1972

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 Plaintiff

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

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

vs.

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 PLAINTIFF

Appeal from Report and Order Denying Application for Certificate of Public Convenience and Necessity

WALTER P. FABER, JR.
WATKINS & FABER
606 Newhouse Building
Salt Lake City, Utah 84111
Attorney for Plaintiff

VERNON B. ROMNEY
Attorney General
MERL R. TOPHAM
Assistant Attorney General
State Capitol
Salt Lake City, Utah 84114
Attorney for Defendants

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STATEMENT OF THE KIND OF CASE

Plaintiff applied to the Utah Public Service Commission for a certificate of convenience and necessity which would allow him to operate a public mobile radio-telephone communications system in the central area of Utah.

DISPOSITION IN PUBLIC SERVICE COMMISSION

The Public Service Commission, by commissioners Hal S. Bennett, Donald Hacking and John T. Vernieu,

on February 3, 1972 denied plaintiff's application. Plaintiff made application for rehearing on February 22, 1972. The Public Service Commission, by commissioners Hal S. Bennett, Frank Warner and Eugene S. Lambert denied plaintiff's application for rehearing on March 10, 1972.

RELIEF SOUGHT ON APPEAL

Plaintiff asks to have this Court reverse the Public Service Commission's Conclusion in its Report and Order on the grounds that the same is unlawful because it is arbitrary, capricious and unreasonable, does not follow or properly interpret the applicable law, is contrary to the Commission's own Findings of Fact, and ignores certain other essential and material facts which are adverse to said Conclusion.

Plaintiff also seeks a review of the lawfulness of the Commission's (1) admitted reliance on a non-expert advisor for technical and legal advice in relation to mobile radio service, and (2) the propriety of such reliance when the Commission knew said advisor had business and personal interests which placed him in a conflict of interest position in opposition to plaintiff's application. Plaintiff contends that said reliance (1) negates the presumption of expertness afforded the Commission's Findings, and (2) is a violation of plaintiff's constitutional right to due process of law under the constitutions of the United States and the State of Utah.

STATEMENT OF FACTS

The following Facts have been divided into numbered paragraphs to facilitate referencing.

1. Plaintiff applied for a certificate of convenience and necessity from the Utah Public Service Commission (Commission) to furnish two-way mobile radio telephone service as a radio common carrier (RCC) to the public in the central area of Utah.

2. The central area of Utah has a population in excess of 800,000 people (R-873 (Exhibit 66) — Counties of Salt Lake, Weber, Davis and Utah).

3. Mobile Radio Telephone Service, Inc. (Mobile) is the only non wire-line RCC in the central area of Utah (Finding No. 4) and has been operating under a certificate from the Commission since 1962 (Finding No. 14).

4. The president of Mobile testified that it has 63 two-way mobile radio telephone units in service (R-103) on 2 VHF (Very High Frequency) channels granted by the Federal Communications Commission (FCC) (R-20).

5. The FCC has presently authorized 21 two-way mobile radio channels (7 VHF (R-40; See Finding No. 13) and 14 UHF (Ultra High Frequency) (R-509)) for use by non wire-line RCC's in the central area of Utah. The granting of such channels as well as all operational aspects of mobile radio communications are determined and regulated by the FCC.

6. Ever since 1966 by its own Exhibit Mobile has had approximately the same number of two-way mobile radio telephones in service on its 2 VHF channels (R-826 (Exhibit 51, page B-11)).

7. Mobile admitted that its 2 VHF channels have been crowded for several years (R-37, See R-684 (Exhibit 24); See R-88-90) but that it did not apply to the FCC for additional channels until October 28, 1969 and then it applied for 3 UHF channels (R-689 (Exhibit 30)). Two of the said UHF channels were granted by the FCC prior to June, 1970, but had not been placed in service by Mobile at the conclusion of plaintiff's hearing before the Commission in June, 1971 (Finding No. 13). VHF two-way mobile telephone units cannot be operated on UHF channels (R-473; Also see R-50) and so channel crowding on Mobile's VHF channels cannot be relieved unless the number of users on the VHF channels are reduced or Mobile acquires more VHF channels for use with its present subscribers (See R-473).

8. Mobile was the only person to protest the granting of the plaintiff's application.

9. The Commission's Finding No. 9 states as follows:

> "9. The exhibits of the applicant clearly indicate that the number of RCC two-way mobile units in the central area of Utah is substantially lower than other intermountain metropolitan areas. Some areas are noted to have a mobile unit for approximately every 2,000 persons in gross

population of the area. The comparable ratio of mobile units in the population in central Utah is less than one unit per 10,000 population" (R-921).

10. A number of the Commission's Findings relating to the public need for additional mobile radio service are set forth verbatim herein. All parentheticals and emphasis added will be noted.

The Commission's Findings:

"4. There is presently being offered to the public in the central Utah area mobile radio service by Mountain Bell Telephone Company (a wire-line company) and by Mobile Radio Telephone Service, Inc. (a non wire-line RCC). Each of these two companies indicated that they had held orders for persons desiring service. Mountain Bell had 15 subscribers on a waiting list and Mobile Radio Telephone Service had 12 subscribers on its waiting list. *Additional public witnesses testified to the need for additional mobile radio service, but they had not placed an order for such service with either of the present utilities because of crowded channel conditions.*" (Parentheticals and emphasis added.) (R-920).

"7. *Mountain Bell Telephone Company* (which has 176 two-way mobile radio telephone units on six channels) *will not accept additional subscribers because the present channels are filled to their capacity. This company has no present plans to install additional channels.*" (Parenthetical and emphasis added.) (R-921).

"5. Neil Goodsell, M.D., who administers a private paging service for a group of physicians (Medic-Call), testified that *he would recommend*

to the 65 or 70 physicians who use the system that they transfer to a common carrier if an acceptable one were available, because of the administrative problems which the physicians have encountered in their private operation." (Parenthetical and emphasis added.) (R-921).

"6. There are approximately 300 private radio mobile systems in the Salt Lake City area. *Many of these have been placed in service because of the overloading problems on the channels of the two carriers above referred to. Several witnesses testified that they would prefer the services of a common carrier were such services adequate.*" (Emphasis added.) (R-921).

11. Mobile's own subscribers cited the need for additional service (R-682-84 (Exhibits 22, 23, 24)).

12. Fifty per cent (50%) of Mountain Bell's subscribers who terminate its mobile radio service do so because of channel crowding (R-362). Mountain Bell has other customers (in addition to those on its waiting list) who would resume service if the channels were less crowded (R-645). One customer presently using Mountain Bell's mobile system testified that he had to wait approximately 5 months in 1971 before there was channel space available so that his telephone could be installed in his automobile (R-379).

13. Plaintiff presently has approximately fifty persons who expect to subscribe to the mobile radio service he proposes to offer (R-652).

14. The Commission found that plaintiff was technically and financially qualified to provide the proposed service (Finding No. 10, R-921).

15. In the hearing Commissioner Hacking acknowledged the public need for the service applied for but apparently failed to comprehend that the FCC will not grant the use of mobile radio channels until the State authority has granted a certificate of convenience and necessity. Commissioner Hacking's comments indicate that he believed the Commission could not act until the plaintiff had obtained channels from the FCC, even though he stated that plaintiff had shown the public need for the proposed service.

(R-532) "COMMISSIONER HACKING: Well—but, then you get to this situation — and I think maybe we've somewhat the same situation right here — *there's a growing public need for this type of service, and it's to a degree growing by leaps and bounds. Nobody can fully serve that need unless — no single party, and maybe no combination of parties can serve that need unless the Federal Communications gives them permission, licensed channels.*

So, you get in a situation where you've got the hen or the egg — which come first here, the hen or the egg, and what will the state commission do in the meantime when they're trying to find out whether the egg is going to be coming forth or the chicken — which is going to come first?" (Emphasis added.)

(R-534) "COMMISSIONER HACKING: *Well, now, you've got the same doggoned thing here — an*

applicant for a radio common carrier certificate can come in and show a need — I don't think it's difficult in this day and age for any applicant to show a pretty strong public need for this type of service. He can also show — may be able to show financial ability, but he can't show that he has those air channels to perform the service . . . and he has got to get the license from somebody else to do that.

So, that's the kind of thing we're confronted with here, isn't it?" (Emphasis added.)

16. Harold Mordkofsky, Washington, D. C., the only expert witness who testified on FCC matters, stated that *the FCC will not grant an applicant a license for mobile radio channels in states where the mobile radio business is regulated by state authority unless such applicant has first obtained a certificate of authority from the particular State* to operate a mobile radio business (R-533).

17. Amos R. Jackson (Jackson) who represented the Commission as its expert in plaintiff's hearing is a principal in and the engineer for Intermountain Engineers Incorporated (Intermountain) (R-432-33) which furnished services to Mobile within a year prior to the plaintiff's hearing before the Commission (R-434; See R-418-19).

18. Jackson and Telpower Services, Incorporated (Telpower) assisted Mobile in the preparation of Exhibits used before the Commission in the hearing (R-390-91).

19. Jackson's teenage children are employees of Telpower (R-435). Telpower was providing management ser-

vices to Mobile at the time of plaintiff's hearing before the Commission (R-416).

20. The offices of Intermountain, Telpower and Jackson were at the same address and all had the same telephone number (R-387-88).

21. Commissioner Hacking stated that Jackson was not an expert on mobile radio (R-445). Jackson does not have a radio license from the FCC (R-433).

22. Jackson is not an attorney (R-433) but advised the Commission on legal and technical matters in regard to mobile radio (R-440-42). Jackson also advised the Commission about the qualifications of RCC applicants (R-439-41; See R-453-55).

23. Jackson was charged by the Commission with inspecting the facilities and operation of RCC's and reporting to the Commission but admitted that he had never personally inspected the facilities or operation of Mobile (R-460-61).

ARGUMENT

POINT I.

THE PUBLIC SERVICE COMMISSION'S DENIAL OF PLAINTIFF'S APPLICATION IS UNLAWFUL AND UNREASONABLE BECAUSE IT IS CONTRARY TO THE COMMISSION'S OWN FINDINGS OF GENERAL AND SPECIFIC FACTS.

After reading the Commission's Findings 4 through 10 acknowledging the clear public need for additional mobile radio service in central Utah and acknowledging plaintiff's qualifications to furnish the same, it is difficult not to be astounded by the Commission's Conclusion that to grant plaintiff's application would be "clearly against the public interest". The Commission's Conclusion is especially baffling in light of Commissioner Hacking's comments that there is a great public need for additional mobile radio service and ". . . that no single party, and maybe no combination of parties can serve that need . . ." (See R-532-34).

In spite of the clear public need for additional mobile radio service and even though Mobile obviously was not fulfilling that need, the Commission's primary concern in its later Findings seemed to be to protect Mobile. The Commission found that Mobile had been granted 2 UHF channels from the FCC prior to June, 1970 but had not put the channels into service by June, 1971 (R-922 (Finding No. 13)). Mobile represented to the Commission in June, 1970 that it would have the 2 UHF channels in service "within thirty days or sixty days" (R-110). There was no finding why there was such a long delay in implementing service on the UHF channels. The Commission made no finding when said UHF channels would be put into operation by Mobile or how much such operation could or would relieve present crowding and meet the acknowledged public need.

The Commission stated in Finding 20b (R-924) that "the granting of all or some of these channels [to Mobile] will greatly relieve the present congestion . . ." That Finding illustrates the Commission's failure to understand the technical operation of mobile radio service. Mobile has had 2 VHF channels in operation since 1966 and was granted 2 UHF channels in 1970. Because of the design differences required for the separate frequency bands, two-way mobile telephone units used on VHF channels cannot be used on UHF channels (See R-473). Mobile's channel crowding cannot be relieved on the 2 VHF channels unless Mobile reduces the number of users on those channels. With the proper equipment Mobile could transfer some of its VHF subscribers to the UHF channels but that would reduce the space available for new subscribers to the UHF channels. The Commission made no other Finding that the admitted public need in the central area of Utah could be supplied from any other source since Finding No. 7 (R-921) states that Mountain Bell does not intend to obtain more channels to help fulfill the public need.

In its Finding No. 18, the Commission cited as being applicable to its present decision an excerpt from one of its previous orders in a similar case. The Commission stated that:

> . . . If there is to be any exclusive obligation and right connected with a certificate of convenience and necessity, it must follow that the holder of the certificate of convenience and necessity must be provided protection from competitive ser-

> vice that could seriously dilute the market and precipitate serious economic disruption to long-term investments. . . .

The implication of the Commission's statement is that granting plaintiff's application would "precipitate serious economic disruption to [Mobile's] long-term investments" and "could seriously dilute the [Mobile's] market". The Commission made no finding that Mobile has long-term investments or that serious disruption would result to Mobile or to any one else if plaintiff were granted a certificate. In fact, the Commission had just previously found on May 25, 1971 in another case that all of Mobile's investments were either "short term" or "relatively short term" (Case No. 6359, Finding No. 6). Moreover, the Commission made no finding that Mobile's market would be "seriously diluted" or diluted at all by granting plaintiff's application.

The Commission also stated in Finding No. 18 that the "measure of such adequacy ["to adequately serve the public"] would be the extent to which the holder [Mobile] keeps abreast of current technological advances within the industry." That statement is incredible. It would seem without question that "adequacy" would have to be determined principally by measuring the total amount of available mobile radio service against the public's needs at a given time. It is submitted that if those who desired mobile radio service were given a choice whether to have "current technological advances" such as pushbutton telephones, they would choose to have dial

telephones rather than no telephone service at all as is presently the situation.

The Commission's reliance on *Eck Miller Transfer Co.* v. *Armes*, 269 S. W. 2d 287 (Ky. 1954) in support of its Conclusion is misplaced. The facts in this case clearly show a substantial deficiency of service facilities. Because the Commission's own Findings show there is a large and expanding market in which the available mobile radio service is grossly inadequate, the *Eck Miller* citation by the Commission actually supports plaintiff's position that Mobile has been and is unable to render adequate service. The Commission should not be allowed to assume gratuitously that Mobile can fulfill the public need.

It is submitted that the Conclusion of the Commission denying plaintiff's application is utterly inconsistent with the Commission's own Findings and should be reversed.

POINT II.

THE PUBLIC SERVICE COMMISSION UNLAWFULLY APPLIED THE TERM "DUPLICATION OF SERVICE" TO THE NON WIRE-LINE MOBILE TELEPHONE BUSINESS WHEN IT DENIED PLAINTIFF'S APPLICATION.

Finding No. 18 states that "This Commission previously denied a similar application for duplication of ser-

vice . . ." The Commission's statement assumes that two companies in the same utility area are automatically duplicating service if they both offer the same commodity to the public. That assumption is not correct in the non wire-line RCC mobile telephone business.

The term "duplication of service" as used in public utility law originally meant the duplication of very expensive capital investments by two separate companies and did not merely indicate that where two companies offered the same commodity there was capacity in excess of the needs of the public. See *Kentucky Utilities Company, et al.* v. *Public Service Commission, et al.*, 252 S. W. 2d 885 (Ky. 1952).

The history of public utility law shows how the concept of "duplication" developed, and why it is especially inapplicable to the non wire-line mobile telephone business where there is a clear public need in excess of available service. As cities and urban areas developed in the United States, many private companies entered the business of supplying the populace in those areas with such life-sustaining commodities as electricity, gas for heating, culinary water, and telephone communications. To implement their businesses these companies were required to make very large capital investments. They had to purchase land, execute leases and obtain rights of way and easements. In addition, they usually had to finance and construct manufacturing or other generating facilities as well as provide some type of fixed transmission lines such as pipes or wires necessary to transport their products to

the consumers. The products of these companies were utilized by and became essential to nearly every business establishment and residence in the service area.

In some instances more than one company attempted to supply the same essential product to consumers in the same locality. This usually caused a duplication of costly investments because two companies then had to build transmission lines and make other investments in fixed facilities in the same community in an attempt to serve essentially the same customers. This often resulted in one or both of the companies losing money, going out of business and thus depriving members of the public of these essential products.

In an effort to protect the public against this grievous loss, national and local governments began (1) to regulate the conditions under which these companies operated, and (2) to establish rules governing the entrance of new companies into the same businesses. The companies which provided these essential life-sustaining products became known as "public utilities", and the rules of public convenience and necessity were developed. Such companies as Mountain Fuel Supply, Utah Power & Light and Mountain Bell are examples of the traditional public utility.

As time has passed, however, the scope of "public utilities" has been enlarged and many other businesses have been included under the original definition. Consequently, the regulatory agencies have often been burdened to apply the original concepts to numerous new

businesses which, in many instances, have very few of the attributes of the historic "public utility". These businesses have in some cases accidentally become public utilities by the technical language of statutory law. They are in reality pseudo public utilities and should be legally recognized as such.

Even though the historic public utility was often made an absolute monopoly to protect the public in a given area, it was soon discovered that the public interest did not require that all statutory public utilities needed to be monopolies. Utah has recognized this development. In *Pritchard Transfer, Inc.* v. *W. D. Hatch Co.*, 21 Utah 2nd 106, 441 P. 2d 135 (1968), this Court held that even where there has been a substantial capital investment in equipment such as semi-trucks and trailers the Public Service Commission is not required to maintain a monopolistic position for the existing carrier. Also see *Union Pacific Railway Co.* v. *Public Service Commission*, 103 Utah 459, 135 P. 2d 915 (1943), wherein this Court stated,

> The discretionary power granted the Commission by the act, to grant or withhold certificates, negatives the idea that it was intended to grant and maintain a monopoly in any field. The fact that the act provides that the Commission may grant a certificate when it determines that public convenience and necessity requires such services recognizes that regulated competition is as much within the provisions of the act as is regulated monopoly. In the exercise of its powers to grant or withhold certificates of convenience and necessity, questions of impairment of vested or property

> rights cannot very well arise. No one can have a vested right to be free from competition, to have a monopoly against the public.

Many other states with public utility statutes similar to Utah's have held that the term "public convenience and necessity" means the convenience of the public and not the convenience of an individual doing a limited business. See *Missouri Pacific Railway Co.* v. *State Corporation Commission*, 192 Kan. 575, 389 P. 2d 813 (1964). Moreover, the term is an elastic one and the existence of a presently certified utility does not deprive the regulatory body of authority to issue an additional certificate if it is in the public good to do so. See *Dahlen Transport, Inc.* v. *Hahne*, 261 Minn. 218, 112 N. W. 2d 630. Also see *San Diego & Coronado Ferry Co.* v. *Railroad Commission of California*, 210 Cal. 504, 292 Pac. 640.

The question in this case arises because non wire-line RCC's are technically included as public utilities by the statute but bear almost no resemblance to the traditional public utility such as Mountain Bell because of (1) their negligible investment in fixed facilities and equipment, (2) their very small scope of operation, and (3) the very small percentage of the public served by them. Because non wire-line RCC's are a relatively recent development in the public utility field, it is extremely questionable whether the historic rules can be applied in this case where there is a manifest public need greatly in excess of available service.

There is another paramount difference between a non wire-line RCC and a wire-line telephone company. The non wire-line RCC, even though it may be technically a public utility, is basically a private business which is not required to make its service available to the whole public but can limit its business to any size it desires or even go out of business. Thus, where a non wire-line RCC is not subject to the same responsibilities as the authentic public utility, it is incongruous to give it the same protection and benefits. In fact, it is doubtful that Mobile qualifies as a conventional public utility under the definition given by this Court in both *Crystal Car Line* v. *State Tax Commission*, 110 Utah 426, 174 P. 2d 984 (1946), and in *Garkane Power Co.* v. *Public Service Commission*, 98 Utah 466, 100 P. 2d 571 (1940).

In *Garkane* at 573 P. 2d, this Court 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.

Even if the public could demand Mobile's service, Mobile can go out of business or fail to implement sufficient service to supply that demand. And since Mobile is obviously not able to serve but a very small percentage of the public need at the present time, it seems clear that as a practical matter the public at large cannot demand and receive Mobile's service. In fact, Mobile has only two full time employees (R-10-11).

It is apparent that the term "duplication" is not easily applied to a non wire-line RCC which has no large

capital investment in wire lines, line easements and poles or power generation facilities as are required for Mountain Bell's operations. Moreover, the only real similarity between the non wire-line RCC and Mountain Bell is the fact that the RCC often uses the same type of hand telephone instrument. Certainly the initial capital investment by an RCC is probably less than that required for a modern service station on an urban street corner. The term "duplication" of service, if not inappropriate altogether, cannot be applied with the same significance to an RCC as it is to a wire-line telephone company. There is certainly no duplication of service or investment as such in the airways through and by which the RCC utilizes its operations inasmuch as the FCC assigns separate broadcast channels to each RCC and the channels are operative without interference almost anywhere in the reception area. There are at least 17 unassigned channels presently available from the FCC for use by non wire-line RCC's in central Utah.

In this case the only way "duplication" could reasonably apply would be if there were an excess of capacity over need. It is without question from the Commission's own Findings that there is presently a much larger market than Mobile has capacity to serve. Thus, it would appear that the term "duplication" as it is used in public utility law has no application in this case because (1) there is no excess capacity over need, (2) there has not been the kind of investment by Mobile to which the term "duplication" applies, and (3) Mobile is really only a pub-

lic utility by technicality and is not entitled to the same monopolistic protection as is given to a wire-line telephone company. It is significant that only Mobile protested the granting of plaintiff's application and that Mountain Bell, the authentic public utility, did not.

POINT III.

THE PUBLIC SERVICE COMMISSION'S FINDING THAT MOBILE ACTIVELY SOUGHT TO FULFILL THE PUBLIC NEED IS ARBITRARY AND UNREASONABLE BECAUSE IT IGNORED UNCONTRADICTED TESTIMONY THAT MOBILE KNOWINGLY AND WILLFULLY FILED IMPROPER AND UNWORKABLE CHANNEL APPLICATIONS WITH THE FCC WHEN MOBILE KNEW IT NEEDED MORE CHANNEL SPACE.

Mobile has had 2 VHF channels in service since 1966 and has had approximately the same number of subscribers (63) using those channels since that time. Mobile's two-way telephone subscribers for each year are as follows:

December, 1966 63 (R-826 (Exhibit 51, p. B-11))

December, 1967 59 (R-826 (Exhibit 51, p. B-11))

December, 1968 61 (R-826 (Exhibit 51, p. B-11))

December, 1969 61 (R-826 (Exhibit 51, p. B-11))

December, 1970 59 (R-826 (Exhibit 51, p. B-11))

April, 1971 63 (R-103)

Mobile had known about the crowded channel problem for several years but first filed with the FCC for additional channels on October 28, 1969 (R-42). Instead of filing for VHF channels which would clearly have alleviated its crowded condition, Mobile filed for UHF channels which would not. See discussion under POINT I above. Moreover, Mobile did not even file with the FCC for the UHF channels until after another company had just previously filed for the identical UHF channels even though there were at least ten other UHF channels available to Mobile and not filed on by anyone else. Mobile told the Commission in June, 1970 that it would have the 2 UHF channels in service within 30 to 60 days. Also it was not until just prior to plaintiff's first hearing in June, 1970 that Mobile filed with the FCC for any additional VHF channels (R-472, 506).

Mobile's applications for both the UHF and VHF channels were admittedly defective because the applications were for wire-line connections to the point of transmission on the mountain when there were no wire lines and Mobile knew it (R-50-53, 56-57). The FCC granted Mobile 2 UHF channels prior to June, 1970 but since there were no wire lines for connection Mobile had to file an amended application for a *wireless* connection to the point of transmission on the mountain (R-516). Mobile did not file the amendment for the UHF wireless connection until November, 1970. Moreover, Mobile had not even filed an amendment with the FCC for its defective application for VHF channels at the time of plaintiff's hearing in June, 1971 (R-516).

Harold Mordkofsky testified that Mobile's application for the identical UHF channels which another person had just previously filed for was a "strike" application which was an illegal technique employed to block the granting of channels to the prior applicant (R-511-16).

In light of the above and because of the fact that Mobile did not have any additional channels in operation in June, 1971, it was wholly arbitrary and unreasonable for the Commission to conclude that Mobile had "filed and actively presented applications to the Federal Communication Commission."

The Commission's Finding 20a (R-924) that Mobile has "constantly, earnestly and energetically sought to and has substantially upgraded and expanded its service" is wholly contradicted by that Commission's own "expert", Amos R. Jackson, who admitted that he had never inspected Mobile's facilities or operation to determine what Mobile was doing in its business. In addition, Mobile had not placed the UHF channels in service within 30 to 60 days as it had promised the Commission in June, 1970.

It is submitted that the Commission's Findings concerning Mobile are arbitrary, unreasonable and capricious because they are (1) either not supported by any evidence or (2) are contrary to testimony given in the hearing.

POINT IV.

THE PUBLIC SERVICE COMMISSION'S RELIANCE ON AMOS R. JACKSON NEGATED THE PRESUMPTION OF EXPERTNESS AFFORDED THE COMMISSION'S DECISION AND SUCH RELIANCE WAS UNCONSTITUTIONAL BECAUSE OF JACKSON'S RELATIONSHIP WITH MOBILE.

Although the Commission is given a presumption of expertness, that presumption may be rebutted. *Lewis* v. *Wycoff Co., Inc.*, 18 Utah 2d 255, 420 P. 2d 264 (1966). In the present case, Amos R. Jackson represented the Commission as its expert at the plaintiff's hearing. Commissioner Hacking admitted that Jackson was not an expert in regard to the mobile radio telephone business. Jackson does not have a license from the FCC and has had no formal training in mobile radio.

Jackson had the responsibility of evaluating the business of common carriers for the Commission but had never inspected the facilities or operation of Mobile although he had met with Mobile's president "10 or 15 times".

Jackson is not an attorney but advised the Commission on the legal aspects of mobile radio service.

It is submitted that because Jackson was admittedly not an expert and that he had not inspected Mobile's facilities the presumption of the Commission's expertness or special knowledge is clearly rebutted. The Commission

had no expert basis whatever to uphold its Conclusion denying plaintiff's application.

Jackson was the principal in a business (Intermountain) that had performed services for and billed Mobile. Jackson was a consultant to Telpower, a corporation which employed his teenage children and which was run by his brother. Intermountain, Telpower and Jackson all had the same office address and the same telephone number. Telpower furnished services to Mobile and assisted Mobile in preparing exhibits for use in hearings before the Commission in spring, 1971. Jackson consulted with his brother and Telpower in regard to Mobile's exhibits to be used before the Commission. Telpower was providing management services to Mobile at the time of plaintiff's hearing. These facts were before the Commission.

It is a denial of due process of law to allow a person having conflicting interests to a petitioner to participate in or advise a judicial or quasi-judicial body in relation to a decision concerning such petitioner. Plaintiff was absolutely entitled to "fair treatment" and "reasonable action". 16A *C. J. S.*, Constitutional Law § 567. After the Commission recognized the public need and plaintiff's ability, it should not be allowed to discriminate in favor of a monopoly for the existing inadequate service.

CONCLUSION

In light of the Commission's own Findings, the Commission's Conclusion denying plaintiff's application is pat-

ently arbitrary and unreasonable. The Commission did not follow the applicable law and by its own admission is not entitled to a presumption of expertness in this case. The Commission's own expert was benefitting personally or through his family for services rendered to Mobile who was the only person who protested plaintiff's application. In addition, said expert was consulting with his brother and Telpower about exhibits for Mobile used in hearings in spring, 1971.

It is submitted that to grant plaintiff's application for a certificate of convenience and necessity would not be a "duplication of service" as that term is used in public utility law. The obviously great public need for more mobile radio service is not being fulfilled at present. The Commission's Conclusion is patently in error and should be reversed.

Respectfully submitted,

WALTER P. FABER, JR.
WATKINS & FABER

606 Newhouse Building
Salt Lake City, Utah 84111
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I served 3 copies of the foregoing brief on defendants by delivering the same to Verl R. Topham, Assistant Attorney General for the State of Utah, at the State Capitol Building, Salt Lake City, Utah, this 5th day of June, 1972.