1970

Medic-Call, A Corporation, Harold Jensen, M.D., Professional Exchange Answering Service And Industrial Oommunicationis Company v. Public Service Commission of Utah, Donald Hacking, Hal S. Bennett And John T. Vernieu, Commissioners of the Public Service Commission of Utah : Brief of Petitioners

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

MEDIC-CALL, a corporation, HAROLD JENSEN, M.D., PROFESSIONAL EXCHANGE ANSWERING SERVICE and INDUSTRIAL COMMUNICATIONS COMPANY,

Petitioners,

vs.

PUBLIC SERVICE COMMISSION OF UTAH, DONALD HACKING, HAL S. BENNETT and JOHN T. VERNIEU, COMMISSIONERS OF THE PUBLIC SERVICE COMMISSION OF UTAH,

Respondents.

Case No. 11944

BRIEF OF PETITIONERS

Appeal from the Report and Order and Order Denying Rehearing of the Public Service Commission of Utah

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Utah Code Annotated, § 54-2-1(30) (1969 Supp.) 7,

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BRIEF OF PETITIONERS

STATEMENT OF THE KIND OF CASE

The Hearing before the Public Service Commission of Utah was initiated by the Complainant, Mobile Radio Telephone Service, Inc., on the ground that the petitioners' operation of a one-way emergency paging service was a public utility subject to the jurisdiction of the Commission.

DISPOSITION IN PUBLIC SERVICE COMMISSION

The Public Service Commission, by commissioners Donald Hacking, Hal S. Bennett and John T. Vernieu, on December 10, 1969 determined that the petitioners in oper-

ating their emergency paging system were a public utility subject to the Commission's jurisdiction. Application for rehearing was duly made by petitioners on December 12, 1969 but was denied on December 16, 1969 by the Commission.

RELIEF SOUGHT ON APPEAL

Petitioners seek complete nullification of the Public Service Commission's Report and Order and a decision that the petitioners' operation of their emergency paging service is not a public utility.

STATEMENT OF FACTS

In their application for rehearing petitioners specifically set forth eleven grounds on which petitioners believe the Commission's Report and Order were unlawful. Said grounds are generally discussed under the POINTS below.

Petitioners, respondents and complainant entered into a stipulation of facts which is included herein in its entirety:

> Pursuant to Section 54-7-10, U. C. A. (Repl. Vol. 1953), the above named petitioners, Medic-Call, Harold Jensen, M. D., Professional Exchange Answering Service and Industrial Communications Company, by and through their attorney, Walter P. Faber, Jr., and the Public Service Commission of Utah, Commissioners Donald Hacking, Hal S. Bennett and John T. Vernieu, and Mobile Telephone Service, Inc., Complainant, by and through its attorney, John E. Runyan, hereby stipulate that there was no testimony taken before the Commission in this matter and that the following stipulated facts

together with the file and the exhibits introduced before the Commission in its hearing shall constitute the record on review:

STIPULATED FACTS

1. Many actively practicing physicians in the Metropolitan Salt Lake City area have used mobile telephone service as a means to notify them in case of medical emergency.

2. In the recent past some physicians have not been able to obtain radio telephone service without substantial delay.

3. As a consequence a number of physicians associated themselves together to provide their own emergency radio call service.

4. The physicians formed Medic-Call, Inc., a Utah non-profit corporation, to handle the administrative services required by the physicians for the emergency radio service if they were able to obtain a license from the Federal Communications Commission; they employed Professional Exchange Answering Service to relay emergency calls to the associating physicians through equipment purchased and owned by the physicians if the permit were obtained; and they employed Industrial Communications Company to install and service the equipment if the permit were obtained.

5. The physicians, in the name of Harold Jensen, M. D., obtained licenses from the Federal Communications Commission allowing them to operate an emergency radio service.

6. A central transmitter is located in an office building in Salt Lake City, Utah.

7. Antennas are located in the Oquirrh Mountains to the west of Salt Lake City and on an office

building in Salt Lake City for the transmission of one-way radio signals to the physicians. Except under abnormal conditions, the effective range of the equipment is limited to the metropolitan Salt Lake area.

8. Power to operate the equipment is obtained from the Utah Power & Light Company.

9. The transmission facilities have capacity to serve approximately 100 physicians with small portable telephonic receiver units called "beepers." The beepers can only receive messages and no transmission can be made by the physicians.

10. When an emergency telephone call to a physician is received by the Professional Exchange Answering Service through regular telephone communication, the Professional Exchange Answering Service activates the transmitting equipment purchased by the physicians and signals the particular physician on his beeper that a telephone call has been received. The physician cannot respond to the call via the beeper but must use regular telephone communication if he desires to speak either to the Professional Exchange Answering Service or to a patient who has called in.

11. The equipment purchased by the physicians is not connected to the regular telephone communications network and a patient cannot personally contact a physician directly through the system.

12. Only physicians as such can use the system and must use it on a non-profit, cost-sharing basis as required by the Federal Communications Commission.

13. Only licensed physicians are eligible to receive the beeper service by joining the association

of physicians and agreeing to be bound by the association's rules and regulations.

14. After the physicians began operating their equipment, Mobile Radio Telephone Service, Inc. complained to the Public Service Commission of Utah that petitioners were operating a public utility and were subject to the Commission's authority.

15. The Public Service Commission heard the complaint on October 20, 1969, but took no testimony.

16. The parties thereafter submitted briefs and the Commission on December 10, 1969 issued its Report and Order effective as of the same date holding that petitioners were a public utility and ordering them to cease and desist immediately from their activities.

17. Petitioners made Application for Rehearing and Petition to Suspend Enforcement of Order on December 12, 1969. The Commission issued its Order Denying Application for Rehearing and its Order Suspending Effective Date of Report and Order on December 16, 1969.

ARGUMENT

POINT I.

PETITIONERS CANNOT BE OPERATING AS OR CONSIDERED A PUBLIC UTILITY BECAUSE NO MEMBER OF THE GENERAL PUBLIC AS SUCH CAN DEMAND AND RECEIVE THE PAGING SERVICE.

It is clear that only physicians in that capacity can use the paging facilities as required by the Federal Com-

munications Commission. (See 12, 13 of Stipulated Facts.) Thus, no member of the public generally can demand and receive the paging service or use the portable beeper. In addition, the paging equipment is not connected to the regular telephone equipment, and a patient cannot personally and directly speak with any physician through the facilities. (See 11 of Facts.) Even though only physicians as such are eligible to receive the paging service (13 of Facts), no physician is required to participate. If a physician does use the service, he must agree to the conditions of the license and of the association of physicians. If he does not accept the conditions initially, he cannot use the system. If he does not abide by the conditions after becoming a member of the association, his use of the system must cease.

Although a physician's use of the paging service may benefit one of his patients in a particular instance, the decision whether to use the system seems to rest wholly with the physician and not the patient. It would appear to be an extreme distortion of the facts herein to equate a voluntary use of a convenience by the physician which incidentally benefits a patient with a right in that patient to demand and receive a service given directly to the physician.

This Court has on several occasions defined the term "public utility." In *Crystal Car Line* v. *State Tax Commission*, 110 Utah 426, 174 P. 2d 984, 987 (1946), the court quoted approvingly from 43 *Am. Jur.*, Public Utilities and Services, §2, p. 571, that

> the term "public utility" implies a public use and service to the public; and indeed the principal de-

> terminative characteristic of a public utility, is that of service to, or readiness to serve, an indefinite public (*or portion of the public as such*) *which has a legal right to demand and receive its services or commodities.* (Emphasis added.)

In *San Miguel Power Association* v. *Public Service Commission,* 4 Utah 2d 252, 254, 292 P. 2d 511, (1956), this Court stated that "Since plaintiffs cannot legally be required to serve the public generally they are not public utilities. . . ." In the definitive case in the area this Court in *Garkane Power Co.* v. *Public Service Commission,* 98 Utah 466, 100 P. 2d 571, 573 (1940), stated

> The test . . . is . . . whether the public has a legal right to the use which cannot be gainsaid, or denied, or withdrawn, at the pleasure of the owner.

This Court went on to state on page 572 that

> Garkane does not propose to hold itself out to serve all who apply and live near its lines; its very charter which gives it existence restricts its service to a certain group (members). It does not propose to serve "the public generally", but only to serve its members.

It seems clear in this case that the ruling in *Garkane* is dispositive of the issue. The public certainly has no right to demand that the physicians use the beeper system and the public or members thereof as such pay nothing for the service. The association of physicians is a special group and only physicians meeting the qualifications may participate.

Since the 1969 amendments to Section 54-2-1(30) U.

C. A. (1953) (Supp. 1969) applied only to electric corporations, the definition of the words "public utility" in the *Garkane* case is still binding on the Commission and that by definition and fact the associating physicians cannot be deemed a public utility so as to be subject to the jurisdiction of the Public Service Commission.

Doubtless it may be said that the fact a person may call a physician and have a message relayed to the physician benefits the calling person, but it seems clear that such person has no right to demand any such service and the fact that the physician may utilize such service in no way gives the person calling in a right to such service. The benefit to the calling person is merely incidental. Many physicians in the Salt Lake area do not use mobile telephone service and it seems obvious that not all can use the equipment of the physicians who are licensed in this case. Moreover, it also appears that the physicians could discontinue their service and that the potential patients could not complain if they did so.

POINT II.

EVEN THOUGH PETITIONERS' PAGING SERVICE MAY INCIDENTALLY BENEFIT MEMBERS OF THE PUBLIC, SUCH USE IS NOT A "PUBLIC USE" BECAUSE THE "COMMODITY" IS NOT DELIVERED OR CHARGED TO THE PUBLIC.

The incidental benefit which a patient may receive because his physician uses the paging service is clearly not

the use of the paging service itself, but the faster response made by the physician. Only the physician uses the service. No public facility is connected to the paging equipment.

If a patient could force his physician through the Public Service Commission to use the paging service, he could require the use of every new convenience or equipment which could conceivably be of benefit to him. It is difficult to see how such benefits can be made into a public use. There must be some distinction between the service or commodity delivered to the physician and all the potential benefits which may flow therefrom. If not, then the Public Service Commission would have jurisdiction over every facet of business which in any way resulted in an indirect benefit to the public.

In the instant case the public is not billed for the paging service. The physician pays his pro rata share of the expenses on a non-profit, cost-sharing basis as required by the Federal Communications Commission. Even though it may be argued that a patient will indirectly pay for the paging service, or for that matter, the gasoline for his physician's car, or for his physician's new stethoscope, or for his physician's operating table used in conjunction with other physicians, and that all of these things are of benefit to the patient, it seems clear that is not the kind of compensation or payment comprehended by the Utah statute.

In Section 54-2-1(30) U. C. A. (Supp. 1969) it is stated:

> The term "public utility" includes every . . . telephone corporation . . . where the service is per-

> formed for, or the commodity delivered to the public generally. . . . And whenever any . . . telephone corporation . . . performs a service for or delivers a commodity to the public . . . for which any compensation or payment whatsoever is received, such . . . telephone corporation . . . is hereby declared to be a public utility subject to the jurisdiction and regulations of the Commission and to the provisions of this title.

Courts in other states have held that "public use" is not the same as "public benefit" and many private uses may benefit the public but simply because they benefit the public does not make them a public utility. *Abalt* v. *City of Fort Madison*, 108 N. W. 2d 263, 268 (Iowa).

CONCLUSION

It is submitted that in view of the stipulated facts and applicable law, the Public Service Commission of Utah unlawfully found the petitioners to be performing a public utility function. Moreover, the Commission's Report and Order wholly failed to resolve the eleven specific grounds raised by petitioners' Application for Rehearing. Under the circumstances of this case the petitioners' activities should be held to be outside the jurisdiction of the Public Service Commission and the Commission's Report and Order should be set aside.

Respectfully submitted,

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