

1951

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

Utah Supreme Court

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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 COM-
PANY, a corporation,

Respondents.

REPLY BRIEF FOR PETITIONER

FILED

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Case No.
7695

REPLY BRIEF FOR PETITIONER

The respondents, Public Service Commission of Utah, Hal S. Bennett, W. R. McEntire, Stewart M. Hanson, Commissioners of the Public Service Commission of Utah and the respondent, Utah Natural Gas Company have filed separate briefs herein making the same contentions and substantially citing the same cases. As a consequence petitioner will reply to those briefs as though but one brief had been filed by the respondents.

The initial contention of respondents is to the effect that petitioner does not have a justiciable interest in the controversy in this action or to state the contention

another way, that petitioner is not an aggrieved party. We will not burden the court with a further brief on this point because the same matter has heretofore been before the court in this case and disposed of adversely to the respondents. In May, 1951 the McGuire Company and the Public Service Commission of Utah each filed motions to dismiss this action claiming, as they now claim, that petitioner does not have a justiciable interest in the controversy. Extensive briefs were prepared and filed by the parties and the matter fully argued to the court (Justices Lattimer, Wade and Crockett sitting) on June 4, 1951. On July 5, 1951 this court denied the motions to dismiss. This case is therefore now before the court on the merits. Those portions of respondents' printed briefs devoted to the point that petitioner has no justiciable interest in the controversy are copied from the typewritten briefs filed by respondents in support of their motions to dismiss and, with the exception of one case, are a restatement of the same arguments and the same cases presented to the court on June 4, 1951. In answer to the briefs filed by respondents in support of their motions to dismiss the petitioner filed with this court on June 4, 1951 its brief wherein it presented its arguments and cases in opposition to the motions to dismiss. Petitioner made two points:

POINT ONE—Title 76 Utah Code Annotated, 1943 expressly gives petitioner, *as an aggrieved party*, a right of review in this Court.

POINT TWO—Independent of the right of review provided by the Utah statute, petitioner has such

special interest in the subject matter of the action as to warrant review by this Court.

We assume the court will have no desire to re-examine a matter heretofore fully briefed and argued before the court and upon which it has made a final order. However for the convenience of any member of the court who desires to reexamine the matter we have printed as an appendix to this reply brief the brief filed with the court on respondents' motions to dismiss. In that brief all of the cases now relied upon by respondents, except one, were reviewed by petitioner. The one case not previously cited by respondents is *Arkansas Louisiana Gas Company v. Federal Power Commission, et al* (CCA 5th, 1940) 113 Fed. 2d 281. In that case the Louisiana Nevada Transit Company had sought and procured a certificate of convenience and necessity to construct a pipe line into an area served by Arkansas Louisiana for the primary purpose of serving industrial consumers. Arkansas Louisiana appealed mainly upon two grounds: (1) That the finding of the Commission that the public convenience and necessity would be served was not supported by substantial evidence, and (2) that the conditions attached to Louisiana Nevada's certificate relating to rates and other matters rendered the certificate void because the Commission did not have statutory power to control and regulate direct sales to industrial consumers for their own use as opposed to sale of gas for resale.

The Court *first held*, at page 283, that the evidence was sufficient to support the order granting the certificate. It *then* proceeded to overrule the other contentions

of the appellant and in so doing made the statement quoted by respondent Utah Natural Gas Company (at page 41) to the effect that the order granting the certificate was what aggrieved appellant and since the Court had upheld that order, the appellant could not then claim that the conditions invalidated it. In order to make this holding the Court had, of course, allowed the appellant to appeal *as an aggrieved party* to the order, heard its contention that the order was unsupported by the evidence and then found against such contention.

This interpretation of the case is well supported by the opinion of the same Court and the same Judge some eight years later in the case of *Cia Mexicana de Gas v. Federal Power Commission* (CCA 5th, 1948) 167 Fed. 2d 804, discussed in petitioner's brief on respondents' motions to dismiss the writ of certiorari.

In short, respondents have had their day in court on the question as to whether petitioner is an aggrieved party and it has not been the practice of this court to try the same issue twice.

REPLY TO STATEMENT OF FACTS OF RESPONDENTS

In a consideration of reserves for a projected natural gas pipeline the reserves might be classified into three categories—possible, probable and proven. If a well were drilled on any known structure geologists would agree that natural gas might possibly be discovered. If a well were drilled on a structure having completed gas wells then it might be said that there was a probable reserve. If a structure had producing wells in a pattern so

complete that the sands were well known, that the limits of the structure were well defined, then it might be said there was a proven reserve. Geologists would use more refined definitions but to a layman the foregoing is a fair statement of possible, probable and proven reserves. The mere existence of a structure is not enough. Like other states there are scores of structures in Utah some small and some extensive. With this in mind the respondent, Utah Natural Gas Company called as its first expert, Mr. Willson, a petroleum geologist who worked almost exclusively for Byrd-Frost, Inc. (R. 55). Mr. Willson identified numerous structures and then guessed as to their potential gas production. As a corroborating witness, Utah Natural called Mr. Gordon, a full-time employee of Byrd-Frost, Inc. (R. 744). These were the McGuire Company's principal witnesses on reserves. While there was considerable speculation and guessing as to the gas that might be developed if numerous structures were drilled, the only proven reserve back of the projected pipeline of the McGuire Company was the reserve at Boundary Butte. There three wells had been drilled to the gas zone, the English No. 1 and the Navajo Nos. 1 and 2. The first two wells were completed and the last was abandoned as a dry hole. It developed at the hearing that an independent consulting firm from Ft. Worth, Texas (Cummins, Berger and Pishny) had made a thorough study of the reserves at Boundary Butte. This report was not offered by the McGuire Company until petitioner had made repeated demands for its production and when it became apparent that the Commis-

sion might conclude that the McGuire Company was suppressing evidence, that portion of the report relating to Boundary Butte was finally produced. The report (page 20) with a correcting telegram (R. 1103) was received as Exhibit 66 and attributed to Boundary Butte a total proven recoverable reserve available to the Byrd-Frost, Inc.—English interests and committed to the McGuire Company of 13 billion 661 million cubic feet. This reserve would be adequate to supply the projected pipeline of the McGuire Company for *136 days*. That is to say, a pipeline having a deliverability of 100 million cubic feet a day could be *supplied for 136 days* from a reserve of 13 billion 661 million cubic feet provided no allowance was made for losses in transmission and delivery. Yet this is the reserve upon which the McGuire Company would have the public of the Salt Lake area rely.

As to the other structures, witness Willson testified that no gas had been produced from greater Monticello and no well had been completed as a gas producer but still Mr. Willson said this area was a probable source of supply (R. 86). Mr. Willson made the same speculations relative to the Last Chance structure.

In the final analysis the McGuire Company must rest its case upon the reserve available at Boundary Butte. The basic supply then for a pipeline to cost \$32 million is a supply adequate for 136 days. The effect of the order is to invite the public to spend hundreds of thousands of dollars on gas-burning equipment to be

supplied from a pipeline that could not furnish sufficient gas for one severe winter.

REPLY TO RESPONDENTS' CONTENTIONS THAT THE COMMISSION HAD AUTHORITY TO ISSUE THE CONDITIONAL CERTIFICATE

(a) In an attempt to support its thesis that the Commission may impose whatever conditions it sees fit in the issuance of a certificate, the Commission cites Subsection 3 of Section 76-4-24, U.C.A., 1943. The section relied upon deals with the situation wherein a public utility must secure not only a certificate of convenience and necessity, but must also secure a franchise from a political subdivision of the State of Utah. It is the Commission's contention that this section authorizes the imposition of any manner or description of condition, even to the extent of condoning the proof and determination of a fundamental prerequisite to the granting of a certificate after the close of the hearing. It is submitted, however, that, to the contrary, the portion of the Statute quoted by the Commission for at least two reasons condemns, rather than supports, this view.

In the first portion of the section referred to, the Legislature has set out in a general way the procedure whereby certificates may be issued. It has stated in subsection (1) that no construction shall be commenced without first obtaining from the Commission a certificate that the present or future public convenience and necessity does or will require *such construction*. Subsection 3 states that the Commission shall have the power

after a hearing, to issue the certificate either in whole or in part and attach thereto conditions as in its judgment public convenience and necessity may require. Immediately following this provision in subsection 3, the Legislature has provided for a situation wherein it foresaw that public utilities might run into difficulty. Obviously, the Legislature had in mind an instance where a public utility desired to construct facilities within the corporate limits of a municipality and for which construction and operation the utility would need a franchise from the municipality. The public utility, being regulated by the statute under question, would also need a certificate of convenience and necessity. To avoid the dilemma the public utility would find itself in if it could not get the franchise without the certificate or could not get the certificate without the franchise, the Legislature specifically provided that in such a situation the public utility could come to the Public Service Commission, set forth its intentions and show that it intended to and would attempt to secure the necessary franchise. The statute then provides that if the utility conforms with this procedure, the Commission may then issue a *preliminary order* to the effect that *when* the utility gets the franchise, *then* the Commission will issue the desired certificate *after* the utility has acquired the franchise. Finally, the statute provides that, when the utility presents the franchise in question, the Commission may then issue the certificate.

It will be noted that this is the only instance wherein the Legislature has seen fit to provide for such a pro-

cedure. In this one instance the Commission can issue a preliminary order stating that it will issue a subsequent certificate to take care of a situation where a public utility cannot, practically speaking, comply with the basic prerequisites necessary to the issuance of a certificate of convenience and necessity. By setting up such a procedure the Legislature has implied that in all other instances the statute must be strictly complied with.

A general and well settled rule of statutory construction strengthens this view. As stated in 50 Am. Jur., *Statutes*, Section 244, at page 238:

“It is a general principal of interpretation that the mention of one thing implies the exclusion of another; ‘expressio unius est exclusio alterius.’ The rule applies even though there are no negative words excluding the things not mentioned. Thus, a statute that directs a thing to be done in a particular manner or by certain persons or entities, ordinarily implies that it shall not be done in any other manner, or by other persons or entities.”

As further stated in the same work, 50 Am. Jur., *Statutes*, Section 434, at page 455:

“The specification by the Legislature of exceptions to the operation of a general statute, does not necessarily operate to preclude the court from applying other exceptions. However, where express exceptions are made, the legal presumption is that the Legislature did not intend to save other cases from the operation of the statute. In such case, the inference is a strong one that no

other exceptions were intended, and the rule generally applied is that an exception in the statute amounts to an affirmation of the application of its provisions to all other cases not excepted, and excludes all other exceptions or the enlargement of exceptions made. Under this principle, where a general rule has been established by statute, with exceptions, the courts will not curtail the former nor add to the latter by implication. In this respect it has been declared that the courts will not enter into the legislative field and add to exceptions prescribed by statute."

If the Legislature had intended that the Commission could dispense with essential prerequisites by the attachment of conditions to the certificate such as those attached in the case before this Court, it certainly could have so provided. The fact that the Legislature provided a procedure as above discussed for one instance and one instance only would seem to indicate that it did not wish to deviate from the standard procedure in any other instance.

Furthermore, the portion of the statute quoted by the Commission is illuminating for another reason. It will be noted that the Legislature has given the Commission power to attach conditions to certificates in the sentence immediately preceding the questioned clause. They then proceeded to provide for a system of preliminary orders followed by the issuance of a certificate in the franchise situation. This clearly indicates that they had no idea that the grant of the power to the Commission to attach conditions to a certificate in any way gave the Commission power to provide, by the use of

such conditions, for the proving of essential prerequisites at a later date.

For these reasons, and in light of the clear wording of the statute in general as discussed by petitioner in its first brief under Point C, pages 75 to 84, it is submitted that the Commission's interpretation is untenable.

The cases discussed by the Commission at pages 14 and 15 of its brief in no way support the Commission's contention in connection with which they are cited. The primary concern of the Arkansas Commission in the case of *Re Southwestern Gas & Electric Company* (1949) 82 PUR (NS) 52, was not that the government contract had not been legally finalized. Instead, it was that the company might construct the facilities to take the hydro-electric power into its system and include such new facilities in its present rate base *before it actually began to take the electricity into its system*. The Commission expressly negated any such eventuality by attaching to its certificate a condition that the company could not include the new facilities in the computation of its rates. *This was the only condition attached to the certificate.*

In the *Tennessee Gas Transmission Company case*, 76 PUR (NS) 422, cited at page 14 of the Commission's brief, which was a case involving an application for a certificate of convenience and necessity allowing the construction of additional gas pipeline facilities, the Commission, upon the final hearing, was disturbed by the fact that the applicant had not attempted to secure competitive bidding from financial houses for the purchase of its bonds to be issued in financing the new facilities. The

Commission noted in its opinion that the financial houses proposed for such financing were closely allied to and in fact were large stockholders of the applicant. The Commission felt upon the evidence presented that a more favorable return to the applicant upon its bonds might be procured by offering the bonds to several financial houses on a competitive bidding basis. They therefore indicated that the certificate should be issued but imposed a condition requiring such competitive bidding. In the *Panhandle case*, cited by the Commission at page 15 of its brief, the Commission had attached to the certificate issued to Michigan-Wisconsin Pipe Line Company the condition that Michigan-Wisconsin should obtain approval of its proposed plan of financing by the Securities and Exchange Commission. The apparent reason for such condition was that the parent company of Michigan-Wisconsin was a regulated holding company and therefore no definite commitment for financing was possible without the approval of the Securities and Exchange Commission. It will be noted that the above cases are all instances where conditions were attached to enable the commissions involved to more efficiently carry out their regulatory duties under the various statutes involved. Indeed, the cases are closely comparable to those cases cited by the petitioner in its brief under Point C, pages 77 and 78, wherein it is pointed out that undoubtedly such clauses in statutes of the type here involved were intended to assist in regulation of utilities rather than to allow commissions to dispense with the proof of fundamental prerequisites at the hearing called for the

very purpose of determining such matters. It is further submitted that this view adequately explains the questions raised by Utah Natural Gas Company in its brief, pages 19 through 21, and the apparent inability of counsel there to distinguish between conditions of a mere regulatory nature as opposed to the type of condition complained of in this appeal.

Utah Natural Gas Company in its brief, pages 25 through 31, has raised questions concerning authorities cited by petitioner in its brief which it is felt should be briefly discussed at this point. As to the case of *Re Achtenburg*, complained of by Utah Natural Gas Company at page 27 of its brief, it should be here pointed out that petitioner reproduced a quotation from that case on pages 27 and 28 of its brief in order to support the fundamental proposition that where a particular applicant is seeking a certificate of public convenience and necessity to perform a particular service, such an applicant must show, in order to establish the public convenience and necessity for a particular service, that he can furnish the service concerning which he is seeking a certificate. The Missouri Commission in that case had made a very clear statement of such view and it was reproduced in the brief, not as a binding precedent squarely in point upon the facts, but as a clear and concise statement of the interpretation being discussed. The case was again quoted from on page 57 of petitioner's brief, along with other authorities there being presented, to point out how the Missouri Commission had considered, in a case before it, the necessity of an appli-

cant's presenting a reasonably definite plan of financing the facilities for which a certificate was being sought.

The *Grand Rapids Gas Company* case is complained of by Utah Natural Gas Company at pages 27 to 29 of its brief. Petitioner had quoted from the *Grand Rapids case* at pages 30 and 31 of its brief to point out how the Michigan Commission had required that in a particular case wherein a utility sought a certificate to build a natural gas pipe line, the utility must establish that it had available a sufficient quantity of natural gas to serve the locality it sought to serve for a reasonable length of time. This requirement was found to exist even though the Michigan statute was of a general nature similar to the Utah statute and did not list any such requirement in the section dealing with hearings to grant certificates of convenience and necessity. Counsel for Utah Natural Gas Company has apparently misread the opinion in that case and has omitted certain pertinent facts which should here be pointed out. The evidence before the Commission in that case revealed that while the reserves in the fields from which the applicant proposed to take gas were insufficient to supply the city of Grand Rapids with one hundred per cent natural gas for a period of more than four years, it was evident that the applicant could, by mixing natural gas with artificial gas, serve the city for a period of from eight to ten years. The applicant was already in the business of serving the city with manufactured gas and it is apparent from the Commission's discussion of the evidence that, should the reserves of natural gas fail or prove insufficient, this artificial gas

could again be relied upon to furnish the community with gas service. It appears that the service of the mixed gas would be greatly beneficial to the consumers of Grand Rapids in that there would be a considerable saving in rates and a considerable increase in the consumption of gas. The Commission was obviously satisfied that the line would pay out in the conservatively estimated minimum life of eight years. The second quotation on page 28 of the Utah Natural Gas Company brief is not a quotation from the opinion of the Commission but is a quotation from the dissenting opinion of one of the Commissioners, whose opinion begins at 13 PUR (NS) page 458. It will be noted from a study of the Commission's opinion that the order granting the certificate allowed delivery of gas only on a 50% natural and 50% manufactured gas basis.

At page 29 of Utah Natural Gas Company's brief, counsel attacks the case of *Incorporators of Service Gas Company v. Public Service Commission of Pennsylvania* on the apparent assumption that petitioner has relied upon that case in its brief. It will be noted, however, that the *Incorporators case* was included (at page 35 of petitioner's brief) in a quotation taken from the case of *Re Kansas Pipe Line & Gas Company*, 30 PUR (NS) 321.

In attacking the *Re Kansas Pipe Line & Gas Company case* at pages 30 and 31 (which was quoted from at pages 34 and 35 of petitioner's brief) counsel for Utah Natural Gas Company points to the fact that the Federal Power Commission, because of the failure of the appli-

cant to present firm contracts for the purchase of gas from the reserves relied upon, did not issue a certificate in that case but retained jurisdiction requiring additional showing. This, of course, was pointed out on page 35 of petitioner's brief and it would appear that in holding the matter in abeyance until a further showing was made, rather than issuing a certificate with a condition requiring subsequent proof, the Commission followed the procedure which petitioner throughout this appeal has urged is a proper one.

Counsel for the Utah Natural Gas Company, at pages 23 to 25, has relied heavily upon the Decisions of this Court in the two cases styled *Los Angeles and Salt Lake Railroad Company v. Public Utilities Commission of Utah, et al*, 15 P. 2d 358 and 17 P. 2d 287. The two cases, while similar as to parties and facts, actually involve two separate petitions of the railroad company to change two separate railroad stations from an agency to a non agency status. The primary question in both cases was whether or not, under what is now Section 76-3-1, U.C.A. 1943, the change in status requested by the railroad could be granted and still comply with such section. The section in question requires that, "Every public utility shall furnish, provide and maintain such service instrumentalities, equipment and facilities as will promote the safety, health, comfort and convenience of its patrons, employees and the public, and as will be in all respects, adequate, efficient, just and reasonable." In both cases the Commission denied the request of the railroad.

The appeals to this Court in the Los Angeles cases were brought under the same section of the statutes as this appeal was brought, Section 76-6-16, U.C.A. 1943. In both cases the primary question before the Court was whether or not there was substantial evidence to support the findings and order of the Commission in denying the railroad's request. It is interesting to note that in the first case (involving the St. John Station) this Court held that there was substantial evidence to support the Commission's finding, while in the second case (involving the Faust Station) this Court held that the Commission's findings and order were not supported by substantial evidence.

In the first case this Court, in attempting to determine what its duties and powers were on appeal, cites and discusses various New Mexico cases, as can be noted from the quotation respondent Utah Natural Gas Company presents on page 24 of its brief. As this Court pointed out in distinguishing the New Mexico cases, the New Mexico court's power of review was far more extensive than that of this Court. However, this Court observed that the New Mexico Court applied, as a test of the reasonableness of the Commission's order in requiring a railroad agent at a point where not needed for public safety, that both the public convenience to be served and the increased cost of the service to the company are to be considered. This Court then went on to state, at 15 P. 2d 361, that these factors which the Supreme Court of New Mexico considered in testing the reasonableness are exactly the same factors which the

Utah Commission should consider in determining the question as to whether the agency should be continued. It further said that this Court, in reviewing the decision of the Utah Commission, does not directly measure, consider or determine these two factors and come to an independent decision, but must determine whether or not the Commission has considered these two factors and whether or not there is substantial evidence to support the Commission's finding.

On page 25 of Utah Natural Gas Company's brief, counsel presents a short quotation from the second case concerning out of state precedents. This quotation is a sentence from the middle of the paragraph on page 15, P. 2d 369, and, read in context, does not appear to convey the meaning for which counsel presents it. Furthermore, petitioner has never cited out of state cases which it has urged as binding precedents upon the Utah Commission. It has referred to out of state cases for the purpose of illustrating and convincing beyond doubt that the Utah Commission has not complied with its statutory and constitutional obligations.

Petitioner has no quarrel with the discussions by this Court in the Los Angeles cases concerning its scope of review, so long as those discussions are read in the light of the cases involved and the results reached in each case. It will be noted that this Court reached opposite results in the Los Angeles cases in determining the question of whether or not the Commission had before it substantial evidence to support the respective orders issued in those cases. It is also interesting to note that respond-

ent Utah Natural Gas Company has attempted to take quotations from both cases in support of its argument. The general language of the rules and guides under which this Court must review appeals from the Commission is easily quoted in support of either side in a case of this nature. The difficulty comes, however, in applying the rules to the fact situation before the Court in a given case. It is submitted that Utah Natural Gas Company has failed, by quoting generalities and excerpts out of context from the above opinions, to detract from the contentions raised by this petitioner in its brief under Points A, B and C.

(b) An examination of the so-called conditional certificate issued to the McGuire Company will show that it is conditional in name only. That is to say, a certificate which places in the hands of the applicant the very power to determine whether or not it has complied with a condition is not a conditional certificate but is an absolute certificate. The Commission's order requiring the McGuire Company to show within the one-year period adequate proven reserves and permitting such showing to be made by the filing of a certificate prepared by a geologist selected by the McGuire Company gives to the McGuire Company the determination of whether it has met the condition. It is true the order says that the qualifications of the geologist must be satisfactory to the Commission, but what member of the Commission has the training and ability to determine the geologist's qualifications? This is not a situation where the Commission would be acting in a quasi-judicial capacity at a hearing

and have the benefit of the cross examination of the geologist by adverse parties as his qualifications. The Commission will be required to determine the geologist's qualifications based upon the representations of the McGuire Company and not otherwise. The certificate of the geologist is merely an opinion and it will be a simple matter for the McGuire Company to obtain such certificate. Such an order places in the hands of the McGuire Company the power to meet the condition notwithstanding the true facts.

REPLY TO RESPONDENTS' ARGUMENTS THAT THE
ORDER OF THE PUBLIC SERVICE COMMISSION DOES
NOT VIOLATE DUE PROCESS OF LAW AND DOES NOT
CONSTITUTE AN UNLAWFUL DELEGATION OF ITS
AUTHORITY

The Commission in its brief under the above point contends in effect that the order granting the certificate of convenience and necessity does not in fact mean what it says. It contends that upon the expiration of a one-year period a hearing will be held to determine whether the supply of gas is adequate and that all interested parties will be given notice and will be given an opportunity to appear.

If this was actually the intention of the Commission when it issued the order in question, it certainly is not manifest by the definite wording of the order itself. The order granting the certificate of convenience and necessity (R. 1173) unequivocally grants the certificate and then attaches the condition, among others, that within one year from the date of the order, Utah Natural Gas

Company shall file with the Commission the certificate of an independent geologist of recognized professional standing acceptable to the Commission that there are proven gas reserves committed to Utah Natural Gas Company adequate to justify the construction of the line and facilities, and further states that if such is not done then the certificate shall be null and void.

This is the final order of the Commission as to the merits of the proceeding complained of below. Petitioner filed its motion for rehearing as prescribed by the statute and this was overruled. To all intents and purposes, petitioner had exhausted its possible resources of relief before the Commission.

In accordance with the specific terms of the statute (Section 76-6-16 U.C.A. 1943) petitioner then took the only practical step open to it to correct what it deemed to be gross errors committed by the Commission in the hearing held before it. According to the statute, it had to, within thirty days after the decision on its motion for rehearing, apply to this Court for certiorari or waive its right of appeal from the order entered. In determining what its rights were under the order, the petitioner of necessity had to accept the order as written. It is difficult to conceive an order the language of which points to a more singular construction. Neither this petitioner, nor anyone else, can afford to rely upon the promises and overtures of the Commission's counsel. The purported responsibility and liability of counsel are of small comfort, nor can they redress the grievous wrongs perpetrated upon petitioner by the order in question.

It must not be overlooked that petitioner is here appealing from the order entered on March 12, 1951, and from that order only. The undisclosed intention of the Commission at that time, as now in retrospect discussed by the Commission's counsel, and the possibility of what the Commission may do one year from that date are not involved in this appeal.

In an attempt to excuse the contents of the order granting the certificate counsel for the Commission takes full responsibility "for the inaptness of the language" and says:

"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." (Pages 16 and 17, Commission's brief.)

We question counsel's authority to bind the Public Service Commission by statements contained in the Commission's brief interpreting the order. But counsel does not stop there. Counsel now proposes to enlarge upon

the provisions of the order. The order is clear that if before one year has elapsed the certificate of the geologist and the commitment of the financial institution have not been filed with the Commission *then automatically the certificate to the McGuire Company will expire*. Counsel now says that such is not to be the case: that even after the year has gone by

“Utah Natural Gas Company may then present evidence that it has an adequate supply of gas and adequate financing available.”

and the Public Service Commission will give Utah Natural a hearing. Nowhere in the order is there any provision for a further hearing or for an extension of time after the year for the McGuire Company to make proof. Obviously this statement of counsel for the Commission is a recognition of the invalidity of the present order and an attempt to have the order supported by the court by representing that the Commission will have another hearing. *But nowhere does counsel say that in that hearing Utah Pipe Line Company is to have any right to present its proposed project or to show the extent of its proven reserves.* The way to give Utah Pipe Line Company a hearing is for this court to annul the present order. Such action by the court will undoubtedly result in the Commission doing what it should have done in the first instance,—hear all applicants, Utah Natural Gas Company, Utah Pipe Line Company, and then determine which of the applicants can best serve the public needs.

REPLY TO RESPONDENTS' MISCELLANEOUS ARGUMENTS

We will briefly answer some of the miscellaneous statements and arguments made by the respondents as follows:

1. The McGuire Company suggests that the pipe line must be kept in the hands of "friendly interests." Friendly to whom? Friendly to Mr. McGuire and his associates. Unfriendly to the public interest in that the people of this state must continue to wait for an adequate supply of natural gas while the McGuire Company maneuvers and hunts for a supply. Considerable space in the briefs is devoted to the great benefits that the Byrd-Frost, Inc. — English interests were going to give to the State of Utah. Mr. Byrd frankly said that he was drilling for oil (T. 730) and if, as Mr. Senior, attorney for the Coal Operators, said in his argument to the Commission, the wildcat driller could find the "second prize," i.e., gas, so much the better.

This court will take judicial notice of the extensive drilling being carried on now in practically all the counties of Utah. The Byrd-Frost, Inc.—English interests, like Utah Southern Oil Company, Carter Oil Company, Equity Oil Company, California Company, Americol Petroleum Inc., Standard Oil Company of California, Gulf Oil Corporation, Skelley Oil Company, Shell Oil Company, Phillips Petroleum Company, Stanolind, Mid-Continental, Vernal Oil and Gas Company, Sun Oil Company, Johnson—Bunn Watson Oil Company and many others are engaged in drilling Utah structures primarily

for the purpose of discovering oil. There is no more reason for the Public Service Commission of Utah favoring the Byrd-Frost, Inc.—English interests with a certificate to their associate Mr. McGuire, than there is to extend a blanket certificate to every concern engaged in drilling Utah structures. Counsel argues that Byrd-Frost does not make a practice of selling corporate stock. Anyone familiar with the oil and gas business knows that the scheme is not the sale of corporate stock but consists of transactions in royalties, leases and options. The suggestion that Byrd-Frost has committed itself to spend enormous amounts in drilling in Utah raises the question, to whom was the legal commitment made? Who could sue Byrd-Frost if it defaults? Certainly not Mr. McGuire because there is no contract in evidence of any commitment to him or to his company or to any other person, for the drilling of a single well.

2. For some reason best known to the McGuire Company it points out that petitioner is the only party to appeal from the Commission's order. When one understands the record and the parties participating it is clear why this is so. Mountain Fuel Supply Company has not appealed because the effect of the Commission's order is to keep gas from the Salt Lake area and this operates to the advantage of Mountain Fuel Supply Company. W. W. Ray, attorney for Mountain Fuel Supply Company, was frank in telling the Commission such would be the effect of the issuance of a certificate to the McGuire Company. Mr. Ray said:

“The Applicants came here with great promise and great undertaking. Now they ask of this Commission an option to tie up everything in Utah for a period of one to three years, and in Mr. Cornwall’s generous offer he was to receive everything from this Commission and guarantee nothing. They are not required to drill a well; they are not required to secure a single solitary dollar to get gas to this community. They may sit supinely by when this hearing is adjourned and come to this Commission a year from now and say, ‘We would like another year’s extension, Gentlemen, because the country is in trouble, serious trouble, and we don’t want to interfere with its war program. Please give us an option for another year.’ — without consideration, totally without consideration, and upon two threats.

“Our first threat was that if we didn’t take this gas now, which is non-existent, California needed it very badly; and the final threat is that they are going to trade some of the gas, excess gas down there that California doesn’t need over into this market by a trade between someone that Mr. Byrd knows and something else. This is a trading period. *These are oil and gas promoters. They have a corporation with \$1,000, and getting ready for this case they have spent \$79,000 of the 1,000 —which shows they are quite generous in their hopes and their speculations.*

“But they have a corporation of \$1,000, and not a sign of a commitment, and they admit the impasse we find ourselves in today—‘If you don’t get a pipeline, you’ll get no gas, and if you get no gas you’ll get no pipeline.’

“Now, where does that leave this Commission? It leaves it with people asking for nothing but the opportunity to secure for itself the exclu-

sive right to come into this market for whatever period may be involved.

“It would be to the interest, I say to this Commission frankly, of Mountain Fuel Supply Company to say ‘For Heaven’s sake, grant this application, because it leaves us free. They’ll do nothing—we know they’ll do nothing. We’ll shut out everybody else, and we, the Mountain Fuel, will occupy the market alone.’ That’s what we should say if we were not talking in the public interest here today. That’s what would happen.”

(R. 1022)

The Utah Coal Operators Association did not appeal because it, like Ray’s client, recognized that the granting of a certificate to the McGuire Company would only “foul up” plans to deliver into this area additional natural gas and this would operate to the advantage of the coal operators. There is no harm to the coal companies in the granting of a certificate to a concern that has no fuel to deliver. The intervener, the United Mine Workers, is in the same position as the Utah Coal Operators. The only other persons actively taking a part in the proceedings before the Commission were the railroads (who are in the same position as United Mine Workers) and Mr. Irwin Clawson appearing for some twenty small industrial and apartment house users. Mr. Clawson recognized that the granting of the certificate to the McGuire Company would be ineffective so far as supplying his clients and Mr. Clawson urged the Commission that before it grant the certificate that it hear the application of Utah Pipe Line Company saying: “And we urge at this time that before a decision is reached that the Com-

mission hear the Utah Pipe Line and make their decision on the basis of the combined evidence." (R. 1020) Therefore it is little wonder that Utah Pipe Line is the only party seeking a review.

3. The respondents represent to this Court that Utah Pipe Line Company came into the case at such a late date that the Commission had no opportunity to give it an orderly and adequate hearing. This is pure distortion. The McGuire Company filed its application on May 29, 1950. That application laid in the files inactive from May until late November. On November 17, 1950 the application was enlarged and amended. Notice of a hearing was published for the first time on November 24, 1950 and notice of the hearing mailed to Mr. Turner, general counsel for Delhi Oil Corporation, Dallas, Texas. Mr. Turner was advised that the hearing would begin December 11, 1950. If due allowance is made for the transmission of the mails, the general counsel for Delhi had no notice of an intended hearing until virtually the last moment. Is it little wonder then that he and Mr. P. T. Bee, Executive Vice President of Delhi Oil Corporation, did not appear in Salt Lake City until the morning the hearing began? Now, if there had been any intention on the part of the Commission to grant Utah Pipe Line a hearing, the Commission had adequate opportunity to do so without delaying or prejudicing the application of the McGuire Company. The direct testimony of witnesses for McGuire was not completed until December 14, 1950. The cross examination of those witnesses began January 29, 1951 and was completed a few days

later. At no time did the Commission indicate that it would hear the Utah Pipe Line application. In fact, the Commission preemptorily on December 11, 1950 advised Messrs. Turner and Bee they would not be heard on Utah Pipe Line's project (R. 10-13). The Commission took the McGuire application under advisement and made its order on March 12, 1951. It would have been a simple matter for the Commission at the close of the hearing on February 2, 1951 to have then set the application of Utah Pipe Line for hearing. If the Commission found itself unable to agree with the Federal Power Commission on a time for a joint hearing, the Commission could nevertheless have proceeded independently to hear the Utah Pipe Line matter. This would have resulted in no inconvenience to the parties or to their counsel or to the Commission. It is a common practice, as the Commission well knows, for joint hearings to be held between state commissions and the Federal Power Commission. The Public Service Commission of Utah has held many such hearings with the Interstate Commerce Commission.

4. Counsel says that petitioner might have filed in this Court an application for a writ of mandamus directed to the Commission to compel it to hear the application of Utah Pipe Line. If the duty of the Commission to determine in the public interest which of two applicants could best serve the public with natural gas required the commission to hear both applications before granting any certificate, then the application of Utah

Pipe Line became a part of the McGuire case and should have been heard at the same time or in sequence with that case. But aside from this, let us assume that we might have obtained a writ of mandamus from this Court in an independent proceeding, any such action would not have been in conformity with the rules which require that two law suits not be filed where one may determine the controversy.

CONCLUSION

The bringing of oil from Rangely, Colorado by pipeline to North Salt Lake has built two oil refineries here and expanded another. The pipeline which carries oil from Wyoming to the refinery of Utah Oil Refining Company has resulted in a large expansion of that refinery. In fact, the four refineries in the vicinity of North Salt Lake are supplied primarily by oil from Colorado and Wyoming. Many smaller industries have been established here as a result of such pipelines. No one would seriously contend that such pipelines have retarded wild-cat drilling for oil in Utah or have been bad for the economy of Utah. Likewise, a pipeline carrying natural gas into the Salt Lake area from the San Juan Basin of New Mexico would improve our economy. Petitioner in its desire to bring this supply to the Salt Lake area should be received with open arms and not be confronted by roadblocks of pure promotion.

Counsel for the Commission argues there would be no purpose in this court disturbing the order of the Pub-

lic Service Commission because nine months of the one-year period will shortly expire and before the case can be decided by the court the year will have expired. This argument is no legal justification for affirming an unlawful order. When the one year draws to a close the McGuire Company will, undoubtedly, apply to the Public Service Commission for an extension of time and this could go on indefinitely while Utah Pipe Line stands by. If the order was void in the first instance then the Commission would have no power to extend the one-year period and the Commission will be compelled to hear all parties on the merits. If this court annuls the Commission's order the effect will not be to permanently foreclose the McGuire Company from presenting a new application. The effect will be a hearing of the application of Utah Pipe Line and that of any other company (including the McGuire Company) proposing to build a pipeline into this area. The effect will be a hearing on what all the parties "have to offer." That kind of hearing is what the public interest requires and is the kind of hearing which should have been granted many months ago.

Neither the Commission nor the McGuire Company has adequately explained the lack of substantial evidence to establish the basic prerequisites to the issuance of a certificate of convenience and necessity, nor the complete disregard of the Commission's statutory duty to safeguard the public interest, nor the consequent unlawful

actions and orders growing from the arbitrary and unreasonable treatment of this petitioner by the Commission. The order of the Commission should be vacated and annulled.

Respectfully submitted,

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