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White City Water Company and Sandy City v. Public Service Commission of Utah : Reply Brief

Utah Supreme Court

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~~IN THE SUPREME~~ COURT OF THE STATE OF UTAH

WHITE CITY WATER COMPANY and)	
SANDY CITY,)	
)	
Appellants-Petitioners,)	
)	
vs.)	
)	
PUBLIC SERVICE COMMISSION)	Case No. 920220
OF UTAH,)	
)	Priority No. 10
Appellee-Respondent.)	

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INTRODUCTION

The briefs of the Respondents/Appellees make no new arguments about the propriety of the Order of the Public Service Commission ("Commission") subject to this appeal. The Commission sua sponte purported to bifurcate the issues before it into two cases, i.e., (1) whether the sale of White City Water Company ("White City") to Sandy City ("Sandy") is in the public interest and should be approved (which retained the original docketing No. 91-018-01); and (2) whether the Commission would retain jurisdiction to regulate rates of non-Sandy customers after the sale (which was assigned a new docketing No. 91-018-02). The issue whether the sale is in the public interest, docket No. 91-018-01, remains before the Commission. In order to resolve this issue, Sandy and White City requested the Commission to schedule proceeding concerning the sale.¹ Appellants ask the Court to take notice of the proceedings to the extent they bear on issues relevant to this appeal.

¹ Pursuant to Rule 201 of the Utah Rules of Evidence, Appellants respectfully request that this Court take judicial notice of the proceedings currently in progress before the Commission with respect to White City's application. This court may take judicial notice of proceedings having a direct relation to a matter before it. Wohlschlegel v. Uhlmann-Kihei, Inc., 662 P.2d 505, 508 n.1 (Haw. Ct. App. 1983); Holguin v. Aetna Casualty & Sur. Ins. Co., 749 P.2d 918, 920 n.1 (Ariz. Ct. App. 1986).

Pursuant to Rule 201(d) of the Utah Rules of Evidence, in separate Appendix, Appellants have supplied the Court with the testimony filed in the proceedings necessary for the Court to take judicial notice of these proceedings.

STATEMENT OF ADDITIONAL FACTS

1. On January 27, 1993, the Commission issued a scheduling order in the Application of White City which states that "the Commission is willing to consider alternatives to full jurisdiction that will protect the interests of retail water customers outside municipal boundaries and still allow the sale of White City to proceed." The order directs White City and Sandy to "file testimony, exhibits and work papers, including any cost-of-service studies, supporting their position that the sale would benefit the public interest and a clear explanation of why it cannot afford us any intelligence on resolving the non-residents' concerns without going through the public interest portion of the hearing." Order of the Public Service Commission dated January 27, 1993, Appendix Tab A at p.2.

2. Sandy and White City filed testimony and exhibits in support of its contention that it is in the public interest to approve the sale of the stock of White City to the Building Authority. The testimony and exhibits filed by Sandy and White City support the following propositions: (a) that among Sandy's reasons for acquiring White City is provision of a safe, stable water system for present and future residents (Testimony of Darrell Scow, Director of Public Works for Sandy City, before the Public Service Commission, Appendix Tab B at p. 3); (b) that Sandy is in the best position to provide such a water system (Scow Testimony, id. at pp. 3-4); (c) that current rates for non-resident water users are cost derived (Scow Testimony, id. at pp. 6-7; Siegel

Study attached at Tab B, number 3); (d) that non-resident water users are proportionally represented on the Sandy City Water board (Scow Testimony, id. at p. 8); and (e) that Sandy can make needed capital improvements to White City at less cost to its users (Scow Testimony of Steven R. McFarland before the Public Service Commission, Appendix Tab C at pp. 7-8).

ARGUMENT

I.

THE COMMISSION'S ORDER IS NOT A FINAL ORDER

The Commission's Order, which is the subject of this appeal, deals only with the issue of whether the Commission would retain jurisdiction to regulate rates if the sale between White City Water Company and the Sandy City Municipal Building Authority is approved. The Commission did not take evidence or conduct a hearing concerning whether approval of the sale would be in the public interest. Instead, after briefing by the parties on the issue of jurisdiction, the Commission purported to sever the jurisdictional issue from the case by assigning it a different docketing number. The Commission announced its decision on the jurisdiction issue and declared that the order was a final order.

A. ISSUES IN THIS CASE REMAIN UNRESOLVED BEFORE THE COMMISSION.

It is axiomatic that, for purposes of appeal, a final order ends litigation and leaves no claim remaining for resolution. Tippets v. Page Petroleum, Inc., 738 P.2d 635 (Utah 1987). Parties are entitled to only one appeal as a matter of right and only after

entry of final judgment that concludes the action. Pate v. Marathon Steel Co., 292 P.2d 765 (Utah 1984). In this instance the Commission has not addressed the central issue of approving the sale of White City. It has decided only a condition to the contract of sale, i.e., the jurisdiction of the Commission. The query here is whether bifurcating issues in a case makes an order regarding one issue a final order for purposes of appeal.

Appellees have not addressed the clear ruling set out in Public Utilities Commission v. Poudre Valley Rural Elec. Ass'n, 173 Col. 364, 366, 480 P.2d 106 (Colo. 1970) holding that simply assigning separate docket numbers does not make separate cases. In Poudre Valley, the court stated that "unless and until an administrative matter is reduced to a final judgment, settling all the issues between the parties, we will not review it. The assignment of separate numbers by the Commission to its decisions dealing with different phases of the same proceeding did not create two separate proceedings." Id. at 108. In the Poudre Valley case, the Public Utilities Commission argued that one decision made by the Commission was final and should have been appealed before a second decision was entered. The Court dismissed this reasoning stating that the first order was an interlocutory, rather than a final order, as it was "merely a part of the continuing litigation on this problem." Id. None of the appellees address the ruling in Poudre Valley or give separate authority supporting the notion that a commission can make an order final by assigning a new docket

number to it. Clearly, the Commission's Order lacks finality and should be dismissed.

Furthermore, when other issues remain below, the appellate court allows review only under the standards set out in the Rules of Civil or Appellate Procedure. Neither the standards set out in Rule 54(b), Utah Rules of Civil Procedure, nor the granting of a petition under Rule 5, Utah Rules of Appellate Procedure, have been satisfied in this instance. The appellees argue that "the Commission made a final, appealable decision on the issue of jurisdiction to regulate Sandy." Joint Brief, at 25. No authority or discussion supports this assertion. Similarly, Salt Lake County argues that the Commission's Order is final because "the Commission assigned a separate docket number (91-018-0-02) to that portion of its order declaring it has jurisdiction over Sandy's sale of water to non-residents." Salt Lake County Brief, at 22. None of the appellees explain why issues remaining before the Commission relating to the sale of White City to Sandy are not integral to the jurisdictional issue. Further, the appellees do not explain how an order can be final where issues between the parties in the litigation remain before the Commission. As noted in Sloan v. Board of Review, 781 P.2d 463 (Utah Ct. App. 463) "an order of [an] agency is not final so long as it reserves something to the agency for further decision." Sloan, 781 P.2d at 464.

The current proceedings before the Commission concerning approval of White City's application may resolve some of the Commission's concerns about future regulation and may require the

Commission to revise assumptions on which it based the Order. Among these assumptions are Sandy's reasons for acquiring White City, whether a higher rate for non-Sandy users is justified on a cost basis, and whether White City could finance needed improvements. The Commission implicitly relied on assumptions about those issues when it executed its Order. However, there is no factual basis for those assumptions and the Commission is currently hearing evidence to resolve those issues. Certainly, even the fact that the Commission is now taking evidence underscores the lack of finality in this matter. All of the reasons for lack of finality set out in Kennecott Corp. v. Utah State Tax Comm'n, 814 P.2d 1099, 1104 (Utah 1991), apply in this instance and the matter should be remanded to the Commission for all issues to be determined.

In sum, the Commission has not created, and cannot create, two separate matters in this case. The initial issue of White City's application remains before the Commission. Thus, until the issue of approval of the Agreement between Appellants is resolved, the Commission's Order regarding jurisdiction is not a final order.

B. UTAH ADMINISTRATIVE PROCEDURES ACT ("UAPA") DOES NOT PROVIDE STANDARDS FOR FINAL ORDERS.

Appellees are correct in arguing that the Commission is governed by the provisions of UAPA when conducting hearings and other administrative proceedings. UAPA, however, does not include a provision that creates a standard for determining whether an order from the Commission is final or non-final. Statutes and case

law determine finality. For example, in Sloan v. Board of Review, the Utah Court of Appeals stated that "[a]n appeal can be taken only from entry of a final judgment which wholly disposes of a claim against a party." Id. at 464 (internal quotation and citation omitted).² Where claims remain, the decision is not final for purposes of appeal.

C. THE PROCEDURAL REQUIREMENTS FOR ISSUING A FINAL ORDER HAVE NOT BEEN SATISFIED

Salt Lake County argues that the Commission's Order is final because the Commission complied with Utah Admin. R. 750-100-11(C).³ County Brief at 23. The County also argues that the Commission's Order is final because Section 54-7-10(1) of the Utah Code provides that orders of the Commission "shall take effect and become operative on the date issued." County Brief at 23. The arguments fail because neither statute provides standard by which a court may determine whether an order is final or non-final.

D. THE APPROPRIATE STANDARD OF REVIEW IS IRRELEVANT TO A DETERMINATION OF THE FINALITY OF THE COMMISSION'S ORDER AND, EVEN ASSUMING THAT IT IS RELEVANT, THE

² Salt Lake County contends that "[t]he holding of Sloan is distinguishable under the facts of the present case" SLC Brief, at 24. Petitioners disagree with Salt Lake County's contention. Regardless of whether the ultimate holding of Sloan is factually distinguishable from the instant case, however, it is clear that the finality standard applied in Sloan is the appropriate standard to be applied in judicial review of orders from administrative agencies.

³ Utah Admin. R. 746-100-11(C) provides as follows:

If a case has been heard by the full Commission, it shall confer following the hearing. Upon reaching its decision, the Commission shall draft or direct the drafting of a report and order, as provided above, which upon signature at least two Commissioners, shall become the order of the Commission.

APPROPRIATE STANDARD OF REVIEW IN THIS CASE IS DE NOVO REVIEW

Appellees argue that the appropriate standard of review in this case is the "whole record" or "substantial evidence" standard of review under Utah Code Ann. § 63-46-b-16(4)(g) (1989 & Supp. 1992).⁴ However, the Commission refused to accept evidence or hear testimony concerning the application before it. Accordingly, the Commission's decision involves an interpretation of its statutory powers and authority which is a question of law, not a question of fact as argued by Appellees. Bevans v. Industrial Comm'n, 790 P.2d 573 (Utah Ct. App. 1990). See also MCI v. Public Serv. Comm'n, 186 Utah Adv. Rep. 8 (1992) (questions of law are reviewable under Utah Code Ann. § 63-46b-16(4)(d)). In MCI, this Court made it clear that issues reviewable under Section 63-46b-16(4)(d) are subject to de novo review. MCI, 186 Utah Adv. Rep. at 10.

Furthermore, this Court, as well as the Utah Court of Appeals, has repeatedly held that appellate courts reviewing agency determinations involving questions of law under Section 63-46b-

⁴ This provision states, in pertinent part:

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court

8(1)(d) are to give no deference to the agency's decision. Questar Pipeline Co. v. Utah State Tax Comm'n, 817 P.2d 316 (Utah 1991); Morton Int'l, Inc. v. Auditing Div., 814 P.2d 581 (Utah 1991); Savage Indus., Inc. v. Utah State Tax Comm'n, 811 P.2d 664 (Utah 1991). Thus, Appellees' contention that de novo review is not appropriate in this case is without merit.

II.

THE COMMISSION'S REFUSAL TO ALLOW AN EVIDENTIARY HEARING CONSTITUTES A DENIAL OF DUE PROCESS AND A VIOLATION OF THE UTAH ADMINISTRATIVE PROCEDURES ACT

The Commission acted improperly by bifurcating the issue of jurisdiction from the approval of White City's Application because the Commission does not have the power to make decisions sua sponte on issues not raised by the parties. In Chevron v. Utah State Tax Commission, 207 Utah Adv. Rep. 23 (Utah Ct. App., January 29, 1993), the Court of Appeals agreed with Chevron that it was "improper for the Commission sua sponte to raise and decide an issue that had not been raised by the parties." Id. at 24. The Court cited Combe v. Warren's Family Drive-Inns, Inc., 680 P.2d 733 (Utah 1984) which states "a trial court has no authority to render a decision on issues not presented for determination." Combe at 736. Here the Commission had no authority sua sponte to bifurcate the issues in White City's application when bifurcation was not requested by any party and the issue was not addressed by any party. Sandy and White City were taken by surprise when the

Commission determined to take this novel route. Clearly, adequate notice and an opportunity to object to the process were missing.

In addition, under the Utah Administrative Procedures Act, Utah Code Ann. §§ 63-46b-0.5 to 63-46b-22 (1989 & Supp. 1992), the Commission must follow certain procedures in conducting formal adjudicative proceedings. Section 63-46b-8 provides that in all⁵ administrative hearings associated with formal adjudicative proceedings, "[t]he presiding officer shall afford to all parties the opportunity to present evidence, argue, respond, conduct cross-examination, and submit rebuttal evidence. Id. at § 63-46b-8(1)(d).

The Commission's Order was issued without holding an evidentiary hearing despite objections by White City and Sandy. Indeed, before a hearing was held on the approval of the Agreement between Sandy and White City and the jurisdictional question raised by this agreement, the Commission had already drafted the Order at issue and informed the parties that it would retain jurisdiction if the agreement were approved. Although the Commission informed the parties that they could attempt to change the Commission's mind through oral argument, the Commission did not allow the parties to present any evidence.

Salt Lake County attempts to rationalize and legitimize the Commission's denial of the parties' rights to due process, and

⁵ Section 63-46b-8(1) states that the procedures outlined in the rest of Section 8 apply to all formal adjudicative proceedings except as provided in Subsection 63-46b-3(d)(i) and (ii). The exceptions enumerated in Sections 63-46b-3(d)(i) and (ii) do not apply to the instant case.

the Commission's violation of UAPA, by arguing that a factual hearing was not necessary because the record contains sufficient uncontroverted facts to support the Commission's decision. County Brief at 20. Similarly, the Commission and White City Water Users attempt to legalize the Commission's actions by noting that the Commission's decision was based upon legal and factual evidence, in the form of legal memoranda and briefs, received from all parties. Joint Brief, at 22. In this regard, Salt Lake County asks this Court to interpret Bunnell v. Industrial Comm'n, 740 P.2d 1331, 1333 (Utah 1987) (every person who brings a claim before an administrative agency has a due process right to a fair trial) and R.W. Jones Trucking, Inc. v. Public Service Comm'n, 649 P.2d 628 (Utah 1982) (due process includes notice and opportunity to be heard and defend) as holding that every person who brings a claim before an administrative agency has a due process right to receive a fair trial, including notice and an opportunity to be heard, unless the administrative agency independently determines that a fair trial and due process are not necessary. Or more absurdly, that if the Commission determines, in its discretion, that a hearing is not necessary in light of the legal memoranda, documentation and briefs filed by the parties, it need not be held.

However, this Court used absolute language in Bunnell, guaranteeing that individuals appearing before the Commission hold the right to due process without any exceptions. This rule is reiterated in Tolman v. Salt Lake County Attorney, 818 P.2d 23, 28 (Utah Ct. App. 1991) (it is clear abuse of discretion for an

administrative body to conduct proceedings in a way to deny due process). Furthermore, the Utah legislature clearly expressed its intent that the Commission's adherence to UAPA be mandatory, and not discretionary, by stating that "[t]he presiding officer shall afford to all parties" the rights outlined in Section 8. Utah Code Ann. § 63-46b-8(1)(d) (1989). The Utah Court of Appeals recognized the mandatory nature of UAPA in D.B. v. Division of Occupational and Professional Licensing, 779 P.2d 1145 (Utah Ct. App. 1989), in which the Court held that the plaintiff social worker's due process rights were violated by an administrative law judge who failed to provide the plaintiff with the opportunity to cross-examine an adversarial witness at a hearing concerning revocation of the plaintiff's license to practice.

In sum, the Commission must comply with the Constitutional mandates of due process and the requirements of UAPA in all situations except those specifically enumerated by the courts and the legislature, none which are relevant in this case. In the instant case, notice and an evidentiary hearing would have allowed the parties to present facts and evidence demonstrating that approval of the proposed transaction would be in the public interest. More importantly, an evidentiary hearing would have given the Commission, and this Court, the factual basis on which to determine the constitutionality of the Commission's exercise of jurisdiction. Thus, notwithstanding Appellees' arguments to the contrary, the Commission's refusal to allow an evidentiary hearing violated the parties' rights to due process and violated the

provisions of UAPA, all to the substantial prejudice of Appellants. Consequently, Appellants are entitled to the judicial relief requested in this appeal.

III.

THE COMMISSION HAS NO JURISDICTION OVER MUNICIPAL WATER SALES.

The issue before this Court is the extent of the Commission's jurisdiction over sales of water by a municipality. Specifically, the Appellants challenge the Commission's conclusion that it "would retain jurisdiction to regulate rates charged the extra-territorial retail customers . . ." Commission Report and Order, pg. 15. The Appellees have avoided the straightforward analysis applicable to that narrow question.⁶ Instead, the Appellees have argued "facts" of their own making, supposedly supported by a record devoid of any evidence and the policy reasons

⁶ The citations to White River Shale Oil v. Public Service Commission, 700 P.2d 1088 (Utah 1985) and Kearns-Tribune Corp. v. Public Service Commission, 682 P.2d 858 (Utah 1984) in the Joint Brief do not support the Commission's extension of jurisdiction because jurisdiction was not an issue in either case. Similarly, City of Orangeburg v. Moss, 204 S.E.2d 377 (S.C. 1974), does not support extension of the Commission's power because the case does not deal explicitly with a "ripper" clause exception and because, in that case, the Commission had statutory authority to regulate.

Respondents' citation to North Salt Lake v. St. Joseph Water & Irrigation Company, 223 P.2d 577 (Utah 1950), for the proposition that continuing regulation by the Commission is an "obligation" that would remain with White City after its sale to Sandy is similarly inapposite. County Brief at 19; Joint Brief at 10. In North Salt Lake the court found that while the town took the water company with binding obligations (to serve certain customers) from prior Commission orders, the obligations did not include continuing regulation by the Public Utilities Commission.

why the commission's jurisdiction should be allowed based on those hypothetical facts. Policy hyperbole, however, cannot substitute for a lack of statutory jurisdiction. Hypothetical facts cannot be the basis for disregarding the constitutional protection accorded municipalities against interference by special commissions under the West Jordan balancing test, even assuming it applies, since that case certainly requires a full evidentiary hearing in order to balance the interests.

A. ONLY A FACTUAL HEARING CAN DETERMINE WHETHER SANDY'S SERVICE OF WATER TO NON-RESIDENT WHITE CITY USERS IS SALE OF SURPLUS WATER AND INCIDENT TO SERVICE TO SANDY'S RESIDENTS.

Case law has consistently held that the Commission may not regulate cities selling water to non-residents. In Salt Lake County vs. Salt Lake City, 570 P.2d. 119 (Utah 1977), the County asked this Court for a declaratory order that the City's distribution system was so extensive it should be deemed to be in the business of selling water and, therefore, subject to regulation by the Commission. Utah's Supreme Court clearly recognized that a city's "business in furnishing water to its residents and activities reasonably incident thereto, is not subject to regulation by the Commission." Id. at 121-122. In dicta following this holding, the court noted that the extent to which "a city may engage in rendering a utility service outside city limits without being subject to some public regulation is not so clearly determined." Id. This dicta, however, does not give the Commission authority to retain jurisdiction in this case. At most, Salt Lake County directs the Commission to conduct evidentiary

hearings to determine the extent of surplus sales, not to establish jurisdiction.

Here Appellees' argument that Sandy's sale of water to current White City water users would constitute a general business rather than being incidental to furnishing water to its residents has no factual support. The Commission's Order states that among the "salient considerations" are its "doubts that service outside the city boundaries would constitute exercise of a municipal function." The Order also states the Commission's "skepticism that Sandy would be selling surplus water." Commission Report and Order at p. 4, emphasis added. However, nowhere does the Order set out even a scintilla of evidence that the prospective sale is not incident to Sandy's service to its own customers or any criteria to determine what is "surplus" water.

Similarly, Appellees assert, without legal or factual support, that the sale of water by Sandy to non-resident White City water users would not be "surplus" water because the sale would be to already existing customers. Appellees further argue that if the water was "surplus" Sandy would not be obligated or required to sell such water for the long term and, therefore, the water users would have no guarantee of continued future service. These arguments do not address the legal issue of whether the Commission has authority to regulate.

Meanwhile, White City and Sandy are in the process of setting forth facts before the Commission concerning the sale of White City to Sandy. The hearings will include evidence that the

sale of water to non-residential users is incidental to Sandy's water delivery system, that such sale is of surplus water, and that proposed rates are reasonable in light of costs. Only after the Commission has had the opportunity to evaluate the testimony and studies presented to it, will the issue whether sale of water is incident to Sandy's municipal functions have some factual basis and this court have a record to review.

B. SANDY'S SALE OF WATER TO NON-RESIDENT WHITE CITY USERS IS A LOCAL MATTER CONSTITUTING A MUNICIPAL FUNCTION.

Appellees rely on City of West Jordan v. Utah State Retirement Board, 767 P.2d. 530 (Utah 1988), and Utah Associated Municipal Power Systems v. Commission of Utah, ("UAMPS") 789 P.2d. 298 (Utah 1990) to argue that the Commission should have jurisdiction over Sandy's delivery of water outside its boundaries. It is not clear that the analysis set out in those cases applies to water utilities. This Court has twice been asked to rule that cities selling water to non-residents should be regulated by the Commission. In County Water System, Inc. v. Salt Lake City, 3 Utah 2d 46, 278 P.2d 285 (1954) and Salt Lake County v. Salt Lake City, 570 P.2d 1191 (Utah 1977), this Court clearly stated that cities selling surplus water outside their boundaries are not regulated by the Commission. However, even if the analysis set out in City of West Jordan and UAMPS applies in this instance, the Commission did not apply the balancing test announced in these cases. In UAMPS, a number of municipalities planned to establish an electrical system to supply electricity over a large territory. Under § 11-

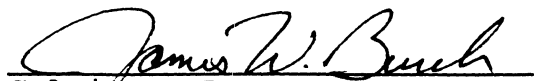
13-27, Utah Code Ann., such a system must apply for and receive a certificate of convenience and necessity from the Commission. The Commission, after extensive hearings, found that the system would have duplicated existing lines and generated excess electricity. The Supreme Court, noting that the electrical system extended far beyond any single city, held that the proposed electrical system went beyond any municipal function and, therefore, the statute granting jurisdiction to the Commission to regulate such a system would be constitutional. No such balancing test was ever done in this instance. The appellees simply conclude, without analysis, that "the sale of water to non-residents involves more of a state regulatory interest than an exclusive local interest and is sufficient to avoid the characterization of a municipal function." County Brief at 18. Such a conclusory statement, based on no factual analysis, and in light of the close alignment of Sandy's and White City's water systems demonstrates the Commission's failure to apply even a minimal UAMPS analysis. Clearly, the Commission cannot simultaneously deny White City and Sandy the opportunity to put on evidence and rely on the fact-intensive analysis required by City of West Jordan and UAMPS. The Order should be dismissed and the matter remanded to the Commission for findings.


CONCLUSION

Salt Lake County, the Commission and White City Water Users ask this Court to affirm an Order that is not final, that violates the basic standards of due process, and that is in direct

contravention to existing constitutional, statutory and case law. In contrast, White City and Sandy ask the Court to overrule the Order and to remand the matter to the Commission. White City and Sandy ask the Court to direct the Commission to resolve all the issues before it and to give White City and Sandy an opportunity to present their evidence to make an appropriate record.

DATED this 9th day of April, 1993.


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APPENDIX A

63-46b-8. Procedures for formal adjudicative proceedings — Hearing procedure.

(1) Except as provided in Subsections 63-46b-3(d)(i) and (ii), in all formal adjudicative proceedings, a hearing shall be conducted as follows:

(a) The presiding officer shall regulate the course of the hearing to obtain full disclosure of relevant facts and to afford all the parties reasonable opportunity to present their positions.

(b) On his own motion or upon objection by a party, the presiding officer:

(i) may exclude evidence that is irrelevant, immaterial, or unduly repetitious;

(ii) shall exclude evidence privileged in the courts of Utah;

(iii) may receive documentary evidence in the form of a copy or excerpt if the copy or excerpt contains all pertinent portions of the original document;

(iv) may take official notice of any facts that could be judicially noticed under the Utah Rules of Evidence, of the record of other proceedings before the agency, and of technical or scientific facts within the agency's specialized knowledge.

(c) The presiding officer may not exclude evidence solely because it is hearsay.

(d) The presiding officer shall afford to all parties the opportunity to present evidence, argue, respond, conduct cross-examination, and submit rebuttal evidence.

(e) The presiding officer may give persons not a party to the adjudicative proceeding the opportunity to present oral or written statements at the hearing.

(f) All testimony presented at the hearing, if offered as evidence to be considered in reaching a decision on the merits, shall be given under oath.

(g) The hearing shall be recorded at the agency's expense.

(h) Any party, at his own expense, may have a person approved by the agency prepare a transcript of the hearing, subject to any restrictions that the agency is permitted by statute to impose to protect confidential information disclosed at the hearing.

(i) All hearings shall be open to all parties.

(2) This section does not preclude the presiding officer from taking appropriate measures necessary to preserve the integrity of the hearing.

63-46b-16. Judicial review — Formal adjudicative proceedings.

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure, except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

(b) the appellate court may tax the cost of preparing transcripts and copies for the record:

(i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(ii) according to any other provision of law.

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute;

(ii) contrary to a rule of the agency;

(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or

(iv) otherwise arbitrary or capricious. 1988