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David R. Williams Dba Industrial Communications v. Public Service Commission of Utah, Hal S. Bennett Frank Warner And Eugene S. Lambert, Commissioners of the Public Service Commission of Utah : Brief of Defendants

IN THE SUPREME COURT OF THE STATE OF UTAH

DAVID R. WILLIAMS DBA
INDUSTRIAL COMMUNICATIONS,
Plaintiff,

-v-

PUBLIC SERVICE COMMISSION
OF UTAH, HAL S. BENNETT,
FRANK WARNER and EUGENE S.
LAMBERT, COMMISSIONERS OF THE
PUBLIC SERVICE COMMISSION
OF UTAH,
Defendants.

Case No.
12871

BRIEF OF DEFENDANTS

APPEAL FROM REPORT AND ORDER DENYING
APPLICATION FOR CERTIFICATE OF PUBLIC
CONVENIENCE AND NECESSITY

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IN THE SUPREME COURT OF THE STATE OF UTAH

DAVID R. WILLIAMS DBA INDUSTRIAL COMMUNICATIONS,

Plaintiff,

-v-

PUBLIC SERVICE COMMISSION OF UTAH, HAL S. BENNETT, FRANK WARNER and EUGENE S. LAMBERT, COMMISSIONERS OF THE PUBLIC SERVICE COMMISSION OF UTAH,

Defendants.

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BRIEF OF DEFENDANTS

STATEMENT OF THE NATURE OF THE CASE

This was an action initiated by plaintiff to obtain a Certificate of Convenience and Necessity from the Public Service Commission of Utah, which would allow him to operate a mobile radio-telephone communications' system in the central area of Utah.

DISPOSITION IN THE PUBLIC SERVICE COMMISSION

Upon a thorough and complete review of all evidence presented during four days of hearings, the Public Service

Commission, by Commissioners Hal S. Bennett, Donald Hacking and John T. Vernieu, on February 3rd, 1972, denied plaintiff's application. The reasons were, as follows:

> "(a) That protestant, Mobile Radio Telephone Service, Inc., an RCC operation in the Wasatch Front Area, has constantly earnestly and energetically sought to and has substantially upgraded and expanded its service to the public since its certification by the Commission.
>
> "(b) That when channel congestion was indicated on both protestants' system and the Mountain Bell mobile radio system, protestant filed and actively presented applications with the Federal Communications Commission for additional channels. The granting of all or some of these channels will greatly relieve the present congestion and broaden the service to new customers.
>
> "(c) That to grant the application herein would be clearly against the public interest."

Plaintiff made application for rehearing on February 22, 1972. The Public Service Commission, by Commissioners Hal S. Bennett, Frank Warner, and Eugene S. Lambert determined that the application was without merit, and it was denied.

RELIEF SOUGHT ON APPEAL

The plaintiff seeks a reversal of the Public Service Commission's Order and the defendants ask that it be affirmed.

STATEMENT OF FACTS

On February 18th, 1971, David R. Williams, dba Industrial Communications (hereinafter referred to as plaintiff)

applied for a "Certificate of Convenience and Necessity" from the Utah Public Service Commission to provide two-way radio paging and dispatch service to the general public in the central area of Utah from a proposed transmitting antenna to be located on Kessler Peak, southwest of Magna, Utah.

At that time, the plaintiff operated mobile units and fixed radio-telephone units in Vernal, Utah. Substantially similar radio dispatching service was being offered to the central Utah public by Mountain Bell Telephone and Mobile Radio Telephone Service, Inc., (hereinafter referred to as the protestant.)

During the course of the hearings, plaintiff presented a number of witnesses subscribing to the protestant's service who testified that there was a problem with "overcrowded channel lines." One witness, Mr. Ken Isaacson, testified that he received terrific service from the protestant, and that his overcrowding problems came only during peak hours when congestion was greatest.

Michael Fullmer testified that the greatest problem with protestant's service was congested lines. However, the record indicates that Mr. Fullmer abused the service, helping to create the very problem complained of.

A further witness called by the plaintiff, Mr. Jerry Stanger, testified that he had discontinued protestant's service several years before. However, the discontinuance was predicated upon lack of need, and because he had moved his business to another area not serviced by the protestant.

The testimony of Merrill Wilson, M.D., solicited by the plaintiff, indicated a dissatisfaction with protestant's service. However, the doctor's knowledge was based only on information from a third party, and he professed no personal experience with the actual transmission and reception of messages. All of these witnesses and many others testified, however, that the protestant had earnestly and expeditiously corrected all problems as they arose.

Evidence was presented by Barton North of Mountain Bell, which indicated that while their channels were overloaded and crowded there were no held orders in 1968, 69, and 70, and that they had five less units in 1970 than in 1968. These figures, coupled with a survey of the Salt Lake Metropolitan area, conducted by Mr. North, demonstrated that there was not an immediate demand for additional services.

The protestant had been operating two channels in the 150 Mhz range. In response to complaints of overcrowding, Mr. Bangerter, president of the protestant company, filed with the F.C.C. for three additional channels in the 450 Mhz range, in October, 1969. Two 150 Mhz channels were granted by the F.C.C. prior to June, 1970. The protestant then applied for five additional channels in the 150 Mhz range. None of the applications were denied although there was a delay in implementation.

The protestant was operating under Certificate of Convenience and Necessity, No. 1419, issued by the Public Service Commission on October 11, 1962, and was complying with all of the rules and regulations of the Commission.

The Commission previously denied a similar application for a new service in the mobile-radio dispatching area in Case No. 6144. {In the Matter of the Application of Utah Mobile Telephone Company.} The Order was not appealed.

There were no complaints registered with the Commission against the protestant's service that could have provided a basis for investigation by the Commission. In fact, a number of witnesses testified that the service offered by the protestant was excellent. Michael C. Kenyon, a subscriber for several years, indicated that he was pleased with the service and had not experienced any problems with receiving messages. Ben Banks, testifying that he used the service seven days a week for business, personal and church matters, stated that he had never missed any business because of a busy line. Commenting on the excellence of protestant's service, Alva W. Rawdon noted that as a shop manager for a large automobile dealer he had never received any complaints from his personnel, and that the protestant was always sensitive to his problems and cooperative in trying to solve them.

Further evidence of the protestant's ability to provide adequate service and to correct any and all problems as they arose is presented in Point III of this Brief.

The facts presented in plaintiff's Brief are substantially correct with the following modifications concerning plaintiff's facts #17-23:

1. At the time of the hearing, Amos R. Jackson served as chief engineer on the staff of the Public Service Commission in the Department of Business Regulation. One of his

duties was to advise the Commission on matters upon which the commissioners requested his opinion. These included engineering, economic, and legal opinions within the scope of his expertise. (T. 432-41).

2. Mr. Jackson testified that his contacts with Mr. Bangerter (president of the protestant company) were in connection with his duties as chief engineer of the Public Service Commission. (T. 432-37).

3. Mr. Jackson is president of Intermountain Engineers which had furnished, through his brother, engineering services to the protestant. However, Mr. Jackson, personally, did not render advice or assistance to the protestant concerning his course of action in the instant matter, other than assistance which normally would be offered in the ordinary course of his duties with the Public Service Commission. These duties require that he "cover the waterfront" and have continuous contact with those who come within his jurisdiction. (T. 432-446).

ARGUMENT

POINT I

THE FINDINGS AND ORDERS OF THE UTAH PUBLIC SERVICE COMMISSION ARE PRESUMED VALID AND MUST BE UPHELD ON APPEAL, UNLESS IT IS DETERMINED THAT THE COMMISSION ACTED ARBITRARILY, CAPRICIOUSLY, OR UNREASONABLY.

Utah Code Annotated, Section 54-7-16 (1953), grants to this Court the power to review, on appeal through a Writ of Certiorari, all findings and orders of the Utah Public Ser-

vice Commission, with the exception that "[T]he findings and conclusions of the commission on questions of facts shall be final and not subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination."

Pursuant to this section, this Court has given wide latitude to the Public Service Commission in exercising its statutory authority. In *Utah Gas Service Co. v. Mountain Fuel Supply Co. and Public Service Commission,* 18 Utah 2d 310, 422 P.2d 530 (1967), the Court in awarding an exclusive franchise to a gas company to furnish natural gas service to a municipality on the basis that evidence presented in the hearing, indicating that the company had built a line within one mile of town, was sufficient to sustain the Public Service Commission's findings, stated:

> "Under our law, the Public Service Commission is charged with the responsibility of granting franchises and regulating such utilities in the public interest. It is *necessarily* endowed with considerable latitude of discretion to enable it to accomplish that purpose." 18 Utah 2d, at 313. (Emphasis added.)

This Court has further determined that the findings and conclusions resulting from the Public Service Commission's judicially encouraged "wide latitude" are clothed with verity and must be examined in the light most favorable to the Commission.

In a more recent case, *Armored Motors Service v. Public Service Commission,* 23 Utah 2d 418, 464 P.2d 582 (1970), this doctrine is clearly announced. This Court stated, in upholding a Public Service Commission decision that the author-

ity of a common motor carrier delivery service be enlarged in a particular area:

> "However . . . it must be realized that the legislature has given the commission the responsibility for the overall planning and regulation of certain public services because that is the purpose for which the commission was established and functions — it is assumed to have specialized knowledge and expertise in that field. Consequently it is accorded comparatively broad prerogatives in carrying on investigations and making determinations in the discharge of its duties. For these reasons its findings and orders are endowed with presumptions of verity; and upon appeal to this court, we assume that the commission believed those aspects of the evidence which support its findings and we review the record in the light most favorable to them." 23 Utah 2d at 420-21.

This Court has consistantly and uniformly adopted this policy, and in practice has set aside Commission orders only if the Commission acts outside of its authority or in any unreasonable, arbitrary or capricious manner. This solid precedent was established in *Goodrich v. Public Service Commission,* 114 Utah 296, 198 P.2d 995 (1948), and followed in virtually all succeeding cases dealing with this problem. A more recent expression of the Court's intent is found in *Uintah Freightways v. Public Service Commission,* 15 Utah 2d 221, 390 P.2d (1964), involving an action to review a Public Service Commission's Order directing suspension of a tariff published by a common carrier. In upholding its decision, this Court said:

> "Where a Public Service Commission has acted within the scope of its authority, its order will be upheld if it has *any substantial foundation in the evi*

dence and is not unreasonable, [or] arbitrary or capricious." 15 Utah 2d at 223-24. (Emphasis added.)

It is evident from these judicial fiats that this Court, in reviewing Public Service Commission decisions, has evolved a two-fold concern: (1) whether the Commission acted within the scope of its statutory authority, and (2) whether its actions are capricious, arbitrary or unreasonable. While the former is determined by reviewing the applicable statutes, and such authority is not challenged in this case, the latter has been clarified by case law decisions and will not be found to be unreasonable, arbitrary or capricious if there is *any* factual evidence to support the finding.

In *Salt Lake Transfer Company v. Public Service Commission,* 11 Utah 2d 121, 355 P.2d 706 (1960), this Court, in sustaining a Commission Order amending a Certificate of Convenience and Necessity increasing the authority of a common carrier to render further service, held that:

> "We will not disturb the findings of the commission if supported by substantial evidence and are reasonable in view of the evidence . . . [R]ealizing the limits of this court to review the orders of the commission, nevertheless, if in relation to the facts before it, if the commission acts in an arbitrary and capricious manner, the order is without authority and must be set aside.
>
> "Whatever the minimum quality and quantity of evidence necessary to justify administrative action, *orders issued in complete absence of factual support are clearly arbitrary, capricious, and void.*" 11 Utah 2d at 124, 127. (Emphasis added.)

The clearest judicial expression on this point is found in *Utah Gas Service Company v. Mountain Fuel Supply, supra,* where this Court concluded that:

> "When the Commission, in performing its duties has given consideration to pertinent facts and has made its findings and decision, they are endowed with a presumption of validity and correctness. In accordance with the recognized prerogatives of the trier of the facts, on appeal the evidence is viewed in the light most favorable to sustaining them; and the decision *will not be reversed unless when the evidence is so viewed, there is no reasonable basis to support the Commission's action, so that it thus appears to be capricious and arbitrary,* a situation which is not shown to exist here." 18 Utah 2d at 315. (Emphasis added.)

These two cases demonstrate that the Court is concerned with the existence of competent evidence and a reasonable decision made therefrom. If these are present, arbitrariness and capriciousness are not.

Therefore, defendant respectfully submits that this Court has uniformly and consistently given a wide latitude of discretion to the Public Service Commission and a presumption of verity to its findings. In clear, unambiguous language, this Court has determined that a Public Service Commission decision will be overturned only if deemed unreasonable, arbitrary or capricious. In applying this principle, the courts have looked to two areas: (1) whether the Commission acted within its statutory authority, and (2) whether the conclusion reached was reasonable from the evidence presented. These are the two areas which this Court must now examine in confronting the problem at bar.

POINT II

THE PUBLIC SERVICE COMMISSION ACTED WITHIN ITS SCOPE OF AUTHORITY IN HEARING PLAINTIFF'S REQUEST FOR A CERTIFICATE OF CONVENIENCE AND NECESSITY.

The Commission's authority to act in this case has been impliedly challenged by innuendos raised in the plaintiff's Brief. They have indicated that a two-way mobile radio dispatching service can be considered as a "quasi-utility", and, thus, not subject to the complete control of the Public Service Commission. This analysis is statutorily incorrect. The tools to act in this area have been clearly and unambiguously given to the Commission by State statutory law. Utah Code Annotated, §54-4-25, (as amended 1965), declares that:

> "No railroad corporation, street railroad corporation, aerial bucket tramway corporation, gas corporation, electric corporation, *telephone corporation,* telegraph corporation, heat corporation, automobile corporation, water corporation or sewage corporation shall henceforth establish, or begin construction or operation of a railroad, street railroad, aerial bucket tramway, line, route, plant or system, or of any extension of such railroad, street railroad, aerial bucket tramway, line, route, plant or system, without having first obtained from the commission a certificate that present or future public convenience and necessity does or will require such construction; . . . ." (Emphasis added.)

The plaintiff's anticipated service, two-way mobile radio-telephone dispatching, is included in this definition as a "telephone corporation." Utah Code Annotated, §54-2-1(22) (1953) defines a telephone corporation as:

> ". . . every corporation and person, their lessees, trustees and receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any telephone line for public service within this state."

A telephone line is defined in section 54-2-1 (21) as:

> ". . . all conduits, ducts, poles, wires, cable, instruments and appliances, and all other real estate and fixtures and personal property owned, controlled, operated or managed in connection with or to facilitate communication by telephone whether such communication is had *with or without the use of transmission wires.*" (Emphasis added.)

Clearly plaintiff's service is a telephone communication without the use of transmission wires; thus, it is within the scope of the Public Service Commission's authority to grant Certificates of Convenience and Necessity.

Furthermore, plaintiff admits in his Brief (p. 17) that: ". . . non wire-line R.C.C.'s are technically included as public utilities by the [Utah] statute."

The Commission has previously acted under this authority in granting Certificate #1504 (1964) to plaintiff and #1419 (1962) to the protestant.

The Court should take careful note of its recent decision in *Medic-Call, Inc. v. Public Service Commission,* 24 Utah 2d 273, 470 P.2d 258 (1970). In holding that an "answering service" used only by physicians (a telephone receiver "beep call") was not a utility, this Court accepted the C.J.S. test of what constitutes a public service, regulatable by a Public Ser-

vice Commission. As defined in 73 C.J.S., Public Utilities, §2, that test is:

> ". . . whether or not such person holds himself out, expressly or impliedly, as engaged in the business of supplying his product or service to the public, as a class, or to any limited portion of it, as contradistinguished from holding himself out as serving or ready to serve only particular individuals." 24 Utah 2d at 275.

The testimony of the plaintiff in the record of the Public Service Commission hearing clearly demonstrates that he envisions his service as one to the public as a class.

Therefore, defendant respectfully submits that statutory authority, previous practice, and recent case law conclusively demonstrate that the Public Service Commission acted within its authority in hearing plaintiff's request for a Certificate of Convenience and Necessity.

POINT III

THE PUBLIC SERVICE COMMISSION'S CONCLUSION DENYING PLAINTIFF'S APPLICATION WAS REASONABLY DRAWN FROM THE EVIDENCE PRESENTED.

In reviewing applications for Certificates of Convenience and Necessity which provide for services similar in nature to those presently serving a particular area, the Public Service Commission has adopted the position that the applicant must demonstrate the following:

(1) a public need for his service

(2) a substantial inadequacy of existing service to meet the need

(3) that the inadequacy must be due either to a substantial deficiency of service facilities, beyond what could be supplied by normal improvements in the ordinary course of business, or to indifference, poor management or disregard of the rights of the customer persisting over such a period of time as to establish an inability or unwillingness to render adequate service.

(4) that he has the ability to provide service, in an economically feasible manner.

Compelling authority for these criteria is found in *Eckmiller Transfer Company v. Armes,* 269 S.W. 2d 287 (Ky. 1954); *Ferguson-Steere Motor Company v. New Mexico State Corporation Commission,* 21 PUR 3d 285 (1957); *Re Harper,* 42 PUR 3d 430 (1962), and in 41 PUR Digest 2d, Monopoly and Competition, 3376.

It is necessary, therefore, to review the record of the Public Service Commission's hearing on plaintiff's application in light of the above rationale. This examination will conclusively demonstrate that the decision rendered by the Public Service Commission was reasonable from the evidence presented.

The record indicates that the plaintiff tried to show, through his witnesses that there was a "need" which was not being fulfilled by the predominant R.C.C. carrier (the protestant). Plaintiff cited testimony from Charles Goff, his witness, who testified that he needed additional radio service in his business. An examination of the record reflects that Mr. Goff had used Mountain Bell's telephone service and had found it to be congested (T. 369). When asked on cross-examination

if he would be interested in a service less congested than Mountain Bell's, Mr. Goff replied, "Certainly." (T. 373). Mr. Goff indicated he had never had any contact personally with Mobile Radio Telephone Service, Inc., (the protestant) and had not made personal inquiry into its operation (T. 370-373). Therefore, Mr. Goff had not explored protestant's ability to fulfill his "need".

Neil W. Goodsell, M.D., was called to testify on behalf of the plaintiff and indicated that he administered a private radio service for a group of physicians. The service is operated by a beeper-type system, which is a one-way paging unit. On cross-examination, Dr. Goodsell indicated that he had been contacted shortly after the inception and organization of his Medi-Call group by the protestant and had indicated that it was too late for his group to use the protestant's services, as his group was already in operation. However, he did indicate that now if any other utility offered him a comparable service, he would be interested in considering that service (T. 165). He stated that he had only made limited personal inquiry as to the services available to him by the protestant, and, therefore, was not aware of protestant's ability to fulfill his "need". Dr. Goodsell indicated that he too had complaints about his service from other doctors (T. 171).

Ken Isaacson testified on behalf of the plaintiff that from 8:00 a.m., until approximately 3:30 p.m. he received *terrific* service from the protestant (T. 148), and that his problems came during the peak hours when congestion was greatest (Emphasis added.)

The plaintiff stated that he had approximately fifty people who might be interested in his service but, also, indicated that none of them had given a firm commitment to subscribe (T. 652). In essence, there were "interested" parties, but any business could get fifty people to say they were interested in its services without making any firm commitments.

The testimony of Michael Fullmer was distorted as Mr. Fullmer abused the service and helped create the very congestion he claimed to be the biggest problem with protestant's service. Mr. Fullmer indicated that he had examined Mountain Bell's service and found the channel congestion to be approximately the same (T. 548). Mr. Fullmer further testified that he felt the overcrowding of the channels was the great problem he had with protestant's service (T. 551).

Barton North of Mountain Bell testified that all of Mountain Bell's channels were overloaded and crowded, but that Mountain Bell had filed no present applications for additional channels, although there were available channels open to Mountain Bell (T. 646). *He further indicated that during the years* 1968, 1969 *and* 1967 *there were no held orders; and that, in fact, in* 1970, *there were five less units than in* 1968 (T. 640). (Emphasis added.) He testified that since 1968, Mountain Bell had experienced fewer held orders than in prior years (T. 362). Mr. North said that through his studies he had found that at least fifty percent of the customers who disconnected were dissatisfied with the congested condition of the channels and their inability to obtain access to the channels (T. 362). Mr. North conducted surveys of the metropolitan area of Salt Lake and *found that there was not an immediate demand for additional services.* He stated that the records for the past three

years showed a stabilizing effect on the number of customers Mountain Bell had. There were no additional requests for service and no appreciable difference in the number of subscribers for the previous two years (T. 363). (Emphasis added.)

Plaintiff presented further testimony by one Jerry Stanger who had been a subscriber of Mobile Radio Telephone Service, Inc., and had discontinued the service several years ago because of channel overloading. However, overloading was only one of the reasons for Mr. Stanger's disconnection. Mr. Stanger discontinued the service because of his lack of need for it and because his office had moved to Syracuse in Davis County. He further indicated that at such time as Mobile Radio Telephone Service, Inc., obtained an Ogden line or an Ogden exchange, he would very seriously consider going back with the company (T. 89-90).

The testimony of Merrill Wilson, M.D., was solicited by the plaintiff. It is important to note that all of the doctor's knowledge was based upon heresay; that is, upon what his secretary had told him. He had no personal experience with whether or not messages were transmitted. He did indicate that sometimes the messages were very prompt, but that several times a week he felt the messages were less than prompt (T. 220-223). The testimony of Dr. Wilson, in fact, was so vague as to whom he was a subscriber with, that he did not know the name of the mobile company or anyone connected therewith. [He was, in fact, a subscriber with the protestant.] He did indicate that the mobile carrier service would call his secretary and inquire as to whether or not the doctor had received his messages, and the secretary would say that she had not heard from the doctor (T. 224). This, in fact, demonstrated the

concern of the protestant that the messages were being promptly and adequately relayed.

Plaintiff indicated that there were fewer mobile radios in the metropolitan area of central Utah than in other similar areas of equal population. However, plaintiff failed to point out that population itself is not the criteria of need. Each area has its own peculiar needs. Mountain Bell indicated, through the testimony of Barton North, that there was no appreciable need, and, therefore, additional channels had not been applied for by Mountain Bell. Plaintiff compared the Vernal area with the Salt Lake area. This is misleading because the Vernal area contains many oil and gas operators in remote areas where telephone land lines are not available. However, in the central area of Utah, land telephones are available throughout the area; consequently, there could well be less need for mobile services on a percentage per population basis than in Vernal or more remote areas.

The plaintiff called as an adverse witness Max E. Bangerter, president of the protestant corporation. Mr. Bangerter testified that his corporation was constantly seeking ways of raising additional capital, so that it might improve and expand the equipment for a state-wide operation that it felt it needed for the future, and that his corporation was considering a public stock offering to raise $1,600,000.00 for possible state-wide expansion (T. 31). Mr. Bangerter indicated that originally his company had started out with two-way radio units of the tube type, which were Simplex units with microphone and speaker. This had been upgraded to transistorized and partly-transistorized units. Subsequently, selective calling systems were also introduced, as well as push-button dials, which

were protestant's own concept of how push-button dials should be used in a mobile phone. This concept was introduced by the protestant to the National Association of Mobile Systems, and is now being widely accepted (T. 34). Thereafter, duplex systems were upgraded with the push-button dials.

When channel congestion was felt to be a problem by the protestant, applications were filed with the F.C.C. for three additional channels. However, the F.C.C. did not find there was a sufficient need shown for three channels, so it only granted two additional channels (T. 37). Sometime later, additional channel-loading studies were made. Then protestant felt the need for the additional channels could be substantiated so additional applications were filed with the F.C.C. (T. 37). Protestant believed that the granting of these additional channels and putting them into operation would greatly relieve the congested nature of its system. Applications were filed and amendments were made, but time continued to drag on pending the F.C.C.'s granting of the additional channels. A short time before the hearings the channels were granted and were set for introduction to the protestant's subscribers.

In order to enhance the speed with which the F.C.C. might act, the record indicates that Mr. Bangerter, at the suggestion of his attorney in Washington, D.C., solicited letters from subscribers indicating the crowded condition of the channels.

In addition to trying to obtain additional channels to relieve congestion of the then existing channels, the record indicates that the protestant always tried to service and be cognizant of the difficulties, if any, that its subscribers might

have. Even the plaintiff's witnesses testified that protestant was sensitive to their problems. Mr. Isaacson indicated that when he had his telephone out of his wrecker truck, protestant loaned him a Pagette so that he would have a method of communication by which to receive the calls when he needed them (T. 154).

Plaintiff's witness, Mr. Bennett, testified that whenever he had service problems, protestant was more than willing to service the problems (T. 235). Several other witnesses called by the plaintiff who testified they had problems with the units in their vehicles, almost without exception, were wrecker drivers. It was stated, however, that the problems with units installed in wreckers were greater because the wreckers apparently ride much rougher and the springs are harder, plus the driver is generally rushing to and from accidents in a hurry, so that the radios take a considerable beating (T. 201). In addition, the telephones in a wrecker are generally in a terribly dirty environment, so that grease and dirt work down into the equipment and the push buttons. The vibrations of the rough ride break the printed circuit boards in the equipment. The unit placed in a Cash Wrecker Service truck, operated by Mr. Isaacson, had to be remounted because it had vibrated right off the dashboard. The telephone was remounted above the mirror to give it a better and more solid mounting where the vibrations might be less. Since that time, however, it was necessary to tighten the bolts regularly to keep the unit in place (T. 202).

The plaintiff, in fact, testified on cross-examination that in his business he also had received complaints; that he had dissatisfied customers, and, also, that he sometimes felt the

complaints were not justified (T. 326). It is clear that the simple fact that complaints are registered does not indicate a need or inadequate service. It is significant to note that no official complaints were registered with the Commission about the protestant.

Max E. Bangerter testified that his company had made a request of Motorola to phase out certain existing head units that the protestant was using at that time and to replace them with a new head which did not have any electronics in it other than two or three switches. This would hopefully relieve some of the vibration problems found in units such as those placed in rough-riding trucks.

Protestant indicated it had invested a considerable amount of money in equipment in order to upgrade its service (T. 206).

Protestant had sought to increase its plant facilities to better serve the public, and had, as of the date of the Commission's Order, obtained new property, larger and better facilities and buildings with which it can better serve its subscribers. Protestant was in the process of doing so at the time of the hearing before the Commission and was going to obtain new facilities at which there would be two stalls to drive cars into, so that it would be better able to serve the public through the expanded plant facilities (T. 189).

There was some question as to whether or not transient service could be offered by the protestant. At the time of the hearing, Mr. Bangerter indicated that such service was not within protestant's present tariff, although some service had

been offered on a test basis. However, subsequently, such service has been included in a new tariff approved by the Commission. The protestant indicated it would like to make some sort of hookup arrangement with transients, pending a resolution of the problems, both legal and economical.

Testimony was solicited on behalf of the protestant from Ben Banks, vice president of Intermountain Lumber Company, who testified that he had been using protestant's service for several years. He testified that he had used it every day, seven days a week, for business, personal and church matters. He indicated that the only problems he had were that sometimes the channels were busy. He had not had any problems with the service aside from that. He, also, indicated that he had never missed any business because of a busy line and that he received his messages very well (T. 575-9).

Michael C. Kenyon testified on behalf of the protestant and indicated that he had used protestant's service for several years; first, with Intermountain Lumber Company and presently with Georgia-Pacific. He indicated that the service had been very satisfactory, and that he was very pleased with the service, having had no problems with receiving his messages (T. 582).

Alva W. Rawdon was called to testify on behalf of the protestant and indicated that his service had been excellent. He testified he was the shop manager for Ken Garff Oldsmobile and was acquainted with an individual by the name of Harold Robinson who had testified on behalf of the plaintiff. Mr. Rawdon said Mr. Robinson worked for him for approximately thirty days as an alternate wrecker driver while his

regular driver was in the hospital. He indicated Mr. Robinson had never complained to him about any of the services of the protestant, and that the protestant was always very sensitive to problems and always very cooperative in taking care of any technical problems which arose. He also testified that the mobile radio telephone units in his trucks had shaken loose, and that the wrecker trucks did ride much more roughly than other vehicles (T 585-6).

Testimony was also given by Lalif A. Campbell (T. 600-607) Warren Barnes (T. 608-612) and B. Y. Farrell Packard (T. 612-623) providing additional support for the excellent service being rendered by the protestant to the public. In fact, Mr. Packard indicated he had been on both the services of Mountain Bell and the protestant and had found that the service of the protestant to be about ten times better (T. 615).

In summation, defendant respectfully submits that the record conclusively demonstrates that the evidence in support of the plaintiff was, in many instances, incomplete, contradictory, unreliable, and rebuttable; and that the evidence in support of the protestant clearly indicates, without opposition, that current public needs were effectively being met, and that steps were being initiated to meet future needs.

Thus, a reasonable conclusion from the evidence presented was that the plaintiff did not meet the burden of proving the established requisites for the issuance of a Certificate of Convenience and Necessity. Therefore, the Public Service Commission reasonably determined that his application should be denied.

CONCLUSION

Decisions of the Utah Public Service Commission must be upheld on appeal, unless they transcend the authority of the Commission, or are unreasonable from the evidence presented. In the case at bar, the Commission acted within its authority and reasonably concluded from the evidence presented that the plaintiff's application was without merit and should be denied.

We respectfully request this Court to uphold the Public Service Commission and its decision.

Respectfully submitted

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