

1951

# Utah Pipe Line Co. v. Public Service Commission of Utah et al : Brief for Petitioner

Utah Supreme Court

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Cheney, Marr, Wilkins & Cannon; Turner, Atwood, White, McLane & Francis; Of Counsel;

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## Recommended Citation

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**IN THE SUPREME COURT  
of the  
STATE OF UTAH**

UTAH PIPE LINE COMPANY, a  
Corporation,

*Petitioner,*

— vs. —

PUBLIC SERVICE COMMISSION  
OF UTAH, HAL S. BENNETT, W.  
R. McENTIRE and STEWART M.  
HANSON, Commissioners of the  
Public Service Commission of Utah,  
and UTAH NATURAL GAS  
COMPANY, a Corporation,

*Respondents.*

**FILED**

AUG 17 1951

Clerk, Supreme Court, Utah

Appealed from the Public Service Commission of Utah  
by Certiorari

**BRIEF FOR PETITIONER**

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UTAH PIPE LINE COMPANY, a  
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*Petitioner,*

— vs. —

PUBLIC SERVICE COMMISSION  
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*Respondents.*

No. 7695

Appealed from the Public Service Commission of Utah  
by Certiorari

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**BRIEF FOR PETITIONER**

---

**TO THE HONORABLE SUPREME COURT OF THE  
STATE OF UTAH:**

**STATEMENT OF THE NATURE OF THE CASE**

This is an appeal to this Honorable Court by writ of certiorari from the proceedings, Findings and Report and Order, of the Public Service Commission of Utah

in case No. 3504 before said Commission, entitled "In the Matter of the Application of Utah Natural Gas Company for a certificate of convenience and necessity." The petition for writ of certiorari was filed by Utah Pipe Line Company, a corporation, an intervener in the above proceedings before the Public Service Commission of Utah under and by virtue of Section 76-6-16 of the Utah Code Annotated, 1943. The writ of certiorari thus petitioned for was granted by this Court. Respondents filed their motions to dismiss the petition for writ of certiorari and the writ of certiorari granted pursuant thereto "on the grounds and for the reason that it affirmatively appears from said petition for writ of certiorari that the petitioner, the Utah Pipe Line Company, does not have a justiciable interest in the subject matter of the action." This Honorable Court has heretofore overruled said motions to dismiss, and the case is now before the Court on the merits. Except as otherwise indicated, all italics are supplied.

## THE RECORD ON APPEAL

The record from the Public Service Commission consists of four volumes, Volume I being numbered R. 1 to R. 493, inclusive, and comprising a portion of the transcript of the testimony; Volume II being numbered R. 494 to R. 1039, inclusive, and comprising the transcript of the balance of the testimony and of the arguments made by counsel before the Commission; Volume III being numbered R. 1040 to R. 1105, inclusive, and made

up of the numerous exhibits received in the case; and Volume IV being numbered R. 1106 to R. 1228, inclusive, and comprising, among other things, the various applications, petitions to intervene, Findings and Report and Order of the Commission, the petition for the rehearing, and the petition for the writ of certiorari.

## STATEMENT OF FACTS

Utah Pipe Line Company, petitioner herein, is a corporation organized under the laws of the State of Delaware, qualified to do business in the State of Utah, and is a wholly owned subsidiary of Delhi Oil Corporation. Delhi Oil Corporation and Utah Pipe Line Company have their principal offices at Dallas, Texas. Utah Pipe Line Company proposes to construct and operate a natural gas pipeline system extending a distance of approximately 392 miles from a point near Aztec, New Mexico, to a point or points in and near Salt Lake City, Utah, and to commence the construction of such facilities promptly after the issuance of the necessary certificates of public convenience and necessity and to place the facilities in operation on or before January 1, 1952 at an estimated overall cost of approximately \$22,000,000. (R. 1148). Utah Pipe Line Company has pending before the Federal Power Commission and before the Public Service Commission of Utah its respective applications for the necessary certificates of convenience and necessity (R.

1149, R. 1184). Utah Pipe Line Company has available proven gas reserves approximating 1 trillion cubic feet to be committed to its proposed pipeline and has been in negotiation with industrial consumers in the Salt Lake City area for the sale of natural gas to them (R. 1150)

Respondent Utah Natural Gas Company is a Delaware Corporation, qualified to do business in Utah, its president and principal officer and stockholder being Mr. John A. McGuire, an attorney who resides at Lowell, Massachusetts (R. 19). At the commencement of the hearing before the commission the paid in capital of Utah Natural Gas Company was \$1,000, all of which was subscribed for by Mr. McGuire (R. 21). Because of the similarity of names, i.e. Utah Pipe Line Company and Utah Natural Gas Company, we will sometimes hereafter refer to the respondent, Utah Natural Gas Company as the McGuire Company and to the petitioner, Utah Pipe Line Company, as Utah Pipe Line.

The McGuire Company has no gas acreage and does not intend to acquire any gas reserves, its plan being to buy in the field from independent producers natural gas for delivery into its pipeline as and when structures in Utah may be drilled and natural gas in marketable quantities developed (R. 27, 28). As a typical example of how the McGuire Company intended to operate we refer to Exhibit 50 (R. 1089) which is as follows :

“EXHIBIT NO. 50

“N. G. Morgan, Sr.	Telephones 4-5521
N. G. Morgan, Jr.	4-5522
Dr. Paul T. Walton	

“MORGAN & WALTON OILS  
Suite 518 Wasatch Oil Building  
Salt Lake City, Utah

December 14, 1950

“Utah Natural Gas Company  
Salt Lake City, Utah

“Gentlemen :

“We agree to commit to the Utah Natural Gas Company all gas produced to our interests in the following structures in the State of Utah, which we consider productive of gas :

Clear Creek Anticline  
Scofield Reservoir Anticline  
Flat Canyon Anticline  
Joe's Valley Anticline  
Lake Shore Anticline

“This agreement is contingent on the completion of the pipe line and its readiness to purchasers within two years from January 1, 1951.

“Before the delivery of any gas to said line, a mutually satisfactory contract will be negotiated

between us, providing for a minimum rate of 10¢ per thousand for gas showing BTU content and pressures of standard character.”

Yours very truly,

MORGAN-WALTON OIL &  
GAS, INC.

By (s) N. G. MORGAN, SR.  
(s) PAUL T. WALTON  
(s) N. G. MORGAN, JR.

ACCEPTED BY:  
UTAH NATURAL GAS CO.

(s) John A. McGuire  
President”

That is to say, Mr. McGuire on behalf of the McGuire Company obtained numerous conditional commitments from Mr. N. G. Morgan, Sr., Byrd-Frost, and others to the effect that gas which might be developed from structures not yet drilled would be committed to the McGuire Company pipeline. In short, Mr. McGuire’s plan was to obtain a certificate of public convenience and necessity for the construction of a pipeline and as and when structures might be drilled in Utah by independent operators and natural gas in commercial quantities developed, the McGuire Company would purchase in the field such gas for delivery into its pipeline. The McGuire Company did not contend before the Commission that it had committed adequate proven gas reserves for delivery through its pipeline and there is no conflict in the evidence that the construction of its pipeline depends entirely upon the results of wildcat drilling by independent operators.

The pipeline project of the McGuire Company proposes a pipe line to deliver 100 million cubic feet of natural gas into the Salt Lake area each day. The standard requirement by financial institutions interested in financing natural gas pipelines is that a proven gas supply be available to the pipeline for a period of not less than twenty years (R. 471). Therefore a pipeline project planned to deliver 100 million cubic feet of natural gas each twenty-four hours for twenty years would need a supply equivalent to:  $100,000,000 \times 365 \times 20$ . This is a tremendous requirement and developed reserves less in quantity than those adequate for a "break even" operation would not permit the required financing (R. 460). Exhibit 58 (R. 1097) was produced by a witness for the McGuire Company and shows that it would require a daily sale of 76,169,958 physical units (MCF) at the McGuire Company's proposed rates of  $23\frac{3}{4}\text{¢}$  to Utah industrial users and at  $30\text{¢}$  to other users per MCF for the McGuire Company to reach the break even point on its proposed project.

The only claim of proven gas reserves committed to the McGuire pipeline consists of an insignificant amount of natural gas in the Boundary Butte structure near the Utah-Arizona line. The insignificant quantity of gas in this structure will be dealt with in detail sub-



sequently in the brief. There is no pipeline to the Boundary Butte structure and the gas in the structure is of an extremely low BTU content.

While the paid in capital of the McGuire Company at the time the hearing began on December 11, 1950 was \$1,000, by the time the hearing adjourned the capital stock issued or reserved for issue had grown to \$78,760 (Ex. 68, R. 1105). The accountant for the McGuire Company would not certify to these figures and stated that all he knew about them was what Mr. McGuire had told him, but that it was his understanding this increase represented unclassified expenditures such as for professional services, travel expenses and other items (R. 947 to 949).

The McGuire Company in its amended application for the certificate stated that it had the ownership of or could by firm contracts secure the ownership and delivery of the required quantities of natural gas for its pipeline and that it was financially able to perform and carry out the construction of the line and the required facilities (R. 1111, R. 1113). Notwithstanding the fact that Mr. McGuire is a lawyer and must appreciate the difference between a firm commitment and an instrument which does not create any binding obligation, he produced Exhibit 45 (R. 1084) as evidence of ability to adequately finance the project. This exhibit is as follows:

“Chicago Office  
231 South LaSalle Street

“LEHMAN BROTHERS

One William Street  
New York 4  
July 25th, 1950

“Utah Natural Gas Company  
Suite 1311, Walker Bank Building  
Salt Lake City 1, Utah

“Dear Sirs :

“This letter is to confirm the fact that officers of your company have discussed with us the subject of your obtaining a financing for the construction of a gas pipe line from the four corners area to the Salt Lake City market, and for the purchase of other related facilities.

“While a number of things still remain to be done, such as obtaining a certificate from the Public Service Commission of the State of Utah, obtaining assurance of adequate available gas reserves, an engineering report covering construction and operating matters, etc., this letter is further to confirm that we will undertake to provide adequate financing for the Company, either by a private placement or public offering of its securities, when all the necessary preparatory steps have been satisfactorily completed.”

“Very truly yours,  
LEHMAN BROS.”

The Byrd-Frost interests of Dallas, Texas, were active in support of the application of McGuire Company but Col. Byrd testified that neither he nor his associates

in Byrd-Frost had any stock interest in the McGuire Company (R. 735 & 932-936). At the time of the hearing the Byrd-Frost interests were drilling a well (Sitton No. 1) at Monticello and intended to drill what is commonly called the Last Chance structure in Emery County.

The Commission permitted Utah Pipe Line to intervene in the McGuire Company's case but refused to permit Utah Pipe Line to offer any evidence as to its gas reserves in New Mexico and its proposed pipeline from Aztec to Salt Lake City. The Commission also failed to take any action with regard to a hearing upon the application of Utah Pipe Line (R. 1221) for a certificate.

The application of McGuire Company was filed with the Commission on May 29, 1950, (R. 1106). No notice of the application was given and nothing was done with regard thereto until November 17, 1950, when an amended application (R. 1111) was filed enlarging upon the program of the applicant. On November 24, 26, and 28, 1950, notice of a hearing on the amended application was published in the Salt Lake Tribune, the hearing being scheduled for December 11, 1950. Notice was mailed to J. Glenn Turner, Dallas, Texas, general counsel for Delhi Oil Corporation and one of the attorneys for Utah Pipe Line. Whether Mr. McGuire had learned of the plans of Delhi Oil Corporation to build through a subsidiary, a pipeline from the San Juan Basin of New Mexico to Salt Lake City is not certain, but it is a fair inference (R. 1028) that this accounted for the short notice and the

sudden necessity of speed in the disposition of the McGuire Company's application. At the beginning of the hearing on the McGuire application Mr. Turner entered an appearance on behalf of Utah Pipe Line and asked leave to file its petition to intervene in the proceeding. The petition of Utah Pipe Line set forth that there was then pending before the Federal Power Commission an application of Utah Pipe Line for a certificate of public convenience and necessity authorizing the construction and operation of a pipeline from Aztec, New Mexico to Salt Lake City; that Utah Pipe Line proposed to construct and operate such line and that the gas reserves available to Utah Pipe Line approximated 1 trillion cubic feet; that Utah Pipe Line was informed and believed that the McGuire Company had insufficient and inadequate reserves and that if a certificate were granted to the McGuire Company it would be unable to furnish the service and that any attempt by the McGuire Company to transport gas by its pipe line from outside Utah would have to be made through the Federal Power Commission (R. 1148-1153). When Mr. Turner presented the petition of Utah Pipe Line for leave to intervene, counsel for the McGuire Company strenuously objected and the following occurred:

“MR. TURNER: Mr. Commissioner, may I be heard with reference to that?”

“COM. BENNETT: You may.

“MR. TURNER: Utah Pipe Line Company is a wholly owned subsidiary of Delhi Oil Com-

pany. Delhi Oil Company owns substantial oil and gas holdings in New Mexico.

“We expect to prove, if allowed to participate in this hearing, that we ourselves have approximately 1 trillion feet of gas ourselves under our own leases. It is a matter of common knowledge — it has been the subject of considerable comment, and it is generally known we have been negotiating for quite some time with industrial customers in the Salt Lake City area, and those negotiations are down to the last stages. We have had the right of way surveyed; we have taken all the steps—and it is true we just recently filed with the Federal Power Commission, but we expect to prove, if allowed to intervene, that the applicant is merely trying to preempt the Salt Lake City industrial market, that they do not have sufficient gas reserves; that it would be impossible to support this line unless it is an interstate line, and that the Federal Power Commission, if it is going to be an interstate line, is the first body who will have to authorize a certificate.

“Now we have filed our application. We propose to serve substantially the same market that these gentlemen propose to serve, and we say that it is in the public interest for this Commission to hear both projects and both plans and decide which of the 2 plans it should allow. We think that it is obvious that you couldn't have 2 lines coming in here, and we think that as a direct competitor that we do have a direct interest in this proceeding, and if allowed to intervene, we will present such data as the Commission may desire to show

that we do have the gas, that we are in good faith in wanting to serve the Utah area, and that we will take all prompt steps to that end.

“But, we do think that if a certificate were here given the applicant without sufficient gas reserves, it would confuse the issues, as counsel says, and we think it would be in the public interest for this Commission to hear both of these competing projects at the same time.

“MR. CORNWALL: I think our views are expressed, Mr. Commissioner.

“COM. BENNETT: We will be in recess for 5 minutes at this time.”

\* \* \* \*

“COM. BENNETT: The hearing will be in session.

“The commission believes that the Utah Pipe Line Company has shown sufficient interest to intervene. The Commission also feels that such intervention should be limited as to the reasons alleged—as to why the petitioner’s application should not be granted, but in no instance should this be used as a place for the Utah Pipe Line Company to try and prove a case which the Commission does not have before it.

“If they intend to petition this Commission for a hearing for a pipeline, why that would have to be done in its usual manner.

“So, while the petition of intervention will be granted, it will be granted in a limited manner, as set out here.

“MR. CORNWALL: Do I understand, Mr. Commissioner, that the showing which the Intervenor is entitled to make here will be a showing going to the merits of our application, but, they will not be entitled to make affirmative proof with respect to their proposed application; is that the position of the Commission?”

“COM. BENNETT: That is the position of the Commission.” (R. 10-13)

In other words, the ruling of the Commission was to the effect that Utah Pipe Line would not be permitted to offer any evidence with regard to its application pending before the Federal Power Commission nor with regard to its gas reserves in New Mexico or its proposed pipeline project. That ruling of the Commission was never changed and throughout the proceeding Utah Pipe Line was barred from presenting any evidence in its support. Its participation was limited to a showing of what the McGuire Company did not have.

The hearing on the McGuire Company's application continued through December 11, 12, 13 and 14, 1950, and was then adjourned to January 29, 1951. On January 26, 1951 Utah Pipe Line filed with the Commission its application entitled “In the Matter of the Application of Utah Pipe Line Company,” case No. 3578, a copy which is attached as Exhibit “C” to the petition for the writ of certiorari herein, and will be found at R. 1199, and a map of its proposed line will be found at R. 1204. On the following day, January 27, 1951, Utah Pipe Line filed with



the Commission a request that the Commission arrange with the Federal Power Commission for a "joint hearing" of the two applications of Utah Pipe Line (R. 1188). Utah Pipe Line, in its verified application for such certificate, again stated that in excess of 1 trillion cubic feet of proven natural gas reserves in the Angel's Peak, Blanco, Largo and Glade areas in San Juan County, New Mexico, were available to Utah Pipe Line for transmission and disposition through its proposed pipeline into the Salt Lake area. Without considering any of the said matters and without granting Utah Pipe Line a hearing on its application and without granting or denying its motion for a joint hearing with the Federal Power Commission and after limiting Utah Pipes Line's participation as aforesaid in the hearing upon the application of the McGuire Company, on March 12, 1951, the Commission made its Findings and Report and Order and granted to the McGuire Company certificate of convenience and necessity No. 925.

The Commission recognized that the McGuire Company had not made a sufficient showing of proven gas reserves or of adequate financing. The Findings of the Commission are clear in this regard. On page 6 of the Findings (R. 1169) the Commission says:

"The Commission further finds that the estimated reserves in the area where the applicant has gas purchase contracts are sufficient, *if proved*, to make the construction of applicant's pipe line and facilities economically feasible."

\* \* \* \*

"The Commission further finds that if said reserves are proved, the applicant can secure gas purchase contracts to deliver the gas so purchased and developed into its pipe line. The Commission further finds that the operation of the pipe line will be economically feasible with the available market *if* the estimated reserves are proved; and that *if* said pipe line is economically feasible the applicant can secure the necessary financing for the construction of the same."

In short, the Findings and Report are to the effect that the McGuire Company *claimed* to have adequate proven gas reserves, and based upon that assumption, the Commission then found that "estimated reserves—are sufficient, *if proved*," and "*that if said reserves are proved*, the applicant can secure gas purchase contracts to deliver the gas so proved." In effect, the Commission found that the McGuire Company was entirely dependent upon the results of limited wildcat drilling for its gas supply.

Although recognizing that the McGuire Company had not made a sufficient showing of proven gas reserves or of the required financing, nevertheless the Commission granted the certificate and gave the McGuire Company one year within which to:

"(a) File with this Commission the unconditional commitment of a financial house of recognized responsibility committing itself to supply the funds necessary for the construction of the pipe line and facilities to be installed by Utah Natural Gas Company;

“(b) Concurrently with the furnishing of such commitment and as a part thereof, Utah Natural Gas Company shall file with this Commission the certificate of an independent geologist of recognized professional standing, acceptable to this Commission, that there are proven gas reserves committed to Utah Natural Gas Company adequate to justify the construction of the line and facilities;

“(c) Deposit with this Commission copies of any gas purchase contracts entered into with owners of producing gas wells;

“(d) Deposit with this Commission a copy or copies of its contracts then entered into with a recognized responsible construction firm or firms for the construction of said line and facilities; and

“(e) Pending the compliance with the conditions herein imposed, Utah Natural Gas Company shall make no public offering of its stock or other securities.” (R. 1173).

## OUTLINE OF ARGUMENT

I. THE RECORD CONTAINS NO COMPETENT, SUBSTANTIAL EVIDENCE TO SUPPORT THE ORDER; THE FINDINGS AND REPORT DO NOT SUPPORT THE ORDER AND THE ISSUANCE OF THE CERTIFICATE.

The Findings and Report in substance merely state that the McGuire Company claims to have gas reserves and as a consequence claims it can obtain the necessary financing. It is true that the evidence supports a finding

that the McGuire Company makes such claims. But more than mere claims are required to sustain the issuance of a certificate of convenience and necessity.

II. THE COMMISSION UNLAWFULLY DELEGATED TO AN UNKNOWN AND UNDETERMINED GEOLOGIST THE POWER WITHIN ONE YEAR TO MAKE THE DETERMINATIONS REQUIRED BY LAW OF THE COMMISSION AND TO THEREBY PERFECT AND EXTEND THE MCGUIRE COMPANY CERTIFICATE; THIS ACTION OF THE COMMISSION VIOLATED THE CONSTITUTIONAL RIGHTS OF PETITIONER.

The order of the Commission delegates to a geologist to be selected by the McGuire Company (subject to the Commission's determination of his qualifications) the power, ex parte, without hearing, without investigation by interested parties into his background or qualification, without investigation as to his interest in the controversy or his relationship with McGuire Company, to perfect and extend the certificate by filing with the Commission the geologist's opinion that the McGuire Company has obtained the required gas reserves. These are the matters exclusively reserved to the Commission by law for their determination and such delegation is unlawful and void.

The due process clause of the Federal Constitution and that of the Constitution of the State of Utah required that Utah Pipe Line be given a full hearing before any certificate was granted to the McGuire Company; the vesting by the Commission in an independent geologist of the power to perfect and extend the certificate,

ex parte, does not give to Utah Pipe Line that impartial, fair and full hearing which both the Federal and the State Constitutions require.

### III. THE COMMISSION FAILED TO REGULARLY PURSUE ITS STATUTORY AUTHORITY.

The authority of the Commission is wholly statutory and although an administrative agency, it does not have unlimited authority in granting certificates of convenience and necessity and particularly may not constitute itself a conservation and development commission for the State of Utah.

### IV. THE COMMISSION ACTED ARBITRARILY AND CAPRICIOUSLY IN THE PROCEEDINGS AND IN THE ISSUANCE OF THE CERTIFICATE AND IN VIOLATION OF THE CONSTITUTIONAL RIGHTS OF PETITIONER.

The restriction on the participation of Utah Pipe Line in the hearing on the McGuire application; the refusal of the Commission to hear any evidence on the pipeline project of Utah Pipe Line and its reserves; the failure to take any action on Utah Pipe Line's request for a joint hearing; and the order requiring Utah Pipe Line to stand aside and defer presentation of its project while the McGuire Company embarked on a "hunting expedition" for natural gas, all were arbitrary and capricious and in excess of the jurisdiction and powers of the Commission.

### *Preliminary Statement Relative to Points on Appeal*

The petition for the writ of certiorari sets forth 13 points wherein petitioner claims the Commission ex-

ceeded its jurisdiction and failed to pursue its statutory authority (R. 1189-1192). These points are numbered a, b, c, d, e, f, g, h, i, j, k, l and m. For the purposes of the argument and to save repetition Utah Pipe Line has grouped these points so that they may be embraced within the four general headings above set forth. The alphabetical identity of the points has been retained with designation in capital letters.

## ARGUMENT AND AUTHORITY

I. THE RECORD CONTAINS NO COMPETENT, SUBSTANTIAL EVIDENCE TO SUPPORT THE ORDER; THE FINDINGS AND REPORT DO NOT SUPPORT THE ORDER AND THE ISSUANCE OF THE CERTIFICATE. POINTS A, B, C, AND L.

### *In General*

This is the first case presented to the Supreme Court of Utah involving the question as to what showing must be made by an applicant for a certificate of public convenience and necessity for the construction and operation of a natural gas pipeline. While the case is of first impression nevertheless the requirements for a showing of an adequate gas supply and firm commitments for the necessary financing actually are no more than the application of the well settled rule in any type of certificate of public convenience and necessity case that the applicant must show that it is able to furnish the proposed service and that the financing thereof is economically sound and feasible. The whole purpose of a



hearing upon an application for such certificate is to determine not only that public convenience and necessity require the service but the applicant is in a position to furnish the service. Applications for certificates of convenience and necessity are not treated lightly. Commissions and courts recognize that the granting of such certificate materially affects the public welfare.

The application of the McGuire Company is not unlike the application before the Idaho Commission in *Re Wilcox*, P.U.R. 1916C., 35, 37, involving a proposed construction and operation of a gas plant and where the Commission in disposing of the application said:

“The whole plan or scheme of applicant Jones seemed to be, as we gathered from the evidence adduced, that he would secure a certificate of convenience and necessity, thereby securing the control of that field for a time at least, and then endeavor to secure the necessary capital, either by subscription or by bonding the plant, with which to construct the plant and distribution system. He presented no definite tangible plan of procedure, but trusted to the future to take care of itself. In other words, it appeared that he was acting purely as a promotor.”

There has grown up in natural gas pipe line cases three fundamental requirements which courts and commissions recognize must be met before a certificate for the construction and operation of a natural gas pipeline should issue. These requirements are sometimes embodied in regulations of commissions; sometimes are to be found only in the decided cases but they are funda-



mental and have become well settled rules of law. The Federal Power Commission has considered these requirements in a more extensive manner than probably all other commissions and courts combined. These rules of law require an applicant to show:

1. Proven gas reserves dedicated to the pipeline in sufficient quantity to justify the project from the standpoint of consumer and investor.
2. Adequate financing for the construction and operation of the pipeline.
3. Adequate showing of consumer demand for the natural gas.

With reference to the last requirement, i.e. adequate showing of consumer demand, we make no contention. The Commission found that there was an inadequate supply of gas in the Salt Lake area; that home owners, schools, apartment houses, small and large industry, are suffering from a lack of adequate gas reserves. Newspaper photographs of people standing in line in the hope of obtaining a gas connection; repeated notices in the newspapers to the effect that gas is limited for new home construction; all are facts with which we are familiar. We will, therefore, confine our argument to the first two requirements.

## POINT A

“(a) THAT THE COMMISSION ERRED IN FINDING THAT A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY SHOULD BE GRANTED TO THE APPLICANT, UTAH NATURAL GAS COMPANY, IN THAT THE RECORD

CONTAINS NO COMPETENT SUBSTANTIAL EVIDENCE TO SUSTAIN A REQUIRED SHOWING OF ADEQUATE PROVEN GAS RESERVES COMMITTED TO SUPPLY APPLICANT'S PROPOSED LINE, BUT ON THE CONTRARY, THE EVIDENCE SHOWS THAT APPLICANT HAS AVAILABLE INCONSEQUENTIAL AND WHOLLY INADEQUATE SUPPLIES OF GAS."

### STATEMENT UNDER POINT A

Respondent, Utah Natural Gas Company, proposed to construct a system of natural gas pipelines from the Southeastern area of the State of Utah to the Salt Lake City area at a total cost of approximately \$32,000,000 (R. 242 and Ex. 42). The pipeline system as proposed would have a maximum daily delivery capacity into the market area of 135,000,000 cubic feet of natural gas (R. 300), with a proposed actual delivery of 100,000,000 cubic feet (R. 304) and a required minimum economic "break-even" delivery of 76,000,000 cubic feet per day over a twenty year period (R. 718, Ex. 58). It was proposed that gas with a heating value of 875 British thermal units per cubic foot would be delivered to the consumers (R. 521).

The Utah Natural Gas Company offered evidence pertaining to several different areas in an attempt to show that it had adequate natural gas reserves to furnish the requirements of the proposed system. The areas primarily relied upon were the areas known as Boundary Butte, Last Chance and Greater Monticello. As to Boundary Butte, all witnesses agreed that there were

some “proven” reserves of natural gas but there was a sharp conflict of testimony as to the extent of such “proven” reserves.

A report on the gas reserves of Byrd-Frost, Inc.—English interests, made by the independent consultant firm of Cummins, Berger and Pishny, page 20 of which, along with a correcting telegram (R. 1103), was introduced in evidence as Exhibit 66, attributed to Boundary Butte a total proven recoverable reserve of 62,467,000,000 cubic feet and to the net interest of Byrd-Frost, Inc.—English 13,661,000,000 cubic feet.

Of the total productive area estimated by witnesses of Utah Natural Gas Company to be in Boundary Butte, Utah Natural Gas Company has a gas purchase contract committing gas to its proposed line from only the Byrd-Frost, Inc.—P. B. English interest, which accounted for ownership of only one-fourth of the ownership in the Boundary Butte structure (R. 515-516, Ex. 46). While there was some testimony to the effect that a trade of gas owned elsewhere by the Byrd-Frost, Inc.—P. B. English interests for the remaining three-fourths interest at Boundary Butte had been considered (R. 530), there was no evidence that such trade had or would be made.

As to the area or structure known as Last Chance, there was sharp conflict in the testimony as to whether or not there were recoverable “proven” reserves of natural gas in that structure.

Witnesses for petitioner testified that there were no proven reserves at Last Chance and not enough basic data to estimate reserves (R. 671, 744). A witness for Mountain Fuel Supply Co. testified that at the most the total reserve at Last Chance was slightly over 406,000,000 cubic feet (R. 763).

As to the area or structure known as Greater Monticello, all witnesses were in accord that it did not have a "proven" reserve of natural gas (R. 86, 92, 147, 672, 705), and the principal witness for Utah Natural Gas Company denoted it as a "probable" reserve (R. 92, 147), with the admission that they were in the "field of conjecture" (R.93).

Witnesses for petitioner testified that there was no accurate estimate of reserves possible on the data available and that there was no substantial amount of gas proven today at Greater Monticello (R. 672, 705).

While Utah Natural Gas Company introduced testimony as to other "unproved structures" (R. 99, Ex. 1), it relied primarily on the foregoing to establish the natural gas reserves upon which its application was predicated.

## ARGUMENT AND AUTHORITIES UNDER POINT A

### (a) *Public Interest as Paramount Concern.*

The Utah statute under which the certificate of convenience and necessity here concerned was sought is, primarily, Section 76-4-24, U.C.A. 1943, which reads in part as follows:

“(1) No . . . gas corporation . . . shall henceforth establish, or begin construction or operation of a . . . line, route, plant or system, . . . without having first obtained from the commission a certificate that present or future public convenience and necessity does or will require such construction.”

“(3) . . . The commission shall have power, after a hearing, to issue said certificate as prayed for or to refuse to issue the same, or to issue it for the construction of a portion only of the contemplated railroad, street railroad, serial bucket tramway, line, plant or system, or extension thereof, or for the partial exercise only of said right or privilege and may attach to the exercise of the rights granted by said certificate such terms and conditions as in its judgment public convenience and necessity may require.”

It is a well settled fundamental in the public utility law of Utah that the interest of the public is paramount in determining whether or not a certificate of public convenience and necessity, under the above and similar statutes, should be issued. As this court stated:

“It is the public good and convenience which is the yardstick to be used in determining the advisability of granting or denying a certificate of necessity and convenience. *Mulcahy v. Public Service Commission*, 101 Utah 245, 117 P2d 298; *Utah Light & Traction Co. v. Public Service Commission*, 101 Utah 99, 118 P2d 683.” *Salt Lake & Utah R. Corp. v. Public Service Commission, et al.* (Sup. Ct. 1944) 106 Utah 403, 149 P2d 647. See also, *Collett et al. v. Public Service Commission, et al.*, (Sup. Ct. 1949) 211 P2d 185.

(b) *Adequate Supply Basic Prerequisite to Protection of Public Interest.*

It would seem basically fundamental that where a particular applicant is seeking such a certificate of public convenience and necessity to perform a particular service, such applicant must show, in order to establish the public convenience and necessity for his particular service, that he can furnish the services concerning which he is seeking a certificate. Such requirement has been clearly stated by the Public Service Commission of Missouri in the case of *Re Achtenberg* (1934) 8 P.U.R., N.S. 397. In that case the Commission, in considering and discussing the Missouri statute authorizing the Commission to issue certificates of public convenience and necessity, which statute is partially quoted on page 407 of such opinion and is substantially the same as Section 76-4-24, U.C.A. (1943) above quoted, observed the following at pages 408-9:

“We have always regarded this statute and the similar statutes relating to other utilities, as involving consideration of two questions—first, whether public convenience and necessity require the proposed service; second, whether the applicant is a proper person to fulfill this need. The combination of these two elements in a finding constitutes a certificate of convenience and necessity. \* \* \* \* But the question as to whether the two features which have been indicated may be separately considered by the Commission seems, so far as we are able to ascertain, undecided. On principle it seems that this division might and should be recognized. Going to the fundamentals



of regulation first announced in the case of *Munn v. Illinois*, (1877) 94 U.S. 113, 24 L.ed. 77, it will be observed that regulation proceeds upon the theory that the owner of property theretofore held in private tenure, has by voluntary act devoted it to some use which the state denominates as affected with a public interest. It seems reasonable to regard one of the purposes of the finding of convenience and necessity as that of stamping the property so proposed to be used as being within the category of property affected with a public interest. That can only be done by the determination of the state, through its agent, the Public Service Commission, that the business is really necessary and convenient for the public. That question having been decided, the next question to be determined by the Commission is the suitability of the owner of the property to use it in meeting this public need. The two findings together constitute the certificate or franchise granted to the applicant when such certificate is issued."

The wording of Section 76-4-24, U.C.A. (1943), indicates that such a requirement was contemplated by the legislature. Such section states that no utility shall begin construction "without having first obtained from the commission a certificate that present or future public convenience and necessity does or will require *such construction*." Furthermore, the actual procedure set out by the Rules of Practice and Procedure of the Public Service Commission of Utah indicates that such is the interpretation of its duty by that Commission. Section 11.2 of the Rules of Practice and Procedure requires that



applications for certificates of convenience and necessity shall show, among other things, the financial condition of the applicant, the manner of financing the operation and the construction proposed.

In situations where the applicant for a certificate desires to furnish some commodity to be used by the public this inquiry into whether or not the applicant is capable of performing the service to be certificated necessarily involves the very important inquiry into whether or not the applicant has at its disposal an adequate supply of the commodity to be furnished to the public to help meet its "present or future convenience and necessity." For example, the California Railroad Commission in 1933 denied an application of an individual for a certificate to operate as a water utility where, by reason of pending litigation, there existed grave doubt as to the right of the applicant for the certificate to operate a plant from the proposed source of supply and where, also, the applicant had failed to give reasonable assurance of an adequate supply of, or the ability to obtain additional, water to meet demands. *Re Morgan*, (1933) 38 Cal. R.C.R. 667.

(c) *Adequate Supply Means Adequate Reserves of Natural Gas.*

Certainly, in situations where the activity to be certificated is a pipeline for the transmission of natural gas, the adequacy of the gas supply to meet the demands of the public and to insure that the continuation of the

pipeline will be a sound investment from the standpoint of the public interest will be of the utmost importance in determining the public convenience and necessity and the ability of the applicant to meet and fulfill that public convenience and necessity. The Commissions and Courts which have considered the problem have so held.

The Michigan Public Utilities Commission, in the case of *Re Grand Rapids Gas Light Co.*, (1936) 13 P.U.R. (N.S.) 445, said at page 451 :

“In a former opinion this Commission held that, in order to justify the issuance of a certificate of public convenience and necessity for a gas utility to construct a natural gas pipe line under Act 9, Public Acts of 1929, three things should be established and they were briefly stated as follows.

(a) The utility should establish its financial ability to construct the facilities and carry out the enterprise.

(b) *The utility should establish that it has available a sufficient quantity of natural gas to serve the locality it seeks to serve for a reasonable length of time.* Just what that reasonable length of time is it is difficult to say but certainly it should have a sufficient supply of gas to serve the locality it proposes to serve for eight or ten years.

(c) Said utility should have a market ready to receive the natural gas it proposes to transport.”

Further, in connection with its requirement of adequate supply, the Commission stated at page 456:

“Public convenience and necessity will not be served if the service of natural gas must be terminated (through lack of supply) at the end of two or three years, and if the expense of the pipe line and equipment must be added to the rates charged to customers over so short a period of time.”

The Michigan statute was no more detailed in its requirements concerning public convenience and necessity than is the Utah Statute.

The Tennessee Railroad and Public Utilities Commission, in considering the application of Tennessee Gas & Transmission Co. to bring gas into the State of Tennessee, inquired into, and made a definite requirement of a showing of the adequacy of, the reserves of natural gas available to the applicant; and this, even though the statute of Tennessee specifically referred to certain inquiries to be made by the Commission in such cases, such as the financial ability of the applicant, but was silent as to reserves. In discussing this requirement which it imposed, the Commission stated in its opinion, *Re Tennessee Gas and Transmission Co.*, (1941) 40 P.U.R. (N.S.) 129, at page 133:

“When the Federal Power Commission refers to the regard due ‘to the sufficiency of its available reserves of natural gas,’ it is returning to one factor which is clearly indispensable in any case involving the granting to a company of a certifi-

cate of public convenience and necessity for the introduction of natural gas. Beyond this, the economic feasibility of the projected construction would certainly be an essential factor. Other factors which are referred to, even including so important a matter as financial resources, are collateral ones under the most normal circumstances which may arise in certificate cases. In other words, if a company has clearly adequate reserves of natural gas, and if a market exists in which it is economically feasible to sell such natural gas to the advantage both of the public and of the company, it is almost certain that financial resources would be made available for constructing and operating the project. Accordingly, it will first be necessary for the Commission to analyze and ascertain whether the Tennessee Gas and Transmission Company has available adequate supplies of natural gas . . .”

The Federal Power Commission has, of course, considered the problem of reserves many times in its deliberations. The statute under which it issues certificates of public convenience and necessity is very similar to and almost equally as brief as the statute under which the Public Service Commission of Utah issued the certificate in this case.

The applicable provisions of the United States statute, 15 U.S.C.A. Sec. 717f (c) and (e) (Natural Gas Act, Sec. 7(c) and (e) ) compare in substance with Sec. 76-4-24 Utah Code Anno. 1943.

“(c) No Natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension

shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations.”

\* \* \* \* \*

“(e) Except in the cases governed by the provisions contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.”

The applicable provisions of the Utah Statute, 76-4-24, U.C.A. (1943) are set out above.

In view of the similarity of the U.S. Statute to the Utah Statute, of the fact that few states have dealt with the problem of reserves and that the problem before this court appears to be one of first impression in the State of Utah, it would be helpful, it is believed, to observe the problem as handled by the Federal Power Commission.

In its first case under the Natural Gas Act, *Re Kansas Pipe Line & Gas Co.*, the Federal Power Commission attempted to lay down some of the principles by which it conceived itself bound under the Natural Gas Act. That case involved the applications of two companies to construct pipelines, one from the Hugoton gas field in Kansas to the Mesabi Iron Range in Minnesota and the other from North Dakota to a region on the North Dakota-Minnesota border.

In its opinion, *Re Kansas Pipe Line & Gas Co.*, (1939) 30 P.U.R. (N.S.) 321, the Commission had this to say about reserves at page 332:

“We are of the opinion that applicants who contend that ‘public convenience and necessity’ requires or will require the construction of facilities for the transportation of natural gas must show that they possess a supply of natural gas adequate to meet those demands which it is reasonable to assume will be made upon them. It is obvious that the public convenience and necessity would not be served by certificating an applicant who had an insufficient supply of the product which it proposes to make available to



the public. *Cf. Incorporators of Service Gas Co. v. Public Service Commission*, (1937) 126 Pa. Super. Ct. 381, 190 Atl. 653.

The Commission then proceeded to examine and evaluate very carefully the available gas reserves of the applicants. In connection with the gas reserves of one applicant, Kansas-Pipe Line & Gas Co., the Commission observed that, although the terms of the gas purchase contract between the producer and applicant had been agreed upon, there was as yet no firm commitment between the producers and the applicant which would specifically dedicate the reserves to the applicant's pipeline. In its disposition of the matter the Commission refused to issue certificates of convenience and necessity to the applicants, requiring additional showing by them of many facts in connection with the proposed projects, including the requirement that the "Kansas Pipe Line & Gas Co. must present to us for our further consideration a firm commitment for the purchase of natural gas in the Hugoton gas field in the State of Kansas," 30 P.U.R. (N.S.) 348.

In its recent opinion in *Re Atlantic Seaboard Corp.*, (1948) 76 P.U.R. (N.S.) 410, the Commission evidenced its continued adherence to the principles announced in the *Kansas Pipe Line Co. case, supra*. In the Atlantic case the Commission had before it the applications of Atlantic Seaboard Corporation and Tennessee Gas Transmission Company seeking a certificate of public convenience and necessity authorizing additional facili-



ties to expand the capacity of their then existing pipeline facilities. In considering the adequacy of Tennessee's gas reserves, the Commission observed at page 412:

“The Commission in its opinion dealing with the Kansas Pipe Line & Gas Company case (1939) 2 FPC 29 referred to certain minimum requirements that an applicant must meet to entitle it to a certificate of public convenience and necessity under §7. In that opinion, among other requirements to be met by certificate applicants, it was stated that ‘We are of the opinion that applicants who contend that “public convenience and necessity” require or will require the construction of facilities for the transportation of natural gas must show that they possess a supply of natural gas adequate to meet those demands which it is reasonable to assume will be made upon them. It is obvious that the public convenience and necessity would not be served by certificating an applicant who had an insufficient supply of the product which it proposes to make available to the public’.”

After reviewing Tennessee's evidence as to its supply of gas the Commission determined that Tennessee had not shown that it had a supply of natural gas reasonably adequate to meet its contracted obligations to its customers and the demands which it was reasonable to assume would be made upon it. The Commission observed that the extensive capital expenditures proposed by Tennessee would be financed principally by sale of securities to the public and that, in reliance upon the proposed service to be undertaken by Tennessee, substantial capital

expenditures were planned to be made by its customers, not to mention the expenditures by thousands of gas consumers for appliances in expectation of gas services. The Commission then stated, at page 414:

“Consumers, investors and the public generally expect to and do rely upon this Commission, in issuing certificates of public convenience and necessity to natural gas companies, to issue certificates only to companies clearly showing ability to perform the services proposed. Section 7 of the Natural Gas Act requires such finding by this Commission in certificate proceedings as a condition precedent to the issuance of a certificate.”

The Commission denied the certificate sought and provided for a later hearing wherein Tennessee was required to make additional showing as to certain facts, primarily gas reserves. It is true that two Commissioners dissented, primarily on the ground that since this was an application for enlargement of existing capacity, and not an entirely new project, and since Tennessee had made a substantial showing as to reserves, it should be given a conditional certificate. It is also true, however, that the dissenting Commissioners recognized that there would be a difference in the case of a new enterprise. At page 418 they make the following observations:

“As a practical matter such a showing might well be required in the interest of the investing or consuming public were the surrounding circumstances different — as in the promotion of an entirely new enterprise, or where a pipe line relied for its gas supply on an area where large addi-

tional reserves of gas were not known to be available or in reasonable prospect. But these are not the circumstances of this case.”

In answering the dissent, a commissioner of the majority wrote the following at page 412:

“In our 1944 report to the Committee on interstate and Foreign Commerce of the House of Representatives, entitled ‘The First Five Years of the Natural Gas Act,’ the Commission, including Commissioner Smith, stated:

‘Where the basic reserves of an industry are exhaustible, as in the case of natural gas, it is obviously desirable that, before millions are invested in well drilling and pipe lines and before thousands of consumers are induced to invest in appliances, there should be *positive determination*, after public hearings, that the enterprise is sound and the reserves are sufficient to insure adequate service at reasonable rates over a sufficiently long period to justify every dollar honestly invested.

‘If such effective regulation had existed during the earlier days of the industry, we might not now be confronted in certain of the eastern areas with petitions for the abandonment of service, which will leave communities unsupplied with the gas to which they have grown accustomed and for the utilization of which they have made large facility investments.’ (Italics supplied.)

“The minority clearly recognize that Tennessee Company sought to establish a 20-year firm supply of gas but failed. They also recognize that

additions to the gas reserves, committed to supply its line, are necessary. But they are willing to accept, in this particular case, as a substitute for a *positive determination* of adequate gas reserves, the assumption that Tennessee Company will be able to acquire additional reserves.

“Thus, by their dissent, the minority would effectually repudiate the statement quoted above, although only recently they participated in a decision in the Trans-Continental Pipe Line Case in complete accord therewith, without the deleterious results which they conjure up here. It is a well-known fact that the unanimous decision to reopen that case for lack of a proper showing on the supply side had a beneficial effect on the general availability of gas for the pipe-line market and that Trans-Continental was able, within a few weeks, to come in with a showing of dedicated reserves affording both investors and consumers complete protection.

“The fact is that the Commission has a responsibility to millions of investors as well as consumers to make a *positive determination* that adequate supplies of gas are assured. For a certificate of convenience and necessity is recognized as a great aid to the issuance of securities because it implies that the evidence as to adequate supplies of gas for the term of the financial obligations has been well tested by an impartial body.”

The same two Commissioners who dissented in *Re Atlantic Seaboard Corporation, supra*, had this to say concerning the importance of a determination of natural gas reserves in their report to Congress entitled Federal

Power Commission, *Natural Gas Investigation* (Docket No. G-580) Report of Commissioners Smith and Wimberly (1948), at page 31:

“For individual fields or local areas, however, estimates of natural-gas reserves have always been a requirement of the industry. Before a pipe-line company can justify the construction of a line to bring gas from a particular area to a market, it must know that there are sufficient quantities of gas available to permit profitable operations. Bankers and investors, before financing gas development projects, require a determination of the gas reserves of the area being considered. Regulatory commissions, having authority as to methods of financing and conditions of service, must be apprised of the extent of the gas supply before appropriate authorizations for the construction of pipe lines or distribution facilities can be granted.

“A distribution utility also has an interest in the availability of gas reserves, either in local areas or those within feasible distance. Not only is there a need for the justification of capital expenditures in the expansion of facilities for new services, but the matter of rates, utility rules and regulations, and other policy considerations are affected by the abundance or scarcity of available gas. The consumer is, of course, anxious that there will be large enough quantities of gas available to afford reasonable rates for service and to assure him a continued use of his appliances.”

While decisions of federal commissions are not conclusive on a state commission, they are important au-

thority as was said by the State Commission in *National Tube Co. v. Baltimore & Ohio R. R. Company, P.U.R.* 1918 D., page 68:

“Decisions of the Interstate Commerce Commission, although not binding upon a state commission should be considered as persuasive authority by it.”

On the basis of the foregoing and by all reasonable standards, it is inescapable that an applicant for a certificate of convenience and necessity to construct a natural gas pipeline must first establish as the basic prerequisite that it has available at its disposal sufficient volumes of natural gas to supply the requirements of the proposed line. The public interest is safeguarded only when the supply is sufficient to give the project a usable life sufficiently long to insure that the costs to the public in preparing itself to use the new facility and the costs to the applicant of the project, which are passed on to the public in the rates it pays, will be amortized over a reasonable period. *Re Grand Rapids Gas Light Co., supra.*

When an applicant fails to show that it has an adequate supply of gas to furnish the needs of its proposed line it would seem that the logical procedure for a commission to follow would be to either dismiss the application or reopen the proceedings at a later date for the taking of additional evidence on gas supply. The Public Service Commission of Pennsylvania dismissed the application in such a situation in *Incorporators of Service*



*Gas Company v. Public Service Commission*, (1937) 190 Atl. 653, 18 P.U.R. (N.S.) 256. In *Memphis Natural Gas Co.*, 4 F.P.C. 197, 608, the Federal Power Commission dismissed the application for a certificate because of the inadequacy of the gas supply showing and subsequently granted a rehearing in order to afford the applicant an opportunity to make a further showing. In several cases where, upon initial consideration of the application, the supply of natural gas available to the applicant has been found inadequate, the Federal Power Commission has reopened the proceedings for the taking of additional evidence on gas supply and has allowed the applicants a period of time within which to make a further showing on that subject. The periods of time allowed for such further showings have varied from sixty days (*Tennessee Gas Transmission Co.*, 3 F.P.C. 442; *Piedmont Natural Gas Corp.*, March 30, 1950) and three months (*Tennessee Gas Transmission Co.*, Docket No. G-962, September 29, 1948; *San Juan Pipe Line Co. and El Paso Natural Gas Co., et al.*, Dockets Nos. G-1067, et al., July 13, 1949) to as much as six months (*Transcontinental Gas Pipe Line Co.*, Docket No. G-704, March 31, 1948).

(d) *How Adequacy of Reserves Is Determined.*

Estimating the volume of gas reserves is not an exact science. The test is not to determine by mathematical calculation the exact extent of the gas reserves in particular reservoirs. This does not mean, however, that the requirements for showings of adequate gas reserves



are lax or haphazard. As the Federal Power Commission puts it, "in evaluating the evidence as to gas reserves it is not realistic to attempt a determination of the precise or exact volumes of gas available to a proposed project. Rather we are called upon to determine whether the available gas supply is sufficiently adequate to support the project for which a certificate of public convenience and necessity is authorized." *Re Michigan-Wisconsin Pipe Line Co.*, (1947) 67 P.U.R. (N.S.) 427. However, the Commission feels that its determination that adequate supplies are assured must be *positive determination*. (See quotation from "The First Five Years of the Natural Gas Act," *supra*.)

To make a positive determination of adequate supply, it would seem that a commission could only rely upon *proven reserves* of natural gas; that is, reserves in fields where actual wells had been drilled and recoverable natural gas discovered. Thus, it will be noted that the Michigan Public Utilities Commission, in the case of *Re Grand Rapids Gas Light Co.*, *supra*, carefully and conservatively considered only estimates of proven reserves, or reserves from fields in which wells had been drilled and gas discovered and from which gas was being produced. 13 P.U.R. (N.S.) 451 to 454.

In this connection, the Commission made some observations relative to natural gas reservoirs, of interest here, at page 449:

“Natural gas in Michigan comes mostly from what is called Michigan stray sand. It is not found in open spaces or in pools. The ‘pay sand’ underlying the surface of this state is not a continuous sheet. In some places pay sand has been found to be as much as 27 to 30 feet in thickness; in other places it is only 2 feet thick or less. A well on one forty may discover commercial pay sand, while a well a few hundred feet away is a dry hole. The porosity of the sand itself frequently determines the amount of natural gas which may be recovered from it. More natural gas is found in the interstices of pay sand which is coarse than can be recovered from a tightly packed sand, and obviously more natural gas is recoverable as the thickness of the pay sand increases. The amount of reserves of natural gas in a certain area does not at all depend upon the amount of so-called ‘open-flow.’ A large pipe driven into pay sand of open porosity and of considerable depth may develop an open flow in excess of 30 million cubic feet but this does not increase the amount of gas in the area or necessarily indicate the extent of the reserves. As a simple comparison we may consider a gas area as a barrel which holds only a certain amount of contents. Boring a large hole or a large number of smaller holes into the barrel may remove the contents more rapidly, but only so much can be taken out of the barrel as it originally contained. Natural gas is not being manufactured underground. It is there in fixed quantity, and taking out the gas does not increase the quantity. In fact, if taken out too rapidly the amount of recoverable gas may be substantially decreased and as in the Muskegon field, the usefulness of the area may be rapidly destroyed.”

The Federal Power Commission also looks fundamentally to *proven* reserves. *Re Michigan-Wisconsin Pipe Line Co.*, *supra*, at page 442 et seq.; *Re Kansas Pipe Line & Gas Co.*, *supra*, at page 332 et seq.

(e) *Inadequacy of Evidence of Reserves in this Case.*

In delineating the scope of its review of proceedings of the Public Service Commission of Utah under Sec. 76-6-16, U.C.A. 1943, this Court reannounced in the comparatively recent case of *Salt Lake & Utah R. Corp. et al. v. Public Service Commission of Utah, et al.*, (Sup. Ct. Utah 1944) 106 U. 403, 149 P. 2d 647, the rule which it had prescribed for itself, as follows:

“Under 76-6-16 U.C.A. 1943, which provides that ‘ \* \* \* The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review \* \* \* ’ this court has many times said that it is limited in its review of a decision of the commission to ascertain whether the commission had proceeded according to law and whether it had sufficient substantial evidence before it upon which to base its findings. Only in the event that it is apparent from the record that there was not sufficient substantial evidence before the commission and that its order was arbitrary, capricious or unreasonable, will this court set aside its decision. *Utah Light & Traction Co. v. Public Service Commission*, 101 Utah 99, 118 P. 2d 683; *Mucahy et al. v. Public Service Commission, et al.*, 101 Utah 245, 117 P. 2d 298; *Salt Lake City et al. v. Utah Light & Traction Co.*, 52 Utah 210, 173 P. 556, 3 A.L.R. 715; *Union Pacific Service Commission*, 103 Utah 459, 135 P. 2d 915.”

In the recent case of *Universal Camera Corporation v. N.L.R.B.* (Supreme Court of U.S. 1951), 340 U.S. 474, 95 L.Ed. 304, the Supreme Court of the United States had before it an appeal involving the question of the extent of the scope of review of appellate courts of the United States in cases appealed from the N.L.R.B. under the Taft-Hartley Law and the Administrative Procedure Act. The Wagner Act had originally provided that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive." Act of July 5, 1935 §10 (e), 49 Stat. 449, 454, ch. 372, 29 USC §160 (e). The Supreme Court construed "evidence" to mean "substantial evidence" and hence establish the so-called substantial evidence rule. *Washington, V. & M. Coach Co. v. National Labor Relations Board*, 301 US 142, 81 L.ed. 965, 57 S. Ct. 648.

The Administrative Procedure Act, dealing with judicial review of administrative proceedings in general, provided in part under the section dealing with scope of review that reviewing courts should deal with administrative actions, findings and conclusions which were found to be violative of certain standards there set out (such as arbitrary or capricious, excess of statutory jurisdiction, unsupported by substantial evidence and others) in the manner outlined. Then this section provided: "In making the foregoing determinations the court shall review *the whole record* or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error," 60 Stat. 243, 244,

ch. 324, 5 U.S.C. Sec. 1009(e). The Taft-Hartley Act, passed subsequent to the Administrative Procedure Act, was made to conform to the corresponding section of the Administrative Procedure Act above referred to. In the court's opinion Justice Frankfurter stated at 95 L.ed. 312:

“Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitively precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record.”

Further, the court stated at page 314:

“We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoy-

ing the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.

"From this it follows that enactment of these statutes does not require every court of appeals to alter its practice. Some — perhaps a majority — have always applied the attitude reflected in this legislation."

It is believed that the Supreme Court of Utah, in applying its "substantial evidence" rule to orders of the Public Service Commission on appeal before it, has consistently applied such rule in the same manner as Justice Frankfurter states that perhaps a majority of courts have always applied the substantial evidence rule, i.e. to the evidence as viewed "on the whole record." The very manner in which this court reviewed the evidence in the *Salt Lake & Utah R. R. Corporation case, supra*, indicates that it reviewed all evidence in the record pertinent to the points complained of and then concluded that the Commission had and could reasonably reach the conclusions it did. See also *Gilmer v. Public Utilities Commission*. (Sup. Ct. of Utah 1926) 67 U. 222, 247 Pac. 284, and the statement at the conclusion of the court's review in that case at page 290.



*Summary of Inadequacy of Reserves*

What, then, did Utah Natural Gas Company show in the way of reserves for its proposed pipeline?

Upon the basis of the evidence the only structure the reserves of which could be classed as proven would be Boundary Butte; and, of course, that gas has a very low B.T.U. content, falling far short of meeting the market requirements as set by Utah Natural Gas Company itself of 875 B.T.U. per cubic foot. Taking the most favorable estimate of proven reserves at Boundary Butte, we find that Utah Natural Gas Company's witnesses estimated 133,980,000,000 cubic feet of recoverable proven reserves. Computing the amount of such reserves available for use in the pipeline on the same basis that Utah Natural Gas Company used in arriving at the amount of net recoverable reserves available (i.e. from approximately 348 billion of proven and probable reserves they estimated a net available for the pipeline of 255 billion) we find that not more than 98 to 100 billion cubic feet would be available for use in the pipeline over a twenty-year period, or roughly 13 to 14 million per day. This figure, of course, is based upon full ownership of the gas at Boundary Butte. The amount of the gas at Boundary Butte actually committed to the pipeline, then, would be only about 25 billion cubic feet of reserves available for the pipeline, or only about  $3\frac{1}{2}$  million cubic feet per day over a twenty-year period. This evidence was contradicted by very convincing evidence, for the record fairly reflects that the reserves were even smaller



than above set out. Compare this with the McGuire Company's pipeline requirement of 100,000,000 cubic feet a day.

This Boundary Butte gas would necessarily have to be mixed with gas from some other area with a very high B.T.U. content in order to make it usable at all. And what did the Utah Natural Gas Company offer? The Greater Monticello structure, a doubtful probable area of gas reserves about which no one knows much and about which Utah Natural Gas Company offered pitifully little evidence upon which to base any more than a faint hope that gas was there. The net effect was that the backbone of the pipeline was left without any gas to support it. Nor did the "stepchild" structure of Last Chance offer any support. This structure, apparently an after-thought in the planning of the pipeline project, could not, with its low pressure, low B.T.U. and small volume reserves, furnish the sustenance needed; even if the fantastic claims of the witnesses of Utah Natural Gas Company are admitted. All in all, this is certainly not the "stuff" upon which pipelines are built and it certainly should not be the "stuff" upon which certificates are issued.

The public Service Commission of Utah in its finding specifically recognized and found that the respondent had failed to establish that it had adequate proven reserves for the pipeline sought in its Findings and Report. The Commission stated at page 4:

“The principal structures upon which applicant relies for its sources of supply are designated and known as Boundary Butte, Monticello and Last Chance. Witnesses for the applicant estimated recoverable reserves of gas from these structures of one trillion, one hundred thirty-four billion cubic feet. In addition the evidence indicates that there are other structures located at points and places along the course of applicant’s proposed pipe line and in the southeasterly part of the State of Utah which are likely sources of additional supplies of natural gas. *None of the fields from which the applicant proposes to obtain gas, however, have been sufficiently explored to prove the extent of the reserves.*”

(f) *Summary*

From the foregoing it is submitted that, in safeguarding the public interest as the paramount concern, the basic fundamental prerequisite to the issuance of a certificate that present or future convenience and necessity does or will require the construction of a gas pipeline is a showing that the applicant for such certificate has an adequate supply of natural gas to supply the needs of such pipeline in the form of adequate, available, proven reserves of natural gas. It is further submitted that, by all reasonable and recognized standards, the Utah Natural Gas Company has wholly failed to show such reserves and that the record in this case contains no competent substantial evidence which would establish that such prerequisite has been met. In fact, the evidence in the record shows clearly that respondent Utah Natural

Gas Company has available inconsequential and wholly inadequate supplies of gas for its pipeline. The Commission, in its Findings and Report, so held. In view of the fact that the applicant, Utah Natural Gas Company, failed to establish that it had met such a fundamental prerequisite, the Commission erred in finding that a certificate of public convenience and necessity should be granted to Utah Natural Gas Company.

### POINT B

“(b) THAT THE COMMISSION ERRED IN FINDING THAT A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY SHOULD BE GRANTED TO THE APPLICANT, UTAH NATURAL GAS COMPANY, IN THAT THE RECORD CONTAINS NO COMPETENT, SUBSTANTIAL EVIDENCE TO SUSTAIN A REQUIRED SHOWING THAT FIRM COMMITMENTS FROM FINANCIALLY RESPONSIBLE SOURCES FOR THE REQUIRED FINANCING OF THE PIPELINE HAVE BEEN MADE, BUT ON THE CONTRARY, THE EVIDENCE SHOWS THAT THE APPLICANT HAS NO FIRM COMMITMENTS FOR THE REQUIRED FINANCING AND CANNOT OBTAIN SUCH COMMITMENTS UNTIL SUCH TIME AS ADEQUATE PROVEN GAS RESERVES MAY BE AVAILABLE TO APPLICANT.”

### STATEMENT UNDER POINT B

The Utah Natural Gas Company was organized for the express purpose of transporting gas through its proposed pipeline. The corporation was set up with 1000 shares of stock outstanding with a par value of \$1.00 per share, all of which was subscribed by Mr. McGuire, its president (R.21). President McGuire advanced money

or incurred indebtedness to the extent of \$77,760.79 for expenses of the company (R. 505), and this was added to the capitalization of the company as reflected by Exhibit 68 (R. 943-947) and Mr. McGuire was to take stock in return (R. 946).

Witness Mehrten, for Utah Natural Gas Company, in Exhibit 42, page 4, offered a proposed plan of financing "for purposes of illustration only" whereby the funds required for financing the \$32,000,000 pipeline project might be raised (R. 258-9).

Witness McGuire stated that he had undertaken to procure financing for the pipeline and that he had procured a commitment from a responsible financial house that would undertake to finance the construction of the line (R. 37-8). The letter (supra) from Lehman Brothers to Utah Natural Gas Company, dated July 25, 1950, introduced as Exhibit 45, was offered as the commitment above referred to.

Utah Natural Gas Company also introduced a second letter from Lehman Brothers to Mr. John A. McGuire, President, Utah Natural Gas Company, dated January 23, 1951, as Exhibit 53, which letter stated, in effect, that Lehman Brothers had employed two individuals to make a report on proven gas reserves dedicated to supplying the pipeline.

Utah Natural Gas Company witnesses Fell and Rusmisl testified in effect that the letter of July 25, 1950 was not a firm commitment to make a loan and

that considerable development work remained to be done before they would be ready to make a commitment (R. 457-461, 471-472.)

## ARGUMENT AND AUTHORITIES UNDER POINT B

The second fundamental prerequisite to the issuance of a certificate is a showing that the applicant has adequate means of financing the proposed construction. Before a commission can reasonably say that the public convenience and necessity require "*such construction*" (76-4-24, U. C. Anno. 1943) it would seem elementary that it must inquire into, and be satisfied with, the adequacy and soundness of the proposed financing of the projected construction. Logically, this entails a showing by an applicant that either it has the requisite ability itself or that it has a firm commitment to furnish such financing from some source which has such financial ability. From an observance of the Rules of Practice and Procedure of the Public Service Commission of Utah, it is apparent that such commission has so conceived its purpose and function. Section 11.2 of such Rules requires that applications for certificates of convenience and necessity must show, in addition to other requirements, "a statement showing the financial condition of the application" and "the manner in which it is proposed to finance the operation." The commissions and courts of other states have also so conceived the requirement of such a showing in order to safeguard the public interest involved.

The Supreme Court of Wisconsin in 1931 had before it a case which involved the question of whether or not a commission could require a showing of adequate financing in reference to proposed construction under a certificate of convenience and necessity. *Union Co-operative Telephone Company vs. Public Service Commission of Wisconsin* (Sup. Ct. Wisconsin 1931) 239 N.W. 409, P.U.R. 1932B, 269. The facts in the case reveal that the Ontario & Wilton Telephone Co. served a small community in Wisconsin. The Company proposed a change in rates and the citizens, resenting this change in rates allowed by the Railroad Commission, organized the Union Co-op for the purpose of furnishing competing telephone service. Union Co-op applied for a certificate and was turned down by the Railroad Commission on the grounds that the dissatisfied patrons had not exhausted the remedies available for improvement of the service. This was an appeal, with the Public Service Commission, successor to the Railroad Commission, as defendant on appeal. The Public Service Commission on appeal did not agree with the Railroad Commission's reason for dismissing the application, but maintained that the failure to show proper financial ability was sufficient reason for the denial. In reference to this point the Supreme Court said at P.U.R. 1932B, page 272:

“ . . . While the Public Service Commission does not approve the reason assigned by the former Railroad Commission for the denial of the certificate it does approve of the determination, because there was no showing made by the



applicant that it possessed the proper financial ability to install and maintain a competing utility. This seems to be a condition required by many Public Service Commissions before such a certificate will be granted. *Re Gulich* (1925) 26 Col. R.C.R. 312, P.U.R. 1925E, 359; *Re Fulton Petroleum Corp.* (Colo. 1930) P.U.R. 1931A, 373; *Re Wyoming-Montana Pipe Line Co.* (Wyo. 1930) P.U.R. 1931B, 63; *Re Universal Bus Line Co.* (Ill. 1922) P.U.R. 1923B, 90; *Re St. Louis-Kansas City Short Line R. Co.* (1925) 15 Mo. P.S.C.R. 327 344. The Supreme Court of Illinois set aside a certificate of convenience and necessity issued by the Public Service Commission of that state, for the reason that the application was not supported by proof showing that the applicant possessed the financial ability to furnish an adequate service or to otherwise discharge its duties as a public utility in the field which it was authorized to enter. *Roy v. Illinois Commerce Commission, ex rel. North Shore Connecting R. Co.* (1926) 322 Ill. 452, 153 N.E. 648. Such a showing would seem to be a very reasonable requirement if exacted by the administrative body as a condition precedent to the issuance of the certificate, and all that can be said is that this would seem to furnish an additional reason justifying the withholding of the certificate by the Railroad Commission. The determination of the Railroad Commission here challenged was fully justified by either of the considerations above mentioned . . . ”

Under a statute almost identical to the Utah Statute here involved, the Missouri Public Service Commission,

in *Re Achtenberg* (1934) 8 P.U.R. (N.S.) 1937, had this to observe about the requirement of adequate financing, at pages 410-411:

“Respecting the suitability of the applicant and his associates to perform this function we mean, of course, no inquiry as to personal fitness but mean that before granting the certificate prayed, we should examine a concrete proposal and ascertain whether it is reasonably adapted to serve permanently the public need which we have found to exist. This involves the financial feasibility of the project generally and also the probable stability and soundness of the particular securities to be offered to the public for sale. We take this responsibility seriously and are gratified that in the present period of unprecedented financial distress and disorder, no secured obligation ever approved by this Commission is in default in this state.

“The proposed financing of the applicant is in our judgment too uncertain and vague for us to place the stamp of our approval upon it in advance. The amount which the applicant will have to pay for the properties in question is as yet unascertained. The amount which can reasonably be anticipated to be derived from the sale of preferred stock is wholly conjectural. The amount of the proposed borrowing from the Reconstruction Finance Corporation is dependent upon the amount derived from the sale of the preferred stock and is, consequently, equally vague. This Commission has not as yet had occasion to pass upon the method by which the requirements of the RFC may be reconciled with the principles of finance heretofore deemed essential by the Com-

mission. The principal difficulty which we apprehend grows out of the requirement that such government loans shall be self-liquidating that is, that the company shall devote enough of its earnings to effect retirement of this indebtedness within a period prescribed by the RFC. We have not yet formulated a method by which this requirement can be reconciled with the principle that the utility is authorized to charge such rates as will yield a fair return upon the fair value of the property used and useful in the public service, and no more. The actual retirement of such a loan, not by way of consumption of capital by use in the public service, but by charging rates which will enable the amount of such capital to be definitely withdrawn from the project, presents a question of considerable difficulty for which we have not yet found or been obliged to find a solution. For these reasons we withhold expression of approval or disapproval of the applicant's proposed financial arrangements."

The New York Public Service Commission has had at least two interesting cases dealing with the point under discussion. In *Re Buffalo Jitney Owners Association* (1923) P.U.R. 1923C, 645, there were involved applications for certificates to institute a bus line. The application of Buffalo was denied and one of the primary reasons for such denial was lack of a plan upon which to finance the acquisition and operation of the bus line. Concerning this the Commission said at pages 653-654:

"\* \* \* the petitioner has no funds with which to finance the enterprise and has no definite plans for procuring such funds.

“There is a suggestion that a corporation may be formed later which will be capitalized at \$150,000, about \$75,000 of which it is said will be furnished by the members of the association and the other \$75,000 by citizens and business men of the City of Buffalo. If stock of this amount were sold, it would provide only \$150,000 of the \$350,000 which the association estimates will be required to purchase 50 busses. But there is nothing definite as to where any of the money is coming from. Even in respect of the \$150,000 which the association hopes to raise by the sale of stock, nothing has been done, no subscription paper has been circulated, and in the words of the President of the association, there is ‘nothing binding’ so far as the sale of stock is concerned.”

In *Re Niagara* (New York Public Service Commission 1916) P.U.R. 1917A, 278, the New York Commission had before it another application for a certificate of convenience and necessity, this time to construct a railroad. In holding that the applicant had failed to show that public convenience and necessity required such construction, the Commission said this in relation to financing at page 286:

“As to financing the Niagara River & Eastern Railway, the record does not disclose any agreement on the part of any person to furnish the necessary moneys. The only evidence produced before the Commission on this important subject is found in the testimony of Mr. Frank A. Dudley, who presented certain letters and telegrams from three incorporators, which were claimed to be sufficient to show that those who sent them could

be relied upon to furnish the necessary funds. Mr. Edward G. Connette, of Buffalo, the President of the International Railway Company, stated that 'when necessary consents from public authorities are obtained, I shall assist as far as possible in the financing of the proposition.' Mr. E. R. Wood of Toronto, a man of financial importance, telegraphed that 'when the company secures the necessary rights and permission, I will be glad to assist in financing.' Mr. Clifford D. Beebe of Syracuse, the President of a syndicate of electric railroads in Central New York, wrote that 'in refinancing the Niagara River & Eastern Railroad, our associates in connection with New York, Buffalo and Canadian interests will be prepared to carry our share of the cost of that enterprise.' The communications, which are given verbatim, contain all the facts which may be claimed as a basis for any agreement, subscription or obligation on the part of any person to assist in financing this project."

The Federal Power Commission has also considered and made requirements concerning the proposed financing of any project coming before it on an application for a certificate of convenience and necessity. In its first case under the Natural Gas Act, *Re Kansas Pipe Line & Gas Company*, (1939) 30 P.U.R. (N.S.) 323, *supra*, the Commission announced certain fundamental prerequisites which must be established prior to the issuance of a certificate of convenience and necessity. The requirement of adequate natural gas reserves has been heretofore referred to and discussed under Point A. In reference to financing, the Commission had this to say at pages 342-343:

“We believe that applicants for certificates of convenience and necessity should show that they possess adequate financial resources with which to construct the facilities for which certificates are sought. Other regulatory Commissions have denied applications for certificates where the applicants have been unable to show adequate financial resources. *Re Niagara River & E. R. Co.* (N.Y. 1916) P.U.R. 1917A, 278; *Re Buffalo Jitney Owners Asso.* (N.Y.) P.U.R. 1923C, 645; *Re Wyoming-Montana Pipe Line Co.* (Wyo. 1930) P.U.R. 1931B, 63; see also *Re Carver* (Colo. 1922) P.U.R. 1923B, 242. When we consider that one effect of the issuance of a certificate to construct and operate facilities to and in a given area is to preclude from that territory other construction or operation except under a certificate issued by us, the necessity that the present applicants be financially able to consummate their proposed construction becomes the more apparent.

“In the instant proceedings the applicants have stated that they intend to rely for their finances entirely upon the successful disposition of applications each has filed with the Reconstruction Finance Corporation. Witnesses for both applicants have testified that for projects of the magnitude of those here under consideration the ordinary financial channels are closed; that the sale of securities to the general public in customary fashion is impossible for this type of project. We pass no comment upon this latter contention other than to note that neither applicant appears to have seriously made any attempt to finance through such channels.

“Neither applicant has submitted any firm commitment from the Reconstruction Finance



Corporation that that organization will loan applicants the necessary funds. The record is silent upon the subject of the terms, conditions, type of security, method of repayment, amount, and other details of any financing program. Under these circumstances we could justifiably deny the applications before us; certainly we cannot authorize the issuance of unconditional certificates or, *without assurance on this vital point, make a finding that the present or future public convenience and necessity requires or will require the construction and operation of the proposed facilities.*

“However, we have been informed from the beginning that applicants intended to finance through the Reconstruction Finance Corporation and there is evidence in the record to the effect that that body had informed the applicants that action on their pending applications for loans would be held in abeyance until applicants had presented their applications for certificates to this Commission. Under these circumstances we do not feel it expedient presently to deny and dismiss the applications forthwith solely for lack of proper financial support.

“We have no desire to foreclose the consideration of these matters by the Reconstruction Finance Corporation. We realize that the standards by which applications are judged by the two agencies may vary and the matters on which we place emphasis may not be the same which the Reconstruction Finance Corporation considers important.

“Accordingly with regard to this matter we find that: neither applicant has made a satisfactory showing that it possesses the requisite financial ability to construct the facilities for which certificates are sought: applicants must, therefore, make further showing satisfactory to us that they have secured adequate finances with which to prosecute the proposed undertakings before we can finally dispose of the pending applications.”

The Commission has continued to adhere to this requirement of a showing of adequate financing as a prerequisite to the issuance of a certificate of convenience and necessity.

The record in the proceedings before the Commission in this case fails to show any definite plan of financing or any firm commitment from any financially responsible source to guarantee that the project will be financed. In fact, not only does the record fail to show such, but it affirmatively establishes that such facts did not exist at the time of the hearing. The letter from Lehman Brothers to Utah Natural Gas Company, dated July 25, 1950, (Exhibit 45) was introduced to show that the applicant, Utah Natural Gas Company, had a firm commitment for financing of the gas pipeline. Actually, as can be readily seen from the letter it is nothing more than a statement by Lehman Brothers that *if* all the conditions as there set out are met, it will undertake to provide adequate financing. Exhibit 53, a letter from

Lehman Brothers to the President of Utah Natural Gas Company, dated January 23, 1951, adds nothing to the letter it supplements, insofar as a firm commitment for financing is concerned.

Mr. Mehrten, the Certified Public Accountant witness for Utah Natural Gas Company, offered for "purposes of illustration only" his idea as to a possible breakdown and ratio of securities which could be used in procuring funds with which to finance the proposed pipeline. Such ideas were indeed meager and vague (R. 258-9, Ex. 42, page 4). In testifying in relation to such "illustration," witness Rusmisl, an executive with Lehman Brothers, stated at page 474 of the Record:

"Q. Have you discussed with him (Mehrten) in what proportion the stock and the bank loans would be to make up the \$3,000,000?

"A. Well, I have discussed this with him. I don't know that I attempted to tell Mr. Mehrten how we would vary this, because I understood that this was being used for illustrative purposes really, and I think my own testimony has to be treated pretty much on the same basis."

In relation to a general plan of financing Mr. Rusmisl stated, at page 470 of the Record:

"Q. As a matter of fact, the truth is that you don't have a definite plan set up and agreed to on this project, do you?

"A. No. I think it is impossible to have a definite plan at this time."

Concerning the July 25, 1950 letter (Ex. 45) and the so-called "commitment" to finance supposedly contained therein, Utah Natural Gas Company's witness Fell, a partner in Lehman Brothers, testified as follows, at pages 457-458 of the Record:

"Q. Lehman Brothers today is not committed to make any loan is it?

"A. No Sir."

\* \* \*

"Q. You have given a letter of intent, isn't that all this is?

"A. Yes, but I'd like . . . I think it is only fair to say that we have given more thought to this than just a letter of intent. As I said earlier, we do not write these letters as a means of obtaining a call on a piece of business."

\* \* \*

"Q. We are discussing whether or not there is a firm commitment to make a loan. That is all I am asking you, Mr. Fell.

"A. This is not a firm commitment to make a loan as of today."

In discussing the matter of reserves and the geological report on reserves which Lehman Brothers would require as a prerequisite to financing, witness Fell testified at R. 459-61:

"Q. Why haven't you as yet hired the engineers to make this report?

“A. Well, I don’t believe that . . . Now, this is my opinion, not as a geologist at all or as a petroleum engineer, or really knowing much at all about the gas and oil business . . . it doesn’t seem to me that there has been enough development in this area probably to . . . or the rest of the development required to build . . . well, to complete this whole project to where a report at this time would be of much use to you.

“Q. In other words, it is your opinion that on the basis of the proven reserves up to this date it wouldn’t support any such financing as we are talking about?

“A. The estimated proven reserves as of today?

“Q. Yes, Sir.

“A. It would not.”

\* \* \*

“Q. Now, you have heard the testimony, you are aware that some 60 per cent of the projected gas comes from Greater Monticello, which the applicant itself treats as possible reserves, or probable reserves, isn’t that true?

“A. Yes.

“Q. Then, in your opinion, do you think that would require considerable development before you would be satisfied that that was a proven field?

“A. I think Monticello would require considerable development, or, if not Monticello, something else.

“Q. I see. Then at best there is a great deal of work to be done before you will be ready to make a commitment?

“A. Yes, Sir.”

Concerning the same subject, witness Rusmisl stated the following at page 471 :

“A. Well, that report would have to show . . . as I understood most of the testimony that has been given, a large percentage of the reserves have been designated as estimated reserves. We understand that there is a great deal of exploration work going on now and planned, and that report would have to show that these reserves had passed from the category of ‘estimated reserves’ to ‘proven reserves,’ so that we would be assured of a sufficient supply of gas for the line.

“Q. For a reasonable period of time?

“A. For a reasonable period of time, that’s correct. As a matter of fact, I would say in that connection, a minimum of 20 years.”

From the evidence in the record, it is readily seen that Utah Natural Gas Company did not have itself the financial ability to construct the line and that it had no firm commitment from a financially responsible source for the required financing of the pipeline. In fact, the evidence in the record clearly shows that the financial source upon which Utah Natural Gas Company has relied will not, and cannot, furnish such commitment until the time when adequate proven reserves have been shown to be available to the pipeline.



Obviously Mr. McGuire had gone to Lehman Bros. and stated that it would help him before the Commission if he had something in writing which indicated Lehman Bros. might be interested in the financing. The attempt to construe the Lehman Bros.' letter (Ex. 45, R. 1084) as a financial commitment is pure distortion. Lehman Bros. considered it no such commitment and the letter is the kind that could be written on any project no matter how fantastic. Further, the Commission recognized the inadequacy of the financial arrangements offered by the Utah Natural Gas Company in that it provided in its Findings and Report that the certificate which it was to grant should be conditioned upon the requirement that within one year Utah Natural Gas Company should "file with this Commission the *unconditional commitment* of a financial house of recognized responsibility committing itself to supply the funds necessary for the construction of the pipeline and the facilities to be installed by Utah Natural Gas Company."

It is not here being contended that complete and minute financial details are absolutely necessary at the initial hearing concerning an application for a certificate of convenience and necessity. Furthermore, it is not here being contended that in certain circumstances a certificate cannot be issued with the attachment of a condition to later furnish adequate evidence of firm

commitments of complete financing. In situations where an applicant has shown that it has available adequate supplies of natural gas and that the pipeline itself is economically feasible, a Commission might conclude that the procurement of adequate financing would be relatively easy, and under such circumstances the Commission might conclude that the issuance of a certificate with a condition that the evidence of firm commitments for financing could be later shown.

In Docket No. G-704, *In the Matter of Trans-Continental Gas Pipe Line Company, Inc.*, Opinion No. 165, May 29, 1948, the Federal Power Commission had before it the reopened proceedings concerning the application of Trans-Continental for a certificate to construct a natural gas pipeline from South Texas to New York City and other points in the East. After reviewing the record as to other points and finding that the proposed project was economically feasible, the Commission said, in relation to the plan of financing, the following:

“Trans-Continental proposes a capitalization consisting of Bonds and Bank Loans equalling 78%, Preferred Stock 12%, and Common Stock 10%. Applicant’s witnesses testified that conversations with responsible financial institutions indicated that the Applicant could issue the twenty-year serial bonds at a cost of  $31\frac{1}{2}\%$  to  $33\frac{3}{4}\%$  and obtain ten-year bank loans at approximately 3%, dependent upon market conditions at the time of the financing. The President of Trans-

Continental stated that he had entered into no firm commitments for financing the project at this time. We recognize that more definite commitments on the part of the Applicant or financial institutions are not feasible or to be expected at this stage.

“Applicant’s witnesses testified that preferred stock representing 12% of the total capitalization could be issued at a cost to the Applicant slightly in excess of 5%, with the qualification that dependent upon market conditions at the time of financing, it may be necessary to issue Common Stock in conjunction with the sale of the Preferred Stock. Testimony also has been presented indicating that with the possible exception of the Common Stock which may be issued in connection with the sale of the Preferred Stock, none of the Common Stock would be initially offered to the public.

“On the basis of the financial testimony in the record, the recent firming of contracts providing for gas reserves over a probable twenty-year period, and the willingness of the marketing companies to purchase the gas at rates which will carry the project, it appears that the proposed plan of financing is economically feasible. However, since Trans-Continental has not entered into any firm commitments concerning its proposed financing, it seems reasonable in the public interest to require the submission by Trans-Continental of a definite plan of financing for consideration by the Commission, including full description of the securities to be issued and the terms and conditions of the sale thereof.”

It will be noted in connection with the above Federal Power Commission opinions that in each instance the Commission had before it far more definite plans of financing than were presented in the hearing involved in this appeal. Furthermore, it will also be noted that in each instance the Commission was dealing with situations where the evidence presented by the applicants had conclusively established that the applicant in each case had adequate and sufficient supplies of natural gas to furnish the anticipated needs of their respective projects over the life of such pipe lines. It appears to be in such an instance only that the Federal Power Commission will allow anything less than an absolute showing of a firm commitment for financing a particular proposed project. Certainly, in a situation where an applicant has failed to prove that it has adequate reserves, the Federal Power Commission or any other Commission can ill afford to issue a certificate on such meager showing of financial commitments as was presented in this proceeding below.

From the foregoing, it is submitted that a fundamental prerequisite to the issuance of a certificate "that present or future convenience and necessity does or will require *such construction*" is a showing that the applicant for such certificate has adequate means of financing the proposed construction. This would necessarily mean that an applicant must either have the financial ability to carry out the construction itself or a firm commitment from a financially responsible source committing such source to the financing of such construction.

The record in this case contains no competent substantial evidence which would establish that such prerequisite had been made. In fact, the evidence in the record shows clearly that respondent Utah Natural Gas Company has no firm commitments for the required financing and cannot obtain such commitments until such time as adequate proven reserves are available to the pipeline. The evidence here is of the same character as, and surely no stronger than, the evidence relied upon by applicants in the cases of *Re Buffalo-Jitney Owners Association* and *Re Niagara, supra*. The Commission, in its Findings and Report, in effect, so held. In view of the fact that the applicant, Utah Natural Gas Company, failed to establish that it had met such a fundamental prerequisite, the Commission erred in finding that a certificate of public convenience and necessity should be granted to Utah Natural Gas Company.

### POINT C

“(c) THAT THE COMMISSION EXCEEDED ITS JURISDICTION IN GRANTING SUCH CERTIFICATE AFTER FINDING IN EFFECT: (1) THAT APPLICANT DOES NOT HAVE ADEQUATE PROVEN GAS RESERVES COMMITTED TO THE LINE; AND (2) THAT APPLICANT DOES NOT HAVE FIRM COMMITMENTS FOR THE REQUIRED FINANCING OF THE LINE.”

### STATEMENT UNDER POINT C

The Commission found in effect that Utah Natural Gas Company did not have adequate proven reserves of natural gas available for its pipeline. Quoting from

the Findings and Report of the Commission we find these statements in relation thereto:

at page 4:

“The principal structures upon which applicant relies for its sources of supply are designated and known as Boundary Butte, Monticello and Last Chance. Witnesses for the applicant estimated recoverable reserves of gas from these structures of one trillion, one hundred thirty-four billion cubic feet. In addition the evidence indicates that there are other structures located at points and places along the course of applicant’s proposed pipe line and in the southeasterly part of the State of Utah which are likely sources of additional supplies of natural gas. *None of the fields from which the applicant proposes to obtain gas, however, have been sufficiently explored to prove the extent of the reserves.*

at page 5:

“From the foregoing general findings, the Commission expressly finds that public convenience and necessity require that the quantity of natural gas applicant proposes to furnish be supplied to the area within the State of Utah covered by the application, *and if adequate gas reserves are proved as herein provided public convenience and necessity require the construction, operation and maintenance of the pipe line and facilities proposed by the applicant.*

at page 6:

“The Commission further finds that the estimated reserves in the area where the applicant



has gas purchase contracts are sufficient, *if proved*, to make the construction of applicant's pipe line and facilities economically feasible.

\* \* \*

"The Commission further finds *that if said reserves are proved*, the applicant can secure gas purchase contracts to deliver the gas so proved and developed into its pipe line."

The Commission then concluded that the certificate should issue to Utah Natural Gas Company, but upon the condition, among others, that:

"Concurrently with the furnishing of such commitment and as a part thereof, Utah Natural Gas Company shall file with this Commission the certificate of an independent geologist of recognized professional standing, acceptable to this Commission, *that there are proven gas reserves committed to Utah Natural Gas Company adequate to justify the construction of the line and facilities;*"

Further, the Commission found in effect that Utah Natural Gas Company did not have firm commitments for the required financing of the line. Quoting from the Findings and Report of the Commission :  
at page 5:

"Lehman Bros., a reputable and responsible financial house of New York City, has committed itself to furnish the necessary financing for the construction of the applicant's pipe line *provided that a study by a geological firm acceptable to Lehman Bros. finds that exploration and develop-*

*ment work proves that there are sufficient developed gas reserves available to make the operation of applicant's proposed pipe line economically feasible.*

at page 6:

*"The Commission further finds that the operation of the pipe line will be economically feasible with the available market if the estimated reserves are proved; and that if said pipe line is economically feasible the applicant can secure the necessary financing for the construction of the same."*

The Commission then concluded that the certificate should issue to Utah Natural Gas Company, but upon the condition, among others, that:

*"File with this Commission the unconditional commitment of a financial house of recognized responsibility committing itself to supply the funds necessary for the construction of the pipe line and facilities to be installed by Utah Natural Gas Company;"*

## ARGUMENT AND AUTHORITIES UNDER POINT C

This point is closely allied with points "A" and "B" but because the respondents claimed before the Commission that Section 76-4-24, Utah Code Annotated 1943, permits the Commission to issue conditional certificates we will elaborate on the effect of such a section where the fundamental requirements of adequate proven gas reserves and the necessary financing are not fulfilled.

Obviously the legislature never intended by Section 76-4-24 to give the Commission a "blank check" in the issuance of certificates. The legislature realized that there might be occasions when substantially all of the requirements had been met by the applicant but that some minor showing was lacking. To argue otherwise would be to in effect say that all that an applicant need do is make a written application to the Commission for a certificate and the Commission will then issue the certificate but impose the necessary conditions. A careful examination of the section which vests in the Commission the power to issue the certificate (Section 76-4-24) makes clear that public convenience and necessity would not require a particular service or a particular commodity from an applicant unless he had that which the public needed. That is to say, the Commission must find that public convenience and necessity "require such construction."

The Commission cannot properly safeguard the public interest by ruling, in effect, that it would be nice to have a gas pipeline into the Salt Lake City area supplying 100,000,000 cubic feet of gas per day and, although you, Utah Natural Gas Company, have not shown that you have that much gas available nor the necessary financial arrangements to carry it through, we will, nevertheless, give you a certificate to build such pipeline and a year within which to find the gas which you hope to find and to get the financial commitments which you

hope you can get. The statute allows no room for such a procedure. And yet, that is exactly what the Commission did in this case.

It is true that Section 76-4-24, U.C.A. 1943, provides that the Commission may attach "to the exercise of the rights granted by said certificate such terms and conditions as in its judgment public convenience and necessity may require." As one authority pointed out, such a provision is common in such statutes, and at the time he wrote, he listed some twenty-three states as having such a provision in their statutes. Hall, *Certificates of Convenience and Necessity*, (1930) 28 Michigan Law. Rev. 276, 296. Furthermore, the statute creating the Federal Power Commission has a similar provision. 15 U.S.C.A. Sec. 717f (e), *supra*. In discussing such a provision, Mr. Hall had this to say at 28 Michigan Law Review, page 297:

"The provision that 'conditions' may be attached to certificates is designed to give the Commission a greater regulative control over the particular utility than it might otherwise possess. That body can make regulations which it would be unable to make under its general statutory control. It also enables the Commission to make different regulations for different applicants. Such a provision makes for more flexibility in regulation, as the Commission can fit the conditions which it attaches to each individual case."

Undoubtedly, legislatures intended such provisions as a means to allow commissions to more efficiently carry

out their regulatory duties under the various statutes involved. In accordance with such view, commissions have attached such conditions as the securing of necessary authorizations from the Securities and Exchange Commission to the issuance of securities, *Re Michigan-Wisconsin Pipe Line Co.* (F.P.C. 1947) 67 P.U.R. (N.S.) 427, requiring a taxicab company to make adequate provision for public liability insurance, *Re Sun Cab Co.*, P.U.R. 1930 D, 260, the making of a certificate non-assignable, *Re Rodgers* (Colo. 1940) 35 P.U.R. (N.S.) 379, and other requirements relating to the methods of construction and the quality and extent of service in relation to rates and other such matters, *Dept. of Public Utilities v. McConnell* (Sup. Ct. Ark. 1939) 30 P.U.R. (N.S.) 53, 130 S.W. 2d 9.

No case has been found where a commission issued a certificate with a condition allowing and requiring the applicant to later show, after the record had been closed, the very basic facts for which the hearing was held to determine. Nor does Section 76-4-24, U.C.A. (1943), indicate that the legislature had any such thing in mind. In fact, the wording of the statute indicates clearly the contrary. Subsection (3) thereof provides that the Commission has power to refuse to issue the certificate or to issue it for all or a part of the construction requested and may attach to the exercise of the rights granted such terms and conditions as in its judgment public convenience and necessity may require. But, as required by Subsection (1), the certificate, when it is issued, must

be based upon the Commission's determination, properly arrived at after the hearing provided for in Subsection (3), that the public convenience and necessity does or will require such construction. As heretofore pointed out, such a determination could not properly be made without having first determined, at least, that the applicant had an adequate supply of natural gas in the form of proven reserves committed to the pipeline and adequate financing. This the Commission recognized, in effect, as is clearly shown by the manner in which its Findings and Report and Order condition everything upon the proposition "if the reserves are proved," so to speak.

If the Commission can issue such a certificate as it did in this case, then it has in effect done away with the requirement in Subsection (1) that the public convenience and necessity does or will require *such construction* and the requirement for a hearing in Subsection (3). Yet, it is a cardinal rule of statutory construction that significance and effect should be accorded every part of an act, including every paragraph, sentence, clause, phrase and word. 50 Am. Jur., *Statutes*, Sec. 358, page 362; *Dunn v. Bryant* (Sup. Ct. Utah 1931) 299 P. 253.

What alternatives are open to a Commission in a situation of this sort? As heretofore pointed out under Point A, when an applicant has failed to show that it has an adequate supply of gas to furnish the needs of its proposed line, it would seem that the logical procedure for a commission to follow would be to either dismiss the



application or reopen the proceedings at a later date for the taking of additional evidence on gas supply. The Public Service Commission of Pennsylvania dismissed the application in such a situation in *Incorporators of Service Gas Company v. Public Service Commission* (1937) 190 Atl. 653, 18 P.U.R. (N.S.) 256. In *Memphis Natural Gas Co.*, 4 F.P.C. 197, 608, the Federal Power Commission dismissed the application for a certificate because of the inadequacy of the gas supply showing and subsequently granted a rehearing in order to afford the applicant an opportunity to make a further showing. In several cases where, upon initial consideration of the application, the supply of natural gas available to the applicant has been found inadequate, the Federal Power Commission has reopened the proceedings for the taking of additional evidence on gas supply and has allowed the applicants a period of time within which to make a further showing on that subject. The periods of time allowed for such further showings have varied from sixty days (*Tennessee Gas Transmission Co.*, 3 F.P.C. 442; *Piedmont Natural Gas Corp.*, March 30, 1950) and three months (*Tennessee Gas Transmission Co.*, Docket No. G-962, September 29, 1948; *San Juan Pipe Line Co. and El Paso Natural Gas Co., et al.*, Dockets Nos. G-1067, et al., July 13, 1949) to as much as six months (*Transcontinental Gas Pipe Line Co.*, Docket No. G-704, March 31, 1948).

In *Re Tennessee Gas & Transmission Co.* (1941) 40 P.U.R. (N.S.) 129, the Tennessee Commission, where they considered the evidence of finances inadequate, directed the applicant to present its plan of financing the project within 120 days from the date of their order. After stating that all requirements, other than financing, had been met, the Commission said, at page 145:

“It therefore follows that if the further showing made by the applicant, Tennessee Gas and Transmission Company, on the matter of the adequacy of its financing, is satisfactory to the Commission, it is then the intention of the Commission to authorize the issuance of a certificate of public convenience and necessity to the Tennessee Gas and Transmission Company to authorize the construction and operation of facilities for the transportation or sale of natural gas in the state of Tennessee in the various communities which it is proposed to serve, under the conditions recited and set forth hereinabove with reference to the service of particular customers. This disposition of the application is based upon the facts shown in the record presently before the Commission. In arriving at the final disposition of the case, it is intended to take into consideration any changed facts and circumstances that may bear upon these proceedings, either as a result of our direction for further showings by the applicant, or otherwise. *Nothing in this order shall be construed to prevent consideration by the Commission of any other application.*

“It is accordingly ordered by the Commission that this cause be retained on the docket of the

Commission for such further and future disposition as may be warranted upon future proceedings in this cause."

Whatever may have been a proper procedure for the Commission to follow, it is submitted that the procedure actually followed was not it. To illustrate the futility of the actual manner in which the Commission handled this case, let us consider what might happen during the wild search for gas.

As heretofore pointed out, the whole pipeline project of applicant depends upon a finding of tremendous, high B.T.U. content gas at Greater Monticello, because the only way the gas at Boundary Butte can be utilized is by mixing that gas with such large quantities of high B.T.U. gas. But suppose those reserves are not found at Greater Monticello, but at some other point not as conveniently located as Greater Monticello in relation to the proposed pipeline. Or, suppose the required volumes of and B.T.U. content gas are found at several other points removed from the proposed line. Or, suppose Last Chance might conceivably be the structure where the large volumes of gas are found (which is, of course, not admitted but denied). There the gas is very low in B.T.U. content, and the whole pipeline project would have to be revised. The possibilities of varying conditions could be enumerated indefinitely. In any of such events, the Commission, the applicant-respondent and all the persons concerned would have to virtually start over to determine whether or not the pipeline of

*applicant* would be required by the public convenience and necessity. The order granting the certificate is specific and grants the right of construction as originally proposed. If the reserves were found at other locations as above indicated, requiring a different pipeline system, then the certificate would be inadequate and inaccurate and construction thereunder would probably be illegal.

What does this mean? It means that the applicant-respondent's project and activities had not reached the state of development where it was ready for a certificate, and the Commission, in attempting to award such certificate exceeded its power under the statute.

On the basis of the foregoing, it is submitted that the legislature has prescribed in Section 76-4-24, U.C.A. 1943, that before the Commission can issue a certificate it must properly determine that the public convenience and necessity require the particular construction proposed by an applicant; that this requires a determination as pointed out under Points A and B, that, at least, the applicant has adequate reserves and adequate financing, and that, by allowing the Commission to attach to a certificate "such terms and conditions as in its judgment public convenience and necessity may require," the legislature did not intend that the Commission could, by the use of such conditions, allow the applicant to forego the showing of such basic prerequisites at the hearing and later show them after the hearing and the record had been closed.

Mark K. Boyle, Deputy Attorney General and counsel for the Commission, summed up the matter in no uncertain terms: (R. 479)

“Mr. Boyle: Isn’t it true that if Lehman Brothers have not given a commitment and don’t promise to give one until further exploratory work is done and more reserves are proven, that a certificate from the Commission will not by any means guarantee the existence or construction of a pipeline, *and that it appears to me that the Commission should have the same information that Lehman Brothers insists upon.* \* \* \*”

## POINT L

“(1) THAT THE EVIDENCE INTRODUCED AT THE HEARING WAS INSUFFICIENT TO SUPPORT OR JUSTIFY THE FINDINGS AND REPORT AND ORDER OF THE COMMISSION.”

This point will be presented under two sub-points as follows: (1) the evidence introduced at the hearing was insufficient to support or justify, generally, the substance of the Findings and Report and Order to the effect that the public convenience and necessity requires the issuance of the certificate to Utah Natural Gas Company and, specifically, the finding that “if adequate gas reserves are proved as herein provided public convenience and necessity require the construction, operation and maintenance of the pipeline and facilities proposed by applicant;” and (2) the evidence introduced at the hearing was insufficient to support or justify the finding that the project proposed by Utah Natural Gas Company will be economically feasible.

## SUB-POINT (1)

“THE EVIDENCE INTRODUCED AT THE HEARING WAS INSUFFICIENT TO SUPPORT OR JUSTIFY, GENERALLY THE SUBSTANCE OF THE FINDINGS AND REPORT AND ORDER TO THE EFFECT THAT THE PUBLIC CONVENIENCE AND NECESSITY REQUIRES THE ISSUANCE OF THE CERTIFICATE TO UTAH NATURAL GAS COMPANY AND, SPECIFICALLY, THE FINDING THAT ‘IF ADEQUATE GAS RESERVES ARE PROVED AS HEREIN PROVIDED PUBLIC CONVENIENCE AND NECESSITY REQUIRE THE CONSTRUCTION, OPERATION AND MAINTENANCE OF THE PIPE-LINE AND FACILITIES PROPOSED BY APPLICANT.’ ”

## STATEMENT UNDER SUB-POINT (1)

To avoid undue repetition, the statements heretofore made under Points A, B, & C, are adopted as statements under this subpoint. In addition, it will be noted that the Commission, in its Findings and Report (Exhibit “C” to Petition for Writ of Certiorari) found specifically at page 5 thereof:

“From the foregoing general findings the Commission expressly finds that public convenience and necessity require that the quantity of natural gas applicant proposes to furnish be supplied to the area within the state of Utah covered by the application, and *if adequate gas reserves are proved as herein provided public convenience and necessity require the construction, operation and maintenance of the pipe line and facilities proposed by the applicant.*”

## ARGUMENT UNDER SUB-POINT (1)

Let us assume first that Utah Natural Gas Company can do all that it hopes it can do in relation to its pro-



posed pipeline system. That is, assume for the purposes of argument that they will find the reserves of natural gas they hope to find in the locations they are relying upon; and let us assume that they are successful in procuring the necessary gas purchase contracts; and let us assume that they are successful in procuring adequate finances for the proposed construction; and that they are successful in constructing the project according to the plans and financial estimates they have offered; and, finally, let us assume that they are successful in negotiating and procuring the necessary gas sales contracts to users in the Salt Lake City market at the prices they hope to get in order to make their project pay. Assuming all of the foregoing, the evidence introduced at this hearing was insufficient to support or justify the findings that the public convenience and necessity required the issuance of the certificate to Utah Natural Gas Company.

As heretofore pointed out several times (see primarily Arguments under Points A, B and C), the primary duty of the Commission in proceedings of this sort is to look to and safeguard the interest of the public who will be served (or disserved) by a proposed utility service.

This duty of commissions to look to and safeguard the public interest requires that, where conflicting applications are before it to serve substantially the same area with substantially the same service, a commission must determine which of the conflicting applicants will best

serve the interest of the public. When only one applicant is before the commission, obviously its only duty is to determine whether or not that applicant and the service which it proposes are in the public interest. However, when two or more applicants seek to perform substantially the same service, then the commission's duty is to determine whether either one of the applicants and its project can meet the public convenience and necessity, and then if both can, which one will do the better job. And priority in time of filing applications should enter into the commission's determination as a factor influencing its decision *only after* the commission has determined that the applicants can equally meet the public interest and requirements in all other respects.

As has been pointed out throughout this brief, the Commission here had before it applicants with conflicting applications. From the very beginning, the Commission consistently foreclosed, by denial of complete intervention, separate hearing of petitioner's application or joint hearing with the Federal Power Commission, any consideration of petitioner's application whatsoever and proceeded to issue the certificate to the Utah Natural Gas Company. It is submitted that by so doing the Commission has failed and refused to perform its primary duty and it has thereby rendered itself incapable of finding that the public convenience and necessity require the construction proposed by the Utah Natural Gas Company.

However, we cannot indulge the assumptions that Utah Natural Gas Company will be as successful as it hopes to be. As heretofore pointed out under Points A and B, Utah Natural Gas Company has miserably failed to show by competent substantial evidence that it has either adequate proven gas reserves or adequate financial arrangements whereby its proposed construction is in any sense of the word practical or feasible. As also pointed out under the Arguments and Authorities under those Points A and B and under Point C, showing of adequate proven gas reserves and adequate financial arrangements are, as minimal requirements, basic prerequisites to a finding by the Commission that the public convenience and necessity does require "such construction." The Commission found, in effect, as pointed out in the Argument and Authorities under Point C, that Utah Natural Gas Company had failed to show that it had either adequate proven gas reserves or adequate financial commitments. The Commission has recognized by conditioning its order granting the certificate to the effect that such needs must be shown before the construction under the certificate can be in the public interest and required by the public convenience and necessity under Section 76-4-24, U.C.A. (1943), that such showings are necessary for valid certification.

Under such circumstances, it is submitted that the evidence introduced in the proceedings is wholly insuffi-

cient to support or justify the action and the Findings and Report and Order taken and entered by the Commission.

### SUB-POINT (2)

THE EVIDENCE INTRODUCED AT THE HEARING WAS INSUFFICIENT TO SUPPORT OR JUSTIFY THE FINDING THAT THE PROJECT PROPOSED BY UTAH NATURAL GAS COMPANY WILL BE ECONOMICALLY FEASIBLE.

### STATEMENT UNDER SUB-POINT (2)

In presenting its case in support of its application for a certificate before the Commission, Utah Natural Gas Company presented testimony of a general nature in an attempt to show that there would be a demand for gas in Salt Lake City. It presented a witness who gave his opinion, as a result of general surveys of the community, as to the possible demands for natural gas in the Salt Lake City area in the future. He concluded by giving estimates of certain volumes which *could* be used by three segments of the community—home and small commercial users, general industrial users and, if they were there, chemical industrial users (R. 414-430). Other witnesses offered testimony to the effect that their companies might or could use gas if it were available, but these other witnesses accounted for only a total of approximately 3 million cubic feet of gas per day (R. 353-60, 390-394, 408-414, 430-434).

Mr. McGuire, president of Utah Natural Gas Company, testified that when he first considered the proposed

pipeline he talked with three of the large industrial users in the Salt Lake City area in relation to gas purchase contracts. In those conversations he testified that he proposed a price of  $22\frac{1}{2}\text{¢}$  per thousand cubic feet (R. 520-521). No gas sales contracts with these large industrial users (or any other potential users) were offered in evidence by Utah Natural Gas Company. The price proposed and relied upon by Utah Natural Gas Company in its calculations and evidence was  $23\frac{3}{4}\text{¢}$  per thousand cubic feet to industrial users (R. 521).

The Commission found in its Findings and Report, Exhibit "C" of the Petition for Writ of Certiorari, at page 6 thereof:

"The Commission further finds that the estimated reserves in the area where the applicant has gas purchase contracts are sufficient, if proved, to make the construction of applicant's pipe line and facilities economically feasible."

\* \* \*

*"The Commission further finds that the operation of the pipe line will be economically feasible with the available market if the estimated reserves are proven."*

#### ARGUMENT UNDER SUB-POINT (2)

Couched in numerous "ifs," the Findings and Report of the Commission contain the equivocal determination that the project outlined by the respondent is economically feasible—this in spite of the fact of complete failure to prove adequate reserves, adequate financing and

commitments by prospective purchasers of natural gas. Apparently, the sole consideration has been that there exists a market in which natural gas is sorely needed, and such consideration has been given undue weight by the Commission in its deliberations in this case.

Once it has been proved to the satisfaction of the Commission that there exists a market, the serving of natural gas to the market being required by public convenience and necessity, the Commission should then require that the applicant prove a plan which is economically feasible, i.e., a plan which, in reasonable probability, will be successful. Such finding of economic feasibility should be based on clear and concise proof of (1) the existence of adequate reserves, the cost of developing same, and the ability of the applicant or its associates to meet such cost; (2) the cost of laying, operating and maintaining the necessary pipeline, compressor stations and related facilities, and the ability of the applicant to meet such cost; and (3) firm commitments by prospective purchasers of natural gas to purchase same at a price certain, as and when delivered, adequate enough to repay investment costs.

The inadequacy of proof relative to the first two matters has already been discussed hereinbefore.

With reference to the third matter mentioned above, i.e., whether or not the respondent has firm commitments from prospective purchasers of its gas in the Salt Lake City area, the attention of the Court is invited to those



portions of the Record mentioned above, a reading of which will indicate that at no place in the hearing concerning the respondent's application did the respondent offer proof of the existence of firm commitments from prospective purchasers of its natural gas. True, a number of witnesses stated that a certain volume of natural gas, insignificant in relation to the total proposed volume, of a certain B.T.U. content could be used by their companies in the operation of their plants. There is also testimony in the record that Mr. McGuire conferred with prospective purchasers of natural gas in the Salt Lake City area at some indefinite dates in the past, that a price of twenty-two and a half cents ( $22\frac{1}{2}\phi$ ) per thousand cubic feet was discussed at these conferences, and that such conferences never ripened into the execution of definite contracts by which prospective purchasers bound themselves to purchase a certain amount of gas of a certain B.T.U. content at a price certain, as and when delivered to their plants by the respondent. It is also to be noted that the above witnesses from specific companies placed on the stand by the respondent, with a view to proving up the fact of a market which was ready and willing to purchase its gas, were witnesses having an engineering or technical background, these witnesses at no place in their testimony stated the price at which their firms or companies would purchase this gas and, in fact, such witnesses were unable and unwilling to attempt to bind the corporations they represented.

It is not sufficient to say that, since natural gas is sorely needed in the Salt Lake City area, those corporations desiring to purchase such gas are willing to pay any price at which such gas is delivered. Apparently, the officials of the three large industrial users (Kennecott, American Smelting & Refining Co., and Utah Power & Light Co.) to whom Mr. McGuire talked knew that Delhi Oil Corp. had the gas and that Mr. McGuire could not supply them with their much needed requirements, because these officials didn't waste time by making any agreements with Utah Natural Gas Company. In brief, no matter how much natural gas is desired and needed in the Salt Lake City area, it is futile to authorize the construction of a pipeline by respondent if the company cannot render such service adequately and at a price which is agreeable to the prospective purchasers. It is interesting to note in this connection that, whereas Utah Natural Gas Company has estimated the cost of its pipeline to be Thirty-two Million Dollars (\$32,000,000.00), Utah Pipe Line, in its petition in intervention in this matter, the proof of which was not allowed by the Commission, estimated the cost of its pipeline to be Twenty-Two Million Dollars (\$22,000,000.00). Any rate which is charged by the respondent, if, as and when it delivers natural gas to the Salt Lake City area, must, of necessity, be based upon all of its costs incurred in developing resources and laying, maintaining and operating its pipeline. Any rate charged on the basis of a Thirty-Two Mil-

lion Dollar (\$32,000,000.00) pipeline will, of necessity, be higher than a rate charged on the basis of a Twenty-Two Million Dollar (\$22,000,000.00) pipeline.

Thus, the Record in this case clearly indicates an utter lack of a reasonable guarantee by the respondent that its natural gas will be purchased when delivered to the Salt Lake City area. Without proof of firm commitments by prospective purchasers, how can the Commission state in its Findings and Report that respondent's project is economically feasible? The argument can well be made that corporations in the Salt Lake City area will purchase natural gas, as opposed to other fuels, only if such purchases are of economic benefit to their operations. Natural gas, at a rate which precludes economic operation of a business, will receive no buyers.

The Alabama Public Commission, having before it an application for the extension of an electric transmission line in *Re Alabama Power Co.* (1923) P.U.R. 1923 E, 828, at page 833, made the following observation:

“Whether the application is for authority to construct a new plant or to make an extension of an existing system not in the usual course of business, the burden is upon the applicant to show there is a reasonable guaranty of sufficient business to warrant to the public a sufficient operation of a permanent utility enterprise

\* \* \*

“The fact that the utility must balance the burden of risk of unfavorable results that may follow the investment in either a new plant or the extension of an existing system does not exempt the Commission from responsibility of exercising its best judgment as to whether the authorization of the investment is justified, and as to whether the rights, welfare and interest of the general public will be advanced.”

Economic feasibility of proposed construction is a factor considered by other commissions. See, for example, *Re Tennessee Gas & Transmission Co.*, Tenn. R. R. and P. U. Comm. (1941), 40 P.U.R. (N.S.) 129, at page 139. Also, see *Re Atlantic Gulf Gas Co.*, Federal Power Commission Opinion No. 207, Docket No. G-887, February 28, 1951.

Thus, in this case, on the basis of mere discussions of possible purchases of natural gas by industries in the Salt Lake City area, the Commission has found respondent's project to be economically feasible—such discussions centering around the need for gas and apparently reaching no concrete agreement as to purchases of such gas at a price certain. It is conceded that industries in the Salt Lake City area will purchase natural gas if it can be made available at a price which is not prohibitive; but, the respondent has failed to produce gas sales contracts at the price at which it proposes to deliver natural gas, and has failed to prove that it will have enough

buyers at such proposed price to serve as a reasonable guarantee of such business to warrant a finding that its project will be economically feasible.

It is respectfully submitted that the Findings and Report do not support the Order and the issuance of the Certificate.

II. THE COMMISSION UNLAWFULLY DELEGATED TO AN UNKNOWN AND UNDETERMINED GEOLOGIST THE POWER WITHIN ONE YEAR TO MAKE THE DETERMINATIONS REQUIRED BY LAW OF THE COMMISSION AND TO THEREBY PERFECT AND EXTEND THE McGUIRE COMPANY CERTIFICATE; THIS ACTION OF THE COMMISSION VIOLATED THE CONSTITUTIONAL RIGHTS OF PETITIONER. POINT D.

### POINT D

“(d) THAT THE COMMISSION EXCEEDED ITS JURISDICTION IN ORDERING THAT ‘AN INDEPENDENT GEOLOGIST OF RECOGNIZED PROFESSIONAL STANDING ACCEPTABLE TO THE COMMISSION’ MAY WITHIN ONE YEAR OF APRIL 7, 1951, FILE WITH THE COMMISSION A CERTIFICATE, THAT IN THE GEOLOGIST’S OPINION ‘THERE ARE PROVEN GAS RESERVES COMMITTED TO UTAH NATURAL GAS COMPANY ADEQUATE TO JUSTIFY THE CONSTRUCTION OF THE LINE AND THE FACILITIES’ AND IN THEREBY PERMITTING SUCH GEOLOGIST TO CONCLUSIVELY DETERMINE THE ADEQUACY OF THE ALLEGED GAS RESERVES WITHOUT FURTHER HEARING THEREON, AND WITHOUT FURTHER DETERMINATION BY THE COMMISSION; THAT SUCH DELEGATION OF AUTHORITY WAS UNLAWFUL AND IN EXCESS OF THE POWERS OF THE COMMISSION IN THAT IT

PERMITS SUCH GEOLOGIST TO PERFORM THE FUNCTIONS AND MAKE THE DETERMINATIONS EXCLUSIVELY RESERVED TO THE COMMISSION; THAT SUCH DELEGATION OF AUTHORITY WOULD PERMIT SUCH GEOLOGIST EX PARTE AND WITHOUT FURTHER HEARING TO FULFILL THE PRINCIPAL REQUIREMENT IN THE COMMISSION'S ORDER AND MAKE PERMANENT THE CERTIFICATE OF CONVENIENCE AND NECESSITY NO. 925."

### STATEMENT UNDER POINT D

The Commission made the following statements in its Findings and Report:

(1) "None of the fields from which the applicant proposes to obtain gas, however, have been sufficiently explored to prove the extent of the reserves" (R. 1168).

(2) "From the foregoing general findings, the Commission expressly finds that public convenience and necessity require that the quantity of natural gas applicant proposes to furnish be supplied to the area within the State of Utah covered by the application, *and if adequate gas reserves are proved as herein provided* public convenience and necessity require the construction, operation and maintenance of the pipe line and facilities proposed by the applicant" (R. 1169).

(3) "The Commission further finds that the estimated reserves in the area where the applicant has gas purchase contracts are sufficient, *if proved*, to make the construction of applicant's pipe line and facilities economically feasible" (R-1169).



(4) "The Commission further finds that *if said reserves are proved*, the applicant can secure gas purchase contracts to deliver the gas so proved and developed into its pipe line" (R. 1169).

(5) "The Commission further finds that the operation of the pipe line will be economically feasible with the available market *if the estimated reserves are proved*; \* \* \*" (R-1169).

(6) "\* \* \* and that if said pipe line is economically feasible the applicant can secure the necessary financing for the construction of the same" (R-1170).

(7) "The Commission further concludes, however, that conditions should be imposed upon such authority so granted requiring that within one year from the date the order granting such certificate of convenience and necessity shall be effective said Utah Natural Gas Company shall

'(b) Concurrently with the furnishing of such commitment and as a part thereof, Utah Natural Gas Company shall file with this Commission the certificate of an independent geologist of recognized professional standing, acceptable to this Commission, that there are proven gas reserves committed to Utah Natural Gas Company adequate to justify the construction of the line and facilities;' " (R. 1170).

In its Order granting Certificate of Convenience and Necessity No. 925 (Exhibit D), on page 10 (R-1173) the Commission ordered as follows:

"IT IS FURTHER ORDERED and made conditions of the certificate of convenience and necessity herein issued that within one year from the date this order shall be effective, said Utah Natural Gas Company shall

‘(b) Concurrently with the furnishing of such commitment and as a part thereof, Utah Natural Gas Company shall file with this Commission the certificate of an independent geologist of recognized professional standing acceptable to this Commission that there are proven gas reserves committed to Utah Natural Gas Company adequate to justify the construction of the line and facilities.’

\* \* \* \*

"IT IS FURTHER ORDERED, That if said Utah Natural Gas Company shall fail within said one year period to comply with the conditions herein imposed, then the certificate of convenience and necessity hereby granted shall be null and void."

It can readily be seen that the Commission admitted six times in its Findings and Report that the respondent failed to show sufficient proven reserves of natural gas entitling it to a certificate of convenience and necessity. In its Findings and Report, the Commission stated six times that respondent must *yet* prove an adequate gas supply, and gave respondent one year *to prove* an adequate gas supply. In its Findings and Report, and in its Order, the Commission held that respondent *can prove* an adequate gas supply by filing with the Commission the

certificate of an independent geologist of recognized professional standing, acceptable to the Commission, that there are proven gas reserves adequate to justify the construction of the line and facilities.

## ARGUMENT AND AUTHORITIES UNDER POINT D

The Argument and Authorities will be presented under the following subdivisions:

(1) Such action of the Commission violates the due process clauses of the Constitutions of the State of Utah (Sec. 7, Art. 1) and the United States of America (Sec. 1, Fourteenth Amendment) in that it is a denial of the character of hearing guaranteed by such clauses.

(2) Such action of the Commission in effect leaves its finding on a material fact based solely on hearsay evidence.

(3) By such action the Commission has exceeded its jurisdiction in that it has improperly delegated to an unnamed geologist, chosen and paid by the respondent, the Commission's sole and non-delegable power to determine the adequacy of the respondent's gas supply.

\* \* \* \*

(1) Such action of the Commission violates the due process clauses of the Constitutions of the State of Utah and the United States of America in that it is a denial of the character of hearing guaranteed by such clauses.

It will be noted that subsection (3) of Section 76-4-24, U.C.A. (1943), requires that the Commission have a hear-

ing before it enters its order either denying or issuing a certificate of convenience and necessity. As may be readily seen from Chapter 6 of Title 76, U.C.A. (1943), and especially Sections 1, 10 and 16 thereof, the legislature contemplated that such hearing be a full hearing with the right of all parties to be heard and to present evidence, to cross-examine and rebut evidence of others, and with the requirement that the Commission make findings and issue its orders based thereon. The Rules of Practice and Procedure of the Commission have so construed the statutory requirements.

It is fundamental that the requirements of due process of law apply to administrative proceedings as well as to judicial proceedings. As stated in 42 Am. Jur., *Public Administrative Law*, Section 137, pages 479-80:

“An administrative hearing in the exercise of judicial or quasi-judicial powers must be fair, open, and impartial. The right to such a hearing is an inexorable safeguard and one of the rudiments of fair play assured to every litigant by the Fourteenth Amendment as a minimal requirement. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored. The breadth of administrative discretion places in a strong light the necessity for maintaining in its integrity the essentials of a fair and open hearing. When such a hearing has been denied, the administrative action is void. The requirements of fairness are not exhausted in the

taking or consideration of evidence, but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps."

In fact, the very reason legislatures require hearings is to comply with the procedural requirements of due process of law. Quoting from 42 Am. Jur., *supra*, Section 138, pages 481-2:

"\* \* \*. The manifest purpose of requiring a hearing is to comply with the requirements of due process of law. If such requirements are met under the circumstances of the particular proceeding involved, the hearing is sufficient; and to render a hearing unfair, the defect or the practice complained of must be such as might lead to a denial of justice, or there must be an absence of one of the elements deemed essential to due process of law. A requirement of a hearing in the exercise of quasi-judicial powers has obvious reference to the tradition of judicial proceedings with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature. A requirement of a full hearing means one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the steps asked to be taken. Under general requirements applicable to quasi-judicial proceedings, or under the requirement of a full hearing, a party has the right and the hearing must afford him the opportunity, to defend the right involved, by argument, proof, and the cross-examination of witnesses, and the trier of the facts must reach his decision in accordance with the facts proved. \* \* \*"

In *Morgan v. United States* (Sup. Ct. U.S. 1936) 298 U.S. 468, 80 L. Ed. 1288, Morgan had been a party to a hearing held pursuant to an order of the Secretary of Agriculture directing an inquiry into the reasonableness of existing rates charged by market agencies for buying and selling livestock at the Kansas City Stock Yards. The statute under which the Secretary had proceeded provided that, "after full hearing," if the Secretary was of the opinion that rates charged were unjust, unreasonable or discriminatory, he could determine and prescribe what rates should thereafter apply. 80 L. Ed. 1291. On appeal Morgan was attacking the order entered by the Secretary as void on the grounds that he had not been accorded the requisite hearing. The Court, through Chief Justice Hughes, had this to say concerning the raising of the due process question at 80 L. Ed. 1293:

"\* \* \* in determining whether in conducting an administrative proceeding of this sort the Secretary has complied with the statutory prerequisites, the recitals of his procedure cannot be regarded as conclusive. Otherwise the statutory conditions could be set at naught by mere assertion. If upon the facts alleged, the 'full hearing' required by the statute was not given, plaintiffs were entitled to prove the facts and have the Secretary's order set aside. Nor is it necessary to go beyond the terms of the statute in order to consider the constitutional requirement of due process as to notice and hearing. For the statute itself demands a full hearing and the order is void if such a hearing was denied. (Citing cases)."



In *Shields v. Utah Idaho Central R. Co.* (Sup. Ct. U.S. 1938) 305 U.S. 175, 83 L. Ed. 111, the Supreme Court of the United States again had before it the question, among others, of what a statutory requirement of a hearing meant. As stated by the Court, in an opinion again by Chief Justice Hughes, at 83 L. Ed. 114:

“The Railway Labor Act, which applies to railroads engaged in interstate commerce, excepts any ‘interurban’ electric railway unless it is operating as a part of a general steam-railroad system of transportation. The Interstate Commerce Commission is ‘authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power’ falls within the exception. \* \* \*”

In discussing the statutory provision the Court stated, at 83 L. Ed. 116:

“The requirement of a ‘hearing’ has obvious reference ‘to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts.’ The ‘hearing’ is ‘the hearing of evidence and argument.’ *Morgan v. United States*, 298 U.S. 468, 480, 80 L. ed. 1288, 1294, 56 S. Ct. 906. And the manifest purpose in requiring a hearing is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist. *Interstate Commerce Commission v. Louisville & N.R. Co.* 227 U.S. 88, 91, 57 L. ed. 431, 433, 33 S. Ct. 185. \* \* \*”

In *Alabama Power Company v. City of Fort Payne* (Sup. Ct. Ala., 1939) 237 Ala. 459, 187 So. 632, 123 A.L.R. 1337, the Alabama Supreme Court had before it an appeal somewhat similar to the one now before this Court. Pursuant to the Alabama statutes, the city of Fort Payne applied to the Public Works Board of Alabama for permission to issue municipal revenue bonds for partial financing of a municipal electric distribution system in Fort Payne. The statute provided that such permission could be granted only after a public hearing. The Board set it down for hearing and Alabama Power Company intervened and contested the issuance of such bonds and thereafter appealed from an order consenting to such issuance. In connection with the Point here under discussion, the Court had this to say at 123 A.L.R. 1343:

“We do not think it can be doubted that the proceedings authorized to be had before, and by, the Board are of a character quasi judicial, in which due process must be observed, and preserved to all persons whose legal rights may be involved, and concluded by the deliberations and determinations of the Board. Such proceedings require the taking and weighing of evidence, and a finding of fact based upon a consideration of the evidence, and the making of an order supported by a finding upon substantial evidence given before the Board.

“Nor will any one doubt, we take it, that the ‘public hearing’ provided for in the act ‘has obvious reference to the tradition of judicial pro-

ceedings in which evidence is received and weighed by the trier of the facts.' \* \* \*” (Citing and quoting from *Morgan v. United States*, *supra*.)

The Court concluded, at 123 A.L.R. 1345:

“We are, therefore, at the conclusion, (a) that the intervenor had such an interest in the proceedings before the Board of Public Works as entitled it to intervene in the proceedings there held; (b) that such proceedings required a public hearing; (c) that they have the character of a quasi judicial proceeding, in which the right of due process must not be ignored; \* \* \*”

In general, “due process, of course, requires that commissions proceed upon matters in evidence and that parties have opportunity to subject evidence to the test of cross-examination and rebuttal.” *Market Street R. Co. v. Railroad Commission of California* (Sup. Ct. U.S., 1945) 324 U. S. 548, 89 L. Ed. 1171, 1182. See also authorities cited above.

It is true, of course, that administrative bodies such as the Public Service Commission of Utah, even where they are acting in a quasi-judicial capacity, are not limited by the strict rules of courts concerning procedure and admissibility of evidence. 76-6-1, U.C.A. (1943). But, as stated by Justice Cardoza in *Ohio Bell Telegraph Co. v. Public Utilities Commission* (U.S. Sup. Ct. 1937) 301 U. S. 292, 304, 81 L. Ed. 1093, 1101:

“Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. (Citing cases). Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. *All the more insistent is the need, when power has been bestowed so freely, that the ‘inexorable safeguard,’ \* \* \* of a fair and open hearing be maintained in its integrity.* (Citing cases). *The right to such a hearing is one of ‘the rudiments of fair play’ \* \* \* assured to every litigant by the Fourteenth Amendment as a minimal requirement.* (Citing cases). There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored.”

The Supreme Court of the United States had earlier made the following observation in *Interstate Commerce Commission v. Louisville & N. R. Co.* (U. S. Sup. Ct. 1913) 227 U. S. 88, 93, 57 L. Ed. 431, 434:

“\* \* \* But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must

be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown, but presumptively sufficient information to support the finding."

As pointed out in *United States v. Abilene & S. R. Co.* (U. S. Sup. Ct. 1924) 265 U. S. 274, 68 L. Ed. 1016, 1023, by Justice Brandeis, the evidence upon which an administrative body acts quasi judicially must be the evidence adduced at the hearing and nothing can be treated as evidence which is not introduced as such. In accordance with this idea, it is firmly established that a fair hearing is violated where a commission makes its determination after taking judicial notice of certain matters without giving the opportunity to those involved of explaining or disputing the matters judicially noticed. Concerning this, we quote at length from Justice Cardoza's opinion in *Ohio Bell Telegraph Co. v. Public Utilities Commission* (U. S. Sup. Ct. 1937) 301 U. S. 292, 81 L. Ed. 1093, beginning at page 1099:

"The fundamentals of a trial were denied to the appellant when rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record.

“The Commission had given notice that the value of the property would be fixed as of a date certain. Evidence directed to the value at that time had been laid before the triers of the facts in thousands of printed pages. To make the picture more complete, evidence had been given as to the value at cost of additions and retirements. Without warning or even the hint of warning that the case would be considered or determined upon any other basis than the evidence submitted, the Commission cut down the values for the years after the date certain upon the strength of information secretly collected and never yet disclosed. The company protested. It asked disclosure of the documents indicative of price trends, and an opportunity to examine them, to analyze them, to explain and to rebut them. The response was a curt refusal. Upon the strength of these unknown documents refunds have been ordered for sums mounting into millions, the Commission reporting its conclusion, but not the underlying proofs. The putative debtor does not know the proofs today. This is not the fair hearing essential to due process. It is condemnation without trial.

“An attempt was made by the Commission and again by the state court to uphold this decision without evidence as an instance of judicial notice. \* \* \* Courts take judicial notice of matters of common knowledge. \* \* \* For illustration, a court takes judicial notice of the fact that Confederate money depreciated in value during the war between the states (Wood v. Cooper, 2 Heisk, 441, 447; Hix v. Hix, 25 W. Va. 481, 484, 485), but not of the extent of the depreciation at a given time and place. \* \* \* The distinction is the more important in cases where as here the extent of the



fluctuations is not collaterally involved but is the very point in issue. Moreover, notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence. Wigmore, Evidence, § 2567; 1 Greenleaf, Evidence, 16th ed. p. 18. *'It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable.'*

"What was done by the Commission is subject, however to an objection even deeper. Cf. *Brown v. New Jersey*, 175 U. S. 172, 174, 175, 44 L. Ed. 119-121, 20 S. Ct. 77; *West v. Louisiana*, 194 U. S. 258, 262, 263, 48 L. Ed. 965, 969, 970, 24 S. Ct. 650. There has been more than an expansion of the concept of notoriety beyond reasonable limits. *From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out.* When price lists or trade journals or even government reports are put in evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without preliminary proof, there is at least an opportunity in connection with a judicial review of the decision to challenge the deductions made from them. The opportunity is excluded here. The Commission, withholding from the record the evidential facts that it has gathered here and there, contents itself with saying that in gathering them it went to journals and tax lists, as if a judge were to

tell us, 'I looked at the statistics in the Library of Congress, and they teach me thus and so.' *This will never do if hearings and appeals are to be more than empty forms.* \* \* \*

*"In Ohio the sole method of review is by petition in error to the Supreme Court of the State, which considers both the law and the facts upon the record made below, and not upon new evidence. In such circumstances judicial review would be no longer a reality if the practice followed in this case were to receive the stamp of regularity. To put the problem more concretely: how was it possible for the appellate court to review the law and the facts and intelligently decide that the findings of the Commission were supported by the evidence when the evidence that it approved was unknown and unknowable? In expressing that approval the court did not mean that, traveling beyond the record, it had consulted price lists for itself and had reached its own conclusions as to the percentage of decline in value from 1925 onwards. It did not even mean that it had looked at the particular lists made use of by the Commission, for no one knows what they were in any precise or certain way. Nowhere in the opinion is there even the hint of such a search. What the Supreme Court of Ohio did was to take the word of the Commission as to the outcome of a secret investigation, and let it go at that. 'A hearing is not judicial, at least in any adequate sense, unless the evidence can be known.'"* (Citing cases).

Furthermore, a commission may not base its orders on evidence procured on its own investigation and not

introduced as evidence in the hearing. In the case of *United States v. Abilene & S. R. Co., Supra*, the court said, beginning at page 68 L. Ed. 1022:

“The plaintiffs contend that the order is void because it rests upon evidence not legally before the Commission. It is conceded that the finding rests, in part, upon data taken from the annual reports filed with the Commission by the plaintiff carriers pursuant to law; that these reports were not formally put in evidence; that the parts containing the data relied upon were not put in evidence through excerpts; that attention was not otherwise specifically called to them; and that objection to the use of the reports, under these circumstances, was seasonably made by the carriers and was insisted upon. The parts of the annual reports in question were used as evidence of facts which it was deemed necessary to prove, not as a means of verifying facts of which the Commission, like a court, takes judicial notice. The contention of the Commission is that, because its able examiner gave notice that ‘no doubt it will be necessary to refer to the annual reports of all these carriers,’ its Rules of Practice permitted matter in the reports to be used as freely as if the data had been formally introduced in evidence.

“The mere admission by an administrative tribunal of matter which, under the rules of evidence applicable to judicial proceedings, would be deemed incompetent, does not invalidate its order. (Citing cases). *But a finding without evidence is beyond the power of the Commission.* Papers in the Commission’s files are not always evidence in a case. (Citing cases). *Nothing can*

*be treated as evidence which is not introduced as such.* (Citing cases). If the proceeding had been, in form, an adversary one, commenced by the Orient system, that carrier could not, under Rule xiii., have introduced the annual reports as a whole. For they contain much that is not relevant to the matter in issue. By the terms of the rule, it would have been obliged to submit copies of such portions as it deemed material, or to make specific reference to the exact portion to be used. The fact that the proceeding was technically an investigation instituted by the Commission would not relieve the Orient, if a party to it, from this requirement. *Every proceeding is adversary, in substance, if it may result in an order in favor of one carrier as against another.* Nor was the proceeding under review any the less an adversary one because the primary purpose of the Commission was to protect the public interest through making possible the continued operation of the Orient system. The fact that it was on the Commission's own motion that use was made of the data in the annual reports is not of legal significance.

"It is sought to justify the procedure followed by the clause in Rule xiii. which declares that the 'Commission will take notice of items in tariffs and annual or other periodical reports of carriers properly on file.' But this clause does not mean that the Commission will take judicial notice of all the facts contained in such documents. Nor does it purport to relieve the Commission from introducing, by specific reference, such parts of the reports as it wishes to treat as evidence. It means that as to these items there is no occasion for the parties to serve copies. The objection to the

use of the data contained in the annual reports is not lack of authenticity or untrustworthiness. It is that the carriers were left without notice of the evidence with which they were, in fact, confronted, as later disclosed by the finding made. The requirement that, in an adversary proceeding, specific reference be made, is essential to the preservation of the substantial rights of the parties.

“The right of the carriers to insist that the consideration of matter not in evidence invalidates the order was not lost by their submission of the case without argument, and by their acquiescing in the suggestion that the presentation of a tentative report by the examiner be omitted. While the course pursued denied to the Commission the benefit of that full presentation of the contentions of the parties which is often essential to the exercise of sound judgment, it cannot be construed as a waiver by the carriers of their legal rights. The general notice that the Commission would rely upon the voluminous annual reports is tantamount to giving no notice whatsoever. *The matter improperly treated as evidence may have been an important factor in the conclusions reached by the Commission.* The order must, therefore, be held void.”

In *West Ohio Gas Co. v. Public Utilities Commission of Ohio* (U. S. D. C. 1928) 42 F. 2d 899, the plaintiff brought suit for a temporary restraining order against the Commission to restrain it from enforcing rates of service established by the Commission. The plaintiff claimed that the order of the Public Utilities Commission was unfair and that its enforcement would be in viola-

tion of the Fourteenth Amendment to the Federal Constitution. The court ordered a temporary injunction because the Commission found, after examining its own records, that the rate of Fifty-Five Cents per thousand feet contracted by plaintiffs to be paid for natural gas at wholesale was unreasonable and excessive in comparison with wholesale rates obtained by other gas companies. It was shown that the Commission used its own files of schedules of other companies as evidence supporting its order, but the files were not introduced in evidence and no opportunity was given to the plaintiffs, either to be heard respecting the files or to introduce testimony respecting the nonapplicability of the files to the situation confronting the plaintiffs. The court said on page 900:

“The schedules so referred to by the commission are not brought into this record, nor could they, under the circumstances of the hearing, be brought to our attention; for it is established that *the commission might not base its conclusions upon its files and other general information, unless the same were put in evidence in the particular proceeding, and opportunity given to the plaintiff to meet and explain them.* The question is fully considered by a three judge court in this circuit, in *Illinois Central Railroad Co. v. Railroad Commission of Kentucky et al.*, 1 F. (2d) 805, 806, citing decisions of the Supreme Court of the United States on that subject, and we are constrained to follow its conclusions.”

In line with the foregoing, this Court has had occasion to comment upon the propriety of consideration by



the Commission of things not in the record. In the case of *Utah Power and Light Co. v. Public Service Commission* (Sup. Ct. Utah 1944) 152 P. 2d 542, the Commission had predicated one of its holdings upon matters which were never made a part of the record. The court stated, in reference to this, at 152 P. 2d 567:

“For example, in regard to the discussion of post-war electrical revenues, the Commission referred to testimony of Mr. Gadsby in another case (No. 2652) which was pending before the Commission at about this same time. Mr. Gadsby had no opportunity at this hearing to explain this testimony to show why it would not be applicable to the various situations involved in this case or to deny the conclusions which the Commission drew from it. Such references to matters which the Company has had no opportunity to explain or rebut certainly cannot be commended.

“In *Los Angeles & Salt Lake Railroad Co. v. Public Utilities Commission*, 81 Utah 286, 17 P. 2d 287, 290, a similar point was raised. The question before the Commission was whether a railroad could be permitted to discontinue maintaining a station agent at Faust, Utah, without impairment of the services which the law required it to furnish to the public. At this hearing no evidence was taken regarding the needs of various sheepmen who used the road for movement of livestock and feed. The Commission had had another similar case a short time before this hearing. This earlier case involved the closing of the station at St. John some 12 miles away from the Faust station. In the hearing on the St. John case

considerable evidence was introduced concerning the needs of the various sheepmen. In disposing of the case involving the closing of the Faust station, the Commission relied upon evidence which had been introduced in the St. John case. On certiorari this court held that this was error. We said: 'The evidence adduced in the St. John Station case in this regard cannot be considered as evidence adduced in this case. While the same counsel for the railroad may have appeared in both cases, and the same witnesses testified for the railroad in both cases, \* \* \* *yet the cross-examination which the railroad counsel might direct in the Faust case to the witnesses who appeared in the St. John case, if they appeared in the Faust case, might vary materially because of the new witnesses who appeared in the Faust case.* The Commission, like a jury, can consider such facts in relation to evidence adduced which constitute the common facts of life and which form the common knowledge of mankind and can take judicial knowledge of such facts as a court may take judicial notice of. Such facts permit the fact finder to interpret evidence and articulate it to the general facts of life. The Commission may also, perhaps, take judicial notice of such facts and practices as are generally known throughout the whole field of railroad transportation; \* \* \* *but it cannot take its special knowledge which it may have gained from experience or from other hearings and base any findings or conclusions upon such knowledge. That is fundamental.*' To the same effect see *Spencer v. Industrial Commission*, 81 Utah 511, 20 P. 2d 618."

Why is the requirement that the evidence upon which quasi judicial administrative action is taken must be

presented as evidence in the hearing? As evidenced by the foregoing authorities, "generally, a party to an administrative hearing is entitled to know the witnesses and the evidence against him. There is no hearing when the party cannot know what evidence is offered or considered and is not given an opportunity to test, explain, or refute." 42 Am. Jur., *Public Administrative Law*, section 140, page 483.

These rights to cross-examine, refute, explain or qualify evidence offered to prove a given assertion cannot be overestimated. As Professor Wigmore says of cross-examination in his treatise on the *Law of Evidence* (First Edition), Vol. II, Section 1367:

"For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement \* \* \* should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience. \* \* \* Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovery of truth."

But, what has the Commission done in this case? It has held a hearing to determine whether or not Utah Natural Gas Company could show that the public convenience and necessity required the construction of its

pipeline. At the conclusion of such hearing it found that Utah Natural Gas Company did not have the proven gas reserves necessary to supply such line. By the way it conditioned its order it in effect found that a basic prerequisite to the right to build such pipeline was a showing of proven reserves of gas sufficient to supply such pipeline. In other words, the proven reserves are necessary before Utah Natural Gas Company has the right to construct the pipeline, and, under the wording of section 76-4-24 (1) and (3), U. C. A. (1943), before such a company can engage in such construction the commission must have determined, after hearing, that the public convenience and necessity requires such construction. And yet, after the hearing has been closed, the Commission provides that such a basic fact, upon which its action has been predicated and will continue to be predicated, may be conclusively established by the filing of a certificate of an independent geologist that there are proven reserves committed to Utah Natural Gas Company adequate to justify the construction of the line and facilities.

A clearer case of the denial of a required fair hearing cannot be conceived. Petitioner and other opponents of the application will never be confronted by the geologist and therefore will never have the opportunity to cross-examine him or inquire into the facts upon which he bases such certificate. Petitioner and opponents, indeed the Commission itself, will thereby be deprived of the only test, as the experience of centuries has shown beyond peradventure, of the credibility of a person asserting

facts and of the trustworthiness of the asserted facts. But, even worse; "not only are the facts unknown; there is no way to find them out." Justice Cardoza in *Ohio Bell Telegraph Co. v. Public Utilities Commission*, *supra*.

Such procedure, so contrary to the recognized requirements of a fair hearing in Anglo-American tradition, further deprives the Petitioner of an opportunity to offer evidence to prove that the assertions of the geologist may be unjustified in fact or to explain or qualify his statements. Still further, such procedure denies to the Commission the benefit of the enlightening process of cross-examination, explanation, refutation and qualification which the participation of opposition invariably affords and thereby fatally handicaps the Commission in obeying its statutory duty of looking primarily to the public interest. *Salt Lake and Utah R. Corp. v. Public Service Commission, et al* (Sup. Ct. Utah 1944) 106 Utah 403, 149 P. 2d 647, *supra*, and cases therein cited.

(2) Such action of the Commission in effect leaves its finding on a material fact based solely on hearsay evidence.

The procedure followed by the Commission is faulty for another reason. As heretofore pointed out, the Commission found that adequate proven reserves had not been established at the hearing by the applicant-respondent. Further, the Commission, by its order and the condition attached thereto, has required that adequate

proven reserves be established before construction can be commenced under the certificate. By doing so, it has recognized that a determination of adequate proven reserves is a necessary prerequisite to the determination required of it by the statute that public convenience and necessity requires such construction; which determination, in turn, is a necessary prerequisite to the commencement of construction by a public utility.

Yet, determination of whether or not there are adequate proven reserves will be made by the filing of a certificate of a geologist with the Commission that such reserves do exist, and nothing more. That certificate, being an extra-judicial statement (or extra-quasi-judicial statement, if you wish) or assertion, offered (and accepted) for the purpose of proving the matter asserted would be the clearest sort of violation of the rule excluding hearsay evidence. *Wigmore on Evidence*, Vol. II, section 1364. Thus, in effect we have the Commission allowing its determination of a basic fact, upon which its quasi-judicial determination required by the statute depends, to be based solely upon hearsay.

This court, in several cases dealing with appeals from proceedings before the Industrial Commission, has held that a finding of fact cannot be based solely upon hearsay. See *Ogden Iron Works v. Industrial Commission* (Sup. Ct. Utah 1942) 132 P. 2d 376, 380 and cases there cited.



It will be noted that, insofar as procedure before the Industrial Commission is concerned, section 42-1-82, U. C. A. (1943), provides that the Commission shall not be bound by the usual common law or statutory rules of evidence. This statute has prompted this court to hold that hearsay evidence is admissible before the Commission and may be considered by it but that a finding may not be based solely upon hearsay. The reason for this last restriction is, of course, that such evidence alone is incompetent.

It is submitted that such rule should apply equally as well to the Public Service Commission. While it probably can admit and consider hearsay evidence under section 76-6-1, U. C. A. (1943), it should not be allowed to base a finding of a basic fact solely upon such incompetent evidence. The Commission has found that, at the close of the hearing, there were inadequate proven reserves. It has required that adequate reserves be proven before the certificate becomes operative. Yet, it has provided that conclusive proof of such adequate proven reserves may be established solely by hearsay evidence. This it ought not be allowed to do.

(3) By such action the Commission has exceeded its jurisdiction in that it has improperly delegated to an unnamed geologist, chosen and paid by the respondent, the Commission's sole and non-delegable power to determine the adequacy of the respondent's gas supply.

The Commission has exceeded its jurisdiction and statutory power in still another respect. Under section 76-4-24, U. C. A. (1943), the legislature has directed that the Commission shall hold hearings to determine whether or not certificates of convenience and necessity shall be issued and shall make the determination that a proposed construction is required by the public convenience and necessity. As heretofore pointed out, and as recognized by the Commission in its order and the condition attached thereto, such determination involves a showing of adequate proven reserves of natural gas. The applicable statutes have no provision allowing the Commission to delegate the responsibility of making such determination for it. Such power to determine is more than ministerial and is discretionary or quasi-judicial.

As stated in 42 Am. Jur., *Public Administrative Law*, sec. 73, page 387:

“It is a general principle of law, expressed in the maxim ‘delegatus non potest delegare,’ that a delegated power may not be further delegated by the person to whom such power is delegated. Apart from statute, whether administrative officers in whom certain powers are vested or upon whom certain duties are imposed may deputize others to exercise such powers or perform such duties usually depends upon whether the particular act or duty sought to be delegated is ministerial, on the one hand, or, on the other, discretionary or quasi-judicial. Merely ministerial functions may be delegated to assistants whose employment is authorized, but there is no authority

to delegate acts discretionary or quasi-judicial in nature. Authority from the legislature is necessary to the power of a commission to appoint a general deputy who may exercise quasi-judicial powers. If such deputy may be appointed or the commission is given authority by the legislature to deputize quasi-judicial matters to others, it may do so. Statutory authority to a commission to employ agents, statisticians, experts, attorneys, and such other assistants and employees as may be necessary to perform its duties does not give the commission authority, either directly or by implication, to deputize those matters which are quasi-judicial in character.”

The question of the power of Utah commissions to authorize the performance by a deputy of quasi-judicial functions has been before this court in a number of cases. The leading Utah case in this regard is that of *State Tax Commission of Utah v. Katsis* (Sup. Ct. Utah, 1936), 90 Utah 406, 62 Pac. 2d 120, 107 A.L.R. 1477. The question before this court related to whether the Tax Commission could deputize the Commission’s auditor with the power to recompute sales tax returns and assess additional taxes and penalties. The court inquired into the question of whether or not the act was ministerial or quasi-judicial. The statute provided for penalties of varying amounts, depending upon the manifest intention of the tax payer in filing an insufficient return. The court held that the determinations to be made were quasi-judicial and could not therefore be delegated to the auditor and said at page 412, Utah Report:

“If the Commission had power to deputize this matter to the auditor and had actually done so, it would then be the Commission’s act. The fact that the legislature gave the Tax Commission authority to employ agents, statisticians, experts, attorneys, and other assistants and employees as may be necessary to perform its duties does not give the Commission authority directly or by implication to deputize those matters which are quasi judicial in character. It takes authority from the Legislature to appoint a general deputy. If such deputy may be appointed or the Commission is given authority by the Legislature to depute quasi judicial matters to others, it may do so. *Dorr v. Clark*, 7 Mich. 310; *Andres v. Circuit Judge*, 77 Mich. 85, 43 N.W. 857, 6 L.R.A. 238; *Wilkerson v. Dennison*, 113 Tenn. 237, 80 S.W. 765, 106 Am. St. Rep. 821, 3 Ann. Cas. 297; *Steinke v. Graves*, 16 Utah 293, 52 P. 386. Ministerial acts may be delegated to others. ‘Merely ministerial functions may be delegated to an officer or committee.’ *Jewell Belting Co. v. Village of Bertha*, 91 Minn. 9, 97 N.W. 424, 425, citing *Harcourt v. Common Council*, 62 N.J. Law, 158, 40 A. 690.

“ ‘Where judgment and discretion are required of municipal officers they cannot be delegated without express legislative authority.’ ”

In *Moormeister v. Golding*, 84 Utah 324, 27 Pac. 2d 447, this court held the Department of Registration could not take testimony by deposition without the grant of express statutory authority. In the earlier case of *Moormeister v. Department of Registration*, 76 Utah 146, 288

Pac. 900, it was stated that any determination of the issue must be on evidence produced in an open hearing before the director of registration.

Even though the power be lawfully delegated as in the Workmen's Compensation Act the person so deputized cannot make the determination that the Commission is required to make. In *Utah Copper Company v. Industrial Commission*, 57 Utah 118, 193 Pac. 24, 13 A.L.R. 1367 at page 1379 this court said:

“\* \* \* The referee does not, and cannot, make any award or make any binding order respecting an award. That is a matter left to the determination of the commission itself, when the testimony taken is submitted to and considered by the members of the commission. Taking testimony by a referee is only one manner of investigating and ascertaining the facts involved in any particular proceeding.”

In the case here the geologist is authorized in the Commission's order to determine a fact that is the most important issue in the entire proceeding, i.e. the proven reserves. Days of trial before the Commission were devoted to this issue. The Commission by its order has effectively foreclosed Utah Pipe Line from its day in court. Mr. Justice Wolfe in the *Mountain States Telephone & Telegraph Co.* case on the petition for rehearing, 105 Utah 266, 145 Pac. (2nd) 790, at page 271 said:

“The first prerequisite of a valid rate order by the Commission is that it be preceded by a hearing and findings. Common sense dictates that at such a hearing the legislature intended that there be evidence adduced which would be reasonably calculated to resolve the issues presented for determination. Common sense likewise requires a holding that the findings required by statute be made in accordance with the evidence so presented. If there is no substantial evidence to support an essential finding, that finding cannot stand and a rate order predicated upon it must fall. \* \* \*”

In the case of *Crow v. Industrial Commission*, 104 Utah 333, 140 Pac. 2d 321, 148 A.L.R. 316, the appellant Crow had been injured on the job and had received six years' compensation from the insurance fund. The medical witnesses disagreed as to the extent of the injuries. This court discusses what comprises a full hearing and the duty upon a commission to participate in the determination of the issues and said: (page 337 A.L.R.)

“Where there is a conflict in the testimony, and the weight and credibility to be given testimony of the various witnesses is the determining factor, in order to accord a ‘full hearing’ to which all litigants are entitled, the person who conducts the hearing, hears the testimony, and sees the witnesses while testifying, whether a member of the board, or an examiner or referee, must either participate in the decision, or where, at the time the decision is rendered, he has severed his connections with the board, commission or fact finding body, the record must show affirmatively that the



one who finds the facts had access to the benefit of his findings, conclusions and impressions of such testimony, by either written or oral reports thereof. This does not necessarily require that all of the commissioners must be present at the hearing, or even that the one hearing the evidence must concur in the result, but his opinion on the testimony must be available to the commission in making its decision. This is in harmony with the law on this subject regarding commission and quasi-judicial triers of fact in the Federal Courts. See 1 Vom Bauer's Federal Administrative Law, 318 to 322, section 310 to 313; *United States ex rel Ohm v. Perkins*, 2 Cir. 79 F. 2d 533; *United States v. Nugent*, 6 Cir., 100 Fed. 2d 215; *Morgan v. United States*, 1936, 298 U.S. 468, 80 L. Ed. 1288, 56 S. Ct. 906; *Id.*, 1938, 304 U.S. 1, 58 S. Ct. 773, 82 L. Ed. 1129.

"The showing here does not meet these requirements and the case is therefore reversed and remanded for a rehearing, with costs to applicant."

The importance of this decision lies in the fact that even though there had been a proper delegation by the Industrial Commission, the Commission was nevertheless called upon to make the ultimate decision and such decision must be made from the evidence adduced at the hearing. In *Andrew Revne v. Trade Commission of Utah*, 130 Utah 155, 192 Pac. 2d 563, 3 A.L.R. 2d 169 (1948) this court held that a statute was an unconstitutional delegation of legislative authority in that it permitted a percentage of the barbers in a locality to establish barbers'

prices and fix the operation of barber shops. The opinions in the case review at length the leading authorities on the delegation of powers and Mr. Justice Pratt particularly pointed out that the delegation was obnoxious in that the person delegated to make the determination would not be wholly uninterested in the result of his finding. That situation obtains here in that the geologist is to be selected by the McGuire Company.

It is submitted that the same rule should apply here. The Commission by statute has been given the discretionary power, after hearing, to grant or deny a certificate of convenience and necessity. If it grants the certificate it must first determine that the public convenience and necessity require the proposed construction. It has seen fit to require in this case as a preliminary to the effectiveness of the certificate a showing of adequate proven reserves of gas; and yet, it has delegated the right and power to make such determination to a stranger to the Commission, chosen and paid by applicant-respondent. Clearly this is attempted delegation of a statutory, non-delegable power.

Upon the basis of the forgoing, it is submitted that the Commission erred in providing, by a condition attached to its order issuing the Certificate of Convenience and Necessity, that the proof of adequate, proven reserves of natural gas required by it could be made and determined, after the hearing had been closed and without further hearing, by an unnamed geologist, chosen and

paid by applicant-respondent, in that such procedure denies the fair hearing required and guaranteed by the statutes of Utah and the due process clauses of the Constitutions of the State of Utah and the United States of America; in that such procedure allows the determination of an essential fact to be based solely upon incompetent evidence which violates the rule excluding hearsay evidence; and, in that such procedure is an attempt by the Commission to delegate a duty and a power non-delegable under the applicable statutes of Utah. For these reasons the Commission's order should be declared null and void.

### III. THE COMMISSION FAILED TO REGULARLY PURSUE ITS STATUTORY AUTHORITY. POINTS H AND I.

#### POINT H

“(h) THAT THE COMMISSION EXCEEDED ITS LAWFUL AUTHORITY IN ISSUING SUCH CERTIFICATE IN THAT IT FAILED TO ACT AS A REGULATORY BODY AS REQUIRED BY LAW, BUT IN EFFECT CONSTITUTED ITSELF A DEVELOPMENT AND CONSERVATION COMMISSION.”

#### STATEMENT UNDER POINT H

Sprinkled throughout the record are instances where witnesses for Utah Natural Gas Company stated or intimated that they, or others, would not drill wells and develop areas unless a certificate was issued. (For example, see R. 205-6, 208, 235, 551).

In its Findings and Report, set out as Exhibit C to the Petition for writ of certiorari, the Commission made the following findings in connection with the point here involved. (R. 1168)

“None of the fields from which the applicant proposes to obtain gas, however, have been sufficiently explored to prove the extent of the reserves. It appears, however, that the exploratory drilling program in all of the fields will be greatly stimulated if the owners of the fields are assured of facilities to transport their gas to a market if such fields are developed.”

(R. 1168) :

“The officers of Byrd-Frost, Inc. appeared at the hearing as witnesses in support of the application. During the past five years this company has spent in excess of \$2,500,000 in the State of Utah in gas and oil exploration and drilling operations. The Commission finds that this company is financially able to carry on an extensive drilling program in the fields above mentioned and will, if a certificate of convenience and necessity is granted in this case for the construction of a pipe line, spend between \$5,000,000 and \$10,000,000 during the coming year in an intensified drilling program to determine as nearly as possible the extent of the gas reserves in the fields from which the applicant proposes to obtain its gas supply.”

(R. 1169) :

“The Commission further finds that the granting of applicant's application is necessary to stimulate an exploration and development pro-

gram to determine the extent of said reserves, and that one year's time is a sufficient period within which such exploration and development work should have progressed to a stage sufficient to determine the extent of such reserves."

## ARGUMENT AND AUTHORITIES UNDER POINT H

As has been pointed out several times in this brief, it is well settled in Utah and elsewhere that the interest of the public is paramount in determining whether or not a certificate of public convenience and necessity should be issued. (See Arguments under Points A, B and C). As further pointed out under Point C, the public interest involved is primarily the interest of the public in the territory or community which will use the service or commodity to be offered.

The Public Service Commission was established by, and exists under, the statutes contained in Title 76 of U.C.A. (1943). It has been created by the legislature through those statutes as an administrative body vested with the power to "supervise and regulate" the public utility businesses in the State of Utah. 76-4-1, U.C.A. (1943). No place in those statutes is it given any power whatever to take it upon itself to provide for and regulate the development of natural resources in the State of Utah.

It is a well settled fundamental of administrative and statutory law that administrative agencies, being creatures created by statute, have no power beyond those conferred by the statute. As stated in 42 Am. Jur., *Public Administrative Law*, Section 26, page 316:

“Administrative boards, commissions, and officers have no common-law powers. Their powers are limited by the statutes creating them to those conferred expressly or by necessary or fair implication. General language describing the powers and functions of an administrative body may be construed to extend no further than the specific duties and powers conferred in the same statute. In determining whether a board or commission has a certain power, the authority given should be liberally construed in light of the purposes for which it was created, and that which is incidentally necessary to a full exposition of the legislative intent should be upheld as being germane to the law. In the construction of a grant of powers, it is a general principle of law that where the end is required the appropriate means are given. Implication of necessary powers may be especially appropriate in the field of internal administration. However, powers should not be extended by implication beyond what may be necessary for their just and reasonable execution. Official powers cannot be merely assumed by administrative officers, nor can they be created by the courts in the proper exercise of their judicial functions.”

As stated by the Supreme Court of Oregon in *Layman v. State Unemployment Compensation Commission*, (1941) 117 P. 2d 974, 136 A.L.R. 1468, 1479 “it is an ele-



mentary and fundamental principal, which no one will dispute, that a commission, created by the legislature to administer a statute, is wholly limited in its powers and authority by the law of its creation. No more unwholesome doctrine could be suggested than that such a body is vested with discretion to ignore or transgress these limitations even to accomplish what it may deem to be laudable ends. That would be to leave room for that 'play and action of purely personal and arbitrary power' condemned in *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 1071, 30 L. ed. 220, 226. If the statute is not workable then the remedy is with the legislature \* \* \*

The legislature of the State of Utah has not seen fit to grant to the Commission the power and the duty of seeing that the mineral resources of the State of Utah are developed. The legislature is the proper body to say when and by whom such shall be done. It does not befit this Commission, or any regulatory body so constituted, to attempt to expand its powers beyond the scope of those powers specifically and carefully traced by the legislature.

The North Dakota Board of Railroad Commissioners was faced with a similar problem in 1928. In the case of *Re Montana-Dakota Power Co.*, P.U.R. 1929A, 369, there was before the Commission conflicting applications of Montana-Dakota and Scranton Electric for certificates to serve substantially the same area with electric power line facilities. Scranton made quite a point of the fact

that Montana-Dakota's electricity would be generated with gas from Montana, while Scranton would use coal from North Dakota to generate its electricity. In reference to this contention the Commission stated, at pages 376-7:

“\* \* \* The necessity for protecting the investment in the coal mine is stressed. While witnesses for the Scranton Electric Company have testified that the proposed transmission line and local plants are incidental to the coal mining interest, we consider the electric interest as the only issue in these cases \* \* \* The question which appears to be uppermost in the minds of those interested in the Scranton properties is whether the electric current to serve the territory covered by the proposed highline shall be generated by the use of gas from Montana or lignite from North Dakota.

“While the desire to build up a large mining industry in the state is a commendable one, the question for this Commission to determine is which company will best serve the communities along the line of the Milwaukee Railway, Marmuth, to Hettinger, inclusive, with electric energy. The Commission does not believe that the people in those communities through unduly high electric light rates should be required to bear the burden of building up a mining industry which is dependent upon the partial drying of the coal, which process at this time has not passed the experimental stage.”

That the powers of the Public Service Commission of Utah are limited and the Commission has no right to determine state policy is emphasized in a case before the

Utah Commission decided in 1924 *Re Clays* 1914 E., P. U.R. Annotated, page 178. There Clay applied for a certificate from the Commission for authority to construct and operate an aerial tramway from a railway terminal in Salt Lake County to Alta to convey ore, rock and freight. At the hearing the applicant showed there were a large number of companies in the Alta area unable to mine and mill their ores because of low grade and that the expense of transportation by team and wagon to the rail head was prohibitive; that there were large and valuable ore deposits to be worked and that it was in the public interest that mining be encouraged and that unless the tramway were built these valuable ore deposits would be lost. The Commission denied the application recognizing that even though it would be in the general public welfare that mining be encouraged and the tramway built the Commission had no power to authorize such construction.

That it is not in the province of the Commission to determine the public policy is well settled. In *Central Northwest Business Men's Association v. Illinois Commerce Commission*, 168 N.E. 890 at 894, it was said:

“It is not given to the Commission to determine the public policy of the state (citing cases). The finding that the operation of motor bus serv-

ice as an extension of street car service is not desirable as a matter of public policy is a finding in a field which the Commission may not enter."

If the power to perform an act is not clear from the statute, then the courts should decide against the exercise of any such power. To this effect are:

*State ex rel Thatcher v. Boyle, et al.*, Public Service Commission (Mont.) 204 Pac. 378. (Syllabus 1)

1. Public service commissions—Administrative body having limited powers.

"The Public Service Commission is a mere administrative agency, and has only limited powers, to be ascertained from the statute creating it (Laws 1913, c. 52); and any reasonable doubt as to the grant of a particular power will be resolved against the existence thereof."

*Backus-Brooks Co. v. Northern Pacific Railway Co., et al.*, Circuit Court of Appeals, Eighth Circuit, 21 Fed. 2d, 4, beginning at page 19 says:

"It is well settled that the powers of a state Commission are special and limited, and they can exercise only such authority as is legally conferred by express provisions of law, or such as is by fair implication and intendment incident to and included in the authority expressly conferred for the purpose of carrying out and accomplishing the objects for which the Commission was created, *and that any reasonable doubt of the existence of*

*any particular power in the Commission should be resolved against the exercise of such power.* State ex rel. Railroad Com'rs v. Louisville & N. R. Co., 57 Fla. 526, 49 So. 39; Siler v. Louisville & Nashville R. R. Co., 213 U. S. 175, 194, 29 S. Ct. 451, 53 L. Ed. 753; Board of R. Commissioners of Oregon v. Oregon Ry. & Nav. Co., 17 Or. 65, 19 P. 702; 10 C. J."

See also the numerous authorities collected in Volume 1 of P.U.R. Digest at 555.

Apparently the Public Service Commission of Utah was not, in the proceedings below, so mindful of the public interest it is charged to protect. It hastened to award its certificate to an applicant who had insufficient gas but wanted to find some in Utah, without even considering the application of Petitioner to see what it had to offer. Apparently it felt justified in jeopardizing the interest of the consumers in the area to be served to the extent that they may not get any gas after all or may have to pay higher rates if they do get gas (see Argument under Point F) for the benefit of those few who wish to see if they can find some gas in possible structures discussed in the record. Self justification is not enough. In doing so, it is submitted that the Commission exceeded its lawful authority in usurping powers it has not been granted and in failing to perform the principal duty it has been given, namely, to look first to the interest of the public in the area and community to be served.

## POINT I

“(i) THAT THE COMMISSION EXCEEDED ITS LAWFUL AUTHORITY IN ADOPTING THE VIEW THAT THE FIRST APPLICANT IN POINT OF TIME SHOULD BE GIVEN PREFERRED CONSIDERATION AND IN FAILING TO APPLY THE RULE THAT THE QUESTION OF PARAMOUNT CONSIDERATION IS AS TO WHO CAN BEST FURNISH THE PROPOSED SERVICE IN THE PUBLIC INTEREST.”

## STATEMENT UNDER POINT I

The Utah Natural Gas Company, respondent, filed its application for a certificate of convenience and necessity in this case on May 29, 1950, and on November 17, 1950, filed an amended application, and the Commission immediately gave notice of a hearing upon said application to be held on December 11, 1950. On that date, December 11, 1950, petitioner Utah Pipe Line Company filed its petition for intervention, setting forth that it then had on file with the Federal Power Commission an application for a certificate of public convenience and necessity to construct a pipe line from New Mexico to Salt Lake City, serving the same approximate area as that proposed to be served by the Utah Natural Gas Company. The hearing proceeded on the 11th of December and was concluded on the 2d day of February, 1951. During the course of the proceedings, petitioner Utah Pipe Line Company filed with the Public Service Commission of Utah its application for a certificate of convenience and necessity to serve the same area on the



26th day of January, 1951. The Commission refused to go into the merits of petitioner's application and limited petitioner's participation in the hearing merely to that of opposing the application of Utah Natural Gas Company, respondent. On March 12, 1951 the Commission entered its order granting the certificate of convenience and necessity to Utah Natural Gas Company.

By its action in proceeding to the final issuance of the certificate of convenience and necessity to Utah Natural Gas Company while refusing to consider in any manner the application of Petitioner for a similar certificate to serve the same area, the Commission has in effect given a preference to the application which was filed prior in time.

## ARGUMENT AND AUTHORITIES UNDER POINT I

The great weight of authority is to the effect that where there are several applicants for a certificate of convenience and necessity to perform the same service in the same community, the controlling question should be which applicant is best qualified to serve the public and not merely which one was the first to apply.

The Civil Aeronautics Board, in choosing between two applicants for authority to serve the same air carrier route, has held that it must consider the comparative public interests and select the carrier most qualified to provide the needed service. *Re North Central Case*, Docket No. 415, December 19, 1946. The Colorado Public

Service Commission held, in *Re Willis Application*, Nos. 8968, 8969, Decision No. 30741 (June 23, 1948), that the Commission will issue a certificate to the one of two rival applicants who establishes most conclusively his preparedness and physical and financial ability to operate successfully.

In *Re Helena Bus Applications*, Docket No. 994, Report & Order No. 1498, 1927, the Public Service Commission of Montana held that the controlling consideration in the preference of applicants for certificates should be the choice of that applicant best fitted to carry out the duties imposed by the certificate. Likewise the New Hampshire Public Service Commission held in *Re White Mountain Power Company*, 14 N.H.P.S.C.R. 208, 1931, that as between two rival power utilities seeking to operate in the same territory, the one which seemed to be better equipped for furnishing adequate service should be granted the authority.

The Illinois Supreme Court said in *Bartonville Bus Line v. Eagle Motor Coach Line*, 326 Ill. 200, 157 N.E. 175, that priority in the field does not of itself govern the granting of a certificate for motor carrier service, although it is an element to be considered, but the proper consideration is which applicant under the facts and circumstances shown by evidence will best serve the public interests. And, in the case of *In Re Gibson*, 26 Calif. R.C.R. 1925, the Public Service Commission of California held that the Commission gives little or no

consideration to the date of the filing of an application in reaching a decision after formal hearings upon two or more applications wherein the respective applicants seek authority to operate a stage service over similar or identical routes, but a careful review is given not only to the time, character and nature of the investigations made as to the necessity of a proposed stage service, but also to the experience and financial ability and resources of the respective applicants.

Many states have adopted the view that the time of filing of the application for a certificate of convenience and necessity should have no bearing on which of several applicants should be chosen to operate in the field. The South Dakota Supreme Court said in *Re Dakota Transportation, Inc.*, 291 N. W. 589, 35 P.U.R. (N.S.) 442, at page 450:

“The legislature has granted no rights of priority in an applicant who first applies for a certificate. The public interest clearly did not require the granting of both applications for certificates to operate over the same route. The principal consideration was not which applicant was first in point of time, but an administrative question of deciding which applicant would better serve the public interest was primarily involved. A view of the report and decision of the Commission as to the authority granted to the Black Hills Transportation Company is not before us, and we do not undertake to determine whether or not the Commission acted reasonably in such matter.

We hold that the priority of making application for certificate was not a controlling factor in determining which of the two applications, if either, should be granted."

And the Ohio Supreme Court said in *Re Sohngen v. Public Utilities Commission*, P.U.R. 1928 C, 753, 115 Ohio St. 449, 154 N. E. 734, that mere priority of filing of an application for a certificate of convenience and necessity for the operation of motor busses does not entitle the applicant to any pre-emption of route in the territory traversed.

The Washington Supreme Court also held in *Re State ex rel. B. & M. Auto Freight v. Department of Public Works*, P.U.R. 1923 E. 101, 124 Wash. 234, 214 Pac. 163, that priority in making an application for a certificate of convenience and necessity to operate motor vehicles over a particular route has no controlling effect in selecting the carrier which should receive a certificate. The North Dakota Public Service Commission has adopted the view that priority in the filing of applications for certificates of convenience and necessity to operate and construct electrical properties should not be controlling, and all applications timely filed should receive equal consideration in determining the choice of the applicant. *Re Montana-Dakota Power Company*, P.U.R. 1929 A, 369.

If considered at all, the time of filing of the application for a certificate of convenience and necessity is

looked to only when all applicants appear to be equally qualified. As Mr. Hall stated in his article *Certificates of Convenience and Necessity*, (1930) 28 Michigan Law Review 276:

“It frequently happens that a commission will have two or more applications for permission to serve the same territory. If public convenience and necessity will not be served by the issuance of a certificate to more than one, the Commission is confronted with the necessity of choosing among the petitioners. It is clear that mere priority in the time of filing an application, while a factor, is not the determining one in the selection of an applicant. *Priority in service, rather than priority in time is the important consideration.* However, other things being equal, priority in time of filing an application is controlling. It should be used, however, only as a last resort.”

In *Re Yellow Cab and Baggage Company*. Docket M.R.O. 246, Report & Order No. 1510, May 9, 1928, the Public Service Commission of Montana held that priority in application filing is a material factor only when everything else is equal between applicants and where the Commission has already determined that public convenience and necessity warrants the granting of a certificate over the proposed routes. Likewise the Arkansas Supreme Court reached the same decision in the case of *Camden Transit Company v. Owen*, 1946, 209 Ark. 861, 192 S.W. (2) 757, 63 P.U.R.(N.S.) 448, that the fact that one applicant for a certificate of convenience and necessity to operate a bus line files his application before a



rival applicant does not create any controlling priority in favor of the first applicant as the filing date is merely one element that may be properly considered by the Commission in determining which applicant should receive the permit. In *Re Wilcox* (Idaho Public Utilities Comm. 1916) P.U.R. 1916C, 35, the facts were:

On November 29, 1915, Jones filed with the Commission an application for a certificate of convenience and necessity to build a gas plant in Idaho Falls, Idaho. On December 9, 1915, Wilcox filed an application to construct the same type of plant for the same city. On January 10, 1916, Wilcox filed a petition in intervention in Jones' proceedings. On January 17, 1916, Jones petitioned to intervene in Wilcox's proceedings. The Commission heard the applications together on January 31, 1916.

Page 37 — “. . . We are met at the threshold with the proposition as to what weight should be given the application of Jones by reason of its priority alone. If all other conditions and facts surrounding the two applications were equal, then the preference should be given to the party first making proper application therefor . . .”

“The question that is squarely presented is, from all the evidence, facts and surroundings of these cases, which applicant is entitled to a certificate? The preference should be given to that party who is acting in good faith, has the funds or financial backing to carry his plans into execution within a reasonable time, and who will construct a modern up-to-date plant.”



They then reviewed Wilcox's plan of financing and found it very satisfactory and adequate. Then, at page 38, the Commission said:

"The controlling factor in a controversy of this kind is the public convenience and welfare. Making a concrete application of that rule to the present proceeding, the question naturally arises, which one of these applicants will be able to render the best service to the public?"

They answered the question by awarding Wilcox the certificate.

As will be seen from the foregoing authorities, the primary factors to be considered by any public service commission prior to the granting of a certificate of convenience and necessity when there is more than one applicant seeking to render the same service to the same community are—which of the applicants is best qualified to render the desired service, taking into due consideration financial qualifications as well as physical, and which applicant is best able to serve the public interest. In safeguarding the public interest, only when the Commission finds that all applicants are equally qualified in these respects should it consider which applicant first filed its application for a certificate of convenience and necessity.

Instead of considering the comparative qualifications of the Utah Natural Gas Company, respondent, and the Utah Pipe Line Company, petitioner, the Commission in this instance apparently adopted the sole test of which

applicant first filed its petition and limited Utah Pipe Line Company's participation only to that of opposing Utah Natural Gas. In this instance it was impossible for the Commission to have considered the relative merits of both applications, and, in obviously adopting the view that the one which was prior in time should prevail, it is submitted the Commission erred.

IV. THE COMMISSION ACTED ARBITRARILY AND CAPRICIOUSLY IN THE PROCEEDINGS AND IN THE ISSUANCE OF THE CERTIFICATE AND IN VIOLATION OF THE CONSTITUTIONAL RIGHTS OF PETITIONER. POINTS F, J & K, AND E, G AND M.

#### POINTS F, J AND K

“(f) THAT THE COMMISSION ACTED ARBITRARILY AND CAPRICIOUSLY IN THAT IT SHOULD NOT HAVE RULED ON APPLICANT'S CASE AND GRANTED SUCH CERTIFICATE UNTIL IT HAD FIRST GIVEN UTAH PIPE LINE COMPANY, INTERVENER, AN OPPORTUNITY FOR A FULL HEARING ON THE APPLICATION OF INTERVENER IN CASE NO. 3578 THEN PENDING BEFORE THE COMMISSION, WHICH APPLICATION PROPOSED TO SUPPLY NATURAL GAS TO CONSUMERS OF SUBSTANTIALLY THE SAME AREAS AS PROPOSED TO BE SUPPLIED BY APPLICANT, AND AT A LESS COST TO THE CONSUMER.”

“(j) THAT THE COMMISSION ACTED ARBITRARILY AND CAPRICIOUSLY AND IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE CONSTITUTION OF THE STATE OF UTAH, AND OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

IN LIMITING THE PARTICIPATION OF UTAH PIPE LINE COMPANY 'AS TO WHY THE PETITIONER'S (UTAH NATURAL GAS COMPANY) APPLICATION SHOULD NOT BE GRANTED' AND IN NOT PERMITTING UTAH PIPE LINE COMPANY TO SHOW THAT THERE WAS THEN PENDING BEFORE THE FEDERAL POWER COMMISSION THE APPLICATION OF UTAH PIPE LINE COMPANY FOR A CERTIFICATE TO BUILD A PIPELINE FOR THE CARRYING OF NATURAL GAS FROM NORTHWESTERN NEW MEXICO TO SALT LAKE CITY AND INTERMEDIATE POINTS, AND IN NOT PERMITTING UTAH PIPE LINE COMPANY TO PRESENT EVIDENCE IN SUPPORT THEREOF, ALL AS SET FORTH IN THE PETITION FOR LEAVE TO INTERVENE FILED BY UTAH PIPE LINE COMPANY."

"(k) THAT THE COMMISSION ACTED ARBITRARILY AND CAPRICIOUSLY IN NOT PROCESSING THE APPLICATION OF UTAH PIPE LINE COMPANY IN CASE NO. 3578, AND IN NOT HAVING A FULL HEARING THEREON OR A JOINT HEARING THEREON WITH THE FEDERAL POWER COMMISSION, BEFORE RULING IN CASE NO. 3504-AMENDED."

## STATEMENT UNDER POINTS F, J AND K

At the commencement of the hearing upon the amended application of Utah Natural Gas Company in Case No. 3504 on December 11, 1950, petitioner, Utah Pipe Line Company, presented to the Public Service Commission of Utah its petition for leave to intervene in the proceedings, setting out in such petition that said Utah Pipe Line Company had then pending before the Federal Power Commission its application for certificate of convenience and necessity to build a natural gas pipeline system extending a distance of approximately 392

miles from a point in Northwestern New Mexico near Aztec, New Mexico, to a point or points in and near Salt Lake City, Utah; that by such application to the Federal Power Commission it proposed to serve substantially the same area proposed to be served by Utah Natural Gas Company under its application before the Public Service Commission of Utah in case No. 3504; that Utah Pipe Line Company was of the opinion and did believe that Utah Natural Gas Company had wholly inadequate reserves of natural gas to furnish the requirements of its proposed pipeline system; and that Utah Pipe Line Company desired to intervene in the proceedings concerning the Utah Natural Gas Company's application in order to show that Utah Natural Gas Company's reserves were inadequate and that, consequently, its plan was not feasible, and to show that the Utah Pipe Line Company had adequate reserves and could furnish the facilities and the natural gas and could more adequately meet and fulfill the convenience and necessity of the public, and could thereby assist said Commission in properly safeguarding the public interests.

The Utah Natural Gas Company objected to the intervention of Utah Pipe Line Company in such a manner, and thereupon the Public Service Commission ruled (R. 12) that the participation of Utah Pipe Line Company in the proceeding would be limited to the purpose of showing "why the petitioner's (Utah Natural Gas Company's) application should not be granted."

After such restriction of Utah Pipe Line Company's intervention, and between the close of the first session of the hearing and the beginning of the second session of the hearing, Utah Pipe Line Company, on January 26, 1951, filed with the Public Service Commission of Utah its application entitled, "In the Matter of Application of the Utah Pipe Line Company," case No. 3578, wherein Utah Pipe Line Company set forth its proposal to construct and operate a natural gas pipeline system as set forth in the application theretofore filed with the Federal Power Commission and hereinabove referred to, and requested that the Commission issue to it a certificate or other form of authorization for the construction and operation of the proposed facilities.

At the same time it filed its application in case No. 3578, Petitioner requested the Commission, in writing, to arrange with the Federal Power Commission for a joint hearing of the Utah Public Service Commission and the Federal Power Commission. The Utah Public Service Commission refused to consider the request of petitioner for a joint hearing and made no investigation into the merits of said request whatsoever.

Without considering such application of Utah Pipe Line Company for a certificate to supply natural gas to consumers of substantially the same areas as proposed to be supplied by Utah Natural Gas Company and at a less cost to the consumers, the Public Service Commission proceeded to conclude the hearing concerning the



Utah Natural Gas Company application and to issue to it the certificate of convenience and necessity herein complained of; making no attempt to inquire into the merits of the application of Utah Pipe Line Company in an effort to make certain that the Commission was granting the certificate to the applicant who could better serve the public interest, convenience and necessity it is charged with safeguarding.

In the early part of the brief in our Statement of Facts we have detailed the events which transpired when Mr. Turner, General Counsel for Delhi Oil Corporation and appearing for Utah Pipe Line Company presented its petition for leave to intervene. Mr. Turner in detail stated to the Commission what Utah Pipe Line Company would be prepared to prove and we invite the court's attention to this statement (R. 1148-1153). In substance, Mr. Turner stated that Utah Pipe Line was a wholly owned subsidiary of Delhi Oil Corporation; that Delhi owns substantial oil and gas holdings in New Mexico with approximately 1 trillion feet of gas available to Utah Pipe Line; that the holdings of Delhi are so extensive as to be common knowledge and the subject of considerable comment; that it is generally known that Delhi has been negotiating with industrial consumers of the Salt Lake area and that these negotiations are down to the last stages; that the right of way has been surveyed; that all steps have been taken and the necessary filings made with the Federal Power Commission; that Utah Natural is merely trying to preempt the Salt Lake City



industrial market and well knows that it does not have sufficient gas reserves; that it would be impossible for Utah Natural to support any line without it being an interstate line and that the Federal Power Commission would be the body that must pass upon an interstate line; that it is in the public interest that two projects not be completed and two lines supported; that Utah Pipe Line has the necessary proven gas reserves; that it is acting in good faith and will take prompt steps to complete its pipeline; that it is in the public interest for the commission to hear the competing projects at the same time.

## ARGUMENT AND AUTHORITIES UNDER POINT F

Section 76-4-24 U.C.A. (1943) as construed by this Court in *Mulcahy v. Public Service Commission, et al.*, 101 Utah 245, 117 P. 2d 298, and other cases, provides that the paramount concern of the Commission in certificate cases is the public interest. It is submitted that the Commission cannot properly protect such interest where conflicting applications are pending and are being urged without considering the merits of all such applications before granting a certificate.

While the Utah courts have not, up until the present time, had an opportunity to pass directly upon the question raised by this point, the Illinois Supreme Court in the case of *Black Hawk Motor Transit Company v. Illinois Commerce Commission*, (1943) 48 N.E. 2d 341, 49

P.U.R.(N.S.) 438, held that where there are two applications pending to render the same service to the same approximate area, the Commission should hear the evidence on the merits of both applications before granting a certificate of convenience and necessity to either applicant. The facts of that case were that the Illinois Highway Transportation Company, appellee, had filed an application with the Illinois Commerce Commission for a certificate of convenience and necessity to extend its operations as a motor carrier between Peoria and Decatur. The appellant, Black Hawk Motor Transit Company, was made a respondent to this petition, inasmuch as it already operated partially along the proposed new route. On November 13, 1940, six days prior to the hearing on the above petition, Black Hawk filed an application for a certificate to operate a similar service between Peoria and Decatur. Black Hawk's petition came on for hearing on December 3, 1940, and was continued over to January 3, 1941. On December 5, 1940, the hearing on the Highway Transportation Company's application was resumed, at which time Black Hawk filed a motion to consolidate the two cases so that the evidence taken in each case would be considered in both cases. On December 11 the Commission denied the motion to consolidate and on January 3, 1941 the petition of the appellant Black Hawk Motor Transit Company again came on for hearing, at which time appellant renewed its motion to consolidate. On January 8, 1941, the Illinois Commission entered an order in the appellee's proceeding granting the petition of appellee, Highway Transpor-

tation Company, for a certificate of convenience and necessity to operate a bus line between Peoria and Decatur. Then, on January 22, 1941, there was a further hearing of appellant's petition, at which time counsel for appellee entered a motion to dismiss the application of appellant for the reason that a certificate had already been granted to appellee, Highway Transportation Company, involving substantially the same route. Appellant, Black Hawk, then filed a motion for rehearing in appellee Highway Transportation Company's case for the reason that the Commission had granted the certificate before the hearing on its application had been concluded and all of its evidence was in. On February 25, 1941, the Commission granted appellant's motion for rehearing in the Highway Transportation Company's case and on March 4, 1941, both cases came on for hearing and both Black Hawk and Highway Transportation Company presented more evidence. On March 18, two separate orders were entered by the Commission, one affirming the granting of a certificate to appellee, Highway Transportation Company, and the other denying the application of appellant, Black Hawk Motor Transit Company. Black Hawk perfected its appeal and the Supreme Court of Illinois had the following to say in regard to the right of consolidation of cases involving applications for a certificate of convenience and necessity to perform the same service in the same community:

“ . . . The refusal to consolidate or to integrate the evidence is subject to review, but only to the extent of determining whether the discre-

tion was abused, and, if abused, whether the result was injurious or prejudicial to appellant's right to a fair and impartial hearing.

"Counsel for appellee concede in their brief and argument that if in either proceeding the parties were denied an opportunity to present competent and proper evidence it would require a reversal. Our consideration must, therefore, be directed to that question.

"... There are three forms of consolidation of cases recognized by the authorities: (1) Where several cases are pending involving substantially the same subject matter, a method of avoiding the trial of each case separately is to stay the proceedings in all but one, the decision in the others to be settled by that reached in the one trial; (2) where several cases involve an inquiry into the same event in its general aspects, the cases may be tried together, but with separate docket entries, verdicts, and judgments, the consolidation being limited to a joint trial; and (3) where several actions are pending which might have been made the subject of a single proceeding, the cases, by consolidation, become merged into one in which the rights of the parties are determined. See *Lumiansky v. Tessier*, (1912) 213 Mass. 182, 99 NE 1051, Ann. Cas. 1913E 1049. The instant case comes within the second classification above mentioned and our inquiry must be limited to the questions of whether appellant has been prejudiced by the Commission's refusal to integrate the evidence and consolidate the hearings on the two applications as a joint proceeding, and whether the refusal to consolidate amounted to an abuse of discretion.

“When the applications of both utilities are viewed in connection with all the amendments and consents to restrictions to be included in any certificate issued by the Commission, they both cover substantially the same extended service and route. Both parties proved and the Commission found that the service petitioned for is required from the standpoint of convenience and necessity. *The controlling question in controversy before the Commission was which utility was entitled to the certificate, and a determination of that question could only be fairly made from a consideration of all the evidence in both cases and appellant’s counsel was led to believe that such would be done. But, on January 8, 1941, while appellant’s proceeding was still pending, the Commission entered an order granting a certificate to the appellee. This action demonstrated that the evidence in the two cases was not considered together. The Commission, however, acknowledged the error by granting a rehearing, and on March 18, having all the evidence in the two records before it, simultaneously entered an order in each case. It cannot, therefore, be reasonably said it did not consider all the evidence.*”

Other courts have also considered the general problem here involved. In the case of *Hazard-Hyden Bus Company v. Black*, 169 SW2d 21, the Division of Motor Transportation of Kentucky had before it eight applications for certificates to operate bus lines over approximately the same area, which had all been filed during 1937. No one pressed for a hearing on the applications and none was held until February 3, 1942, at which time the application of the Hazard Hyden Bus Company was



set for hearing, the Commission announcing that it would consider at that time only the application as it applied to a certain area in which the other applicants were not interested. However, the Commission received evidence relating to the proposed bus service over the entire area, including that in which the other seven applicants desired to render the same service and granted a certificate to Hazard-Hyden. Since the applicants were not present at this hearing and did not offer evidence in their own behalf, they filed motions for rehearing, which were denied, and an appeal was perfected to the Circuit Court of Kentucky wherein the order granting the certificate was reversed so that a new hearing could be held, at which time all of the applicants could offer evidence as to the merits of their petitions. The Hazard-Hyden Bus Company appealed to the Court of Appeals of Kentucky and that court said at page 23 :

“KRS 281.410 provides that an appeal may be taken to the Franklin circuit court from the action of the Division of Motor Transportation within twenty days after the rendition of the order of the division. Certainly, during this time or until an appeal has been taken, the Division of Motor Transportation has jurisdiction to correct any error or mistake on its part or for cause shown to set aside the order. The facts disclosed by the record show that the appellees did not have a full and complete hearing before the Division of Motor Transportation, and the circuit court correctly referred the case back to the division.”



In the case of *Crowell & Spencer Lumber Company v. Public Service Commission*, 157 La. 676, 102 So. 866, the Louisiana Court held that a commission order entered in a proceeding in which some of the parties had not appeared and in which another party had made only a perfunctory defense after the case had been ordered to trial over its objection that an injunction operated as a bar to the proceeding, should be set aside so that all parties in interest might have an opportunity to be heard before the Commission.

Under the public utility law and practice of Utah still another reason exists. As will be observed from the amended application of Utah Natural Gas Company and the petition to intervene and applications of Petitioner, the proposed pipeline systems of the two would deliver approximately the same amount of gas to the ultimate market, but the line and facilities of Utah Natural Gas Company would cost approximately \$32,000,000 whereas Petitioner's line and facilities would cost only approximately \$22,000,000. The evidence presented before the Commission soon disclosed, as pointed out in the statements and arguments under Points A and B, that the difference in cost was largely made up by the necessity of treating and compressing the gas to be used, if found, by Utah Natural Gas Company.

From the opinion and decision in the case of *Utah Power & Light Co. v. Public Service Commission*, (Sup. Ct. Utah 1944) 107 Utah 155, 152 P. 2d 542, it will be

seen that the Commission, with this court's approval, considers the "prudent investment value" rather than the "fair value" as the basis upon which to determine utility rates to be charged to the public. From the very beginning of the hearing it was obvious that there was a wide discrepancy in the amount of money which would have to be invested in the respective projects. Yet, the Commission refused to hear any evidence in relation to the project which was offered as the more economical one and proceeded to certificate the project which would cost at least \$10,000,000 more than the other under the most favorable circumstances. How can such action, by any stretch of the imagination, be considered as compliance with the paramount duty of looking to the public interest.

Commissions, under similar statutes and circumstances, have held time and time again that the public interest involved requires a determination of which applicant can best serve the community at the least possible cost to the consumer. In *Re N. Central Case*, C.A.B., Docket No. 415, December 19, 1946, the prime consideration was which applicant is most qualified to provide the needed service; in *Re Willis*, Application Nos. 8968, 8969, Docket No. 30741, June 23, 1948, the Colorado Commission decided it would issue the certificate to one of two rival applicants who established most conclusively his preparedness and financial ability to operate successfully; in *Re Wilcox*, P.U.R. 1916C, 35, the Idaho Commission held that a certificate for the construction of a

gas plant should be granted to the one who had assured himself of the feasibility of the enterprise and had the necessary capital at his command; and in *Re Helena Bus Application*, Docket No. 994, Report and Order No. 1498 (1927), the Montana Commission stated that the controlling consideration in the preference of applicants for certificates should be the choice of that applicant who is best fitted to carry out the duties imposed by the certificate. (The foregoing cases are discussed under Point I.)

Petitioner's application did not receive equal consideration with Utah Natural Gas Company in the proceedings below. Petitioner's role in the proceedings below was restricted to that of opposing the application of Utah Natural Gas Company and it had no opportunity to show the Commission that its gas reserves were proven and that they were many times greater than the unproven reserves of Utah Natural Gas Company. Petitioner did not have an opportunity to show the Commission below its highly adequate financial qualifications as compared with those of respondent, Utah Natural Gas Company. Furthermore, Petitioner was not allowed to show that its project would serve the public more adequately, and at a "prudent investment" of much less than the project of Utah Natural Gas Company. Indeed, the Petitioner was not allowed to show, and the Commission had no way of knowing, which project would best serve the public interest the Commission is required to protect.

Upon the basis of the foregoing, it is submitted that the action of the Commission in granting the certificate

to Utah Natural Gas Company without first considering the application of Petitioner was arbitrary and capricious.

## ARGUMENT AND AUTHORITIES UNDER POINT J

In *Mountain States Tel. & Tel. v. Public Service Commission*, 105 Utah 230, 142 P. 2d 873, the appellant Mountain States Tel. & Tel. alleged that the commission acted arbitrarily and unreasonably in refusing to allow appellant to make a comparison between toll charges of independent operators and its own charges. The Supreme Court, at page 265, held "*It was error not to allow Mountain States to make a comparison in this case.*" The commission had, after a hearing, ruled that Mountain States should adjust their intra-state rates to their inter-state rates which were considerably lower. Mountain States had sought to show how its intra-state rates compared with rates charged by independents, but was denied this right.

In this case, Petitioner sought to intervene, alleging among other things that it could supply natural gas at a lower cost to consumers than could Applicant-Respondent.

Certainly it would seem that one of the prime factors concerned in determining which of two applicants could better serve the public interest would be the cost of the natural gas sold to the public. Yet, in spite of the fact that Petitioner had alleged in its petition to intervene that it was ready and willing to show that it could

furnish gas at a lower cost to the consumers than could Utah Natural Gas Company, it was denied the chance to prove it. The Commission was charged with the duty of considering the public interest and yet, with Petitioner *asking* for permission to so prove, the Commission completely ignored the claim of Petitioner that it could serve the public better at a lower cost. In failing to inquire into this vital factor in protecting the public interest when it could easily have done so by allowing Petitioner to intervene, the Commission clearly acted arbitrarily and capriciously.

Especially is this true in light of the subsequent procedure followed by the Commission. Having restricted Petitioner's intervention to nothing more than that of a protestant, the Commission proceeded to hear the application of Utah Natural Gas Company, to ignore Petitioner's application for a certificate and its application for a joint hearing with the Federal Power Commission, and proceeded to issue the certificate here complained of to the Utah Natural Gas Company without ever having considered the factors which Petitioner so clearly brought to the attention of the Commission in its petition to intervene.

## ARGUMENT UNDER POINT K

In its request to the Commission for a joint hearing with the Federal Power Commission, the petitioner pointed out that:



(1) The Natural Gas Act provides for cooperative procedure, which in no wise impairs the jurisdiction and authority of the State Commission.

(2) The Federal Power Commission wrote a letter on December 21, 1950, asking the Utah Public Service Commission whether or not the latter desired a joint hearing.

(3) Section 1.37 (c) of the Federal Power Commission's Rules and Regulations, provides:

“(c) *Conferences.* Inasmuch as experience has proved that informal conferences are the means most often used to enable commissions to work together to promote good regulations, affording means whereby common understandings may be reached, and the imposition of inconsistent or conflicting regulations upon companies subject to both Federal and State control may be avoided, and means whereby State commissions may secure the assistance in State regulatory work which sections 209 and 17, respectively, of the Federal Power and Natural Gas Acts authorize the Federal Power Commission to extend, any commission, Federal or State, should always feel free to suggest a conference to another commission, concerning any matter of regulation subject to the jurisdiction of either, with respect to which it is believed that a cooperative conference may be in the public interest. The commission desiring a conference upon any such matter should notify other interested commissions without delay, and thereupon the Federal Power Commission or a



State commission, as may be agreed, will promptly arrange for a conference in which all interested commissions will be invited to be represented."

The Commission is undoubtedly not as experienced in the matter of certifying gas pipelines as is the Federal Power Commission. As heretofore pointed out, the statutes under which the two Commissions operate are very similar, each being charged with safeguarding the public interest. By holding a joint hearing with the Federal Power Commission, indeed, by just conferring with the Federal Power Commission, the Public Service Commission of Utah could have availed itself of the vast experience of the Federal Power Commission in determining which of the two applicants then before it could better serve the public interest. It is difficult to see how any commission charged with the duty of protecting the public interest in such situations could deem the public interest adequately protected without inquiring into the merits of any application made to it under the terms of the statute. Especially would this seem true where there were conflicting applications before it for substantially the same certificate to serve substantially the same segment of the public. In the case now before this Court the Commission steadfastly refused to consider the proposal of Petitioner in any form and proceeded to issue the certificate to the applicant who had presented a conflicting application. It is submitted that in so doing and by refusing even so much as to direct

an inquiry to the Federal Power Commission as to the advisability and feasibility of a joint hearing, the Commission acted arbitrarily and capriciously.

## POINT E

“(e) THAT THE COMMISSION ACTED ARBITRARILY AND CAPRICIOUSLY AND UPON INADEQUATE NOTICE IN PERMITTING THE APPLICATION OF UTAH NATURAL GAS COMPANY TO LAY DORMANT UNTIL THE 17TH DAY OF NOVEMBER, 1950, AT WHICH TIME THE APPLICATION WAS AMENDED, AND IN THEN SETTING THE CASE FOR HEARING FOR DEMEMBER 11, 1950, AFTER NOTICE BY PUBLICATION ON NOVEMBER 24TH, 26TH AND 28TH, 1950, OF THE PROPOSED HEARING.”

## STATEMENT UNDER POINT E

On May 29, 1950, Utah Natural Gas Company, respondent, filed an application with the Public Service Commission of Utah entitled, “In the Matter of the Application of Utah Natural Gas Company for a Certificate of Convenience and Necessity.” In such application Utah Natural Gas Company applied for a certificate to construct, operate and maintain a 22-inch natural gas pipe line extending from the area in and around San Juan County in the Southeastern portion of the State of Utah, Northerly and Westerly through portions of the Counties of San Juan, Emery, Carbon, Wasatch and Utah, and into the County of Salt Lake at a point at or near Salt Lake City. In addition to said main pipe line, applicant stated that it proposed to construct such lateral lines as should be necessary to effect delivery of such

natural gas to the consumers or purchasers thereof. Such application was given case No. 3504 and was allowed to remain on the docket of the said Public Service Commission without any action whatsoever until the date hereinafter noted. On November 17, 1950, Utah Natural Gas Company filed an amended application altering the project for which it sought a certificate of convenience and necessity by making application for a secondary gas pipe line of  $8\frac{5}{8}$  inches maximum size, in addition to its requested main gas line of 18 inch maximum size, from the San Juan County area, extending from alleged gas fields in the Counties of Sevier, Wayne and Emery, "northerly and westerly to Salina in the County of Sevier, thence southerly from Salina to Richfield, thence northerly from Salina through Gunnison, Manti, Ephraim and Moroni, connecting with said main line at Fountain Green in the County of Sanpete."

Notwithstanding the fact that the first application was allowed to lay dormant upon the docket of the Public Service Commission for many months, and notwithstanding the fact that material changes were made in the proposed application of Utah Natural Gas Company by the filing of its amended application, nevertheless the Commission immediately gave notice of a hearing upon said application and set said amended application for hearing on December 11, 1950.

## ARGUMENT AND AUTHORITIES UNDER POINT E

Utah Natural Gas Company, in allowing its original application to lay dormant for almost six months without requesting a hearing thereon, demonstrated to the public in general, and to petitioner in particular, that no action would be taken on respondent's application for some time, or that when a hearing was requested, petitioner would have ample time in which to work out and decide upon its necessary course of action in order to file its own application if it was to be heard at the same time as that of respondent. However, on November 17, 1950, respondent materially amended its original application and it was then set down for an immediate hearing by published notice made beginning on November 24. Petitioner could have had only 17 days to analyze the effect of respondent's amended application upon its own proposed activities, in addition to planning its own procedure as to opposing the application of respondent and proposing its own application. Petitioner realized that its application for a certificate of convenience and necessity to serve the same approximate area with natural gas should be considered, along with that of respondent, in order that the Commission might consider the merits of both applicants in regard to the financial feasibility and physical practicality of the two proposed pipe lines and award the certificate to the applicant more qualified to serve the public interest. It must be remembered that Petitioner is not a resident of Utah. Petitioner's home office is in Dallas, Texas, a considerable distance from

Utah, so that any correspondence between the two points requires about three days mailing time. As a result, Petitioner had even less time than would appear within which to prepare the necessary papers and forward them to Utah and to formulate its plan of procedure.

In setting the hearing on the application of the Utah Natural Gas Company so soon after the filing of the amended application by respondent, the Commission in effect deprived this Petitioner, and any other interested party, of the opportunity of filing its application in time to have it considered immediately along with that of the respondent. Petitioner, Utah Pipe Line Company, has been prejudiced by this hasty action of the Commission in that its application for a certificate of convenience and necessity for an interstate pipe line is still pending before the Federal Power Commission and the Federal Power Commission is likely to disfavor the granting to petitioner of a certificate for an interstate line, in view of the fact that a certificate has already been granted by the Utah Commission to another company to serve the same area as that proposed to be served by this petitioner.

Even more serious, however, is the prejudicial effect upon the interest of the public involved. In so important a matter as the construction of a natural gas pipe line of the magnitude proposed, how could the public be benefitted by so much haste in setting down the application

and forcing it to final conclusion with the issuance of a certificate without considering the conflicting application of Petitioner?

The Montana Public Service Commission in the case of *Re Montana-Dakota Utilities Company*, 32 P.U.R. (N.S.) 121, said at page 128:

“Before a hearing is held in determining the reasonableness of utility rates the public and the Utility should be given reasonable notice of the hearing by the Commission. Justice requires that all parties to the proceeding have a reasonable opportunity to prepare and present their respective interest.”

This was a rate regulation matter and the Commission went on to say that from the record it appears that the parties had 22 days within which to prepare their cases after actual notice of the hearing and that the Commission thought this was ample time in view of the fact that as early as two months prior to the actual notice date the utility had knowledge of the fact that a hearing on its rates would be held in the very near future. Such was not the case with Petitioner in this instance. Because of the long period of time during which respondent's Utah Natural Gas Company, application was allowed to lay dormant with no request for a hearing, this petitioner had no reason to anticipate when the hearing on respondent's application would be set and especially the rapidity with which a setting would be made immediately after such application had been amended.



The Utah Commission has said in the case of *Re Ogden Gas Company*, P.U.R. 1929B, 127, that it is the duty of the Commission in all cases where applications are made for permission to serve in the capacity of a public service utility to permit other interests that will be affected to be represented and heard at a hearing which should be public according to the provisions of the statute. Such was not the case in the present matter before this court. By setting the hearing on the amended application of the respondent, Utah Natural Gas Company, only 17 days after the request for same, the Commission in effect deprived this petitioner of an opportunity to file its application for a certificate to serve the same area as that proposed to be served by respondent, and to have its application considered along with that of respondent. It is submitted, therefore, that the Commission acted arbitrarily and capriciously and upon inadequate notice in permitting the application of the Utah Natural Gas Company to lay dormant from the 29th day of May, 1950, to the 17th day of November, 1950, at which time the application was amended, and in setting the case on that date for hearing on December 11, 1950.

### POINT G

“(g) THAT THE COMMISSION ACTED ARTIBRARILY AND CAPRICIOUSLY IN ISSUING SUCH CERTIFICATE IN THAT THE EFFECT OF SUCH ISSUANCE IS TO PERMIT UTAH NATURAL GAS COMPANY TO PRE-EMPTY THE MARKET FOR NATURAL GAS PENDING THE RESULT OF WILDCAT DRILLING BY APPLICANT’S ASSOCIATES.”

## STATEMENT UNDER POINT G

In its findings and report made in Case No. 3504 - amended, the Commission found that "the applicant (Utah Natural Gas Company) will not be engaged in the exploration for or production of natural gas at the sources, but will rely for its supply upon gas produced by others."

The Commission found that "none of the fields from which the applicant proposes to obtain gas, however, have been sufficiently explored to prove the extent of the reserves."

The Commission further found that the applicant, Utah Natural Gas Company, had gas purchase contracts with Byrd-Frost Inc., and others, "all of whom are owners of substantial oil and gas acreage in the fields above mentioned. While, as set forth above, these fields are not yet proved, the Commission finds that one year is a sufficient time in which the owners of said fields could do sufficient exploration and development work to adequately determine the gas reserves therein."

## ARGUMENT AND AUTHORITIES UNDER POINT G

The obvious effect of the issuance of the certificate here involved without finding as a basis for such issuance that the Utah Natural Gas Company has the gas reserves to serve and to satisfy the Salt Lake City market and that Utah Natural Gas Company has the financial com-

mitments and ability to build and to operate a pipeline from the supposed source of its gas supply to the Salt Lake City area, is to grant to such company a market for gas pending the problematical outcome of its exploratory work within the unproven fields from which it proposes to secure natural gas.

As hereinbefore set out, an applicant for a certificate of public convenience and necessity in a case such as this, must prove to the satisfaction of the Utah Public Service Commission the following:

1. A market for its gas;
2. Gas reserves sufficient to serve and to satisfy such market; and
3. Adequate financing, either through its own resources, or the resources of those who have committed themselves to grant financial aid in the construction and operation of the proposed natural gas pipe line.

Here only one of these basic ingredients of a proper showing was proved before the Commission, i.e., the existence of a market.

As heretofore pointed out, the determination of the Commission in such case should be based on concrete facts, which facts can then form the basis for the issuance of a certificate of public convenience and necessity. Speculation and conjecture should have no standing be-

fore the Commission, yet the Findings and Report of such body is a bundle of hopes, desires and "ifs". Mere proof of a market is not sufficient to form the basis for the granting of a certificate—yet such is the case here.

Public service commissions should fully understand the effect of the issuance of a certificate of public convenience and necessity. As succinctly stated by the Federal Power Commission in *Re Kansas Pipeline & Gas Co.*, (1939) 30 P.U.R.(N.S.) 321, at page 342:

"When we consider that one effect of the issuance of a certificate to construct and operate facilities to and in a given area is to preclude from the territory other construction or operation except under a certificate issued by us, the necessity that the present applicants be financially able to consummate their proposed construction becomes the more apparent."

If such statement is made by a commission whose main problem in the case before it is a determination of whether or not there is adequate financing, such statement could, a fortiori, be made in the case here before us involving a commission, which, by the very wording of its Findings and Report, was troubled with both the problem of adequate financing and the even greater problem of adequate reserves.

It is obvious that only one natural gas pipeline will extend from the Four Corners Area to the Salt Lake City market. Such being the case, it is incumbent upon

the Commission, in granting a market to one of conflicting applicants to determine which applicant shall best serve this area. The Utah Statute looks not to the applicant but to the convenience and necessity of the public and clearly contemplates that applications for certificates shall be granted on that basis alone—not on the basis of the desires and speculative plans of an applicant. Utah Pipe Line Company was not given the proper consideration in this case, and neither was the public. The public, being the beneficiary of the proper decision, or the victim of an improper decision, is entitled to due consideration of all applications by the Commission. Such consideration would, of necessity, require a comparison of the finances and reserves of various applicants who propose to serve the Salt Lake City area. Having before it only the evidence presented by Utah Natural Gas Company, the Commission could not find that such company is *best* able to serve the public convenience and necessity.

Reduced to its bare facts—or lack of such facts—this case involves an applicant who, although failing to prove adequate reserves and adequate financing, has been given by the Commission a hunting license, the practical effect of which is to allow such applicant to attempt to secure proof of facts which should have been proved at the time of the hearing on its application. Nowhere in the Law Reports can be found a certificate couched in terms of speculation, hope and desire, as here. Granted that public convenience and necessity requires the issu-

ance of a certificate to a party or parties who can adequately transport gas to the Salt Lake City area, the next query should logically be whether or not the applicant now before the Commission can best serve the public convenience and necessity in such respect. With only one applicant before the Commission, as here, and with a conflicting application being given no consideration by the Commission, as here, it was impossible to determine whether Utah Natural Gas Company could *best* serve the public. And yet, the Commission issued the certificate and thereby has, in effect, permitted Utah Natural Gas Company to pre-empt the market during the one year period allowed by the Commission. In so doing, the Commission has acted arbitrarily and capriciously.

### POINT M

“(m) THAT THE PROCEEDINGS OF THE COMMISSION AND ITS FINDINGS AND REPORT AND ORDER, AND EACH OF THEM, ARE CONTRARY TO THE LAWS OF THE STATE OF UTAH AND IN VIOLATION OF SECTIONS ONE AND SEVEN OF ARTICLE ONE OF THE CONSTITUTION OF THE STATE OF UTAH, AND IN VIOLATION OF SECTION ONE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.”

### ARGUMENT AND AUTHORITIES UNDER POINT M

#### (a) *Laws of the State of Utah.*

The Legislature has prescribed in Sec. 76-4-24, U.C.A. (1943), that before a commission can issue a certificate it must properly determine after a hearing held



for such purpose that the public convenience and necessity require the particular construction proposed by an applicant. This requires, of course, a determination that the particular applicant has the wherewithal to meet the requirement, which in the instance of a gas pipeline would mean, as a minimum, adequate proven gas reserves and adequate financial commitments. The Commission has, in effect, by the manner in which it has made its findings and conditioned the certificate, recognized that such showings must be made by the applicant. The statute in no way indicates that the commission could allow the applicant to forego the showing of such basic prerequisites at the hearing and later show them after the hearing and record had been closed. In fact, the clear import of the statute is to the contrary. Furthermore, as pointed out in the Argument and Authorities under Point I, the Commission has, in fact, followed a course of proceedings which has given priority to the applicant filing first in time, consistently foreclosing consideration of Petitioner's conflicting application.

(b) *Due Process Clauses of the Constitutions of the State of Utah and the United States.*

As heretofore pointed out under Sec. (a) of the Argument and Authorities under Point D, by allowing the determination of the question of adequate proven gas reserves through the filing of a certificate after the hearing had been closed by an unnamed geologist, the Commission has denied the hearing provided for in the

statute and required as a fundamental procedural right under the due process clauses of the Constitutions of both the State of Utah and the United States.

(c) *Section One of Article One of the Constitution of the State of Utah.*

Article I of the Constitution of the State of Utah provides in part as follows:

“Section 1.

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

The law is well settled that corporations are “persons” within the meaning of constitutional provisions forbidding the deprivation of property without due process of law. *Covington and Lexington Turnpike Road Company et al. vs. A. P. Sandford et al.*, (U. S. Sup. Ct. 1896) 164 U. S. 578, at page 592, 164 Sup. Ct. 560 at page 565. The word “man” in such a Constitutional provision has also been held to include corporations. *Dayton Co. and Iron Co. vs. Barton*, (Tenn. Sup. Ct. 1899) 53. S. W. 970, 971, 103 Tenn. 604. Use of the word “man” as in Section One of Article One of the Utah Constitution is the same type of use as Constitutional framers have used before. It is patent that the framers of the Utah Constitution when speaking of the inalienable right of men to acquire, possess and protect property must have had in their minds that such right would extend to and include all legal entities, including partnerships, associations, corporations and trusts.

Although it may be true that some courts have held that a certificate of convenience and necessity is not property in the ordinary sense of the word, it cannot be denied that the holder of a certificate can acquire property by virtue of such. In fact, a public utility *cannot* acquire property contemplated by Section 76-4-24 without having first secured such a certificate.

In the proceeding below Petitioner was completely foreclosed throughout from affirmatively presenting its case. It had no opportunity to show that it was, in fact, entitled to the certificate. While Petitioner may still have the “technical” right to insist upon the processing of its application, such insistence would be a futile gesture, and, indeed, a very hollow right. The certificate has been issued and the devilment done.

Thus, in effect, the Utah Public Service Commission, by its arbitrary and capricious action, has failed and refused to allow Utah Pipe Line Company to acquire, possess and protect property within the State of Utah. Had there been a comparison of Utah Pipe Line Company’s case with that of the Respondent and had there been a determination that the Respondent in truth and in fact should be granted a certificate of public convenience and necessity based on clear and concise evidence pointing up that it could best serve the public convenience and necessity of the State of Utah, Utah Pipe Line Company would have no standing before this Court other

than to protest the adequacy of proof presented by the Respondent. In this instance, however, Utah Pipe Line Company has been effectively foreclosed from exercising its right granted to it by virtue of its permit to do business within the State of Utah by the Constitution of the State of Utah.

## CONCLUSION

The public interest in the determination of this case by this court cannot be over-emphasized. For many years the Utah public has waited for the time when new homes, schools, apartment buildings and large and small industry would have an adequate supply of natural gas. Any action by a commission which delays the arrival of that time should not be treated lightly. Time is of the essence. The gas is needed now. Obviously the more gas supply behind any projected pipeline, the greater the stability to industry and the greater the security to the home user of gas. A major industry may come to Utah if an adequate reserve supply for 20 years or more is dedicated to the line. It will not be attracted if that industry must depend on an uncertain and inadequate gas supply. Ultimately the public interest will demand that the enormous gas reserves of Utah Pipe Line be admitted through the Utah gate, and that Utah Pipe Line Company build its line. If in due time gas is developed in Utah from wildcat drilling, that gas, if found in adequate quantities, will not be lost to Utah, but will extend the useful life of petitioner's pipeline.

It must be apparent that it is not in the public interest for two pipelines to be built and paid for by the public. It must also be apparent that to build the line enormous reserves are required. An inadequate supply is the equivalent of no gas at all because at the beginning a full supply is required to finance the line.

Mr. Irwin Clawson, attorney, representing some 29 industrial users of gas, whose only interest in the proceeding was to see that the Commission obtained more gas for the area (R. 1018), after listening to the testimony and at its close, told the Commission that he did not care whether the gas supply came from Mountain Fuel Supply Company, Utah Natural Gas Company or Utah Pipe Line Company; that "What we want is more gas" and said:

"On behalf of my clients I suggest to the Commission that the public interest and necessity demands that *before* a decision is reached that the Commission see what the market affords, and then on the basis of the knowledge thus obtained, grant the certificate. *And we urge at this time that before a decision is reached that the Commission hear the Utah Pipeline and make their decision on the basis of the combined evidence, and that the Commission require the Utah Pipe-*

line to as quickly as possible make their showing as to what they've got so that the Commission can reach a decision on something that needs a decision very shortly." (R. 1020, 1021)

The extensive drilling in the Counties of Duchesne, Uintah, Box Elder, Utah, Summit, Millard and Washington by major oil companies and by wildcatters and far removed from the projected location of the pipeline of Utah Natural shows that such drilling will occur when geologists for those companies conclude the discovery of oil is possible or probable and further shows that no certificate or lack of certificate from the Public Service Commission of Utah for a pipeline is going to influence this drilling.

In this case, where Utah Natural has wholly failed to make a sufficient showing of adequate gas reserves or of required financing; where the Commission has failed to permit Utah Pipe Line to have any hearing on its projected line; and where the Commission has delegated to a geologist the power to make the basic determination which is the foundation of all grants of certificates of convenience and necessity for a natural gas pipeline, the Commission exceeded its jurisdiction in granting the certificate, violated the constitutional



rights of petitioner, acted arbitrarily and capriciously in the proceedings and failed to follow the rules of fair play.

Respectfully submitted,

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