

1951

# Utah Pipe Line Co. v. Public Service Commission of Utah et al : Brief of Respondent Utah Natural Gas Company

Utah Supreme Court

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Clifford L. Ashton; S. N. Cornwall; Attorneys for Respondent;

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In the

# Supreme Court of the State of Utah

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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.*

Case No.  
7695

**FILED**

OCT 26 1951

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Clerk, Supreme Court, Utah

## BRIEF OF RESPONDENT UTAH NATURAL GAS COMPANY

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Case No.  
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## BRIEF OF RESPONDENT UTAH NATURAL GAS COMPANY

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### PRELIMINARY STATEMENT

On the 29th day of May, 1950, Respondent Utah Natural Gas Company, a Delaware corporation, qualified to do business in Utah, made application to the Public Ser-



vice Commission of Utah for a certificate of convenience and necessity authorizing it to transport and supply natural gas from gas fields in Southeastern Utah, primarily at Boundary Butte and Monticello, to the industrial area in and around Salt Lake City (R. 1106-1110). On November 17, 1950, this Respondent amended its original application and requested a certificate to build its line along the route proposed in its original application and also to construct a supplementary line from Last Chance to Salina, connecting with the main line at Fountain Green. It was proposed that this supplementary line would serve an area in the Sevier Valley and that the interconnected line would serve the industrial area from Provo north to Salt Lake City (R. 1111-1117).

The hearing on the amended application was set for the 11th of December, 1950. Five days prior to that date the Utah Pipe Line Company, Appellant herein, was organized as a Delaware corporation. On December 9th it was authorized to do business in the State of Utah and, two days later, on the date of the hearing, appeared before the Public Service Commission of Utah and requested leave to intervene and introduce evidence on behalf of its application. This request was refused but the Commission did permit Appellant to intervene for the limited purpose of objecting to the application of the Utah Natural Gas Company (R. 10-13). Parenthetically, it is interesting to speculate on what Appellant would have done had it been permitted to intervene as a competing applicant. As a two day old corporation without an acre of committed or even

prospective gas in the State of Utah and without any authority or certificate from the Federal Power Commission to bring claimed New Mexico gas across two state lines how could Appellant have made even a semblance of a showing?

Both Appellant and the Utah Natural Gas Company, at the time of the hearing before the Utah Public Service Commission, were skeleton corporations. Both were sponsored by other interests to perform the express function of transporting and marketing natural gas. The Respondent company was sponsored by Byrd-Frost, Inc., of Dallas, Paul B. English, The Three States Natural Gas Company, and others. The Appellant company was sponsored solely by the Delhi Oil Corporation. All these sponsors are petroleum producers not engaged in the transporting and marketing of petroleum products.

After conducting prolonged hearings in 1950, which hearings were continued to January and conducted through a part of February in 1951, the Commission took the matter under advisement and on the 12th day of March, 1951, signed an order granting to this Respondent a certificate conditioned that, within one year of the effective date of said order, it should:

“(a) File with this Commission the unconditional commitment of a financial house of recognized responsibility, committing itself to supply the funds necessary to 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).

From this conditional order the Appellant company petitioned for a rehearing. On the 16th day of April, 1951, this petition was denied (R. 1182). On May 11, 1951, Appellant filed in this Court its petition for a writ of certiorari (R. 1184-1192). Appellant is the only one of all the protestants who has appealed from the Commission's order.

## STATEMENT OF FACTS

We feel that the Appellant in presenting its statement of facts to this Court at pages 3-22 of its brief has ignored many important phases of the presentation made before the Commission. Therefore, we propose to outline briefly

a more comprehensive statement of facts so that this Court may have a better understanding of this Respondent's position and its reasons for seeking the conditional certificate granted.

Respondent company's evidence falls into four categories. First, public need; second, availability of natural gas in the vicinity of the proposed pipe line; third, feasibility of the engineering plan; and fourth, feasibility of the financial plan.

1. *Public Need*—There is very little point in setting out testimony of the public witnesses who appeared and testified to the great need in the Salt Lake industrial area of natural gas. The record shows that the southeastern and central portions of the state are without any present supply. The record also amply shows that industrial development, domestic convenience and the building of new homes is greatly retarded because of either no natural gas or an insufficient supply. This fact is conceded by Appellant and is its reason for seeking a certificate of its own.

2. *Availability of Natural Gas in the Vicinity of the Proposed Line*—This evidence consists of testimony of seven trained geologists who are presently actively engaged in exploratory and development work in the central and southeastern portion of the state. They are Kenneth M. Willson, Dorsey Hager, Glen Ruby, Paul Walton, R. E. Landon, D. H. Byrd and Jack Frost.

Mr. Willson, who is an independent consulting geologist and who has been employed for the past several years

by Byrd-Frost, Inc., working in the Four Corners area, testified from a carefully prepared report of the known gas reserves, the probable gas reserves and the general gas potential of the entire southeastern and central area of the state. His report was especially significant because of the great amount of work done by him in the general area, during the past few years. His recommendations have resulted in the drilling of thirty-five producing oil and gas wells and only eight dry holes (R. 55).

After generally discussing the area in the vicinity of the pipe line and explaining to the Commission his reasons for believing that there is an ample supply of gas to justify the construction of the proposed line the witness specifically discussed three structures which he believed would produce a sufficient quantity of commercial gas to supply the line over a twenty year period. These structures are Boundary Butte, Monticello, and Last Chance. In explaining the reserves in the foregoing structures the witness repeatedly emphasized that he had kept his estimates conservative so that any error would be on the safe side. He also pointed out that Mr. Joseph Gordon, a petroleum geologist, collaborated with him in computing the reserve on the data which he supplied (Exhibit 28-34, R. 1067-1073).

Boundary Butte, he explained, was a known producer of natural gas. It had not been developed because there is not a line to take the gas to market. This structure, he estimated, contains 348 billion cubic feet of recoverable natural gas (R. 70). Because, however, the Boundary Butte gas does not have the required b. t. u. content it will be

necessary to process it and remove inert materials. As a result the witness estimated that the Boundary Butte structure can produce approximately 255 billion cubic feet of 648 b. t. u. gas (R. 73). It was explained by subsequent expert witnesses that this 648 b. t. u. gas would be "sweetened" with other gas and raised to the desired 875 b. t. u. content which is the b. t. u. content of the gas to be sold.

In collaboration with Mr. Gordon, Mr. Willson computed the reserves at Last Chance to be 104 billion cubic feet of recoverable gas in place reduced to 98 billion cubic feet of deliverable 875 b. t. u. gas (R. 83). Mr. Dorsey Hager, called by Respondent, also testified to the reserves at Last Chance. He thought Mr. Willson's estimates were too conservative and estimated that in his opinion there were 164 billion cubic feet in the Last Chance structure. In making the estimate he employed the same volumetric method employed by Willson and Gordon. His larger estimate was due to a difference in basic data. He thought there was more acreage in the Last Chance structure than Willson had estimated (R. 224-225).

In estimating the reserves at Monticello Mr. Willson pointed out that the structure, unlike Boundary Butte and Last Chance, could not be considered proved so that accurate appraisals of the reserves could be made. Before the structure could be classed as proved more exploratory and development work would be necessary. He was certain, however, that the large structure which lies east of Monticello contains tremendous quantities of commercial gas which can be made available to the proposed pipe line if

an adequate development and exploratory program is launched. His reasons for believing that Monticello contains gas were: (1) It is adjacent to the proven reserves in the Dove Creek structure which lies to the east in Colorado and is separated from that structure by a small syncline. (2) The subsurface formations at Dove Creek corrolate with the subsurface formations at Monticello. (3) The No. 1 Redd Well which was drilled at Monticello found 1100 b. t. u. gas in the same formation and at approximately the same depth that 1100 b. t. u. gas was found at Dove Creek. (4) The failure of the No. 1 Redd Well to produce commercial quantities of natural gas was due to a mechanical and not a structural failure (R. 92).

By employing very conservative estimates on the Monticello structure Mr. Willson and Mr. Gordon computed 682 billion cubic feet of natural gas in place at Monticello and stated that 457 billion cubic feet of this gas, with a b. t. u. content of 875 or better, could be placed in the proposed line over a twenty year period (R. 97).

Relying only on the structures at Boundary Butte, Last Chance and Monticello, Mr. Gordon and Mr. Willson computed, as shown in Exhibit 34, a total of 1 trillion, 134 billion cubic feet of recoverable reserves in the three structures and stated that from these recoverable reserves they could withdraw over a twenty year period 816 billion cubic feet of excellent, high b. t. u. gas (R. 1073).

While Mr. Willson confined his estimates of reserves to the three structures named, he further testified that on his recommendation his client, Byrd-Frost, Inc., had

acquired large holdings of acreage in southeastern Utah in more than twenty other structures and that in the event a certificate should be granted to the Utah Natural Gas Company he would recommend the immediate drilling of many of these structures and extensive drilling and developing of the structures at Boundary Butte, Last Chance and Monticello (R. 103). He had no question in his mind that if a pipe line should be constructed as proposed that there would be more than an ample supply of gas to fill it (R. 140).

The other geologists corroborated and supplemented the report of Mr. Willson. Dr. Paul T. Walton confined his attention to the Upper Schofield area which is located west of Price and adjacent to the proposed line. This area was referred to by Mr. Willson. Walton stated that there was an excellent possibility of finding large reserves of commercial gas in the huge structures located in the area known as Gordon Creek, Clear Creek, North Schofield, Flat Canyon and Joes Valley. He based his opinion on the following: (1) The well which was drilled on his recommendation by the Pacific Western at Gordon Creek encountered inflammable gas in unknown quantities in the Dakota Sandstone and, according to the log of the well, showed some indications of gas in the Ferron, Morrison and Emery sands. The well was not tested properly for gas because its primary objective was oil and because it was finally completed as a commercial carbon dioxide well. Furthermore, gas is worthless unless there is a pipe line in the vicinity. (2) The drilling of this well proved that the faulting in the area had not destroyed the trap in the under-



lying structure. (3) The area is strategically located between the Uintah and Paradox Basins and contains formations which are known to contain petroleum products in Wyoming, New Mexico, Colorado and Utah. While this area cannot be, of course, considered as a proved area, it gives excellent promise as a potential producer of inflammable gas and, Dr. Walton testified, if the certificate is granted and a pipe line constructed he would recommend an immediate exploratory drilling of all five of these structures.

He further explained that in the event gas is found in the Upper Schofield area it will be in tremendous quantities because of the hugeness of the structures. Depending upon how many formations, if any, would yield commercial gas the witness estimated the following possible reserves: Flat Canyon, 105 to 400 billion cubic feet; Clear Creek, 307 billion to 1 trillion cubic feet; North Schofield, 63 billion to 200 billion cubic feet; Joes Valley, 576 billion to 2 trillion cubic feet. No estimate was made of the possible reserves at Gordon Creek (R. 202, 209, 211, 217).

The estimates made by Mr. Walton were in no way relied upon by this Respondent and were produced for the Commission's consideration only to show the great potential of the area, and to point out the need for a gas line in the vicinity to stimulate further exploration and development.

Mr. Glen Ruby, who had been employed by the governments of Portugal, China, Chile, Argentina, and Cuba, and who was then employed by the United States government

in exploratory work on the Navy petroleum reserve in Alaska, testified that in his opinion the Colorado River basin area along the course of the proposed line in Southeastern Utah offers the best oil and gas future of any other undeveloped area in the United States (R. 172-175, 186).

Mr. Ruby paid particular attention to the area around the Big Flat structure which is located near the town of Moab. The Big Flat, he explained, is located in the center of the Paradox Basin where the subsurface formations have reached a maximum thickness. The well which was drilled at the Big Flat by Tidewater indicated the presence of gas and oil, but because of low pressure in the area these products were effectively mudded off by the mud used in the rotary drill process (R. 184-187). Mr. Ruby and his associates propose to drill a well in this structure with a cable tool rig and expect excellent possibilities of obtaining large quantities of commercial gas. Such gas, if found, will go either to the California or the Utah market depending on which way the first pipe line is constructed (R. 189).

Mr. Robert E. Landon, who is in charge of the geophysical work of General Petroleum in Idaho, Utah, Arizona, Nevada, and Southeastern Colorado, indicated to the Commission that his company is actively interested in the construction of the proposed pipe line in Southeastern Utah because of its activity in that area where it is presently drilling for petroleum products and where it hopes to have a means of transporting gas to market in the event the same is found in commercial quantities (R. 313-315).

Both Mr. Byrd and Mr. Frost, who are partners in Byrd-Frost, Inc., and who are geologists, testified that they had in the past backed up the recommendations of their geologists, particularly Mr. Willson, and as a result had obtained large holdings of acreage in twenty some odd structures in the State of Utah. They expressed a willingness to spend 5 to 10 million dollars drilling and developing these structures if the Commission granted the application for a certificate (R. 912, 920, 940). The attorneys for the Mountain Fuel Supply Company raised some question relative to the ability of Byrd-Frost, Inc., to undertake such a large scale program. At the Commission's request Mr. Byrd produced a financial statement showing that Byrd-Frost, Inc., had a net worth in excess of 32 million dollars (R. 726, 1099).

John R. Fell, a general partner in the banking house of Lehman Bros. in New York City, was asked the following question and gave the following answer: Question. "Have you any opinion as an investment banker as to whether Byrd-Frost have got the ability to do that testing job?" Answer. "Well, I wish I was in as good position as they are to do it. There is no question in my mind that they have got the ability to do it" (R. 450). The record shows that Mr. Byrd and Mr. Frost, operating as Byrd-Frost, Inc., presently own and operate more than 500 producing oil and gas wells in the United States (R. 911).

There was also some suggestion made that the plan proposed by the Applicant and supported by Byrd-Frost, Inc., was a promotion scheme and that Byrd-Frost, Inc.,

would make a public offering of stock. In answer to this suggestion the two partners testified that they have never sold stock for any enterprise in which they have been interested and that they do not anticipate selling stock for the drilling and development of gas in Utah (R. 910).

It appears from Exhibits 46, 47, 48, 49, 50, 51, and 54 that this Respondent has a call on all the gas to be produced by Byrd-Frost, Inc., Paul B. English, Four Corners Oil Company, Morgan-Walton Oil Company, Last Chance Holding Company, Americol Petroleum Company and Cane Creek Oil Company. It also appears that Shell Oil Company and General Petroleum Company are willing and anxious to make arrangements for the sale of any gas they may obtain in the area to the Respondent company (R. 1085, 1086, 1087, 1088, 1089, 1090, and 1093). All of the parties named own acreage in Southeastern and central Utah. For this reason all who were asked testified that they were anxious that the proposed *intrastate* line be constructed so that they would have a market for Utah produced gas, and all indicated that the construction of such a line would stimulate development.

Appellant called two expert witnesses, Mr. Dougherty and Mr. Davis. Mr. Dougherty had never been on the Last Chance property and had not been on the Boundary Butte or Monticello property for at least eight years, during which time all of the existing wells on those structures had been drilled (R. 683). Mr. Davis had not at any time been on any of the structures identified by this Respondent. Neither had actively participated in the discovery of any

oil or gas well (R. 709). Nevertheless, they disagreed with some of the testimony given by the seven geologists who testified for this Respondent.

3. *Feasibility and the Engineering Plan*—The engineering of the proposed project falls into two logical categories: (a) Transporting, treating and processing of the natural gas; (b) construction of the proposed line.

(a) *Transporting, Treating, and Processing of the Natural Gas*—Mr. Melvin Gertz, a qualified technical petroleum engineer and an associate of Robert L. Purvin, consulting engineers of Dallas, testified to a detailed study made by himself and his associates of the proposed operation of the line. His study is outlined in Exhibits 43 and 44 (R. 1082-1083). His testimony dealt in detail with the analysis, processing, mixing and transporting of gas from Boundary Butte, Monticello and Last Chance through the pipe line to the distributing facilities enroute and to the Provo-Salt Lake industrial area (R. 317). His analysis and study, which is technical and detailed in nature, was not questioned by any of the protestants or by Appellant.

(b) *Construction of the Proposed Line*—The location of the proposed route and the study relating to the costs of the proposed line and the details relative to the actual construction were supplied by Mr. H. H. Allen and Mr. Joseph C. Gordon, both civil engineers from Dallas, Texas. From first hand experience and as a result of studies which they had made they testified that the proposed line was feasible and that its total cost, including all the necessary facilities, would approximate, before adding overhead and interest,

\$29,064,920.00 The technical aspects of this testimony were broken down into a detailed study which is set out in Exhibit 42 at page 1081 of the record. The estimates made by Mr. Allen and Mr. Gordon were not questioned.

4. *Feasibility of the Financial Plan*—Mr. William Merten, a certified public accountant and a partner of the firm of Merten, Smyer & Kernaghan, Dallas, Texas, testified that he had been employed by the Utah Natural Gas Company to make a financial study and report for the proposed pipe line venture. He obtained his estimated cost of facilities, supplies, and operation from Mr. H. H. Allen and Mr. J. C. Gordon. Based on a supply of 100,000 cubic feet of gas per day selling at an industrial price of  $23\frac{3}{4}$  cents and a gate price to retailers of 30 cents and projecting the performance over a twenty year period he formulated the financial plan set out in this Respondent's Exhibit 42 (R. 1081). He computed that the over all estimate cost would be a little less than \$32,000,000.00. This financial plan had been submitted to Lehman Bros. Banking House of New York City. Two representatives of that house, Mr. John R. Fell, a partner, and Mr. R. Raymond Rusmisl, explained that they had been consulted and had made a study of the venture and desired to undertake its complete financing providing (1) that the Commission would issue a certificate of convenience and necessity; (2) that their independent geologists, after such certificate had been granted, approved the estimates of Applicant's geologists and determined that the reserves were sufficient to justify the expenditure of \$32,000,000.00. They testified that more



than a preliminary investigation had been made and that Lehman Bros. had concluded that the project in its fundamental nature was feasible (R. 444).

Both Mr. Fell and Mr. Rusmisl indicated the financial proposals at the present stage of the proceedings were contingent and necessarily preliminary because of the necessity of doing further development work and of obtaining a certificate of convenience and necessity.

In summary, then, these facts appear: There is an unsupplied demand for natural gas in the central industrial area of Utah, adequate to justify the construction of the line proposed by the Respondent. The construction of such a line is feasible from the standpoint of economics, engineering and finance. Responsible financing for the line is available upon the proof of adequate gas reserves. Competent geologists produced by this Respondent estimate the gas reserves to be adequate; the Appellant's geologists contend to the contrary. The proof of reserves can only be determined by extensive drilling. Such drilling will require the expenditure of several million dollars. Gas, unlike oil, can only move to market by pipe line. Those in control of the gas structures relied upon for supply will not risk their money on the necessary exploration without assurance that if and when the gas is brought above ground a pipe line in the hands of friendly interests will be available to take it to market; in short, that the Respondent, Utah Natural Gas Company, have a certificate of convenience and necessity for the construction and operation of the proposed line.

Upon these facts this Respondent voluntarily proposed as a reasonable and appropriate solution of the problems presented in this proceeding that the Commission grant to Utah Natural Gas Company the certificate of convenience and necessity prayed for by it, but impose condition upon the exercise of such right (R. 1004). This the Commission did.

## STATEMENT OF POINTS RELIED UPON

### POINT I.

THE CONDITIONAL ORDER MADE WAS WITHIN THE JURISDICTION AND POWER OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF UTAH.

### POINT II.

THE CONDITIONAL ORDER MADE IS REASONABLE AND IN THE PUBLIC INTEREST.

### POINT III.

THE APPELLANT IS NOT A PARTY AGGRIEVED BY THE ORDER HEREIN APPEALED FROM.

### POINT IV.

THE CONDITIONAL ORDER MADE BY THE COMMISSION DOES NOT VIOLATE THE DUE

PROCESS CLAUSE OF THE FEDERAL OR STATE CONSTITUTION AND DOES NOT CONSTITUTE AN UNLAWFUL DELEGATION OF POWER TO AN UNNAMED GEOLOGIST AND DOES NOT PERMIT A FINDING ON A MATERIAL FACT BASED SOLELY ON HEARSAY EVIDENCE.

POINT V.

THE COMMISSION'S FINDING THAT THE DEVELOPMENT OF THE NATURAL RESOURCES OF THE STATE IS DESIRABLE IS A PROPER FINDING AND IS NOT ONE WHICH INDICATES A FAILURE TO REGULARLY PURSUE ITS STATUTORY AUTHORITY.

POINT VI.

THE COMMISSION DID NOT EXCEED ITS LAWFUL AUTHORITY IN HEARING THE APPLICATION OF THE UTAH NATURAL GAS COMPANY BEFORE IT HEARD THE APPLICATION OF APPELLANT.

POINT VII.

THE PUBLIC SERVICE COMMISSION OF UTAH DID NOT ACT ARBITRARILY AND CAPRICIOUSLY IN NOT HAVING A FULL JOINT HEARING BEFORE THE FEDERAL POWER COMMISSION BEFORE RULING ON RESPONDENT'S APPLICATION.

## ARGUMENT

## POINT I.

THE CONDITIONAL ORDER MADE WAS  
WITHIN THE JURISDICTION AND POWER  
OF THE PUBLIC SERVICE COMMISSION OF  
THE STATE OF UTAH.

Section 76-4-1, Utah Code Annotated 1943, provides  
as follows:

“The commission is hereby vested with power  
and jurisdiction to supervise and regulate every  
public utility in this state, and to supervise all of the  
business of every such public utility in this state, and  
to do all things, whether herein specifically design-  
ated or in addition thereto, *which are necessary or  
convenient* in the exercise of such power and juris-  
diction.” (Italics ours.)

Section 76-4-24, Utah Code Annotated 1943, deals spe-  
cifically with the general subject of certificates of conven-  
ience and necessity. The pertinent parts of that statute are  
as follows:

“(3) Every applicant for such a certificate  
shall file in the office of the commission such evi-  
dence as shall be required by the commission to show  
that such applicant has received the required con-  
sent, franchise or permit of the proper county, city,  
municipal or other public authority. The commis-  
sion 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,  
aerial bucket tramway, line, plant or system, or ex-  
tension 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.” (Italics ours.)*

It thus appears clearly that the legislature has delegated to the Public Service Commission alone the right to impose in its order “such terms and conditions *as in its judgment* public convenience and necessity may require,” and to do whatever is “necessary or convenient” in the exercise of such power. The legislature has not attempted to limit, qualify, or define the type of condition which may be imposed. Nor are we able to find any cases under a similar statute wherein a court has attempted to limit the nature of the condition, precedent or subsequent, which a commission may invoke.

We submit that 76-4-24 and 76-4-1 contain definite and clear grants of power to the Commission to deal with the specific problem presented in the instant case. An analysis of the language of Section 24, *supra*, clearly shows that the procedure contemplated is that the Commission may issue a certificate and attach to the authority thereby granted terms and conditions *which it sees fit to impose*.

By virtue of the general power thus given, every order granting power or authority to a utility contains conditions implied by law which, if not adhered to, may subject the order to modification or revocation. Almost every order of the Commission contains express provisions or conditions subsequent to its granting which must be complied with by the applicant. These relate to filings of tariffs, policies of insurance, installation, maintenance and

operation of interlocking and other safety devices, evidence of the consummation of transactions authorized in acquisition cases, and compliance with required accounting practice and procedure. It is interesting in this regard to note that even in the cases cited by Appellant conditions subsequent were attached to the Commission order. Thus, in *Re Wilcox*, cited at page 21 of Appellant's brief P. U. R. 1916 C, the Commission provided that the certificate granted would become null and void unless construction was commenced not later than the first day of June and unless petitioners should have available all equipment and pipe necessary for the sale, manufacture and transportation of gas not later than the first day of October, 1917.

Surely, in view of the language of the statute, a Court cannot properly hold that the imposing of a condition subsequent invalidates a commission order. The only test of the validity of the order is not whether it is conditional but whether or not there is evidence to support it or whether it violates any constitutional rights of the Appellant or arbitrarily discriminates against the Appellant. Our statutes and decisions dealing with the power of the Supreme Court to review decisions of the Public Service Commission so provide. 76-6-16, Utah Code Annotated, 1943, in its pertinent provisions is as follows:

“\* \* \* within thirty days after the rendition of the decision on rehearing, the applicant or any party to the proceeding deeming himself aggrieved \* \* \* may apply to the Supreme Court for a writ of certiorari for the purpose of having the lawfulness of the original order or decision \* \* \* inquired into and determined. \* \* \* The review



shall not be extended further than to determine whether the commission has regularly pursued its authority including a determination of whether the order or decision under review violates any right of the petitioner under the constitution of the United States or of the State of Utah. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination.”

The legislature has thus limited the right of the Supreme Court to interfere with the judgment and discretion of the Public Service Commission to those cases wherein the Commission has failed to regularly pursue its authority or has violated a right of the appellant under the constitution of the United States or the State of Utah. The legislature has further provided that findings of fact, including findings and conclusions as to reasonableness and discrimination, are final and not subject to review.

Our Supreme Court in confining itself to the foregoing limited power of review has respected the legislature's obvious intent and has interfered very little with the Public Service Commission's findings on facts, including its determination of what is reasonable, or what is discriminatory.

In one of the first cases, *Jeremy Fuel & Grain Co., et al. v. Public Utilities Commission*, 63 Utah 392, 226 P. 456, the Fuel Company brought an action before the Commission against The Denver and Rio Grande Western Railroad Company seeking reparations on coal shipments on

the grounds that the freight charged by the railroad was excessive both as a matter of reasonableness and as a matter of law. The Supreme Court of the State of Utah, in sustaining the Commission action, said:

“It is important to keep in mind the provisions of our statute relating to that subject. Comp. Laws of Utah 1917, Section 4834, where the powers of this court to review the decisions of the commission are enumerated, provides:” (Citing 76-6-15, Utah Code Annotated 1943, *supra*.)

“Here, thus, is a clear, explicit and unambiguous statement of both the power and the limits of that power. *Beyond that we cannot go.*”

In *Los Angeles & Salt Lake Railroad Company v. Public Utilities Commission of Utah, et al.*, which came before the Supreme Court on two occasions, and as two separate cases, 80 Utah 455, 15 P. (2d) 358 and 81 Utah 286, 17 P. (2d) 287, there is some helpful language on the question now before this Court. The two decisions were written by Judge Wolfe, who at that time was a district court judge but who was sitting by invitation on the Supreme Court. The question in general was whether or not petitioner should be permitted to change its stations from an agency to non agency stations. Judge Wolfe in his first opinion said:

“Technically stated, our power of review goes to the extent of determining whether there was any substantial evidence to support the decision of the commission. \* \* \*

Petitioner, in its argument, had relied on certain New Mexico cases. The Judge pointed out that these decisions

were not helpful as the New Mexico Supreme Court had the power to review the reasonableness and lawfulness of an order made by the State Corporation Commission and was not bound by the findings of that commission. Judge Wolfe said:

“\* \* \* If the power of this court to review the proceedings and the evidence before the commission were the same as given to the Supreme Court of New Mexico, we could review the evidence and determine whether *in our opinion* the commission’s judgment was correct, and we could determine from the evidence itself, as if the question had been before this court for the first time, whether the application of the railroad should not be granted. Under the New Mexico procedure, the commission on appeal is considered analogous to a referee taking testimony and submitting recommendations. The court may or may not follow the recommendations; its judgment operates directly on the evidence and not on the decision of the commission. But we cannot do that under the provisions of section 4834.” (Italics ours.)

The Judge pointed out that the right of the Court to review a Commission finding was similar to its right to review the finding of a jury. He said:

“\* \* \* A court must not set aside a verdict merely because it disagrees with the verdict, but only if it is such that the court could say that no person in a reasonable state of mind, free from passion, bias, or prejudice, following the principles of law given it, could have so found under the evidence. This court must not determine whether *its supposedly reasonable minds differ* from the minds of the commission in the exercise of their judging facul-

ties, but whether any reasonable mind could have agreed with the decision in view of the law and the evidence.” (Italics ours.)

Elaborating further on this same question, Judge Wolfe, in the second case, wrote:

“\* \* \* If there is any evidence upon which any reasonable judging mind could come to the same conclusion that the commission came to it would be our duty to affirm the decision of the commission.  
\* \* \*”

The Judge also paid his respects to the value of precedents from other jurisdictions on the question of reasonableness of the Commission action. He wrote in his first opinion:

“\* \* \* Furthermore, since the commission has the duty to exercise its own judgment on the facts, the opinion of no court on similar facts can be a precedent. \* \* \*”

This last statement is especially applicable to the authorities cited by the Appellant from other jurisdictions, primarily those cited under Point (a) of Point 1 of Appellant's brief. Thus, in *Re Wilcox*, P. U. R. 1916 C (Idaho), page 21 Appellant's brief, *Re Achtenburg*, 8 P. U. R. New Series 397 (Mo.), page 27 Appellant's brief, *Re Grand Rapids Gas Light Co.*, 13 P. U. R. New Series 445 (Mich.), page 30 Appellant's brief, *Re Tennessee Gas & Transportation Co.*, 40 P. U. R. New Series 129 (Tenn.), page 31 Appellant's brief, and several Federal Power Commission cases, opinions of the respective tribunals are given respecting their judgments as to what is reasonable under

entirely different facts and circumstances than in the instant case. Following the suggestion of Judge Wolfe, we submit that Appellant might as well cite the jury verdicts from other cases to prove that a jury verdict in a given situation is wrong.

The foregoing decisions cannot be helpful unless they indicate that the action taken by the Public Service Commission of Utah, in the case now before this Court, was not "regularly pursued" or that the order made violates some constitutional right of the Appellant or in some way is arbitrary and capricious. We do not find language which so indicates in the cases cited by Appellant.

In the *Wilcox* case, *supra*, the dispute before the Idaho Public Service Commission was between two applicants who had filed within one month of each other seeking a certificate to serve Idaho Falls with manufactured gas. Both applicants appeared against the other in opposition. The Commission held a joint hearing and granted a certificate to one of the petitioners. This certificate, as herein indicated, had attached to it conditions subsequent which rendered the order null and void if the conditions were not complied with. True, the Commission did employ language indicating that the unsuccessful applicant seemed to have no plan and was "purely a promoter." But how does this language in any way bear upon the issue in the instant case? There is no promotion involved in the case at bar; in fact, promotion of any type is specifically enjoined by the Commission's order. Furthermore, the financial plan suggested by the Utah Natural Gas Company was endorsed as sound and feasible by Lehman Bros., one



of the outstanding banking houses in this country; finally there is nothing in the language used indicating the Utah Commission is without authority to do what it did.

In *Re Achtenburg, supra*, the applicant seeking a certificate consisted of a group of individuals, without corporate form, who proposed tentatively and conditionally to obtain borrowed capital for the purchase of a defunct railroad and to sell preferred and common stock in a proposed corporation to be later organized. It further proposed to seek permission from the Missouri Commission to borrow funds from the Reconstruction Finance Corporation or some other source to finance the purchase of the proposed property based on a mortgage on that property which it had not yet acquired. The Missouri Court felt the plan was too tentative to grant a tentative certificate. We can only agree, but query, wherein does this case bear upon the present issue?

In *Re Grand Rapids Gas Co., supra*, a Michigan Commission permitted an existing public utility *operating on public financing* to build a pipe line from a new field into the City of Grand Rapids. It appears from the evidence that there were not enough probable reserves in the new area to serve the city with 100% natural gas *for a period of more than four years*. However, the evidence showed that by mixing the natural gas with 50% artificial gas the company could serve Grand Rapids for a period of about eight years. On the basis of this limited showing of reserves the appellant was permitted by the Michigan Commission to build the line. Surely this case relied upon by Appellant does not support its apparent position that this



Respondent has failed to show adequate reserves. The important fact which Appellant apparently does not recognize is that Respondent company is not claiming adequate reserves for an unconditional certificate. It is claiming an adequate showing to support the *conditional* order made. Some of the language used by the Michigan Commission is very applicable. Thus, at page 451 the Commission said:

“\* \* \* It must be kept in mind that the Grand Rapids Gas Light Company is a public Utility and its funds can be expended only where the Commission finds that such expenditure is reasonable and logical and will serve the public convenience and necessity.”

The Utah Natural Gas Company does not propose to use public funds and is prevented from doing so by the Commission's conditional order.

At page 462 of the opinion the Michigan Commission, in justifying the construction of the line on the basis of meager reserves, said:

“\* \* \* Opinions have been expressed that the building of a pipe line is not warranted except when a sufficient reserve is actually proven to supply the community to be served for a period of eight or ten years. *This has not been and necessarily must not be a fixed rule, but depends on many conditions.* For example, the distance of the community from the field as relating to the construction investment, the possibilities of further discovery, the possibilities for development of usage which differs greatly according to the type of community. \* \* \*” (Italics ours.)

We submit that the present order of the Utah Commission, because of its conditional nature, is more conservative than the unconditional order of the Michigan Commission in the Grand Rapids case relied upon by Appellant. Furthermore, the Michigan Commission expressly disapproves the Appellant's fundamental contention that the Utah Commission has no jurisdiction to make a conditional order similar to the one made in the instant case.

In *Incorporators of Service Gas Company v. Public Service Commission of Pennsylvania*, 126 Pa. Super. Ct. 381, 190 A. 653, page 35 Appellant's brief, the Pennsylvania Superior Court had before it for review a decision of the Pennsylvania Public Service Commission denying to petitioners a certificate to serve natural gas in an area already adequately served by four existing gas companies. The Superior Court of Pennsylvania sustained the Commission's ruling and said at page 262:

“\* \* \* The record discloses no inadequacy of service in the territories served by the respective protestants and included in appellant's application. There is no testimony upon which such a finding could be based; and, on the contrary, the testimony of appellants and the protesting companies was consistently to the effect that they knew of no one in the territory in question who had demanded gas and was unable to secure it. \* \* \*”

Surely this case cannot be helpful in deciding the problems existing in the State of Utah. In this state we not only have an admitted inadequate service in the area served by the Mountain Fuel Supply Company, but there is a total lack of any service in most areas of the state.

In *Re Kansas Pipe Line & Gas Co. and Re North Dakota Consumers Gas Co.*, 30 P. U. R. (N. S.) 321, page 34 of Appellant's brief, two applicants were seeking permission to construct interstate gas lines from Kansas and Montana to certain specified towns in eastern North Dakota and western Minnesota. The hearing was before the Federal Power Commission and was the first case to arise under the Federal Natural Gas Act Section 7(c) 15 U. S. C. A., sec. 717g. (c), which provided among other things the following:

“\* \* \* In passing on applications for certificates of convenience and necessity, the Commission shall give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it being the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest.”

In discussing the Kansas company's application the Federal Power Commission pointed out that it did not appear from the evidence that the Kansas company had a firm commitment to purchase gas at the Hugotan Field in Kansas. The Commission therefore said at page 333:

“\* \* \* *We could not issue an unconditional certificate* of public convenience and necessity nor authorize the issuance of such an unconditional certificate until we had received assurance in the form of a contract satisfactory to us that the reserve of natural gas purportedly available to the Kansas

Company is actually available upon firm commitment." (*Italics ours.*)

It was interesting to observe that the Federal Power Commission retained jurisdiction of the two cases so that further evidence could be introduced.

We do not believe that cases decided before the Federal Power Commission involving interpretation of the Natural Gas Act and involving interstate transportation of natural gas can limit this Court in determining the power of the Public Service Commission of Utah to issue the conditional order here in question. The Kansas and North Dakota cases are particularly inapplicable inasmuch as the Federal Power Commission expressly stated that it could not issue an unconditional certificate in that case. We do not claim that the Utah Commission could properly issue an unconditional certificate in the instant case, nor did it do so.

## POINT II.

### THE CONDITIONAL ORDER MADE IS REASONABLE AND IN THE PUBLIC INTEREST.

It seems to us that the Commission's problem, fundamentally and simply stated, was as follows:

The evidence showed an admitted inadequate supply of natural gas in the State of Utah and a real public need to augment this inadequate supply. The possible sources of an additional supply were:

1. The Mountain Fuel Supply Company.
2. New Mexico reserves to be served by the Utah Pipe Line Company.

3. Utah reserves to be supplied by the Utah Natural Gas Company.

From which of these sources did the Commission have the best possibility of obtaining additional gas?

The Mountain Fuel Supply admitted that it would be unable to adequately serve the domestic and industrial needs of the northern part of the state now or in the foreseeable future.

The Utah Pipe Line Company had not obtained a certificate of convenience and necessity from the Federal Power Commission and it might not be able to do so. Until it obtained such a certificate there was no possibility of obtaining gas from that source. The obtaining of a certificate from the Federal Power Commission was and is problematical. In any event before such a certificate could be obtained, several years might elapse. Furthermore, New Mexico gas if brought into the State of Utah would either cause undeveloped Utah gas to remain in the ground or go to the Southern California market.

Several private drillers and producers with large holdings of Utah acreage agreed to spend their own money developing Utah gas in the southeastern portion of the state and believed that they could prove up a sufficient supply within a year to justify the construction of the line proposed by this Respondent, provided that the Commission would assure them by issuing a certificate that the intrastate line would be constructed if they were successful.

Confronted with these facts, the Commission apparently determined that the best chance of obtaining more



natural gas was to accept the proposal made by the Utah Natural Gas Company and its sponsors. However, in order to protect the public, *and to protect the Utah Pipe Line Company*, in the event it sincerely intended to make good its application before the Federal Power Commission, the Commission limited the Utah Natural Gas Company to one year, and in effect said: If you develop a sufficient proved supply from the estimated large reserves in the State of Utah within one year you may build the line as proposed and will be protected in doing so. If you do not, your conditional rights will be void. In the meantime you may not make a public offering of stock.

Surely such a decision is reasonable, and surely no one, not even the Appellant, can reasonably complain. If this Respondent is unable to comply with the conditions within a year's time, Appellant has not been hurt and the public will be greatly benefited. The only one who stands to lose if this Respondent fails, is this Respondent and private producers who desire to spend their own money.

We submit that this Court, or any other reasonable body, faced with the problems which confronted the Public Service Commission of the State of Utah would have had no alternative but to issue the certificate as given.

### POINT III.

THE APPELLANT IS NOT A PARTY AG-  
GRIEVED BY THE ORDER HEREIN AP-  
PEALED FROM.



We believe it is pertinent to point out that not only has Appellant no pipe line, facilities, customers or public duty within the State of Utah but that inasmuch as it proposes to transport natural gas in interstate commerce, its power and authority to engage in any of its proposed functions cannot in the first instance be granted or conferred by the Respondent, Public Service Commission of Utah, but must be granted, if at all, by the Federal Power Commission, upon which body, by the Natural Gas Act of 1938 [Chapter 15 (b), Title 15, U. S. C. A.] is conferred jurisdiction over the interstate transportation of natural gas.

Appellant alleges that it has filed an application before the Federal Power Commission seeking authority to transport natural gas from the State of New Mexico into the State of Utah. Whether that application may be prosecuted or what the ultimate disposition of that proceeding may be is purely conjectural; but until and unless that application is prosecuted and the authority sought thereunder is granted, the Appellant, Utah Pipe Line Company, has at the most only a remote and contingent interest in the proceedings taken before the Public Service Commission of Utah and in the order and decision from which it takes its appeal.

There is no right on the part of any person, whether or not a party or participant in a proceeding before the Commission, to invoke the jurisdiction of this court. Such right is limited by statute to persons who are *aggrieved* by the order or decision complained of. The matter is controlled by Section 76-6-16, U. C. A. 1943, which provides in part as follows:

“Within thirty days after the application for a rehearing is denied, or, if the application is granted, within thirty days after the rendition of the decision on rehearing, the applicant or any party to the proceeding deeming himself aggrieved by such order or decision rendered upon rehearing may apply to the Supreme Court for a writ of certiorari for the purpose of having the lawfulness of the original order or decision, or the order or decision on rehearing, inquired into and determined.”

The question here presented, then, is whether the Appellant is a party aggrieved within the meaning of the above statute. It is elementary that only a person having a legal standing before this court enjoys the right to challenge the order or decision of an administrative body. The statutes of the several states and the United States are not uniform in defining who enjoys a legal standing before a court under such circumstances. Some statutes refer to persons entitled to challenge an administrative order as persons “adversely affected”, others refer to persons having “a legal standing”, while some statutes employ the same language as that of our Code, limiting the right to persons “aggrieved”. Regardless of the language employed, however, the principles controlling the right of challenge are essentially uniform in the decisions of the courts of the various states and of the United States.

The general rule as developd in the decision on this question seems to be this: In order for a party to be entitled to challenge a decision of an administrative body, the order or decision complained of must have an immed-

iate, direct and material effect upon the then existing rights or property of the complaining party.

The right of a party to challenge a decision of an administrative body has so often been considered by the Supreme Court of the United States in connection with orders and decisions of the Interstate Commerce Commission and other regulatory bodies that we believe the decisions of that Court will be particularly helpful to this Court in considering the problem here presented. We therefore direct the attention of the Court to certain of those decisions. Perhaps the leading case in the field is *Federal Power Commission, et al. v. Hope Natural Gas Co.*, 64 S. Ct. 281. In that decision the Rochester Telephone Corporation case, *infra*, was referred to in connection with the power of a party to challenge an order or decision of any regulatory body, and the court, in connection with the power of the Federal Power Commission, at page 295 said in part:

“The Court recently summarized the various types of administrative action or determination reviewable as orders under the Urgent Deficiencies Act of October 22, 1913, 28 U. S. C. Secs. 45, 47a, 28 U. S. C. A. Secs. 45, 47a, and kindred statutory provisions. *Rochester Tel. Corp. v. United States*, 307 U. S. 125, 59 S. Ct. 754, 83 L. Ed. 1147. It was there pointed out that where ‘the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action’, it is not reviewable. \* \* \* The Court said, ‘In view of traditional conceptions of federal judicial power, resort to the courts in these situations is either premature or wholly beyond their province.’ ”

In *Moffat Tunnel League, et al. v. United States*, 53 S. Ct. 543, an action was brought by Moffat Tunnel League against the United States and others to set aside an order of the Interstate Commerce Commission. In affirming a decree dismissing the petition the Court, at page 545, said:

“\* \* \* the complaint must show that plaintiff has, or represents others having, a legal right or interest that will be injuriously affected by the order. (Citing among other cases *Edward Hines Yellow Pine Trustees v. United States*, 44 S. Ct. 72.) Plaintiffs have failed to show that they are so qualified.”

In *Rochester Telephone Corporation v. United States*, 59 S. Ct. 754, suit was brought in equity by the Telephone Corporation against the United States and the Federal Communications Commission to review an order of that Commission. The bill was dismissed by the lower court and dismissal affirmed on appeal in the Supreme Court. Justice Frankfurter, speaking for that court, reviews the circumstances under which an order of an administrative body may be reviewed or attacked by a party deeming himself aggrieved.

In *L. Singer & Sons, et al. v. Union Pacific Railroad Company*, 61 S. Ct. 254, the court had occasion to affirm the order of the Circuit Court of Appeals dismissing a complaint. The facts in this case were that the complainants were commission merchants doing business in one city who would be adversely affected by the construction into another city of a railroad extension involved in the

case. The Supreme Court at page 257 quotes from the decision of the Circuit Court of Appeals as follows:

“The plaintiffs have no definite legal right which is threatened. They are, however, persons whose welfare may be adversely affected by the bringing about of a material change in the transportation situation, in the sense that the extension proposed by the defendant, if built and operated, will enable a competitive market to function to their detriment. In that sense, we think it may safely be said that the proposed extension of defendant’s lines may adversely affect the plaintiffs’ welfare. We are of the opinion, however, that their complaint discloses that their welfare cannot be directly, but only indirectly and consequentially, affected by the proposed extension. They are not in competition with the defendant. They are not engaged in the transportation business. Their only peculiar interest in that business is in the effect which changes in it may have upon the market where they do business and upon rival markets now or hereafter established in the territory which the plaintiffs serve. \* \* \*

We conclude that the statute is not to be so liberally construed as to enable those who fear adverse effects upon their business from the establishment of competitive enterprises requiring transportation facilities to maintain suits to enjoin railroads from constructing what are claimed to be unauthorized extensions to serve such enterprises.”

The Court finally, at page 258, concludes as follows:

“\* \* \* a suit cannot be instituted by an individual unless he ‘possesses something more than a common concern for obedience to law.’ The general or common interest finds protection in the permission to sue granted to public authorities. An individual may have some special and peculiar in-



terest which may be directly and materially affected by alleged unlawful action. See *Detroit & M. Ry. v. Boyne City, etc., Co.*, D. C. 286 F. 540. If such circumstances are shown he may sue; he is then 'party in interest' within the meaning of the statute. In the absence of these circumstances he is not such a party."

In *Alabama Power Co. v. Ickes, et al.*, 58 S. Ct. 300, the Power Company sought to enjoin Ickes as Federal Emergency Administrator of Public Works and others from the execution of certain loan-and-grant agreements entered into with municipalities. The Court, in stating the contention of the petitioner, at page 302 said:

"The injury which petitioner will suffer, it is contended, is the loss of its business as a result of the use of the loans and grants by the municipalities in setting up and maintaining rival and competing plants; a result, it is further contended, which will be directly caused by the unlawful act of the administrator in making and consummating the loan-and-grant agreements."

In stating its conclusion on the same page, the court said:

"On appeal to the United States Court of Appeals for the District of Columbia, that court found it unnecessary to consider the validity of the loans and grants, and affirmed the decrees of the District Court dismissing the bills on the ground that no legal or equitable right of the power company had been invaded, and the company, therefore, was without standing to challenge the validity of the administrator's acts. 91 F. 2d 303. With that view we agree, and confine our consideration of the cases accordingly."



Testing the position of the Appellant here in the light of the rules laid down in the foregoing cases, it appears clear that it is not a party aggrieved within the meaning of our statute. The Appellant stands in the position of a party asserting only an expectancy to engage in a competitive enterprise. Appellant enjoys a complete freedom of election to change or abandon any intended plan or enterprise at any time for it is neither under the jurisdiction or control of the Respondent Commission nor any other commission. It has within the State of Utah no property, customers, investments or market to protect. It owes no duty of public service to anyone. A clearer case for invoking the principles announced in the foregoing decisions could hardly be found.

In *Arkansas Louisiana Gas Co. v. Federal Power Commission et al.*, 113 F. (2d) 281, the Fifth Circuit Court of Appeals reviewed the decision of the Federal Power Commission granting to the Louisiana Nevada Transit Company a certificate of convenience and necessity under the Natural Gas Act. The Appellant claimed that there was not a proper showing of public convenience and necessity and that the order contained conditions as to rates which were beyond the power of the Federal Power Commission to impose. The Circuit Court in sustaining the decision of the Federal Power Commission said at page 283:

“\* \* \* Finally, we find nothing in the statute which prevents the commission from imposing in the interest of the public to be served by the construction, reasonable conditions upon the granting of a certificate of convenience and necessity,

and we cannot agree with petitioner that their imposition in any manner effects or impairs the certificate.

“But, if we could abstractly agree, this would not avail petitioner, for it is aggrieved, not by the imposed conditions, but by the granting of the permit and under the statute, it may complain here only of an order by which it is aggrieved.”

It appears to us that this language is especially applicable to Appellant's position before this Court. The conditions imposed restrict the Appellant, not the Respondent company. They are in effect for Appellant's protection as well as for the protection of the general public. What Appellant is in reality objecting to is that this Respondent, during the period of the conditional order, will have an opportunity to deliver sufficient proven reserves to commence the construction of the proposed gas line. If this Respondent fails to do so because of the conditions imposed, Appellant will have no cause to complain and can pursue its application before the Federal Power Commission.

#### POINT IV.

THE CONDITIONAL ORDER MADE BY THE COMMISSION DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FEDERAL OR STATE CONSTITUTION AND DOES NOT CONSTITUTE AN UNLAWFUL DELEGATION OF POWER TO AN UNNAMED GEOLOGIST AND DOES NOT PERMIT A FINDING ON A MATERIAL FACT BASED SOLELY ON HEARSAY EVIDENCE.

The Appellant throughout its brief continually asserts that the Commission found there were inadequate reserves in Southeastern Utah to justify the construction of the proposed line. This is not true. At page 1210 of the record the Commission made the following finding:

“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.” (Italics ours.)

The term “proved” refers to a sufficient development of “blocked out” *available gas* at the surface. The Commission in effect gave the Respondent Utah Natural Gas Company one year to develop from the *adequate reserves* such a proven available amount to justify the financing and immediate construction of the line. The Commission said:

“\* \* \* 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; \* \* \*”

In the event the Utah Natural Gas Company does not file with the Commission the certificate required the conditional rights issued shall become null and void. In the event the Respondent does file such certificate any party to the proceeding, including, of course, the Appellant, will have an opportunity to be heard and to cross-examine. If there can be any question about the Commission's intention it is fully explained and clarified by Commission's counsel in his brief at page 16 wherein he states:

"It is contended by the Petitioner that the Public Service Commission of Utah in the Certificate of Convenience and Necessity issued on March 12, 1951 delegated to a geologist the power of the Commission to make a finding as to the adequacy of the gas supply of Utah Natural Gas Company. This, the Commission did not intend to do and does not believe that it did do.

"In order to determine whether or not there is an adequate supply of gas it is, of course, necessary for the Commission to lean very heavily upon the testimony of expert witnesses on this subject. The Commission has listened to experts produced by Utah Natural Gas Company, by Utah Pipe Line Company and other interested parties and reserves the right to make its own investigation to aid it to determine this fact. If the language of the Commission order is subject to the interpretation placed thereupon by Petitioner, it certainly carries a meaning not intended by the Commission and for the inaptness of the language, if such exists, counsel takes full responsibility. Upon the expiration of the one year period granted in the certificate in which the applicant, Utah Natural Gas Company, may present evidence that it has an adequate supply of gas and adequate financing available it is the intention of the Public Service Commission of Utah to again set the matter down for hearing. All interested parties

will be given notice and will be given an opportunity to appear. The burden of proof will be upon the applicant, Utah Natural Gas Company to prove to the satisfaction of the Commission that an adequate supply of gas is available. This proof, of course, must come in the form of testimony by competent witnesses. The petitioner in this case, as well as all other protestants, will be given an opportunity to controvert this evidence if they feel that it is not reliable. However, the Commission felt that before it should proceed with any such hearing the applicant, Utah Natural Gas Company, should first furnish the Commission with documentary evidence which would establish *prima facie* that the requirements of the certificate had been met. It was not and is not the intention of the Commission to delegate any of its powers. When the necessary evidence is in as to whether or not the conditions of the certificate have been met, the Commission will then consider this additional evidence and on the basis of that evidence will reach its own findings as to whether or not Utah Natural Gas Company has complied with the orders of the Commission and is entitled to have its certificate made unconditional."

If the Commission's intention needed any clarification, the foregoing should be sufficient. But even should this Court presume that the Commission intended to deny Appellant a right to be heard on the question of "proven reserves", and intended to delegate to an "unknown geologist" the Commission's duty to finally determine an ultimate fact, it has not yet done so. Until it does so, Appellant has not been imposed upon and therefore makes a premature objection.

If Utah Natural Gas Company is unable to file its certificate, Appellant will be content and Respondent's



rights will terminate. If it does file the certificate the Commission will then be obliged to proceed. If it does so improperly Appellant can then object. Until that time the question is moot.

### POINT V.

THE COMMISSION'S FINDING THAT THE DEVELOPMENT OF THE NATURAL RESOURCES OF THE STATE IS DESIRABLE IS A PROPER FINDING AND IS NOT ONE WHICH INDICATES A FAILURE TO REGULARLY PURSUE ITS STATUTORY AUTHORITY.

The Appellant urges under Point H of its brief, at page 132, that the Commission did not regularly pursue its statutory authority, because by deciding that the development of Utah natural resources was desirable it thereby constituted itself "a development and conservation commission." This, the Appellant asserts, it had no authority to do and therefore its *ultra vires* finding makes its conditional order void.

Appellant's conclusion is allegedly supported by several cited cases. We desire to state the fact situations in these cases so that this Court may see for itself the extent to which Appellant has gone in its endeavor to make a point.

The only Utah case cited is *In Re Clays*, 1924-E P. U. R. 178, page 136 of Appellant's brief. In that case applicant sought a certificate of convenience and necessity to build an ore tramway from Alta to Wasatch in Little



Cottonwood Canyon. The Utah Public Service Commission, after reviewing the testimony, said at page 188:

“Under all the circumstances and facts shown to exist, we are of the opinion that this case does not come within the provisions of the section of the act authorizing the Commission to issue a certificate of convenience and necessity before the tramway is constructed, and that the Commission *has no jurisdiction to authorize or deny the construction of the tramway.*” (Italics ours.)

There is not a word in the case applicable to Appellant’s contention.

In *Northwest Businessmen’s Association v. Illinois Commission*, 168 N. E. 890, page 136 of Appellant’s brief, the Supreme Court of Illinois held that the Commerce Commission of Illinois could not rescind a prior order made without making findings of fact different from the findings made in support of the original order, either on the grounds that the original findings were erroneous or that the facts had changed. The Illinois Supreme Court held that the Commission, without doing this, could not change its original order simply on a policy basis.

In *State Ex Rel. Thatcher v. Boyle, et al.*, 204 P. 378, at page 137 of Appellant’s brief, the Appellant quotes the *syllabus* to the effect that administrative tribunals are creatures of statute, which fact no one can deny. The only point cited in the *Thatcher* case was whether the Montana Public Service Commission was authorized by its enabling statute to regulate, as a public utility, irrigation companies. The enabling statute included “water for business”.

The Montana Court properly, we think, held that the irrigation company could not be regulated as a public utility under such a statute.

In *Backus-Brooks Company v. Northern Pacific Railroad Company, et al.*, 21 F. (2d) 4, page 137 of Appellant's brief, the 8th Circuit Court of Appeals held that the federal district court was without jurisdiction to fix joint rates because the preliminary question of what constituted a just and proper rate had not been determined by the proper commissions, to wit, the Interstate Commerce Commission and the State Commission of Minnesota, and that therefore the district court was without jurisdiction to award damages to a stockholder on account of a division of these joint rates. As a part of this decision the Circuit Court held that the Commission of Minnesota by reason of the broad legislative language which conferred powers on it was able to fix and establish joint rates. In reasoning to this conclusion, the court by way of dicta stated the general proposition that commissions created by statute can exercise only those powers which are delegated to it. Surely this is not debatable.

In *Re Montana Dakota Power Company*, P. U. R. 1929-A 369, page 134 of Appellant's brief, several applicants sought certificates to construct an electric transmission line within the state in an area already being served. The main object of the transmission line, so far as the applicant Scranton Electric was concerned, appeared to be to provide a possible market for slack coal which was to be used as generating fuel, and so to build up that mining property. It appeared, however, from the testimony as found by the

Commission, that "the proposed transmission line and local plants are incidental to the coal mining industry." It thus appears that the case in reality shows that the North Dakota Board considered the very policy question which the Appellant claims could not properly be determined.

We respectfully submit that the generalities, dicta and contrary rulings in the foregoing cases not only fail to support Appellant's point, they actually argue against it. The powers given to the Public Service Commission of the State of Utah are extremely broad. In 76-4-1, *supra*, the Commission is given "power and jurisdiction to supervise and regulate every public utility in this state, and to do all things, whether herein specifically designated or not, in addition thereto, which are necessary or convenient in the exercise and power of such jurisdiction." We submit that from this general grant alone the Commission was amply justified in finding that the development of natural resources of the state is desirable.

But even should we assume for the purpose of argument that the Commission's so called "policy finding" in this regard, constitutes a finding which was beyond the Commission's delegated power, is it conceivable that such a finding, which is undisputably in the best interests of the state, will invalidate the Commission's order? We submit that taking Appellant's argument at its best the conclusion reached is not only unsupported by authorities, but it is in its fundamental aspects erroneous. Furthermore, it is apparent from a reading of the Report and Order made that the Commission's finding of convenience and necessity was

not solely based on this so called policy finding but was based on many other facts therein stated.

#### POINT VI.

THE COMMISSION DID NOT EXCEED ITS  
LAWFUL AUTHORITY IN HEARING THE AP-  
PLICATION OF THE UTAH NATURAL GAS  
COMPANY BEFORE IT HEARD THE APPLI-  
CATION OF APPELLANT.

Under Point I of Appellant's brief, page 139, Appellant contends that because the Public Service Commission of Utah heard the Respondent Utah Natural Gas Company's application first, without hearing Appellant's application, it proceeded unlawfully. In support of this proposition Appellant cites several cases wherein it is generally stated that "priority in the field does not of itself govern the granting of a certificate."

We will not cite cases to challenge this proposition, although we do point out that there are many cases which also support holdings that "the applicant who first files an application for a certificate of convenience and necessity should receive an award due his diligence." (See cases cited in P. U. R. Digest, Vol. 1, Section 95). Undoubtedly both of the foregoing generalizations correctly state the law.

In the instant case the Commission received an application from the Respondent Utah Natural Gas Company on May 29, 1950 (R. 1106). An amended application was

filed on November 17, 1950 (R. 1111). Notice of hearing was given on the 21st day of November, 1950. This notice was published as required by law. On December 11, 1950, the case came on for hearing in the Governor's board room at the Capitol Building. The room was filled with interested parties. Some of them appeared to either object to or support Respondent's application (R. 1, 2, 6, 7). At that time Respondent Utah Natural Gas Company appeared with all its witnesses. Most of them were from out of the state. Notwithstanding these facts the Appellant on this morning, for the first time, entered an appearance and indicated that it had an interest in the proceeding.

The facts show that two days before this appearance it had been incorporated and presumably had filed an application before the Federal Power Commission. On the morning of its appearance Appellant had not filed an application for an intrastate certificate before the Utah Commission and did not file such application until more than six weeks later, and after Respondent Utah Natural Gas Company had presented its evidence. (Appellant's brief, page 150.)

The Respondent Utah Natural Gas Company objected to Appellant's appearance as a party in intervention and the Commission, after considering the matter, overruled the objection and permitted Appellant to appear for the limited purpose of objecting to the application of the Utah Natural Gas Company.

More than six weeks after the first hearing date on Respondent's application Appellant filed for the first time



its application before the Utah Public Service Commission seeking an intrastate certificate to construct its proposed pipe line (Appellant's brief, page 150).

On this showing Appellant claims the Utah Public Service Commission erred in proceeding with Respondent's application without hearing Appellant's application first. We submit that such a contention is so unreasonable that it does not merit a serious answer. Does the Appellant seriously contend that the Public Service Commission of Utah should delay a matter which has already been set, with witnesses present and all present, except Appellant, ready to proceed, until Appellant files its application and prepares a case? Suppose the Commission had been so indulgent; what would have been accomplished? Until Appellant receives a certificate of convenience and necessity from the Federal Power Commission, any action taken by the Public Service Commission of Utah would not only be premature, it would be moot. Furthermore, had the Commission delayed the hearing or decision on Respondent's application until such time as the Federal Power Commission had determined whether or not Appellant should receive an interstate certificate of convenience and necessity, the matter would still be in abeyance and in all probability would remain in abeyance for several years to come. For these reasons, as well as for many others that may appear, we submit that the Commission would have acted arbitrarily and capriciously if it had delayed the matter as suggested by Appellant in its brief.



## POINT VII.

THE PUBLIC SERVICE COMMISSION OF UTAH DID NOT ACT ARBITRARILY AND CAPRICIOUSLY IN NOT HAVING A FULL JOINT HEARING BEFORE THE FEDERAL POWER COMMISSION BEFORE RULING ON RESPONDENT'S APPLICATION.

In Point K under Proposition IV of Appellant's brief, page 162, Appellant contends that it was the duty of the Utah Commission to obtain a joint hearing of the entire case. To support this strange conclusion it cites 1.37 (c) of the Federal Power Commission Rules and Regulations, and states that on December 21, 1950, the Federal Power Commission wrote a letter to the Public Service Commission of Utah inquiring whether or not the latter desired a joint hearing.

We, of course, are unable to determine from the record whether the foregoing allegations are so. We assume that the Federal Power Commission rule is correctly stated, but we are entirely uninformed as to the contents of any letter which the Federal Power Commission did, or did not, send to the Utah Commission. Furthermore, we do not know whether or not the Utah Commission answered such letter, and if so what conclusions were reached. So far as we know the Federal Power Commission and the Utah Commission may have consulted together and reached some tentative conclusion relative to the entire matter. In any event, all these matters are outside the record and we do not propose to engage in profitless argument about

things which may or may not exist, and which in any event are not properly before this Court.

If we assume that the off the record assertions of Appellant are so, the conclusion which it urges does not follow. It would be a strangely unique development in the law if the decisions of State Commissions on intrastate affairs were controlled by the rules and regulations of the Federal Power Commission. We submit that when, and if, the Utah Pipe Line Company, Appellant herein, completes its application and has a hearing before the Federal Power Commission the rules and regulations of that body will become applicable. Until then we assume that the Utah law and the judgment of the Utah Commission will control.

Appellant in its argument under Point K has erroneously, we believe, twisted the meaning of the Federal Statutes and rules enacted pursuant thereto, and has placed on the Utah Commission an authorization which in fact is placed upon the Federal Power Commission. Title 15, Sec. 717p. of the Natural Gas Act provides:

“(a) The Commission may refer any matter arising in the administration of this chapter to a board to be composed of a member or members, as determined by the Commission, from the State or each of the States affected or to be affected by such matter. Any such board shall be vested with the same power and be subject to the same duties and liabilities as in the case of a member of the Commission when designated by the Commission to hold any hearings. The action of such board shall have force and effect and its proceedings shall be con-

ducted in such manner as the Commission shall by regulations prescribe.”

It would thus seem that the Federal Power Commission, and not the Public Service Commission of Utah, is the body authorized by statute to provide for joint hearings. Perhaps when Appellant completes the preliminary matters necessary to confer jurisdiction and complies with the Federal Power Commission requirements *that Commission* will provide for a joint hearing. Until it does so the Appellant should not place that responsibility upon the Public Service Commission of Utah.

There are many problems, outside the record, relating to Appellant’s application before the Federal Power Commission, which Appellant realizes even more than this Respondent. It will serve no useful purpose to discuss them herein. This case must be decided on this record.

In subheading J of Proposition IV of Appellant’s brief, pages 147, 161, Appellant argues that failure to provide a joint hearing, either before the Federal Power Commission or the Utah Commission was arbitrary and capricious for a further reason; it did not afford Appellant an opportunity to show that it could supply natural gas more cheaply than the Respondent.

We have attempted to answer this argument herein, and also under Point VI, *supra*. We wish to add, however, that while Appellant continually assumes that its application and Respondent’s application are fundamentally the same, this is untrue. One application is intrastate and the other is interstate. Furthermore, Respondent proposes

to serve a large portion of the state which is entirely uncovered by Appellant's application. This more extensive service of necessity means that Respondent's venture will cost more to construct and maintain. Therefore, the relative over all costs are not comparable. The length of the proposed lines, the size of the pipe, the location of the line, the gathering facilities, the area to be served, and the capacity of the two systems; all differ materially. The ultimate cost to the consumer cannot be definitely determined at this stage of the proceedings. This fact was frankly admitted by Respondent during the course of the hearing, and is apparently conceded by Appellant who in its application states approximate costs only.

## CONCLUSION

The Utah Commission found that public convenience and necessity require the furnishing of additional natural gas to the Utah industrial area. The demand for natural gas in this area is such that if an assured adequate supply is available within the State of Utah no real problem of engineering, economics or financing is presented in connection with the construction of the line.

So insistent is the public demand for this additional gas supply that the Utah Commission concluded that this public need was paramount to the detriment or disadvantage which might be sustained by protestants Mountain Fuel Supply Company, the mine operators who are producing, the railroads which are transporting and the miners who are mining, coal. Each of these protestants was a real

party in interest. Each had a vital present and actual interest in the proposal of Utah Natural Gas Company and each would be a party who might be aggrieved by the order of the Commission. Yet none of these parties is here objecting to the Commission's order.

The Appellant, on the other hand, neither owns, controls or relies upon any reserves of gas in the State of Utah. It has no property whatever in this state. It has no customers, no public duty or responsibility of any kind in this jurisdiction. The Utah Commission has no control whatever over Appellant; its application before that body could be withdrawn tomorrow. Stated in the most favorable light, the Appellant has at most only an expectancy that it may, at some indefinite future date, bring gas into Utah from another state. We believe it clear that Appellant is not a party aggrieved by the order of the Utah Commission within the meaning of our statute.

Appellant seeks to set aside and annul the Commission's order upon numerous grounds, some of which, such as the claim that it did not receive sufficient notice of the hearing, are so lacking in merit that we have not extended this brief to dwell upon them. Primarily, the attack of the Appellant seems to be directed at the restrictions and conditions which the Commission imposed upon the Respondent.

But the onus of these conditions fell not upon the Appellant but rather upon the Respondent, Utah Natural Gas Company. They were designed to give the Commission a continuing control over the proceeding in the interest

of the public. As we have pointed out, inasmuch as these restrictions and conditions fell upon the Respondent, it, and not the Appellant, would have the right to complain of the impositions.

To us the imposition of these conditions demonstrates a careful, considered and judicious attitude on the part of the Utah Commission. We suppose that the Appellant would have had the Utah Commission, instead of imposing conditions as it did and thereby keeping control of the proceedings, shut the door completely upon the Respondent, thereby denying to those upon whom Respondent relies for its gas supply, the opportunity to spend their own money in exploration to gain assurance that if successful they could bring their developed gas to market in a friendly line.

Had the Commission, in the face of the record in this proceeding, completely closed the door to the Respondent, we believe such an order would have been arbitrary and capricious. Instead, the Utah Commission in effect said to the Respondent: "You have told us that you have available gas to supply the public convenience and necessity of the industrial area of this state. The reserves on which you rely have not yet been developed. You may have one year in which your supporters, by spending their own money in exploration, can back up the opinion of their geologists. If you succeed in developing the necessary gas supply, you may go forward with your enterprise. If you



fail, the door is closed upon your proposal." What could be more reasonable than this?

The order should be sustained.

Respectfully submitted,

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