THE PUBLIC UTILITY STATUS OF A SHOPPING CENTER TOTAL ENERGY SYSTEM

Cottonwood Mall Shopping Center, Inc. v. Utah Power & Light Co., 440 F.2d 36 (10th Cir. 1971)

Cottonwood Mall Shopping Center, Inc. (Cottonwood) is the owner and operator of a large shopping center near Salt Lake City, Utah. In 1968, Cottonwood sought to establish a total energy plan[1] whereby it would generate and distribute electrical power to its tenants, who were all retail business outlets. All facilities and equipment were installed on contiguous private property owned by Cottonwood, and electricity was to be supplied only to Cottonwood and its tenants. Payment for services was included in the terms of the tenants' lease contracts.

For seven years prior to the establishment of Cottonwood's energy system, the center had received power from the Utah Power & Light Company (Utah Power), a public utility regulated under Utah law. When Cottonwood put its system into operation, a conflict arose between Cottonwood and Utah Power. Each claimed the sole right to provide electricity for J. C. Penney, a Cottonwood tenant. Cottonwood initiated an antitrust suit in Federal District Court alleging that Utah Power had attempted to monopolize the market for electrical power at the center, thereby, interfering with the performance of Cottonwood's leases. In response, Utah Power asserted that Cottonwood had no standing to challenge Utah Power's economic activities because it did not possess a Certificate of Public Convenience and Necessity from the Utah Public Service Commission.[2] In a first construction of the amended Utah statutes governing public utilities, summary judgment was entered for Utah Power. On appeal, the Tenth Circuit affirmed,[3] and *held*: Cot-

1. *See* notes 5 & 6 *infra.*

2. UTAH CODE ANN. § 54-4-4-25(1) (Supp. 1971) provides that:

> No . . . electric corporation . . . shall henceforth establish, or begin construction or operation of a 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 . . . .

3. Cottonwood Mall Shopping Center, Inc. v. Utah Power & Light Co., 440 F.2d 36 (10th Cir. 1971).

tonwood was functioning as a public utility within the meaning of Utah law. Lacking the necessary certification, it had no right to sell electricity. Thus, Cottonwood lacked standing to bring an antitrust suit against Utah Power.[4]

Energy plans such as Cottonwood's are finding increased use, not only in shopping centers, but also in large apartment complexes.[5] They are attractive to developers and operators for several reasons including reduced construction costs and profitable distribution of services to tenants.[6] Recently, the status of total energy systems with respect to state utility law has become a question of some significance.[7] The future permissibility, management, and operation of such systems depends in part upon whether or not they fall under state regulation as public utilities.

In most states, the term "public utility" is construed to require service or readiness to serve an indefinite public[8] which has the right

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4. *Id.* The circuit court also rejected Cottonwood's contention that Utah law violates the due process clause of the fourteenth amendment as an unwarranted invasion of private property. Citing a number of decisions including Munn v. Illinois, 94 U.S. 113 (1877) and Nebbia v. New York, 291 U.S. 483 (1935), the court pointed out that state legislatures have broad powers to regulate private commercial activities; it is the nature, and not the ownership, of the business which makes it susceptible to regulation; and where economic policies of the state legislature bear a reasonable relationship to the public welfare, it is not for courts to judge their wisdom. The court concluded:

> There is little doubt that Utah has borne this burden here. At this date we feel it unnecessary to explain why a restriction of competition in the utility industry is a 'proper legislative purpose.' When we think of the overlapping power systems, duplicative operations, and higher consumer prices that would occur if every enterprise of this or of related nature were not subject to state regulation, it is certain that for Utah the laws have a reasonable relationship to the end. 440 F.2d at 43.

5. *See* ABA PUBLIC UTILITY LAW SECTION 124-25 (Annual Rep. 1965).

6. Cost savings arise from the type of equipment which can be utilized in conjunction with total energy systems. For example in certain systems, air handling units can be installed instead of air-conditioning and heating equipment. In such cases, as much as $200,000 may be saved in the cost of each large store at the shopping center. *See* PRACTICING LAW INSTITUTE OF NEW YORK, BUSINESS AND LEGAL PROBLEMS OF SHOPPING CENTERS (1968). For a discussion of the engineering and design aspects of total energy systems, see R.M.E. DIAMANT, TOTAL ENERGY (1970).

7. *See* note 5 *supra.*

8. *See* Claypool v. Lightning Delivery Co., 38 Ariz. 262, 299 P. 126 (1931); Story v. Richardson, 186 Cal. 162, 198 P. 1057 (1921); Sutton v. Hunziker, 75 Idaho 395, 272 P.2d 1012 (1954); Missouri v. Brown, 323 Mo. 818, 19 S.W.2d 1048 (1929); *Re* Nafe, 4 P.U.R.3d 369 (Ohio P.U.C. 1953); Limestone Rural Tel. Co. v. Best, 56 Okla. 85, 155 P. 901 (1916); Schumacher v. Railroad Comm'n, 185 Wis. 303, 201 N.W. 241 (1924).

to demand service.[9] A minority of states, however, have rejected these requirements and have found activities, such as the supply of natural gas or electricity to industrial users, though not involving service to the public, so impregnated with the public interest as to warrant regulation as public utilities.[10] On several occasions, this reasoning has been applied to isolated energy systems like Cottonwood's.[11]

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9. The obligation of public utilities to serve members of the general public on an equal basis is posited on the theory that public utilities are natural monopolies spared from competition by governmental regulation. *See generally* Priest, *Some Bases of Public Utility Regulation*, 36 MISS. L.J. 18 (1965).

Courts have often used the right of members of the public to demand service as a definitional element of public utility. *See, e.g.*, Allen v. Railroad Comm'n, 179 Cal. 68, 175 P. 466 (1918); Peoples Gas Light & Coke Co. v. Ames, 359 Ill. 132, 194 N.E. 260 (1935); Bricker v. Industrial Gas Co., 58 Ohio App. 101, 16 N.E.2d 218 (1937); Cawkes v. Meyer, 147 Wis. 320, 133 N.W. 157 (1911).

The right of members of the general public to demand service, however, is not absolute. Services of utilities are often intrinsically limited by the size and nature of their undertaking and their geographic situation. Denial of service to particular individuals may be justified by previous misuse of services or nonpayment of bills. *See generally* Note, *The Duty of a Public Utility to Render Adequate Service: Its Scope and Enforcement*, 62 COLUM. L. REV. 312, 314-22 (1962).

10. *See* Public Service Comm'n v. Panhandle Eastern Pipeline Co., 224 Ind. 662, 71 N.E.2d 117, *aff'd*, 332 U.S. 507 (1947), in which the Indiana Supreme Court found the gas company's sales to large industrial users so closely related to the public interest as to merit regulation. A case often cited in support of this line is Industrial Gas Co. v. Public Util. Comm'n, 135 Ohio St. 408, 410, 21 N.E.2d 166, 168, 29 P.U.R. (n.s.) 89, 93 (1939), in which the court states:

> Regardless of the right of the public to demand and receive service . . . a corporation that serves such a substantial part of the public as to make its rates, charges, and methods of operation a matter of public concern, welfare and interest subjects itself to regulation by the duly constituted government authority . . .

This case presents a peculiar situation. Industrial Gas Co. had operated for several years as a public utility under state regulation and, by a mere amendment in the purpose clause of its articles of incorporation, it sought to avoid regulation. It is noteworthy that later Ohio decisions dealing with the definition of "public utility" require a showing of a "readiness to serve an indefinite public." Ohio Power Co. v. Village of Attica, 19 Ohio App. 2d 89, 97-8, 250 N.E.2d 111, 117 (1969).

11. The *ABA* Utilities Section Newsletter (April 1, 1966) reports that the Nevada State Commission found a total energy system similar to Cottonwood's operated by the Boulevard Shopping Center, a public utility under Nevada law, despite the fact that only a limited number of tenants were to be served. *Contra*, Application of Philadelphia Suburban Water Co. v. Philadelphia Elec. Co., 41 Pa. Pub. Util. Comm'n 505 (1964); Drexelbrook Assoc. v. Pennsylvania Pub. Util. Comm'n, 418 Pa. 430, 212 A.2d 237 (1966). The Pennsylvania Public Utilities Commission found that the operator of a garden type apartment who acquired equipment for the distribution and sale of electricity, gas and water to its tenants was functioning as a public utility. On appeal, the Pennsylvania Supreme Court reversed, holding that the undertaking was not a public utility because the apartment operators did not offer service to the public, but rather

In *Cottonwood*, the circuit court concluded that Utah had elected to follow the minority view. Consequently, a readiness to serve the general public is no longer an essential element in the definition of public utility, and, despite the fact that the shopping center proposed to serve only a very limited class, its total energy system was a public utility. The court's holding is based on two considerations. First, the court points to recent changes in the pertinent sections of the Utah Code. The inclusion of cooperatives in the definition of "electrical corporation"[12] has the effect of overruling *Garkane Power Company v. Public Service Commission.*[13] *Garkane* had held that cooperatives were not public utilities because they did not offer service to the general public. In the same provisions, the legislature expanded the meaning of "for public service" to include "or for its consumers or members for domestic, commercial or industrial use."[14] This further indicates the legislature's intention to replace the criterion of service to the general public with a test encompassing additional types of consumers.[15] The language of the section defining "public utility" is

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to a small selective class of persons. *See also* Welch, CASES AND MATERIALS ON PUBLIC UTILITIES REGULATION 71-73 (Rev. Ed. 1968).

12. This case is the first construction of the 1965 amendments to the Utah public utility statutes. The critical provision is UTAH CODE ANN. § 54-2-1(20) (Supp. 1971) in which "electrical corporation" is defined:

> Every corporation, *cooperative association* and person, their lessees, trustees and receivers or trustees appointed by any court and whatsoever, owning, controlling, operating or managing any electric plant, or in anywise furnishing electric power, for public service *or to its consumers or members for domestic, commercial or industrial use,* within this state except where electricity is generated on or distributed by the producer through private property alone, *i.e., property not dedicated to public use,* solely for his own use or the use of his tenants, . . .

The compiler's note reveals that the section underwent significant amendment in 1965 which so far is relevant:

> . . . inserted "cooperative association" after "corporation," "or to its consumers or members for domestic, commercial or industrial use" after "public service," "i.e., property not dedicated to public use" after "property alone . . ."

The amended language is italicized.

13. 98 Utah 466, 100 P.2d 571 (1940). The court distinguishes *Garkane* from *Cottonwood* in that the former did not deal with the exception stated in UTAH CODE ANN. § 54-2-1(20) (Supp. 1971), but with the subsequently changed language "furnishing electrical power for public use" in the 1917 version of the same section. However, the court concludes that the 1965 statute overrules *Garkane* insofar as that case defined "for public use." Cottonwood Mall Shopping Center, Inc. v. Utah Power & Light Co., 440 F.2d 36. 41 (1971).

14. UTAH CODE ANN. § 54-2-1(20) (Supp. 1971).

15. Cottonwood Mall Shopping Center, Inc. v. Utah Power & Light Co., 440 F.2d 36, 41 (10th Cir. 1971).

equally broad and supports this construction.[16]

Secondly, the public nature of the shopping center precludes Cottonwood's total energy plan from falling within the statutory exception exempting electricity "generated on or distributed by the producer through private property alone, i.e., property not dedicated to the public use, solely for his own use or the use of his tenants. . . ."[17] The court indicates that the modern shopping center is by nature a public place. Not only are the wares of the various merchants held out to the public eye, but, through the auspices of the merchant association, the center sponsors a myriad of festivals and shows[18] tailored to attract an increasing number of the public as potential patrons. In this context, the "beneficial use"[19] of energy expended in such operations as air-conditioning the enclosed mall goes far beyond the tenants.

Cottonwood must procure certification from the Utah Public Service Commission if it wishes to continue operation of its total energy system.[20] Certification is dependent upon the Commission's determina-

16. UTAH CODE ANN. § 54-2-1(30) (Supp. 1971) provides that:

> The term 'public utility' includes every . . . gas corporation, electrical corporation . . . where the service is performed for, or the commodity delivered to, the public generally, or in the case of a gas corporation or electrical corporation where the gas or electricity is sold or furnished to any member or consumers within the State of Utah for domestic, commercial or industrial use. And whenever any . . . gas corporation, electrical corporation . . . performs a service for or delivers a commodity to the public, or in the case of a gas corporation or *electrical corporation selling or furnishing gas or electricity to any member or consumers within the state of Utah, for domestic, commercial or industrial use*, for which any compensation or payment whatsoever is received, such . . . gas corporation, electrical corporation . . . is hereby declared to be a public utility, subject to the jurisdiction and regulation of the commission and to the provisions of this title. (Emphasis supplied).

17. UTAH CODE ANN. § 54-2-1(20) (Supp. 1971).

18. Cottonwood Mall Shopping Center, Inc. v. Utah Power & Light Co., 440 F.2d 36, 39 n.8 (10th Cir. 1971). The court lists the promotional activities engaged in by Cottonwood:

> . . . a small one ring traveling circus with one truckload of animals; a Gymkahana, consisting of small car races; sidewalk sales, moonlight sales, foreign car shows; Junior Achievement Programs; Garden Shows; outdoor living boat shows; Go-cart Shows; Stamp Shows; Aztec Indian Dances; European Art Display; the Singing Christmas Tree; Halloween Parades; Snowmobile Shows; Ceramics Shows; Gladiola Shows; Handicraft Shows; Sports Car Shows; Home Entertainment Shows; Dolphin Shows; Outdoor living camper shows and Mobilehome Shows.

19. Cottonwood Mall Shopping Center, Inc. v. Utah Power & Light Co., 440 F.2d 37, 40 (10th Cir. 1971).

20. UTAH CODE ANN. § 54-4-25(1) (Utah P.S.C. 1970).

tion that Cottonwood's energy system is technically and economically feasible and consistent with the public convenience and necessity.[21] Because Cottonwood's system overlaps with service provided by Utah Power, the shopping center has the added burden of proving that Utah Power's service is inadequate and that its deficiencies cannot be corrected by means within the normal course of business.[22] Should Cottonwood receive certification, the operation of its total energy plan would be subjected to state regulations governing rates,[23] service,[24] and accounting.[25]

Cottonwood, by eliminating the requirement of service to the general public, has expanded the scope of utilites regulation in Utah. Though Utah's is the minority position, private utilities such as Cottonwood's are the proper subject of cognizance by state regulatory agencies. They stand in competition with other utilities and can result in duplication of service systems. Furthermore, the unrestricted development of private energy systems may adversely affect power companies serving the public. Generally, large consumers such as Cottonwood are more efficiently served and offer higher profit margins than smaller consumers. The denial of the more profitable large consumers to power companies tends to weaken their economic base. This may be undesirable from the perspective of the public convenience and necessity. State commissions should be empowered to gauge the effect of private energy systems upon the entire utility industry and determine the situations in which such systems are consonant with the public interest.

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21. *Re* Utah Mobile Tel. Co., 85 P.U.R.3d 252 (1970).
22. *Id.*
23. UTAH CODE ANN. § 54-4-4 (Supp. 1971).
24. UTAH CODE ANN. § 54-4-18 (Supp. 1971).
25. UTAH CODE ANN. § 54-4-23 (Supp. 1971).