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Clearfield State Bank v. W. S. Brimhall, Commissioner of Financial Institutions of the State of Utah; and Bank of Northern Utah : Appellant's Brief

IN THE SUPREME CO
OF THE STATE OF U

LEARFIELD STATE BANK,
Corporation,

Plaintiff-Appellant,

vs.

W. S. BRIMHALL, Commissioner of Financial Institutions of the State of Utah; and

BANK OF NORTHERN UTAH, an unin- corporated association.

Defendants-Respondents.

APPELLANT'S

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WRIGHT VOLKER
istant Attorney General
e Capitol Building
Lake City, Utah
rney for W. S. Brimhall,
Commissioner of Financial Insti
Defendant-Respondent

DUFFY PALMER
rney at Law
South 125 East Street
rfield, Utah
rney for Bank of Northern Uta
efendant-Respondent

INDEX

Page

INDEX TO CASES AND AUTHORITIES CITED

Statutes Cited

Cases Cited

Texts Cited

IN THE SUPREME COURT OF THE STATE OF UTAH

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a Corporation,
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Defendants-Respondents.

Case No. 11900

APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF CASE

This is an action for a judicial review of the actions and proceedings of the defendant Commissioner of Financial Institutions in authorizing the Bank of Northern Utah to operate a bank in Clearfield, Utah, pursuant to the order of said Commissioner, dated March 12, 1969.

DISPOSITION IN LOWER COURT

The lower court awarded judgment in favor of defendants and against plaintiff, of no cause of action.

RELIEF SOUGHT ON APPEAL

The plaintiff-appellant seeks reversal of the lower court decision, and a determination that the defendant Commissioner's action in authorizing the Bank of Northern Utah to operate a bank in Clearfield, Utah, was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law; and for a judgment and order vacating and holding invalid the order of said Commissioner wherein such authorization was granted, enjoining defendant Bank of Northern from establishing its bank at Clearfield, and awarding damages to plaintiff-appellant in event the Bank of Northern Utah engages in the banking business.

STATEMENT OF FACTS

On or about September 17, 1968, the defendant, Bank of Northern Utah, an unincorporated association, filed its application with the defendant Commissioner to operate a bank in Clearfield, Utah. After due notice of the filing of such application was given, protests to the granting of such application were filed by six banking institutions, including plaintiff-appellant, and the State Savings and Loan Association. Plaintiff operates a bank at Clearfield, Utah. A public hearing was held on November 26-29, 1968, and concluded on December 6, 1968. The defendant Commissioner issued his Findings of Fact, Conclusions, and Order on March 12, 1969. (R. 6-10) The plaintiff-appellant prosecuted its review of that order, (R. 1-5) and defendants filed their answers to the complaint. (R. 14-17; R. 21-22). Determination was made

by the lower court following hearing thereon, the court issuing a memorandum decision (R. 24-34) and its judgment. (R. 35, 36) Appeal has been taken from the memorandum decision and the judgment (R. 37)

In this brief the transcript of testimony of the administrative hearing is referred to by the abbreviation, "Tr.", and the exhibits, as marked in the hearing. In the hearing the plaintiff-appellant was referred to as the "protestant Clearfield State Bank" and the defendant Bank of Northern Utah by the designation "applicant". The parties are referred to herein by these terms as well as by the designations in the lower court.

ARGUMENT

POINT I

THE PROPOSED BANKING FACILITY IS IN FACT A BRANCH BANK AND ANY ESTABLISHMENT THEREOF CONTRAVENES STATE LAW.

Section 7-3-6, U.C.A. 1953, as amended, precludes the establishment of a branch bank in Clearfield, Utah, by a state bank, inasmuch as that municipality is not a city of the first class, and the Clearfield State Bank is located at Clearfield. The statute provides, in part:

> "Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing branch. * * * "

It is submitted that the proposed institution is in fact a branch of the Bank of Utah, and that defendant applicant has attempted by a subterfuge to circumvent the provisions of the statute aforementioned.

The evidence at the administrative hearing indicates that the Bank of Utah has its principal office at Ogden, Utah, and maintains branches at South Ogden, Riverdale, and Roy, Utah, all within a few miles and travel minutes from Clearfield. (Tr. 280-282; Plaintiff protestant's Exhibit C) It is also apparent that the controlling stock ownership of the Bank of Utah and the proposed controlling stock ownership of the applicant are one and the same; that is, those incorporators whose stock ownership will control the defendant Bank of Northern Utah are also the controlling stockholders of the Bank of Utah. (Tr. 462, 159-160)

According to 1 Fletcher, Cyclopedia Corporations, pages 240-241:

> "Where the corporate form of organization is adopted or a corporate entity is asserted in an endeavor to evade a statute as to modify its intent, courts will disregard the corporation or its entity and look at the substance and reality of the matter."

That a "branch" bank arises where there is common ownership of two banking corporations is apparent from the case of *Braeburn Securities Corporation v. Smith*, 153 N.E. 2d 806, wherein the Illinois Supreme Court explained a rationale of the bank holding company act of that state as follows:

> " * * * Branch banking in Illinois has been prohibited for many years.
>
> "It is clear that this prohibition could be circumvented and indirect branch banking result if, through ownership of bank stock, one or more bank holding companies could control several banks. Branch banking can be accomplished by one bank operating at several locations or by one company owning or controlling several banks variously located." at 809, 810.

According to the 1967 supplement to 1 Michie, Banks and Banking, Section 27:

> "The corporate veil should be pierced whenever one bank is doing business through the instrumentality of another or in the same way as if the institutions were one and, if such circumstances exist, the relationship of parent and branch exists within federal and state statutes prohibiting branch banks even though banks are separate corporate organizations."

See *Whitney National Bank in Jefferson Parrish v. Bank of New Orleans and Trust Company,* 323 F. 2d 290. (rev. on other grounds 379 U.S., 411)

In addition to the common control of the defendant Bank of Northern Utah, and the Bank of Utah, a unitary type and plan of operation is indicated from the following:

(a) The office of cashier of the Bank of Utah and the office of cashier of the Bank of Northern Utah, are to be held by the same person, William Beutler. (Tr. 155, 94, 72) According to 10 American Jurisprudence 2d, Banks, p. 132:

> "The bank cashier generally has greater inherent power than any other bank officer. Ordinarily, the cashier of a bank is regarded as its chief executive officer . . . "

It is stated in 4 Michie, Banks and Banking, pages 96 and 97 as follows:

> "The powers and duties of a cashier, in virtue of his office, are much greater than the president's though his office is strictly executive. In fact, the cashier generally has greater inherent powers than any other bank officer. * * * "
> (see cases cited in the treatise, and the current supplement thereto.)

It is certain that the Bank of Utah and the Bank of Northern Utah, managed by a common cashier, will engage in a singular operation. Although one might initially wonder how Mr. Beutler can truly represent the interests of two banking institutions whose respective fields of seeming competition overlap, there is nothing really anomolous with his role when the corporate veil is pierced, for it is then apparent that the two institutions are doing business in the same way as if they were one, and/or that the applicant is the instrumentality of the Bank of Utah.

(b) There are interlocking officers and directors of the Bank of Northern Utah and Bank of Utah (Tr. 155, 156) indicative of the plan of operation, and the new institution will be managed and controlled by the executives of the Bank of Utah.

(c) The Bank of Utah will in effect subsidize the Bank of Northern Utah. The cashier of the Bank of Northern Utah, William Beutler, will receive no salary as cashier, but will continue as a salaried employee and cashier of the Bank of Utah. (Tr. 95, 96) Yet he will devote whatever time is required to the Bank of Northern Utah, " * * * *whether it was half a day, an hour a day, or eight hours a day.*" (Emphasis added) (Tr. 96) This unitary accomodation between the two banking institutions was explained by Mr. Beutler as follows:

> "Q. How can you function as a cashier of the Bank of Northern Utah without leaving the Bank of Utah?
>
> A. If I can liken this to a situation between the Bank of Utah and the Bank of Ben Lomond, which you have been rather interested in, you know we have a new officer, an auditor. We allow our auditor at the Bank of Utah to spend certain time at the Bank of Ben Lomond for which the Bank of Utah is compensated. Thus this one officer ends up as an officer of each bank. So we would expect a similar situation. However, with this exception, we would not as organizers of a new bank want to put undue drain on the resources of our new child here, our new bank. So I for one, and I can speak only for myself, would be willing to serve the new bank without compensation and I fully plan to." (Tr. 95)

(d) The architecture of the proposed Bank of Northern Utah reflects the architecture used by the Bank of Utah. The application indicates it will be "colonial styled". Mr. Frank M. Browning responded to a question

regarding the proposed architecture of the Bank of Northern Utah, when authorized heretofore, as follows:

> "Q. Mr. Browning, let me ask this, do you recall ever making a statement that the architecture of the new bank and the interior design would follow the colonial architecture exemplified in Ogden and all branch banks of the Bank of Utah?
>
> A. I am sure I made that statement. If a reporter asked me that, that is the statement I would make." (Tr. 266)

Plaintiff protestant's Exhibit AB represents the architect's sketch of the proposed building of the applicant. (Tr. 443) Plaintiff protestant's Exhibits AC and AD are photographs of the Bank of Utah's branch at Riverdale, Utah, within five miles of Clearfield. An examination of said Exhibits AB, AC, and AD reveals that the proposed building of the applicant is virtually identical with the Riverdale branch of the Bank of Utah, further suggesting a solitary plan of operation.

(e) The application has been referred to as that of a branch. Under cross examination Mr. Beutler was asked if the Bank of Utah were to apply for a branch at Syracuse, Utah, would it weigh the resulting impact on the Bank of Northern Utah. The question and answer follow:

> "Q. Do you think that they would, in their consideration weigh the impact of that branch on the Bank of Northern Utah?
>
> A. Well, I don't know. They probably would. We would consider it in much the same way we

tried to consider the impact on the other North Davis banks *in applying for this branch.*" (Emphasis added) (Tr. 108)

(f) The defendant, Bank of Northern Utah, by its application in the instant matter and in its previous applications has designated a business name which suggests a similarity to Bank of Utah. Initially the proposed name of the corporation was to be Central Bank of Utah (Tr. 468-469), but for a reason immaterial here, the proposed name was changed to Bank of Northern Utah. In either case, by emphasis or de-emphasis, the phrases, Central *Bank of Utah,* and *Bank of* Northern *Utah,* contain the words necessary to indicate identification of the defendant applicant with the Bank of Utah.

(g) The projected operating income as set forth in the application was based upon the performance rate of the Bank of Utah; it was opined that the projected operating expenses in the Bank of Northern Utah would fall somewhere within the same category as those of the Bank of Utah. (Tr. 89, 90, 99)

Even though the applicant is a proposed corporation, claiming status as a distinct entity, its existence separate and apart from the Bank of Utah cannot be sustained. In this matter the corporate veil should be pierced, and the resulting exposure indicates that the Bank of Utah and the proposed Bank of Northern Utah will operate as if the two institutions were one, and/or the latter as the instrumentality of the former, in contravention of Utah law.

According to Section 7-1-26, U.C.A. 1953, as amended, a ground for refusal of approval of an application for a banking charter is " * * * when the plan of operation does not comply with the laws of the state governing such institution * * * ". In this case it is submitted that the proposed operation violates the provisions of Section 7-3-6, U.C.A. 1953, as amended, as heretofore set forth. It is further submitted that the failure of the Commissioner of Financial Institutions to so find, and his further failure to pierce the corporate veil, and go behind the application and proposed articles, was arbitrary and capricious.

POINT II

THE COMMISSIONER OF FINANCIAL INSTITUTIONS WAS ARBITRARY AND CAPRICIOUS IN PRECLUDING PLAINTIFF'S ELICITING PROBATIVE EVIDENCE, AND IN RECEIVING EVIDENCE AND INFORMATION WHICH WAS NOT MADE AVAILABLE TO PLAINTIFF.

As has been set forth in a prior point, plaintiff contends that the proposed banking institution is in fact a branch of the Bank of Utah, and its establishment in Clearfield, Utah, would violate Section 7-3-6, U.C.A. 1953, as amended. At the hearing on this matter, plaintiff, in attempting to elicit evidence on the issue of whether the proposed operation constituted branch banking, was precluded from producing such evidence; and during the course of the hearing defendant applicant tendered "confidential" information on that subject to

the Commissioner of Financial Institutions, which neither of the defendants made available to the plaintiff.

It is elementary that due process requirements of the federal and state constitutions require that a hearing before an administrative agency exercising judicial, quasi judicial, or adjudicatory powers must be fair, open, and impartial, and if such a hearing is denied, the administrative action is void. 2 Am.Jur.2d, Administrative Law, p. 222. It is also fundamental that an administrative body may not base a decision, or findings in support thereof, upon evidence or information, outside the record, and in particular upon evidence obtained without the presence of and notice to interested parties, and not made known to them prior to the decision. Annotation, 18 A.L.R. 2d 552. A rule otherwise would amount to a denial of a hearing. *Simmons v. United States,* 348 U.S. 407; *English v. Long Beach,* (Calif.) 217 P.2d 22. See also *Spencer v. Industrial Commission,* 81 Utah 511, 20 P.2d 618; *Utah Power and Light Co. v. Public Service Comm. et al.,* 107 Utah 155, 152 P.2d 542.

1 Davis, Administrative Law Treatise, p. 412, states:

> "The true principle is that a party who has a sufficient interest or right at stake in a determination of governmental action should be entitled to an opportunity to know and to meet, with the weapons of rebuttal evidence, cross-examination, and argument, unfavorable evidence of adjudicative facts, except in the rare circumstance when some other interest, such as national security, justifies an overriding of the interest in fair hearing. * * * "

During plaintiff's examination of William W. Beutler, Vice President and Cashier of the Bank of Utah, and cashier and director of the Bank of Northern Utah, the witness was asked the identity of the stockholders who had controlling interest of the Bank of Utah and Bank of Ben Lomond. (Tr. 69-72) (Tr. 71, 72) The evidence sought was to "establish that the control of the Bank of Utah and the Bank of Ben Lomond is also the controlling interest of the applicant bank". (Tr. 70) The witness indicated the information was available. The plaintiff requested of the Commissioner of Financial Institutions

> " * * * An order directing Mr. Beutler to furnish at this hearing the stockholders of the Bank of Utah and the Bank of Ben Lomond, or in the alternative the stockholders of the Bank of Utah who own 89% of the stock of the Bank of Utah who also own 73.55% of the stock of Ben Lomond",

of which ownership percentages the witness had previously given testimony. (Tr. 74, 69)

The Commissioner of Financial Institutions denied the request for the order sought, concluding it was confidential information. He invited the defendant Bank of Northern Utah

> " * * * to consider informing us whether any of the applicants in this matter or any combination of individual applicants represent a controlling interest in any other bank. I will leave it up to them whether they furnish the information or not but I will open the hearing for that information if they care to furnish it." (Tr. 84, 85)

The plaintiff restated that the purpose of its inquiry was to establish that the defendant applicant was a branch of the Bank of Utah and/or Bank of Ben Lomond, and that the evidence sought also bore upon the question of competition and monopoly inasmuch as the Bank of Utah had branches at South Ogden, Riverdale, and Roy, all within close mileage of Clearfield State Bank. (Tr. 86) Plaintiff requested an order requiring the production of the percentage of stock ownership that each incorporator of the applicant owns of the stock of the Bank of Utah and/or the Bank of Ben Lomond, and also the percentage of stock that such incorporator owns in any corporation which owns stock in the Bank of Utah or Bank of Ben Lomond. (Tr. 87) The Commissioner denied the request, indicating the submission of the information to be voluntary.

> " * * * I am going to not issue a formal order that your furnish this information * * * the hearing will accept this information and testimony on it if you care to bring it." (Tr. 88)

Subsequently, during the hearing, voluntary submission of the percentages of stock ownership was given to the Commissioner of Financial Institutions by defendant applicant

> " * * * on the condition it was given to the Commissioner as a confidential matter * * * ". (Tr. 156)

It was not made available to the plaintiff protestant (Tr. 157), and objection to not being afforded the opportunity to examine the materials submitted was raised. (Tr. 461-462)

It is not only apparent from the transcript of the hearing that evidence was tendered by the defendant applicant and received by the Commissioner of Financial Institutions relating to the stock interests aforementioned, and plaintiff was not allowed the opportunity to examine the same, but the transcript of oral argument in the trial court contains the admissions of counsel for the Bank of Northern Utah that certain of the evidence and information thus submitted to the Commissioner was not made available to the counsel for the plaintiff protestant. (R. 97, 98; Oral Argument Transcript, Trial Court)

In conclusion 5 of the defendant Commissioner's order he "concludes" of the organizers of the proposed bank:

> " * * * Their financial responsibility is established by personal financial statements that have been filed with the Commissioner." (R. 9)

The record of the hearing indicates no such filing. The plaintiff submits that the "conclusion" aforementoined was unsupported by any evidence—or if such evidence were submitted by the defendant Bank of Northern Utah, then the receipt thereof by the Commissioner, and not making the same available to plaintiff, is action of an arbitrary and capricious nature.

It would seem that the Commissioner of Financial Institutions would be interested in determining the interrelationship of the banking institutions aforementioned, and whether the defendant applicant was or was not

a separate entity in fact, and whether there would be a lessening of competition in the area by reason of the interrelationships enumerated. It is submitted that the Commissioner should have ordered the production of evidence regarding the relationships at issue here, and his failure to do so, was arbitrary and capricious.

Although recignizing the law anent branch banking, the Commissioner in his decision dismissed the issue here presented with the conclusion: "4. That applicant's request is to establish a unit bank, not a branch bank." (R. 9). This cursory dismissal and the failure of the Commissioner to pursue his own inquiry of the relationship of the defendant applicant and the Bank of Northern Utah invokes the language of *Central and Southern Motor Freight Tariff Association, et al v. U. S. et al,* 273 F. Supp. 823, at 832:

> " * * * What is disturbing is the mechanistic, metaphysical incantation of the doctional bar of the corporate veil. Such doctrines lose much of their sacrosanctity when urged in the context of regulated industries. The fact that a subsidiary corporation exists should be a starting point for a searching inquiry, not the finish line. * * * "

In all the aforementioned was the defendant Commissioner arbitrary and capricious; in precluding plaintiff in the elicitation of probative evidence; in denying the requests of plaintiff for orders compelling the production of probative evidence; and in the "unilateral" reception of evidence submitted by defendant applicant which was not made available to the plaintiff. Had the evidence been made available to plaintiff, further in-

quiry could have been pursued, and evidence produced, regarding the question of branch banking, and the question of competition and monopoly. The action of the defendant Commissioner was prejudicial to plaintiff.

POINT III

THE DEFENDANT APPLICANT DOES NOT POSSESS THE REQUISITE CAPITAL AND SURPLUS.

Section 7-3-10, U.C.A. 1953, as amended, sets forth the minimum capital and surplus required to engage in the banking business, of which at least fifty per cent of the said capital and surplus must be paid in cash. See Section 7-3-11, U.C.A. 1953.

The applicants represented under oath in an affidavit filed with proposed articles of incorporation that the requisite capital and surplus had been paid in cash. Under cross examination, an officer of the applicant testified that the affidavit was in error, that he did not want to mislead anybody, that nothing had been paid in, and that no stock subscription agreement had been executed by any of the incorporators. (Tr. 76-77)

It is submitted that the proposed banking institution has failed to meet the requirements as heretofore set forth, and that the Commissioner of Financial Institutions was arbitrary and capricious in finding to the contrary. (See Finding of Fact, number 6, R. 6)

POINT IV

THE COMMISSIONER OF FINANCIAL INSTITUTIONS WAS ARBITRARY AND CAPRICIOUS IN ADMITTING OBJECTIONABLE EVIDENCE, AND MAKING FINDINGS THEREFROM, AND IN DISREGARDING EVIDENCE, TO THE PREJUDICE OF PLAINTIFF.

In the presentation of its case the Bank of Northern Utah offered certain testimony and exhibits which were the subject of objection; certain of this evidence became the basis for findings and conclusions of the Commissioner of Financial Institutions, which in turn provided the basis for the order as issued. The admission of such evidence was error, and the Commissioner was arbitrary and abused his discretion in making findings and conclusions thereon.

The findings of an administrative agency must be supported by substantial evidence; and the rule of substantial evidence is a determinative of lawfulness or arbitrary action. In the case of *Building Service Employees Local No. 59 v. Newhouse Realty et al,* 97 Utah 562, 95 P.2d 507 this court held:

> " * * * Mere uncorroborated hearsay or rumor does not constitute substantial evidence. * * * Hearsay and non-expert opinion evidence may not be used as a basis to support the findings of the Board upon which rests an order sought to be enforced. * * * "

See *American Foundry and Machine Co. v. Utah Labor Relations Board,* (Utah) 141 P.2d 390.

In his Finding of Fact 12, the Commissioner cites the testimony of Charles J. Cuneo and Charles J. Eddy as indicating public convenience and advantage for the proposed bank (R. 8) A careful reading of the testimony of applicant's witness, Charles Cuneo, reveals that it is replete with hearsay, and clearly objectionable. This is especially true with respect to his testimony regarding surveys of individuals who have moved into Clearfield, and the industries located at the Freeport Center. The surveys in question were not made by the witness (Tr. 24); the surveys did not keep a record of those who moved from Clearfield (Tr. 25); and the witness was unable to testify as to vacated housing. (Tr. 34) The witness claimed ten new industries had moved into Freeport, but could not name them. (Tr. 30) The source of the information was hearsay. (Tr. 29) The witness opined that there was need for an additional bank, such judgment being based on the objectionable and defective "evidence" aforementioned. (Tr. 32) Cleary the evidence elicited from Cuneo was without foundation, rank hearsay, and of no probative value. Due objection was made to the introduction of such testimony and evidence.

The testimony of Mr. Charles Eddy reflects a continuing bias and prejudice against this protestant and interjection of his personal politics into the issue before the Commissioner. He seems to be motivated also by the potential taxes which Clearfield will realize if an additional bank is authorized in the city. (Tr. 47) The opinions of Charles Eddy indicate a complete lack of knowledge or understanding of the regulatory system of bank-

ing in the state and country, and an inability to distinguish a bank from any other business.

Mayor Eddy claimed that his opinion was that of the city council. (Tr. 44) Certain councilmen have stated to the contrary, and rightly left the decision with the Commissioner, free of political pressure. (Plaintiff protestant's Exhibit AE)

In his Finding of Fact 17, the Commissioner adopts the testimony of William A. Beutler, an officer of the defendant Bank of Northern Utah, regarding the projected deposit growth and earnings and expenses for the proposed bank. (R. 8) Such a finding was unsupported, for Mr. Beutler never did come up with the evidence in support of his projections, upon which the Commissioner made the "finding".

Beutler referred to a "study" he had made which he never produced, supposedly based upon reports published in the Polk Directory and published by the State Banking Department which he never identified. (Tr. 58) He did not cite figures (Tr. 60); he did not have them with him (Tr. 64, 65, 66); he admitted he did not do "independent research to come up to this hearing", but "relied heavily on the work we had done for the previous hearing". (Tr. 80) Actually, he deferred to another witness (Tr. 65, 82,), who in turn did not analyze the profitability of the proposed institution, and in turn deferred to Beutler. (Tr. 204)

This witness Beutler produced no evidence of a probative nature to support the projected growth of the defendant applicant, despite the queries of protestants, the Commissioner, and the attorney for the Commissioner. (Tr. 63-65)

The Commissioner in his Conclusion 8 states in part:

> " * * * The projections applicant has made for its growth may be overly optimistic, * * * " (R. 10)

yet the Commissioner referred to such testimony in his findings.

Finding of Fact 17 is not supported by substantial evidence, is erroneous and its adoption by the Commissioner is contrary to law. Timely objection to the "testimony" of Beutler was made. (R. 59)

The defendant commissioner was also arbitrary and capricious in adopting his findings of fact, numbers 9, 10, 11, 13, 14, 15, and 16 (R. 7, 8) which infer a demand or basis for authorizing the proposed banking operation. It appears that the defendant Commissioner followed the approach and argument of Milton Matthews, a witness for the Bank of Northern Utah, who had prepared a so-called economic analysis, defendant applicant's Exhibit 1. Actually, the role of Mr. Matthews was one of an advocate, as his active participation would indicate. (Tr. 250) His exhibit and testimony were in the nature of argument, being prepared to support a conclusion already asserted by the defendant bank in its application, and prior to the preparation of the study. Milton

Matthews admitted he was not an expert in the field of banking, and had never worked in a bank anywhere in the state of Utah. (Tr. 165, 166) He in no way analyzed the profitability of the proposed institution, or its effect on the deposits of the existing institutions. (Tr. 204) His presentation was based almost entirely on hearsay material, and not being qualified as an expert, was incapable of analyzing the significance of the material as it bore upon the question of public need of a bank, if any. (Tr. 274-275)

Finding of fact, number 11 (R. 8, 9) and Conclusion 6 (R. 10), as promulgated by the defendant Commissioner refer to certain population figures as adopted by the defendant Commissioner, and a ratio of banking offices to population. The Commissioner's action is erroneous in that he has adopted the Matthews population estimates which partake of inherent deficiencies. Matthews used Davis County authorized building permits as the criteria for estimating population after 1960, with an arbitrary allocation on a local area basis. (See defendant applicant's Exhibit 1) Therefore, his population figures did not consider any demolition or vacancies occurring during the same period. (Tr. 170) This is most significant in Clearfield, where there has been a reduction of over 235 dwelling units at Anchorage Housing since 1960, and relocation of Clearfield residents (Tr. 327). The attempt by Matthews to cover over this deficiency was unsuccessful, and typical of other inaccuracies. (Tr. 170) The defendant Commissioner perpetuated this error throughout his findings.

The defendant Commissioner's findings and conclusions relating to the population comparisons require the arbitrary allocation of a potential clientele to a trading area which does not exist in fact, and amounts to an economic gerrymander. For example, Finding of fact number 11 purports to total and compare population of certain cities in North Davis County, and analyzes the banking facilities therein. The area thus carved out for comparison swings south seven miles from Clearfield to Kaysville (Tr. 285), but dramatcially halts short of the Weber County line at the north and fails to include Roy, within 3 miles of Clearfield, and Riverdale, within 5 miles, (Tr. 285) See Point VI, infra. In comparing ratios of banking facilities to population of Davis County, the Commissioner includes the South Davis areas which are far more remote than South Weber banking offices and population.

The approach of the defendant Commissioner, and defendant applicant, seem to presuppose some oversimplified mathematical formula: X number of people= a bank. Obviously, this arbitrary method fails to consider factors which should be taken into consideration in such a determination. The findings of the Commissioner include the reasoning and premise that somehow the population per banking facility determined on a state basis is the criteria for determining the necessity or requirement of a local bank. This averaging process, of necessity, lumps unit banks and branch offices, the facilities such as those at Richmond, Eureka, and Green River, supported by small rural populations, with main bank

offices at Salt Lake City. Any valid analysis of existing banking facilities requires at least a recognition and appropriate differentiation of unit and branch banks. (Plaintiff protestant's Exhibit G; Tr. 317)

Furthermore, the "population approach" of the defendants engages in dangerous circular reasoning for the more banking institutions in the state, the lower the population per banking facility, which average if applied to a given area with a higher population per facility, would result in a grant of a new facility; this in turn lowers the average population per facility in the state requiring more banks, ad infinitum. The fallacy of this approach is evident—for, in truth, increasing the banking facilities cannot result in the requirement of more banking facilities.

It is submitted that the Commissioner's equating banking needs solely with population is arbitrary; however if the approach is deemed reasonable it should consider adult population and not the general population. In this regard the plaintiff protestant offered an analysis of banking facilities per population of 18 years and older, which in itself includes ages which do not normally generate banking demands. Even with such concession, plaintiff protestant's Exhibit Y shows:

Location	1967 Population 18 and over per banking facility
Utah County	5,902
Weber County	5,050
Salt Lake County	3,942
State of Utah	3,743
Davis County	3,723

It is evident that Davis County has more banks per population 18 and over than any of the more populated areas in the state.

It is also apparent that a comparison of the general population per unit bank, for the state and the populated counties, indicates that Davis County has a lower population (13,571) per unit bank than Weber (26,200), Utah (21,166) or Salt Lake Counties (33,000), or the State of Utah (19,145). (Plaintiff protestant's Exhibit AF)

In adopting his findings the defendant Commissioner also arbitrarily ignored the existence of State Savings and Loan Association, located at Clearfield, Utah (Tr. 282, 467), the only savings and loan institution in North Davis County, in his population and ratio comparisons.

It is further submitted that the defendant Commissioner based his findings and conclusions on hearsay and other clearly objectionable evidence; and that in so doing also he was arbitrary and abused his discretion in that in accepting such "evidence" he disregarded other competent and convincing evidence. See *Building Service Employees Local No. 59 v. Newhouse Realty Co. et al,* supra. Thus in accepting certain population information of defendant applicant, the defendant Commissioner

totally disregarded the population characteristics and economic geography of the area, which bear directly on the issue of probable support of the proposed existing institution. See Section 7-1-26, U.C.A. 1953, as amended.

The record clearly indicates that Clearfield, Utah, is limited in its population potential and economic development by reason of its present geographical and political boundaries. (Tr. 278-289; Plaintiff Protestant's Exhibits B, C.) The city is "hemmed in" by Hill Field on the east; Layton City on the south; Syracuse on the west; and Sunset City on the north. Clearfield is internally dissected by the Interstate Freeway 15; the trackage of two major railroads; the Freeport Center; and public property within its boundaries. All of these factors have restricted the growth of Clearfield, and left only a limited amount of acreage for residential construction, which available acreage is of questionable desirability (Tr. 278-289, 388; Plaintiff Protestant's Exhibits B, C.) These limitations and restrictions have resulted in a substantial decline in residential construction and other development in Clearfield during the most recent years in contrast to surrounding areas, such as Layton and Kaysville (Tr. 383; Plaintiff Protestant's Exhibit W.) It would seem that if any real growth were going to occur it should have been in the most recent years—but no such increase has taken place in Clearfield.

The defendant Commissioner also ignored the low median age of the Davis County population in comparison with surrounding counties in the state. The percentages of the population under 18 years of age for the most populated counties and the state are as follows: Davis County 47.5; Weber County 37.2; Salt Lake County 38.7; Utah County 37.9; State of Utah 39.3. (Plaintiff protestant's Exhibit X) It is apparent that the population of Davis County and Clearfield indicate a higher percentage of infants, and a lower demand for banking services than the population of other areas comprised of a higher percentage of adults and their resulting needs arising from commercial transactions.

Also ignored was the uncontroverted evidence that the Clearfield population is heavily dependant upon federal government employment, especially Hill Air Force Base. Approximately 70 per cent of the employed persons in Clearfield are employed by the federal government (Tr. 309) which employment lends itself to a more transcient population. Being so heavily dependent upon Hill Air Force Base, the economy of Clearfield suffers, and has suffered, severe adverse consequences with cutbacks at the military installation, and real and potential reductions are continuing problems because of political decisions, peace negotiations, congressional appropriations, and changes in the military posture. The decreases and potential cutback in this employment were predicted by Frank M. Browning, one of the principals involved in the application, in testimony before the Com-

missioner in an earlier hearing. (See plaintiff Protestant's Exhibit A)

The defendant Commissioner also disregarded the convincing evidence that the trading patterns of the Clearfield population indicate an orientation toward Ogden as a major point for the purchase of goods. (Tr. 368, 377, 395), borne out by per capita sales and services tax collection companions (Plaintiff Protestant's Exhibits N, O, P), and development of areas outside Clearfield. (Tr. 445, 449)

The actual demands of Davis County residents for services in the immediate areas are for less than other communities of the state, as indicated by the per capita bank resources, deposits and loans in Davis County as compared to the state as a whole, revealing Davis County is far below the state average, and its rate of increase not commensurate with the population increase. (Plaintiff Protestant's Exhibit U)

It is submitted that the defendant Commissioner was arbitrary and capricious, and abused his discretion, in disregarding the aforementioned evidence, and accepting only part of the evidence presented, and that of questionable competency. It is also submitted that the findings and conclusions adopted by the Commissioner are not true findings and conclusions, not only as to form, but also not based on substantial evidence.

POINT V

THE PROPOSED LOCATION OF DEFENDANT APPLICANT AND ITS FIELD OF OPERATION ARE IN SUCH CLOSE PROXIMITY TO THE CLEARFIELD STATE BANK AS TO UNREASONABLY INTERFERE WITH SAID BANK, AND THE SUPPORT OF DEFENDANT APPLICANT AND PLAINTIFF SUCH AS TO MAKE IMPROBABLE THEIR SUCCESS.

The statutory provisions of Section 7-1-26 U.C.A. 1953, as amended, make as a condition for denial of an application.

> " * * * when the location or field of operation of the proposed business shall be in such close proximity to an established business subject to this title that such established business might be unreasonably interferred with and the support of the new business would be such as to make improbable its success * * * ".

It is contended that the evidence submitted in the administrative hearing indicates the foregoing statutory condition to exist. The application in question is unlike the situation where an applicant seeks to establish a banking site more convenient to a local area; the defendant applicant in effect offers no new advantage of greater convenience, but duplicates facilities to divide the present business. In his conclusion 6, the Commissioner concludes that the "field of operation of the proposed bank will not be in such close proximity to an existing business as to unreasonably interefere with it." (R. 9) However, in his Finding of Fact, number 10, the Commissioner states:

> " * * * Clearfield State Bank depends upon the trading area that would be served by the applicant for its primary source of business; * * * " (R. 7)

Actually the trading area of defendant applicant is literally identical with that of the plaintiff. Also, the evidence reveals that the defendant applicant has not determined anything specifically respecting its proposed bank site (Tr. 78) and that no lease agreement had been executed (Tr. 150) It is therefore submitted that the defendant Commissioner had no substantial basis to reach the conclusion aforementioned.

Furthermore, the order of the defendant Commissioner sets forth no specific location for the proposed banking operation. Indeed, the order is a carta blanche as far as the location in Clearfield is concerned, providing:

> "That the application of Bank of Northern Utah, a proposed Utah corporation, for permission to establish a unit bank in Clearfield, Davis County, Utah, is hereby approved, subject to the condition that it qualify for and obtain insurance from the Federal Deposit Insurance Corporation before it commences operation" (R. 10)

The actual site of any proposed bank is a critical element in determining the question of the location and field of operation of said bank and any unreasonable interference with an existing institution. How can the administrative officer make such a determination when the site is uncertain? And how can the existing institution be protected against unreasonable interference unless an operation is restricted to a specific site? It is sub-

mitted that the defendant Commissioner's action in this respect is arbitrary, capricious and an abuse of discretion.

The success of plaintiff is further in jeopardy for the reason that an authorized branch of the First National Bank of Layton, at Syracuse Road on the Clearfield border, will divert customers of the Clearfield State Bank, since that branch is located nearer to one-third of the Clearfield population than the office of plaintiff. (Plaintiff Protestant's Exhibits B, C.) There is already in existence the branch of the First Security Bank of Utah N.A., at Hill Field, subjecting the plaintiff to direct interference. (Tr. 280) The Commissioner gave no indication that he weighed the effect of two additional banking institutions on the plaintiff.

Another area of unreasonable intereference is the restriction that will result on the growth of the Clearfield State Bank and the denial to that institution of the acquisition of electronic devices and computers, presently used in the industry by larger institutions. (Tr. 312-313) A small independent bank, such as the Clearfield State Bank, cannot at present afford to acquire sophisticated electronic banking devices, and necessary technical personnel; if the growth of plaintiff is delayed or halted, the bank will not be able to secure the devices and render the service which attends their use, and will be adversely affected by the competition from those banking institutions which have this electronic banking mechanisms (Tr. 312-313.) No where is there indication that the Commissioner regarded this evidence in his decision.

POINT VI

DEFENDANT APPLICANT HAS NOT PROVED A DEMAND FOR THE PROPOSED SERVICES.

It is submitted that Section 7-1-26, U.C.A. 1953, as amended, requires inter alia, as a condition for granting an application to operate a bank, that the applicant prove a public demand for the proposed services, and that this showing be tantamount to proving public convenience and advantage.

No substantial evidence indicates a demand or need for the proposed service; nor was any evidence produced claiming the needs of the Clearfield residents are otherwise than adequately and fully served by existing banks and institutions.

Hereinafter set forth are the locations of banks and loan institutions, all competitive, and the mileages of the same from the business center of Clearfield:

Clearfield

Clearfield State Bank

State Savings and Loan Association

2 Mile Radius

Branch, First Security Bank of Utah, N. A., Hill Field

Authorized Branch, First National Bank of Layton, (Syracuse Road) on Clearfield, Layton boundary

Branch, Clearfield State Bank, Sunset

2-3 Mile Radius

Branch, First Security Bank of Utah, N.A., Roy

Branch, Bank of Utah, Roy

3-5 Mile Radius

Branch, First National Bank of Layton, Layton (Fort Lane Shopping Center)

First National Bank of Layton, Layton

North Davis Bank, Layton

Branch, Bank of Utah, Riverdale

5-6 Mile Radius

Branch, Commercial Security Bank, Washington Terrace

6-7 Mile Radius

Branch, First Security Bank of Utah, N.A., South Ogden

Branch, Commercial Security Bank, South Ogden

Branch, Bank of Utah, South Ogden

Barnes Banking Company, Kaysville

(Tr. 278-283; Plaintiff Protestant's Exhibit C)

Of the aforementioned banking facilities, three are owned by the principals here involved, which facilities can be reached by Clearfield residents within a few minutes time. Also existent in the area are other financial institutions, including the especially competitive Federal Employees Credit Union (Tr. 300-303), serving employees of the federal government and their families. There is indication that the defendant Commissioner dis-

regarded the existence of certain of the foregoing institutions, by reason of his arbitrary analysis of the institutions in relation to population, and in failing to determine the competitive effect of the foregoing institutions, and the consequences of the proposed institution doing business at Clearfield; and the fact that the banking requirements of the Clearfield residents are being fully and adequately met.

CONCLUSION

By reason of the foregoing, the decision of the lower court should be reversed, and a judgment entered or directed, granting plaintiff the relief sought for in its complaint, including the setting aside of the Order of the Commissioner of Financial Institutions which has authorized the banking operation at issue by defendant Bank of Northern Utah.

Respectfully submitted,

RAYMOND W. GEE
400 Executive Building
Salt Lake City, Utah
Attorney for Plaintiff-Appellant