1973

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 : Plaintiff'S Brief In Opposition To Defendants' Petition For Rehearing

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

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' PETITION FOR RE-HEARING

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STATEMENT OF FACTS

In their brief, defendants have asserted a number of "facts" unwarranted when the full record is examined. Also, defendants ignore the Court's decision that there are obvious factual and legal distinctions between traditional public utilities such as Mountain Bell and the protestant, Mobile. The facts supporting the Court's decision are as follows:

1. Plaintiff relies on the Commission's Findings of

Fact Nos. 4 through 13 (R. 920-22) which show a large unfulfilled public need.

2. Mobile's two applications to the FCC for additional channels were both defective, and Mobile knew they were defective at the time it filed them (R. 50-53, 56-57). In spite of the defects (notwithstanding defendants' claims of delay by the FCC), the FCC still granted two additional channels to Mobile prior to June, 1970 (R. 922, Finding No. 13).

3. Mobile told the Commission in June, 1970 that the two channels which it had been granted by the FCC in May, 1970 would be in service "within thirty days or sixty days" (R. 110). Mobile had still not placed these additional channels in service more than one year later at the conclusion of plaintiff's hearing before the Commission in June, 1971 (R. 922, Finding No. 13). It is clear that the FCC has not prevented Mobile from providing additional service to the public.

4. Harold Mordkofsky testified that Mobile's knowingly defective application to the FCC for the identical channels which another person had just previously filed for was a "strike" application (R. 511-516) which is an illegal technique employed to block the granting of channels to another applicant.

ARGUMENT

POINT I.

THIS COURT'S DECISION FULLY DISCUSSED AND RESOLVED THE POINTS URGED BY DEFENDANTS' PETITION.

Defendants' petition repeats the same contentions originally made to this Court in oral argument and appeal brief. Defendants first assert that this Court was wrong in determining that the Order of the Public Service Commission was arbitrary and capricious. They reject the plain meaning of the Commission's own findings cited in the Court's decision which findings show a large unfulfilled public need for mobile radio service. After reviewing and quoting the written findings of the Commission, the Court stated:

> We cannot do other than agree that it seems paradoxical for the Commission to make the findings just recited, particularly the emphasized portions, which indicate that there is an unfulfilled public need for the proposed service, and then to conclude the granting of the application would be against the public interest.

It is submitted that the Commission's own specific findings resolve this issue against defendants.

Defendants next argue that this Court failed to follow and apply the law of regulated monopoly. The decision fully discussed the question of monopoly under the facts as found by the Commission and determined that the need was for regulated *competition* and not monopoly. The Court stated,

> . . . in the instant situation the service to customers is over assigned wave-length air channels, and it does not appear that either the factor of duplication of expensive facilities, or the danger of impairing or destroying the existing services is

> as important as it is with respect to some other utilities such as railroad and telephone mentioned above. In view of those facts, there should be taken into consideration the sound principle which pervades all business activity, that competition is a wholesome and stimulating factor which tends to further the objective to be desired mentioned above: of assuring the public the best possible service in the most economical and efficient manner.

As one ground for their argument in favor of strict monopoly, defendants make a number of unsubstantiated statements about the nature and extent of Mobile's investments on page 17 of their petition. Those same assertions were answered in plaintiff's original brief as follows:

> The Commission made no finding that Mobile has long-term investments or that serious disruption would result to Mobile or to anyone 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.

Conspicuous by its absence from defendants' lengthy citation of out-of-state authority on the issue of monopoly is the Utah case which discusses the question. This Court, in *Union Pacific Railroad Co.* v. *Public Service Commission*, 103 Utah 459, 135 P. 2d 915, 918 (1943), 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. (Emphasis added.)

CONCLUSION

This Court's decision was based upon the Commission's own findings. In addition, the Court pointed out that the Commission's Orders are not protected by a rule of infallibility. Defendants have presented nothing new. The Court's decision is correct. Defendants' petition for re-hearing should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Brief in Opposition to Petition for Re-Hearing on defendants by delivering two copies of the same to Vernon B. Romney, Attorney General for the State of Utah, at the State Capitol Bldg., Salt Lake City, Utah, and two copies to Kay M. Lewis at 320 South 3rd East, Salt Lake City, Utah, this 26th day of January, 1973.

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