1981

David R. Williams D/B/A Industrial Communications v. Public Service Commission of Utah, Milly 0. Bernard, Brent H. Cameron and David R. Irvine, Commissioners of the Public Service Commission of Utah : Brief of Mobile Service of Southern Utah, Inc.

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

DAVID R. WILLIAMS d/b/a
INDUSTRIAL COMMUNICATIONS,

Plaintiff-
Appellant,

vs.

PUBLIC SERVICE COMMISSION
OF UTAH, MILLY O. BERNARD,
BRENT H. CAMERON and DAVID
R. IRVINE, COMMISSIONERS
OF THE PUBLIC SERVICE COM-
MISSION OF UTAH,

Defendants-
Respondents.

No. 17355

APPEAL FROM THE ORDER OF THE
PUBLIC SERVICE COMMISSION

BRIEF OF MOBILE TELEPHONE SERVICE OF SOUTHERN UTAH, INC.

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CASES CITED

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BRIEF OF MOBILE TELEPHONE OF SOUTHERN UTAH, INC.

NATURE OF THE CASE

This is an action filed by Plaintiff before the Public Service Commission of Utah seeking the revocation of the Certificate of Convenience and Necessity held by competitors Mobile Telephone, Inc., and Mobile Telephone of Southern Utah, Inc.

DISPOSITION OF THE CASE BEFORE THE PUBLIC SERVICE COMMISSION

The Public Service Commission dismissed Plaintiff's Complaint on August 7, 1980. Upon a petition for rehearing, the Commission reaffirmed its prior decision.

RELIEF SOUGHT ON APPEAL

Mobile Telephone Services of Southern Utah, Inc., seek an affirmance of the Commission's order of dismissal.

STATEMENT OF FACTS

The plaintiff Industrial Communications, Inc., is a communications utility offering mobile telephone service in Salt Lake City, Provo, Ogden, and in the counties of Summit, Tooele, Morgan, and Utah. Mobile Telephone Service of Southern Utah, Inc., is also operating communication utilities.

Plaintiff filed an action on July 21, 1980, with the Public Service Commission alleging that both Mobile Telephone, Inc. and Mobile Telephone Service of Southern Utah, Inc., had wrongfully misrepresented an application with the Federal Communications Commission concerning a radio transmitter in St. George, Utah. (R. 1-3). While the transmitting facility was owned and licensed entirely to Mobile Telephone Service of Southern Utah, Inc., plaintiff alleged that since both companies had a common president they were both responsible for the alleged misrepresentation in St. George. (R. 2). Attached to the initial Complaint were affidavits which stated that as of August 30, 1978, no equipment for UHF or VHF channels had been installed in the St. George or Cedar City facilities and that as of July 17, 1980, no VHF service existed in the cities of St. George and Cedar City. (R. 13-16).

Plaintiff alleged that the UHF mobile telephone service had been implemented by Mobile Telephone Service of Southern Utah but had not been in effect prior to 1980. Plaintiff

claimed that the two competitors misrepresented existing faciliities to the public, misrepresented the extent of their public services to customers of Utah, and "by so doing have unfairly taken advantage of the circumstances of their competition with the complainant in advertising for customers in the Salt Lake, Provo and Ogden areas by representing that they could serve the public in Southern Utah when in fact they were not providing such service." (R. p. 3).

Plaintiff requested that the Commission revoke the Certificates of Convenience and Necessity held by the two competitors because of the serious "misrepresentations to the public" and further asked the Commission to inspect the transmitting sites of Mobile Telephone Service of Southern Utah to determine the allegations of the Complaint. (R. 3). After the Complaint was filed Plaintiff requested an inspection of the premises and an order forbidding the competitors from removing or installing any additional equipment. (R. 17-19).

On August 7, 1980, the commission issued an order of dismissal. (R. 23). In reviewing the Complaint filed by Plaintiff the Commission noted that the Certificate of Convenience and Necessity which was issued to Mobile Telephone Service of Southern Utah, Inc., on November 25, 1974, provided that the company would "acquire, maintain and operate facilities for a radio-telephone utility and to engage in the business of a common carrier with authority to provide one-way voice and tone paging and related telephone services within an effective

range of 55 miles from St.George, Utah, including the Cedar City area." (R. 23). The Commission observed that the Certificate did not differentiate between UHF and VHF equipment and "insofar as this Commission is concerned, the company could comply with the requirements of its Certificate by utilizing either UHF or VHF channels." Finally, the Commission noted that if any misrepresentation occurred with reference to the Federal Communications Commission obligation "it would be more appropriate for that agency to investigate and act upon a complaint of this type." (R. 23).

On August 19, 1980, Plaintiff filed a Petition for Rehearing claiming that the Complaint established a violation of the Certificate issued in 1974 because "such defendant did not install such services when it had the authority and obligation to do so and the Complaint should not have been dismissed." (R. 24). In addition, plaintiffs allege that their Complaint showed an unfair competitive advantage based upon advertising to the public and that such misrepresentations were prejudicial to both the public and the industry. (R. 24).

On September 10, 1980, the Commission denied the Petition for Rehearing. This Order stated the following:

> The Commission has considered the Petition for Rehearing, and remains of the opinion that the allegations as to equipment do not constitute a meritorious cause of action which, two years after the fact, would justify further proceedings at this point in time. There is no allegation which, as to equipment, suggests the company is not operating in conformance with its certificate; and, further, it is not clear from the langauge

of the certificate itself that a particular time requirement was imposed upon the company or could now, after the fact, be the basis of a punitive action.

The allegations as to advertising misrepresentations are simply naked assertions which, without elaborations and specifid description, offer no substantive basis upon which the Commission might properly undertake an investigation. The Complainant has offered no evidence by way of pleading from which the Commission can even deduce wrongful conduct.

The Commission is also mindful of the history of the two competitive environments existing between these two copmanies and is concerned that the regulatory process and the considerable powers of the State not be called upon lighly by one or the other as an instrument of competitive warfare.

The Petition for Rehearing is denied. (Supplemental Record).

It is from this Order of Dismissal that the present appeal is taken.

ARGUMENT

THE PUBLIC SERVICE COMMISSION OF UTAH PURSUANT TO STATUTORY LAW AND ITS RULES PROPERLY DISMISSED PLAINTIFF'S COMPLAINT.

Plaintiff complains that the Public Service Commission erred in dismissing plaintiff's Complaint and in failing to receive evidence and investigate the matters asserted in the Complaint. A review of the statutory authority and the rules of the Commission, however, shows that this argument is without merit.

Title 54 of Utah Code empowers the Utah Public Service Commission to oversee and regulate public utilities in Utah. Specifically, Section 54-4-1, U.C.A., gives the Commission the power and jurisdiction to supervise and regulate every public utility and to supervise all of the business of every

such public utility in this state, and to do all things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction." Section 54-4-1, U.C.A. (Supp. 1979).

Pursuant to this broad authority the Public Service Commission has promulgated its own rules of procedure which must be followed in proceedings before the Commission. As such these rules and regulations have the force of law and must be followed by the parties in Commission hearings and must be given full force and effect by a reviewing court. Cascade County Consumers Association v. Public Service Commission, 394 P.2d 856 (Mont. 1964); Halpin v. Corporation Commission, 575 P.2d 109 (Okla. 1977).

Appellant cites Section 54-7-9, U.C.A., as giving the Commission authority to hear complaints against utilities. (Appellant's brief, p. 5). However, this section is included in the specific law dealing with cases where one utility compla about another. In Section 54-7-11, U.C.A., a public utility is given the right to complain to the Commisson "on any of the grounds on which complaints are allowed to be filed by other parties," and the same procedure shall be adopted and followed as in other cases "except that the Complaint may be heard ex parte by the Commission . . . ." (Emphasis added).

Thus, while a public utility complaining against a

competitor isafforded the same substantive rights of complaint, the procedure has been modified so that an ex parte determination can be made by the Commission without a formal hearing as is required in most other complaints made pursuant to the general statute.

Rule 13 of the Commission's Rules of Procedure specifically allows the Commission to proceed to dispose of a matter summarily without a hearing. In such cases, a protest must be lodged by the contesting party stating why a hearing should be held and the Commission must then decide if a hearing is required. This procedure is much like that of this Court in its disposition of cases where full argument and briefing is not required. Rule 73B, U.R.C.P.

In the instant case Plaintiff's Complaint is based upon two underlying documents. The first are applications which were filed by Mobile Telephone Service of Southern Utah, Inc., with the Federal Communications Commission in 1977 and 1978. (R. 5-12). The second is the Certificate of Convenience and Necessity issued to Mobile Telephone Service of Southern Utah, Inc., on November 25, 1974 by the Public Service Commission.

As to any allegations concerning impropriety or misrepresentation with the FCC, the Commission ruled that such matters should be properly addressed to the Federal Communications Commission and not to the State Public Service Commission. Obviously, both of these agencies have concurrent jurisdiction with respect to various aspects of operating a broadcasting

utility and neither agency is empowered to act on behalf of the other. Clearly, if any "misrepresentation" occurred as to the FCC application it should be properly addressed to that agency as noted by the Commission.

As to the "misrepresentation" found in the Commission's Certificate of Convenience and Necessity it is equally clear that the Commission is the ultimate authority as to the interpretation of what was required by the issuance of such certifica Milne Truck Lines v. Public Service Commission, 368 P.2d 590 (Utah 1962); Uintah Freightways v. Public Service Commission, 390 P.2d 238 (Utah 1964).

The Commission in both its original order and in the order denying rehearing stated that the certificate did not require the establishment of certain types of equipment to be utilized in the operation of the facility nor did it require a particular time frame in which the operation could commence. As such, therefore, any claim as to improper equipment or a delay in the operation could not be sustained on the basis of the Certificate issued by the Commission.

Likewise, any claim of "misrepresentation" as to advertisi by the very terms of the Complaint itself shows that such misrepresentations had to relate either to the equipment or to the time period -- neither of which was restricted by the Certificate of Convenience issued by the Commission.

Finally, the Commission noted that the plaintiff and the two competiting companies were involved in a "competitive warfare" and the Commission did not wish to use the power

of the state in assisting one side or the other in such warfare. This statement is borne out by the fact that in Williams v. Public Service Commission, 504 P.2d 34 (Utah 1972) this Court reversed the Public Service Commission's Order denying a certificate of convenience to the plaintiff and required that plaintiff be allowed to compete against Mobile Telephone, Inc. Thus, the legal battles of the competition between these companies dating back to 1972 is certainly indicative of the "competitive environment" which the Commission referred to in its Order.

For these reasons, the Commission was justified in concluding that the Complaint filed by Plaintiff did not give rise to any claim based upon the allegations contained in the Complaint itself. In addition, as noted by the Attorney General in his brief, the Commission, pursuant to Section 54-4-42, U.C.A., is not required to investigate a matter on its own motion unless it believes that it is in the interest of the public to do so. The Commission cannot be forced to conduct an investigation on its own accord in a matter in which it believes there is no merit or need for such investigation.

The actions of the Commission were neither arbitrary nor capricious and it is evident that the Commission exercised its authority according to law. Terra Utilities, Inc. v. Public Service Commission, 575 P.2d 1029 (Utah 1978). As such, this Court should adhere to the decision of the Commission and affirm the lower Commission Order.

Respectfully submitted

KAY LEWIS
Attorney for Mobile Telephone
Service of Southern Utah, Inc.

MAILING CERTIFICATE

I certify I mailed 2 copies of this Brief to Michael Neider, 606 Newhouse Building, Salt Lake City, Utah, postage prepaid, appellant's attorney, and Craig Rich, 236 State Capitol Building, respondent's attorney, postage prepaid, this 3rd day of March, 1981.