalists agree with Common Cause that this case is clearly not applicable to the instant case, for the reasons in the brief of Common Cause. The Journalists would add a sixth reason for distinguishing Arizona Press Club's holding from applicability to the facts of this case. In that case, the Arizona Legislature had included a statutory exception to its Open Meeting Law that exempted "judicial proceedings" from the provisions of the Law. This is contrary to the statute before this court where the Utah Legislature chose not to

include such an exception. It is clear that no such exception is needed to prevent the act from applying to the courts of this state since the Legislature is constitutionally prohibited from requiring the courts to comply with such a law. Therefore, the only purpose that could be served by a statutory exception for "judicial proceedings" is to make the act inapplicable to so-called judicial or quasi-judicial proceedings of an administrative agency. The Arizona Supreme Court relied on the above analysis in reaching its decision that the Arizona law was not applicable to the meeting of the particular agency in question. For the reasons outlined in the brief of Common Cause and the analysis contained above, the Journalists urge that the Arizona decision is not applicable to this case.

4. THIS COURT SHOULD NOT CREATE BY IMPLICATION AN EXCEPTION TO THE STATUTE WHERE NONE WAS INTENDED NOR INCLUDED BY THE LEGISLATURE.

As noted above, the Utah Legislature chose not to include a specific exception to the Act which would exempt the Commission from the provisions of the Act. The Journalists urge that this court should not create such an exception by its decision in this case. Appellants' argument that the Legislature did not intend the Act to apply to the Commission when it is functioning in a quasi-judicial capacity appears to be a smoke screen, designed to convince this court to create a judicial exception where none exists.

The doctrine of expressio unius est exclusio alterius is applicable here. That doctrine provides that where a general rule also includes specific exceptions to the rule, the statute containing the rule should be strictly construed with the view that no other exceptions are present. Publix Cab Co. v Colorado Nat. Bank, 139 Colo 205, 338 P. 2d 702, (1959); State ex rel. Rich v Larson, 84 Idaho 529, 374 P. 2d 484 (1962). This, of course, is a corollary to the general rule of statutory construction that exceptions to legislation are to be narrowly construed. The Legislature in adopting the Utah Open and Public Meetings Act included specific exceptions which it apparently felt were necessary and the Act should be so construed as not to permit further exceptions which the Legislature chose not to include in the Act.

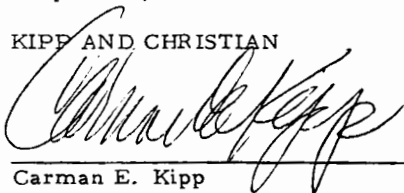
#### CONCLUSION

The Utah Open and Public Meetings Act serves a salutary purpose in requiring the public's business to be transacted in public and not behind closed doors. The attempt of the Public Service Commission to evade the clear intent and policy of the Act should not be condoned by this Court. The Journalists respectfully urge this court to affirm the judgment of the District Court.

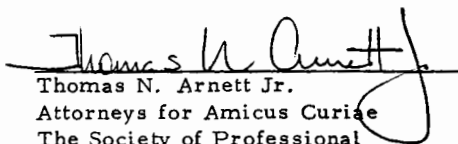


Respectfully submitted,

KIPP AND CHRISTIAN

A handwritten signature in cursive script, appearing to read "Carman E. Kipp", written over a horizontal line.

Carman E. Kipp

A handwritten signature in cursive script, appearing to read "Thomas N. Arnett Jr.", written over a horizontal line.

Thomas N. Arnett Jr.  
Attorneys for Amicus Curiae  
The Society of Professional  
Journalists, Sigma Delta Chi,  
Utah Chapter