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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

COMMON CAUSE OF UTAH, an unincorporated
association by MARJORIE F. [unclear]
behalf of its members, and
THOMAS, an individual,

Plaintiffs,

-vs-

UTAH PUBLIC SERVICE COMMISSION,
G. BERNARD, Chief Commissioner,
RIGHTUP, Inc., [unclear]
Commissioners of the Public Service
Commission, real parties.

Defendants.

MOUNTAIN FUEL SUPPLY COMPANY,

Defendant.

Appellant.

BRIEF FOR

IN

Appeal from

The Supreme Court

ALAN E. WALCHER
318 Kearns Building
136 South Main Street
Salt Lake City, Utah 84101
Attorneys for Respondents

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

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

FILED
APR 11 1967
MONTGOMERY

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 :
O. BERNARD, OLOF E. ZUNDEL and KENNETH :
RIGRTUP, in their capacities as Commis- :
sioners of the PUBLIC SERVICE COMMIS- :
SION, real parties in interest, :

Appeal No. 15685

Defendants and Appellants, :

MOUNTAIN FUEL SUPPLY COMPANY, :

Defendant-Intervenor and :
Appellant. :

BRIEF AMICUS CURIAE OF MOUNTAIN STATES LEGAL FOUNDATION
IN SUPPORT OF APPELLANTS' MOTION TO REVERSE

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

ALAN E. WALCHER
318 Kearns Building
136 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
JOSEPH P. MCCARTHY
236 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.
GLEN E. DAVIES
of WATKISS & CAMPBELL
310 South Main - 12th Floor
Salt Lake City, Utah 84101
Attorneys for Appellant

JAMES B. LEE
DAVID R. BIRD
of PARSONS, BEHLE & LATIMER
79 South State Street
Salt Lake City, Utah 84111
Attorneys for Amicus Curiae
Mountain States Legal Foundation

Mountain Fuel Supply Company

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Utah Code Ann. §54-7-16 (Repl. vol. 1974)

Utah Code Ann. §78-33-1 et seq. (Repl. vol. 1977) . . .

IN THE SUPREME COURT OF THE STATE OF UTAH

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MOUNTAIN FUEL SUPPLY COMPANY, :

Defendant-Intervenor and :
Appellant. :

BRIEF OF AMICUS CURIAE
MOUNTAIN STATES LEGAL FOUNDATION

STATEMENT OF THE CASE

This is an action for declaratory judgment under the Utah Declaratory Judgment Act, Utah Code Ann. §78-33-1, et seq. (Repl. vol. 1977) brought by the Respondents (hereinafter referred to as "Common Cause") against the Utah Public Service Commission (hereinafter referred to as the "Commission") and its individual commissioners Milly O. Bernard, Olof E. Zundel and Kenneth Rigtrup (hereinafter referred to as the "Commissioners").

Respondents seek a determination that the judicial deliberations of the Commission, when it votes upon, establishes, or other-

wise evaluates existing or proposed utility rates, tolls and charges, rentals or classifications, is subject to the Open and Public Meetings Act, Utah Code Ann. §52-4-1, et seq. (1977 Supp.).

DISPOSITION IN THE LOWER COURT

On January 24, 1978, The Honorable Peter F. Leary, District Judge of the Third Judicial District Court, after granting Respondent's Motion for Summary Judgment on all issues and denying Appellant's Motion for Summary Judgment, entered a final judgment declaring that the Utah Open and Public Meetings Act, Utah Code Ann. §52-4-1 et seq. (1977 Supp.), applies to and governs the meetings of the Commission when deliberating, voting upon, establishing, or otherwise evaluating existing or proposed public utility rates, tolls, charges, rentals or classifications. Appellants seek a reversal of that final judgment.

INTEREST OF AMICUS CURIAE

Mountain States Legal Foundation (MSLF) is a non-profit, public interest law center serving the eight mountain states. Its offices are located at 1845 Sherman Street, Suite 675, Denver, Colorado 80203. Its purpose is to engage in legal research, study and analysis for the benefit of the general public as to the effect of evolving concepts of law on our democratic institutions and to provide representation to assist other organizations in providing legal representations on matters of general public interest at all levels of the administrative and judicial processes. Its Board of Directors and Board of Litigation, which control the affairs of the MSLF, are

composed of citizens of the State of Utah, as well as residents of the other seven mountain states. Its members and support come from the eight mountain states.

Many of the supporters of MSLF are Utah consumers and are directly affected by decisions made and actions taken by the Utah Public Service Commission. MSLF seeks, through its participation in this matter, to represent the interests of these supporters. Mountain States Legal Foundation believes the trial court's ruling that the Utah Open and Public Meetings Act, Utah Code Ann. §52-4-1, et seq. (1977 Supp.) applies to and governs the quasi-judicial deliberations of the Utah Public Service Commission to be in error and contrary to the laws of the State of Utah. Because of the effect that this ruling will have upon the supporters of MSLF, MSLF supports the motions of Appellants Commission, Commissioners, and Mountain Fuel Supply Company that the final judgment of the trial court be reversed and that this court declare that, as a matter of law, said adjudicatory functions of the Commission are not within the purview of the Utah Open and Public Meetings Act.

STATEMENT OF FACTS

Amicus Curiae agrees with and adopts the statement of facts set forth in the briefs of Appellants.

ARGUMENT

I. THE DELIBERATIONS OF THE COMMISSION ARE QUASI-JUDICIAL

The question before this Court is whether the Commission must open its deliberations and decision making process to the public. In essence, must the Commission open its collective thought processes; its collective reasoning used in deciding a particular case, its weighing of evidence and witness credibility to public and political scrutiny and influence.

The result which the Commission seeks, and which MSFL supports, is only that the judicial deliberations of the Commission not be subject to the open meetings act. The Commission encourages public participation in Commission hearings, where the evidence and the testimony on which the Commission bases its decision is proffered. Only when the Commission seeks to evaluate the evidence and testimony, weighing the credibility and probative value of testimony and evidence, does the Commission seek refuge from the public eye.

Exempting these deliberations from the Utah Open and Public Meetings Act does not mean that Commission decisions will be based on improper considerations. The Commission, just as a trial court, must enter Findings of Fact, Conclusions of Law and Judgments and Orders based thereon. Final actions of the Commission are taken pursuant to written, well reasoned opinions. Individual Commissioners may dissent in separate written opinions. The factors which the Commission finds controlling are there enumerated and their conclusion based upon those factors is stated. The Utah Rules of Civil Procedure are applicable to the review of Commission cases. 54-7-16 U.C.A.

(Repl. Vol. 1974). The limited exemption sought serves only to allow the Commission to reach a conclusion with complete candor among themselves, the same candor guaranteed a judge or jury acting as fact finder. The importance of the availability of this internal candor is apparent when it is realized that the Commission's functions in this area are essentially judicial.

The judicial character of the Commission has been recognized in Utah. In Wycoff Co. v. Public Service Commission, 13 Utah 2d 123, 369 P.2d 283 (1962), this Court succinctly stated that:

There is no question that in performing its multi-various duties in franchising and regulating public utilities the Commission is required to and does perform some functions of a judicial or quasi-judicial nature; . . . (369 P.2d at 285).

The conclusion reached in the Wycoff case is apparent from the procedures used by the Commission. The Commission adjudicates particular matters, with each franchise or rate adjustment being a separate proceeding before the Commission. The parties to these proceedings file pleadings, complaints and answers raising issues of fact and law. The Commission has subpoena power and discovery processes are open to counsel representing the parties. The Utah Rules of Civil Procedure and Utah Rules of Evidence are applicable, though the hearsay rule is somewhat relaxed. Counsel may represent parties before the Commission, engaging in oral argument with direct and cross examination and submitting written briefs. The competency of witnesses are judged in accordance with judicially accepted principles. The Commission issues Findings of Fact and Conclusions of Law as does a judicial body.

Only when the Commission seeks to deliberate upon issues of fact and law, which have been presented to it in the classic adversary format, does the Commission seek exemption from the Open and Public Meetings Act. Deference to the property rights of the utility and its shareholders require the utmost regard, and the individual nature of these determinations reaffirms the judicial nature of these proceedings.

Specifically, the Legislature, in separating the functions of the Department of Business Regulations and the quasi-judicial and rule making function of the Commission, has recognized the distinct nature of quasi-judicial proceedings and the need to insulate those proceedings from any outside influence:

The Public Service Commission shall not be subject to the jurisdiction of the Executive Director of Business Regulation in regard to the exercise of its quasi-judicial or rule making functions within the Department . . . The Public Service Commission shall exercise all quasi-judicial and rule making powers in regards to public utilities as provided in Title 54. (Utah Code Ann. §13-1-1.3 (Repl. Vol. 1973)).

The above quoted section illustrates that the Legislature not only recognizes the quasi-judicial function of the Commission, but also that the Legislature recognizes the need to insulate that function from any possible taint of influence. The need for such insulation is inherent in judicial processes. That the Commission exercises judicial proceedings is clear from the definition given to such proceedings by the Arizona Supreme Court in Arizona Press Club, Inc. v. Arizona Bd. of Tax Appeals, Div. 1, 113 Ariz. 545, 558 P.2d 697 (1976):

The procedures prescribed by the statute and followed by the Board of Tax Appeals in hearing the parties in open forum, taking the matter under advisement, deliberating, writing a written decision and making that decision available to the parties and the public, follow the classic procedures of an appellate court in making a judicial decision. . . . To allow the public to attend the deliberations leading to a decision and to watch the writing of that decision would not, we believe, promote the ends of justice. (558 P.2d at 699).

The procedures used by the Board of Tax Appeals in Arizona have a direct analog in the procedures used by the Commission in deciding matters. Each follow the format of a court of law. The goal of each is a decision regarding a particular matter, based on evidence and testimony received regarding that matter. The Board of Tax Appeals, as the Commission here, seeks only to deliberate on and write the decision without constant publicity and sensationalism. Only the interim thought processes of the Commission are not open to the public; the conclusions and the reasoning of the Commission are contained in final written decisions.

The characterization by Common Cause of the Commission as merely an extension of the Legislature is not convincing. Admittedly, the Commission has been delegated the task of setting utility rates and granting franchises. However, analysis cannot end here, ignoring as it would the essential nature of the Commission's adjudicatory duties. The Legislature decided that the Commission's decision would be arrived at judicially, as opposed to legislatively. The Legislature provided that those quasi-judicial functions of the Commission would be insulated from influence from other divisions of the Department of Business Regulation. Utah Code Ann. §13-1-1.3 (Repl. Vol. 1973).

This legislative recognition of the quasi-judicial nature of the Commission precludes Common Cause from arguing otherwise. The deliberations of the Commission are quasi-judicial.

II. THE OPEN AND PUBLIC MEETINGS ACT OF 1977
EXEMPTS JUDICIAL OR QUASI-JUDICIAL PRO-
CEEDINGS, AS IT MUST TO BE CONSTITUTIONAL

- (A) THE OPEN AND PUBLIC MEETINGS ACT DOES NOT APPLY TO DELIBERATIONS OF AN AGENCY ACTING AS A QUASI-JUDICIAL BODY.

The above discussion establishes that the Commission acts as a quasi-judicial body when deliberating on the setting of rates or the granting of franchises. Common Cause argues that even should the Commission be considered a quasi-judicial body, its deliberations must still be open to the public under the Open and Public Meetings Act. Neither the structure of the Open and Public Meetings Act nor analogous case law supports this position.

The Open and Public Meetings Act was originally passed in 1955, and extensively amended in 1977. Common Cause argues that this amendment effectuated an absolute and blanket right in the public to attend any "public" meeting, regardless of the particular function being performed. However, a review of the Act does not support this position. Public agency meetings covered by the Act are enumerated in the definition section, Utah Code Ann. §52-4-2 (Supp. 1977). That section provides, in subparagraph (2), that the meetings of a public agency covered by the statute apply only when the public agency is sitting as an "administrative, advisory, executive or legislative body of the state or its political subdivision . . ."

The Legislature specifically omitted including a public agency acting in a quasi-judicial function within the purview of the Act. This omission must be given effect, exempting the Commission when it exercises its judicial or quasi-judicial function.

Supportive of this construction is the fact that the Commission has always deliberated in private. The initial Open and Public Meeting Act was passed in 1955 and the Commission continued to deliberate in private after passage of that Act. This Court must assume that the 1977 Legislature was aware of this Commission practice when it amended the Open and Public Meetings Act. Given this knowledge and the Legislature's specific omission of public agencies acting in a quasi-judicial manner within the language of the Open and Public Meetings Act of 1977, it is clear that the Commission's quasi-judicial deliberations do not fall within either the specific language nor the overall policy of the Act.

Common Cause argues for a strict interpretation of the Open and Public Meetings Act, which, they argue, would include the Commission in its deliberative, quasi-judicial functions. As has been pointed out, the specific language of the Open and Public Meetings Act does not compel opening the deliberative sessions of the Commission to the public, when the Commission is acting in a quasi-judicial manner. In addition, common sense requires that the quasi-judicial deliberative sessions of the Commission be closed to the public. The deliberations of judicial organizations, whether a judge or a jury acting as fact finder, have never been open to the public. The applicability of the Act for which Common Cause argues is inconsistent with the tradi-

tional judicial function envisioned under the American system. The traditional privacy of the deliberative process is a necessary concomitant of the candor which is required for effective interaction between the members of a fact finding body. The same candor is required among the Commission members.

It is in recognition of this basic premise of judicial deliberation that numerous courts have recognized an exemption to open meetings law for judicial and quasi-judicial bodies. It is for the same reason that this Court should recognize this exemption.

Numerous other states have recognized the unique nature of a public agency acting in a quasi-judicial manner and have read into similar open meeting acts a quasi-judicial exemption. Common Cause spends much of its brief attempting to distinguish these cases on technical grounds from the instant case. Technical distinctions, however, do not remove the fundamental basis of those cases -- quasi-judicial deliberations require some insulation from public scrutiny; function effectively and fairly. A reading of these cases reveals that the holdings turn on a recognition by those courts of the analogous nature of the quasi-judicial proceedings of a public agency to the functions of a court of law or jury, and a willingness to attribute to the Legislature a common sense exemption which will preserve the effectiveness of those quasi-judicial proceedings. See, Arizona Press Club v. Arizona Bd. of Tax Appeals, *supra*; Jordan v. Dist. of Columbia, 362 A.2d 114 (D.C. 1976); Stillwater Savings & Loan Ass'n. v. Oklahoma Savings & Loan Bd., 534 P.2d 9 (Okl. 1975); and the persuasive dissenting opinion in Canney v. Bd. of Public Instruction of Alachera Co., 278 So.2d 260 (Fla. 1973).

An exemption for quasi-judicial proceeding is consonant with the language of the Act, the purpose of the Act and case law from other jurisdictions. Additionally, such an exemption is necessary to insure the constitutionality of the Open and Public Meetings Act.

(B) DUE PROCESS REQUIRES THAT THE OPEN AND PUBLIC MEETINGS ACT BE INTERPRETED AS EXEMPTING THE DELIBERATIONS OF AN AGENCY ACTING IN A QUASI-JUDICIAL CAPACITY.

The Open and Public Meetings Act is subject to two interpretations, either exempting or not exempting quasi-judicial functions of agencies. Only the former of these interpretations will insure the parties appearing before agencies acting as quasi-judicial bodies the requisite due process of law. This Court should therefore choose the former interpretation, thereby insuring the constitutionality of the Open and Public Meetings Act and the effectuation of the legislative mandate.

Due process of law requires a fair hearing before an impartial tribunal. The analytical, deliberative function the Commission pursues in passing on individual rate and franchise hearings, conducted in privacy, allowing due consideration to discussion of matters of record and assuring that the final decision will be based only on the record, is an essential element of this Due Process requirement. The Commission does not seek to have "administrative . . . proceedings of a judicial nature held behind closed doors" (Resp. Br. pg. 27), which Common Cause correctly states would be repugnant to our system of justice. However, Common Cause does not, and cannot, argue that closed door deliberative sessions are repugnant to our judicial system, as that procedure is the traditional mode for formulation of a

final decision based on evidence offered in an open and fair hearing.

The analytical basis for closed door deliberations is that the decision should be based on the record only, and should not be subject to any extraneous influence.

The Commission seeks the same insulation of its collective thought process from influence apart from the record which this Court enjoys. The Commission seeks this respite from the public eye to a very limited extent -- only when acting in a quasi-judicial manner and then only for deliberation on the record in order to reach a final decision. Contrary to Common Cause's contention, it is inherent in due process that the final arbiter of a matter be free from the constraints of matters not of record.

The record before the Commission is the result of a full adversary hearing, with any "interested person" able to participate. The Commission hearing is where parties may legitimately exert influence. At the end of the open hearing, the parties are entitled to have the matter decided free from additional influence, based only on the record previously made in the adversary proceeding.

The Commission in deliberating is no different from a jury or a judge acting as fact finder. This Court has recognized the importance of privacy for the fact finding deliberative process of a jury, calling the jury's privacy "sacrosanct" and cautioning that this privacy should "be preserved from influence from outside sources or any semblance thereof." Johnson v. Maynard, 9 Utah 2d 268, 342 P.2d 884, 887-88 (1959). This same need for privacy has been recognized when the fact finder or decision maker is an administrative agency acting in a quasi-judicial manner. National Labor Relations Bd. v. Botany

Worsted Mills, 106 F.2d 263 (3rd Cir. 1939); United States v. Morgan, 313 U.S. 409 (1941). The Arizona Press Club case recognized the need for privacy in a quasi-judicial body in order to assure the fair decision of the matter. To strip the Commission of its ability to insulate itself from outside influences thereby assuring a decision on the record is violative of due process in that it deprives the Commission and the parties before it of the assurance that the Commission's decision is based only on the record.

Common Cause argues that under the definition of due process contained in Christiansen v. Harris, 109 Utah 1, 163 P.2d 314 (1945) a closed deliberative session is not necessary to insure due process. This is contrary to the elements which Christiansen sets out as necessary for due process. Christiansen dealt with the hearing process required for revocation of parole, and the issue of whether the deliberations of the fact finder were necessary to insure due process was not before the court. However, Christiansen did establish that:

In depriving a person of life or liberty, the essentials of due process are: [a fair hearing with notice and] (f) judgment to be rendered upon the record thus made. (163 P.2d 317).

This final element of due process, that any decision be based solely on the record made in the prior fair hearing, is inherently offended by forcing the Commission to deliberate before the public, where matters extraneous to the record may influence them and the complete candor required for effective quasi-judicial decision making will be inhibited. To insure the constitutionality of the Open and Public Meetings Act, quasi-judicial agency functions must be exempted.

Without such an exemption, the due process of law guaranteed the

parties appearing before the Commission by the Utah and United States Constitutions will be violated.

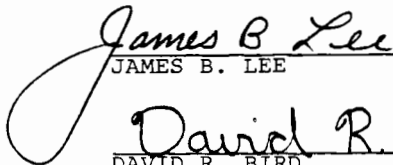
CONCLUSION

The judicial deliberations of the Commission, when it votes upon, establishes, or otherwise evaluates existing or proposed utility rates, tolls and charges, rentals or classifications are entitled to the same right to privacy granted this court in its deliberations. Such private deliberations are necessary to insure candor among the decision makers, proper evaluation of evidence and witness credibility, and a decision based upon the record. Such private deliberations are an essential element of the fair hearing before an impartial tribunal requirement of due process under the Utah and United States Constitutions. The trial court's construction of the Open and Public Meetings Act must therefore be reversed.

Respectfully submitted this 30th day of October, 1978.



JAMES G. WATT
1845 Sherman Street
Denver, Colorado 80203



JAMES B. LEE



DAVID R. BIRD
of and for
PARSONS, BEHLE & LATIMER
79 South State Street
Salt Lake City, Utah 84111