6-9-1977

Aspen Airways, Inc. v. Rocky Mountain Airways, Inc.

IN THE SUPREME COURT

STATE OF COLORADO

No. 27626

ASPEN AIRWAYS, INC., Plaintiff-Appellant-Cross-Appellee,	)
vs.	)
ROCKY MOUNTAIN AIRWAYS, INC., Defendant-Appellee-Cross Appellant.	)

APPEAL FROM THE DISTRICT COURT OF THE
CITY AND COUNTY OF DENVER

BRIEF OF APPELLANT

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STATEMENT OF ISSUES

DID THE TRIAL COURT ERR IN FINDING THAT THE COLORADO PUBLIC UTILITIES COMMISSION HAD AUTHORITY ON FEBRUARY 20, 1968 TO ISSUE A TEMPORARY AUTHORITY TO THE APPELLEE ("RMA") AND THAT SUCH AUTHORITY WAS EXERCISED LAWFULLY AND CONSTITUTIONALLY?

STATEMENT OF CASE

This case concerns the validity of a temporary authority issued by the Commission on February 20, 1968 to the appellee Rocky Mountain Airways, Inc. ("RMA").

> To render scheduled service by airplane for the transportation of passengers and property between Denver and Aspen direct or via Eagle, Colorado . . . pending final determination by the Commission in Application No. 22605-Extension.

where Aspen was furnished no notice or afforded other procedural safeguards provided by statute in the case of the issuance of certificates of public convenience and necessity.

In September, 1970 the appellant Aspen Airways, Inc. ("Aspen") commenced this action against RMA to recover damages alleged to have been suffered by Aspen as a result of RMA's transportation of persons in scheduled passenger service by aircraft between Denver and Aspen pursuant to the temporary authority claimed to have been unlawfully issued by the Commission on February 20, 1968. In its first claim for relief Aspen contends that the temporary authority was not a certificate of public convenience and necessity, was issued without any authority of law and in direct violation of the statutes of the State of Colorado governing the issuance of certificates of public convenience and necessity to utilities including RMA and that RMA, after obtaining the alleged void temporary authority, commenced in the unlawful transportation of persons and property by aircraft in scheduled service in direct competition with Aspen and did so until June 9, 1968. Aspen contends that as a result of such action RMA has caused it damages consisting of loss of traffic, income and profit which it would otherwise have received during the period of RMA's unlawful operations.

Aspen has also requested exemplary damages. In its second claim for relief Aspen contends that RMA was a public utility engaged in transportation for hire and, contrary to law, conducted such business between Eagle and Aspen and Denver and Aspen during the period between February 20, 1968 and June 9, 1968 without obtaining a certificate of public convenience and necessity as required by C.R.S., 1963, §115-5-1 [C.R.S., 1973, §40-5-101], that such business of RMA was in violation of C.R.S., 1963, §115-7-2 [C.R.S., 1973, §40-7-102] and that Aspen is entitled to actual and exemplary damages.

RMA has denied that the temporary authority was granted in violation of Colorado law. In support of this position and other claims, RMA has set forth ten affirmative defenses and two counterclaims. The affirmative defenses are not at issue on this appeal since the trial court did not reach them. By its first counterclaim, RMA claims damages against Aspen and requests an injunction as a result of Aspen's actions in soliciting call and demand air transportation service at Stapleton International Airport, Denver, Colorado in alleged violation of a certificate of public convenience and necessity issued by the Commission authorizing Aspen to conduct intrastate air transportation service on call and demand (charter service) between all points in the State of Colorado with a fixed base of operations only at Aspen, Colorado and airports within a ten mile radius thereof. The second counterclaim is a corollary to the first and alleges that Aspen is engaging in the solicitation and operation of call and demand air transportation service at Stapleton International Airport without a certificate of public convenience and necessity thereby entitling RMA to damages and injunction.

RMA had originally filed a motion to dismiss the Complaint on the grounds that it failed to state a claim against RMA upon which relief could be granted. The trial

court granted the motion to dismiss and Aspen appealed. By its decision dated January 18, 1972, the Colorado Court of Appeals held that Aspen's Complaint stated a claim upon which relief could be granted and that, if the allegations contained therein could be proved, Aspen would be entitled to relief. Aspen Airways, Inc. v. Rocky Mountain Airways, Inc., Colo. App., 494 P.2d 600 (1972). However, the Court did not pass upon the legality of the temporary authority or any other matter of defense asserted by RMA. The judgment of the trial court was reversed and the cause remanded with directions to reinstate the Complaint and to conduct further proceedings not inconsistent with its opinion.

The trial of this case commenced on July 6, 1976 during which the parties stipulated to substantially all of the facts relevant to the trial court's determination. After considering the facts presented and the arguments of counsel, the trial court held that the temporary authority issued on February 20, 1968 by the Commission to RMA was valid and, accordingly, dismissed Aspen's Complaint. The trial court further dismissed RMA's counterclaims upon finding that RMA had not exhausted its administrative remedies. Aspen appealed the trial court's judgment with respect to its Complaint and RMA appealed the trial court's judgment with respect to its counterclaims.

*STATEMENT OF FACTS

*The parties tried this case under an agreed statement of facts subject to two qualifications. First, the parties reserved the right to object to the truth of facts in which case the facts objected to were to be the subject of testimony at trial. Second, the parties reserved the right to object to true facts on the grounds of relevancy and competency. During the trial, these objections were made by both Aspen and RMA. However, Aspen was never afforded the opportunity of establishing facts objected to on the basis of truth, though such facts are probably not relevant to this appeal. Aspen submitted its Proposed Findings of Fact and Conclusions of Law, Paragraphs 4 through 30 of which represented the facts upon which Aspen relied (f.81-150). RMA objected to facts set forth at Paragraph 12, footnote 2 on page 15,

"4. In May of 1967, RMA applied to the Commission for an extension of its certificate of public convenience and necessity which authorized RMA to operate scheduled passenger service between Denver and Eagle, Colorado. (Application No. 22605-Extension.) As amended, the application requested authority to extend its scheduled service to Aspen so that it could operate scheduled flights between Denver and Aspen, Colorado with an intermediate stop at Eagle. The application was opposed by Aspen, which held certificates of public convenience and necessity issued by the Commission and the Civil Aeronautics Board ("CAB") authorizing it to operate scheduled flights between Denver and Aspen. (Exhibit 2 and Exhibit 62, ¶1.) A hearing was held before the Commission on August 28, 1967 and September 12, 13 and 14, 1967 in which Aspen appeared in opposition to the application. The Commission took the matter under advisement on September 14, 1967. (Exhibit 62, ¶2 and Exhibit E attached thereto.) The Commission's decision on the matter was not issued until May 9, 1968. (f.81-82)

"5. On February 16, 1968, while a decision on RMA's application for extension was still pending, RMA, through its attorney's letter application of February 16, 1968 to the Commission, petitioned the Commission "for immediate

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Paragraphs 13, 14, 18 and 30. (f.496) RMA submitted its "Proposed Agreed Statement of Facts," paragraphs 4 through 28 of which represented the facts upon which it relied. (f.323-367) Aspen objected to facts set forth at paragraphs 14, 15, 18 and 27. (f.554-555, 581) The Statement of Facts presented here is taken substantially verbatim from Aspen's Proposed Findings of Fact and Conclusions of Law. The findings of each Aspen and RMA as set forth in the foregoing instruments were supported by reference to exhibits jointly admitted into evidence by the parties. At the time the foregoing instruments were prepared, some of the exhibits were affidavits and other matters which had not been incorporated into the exhibit file. Consequently, the factual statements set forth herein have been modified slightly by deleting references to certain documents and substituting in lieu thereof references to the exhibit number assigned to such document in the exhibit file. For example a reference to "Galligan's Affidavit dated May 21, 1968, ¶2" has been changed to "Exhibit E, ¶2, of Exhibit 62" since such affidavit can be found at such location. Further, Aspen has in some cases reflected citations by reference to both the 1963 and 1973 statutes.

temporary authority to transport passengers on schedule between Denver and Aspen, Colorado on a non-stop basis during the present temporary emergency of transportation between these two point, and thereafter on a one-stop basis in accordance with Application No. 22605-Extension, until such time as decision on said application is rendered by this Commission" for the alleged reason that Aspen's service had become so inadequate that an emergency situation existed and because RMA was informed as of February 16, 1968 that Aspen was "not operating at all because of a strike." (Exhibit E of Exhibit 62 and Exhibit 16.) The application for temporary authority, among other things, alleged that there was a greater number of persons travelling between Denver and Aspen during the current ski season than ever before due to increased accommodations at Aspen, that the 1968 ski season was entering its most active phase and present facilities for scheduled air service between Denver and Aspen were entirely inadequate to handle the traffic, that many requests had been made to RMA to apply for immediate temporary authority to provide scheduled service between Aspen and Denver to help relieve the critical shortage of air transportation between the two points, that such critical shortage made transportation between the two points more difficult during the period of Aspen's greatest activity and Aspen's greatest contribution to the economy of the state and that the matter had become one of extreme emergency to the City of Aspen not only because of the matters set forth in the letter supporting the application for temporary authority but also for the reason that RMA was informed as of the date of its application that Aspen was not operating at all because of a strike. The letter application for temporary authority was supported by various letters including one dated February 9, 1968 from the Aspen Chamber and Visitors Bureau, one dated February 14, 1968 from the City of Aspen, one dated February 6, 1968 from Aspen Skiing

Corporation, one dated February 13, 1968 from the Aspen Lodging Association and various other letters, all of which were intended to show that existing service was inadequate. There was also filed a resolution of the Pitkin County Commissioners adopted on February 5, 1968 urging the Commission to act promptly in the granting of authority for emergency service if necessary to meet an acute air transportation problem in the Aspen vicinity. (See Exhibit 16.) (f.83-86)

"6. On February 16, 1968 when the application for temporary authority was filed by RMA, there was not then in effect in Colorado a statute providing for the issuance by the Commission of a temporary authority under circumstances such as are before us. Subsequently, by Chapter 267 of the Session Laws of 1969, the Colorado legislature adopted various statutes for the purpose of modifying and clarifying certain aspects of Commission jurisdiction. These amendments to the Public Utilities Law were not effective in February, 1968. Prior to the enactment of the changes in 1969, one of which provided a procedure for issuing temporary authority, there was an unwritten "practice and procedure at the Commission pursuant to which it did assume and exercise jurisdiction and authority to grant temporary authority providing particular regulated service upon ex parte application where it was made to appear to the Commission that the public interest required the immediate institution of service prior to the time that such service could be authorized under normal procedures." (Exhibit 65, ¶6.) The existence and nature of the "practice and procedure" is more fully amplified by the deposition testimony of Edwin R. Lundborg and Henry Zarlengo, both commissioners of the Commission, who were in 1968, and before and have since that time been, commissioners.[1] In circumstances where formal

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[1]The testimony by the Commissioners on the existence and nature of the "practice and procedure" is set forth below. (See also Exhibits 73 and 74 for the complete depositions.) (This note is continued on next page.)

proceedings are initiated, the Commission is responsible for the giving of notice (C.R.S., 1963, §115-6-2, C.R.S., 1973, §40-6-102.) (f.87-89)

As to Commissioner Zarlengo's Testimony:

Q. So my first question is, Commissioner, in February 1968 was there any rule before the Commission or of the Commission relating to the granting of temporary authorities?

A. If by rule you mean a rule formally adopted by the Commission, I don't recollect that there was ever any such rule.

Q. Well, is there a practice or procedure relating to temporary authorities which was not the subject matter of the formal rule?

A. There was a procedure that was generally followed with regard to temporary authorities.

Q. Was this procedure in writing?

A. Not that I know of.

Q. It was more or less a practice of the Commission in connection with these matters?

A. It was just a practice that, to the best of my recollection, it just evolved and was followed without any objection that I can recollect from anyone that was involved and had an interest in it.

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Q. Mr. Zarlengo, directing your attention to the specific practice or procedure which would have been followed then had a carrier wanted a temporary certificate of public convenience and necessity, do you recall what the practice relating to aircraft was?

A. Well, if someone made an application for an authority, he [a Commission employee] would look into it and then he would come to the Commission, usually in an oral report, and make a report that he had looked into it and examined what he thought was important, and then he would express his opinion as to whether or not he thought that a temporary authority should be granted.

Q. This informal oral report, it could be made to the Commission as a whole or just to each separate office of the Commission; is this right?

A. Well, I think for the most time all three commissioners participated either jointly or severally in considering whether or not he should --

Q. Was he authorized to sign a temporary authority if the commissioners approved of it?

A. As far as I can recollect, there was no written instruction to him or authority granted to him that he could grant an authority, a temporary authority.

Q. Who would have granted it under the temporary practice and procedure?

"7. The filing of RMA's application dated February 16, 1968 was prompted by a Teamster's strike of Aspen which

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A. Well, he used to write a letter, I think, in the form of a letter, and say you are granted this temporary authority.

Q. When you said there was no formal written authority, it was just part of the practice and procedure that he would write a letter?

A. That's right.

Q. After checking with the commissioners, if it appeared to be all right, he'd write a letter and that was that?

A. That's right.

Q. Was there much attention paid by the commissioners as to the details of the temporary authority, such as, for example, the term of the temporary authority?

A. Well, as far as I can recollect, the temporary authority usually conformed to the request made by the applicant.

Q. That was the practice if there was a practice?

A. That was the practice.

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Q. Now, Commissioner, was there any portion of the practice and procedure relating to giving notice when an application for temporary authority was filed?

A. I don't recall there was any practice followed with regard to notice.

Q. It was an exparte proceeding as far as --

A. That's my recollection. What Mr. Wilson [a Commission employee in charge of aircraft matters] did, I don't know, with regard to notice. He might have contacted somebody who might be opposed to it, but I don't recollect.

Q. Did he have a duty to do that?

A. Well, I don't know what you mean by a duty. I assumed that he would, in making his investigation, would talk to all interested parties to get the facts instead of trying to get them from a one-sided source.

Q. It would have been your --

A. I do -- excuse me. I do remember that there were times when I asked him if there was any protest or any strenuous objection and what basis was the objection, et cetera. I did at times ask him those questions.

Q. Why were your interested in that?

A. Well, I was interested in it because as a commissioner, I thought it was my duty to see that an employee did a good job.

Q. Would it also be fair to say that you were interested in seeing that this informal practice and procedure was equitable in its application to interested parties?

caused its DC-3 flights to be interrupted between February 16, 1968 and March 14, 1968. (Exhibit 62, ¶9 and Exhibit

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A. That's correct.

Q. One of the problems that we have in this case, Commissioner, from our point of view, was that there had been a proceeding in September 1967 lasting several days on an application filed by Rocky Mountain Airways to fly to Aspen one stop via Eagle. And in February 1968 this particular application, the hearings having been concluded, was under advisement by the Commission, hadn't ruled on it. And the application was filed during this particular period of time and there's no evidence that Aspen Airways was ever contacted about the application or given any notice or opportunity to make a statement, and this is one of the bases of the litigation.

Do you have any comment about that set of facts?

MR WHAM: I will object to that question simply setting forth a set of facts and asking for a comment.

Q. (By Mr. Cogswell) Let me ask you this way, Commissioner: In your opinion, as you understood the practice and procedure then in effect, do you feel that the practice and procedure would have required the Commission, acting through its subordinates, to have contacted Aspen Airways?

MR. WHAM: I want to object again unless -- well, insofar as the witness had indicated that he has no recollection of this particular situation.

MR. COGSWELL: Right. I'm asking him for an opinion based upon an expert who had knowledge of the practice and procedure and basically giving him an assumed set of facts, where there had been an adversary proceeding between two parties, where the proceeding had not been concluded, where one of the parties filed an application for temporary authority relating to the subject matter of the prior proceeding because the application was for direct no-stop authority between Denver and Aspen, and at that time there hadn't even been approved one-stop authority; whether or not, in your opinion, the practice and procedures of the Commission then in effect would have required that Aspen receive notice of that temporary application.

MR. WHAM: Well, I'll make a further objection that I think as a hypothetical question, this does not contain all of the elements, which couldn't be addressed, I don't think, unless the Commissioner, or the witness, were asked to familiarize himself with the application and also in some way recall what the recommendation to Mr. Wilson was.

MR. COGSWELL: Well, your objection is noted.

Q. (By Mr. Cogswell) Commissioner, you can go ahead and answer the question.

A. Well, I have been trying to recollect my posture from a legal standpoint concerning what I think is the issue here, and to the best of my recollection, at that time I did not feel on a legal basis that it was necessary to give any notice for a temporary authority of this kind, . . . I must

63, ¶5.) RMA had received a number of complaints and inquiries from lodge owners and others in Aspen beginning

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have felt -- and this is my recollection -- that the Commission could , where they had reasonable facts before it, the Commission could issue a temporary authority.

Q. Without notice?

A. Without notice. Because to give notice might prolong and delay taking care of the public's needs. If the Commission had to go through a procedure of notice, it would largely defeat the very purpose of writing a temporary authority, which in my mind contemplated some kind of a need, an emergency need, on the part of the public.

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Q. Now, Commissioner, you indicated that it was your opinion as to the practice and procedure that the authority granted would be coextensive with the request made.

A. That was generally the case, yes.

Q. If a particular authority granted exceed the request made, this would be an irregularity in the procedure?

A. Well, if we assume that -- no, I can't answer that. I can't answer that.

As to Commissioner Lundborg's Testimony:

Q. Now, did the Commission hold any session before this document, Deposition Exhibit C [the temporary authority], was authorized for release by Ray Wilson [Commission employee]?

A. No, nor was one required.

Q. And when you say one was not, implied that one was not required, on what authority is that statement made?

A. The review of the statutes and rules of the Commission at that time.

Q. And what authority did the Commission have to issue that particular temporary authority which is Deposition Exhibit C?

A. The authority of long-standing practice, at least 10, 15, 20 years.

Q. Now, referring to Paragraph 6 of your Affidavit, Commissioner, is that the long-standing practice that you're referring to? [Paragraph 6 which is not set forth in the deposition, states:

> "6. Prior to the adoption of Chapter 267, Session Laws of 1969, the Public Utilities Commission did in fact, during all of the years that affiant has been familiar with its practice and procedure, assume and exercise the jurisdiction and authority to grant temporary authority to provide a particular regulated service, upon ex parte application, where it was made to appear to the Commission that the public interest

about the first of the year in 1968, claiming that RMA's service was needed and that Aspen's service was inadequate,

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required the immediate institution of service prior to the time that such service could be authorized under normal procedures."]

A. It is.

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Q. (By Mr. Cogswell) Let's back up a little bit, Commissioner. I'm not trying to put you in a hot spot, believe me. I just want to understand what this practice and procedure is. First of all, Paragraph 6 is a true statement of the practice and procedure relating to the Commission to issue temporary authority on February 20, 1968; is that true?

A. Right.

Q. Now, did the Commission comply with this practice and procedure when it issued Deposition Exhibit C on February 20, 1968?

A. What practice and procedure are you trying to allude to, are you alluding to?

Q. The one that's described in Paragraph 6 of your affidavit.

A. Practice and procedure at that time the request made for T.A., the staff would investigate it, who in this instance was Mr. Wilson, and Mr. Wilson came into the Commission and made certain statements and it was issued on that basis.

Q. So he made statements to the Commission as a body, Mr. Wilson?

A. Individually or collectively in 1968, I don't recall.

Q. But the practice would be at least to sound out each Commissioner informally or formally on the matter; is that correct?

A. I would assume so.

Q. But you don't recall because of the time lapse involved whether or not this, how it occurred back then?

A. I know it was issued.

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Q. Do you know when the practice and procedure relating to the temporary authority was first adopted?

MR. ARCHIBOLD: If you don't recall, just say you don't remember.

A. A good many year before I came aboard this Commission, which was in 1957.

Q. (By Mr. Cogswell) In other words, when you came

and asking when the Commission's decision would be forthcoming and if anything could be done to speed it up. RMA had made

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aboard the Commission, that practice and procedure was then a practice and procedure followed by the Commission?

A. Recognized by the Commission and its staff and the transportation utilities operating under our jurisdiction.

Q. Recognized by whom, sir?

A. Transportation companies regulated by this Commission, be it an air carrier or motor carrier.

Q. And do you make that statement based upon the fact that temporary authorities were applied for from time to time by these particular companies?

A. They were.

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Q. What I'm interested in, Commissioner, is why would the Commission not give notice to Aspen Airways, Inc. where the subject matter of the application for temporary authority involved the very subject matter of a proceeding that was under decision at that very time by the Commission in a hotly contested matter.

A. Is this the one where there is the strike?

MR. ARCHIBOLD: Yes, this is the temporary authority that was granted because of the strike.

A. Okay, because Aspen Airways wasn't even running, due to a strike, if I recall. Had no facilities to operate and to protect the public. That's why we issued the T.A. or to insure service to the public.

Q. (By Mr. Cogswell) Well, under your practice and procedure then then of issuing a T.A. without notice, would that T.A. be limited to the emergency that justified the issuance of the T.A.?

A. Issue as stated on Exhibit C for a period of 90 days, what was it, pending the final determination by the Commission and Application No. 22605 in extension.

Q. Why would the Commission create a temporary T.A. unrelated to the temporary emergency that gave rise to the application for the T.A.?

A. At the time we issued, how long did we know that the strike was going to continue?

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Q. (By Mr. Cogswell) Let me ask this: Under the practice and procedure which you have alluded to, no notice was required to be given to any adverse parties; is this correct?

A. You're alluding specifically to temporary authority?

Q. Right.

an investigation of the complaints and inquiries in late January and early February to determine whether the facts

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A. No notice was required to be given.

Q. That's under your practice and procedure, no notice is ever required to be given at that time if there is an application for a temporary authority?

A. That's right, which practicing attorneys up here were aware of, transportation utilities were aware of, namely Aspen or Vail.

Q. Now, and I don't want us to get into the province of reasoning of the Commission, but is it also part of the practice and procedure to limit the temporary authority issued to the amount of temporary authority requested?

A. As to what happened back in 1968, I don't recall. If there is a specific, a set limitation or not, I don't recall.

Q. But what was the practice and procedure?

A. To issue temporary authorities wherein the opinion discretion of the Commission service to the public was needed and required.

Q. And would the practice and procedure have limited the temporary authority to what was actually requested?

A. Could be, could not be.

Q. In some cases the Commissioners' view is that the Commission might grant more temporary authority than was applied for if it felt the public interest deserved it?

A. I would think that would be right.

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Q. I note that the application for temporary authority in this case, Deposition Exhibit B, states that it was for during the present temporary emergency of transportation between the two points, Denver and Aspen; and the Commissioner in his Affidavit, Paragraph 13, states that the temporary authority was for authority to transport passengers during this present temporary emergency. Yet the actual temporary authority, Deposition Exhibit C, is for a longer period of time or possibly a shorter period of time, but it isn't related to any temporary emergency, and that's what I'm trying to get at.

A. I can't recall what the rationale of the Commission would be at that time. I don't recall.

Q. Was it the practice and procedure of the Commission in connection with temporary authorities to mail a copy of it to any adverse party, even though no advance notice was given?

A. I don't recall.

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justified the filing of an application for temporary authority but the filing of the application was actually precipitated by the suspension of Aspen's scheduled service on February 16, in the middle of the ski season. (f.90)

"8. No notice of RMA's application for temporary authority dated February 16, 1968 was given to Aspen. In connection with the issuance of the temporary authority, no opportunity to be heard, to examine or cross-examine witnesses or to introduce evidence was afforded Aspen or other interested parties, no findings of fact or conclusions were made by the Commission and no copy of the findings of fact or conclusions or the temporary authority was served on Aspen. (Exhibit E, ¶¶3 and 4 of Exhibit 62.) (f.90-103)

"9. RMA and the Commission knew of Aspen's interest in the application which was the subject matter of hearings concluded on September 14, 1967 and during which Aspen opposed RMA's application for extension of an existing certificate (authorizing service between Denver and Eagle) to authorize service between Eagle and Aspen and Denver and Aspen via Eagle. (Exhibit 62, ¶10.) (f.103-112)

"10. The Commission under signature of Ray Wilson, Supervisor, Air Carriers, issued temporary authority to RMA

Q. Oh, Deposition Exhibit C, right. That was the temporary authority which was issued. But my question is whether the practice and procedure that was the basis for the Commission being able to do this, was that ever the subject of any written document like other rules of the Commission?

A. To the best of my knowledge, no.

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Q. And it was in fact a practice and a procedure in a verbal business type sense?

A. Right, After study and investigation.

Q. Does the Commissioner acknowledge that on February 20, 1968, there was no statutory authority for the Commission to issue temporary authority?

A. There was no statutory authority, except that it was probably assumed and presumed and acknowledged by all transportation utilities, attorneys practicing before the Commission, that the Commission had the general power to grant such temporary authority.

on February 20, 1968 without holding a hearing or without giving notice to Aspen. (Exhibit E, ¶¶3 and 4 of Exhibit 62.) The temporary authority in pertinent part was:

> To render scheduled service by airplane for the transportation of passengers and property between Denver and Aspen direct or via Eagle, Colorado . . . pending final determination by the Commission in Application No. 22605-Extension. (Exhibit 19.)

The files of the Commission contain no record showing that any notice was issued of the application for temporary authority or that any hearing was held thereon or that there was adherence to any of the other procedures described in Paragraph 8 above. (Exhibit E, ¶¶3 and 4 of Exhibit 62 and Exhibit 62, ¶¶11 and 12 and Exhibit E attached thereto being an Affidavit of Harry A. Galligan, Jr., custodian of the records of the Commission.) The duration of the temporary authority, as issued by the Commission, was not related to the temporary emergency referred to in the letter of February 16, 1968. (f.113)

"11. After obtaining the temporary authority, RMA did on February 29, 1968 commence and thereafter engage in the transportation of persons and property in scheduled service by aircraft between Denver and Aspen until June 9, 1968, when the temporary authority expired by reason of the Commission's final decision in Application No. 22605-Extension."

12. ** (f.114-120)

13. ** (f.120-126)

14. ** (f.127-131)

"15. On February 29, 1968, being thirteen days after the filing of its application for temporary authority and

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**These paragraphs are deleted because what happened after the issuance of the temporary authority could not make valid that which was invalid when done. (See f.619) Suffice it to say that no hearing of any kind was held after February 20, 1968 in the nature of a "post hearing" sometimes following summary action by administrative agencies. What happened after February 20, 1968 may be relevant to affirmative defenses but the trial court elected not to consider these in view of its holding and they are not on appeal.

nine days after the issuance of the temporary authority, RMA commenced operations between Denver and Aspen and Aspen and Denver. (Exhibit 30.) (f.131)

"16. On May 9, 1968 the Commission released its opinion approving Application No. 22605-Extension by RMA for one-stop service between Denver and Aspen via Eagle effective as of May 30, 1968. Subsequently, Aspen filed a petition for rehearing with respect to that decision which had the effect of extending the effective date from May 9, 1968 to June 9, 1968. C.R.S., 1963, §115-6-114 [C.R.S., 1973, §40-6-114]. The temporary authority granted to RMA on February 20, 1968 was terminated as of the effective date of that order which was June 9, 1968. (f.132)

"17. Aspen's petition for rehearing was denied. The petition for rehearing was directed to RMA's initial application and the Commission's decision and did not complain of the temporary authority issued ex parte on February 20, 1968. The District Court, reviewing on a writ of certiorari, upheld the decision of the Commission. The judgment of the District Court was affirmed on appeal to the Supreme Court of the State of Colorado. (Exhibit 62, ¶3.) Aspen Airways v. Public Utilities Commission, 170 Colo. 369, 461 P.2d 215 (1969). The validity of the temporary authority, and the Commission's action in response to Mr. Mueller's letter [referred to in deleted Paragraph 12. See also Exhibits 24 and 25] requesting termination or revocation of the temporary authority were never challenged before the Commission by Aspen." (f.133)

18. *** (f.134-136)

"19. Between February 20, 1968 and June 9, 1968, Aspen was engaged in the transportation of persons and property in

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***This paragraph has been eliminated since it refers to evidence relating to damages suffered by Aspen as a result of the wrongful issuance of temporary authority. Aspen claims actual damages of $49,571.15 plus interest and any other damages that might be appropriate.

scheduled service by aircraft between Denver and Aspen, Colorado, under certificates of public convenience and necessity issued by the Commission and the CAB, and such certificates were during such times in full force and effect. (Exhibit 62, ¶5 and Exhibits A and B attached thereto and Exhibit 2.) (f.136)

"20. Between February 20, 1968 and June 9, 1968, RMA was engaged in the transportation of persons and property in scheduled service by aircraft between Denver and Eagle, Colorado under a certificate of public convenience and necessity issued by the Commission under Decision No. 69613. (Exhibit E, ¶6 of Exhibit 62 and Exhibit 35.) (f.137)

"21. Between February 20, 1968 and June 9, 1968, RMA's certificate of public convenience and necessity issued by the Commission did not authorize transportation by RMA of passengers in scheduled service by aircraft between Eagle and Aspen or between Denver and Aspen, Colorado. (Exhibit E, ¶7 of Exhibit 62 and Exhibit 35.) (f.137-138)

"22. On June 27, 1968, RMA filed Application No. 23270 with the Commission requesting authority to conduct scheduled air carrier operations between Denver and Aspen non-stop, and between Denver and Aspen, with an intermediate stop at Leadville, Colorado. Aspen appeared and protested said application. Hearings were held resulting in the Commission's Decision No. 72542, dated February 11, 1969, granting the application. That decision was ultimately affirmed by the District Court and no appeal therefrom was thereafter taken." (Exhibit 65, ¶18.) (f.138-139)

Part III of Aspen's Proposed Findings of Fact and Conclusions of Law sets forth facts relevant to RMA's counterclaim. These facts are not fully set forth herein since they are not considered fully relevant in view of the trial court's finding that RMA did not exhaust its administrative remedies.

The basis of RMA's claims is that Aspen's certificate

affirmative defenses are without merit is not an issue on this appeal.

A summary of Aspen's argument follows:

I. THE ALLEGED TEMPORARY AUTHORITY GRANTED TO RMA ON FEBRUARY 20, 1968 BY THE COMMISSION EXCEEDED THE COMMISSION'S JURISDICTION AND WAS VOID WHEN GRANTED.

A. RMA was on February 20, 1968 Subject to the Public Utilities Law and the Legality of its Temporary Authority is Determined by Compliance with the Provisions Thereof.

B. The Commission had no Authority on February 20, 1968 to Issue Temporary Authority to RMA Without Notice, a Hearing and Compliance with Other Procedural Safeguards Required by Statute and the Colorado and United States Constitutions.

1. The Commission had no express statutory authority on February 20, 1968 to grant the temporary authority without notice, a hearing and in compliance with other procedural safeguards.

2. The Commission had no constitutional authority on February 20, 1968 to grant the temporary authority without notice, a hearing and in compliance with other procedural safeguards.

3. The Commission had no implied authority on February 20, 1968 to grant the temporary authority without notice, a hearing and in compliance with other procedural safeguards.

C. Authority Granted by the Commission Without Notice, a Hearing and in Compliance with Other Procedural Safeguards as Evidenced by the Commission's own Record and Without Statutory, Constitutional or Implied Authority is Void and may be Collaterally Attacked at any time.

ARGUMENT

I. THE ALLEGED TEMPORARY AUTHORITY GRANTED TO RMA ON FEBRUARY 20, 1968 BY THE COMMISSION EXCEEDED THE COMMISSION'S JURISDICTION AND WAS VOID WHEN GRANTED.

A. RMA was on February 20, 1968 Subject to the Public Utilities Law and the Legality of its Temporary Authority is Determined by Compliance with the Provisions Thereof.

The Public Utilities Law in effect between February 20, 1968 and June 9, 1968 required all public utilities to obtain a certificate of public convenience and necessity from the Commission as a condition for extending their facilities, plants or systems. See generally C.R.S., 1963,

§115-1-1 et seq. and particularly C.R.S., 1963, §115-5-1(1).**** The latter section states:

> No public utility shall begin the construction of a new facility, plant, or system or of any extension of its facility, plant or system, without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction.

Both Aspen and RMA are common carriers and public utilities and clearly subject to the Public Utilities Law. C.R.S., 1963, §115-1-3(1) and C.R.S., 1963, §115-1-2(e). While the term "aircraft" was not included in the definition of a "common carrier" until 1969, a fair interpretation of the statute (C.R.S., 1963, §115-1-2(e)) and the practice before 1969 shows that aircraft was included therein.

The Commission's power to issue a certificate of public convenience and necessity is conditioned on a "hearing." C.R.S., 1963, §115-5-3. That section states in pertinent part as follows:

> The commission shall have power to issue said certificate after hearing, as prayed for, or to refuse to issue the same, or to issue it for the construction of a portion only of the contemplated facility, line, plant or system, or extension thereof, or for the partial exercise only of said right or privilege, and may attach to the exercise of the rights granted by such certificate such terms and conditions as in its judgment the public convenience and necessity may require. (Emphasis supplied.)

The scope of the "hearing" referred to is defined in C.R.S., 1963, §115-6-1 et seq. Such sections provide for notice to interested persons, for opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence and for service of a copy of the Commission's findings of fact and conclusions upon interested parties. The pertinent sections follow:

> Copies of all applications, petitions, and orders instituting investigations or inquiries shall be served upon all persons, firms, or corporation, who in the opinion of the commission, are interested in, or who would be affected by, the granting or denial of any such application, petition or other proceeding. C.R.S., 1963, §115-6-8(2).

****There is attached hereto a conversion table for translating 1963 statutes into 1973 statutes.

> At the time fixed for any hearing before the commission, any commissioner, or an examiner or, at the time to which the same may have been continued, the applicant, petitioner, complainant, person, firm, or corporation as the Commission may allow to intervene, and such persons, firms, or corporations as will be interested in or affected by any order that may be made by the commission in such proceedings, shall be entitled to be heard, examine and cross-examine witnesses, and introduce evidence. (Emphasis supplied.) C.R.S., 1963, §115-6-9(1).
>
> After the conclusion of any hearing . . . the commission shall make and file its order containing its decision. A copy of such order, certified under the seal of the commission, shall be served upon all parties in interest or his or its attorneys. C.R.S., 1963, §115-6-9(3).

It is undisputed that the foregoing requirements for a hearing, notice and other process conform to the minimum requirements of the due process provisions of the Colorado and United States Constitutions. During the time involved herein, there were no exceptions to the above requirements as applied to aircraft carriers and no certificates of public convenience and necessity were expressly authorized by statute to be issued summarily without a hearing.

The trial court ruled that a "temporary authority" was not a temporary certificate because no amendments were made to C.R.S., 1963 §§115-5-1 and 3 [C.R.S., 1973, §§40-5-101 and 103] when the 1969 temporary authority provision [C.R.S., 1963, §115-6-20 and C.R.S., 1973, §40-6-120] was added. This reasoning has not made sense to Aspen which contends that a temporary authority in 1968 was equivalent to a certificate for a limited duration.

B. The Commission had no Authority on February 20, 1968 to Issue Temporary Authority to RMA Without Notice, a Hearing and Compliance with Other Procedural Safeguards Required by Statute and the Colorado and United States Constitutions.

1. The Commission had no express statutory authority on February 20, 1968 to grant the temporary authority without notice, a hearing and in compliance with other procedural safeguards.

The general rule is that the powers of an administrative agency are restricted to those conferred by the statutes under which it operates. At 73 CJS Public Administrative Bodies and Procedures §59 it is stated as follows:

> Administrative officers and agencies must pursue their authority and act within the scope of their powers. Their exercise of authority must be authorized by, and be in accordance with the requirements of, controlling provisions and principles of law. Such officers and agencies are bound by the terms of the statutes or regulations granting them their powers, and are required to act in accordance therewith and to keep within the limits of the powers and authority granted them. They are without power to act contrary to the provisions of the law with a clear legislative intentment, or to exceed the authority conferred on them by statute. They have no power to authorize or acquiesce in the doing of a thing unauthorized or forbidden by statute, and they may not violate a statutory mandate, even though acting within the general jurisdiction conferred on them by statute.
>
> Neither the theoretical nor the practical effect or a proper adherence to the law should be a concern to administrative officers or agencies. They must follow statutory established standards and not their ideas of what would be charitable or equitable, and they may not ignore or transgress the statutory limitations on their power, even to accomplish what they may deem to be laudable ends. Their actions are valid only if they are within the limits of the powers granted them by the legislature; acts or orders which do not come clearly within the powers granted or which fall beyond the purview of the statute granting the agency or body its powers are not merely erroneous, but are void. (Emphasis supplied.)

The above rule is followed in Colorado. In Public Utilities Commission v. Colorado Motorway, 165 Colo. 1, 437 P.2d 44 (1968), the Colorado Supreme Court was confronted with the lawfulness of a Commission decision interpreting the permit of Colorado Motorway. The decision was issued in the course of a proceeding instituted on the Commission's own motion for the purpose of adopting rules and regulations relating to sight seeing and charter service operations. Colorado Motorway was not required to attend the Commission hearing nor was it given any express notice that its permit would even be considered at the hearing. The District Court reversed the Commission's decision which reversal was affirmed by the Colorado Supreme Court. The Supreme Court said of the jurisdiction of the Commission:

> There is no question, as an abstract proposition of law, that the Commission has broad constitutional and statutory authority. However, the breadth of that authority is to be tested by the statutes themselves and not by the unbridled whim of the Commission. The Commission is a creature of statute. Both the power and scope of its authority and its procedures are necessarily controlled by the Act upon which it relies. Industrial Commission v. Plains Utility Company, 127

Colo. 506, 259 P.2d 282; Snell v. Public Utilities Commission, 108 Colo. 162, 114 P.2d 563.

Since the Commission had not complied with the statute requiring notice and hearing, the Supreme Court concluded that the Commission had exceeded its authority and denied Colorado Motorway due process of law. The Court said, referring to Snell v. Public Utilities Commission, supra, as follows:

> Likewise, in the case before us, the provisions of C.R.S., '53, §115-11-18, [requiring notice and hearing] should have been strictly adhered to. In not doing so, the Commission exceeded its authority and it denied procedural 'due process' to Motorway in violation of both the federal and state constitutions.
>
> . . . it [the Commission] must comply with the statutory procedural requirements which would legally justify the end sought to be accomplished, issue a notice, hold a hearing at which the respondent is given an opportunity to defend itself, and finally, enter its decision in accordance with the evidence. Anything less will not satisfy the statute nor that quality of fairness required by 'procedural due process.'

In Snell v. Public Utilities Commission, 108 Colo. 162, 114 P.2d 563 (1941), the plaintiff had applied to the Commission for a certificate of public convenience and necessity to operate a motor vehicle carrier for the transporation of passengers for hire in sight seeing service between certain points. A hearing was held on the application. Competing certificate holders having authority in a portion of the territory involved intervened and protested. The Commission granted the plaintiff a certificate and the interveners filed a petition for rehearing. After oral argument on such petition, the Commission denied the petition for rehearing and at the same time amended its decision granting the plaintiff a certificate. The plaintiff sought review on the grounds that the Commission had no authority to amend its decision without a rehearing. The Court, interpreting the then applicable statute (similar to C.R.S., 1963, §115-6-14) held that the Commission could not change its decision until "after such rehearing and as a result thereof." The Court said:

> It is elementary that a public utility commission derives its authority wholly from constitutional or statutory provisions, and possesses only such powers as are thereby conferred. 51 C.J., pp. 36, 37, §78 [counterpart of 73 C.J.S. §59 cited above]. Thus it is certain, under the facts alleged here, that the commission was without authority to amend or modify the original order, as was essayed, as a part of its action in passing upon the application for the rehearing sought . . . Since the petition alleged facts disclosing deviation by the commission from the regular pursuit of its authority in the foregoing respects, which, if true, in fact, legally precluded the second order from having the original effect therein proclaimed, a motion to quash the writ should not have been sustained.

The Court held that the allegations of the petition, if true, established "the total ineffectuality of the second order."

On February 20, 1968 the Public Utilties Law of Colorado did not provide for or authorize the Commission to issue a temporary certificate of public convenience and necessity without notice, a hearing and compliance with other procedural safeguards. At that time the only provision authorizing the Commission to issue a temporary certificate was that contained in C.R.S., 1963, §115-9-4 relating to highway motor vehicle carriers. That Section stated:

> The commission may, at its discretion, issue a temporary certificate declaring that the present or future public convenience and necessity require, or will require, the temporary or seasonal operation of a motor vehicle for the purpose of transporting unprocessed agricultural produce to market or place of storage during a period to be determined by the commission, but such period shall not be longer than ninety consecutive days in any one calendar year.

Even assuming an aircraft carrier were construed to be a "motor vehicle carrier" within the meaning of C.R.S., 1963, §115-9-1 et seq., RMA's application for temporary authority was not predicated upon the need to transport unprocessed agricultural produce and in any case exceeded the 90 days limitation. Consequently the provision for temporary certificates referred to above has no application to this case.

Apart from the requirement that the Commission must afford notice and hearing as provided by law to protect procedural rights of interested persons to any proceeding, a

hearing is required to further in an orderly and judicial manner the basic concept of regulated monopoly which exists in the State of Colorado. That policy was clearly stated in Ephraim Freightways, Inc. v. Public Utilities Commission, 151 Colo. 596, 380 P.2d 228 (1963) as follows:

> This Court has consistently held that the policy of the State of Colorado and the whole theory upon which the structure of Public Utility Commission power is based is that of regulated monopoly [citations]. In accordance with this theory of regulated monopoly, we have held that a common carrier serving a particular area is entitled to protection against competition so long as the offered service is adequate to satisfy the needs of the area, and no finding of public convenience and necessity for common carrier service is justified unless present service offered in the area is inadequate. [Citations.]
>
> The question involved in the granting or denial of a Certificate of Public Convenience in a particular area is not whether the extent of business in a particular area is sufficient to warrant more than one certified carrier, Donahue v. Public Utilities Commission, 145 Colo. 499, 359 P.2d 1024, but rather whether public convenience and necessity demand the service of an additional transport facility . . .

RMA, relying on the above policy, has previously been successful in overturning decisions of the Commission issuing certificates to those in competition with RMA where the necessary findings were not made. See Rocky Mountain Airways, Inc. v. Public Utilities Commission, 509 P.2d 804 (Colo. 1973).

Since the Commission in issuing the temporary authority afforded no notice to Aspen, afforded no hearing to Aspen at which Aspen could be heard, and afforded Aspen no opportunity to examine and cross-examine witnesses and introduce evidence from which the Commission could fairly make findings essential to a justified departure from the policy of regulated monopoly in the State of Colorado, the temporary authority was not issued in the regular pursuit of the Commission's authority and is void unless justified on the basis of constitutional or implied authority. As late as February 3, 1975, the Denver District Court voided temporary authority issued by the Commission in violation of the procedural requirements of the law. See Rocky Mountain Airways, Inc.

v. PUC, Civil Action No. C-50961 in the Denver District Court, a copy of which is attached hereto.

2. The Commission had no constitutional authority on February 20, 1968 to grant the temporary authority without notice, a hearing and in compliance with other procedural safeguards.

Article XXV of the Colorado Constitution states:

> In addition to the powers now vested in the General Assembly of the State of Colorado, all powers to regulate the facilities, service and rates and charges therefor, including facilities and service and rates and charges therefor within home rule cities and home rule towns, of every corporation, individual, or association of individuals, wheresoever situate or operating within the State of Colorado, whether within or without a home rule city or home rule town, as a public utility, as presently or as may hereafter be defined as a public utility by the laws of the State of Colorado, is hereby vested in such agency of the State of Colorado as the General Assembly shall by law designate.
>
> Until such time as the General Assembly may otherwise designate, said authority shall be vested in the Public Utilities Commission of the State of Colorado; provided however, nothing herein shall affect the power of municipalities to exercise reasonable police and licensing powers, nor their power to grant franchises; and provided, further, that nothing herein shall be construed to apply to municipally owned utilities.

It is clear from the above that, in addition to the powers now vested in the General Assembly, "all power" to regulate facilities and services is vested in the Commission until such time as the General Assembly otherwise designates. Since the Commission has made no contrary designation, RMA contends that some of the Commission's power emanates directly from the Colorado Constitution. However, the general rule in Colorado is that the breadth of constitutional authority is tested by the statutes enacted by the General Assembly as stated above and repeated here:

> There is no question, as an abstract proposition of law, that the Commission has broad constitutional and statutory authority. However, the breadth of that authority is to be tested by the statutes themselves and not by the unbridled whim of the Commission. (Emphasis supplied.) PUC v. Colorado Motorway, 165 Colo. 1, 437 P.2d 44 (1968).

Since the statutes of the General Assembly did not in 1968 authorize the Commission to issue temporary authority summarily (except to transport unprocessed agricultural

produce), RMA cannot now argue that the broad grant of constitutional power described above should be so construed. In any event Article XXV was added to the Colorado Constitution on November 2, 1954 for the purpose of granting to the General Assembly the authority to regulate privately owned utilities within home rule cities, which regulation was not theretofore permissible. City and County of Denver v. Public Utilities Commission, 181 Colo. 38, 507 P.2d 871 (1973). In this case it is stated:

> On the basis of the history of decisions in the context of the constitution as it existed prior to the 1954 amendment, we conclude that the purpose of the change was to grant to the General Assembly the authority to regulate privately owned public utilities within home rule cities. Without the grant of such power the regulation of service among the inhabitants of a city was a local matter, and the laws of the state in conflict with the ordinances and charter provisions enacted pursuant to Article XX had no force and effect within the municipality.

Article XXV is not a wholesale grant of authority to the Public Utilities Commission but adds specific authority to regulate privately owned utilities within home rule cities which the Public Utilities Commission theretofor had not had pursuant to either statute or the constitution.

RMA contends that language in Miller Brothers, Inc. v. PUC, 185 Colo. 414, 525 P.2d 443 (1974), to the effect that Article XXV "has granted to the commission authority to issue certificates of public convenience and necessity . . . until the General Assembly restricts it" supports its position that the Commission had authority to issue the temporary authority (without a hearing and other normal safeguards). RMA argues that the statutes in effect in 1968 relating to certificates of public convenience and authority extended only to permanent or on-going types of authority as distinguished from temporary authority and that the absence of any provision relating to temporary authorities resulted in a silence by the General Assembly justifying an interpretation that Article XXV empowered the Commission to issue temporary authority summarily. We disagree.

The Miller case held in effect that the Commission had as much authority as the General Assembly over certificates of public convenience and necessity as the legislature possessed prior to the adoption of Article XXV in 1954. In that case, the court, relying on this interpretation of Article XXV, found that the Colorado statute enacted for the purpose of authorizing the issuance of certificates of public convenience and necessity was not void for the absence of guidelines because such guidelines could be supplied by the Commission pursuant to its constitutional authority in Article XXV. However, in this case there was no statute to begin with with respect to the issuance of temporary authority and Article XXV and the Miller case cannot combine to justify a grant of constitutional authority free from all limitations. The constitutional limitations of summary proceedings are obvious and are discussed in succeeding paragraphs. But, a clearer limitation is apparent here. There was in effect in 1968 a statute relating to temporary authority for the purpose of transporting unprocessed agricultural produce to market. See C.R.S., 1963, §115-9-4. Having considered the subject of temporary authority in a special situation, the Legislature's refusal to confer more temporary authority signifies its intention that existing statutes pertaining to certificates of authority should apply to all other authorities, whether permanent or temporary. This construction is supported by Mr. James O. Freeman who, after a thorough study of this subject, concluded that "it is justifiable to assume that a legislature's failure to delegate summary authority was not inadvertent." See James O. Freeman, Summary Action by Administrative Agencies, 40 University of Chicago Law Review 1, 5-7 (Fall 1972).

For the foregoing reasons, RMA's position that the Commission had constitutional authority to issue temporary authority summarily is without merit.

RMA also argues that the existence of the constitutional power to issue temporary authority summarily can be inferred from the statute enacted by the General Assembly in 1969 providing for temporary authority. That statute, C.R.S., 1963, §115-6-20, conditions temporary authority in the discretion of the Commission and without a hearing or other proceeding on (1) a finding of an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, (2) five days' notice to interested or affected carriers unless an "emergency" exists and (3) an authorized duration of not more than 180 days. If an emergency exists, then the Commission's authority to act ex parte is conditioned on (1) specific reference in its order to the circumstances constituting the emergency and (2) an authorized duration of not more than 15 days. Even assuming that the Colorado Constitution does confer emergency summary power on the Commission and that the statutes in 1968 did not test the scope thereof, then clearly the above statute retrospectively tests the scope thereof which scope was clearly exceeded by RMA and the Commission in this case.

Moreover, while the above statute has not yet been approved by the Colorado Supreme Court, it may in all probability be unconstitutional as applied in certain circumstances. The United States Supreme Court has only in very rare circumstances condoned summary action by an administrative agency and then only where the public interest was significant, where the temporary action was provisional and subject to a later hearing and where the duration of the action was limited. Driscall v. Edison Light and Power Co., 307 U.S. 104 (1939) (temporary rate order shoe recoupment right was avilable); Fahey v. Mallonee, 332 U.S. 245 (1947) (conservator's possession of bank with hearing provided later); and Adams v. Milwaukee, 228 U.S. 572 (1913) (summary destruction of presumptively infested milk without any

hearing). See also Northwest Airlines, Inc. v. Civil Aeronautics Board, 539 F.2d 748 (D.C. Ct. of Appeals 1976) (a copy is found at f.397-426).

Clearly, in this case, even if the Commission had statutory authority to grant the temporary authority, it would have been unconstitutionally exercised. The Commission took four days to make up its mind (February 16-20). This alone impeaches RMA's assertion of any emergency. Notice to Aspen, however short (a telephone conference may have been enough), would not have compromised the public interest in this case and may have been constitutionally permissible. The procedure utilized manifests not just a disregard of due process but a fear of it - a fear that a telephone call would have set forces in motion to reveal the truth, to test the allegations of RMA and to defeat the application for temporary authority.

RMA contends that the Commission has for many years assumed and exercised jurisdiction and granted temporary authority to provide a particular regulated service upon ex parte application where it was made to appear to the Commission that the public interest required the immediate institution of service prior to the time that service could be authorized under normal procedures. The Commission's assumption and exercise of jurisdiction under such circumstances is supported by a long standing "practice and procedure." While such practice and procedure can clearly not be justified in the absence of constitutional authority in the Commission to grant temporary authority, we nonetheless address ourselves briefly to this contention. It has no merit for at least two very persuasive reasons. First, the evidence shows that there was no unanimity even among the Commissioners as to what the "practice and procedure" was. The testimony of Commissioners Lundborg and Zarlengo varies on many key factors of the practice and procedure including the duration of the temporary authority, the notice requirement and the

investigation requirement. For numerous reasons, it would be straining our system of laws to enforce a verbal policy the subject matter of which is not clearly defined. Not the least of these reasons is the difficulty of reviewing compliance with such a policy. A second reason is that in 1968 the Colorado Administrative Procedure Act (C.R.S., 1963, §3-16-2) required all agencies as a condition to adopting "rules" to follow certain procedures. The act provided that "where a specific statutory provision applies to a specific agency, such specific statutory provision shall control as to that agency." C.R.S., 1963, §3-16-6. Since the Colorado Public Utilities Law contained no provision covering issuance of temporary authority or any procedures for rule making, the Colorado Administrative Procedure Act applied to the making of any "rules" by the Commission. The practice and procedure was clearly a "rule" under that Act and the procedures in the Act were not followed in connection with the formulation of the "practice and procedure" relating to temporary authority. Consequently, as a matter of law such "practice and procedure" cannot be recognized. The most that can be said is that the "practice and procedure" served as a useful vehicle for the Commission under circumstances where no objection to its utilization was made.

The trial court found that the Commission "has issued temporary authority without notice or hearing in proper cases for many years." (f.381) This finding is unsupported by the evidence. The only evidence is that the Commission had been accustomed from time to time to issuing temporary authorities and that Aspen knew this. (f.625-629) There was no evidence as to what was a "proper case," as to whether there was a contest at the time of the issuance or as to whether the practice and procedure was legal. The prior practice is no precedent.

The Commission clearly had no constitutional authority to grant the temporary authority and the temporary authority granted is void.

3. The Commission had no implied authority on February 20, 1968 to grant the temporary authority without notice, a hearing and in compliance with other procedural safeguards.

The general rule is that power and jurisdiction of an administrative agency cannot be conferred by implication. At 73 CJS Public Administrative Bodies and Procedure §50 it is stated:

> The powers of administrative agencies, bodies or officials are not to be derived from mere inference, and their jurisdiction cannot be conferred by implication. As a general rule, however, in addition to the powers expressly conferred on them by organic or legislative enactment, such officials and bodies, in the absence of a restricting limitation of public policy or express prohibitions, or express provision as to the manner of exercise of powers given, have such implied powers, and only such implied powers, as are necessarily inferred or implied from, or incident to, or reasonably necessary and fairly appropriate to make effective the express powers granted to, or duties imposed on, them.
>
> The implied powers of administrative agencies and bodies are not to be extended beyond fair and reasonable inferences. Powers may not be implied in relation to circumstances arising only accidentally; and the power to use such means as are reasonably necessary to make effective the express power, or to carry out the duty imposed, cannot be implied where the means are appointed by law, even though the means specified are inadequate. Administrative boards and commissions have been held to have no implied powers, or none except such as are absolutely necessary to carry out those powers expressly granted them, although it has also been held that administrative commission which is created by the Constitution and whose powers are conferred on it thereby is not limited to the powers expressly granted by the Constitution, and that it may exercise all powers which may be necessary or essential in connection with the performance of its duties. (Emphasis supplied.)

Since the Commission plainly had no statutory or constitutional jurisdiction to issue the temporary authority summarily it cannot be implied. Moreover, no implied power to issue temporary authority summarily is reasonably necessary and fairly appropriate to make effective any of the Commission's express powers, or so history has demonstrated until at least 1969. The need for summary power, at least under circumstances indicating that vacationing skiers may be several hours tardy to the slopes, pales in comparison to the consequences of dispensing with due process of law.

James O. Freeman, Summary Action by Administrative Agencies, 40 University of Chicago Law Review, 1, 5-7 (Fall 1972) commented on the question as follows:

> First, in considering challenges to summary action, courts properly begin by assuring themselves that the legislature has given the agency statutory authority to act summarily. Administrative agencies exercise delegated powers. The question of what powers the legislature has delegated to an agency is never a matter of indifference, either to the legislature, the agency, or those subject to the agency's regulatory jurisdiction, particularly when the powers in issue are significant. The power to act summarily is a drastic and sensitive one, akin to the injunctive power of a court; it is granted to agencies, usually those having the confidence of the legislature, only for the performance of a limited number of tasks. Given the political process by which administrative agencies are brought to birth and the drastic nature of the power to act summarily, it is justifiable to assume that a legislature's failure to delegate summary authority was not inadvertent. Whatever arguments can be made in favor of implying the existence in an agency of particular powers not expressly or precisely delegated, they are not appropriate to the power to act summarily.
>
> Moreover, any assertion of authority to act summarily potentially presents questions of constitutional dimension, particularly with respect to the limitations summary action may impose on the right to a hearing. By enforcing a requirement of statutory authorization, courts insure that they will confront these questions only when the legislature has focused upon them as matter of policy and has unambiguously elected to present them. Courts thereby avoid imputing to the legislature the intention to enacts laws presenting serious constitutional questions when the legislative intention is far from clear. The requirement of statutory authorization thus allows the courts both to respect the legislature's prerogative and to enforce its responsibility of initial decision in matters likely to have a constitutional dimension. It also serves to maintain the integrity of the judicial process by avoiding premature adjudication of constitutional questions.

Based on the above, we do not believe any implied authority existed in the Commission to issue the temporary authority.

C. Authority Granted by the Commission Without Notice, a Hearing and in Compliance with Other Procedural Safeguards as Evidenced by the Commission's own Record and Without Statutory, Constitutional or Implied Authority is Void and may be Collaterally Attacked at any time.

The general rule is that a void judgment may be collaterally attacked at any time. Kavanagh v. Hamilton, 53 Colo. 157, 125 P. 512 (1912) and Zupancis v. Zupancis, 107 Colo. 323, 111 P.2d 1063 (1941). Moreover, a judgment is void and not voidable where an inspection of the proper record furnishes the facts showing that the court acted without jurisdiction. In this case the record of the Commission shows that no notice of RMA's application for

temporary authority was given to Aspen and that such temporary authority was issued without a hearing. Furthermore, these facts are alleged in Aspen's Complaint. Accordingly, it is clear beyond cavil that the temporary authority issued by the Commission, if analogous to a judgment, is void and subject to collateral attack at any time.

In Flavell v. Department of Welfare, 144 Colo. 203, 355 P.2d 941 (1960), the Colorado Supreme Court cited the language earlier referred to herein from 73 CJS Public Administrative Bodies §59 with approval and in effect held that an administrative decision was analogous to a judgment which, if unsupported by jurisdiction, "is void and can be collaterally attacked at any time." The Colorado Court of Appeals in Colorado v. Coors, 29 Colo. App. 240, 486 P.2d 43 (1971), held that "actions which exceed their scope of delegated power are void" and accordingly concluded that a subpoena issued where there was no power to do so since jurisdictional conditions had not occurred was void. In Davidson Chevrolet v. Denver, 138 Colo. 171, 330 P.2d 1116 (1958), the Supreme Court discussed the effects of an irregular, erroneous or void judgment. There the court said:

> Judgments may be irregular, erroneous or void. An irregular judgment is one rendered contrary to the method of procedure and practice allowed by the law in some material respect. [Citation.] An erroneous judgment is one rendered in accordance with the method of procedure and practice allowed by the law, but contrary to the law. [Citation.]
>
> Irregular and erroneous judgments necessarily retain their force and have effect until modified by the trial court in consequence of its authority in certain circumstances [citation] or until vacated pursuant to new trial procedures, Rule 59 R.C.P. Colo., or until reversed by an appellate court in review proceedings. Such judgments are subject only to direct attack; they are not vulnerable to collateral assault.
>
> A void judgment is a simulated judgment devoid of any potency because of jurisdictional defects only, in the court rendering it. Defect of jurisdiction may relate to a party or parties, the subject matter, the cause of action, the question to be determined, or the relief to be granted. A judgment entered where such defect exists has neither life or incipience, and a court is impuissant to invest it with even a fleeting spark of vitality, but can only determine it to be what it is - a nothing, a nullity. Being naught, it may be attacked directly or collaterally at any time . . . (Emphasis supplied.)

RMA has argued that Aspen's right to collaterally attack the temporary authority is conditioned on its having filed an application for rehearing. While this argument has been fully treated elsewhere (f.206-211), Aspen does not believe it is relevant to the issues of this appeal. It is sufficient to state here that applications for rehearing are not required as a condition to review "a nothing, a nullity" because a "nothing" order cannot even invite the requirement for a rehearing - it invites a nothing. Nothing begets nothing.

CONCLUSION

The Court should find that the temporary authority of February 20, 1968 was void, reverse the judgment of the trial court and direct further proceedings on the merit of RMA's affirmative defenses and the amount of Aspen's damages.

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CERTIFICATE OF MAILING

I hereby certify that I have this 9th day of June, 1977, mailed, postage prepaid, a copy of the foregoing Brief of Appellant to:

Robert S. Wham, Esq.
1421 Court Place
Denver, CO 80202

Patte Henderson

EXHIBIT	DESCRIPTION OF EXHIBIT
1	Aspen Airways, Inc. PUC Certificate No. AC-25
2	Aspen Airways, Inc. PUC Certificate No. ACS-25
3	PUC Order dated July 29, 1963 relating to Aspen Airways, Inc.'s offices at Stapleton Airport
4	Aspen Airways, Inc. CAB Certificate effective March 9, 1967
5	CAB Order dated February 14, 1962
6	CAB Order dated February 10, 1966
7	CAB Order dated December 15, 1966
8	CAB Order dated June 20, 1968
9	CAB Order dated February 19, 1969
10	CAB Order dated April 6, 1971
11	CAB Order dated March 31, 1971
12	CAB Order dated October 12, 1971
13	CAB Order dated December 30, 1971
14	CAB Order dated November 16, 1972
15	CAB Order dated December 12, 1973
16	Letter dated February 16, 1968 from Schneider Shoemaker, Wham & Cooke to the Public Utilities Commission (application for temporary authority)
17	Letter dated February 19, 1969 from County of Pitkin to PUC
18	Letter dated February 19, 1968 from FAA to Aspen and reply dated February 22, 1968
19	PUC letter dated February 20, 1968 (the temporary authority)
20	Letter dated March 19, 1968 from Aspen Airways, Inc. to Mr. Ray Wilson of the PUC
21	Letter dated March 22, 1968 from Aspen Airways, Inc. to Mr. Ray Wilson of the PUC
22	Letter dated March 23, 1968 from Aspen Airways, Inc. to the CAB
23	Letter dated April 16, 1968 from Aspen Airways, Inc. to Mr. Ray Wilson of the PUC
24	Letter dated May 14, 1968 from John F. Mueller, to the PUC
25	Letter dated May 15, 1968 from the PUC to Vail Airways, Inc.
26	Letter dated May 14, 1968 from Aspen Airways, Inc. to the PUC

27	Letter dated July 12, 1968 from Aspen Airways, Inc. to the PUC
28	Letter dated February 29, 1968 from Line Driver's Local No. 961 to the CAB
29	PUC Decision dated May 9, 1968 on Application No. 22605 - extension - amended
30	Vail Airways, Inc. monthly operation records for February through June, 1968
31	Vail Airways, Inc. Passenger Report dated March 31, 1968
32	Aspen Airways, Inc. Financial Report for the seven months ending July 31, 1968
33	Aspen Airways, Inc. reports submitted to the PUC dated March 21, 22, 23, 24, 25, 28, 29, 30, 31 and April 1, 1968
34	Aspen Airways, Inc. complaint before the Public Utilities Commission against Vail Airways, Inc. verified on July 11, 1968
35	RMA PUC Certificate Nos. AC-9, ACS-45, ACS-62, ACS-69
36	Daily Trip Reports for January 1968 and, where reports are missing, Daily Ticket and Cash Reports and Agent's Cash Reports for January
37	Same as above only for February 1968
38	Same as above only for March 1968
39	Same as above only for April 1968
40	CAB Form 41 Schedule T-6 - "Summary of Civil Aircraft Charter" for 1968 together with copies of all charter Contracts for trips wholly within the State of Colorado for such year.
41	Same as above but for the year 1969
42	Same as above but for the year 1970
43	Same as above but for the year 1971
44	Same as above but for the year 1972
45	Same as above but for the year 1973
46	Same as above but for the year 1974
47	Same as above but for the year 1975
48	Stapleton records relating to Aspen and RMA offices at Stapleton
49	Aspen's February 1968 Schedule
50	Aspen's current Schedules
51	Part 298 b/w January 1968 and June 9, 1968

52	Report of the PUC and the Legislative Study Committee presented September 15, 1967
53	PUC Decision No. 27747 dated March 15, 1947, page 4, attachment 12 in appendix relating to restriction on base of operations
54	CAB Schedule T-1 (Relating to 1967 Charter Operations)
55	Daily Trip Reports for May 1968
56	Daily Trip Reports for June 1968
57	Aspen Sales Journal for January-July 1968
58	Vail Airways Flight Completion Report March 1968 - August 1968
59	Vail Airways Time Schedule November 1967 - January 1969
60	Vail Airways Air Taxi Operating Certificate
61	RMA's manifests for period between February 29, 1968 and June 9, 1968
62	Hickman Affidavit
63	Second Hickman Affidavit
64	Third Hichman Affidavit
65	Affidavit of Edwin R. Lundborg
66	Affidavit of Harry Galligan dated July 11, 1975
67	Affidavit of Gordon F. Autry
68	Certified Copy of PUC Decision No. 67650 and Temporary Authority dated May 27, 1966
69	Aspen Airways listings and ads in yellow pages of telephone directories
70	Certified copy of PUC Decision No. 72655 dated March 12, 1969
71	Vol. VII through XVI of transcript of testimony before PUC in Application No. 23270
72	Aspen Airways' published schedule effective April 16, 1968 through June 8, 1968
73	Deposition of Edwin R. Lundborg
74	Deposition of Henry Zarlengo