8-11-1977

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 APPELLEE/CROSS APPELLANT

SHOEMAKER AND WHAM

Robert S. Wham

Attorneys for Appellee/Cross Appellant

1421 Court Place

Denver, CO. 80202

534-6386

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I

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

In the brief filed by counsel for Plaintiff-Appellant/Cross-Appellee, hereafter to be referred to as "Aspen", counsel has stated that the affirmative defenses asserted in the trial court below by Defendant-Appellee/Cross-Appellant, hereafter to be referred to as "R M A", are not at issue on the appeal since the trial court did not reach them. (Pages 3, 16, 19 and 20.) It is the position of R M A that the affirmative defenses asserted in the trial court are in issue on this appeal, regardless of whether the said affirmative defenses were considered by the trial court in making its decision. In City of Delta v. Thompson, et al., ____Colo.____, 548 P.2d 1292 (1975), the Colorado Court of Appeals pointed out the absurdity of a rule which would require a prevailing party to file a motion for new trial in order to preserve for appellate review any ruling by the trial court adverse to the prevailing party which would become important if the Appellate Court reversed the judgment. Such a rule would result in the incongruous situation of a winning party being force to file a motion for new trial in order to preserve his rights on appeal, with the possibility that his motion for a new trial would be granted. Considering such an incongruity, the court stated:

> "It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary . . . but it is likewise settled that the appellee may, without taking a cross appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." (548 P.2d at 1294.)

See: Chandler Trailer Convoy, Inc. v. Rocky Mountain Mobile Home Towing Service, Inc., ____Colo.____, 552 P.2d 522 (1976).

Furthermore, the case was tried on the pleadings and on stipulation of facts agreed to by the parties. A review of the pleadings indicates that not only were the affirmative defenses of R M A set out in detail, but the replies to those defenses were set out in detail by Aspen. Counsel for Aspen states in his brief that the trial court "elected not to consider" the affirmative defenses of R M A. (Page 16.) While R M A contends that it is of no significance to this appeal whether or not the court "elected" not to consider the said defenses, it should nevertheless be pointed out that there is nothing in the record or the order of July 9, 1976 which shows that the court made any conscious election not to consider the affirmative defenses. This being the case, and considering the authority cited in the preceding paragraph, R M A contends that all of the issues inherent in its affirmative defenses are to be considered by the Court on this appeal.

In relation to the claims of Aspen, the first issue is whether the trial court erred in finding that the Colorado Public Utilities Commission had authority on February 20, 1968 to issue a temporary authority to R M A. The second issue is whether the said authority was rendered void by failure to give notice and hearing on the application prior to its issuance. The third issue is whether Aspen, by entering a general appearance before the Public Utilities Commission, waived any objections which could have been made by it based upon lack of notice. The fourth issue is whether Aspen, by failing to exhaust its administrative remedies before the Public Utilities Commission, is foreclosed from collaterally attacking the temporary authority on the basis of lack of notice. The fifth issue is whether Aspen is collaterally estopped from attacking the validity of the temporary authority due to the fact that the factual basis of the authority has been litigated in the Public Utilities Commission, the District Court for the County of Denver, and the Colorado Supreme Court. The sixth issue is whether Aspen

by seeking and receiving similar temporary authority on other occasions, is equitably estopped from attacking the jurisdictional basis of a temporary authority. The seventh issue is whether there is any liability on the part of R M A to Aspen, where R M A relied on a temporary authority regular on its face to which a presumption of validity attaches, and with which a public utility such as R M A had an obligation to comply.

In addition to the issues inherent in the claims of Aspen, there are several issues related to the counterclaims of R M A. These counterclaims alleged in substance that Aspen acted unlawfully and in excess of the authority granted to it by the Public Utilities Commission, in establishing facilities in Denver, Colorado, for the purpose of developing and soliciting call and demand (charter) business, and in soliciting call and demand (charter) business at Denver, Colorado. The first issue on R M A's cross appeal is whether the trial court erroneously denied the counterclaims of R M A without considering the merits of the said counterclaims at all. The second issue is whether the trial court erroneously denied R M A's counterclaims for failure of R M A to pursue its administrative remedies, when the remedies of R M A under the facts alleged in the counterclaims lay solely with the courts, rather than with the Public Utilities Commission. The third issue is whether the trial court erred in failing to make any conclusions of law when denying R M A's counterclaims, as required by Rule 52 (a), C.R.C.P.

II

STATEMENT OF THE CASE

R M A concurs in the STATEMENT OF THE CASE set forth in Aspen's brief, except for the statements made by Aspen's counsel that the affirmative defenses asserted by R M A "are not at issue on this appeal since the trial court did not reach them." (Page 3.) As mentioned in the preceding section of this brief, R M A contends that the case was tried on very detailed pleadings and a stipulation as to facts which related in part to the affirmative defenses asserted by R M A. Furthermore, based on the legal authority cited in the previous section, R M A contends that it is of no significance whether the trial court considered the affirmative defenses in arriving at its decision, since R M A can assert in support of the court's order matter appearing in the record overlooked or ignored by the Court.

III

STATEMENT OF FACTS

An attempt was made by the parties to arrive at an agreed statement of facts upon which to try the case. The essential facts are not in dispute. Each party drafted a proposed agreed statement of facts, but failing to reach agreement on some points, each submitted to the court its own proposed statement of facts. Plaintiff's statement appears at ff. 74 through 150. Defendant's appears at ff. 316 through 367. The parties designated by stipulation which of the facts asserted in the opposing party's statement were not agreed to (f. 495-496) and reserved the right to object to the relevancy of facts not in dispute.

The trial was on the record as so submitted.

Aspen sets out in its brief much of the material contained in its statement of facts. R M A does not disagree with the facts so set forth. Additional facts which were set forth in R M A's statement and not disputed are as follows:

> "Aspen Airways' scheduled DC-3 service between Denver and Aspen was suspended between February 16, 1968, the day R M A's request for temporary authority was filed, and March 14, 1968. The reason for the suspension is in dispute, it being Aspen's contention it was an interruption rather than a suspension, and that the sole cause was a strike of certain of its employees. R M A contents that the suspension resulted also from maintenance problems and lack of spare parts for Aspen's DC-3 aircraft which kept them out of service." (Exhibit 7, page 17 attached to Exhibit 66. Folio 331.)
>
> "The Commission referred (R M A's application for temporary authority) to its staff for investigation

and recommendation, and after receipt of the staff's report and recommendation, authorized the issuance of the temporary authority. Exhibit 19.) The temporary authority authorized defendant to render scheduled service by airplane for the transportation of passengers and property between Denver and Aspen direct or via Eagle, Colorado. It stated: 'This temporary authority is issued pending final determination by the Commission in Application No. 22605-Extension', and required that the fare to be charged be the same as published by Aspen Airways for its scheduled air carrier service between Denver and Aspen." (Folio 333.)

"From the commencement of its scheduled service pursuant to the temporary authority through April 30, 1968, R M A provided non-stop service between Denver and Aspen. Thereafter until expiration of the temporary authority its schedules provided for service between the same points with an intermediate stop at Eagle, although the stop at Eagle was frequently omitted if there were no passengers to board or deplane there." (Folio 335-336.)

"Aspen's published schedules for the period February 16, 1968 through June 15, 1968 provided for Douglas DC-3 aircraft service. These aircraft are rated at a capacity of 26 passengers, although this figure is a maximum one and the actual number can vary downward depending upon the temperature and altitude of the takeoff point as well as the weight of luggage, freight and fuel aboard the aircraft." (Folio 336.)

"Aspen's published schedule provided for the following numbers of DC-3 flights in each direction between Denver and Aspen, and the following numbers of seats between February 16, 1968 and April 15, 1968. (Exhibit 49.)

Day	Denver to Aspen	Seats	Aspen to Denver	Seats	Total
Mon.	4	104	5	130	234
Tues.	4	104	4	104	208
Wed.	4	104	4	104	208
Thurs.	4	104	4	104	208
Fri.	5	130	4	104	234
Sat.	8	208	8	208	416
Sun.	8	208	8	208	416

This schedule could be accomplished by utilizing one DC-3 aircraft on Tuesday, Wednesday and Thursday. Two DC-3 aircraft were required to perform the Saturday and Sunday schedules, which correspond with the days of highest damand. The second DC-3 was also required for the extra scheduled flights to Aspen on Friday and to Denver on Monday, although these were in actuality 'positioning' flights, the purpose of which was to place the second aircraft in proper position for its Saturday and Sunday schedules to commence. Many of the flights are booked full with advance reservations during this portion of the ski season." (Folio 337-339.)

"There was correspondence between the Commission and Aspen during the period of the temporary authority. On March 19, 1968, Aspen wrote a letter to Ray Wilson, Aeronautical Inspector of the Commission, advising of the equipment which it then had available, advising of the Teamster's strike and concluding that 'There is

every reason to believe Aspen will have its DC-3 complement of equipment in operation the weekend of March 23, 24 and 25. In addition, the light aircraft listed above will be available on demand.' (Exhibit 20.) In another letter dated March 22, 1968, to Mr. Wilson, Aspen refers to its conversations with Mr. Wilson and commitment 'to consistently furnish you with traffic statistical information on our operations between Denver and Aspen.' The letter continues that the 'statistics will sustain my letter to you stating that Aspen Airways has restored adequate service.' This letter further establishes that Aspen Airways had knowledge of the existence of the temporary authority of R M A by stating, 'due to the advertising campaign conducted by our temporary competitor, which implied they were permanently certificated to serve Denver-Aspen, a continuing diversion through advance reservations will occur as long as the temporary authority continues.' (Exhibit 21.) By Aspen's letter dated March 23, 1968, to the CAB, Aspen advised that it had resumed scheduled service as of March 15, 1968 and that 'during the period of interruption of service due to strike action of employees beginning February 16, 1968 through March 14, 1968, all Aspen Airways, Inc.'s scheduled flights were interrupted' and 'during this interruption of scheduled flights to best serve the public, Aspen Airways, Inc. 'Wet Leased' various light aircraft performing shuttle service' and specified five different aircraft. (Exhibit 22.) In its letter dated April 16, 1968, Aspen informed Mr. Wilson as follows:

'Ray, you are aware of our efforts to return our service to normal, which we achieved, I believe, in a remarkably short time.

'During the height of our travail, the PUC saw fit to give our competitor 'temporary authority to serve Aspen until Aspen Airways, Inc.' restored adequate service. With this we could not disagree inasmuch as the public must be served. All we have to sell is service, and this was temporarily disrupted.

'Adequate service has been restored for quite some time. As a matter of fact, as the figures which we supply you consistently show, we have more seats available to satisfy this traffic than at any time in the history of this service. Since the season is over, I hope that the Commission does not view the termination of the temporary authority as an academic matter. Aspen Airways does not view it as such. To the contrary, we view it as extremely important. We plan to continue to expand and improve our service. It will take all the winter seasonal revenues we can derive from it as well as all the slack summer season charter revenues we can develop to support our program. With two carriers involved the traffic will not sustain adequate service by either carrier.' (Exhibit 23.)

By letter dated May 14, 1968 from John F. Mueller, attorney for Aspen, to the Commission, a formal request was made by Aspen that the temporary authority be terminated and revoked. (Exhibit 24.) By its letter dated May 15, 1968, the Commission advised R M A that the temporary authority would terminate as of the effective date of the Commission's order entered May 9, 1968 with respect to the Application No. 22605-Extension (which became effective June 9, 1968). (Exhibit 25.) (Folio 343-348.)

"Between February 29, 1968 and June 9, 1968, it transported passengers on schedule between Denver and Aspen pursuant to the temporary authority issued by the Commission which Aspen challenges in this action. R M A was an air taxi operator under Part 298 of the Federal Air Regulations, and the size of the aircraft it operated was 12,500 pounds or less in gross takeoff

weight. As an air taxi operator, R M A was exempt from the route certification requirements of the CAB, and was free to transport passengers without any certificate of public convenience and necessity from the CAB. R M A contends that it was free to transport passengers traveling in interstate commerce without any certificate of public convenience and necessity from the Colorado Public Utilities Commission, and that this was true for passengers traveling in interstate commerce who utilized R M A's scheduled service to and from Aspen." (Folio 354-355.)

"In Commission Decision No. 72542, dated February 11, 1969, the Commission made findings which the affirming court found to be supported by the evidence and which in turn supported the Commission's conclusion that Aspen's scheduled service between Denver and Aspen was inadequate and unsatisfactory. These findings include the following:

'It is clear, from the record as made, that the service of Protestant is substantially and materially inadequate and unsatisfactory. Its record of schedule completions is very poor which -- in part -- is due to the lack of mechanical reliability of its equipment. It was shown, however, that said Protestant has held its aircraft past its scheduled departure time waiting for more passengers to show up. Affected persons complain of its lack of candor in dealing with passengers relating to flight information. It is clear, as seen from the record, that, when flight schedules have been cancelled, Protestant has quite frequently utilized a bus between Denver and Aspen, charging the passenger at the air fare, which is $25.00, whereas, the bus fare is $8.90.

'There has not been sufficient capacity to adequately handle the reasonable air needs of the traveling public between Denver and Aspen. While the trend of passenger traffic between Denver and Aspen is increasing, Protestant actually reduced its capacity following the Winter of 1966-67. The lack of space on its aircraft has resulted in serious inconvenience to the public. In addition, it is frequently booked tight with countless persons waiting on 'standby'

status hoping to get transportation. The record clearly leaves no room for doubt that countless additional persons would have used air transportation between Denver and Aspen in the past had adequate space been available.

'Protestant regularly and frequently 'overbooks' its flights. This is the practice of confirming reservations to more passengers than the aircraft will physically hold. Such 'overbooking' cannot be condoned. This conduct and practice has caused serious travel problems for persons desiring to travel to and from Aspen, and contributes to the inadequate and unsatisfactory nature of Aspen Airways' service.

'Protestant's equipment reliability also appears to be very poor. Mechanical problems have been serious and frequent. It has had inadequate equipment and parts. The very serious service disruptions which it experienced in February and March of 1968 can primarily be attributable to the fact that it had insufficient spare engines.

'Regarding Protestant's handling of passenger baggage, the record shows that frequently such baggage does not accompany the passenger in the same airplane because of insufficient space. This has resulted in many instances of passengers arriving at one end or the other of the route without their baggage. Some baggage was even lost for significant periods of time.

'As seen from the record, Protestant has engaged in the practice of 'over-grossing' its aircraft. It has solicited others to participate in this practice with it. This consists of recording baggage weight below the actual scale weight. This practice potentially or actually results in weight aboard the airplane in excess of its authorized maximum gross take-off weight. While enforcement of regulations preventing such occurrences lies exclusively with the Federal Aviation Agency, we believe that this situation contributes to the generally unsatisfactory and inadequate service being performed by Aspen Airways over the routes which have been certificated for service by the Commission.

'The Aspen, Colorado area is an internationally known summer and winter resort. Tourism and travel between Aspen and Denver is expanding rapidly. Full development of Snowmass-At-Aspen will accelerate this situation. In spite of Protestant's demonstrated pattern of service failures and inadequacies, its traffic is nevertheless increasing and it shows a considerable profit from its operations. As indicated by the Examiner, in his Findings of Fact, there are so many people to be transported between Denver and Aspen that Aspen Airways gets business and its volume of traffic is increasing notwithstanding the inadequate and unsatisfactory nature of its service.

'Protestant, Aspen Airways, has been put on notice over a considerable period of time that its service is inadequate and unsatisfactory, and the community of Aspen has made its dissatisfaction known. See Public Utilities Commission Decision No. 71286, entered May 9, 1968, which, while on appeal, as indicated above, has nevertheless plainly stated the position of the Commission and demonstrates the position of the community based on the former hearings held more than one year ago."
(Exhibit 7, Page 16 attached to Exhibit 66, Folio 372.)
(ff 356-361.)

"R M A's actions in applying for and operating pursuant to the temporary authority, were taken with knowledge of the existing practice and procedure for the issuance of temporary authorities. R M A's officers, in acting under the temporary authority believed that the company had a good and valid warrant and authority to conduct the operations described in the temporary authority, and there is no evidence that during the period of such operation they received any information, or notification to the contrary." (Exhibit 67, F. 672.) (f. 362.)

The record herein shows that both Aspen and R M A knew of the Commission's practice of issuing temporary authorities. (Exhibit 65, ¶7, F. 672.) It appears that the original owner of Aspen's call and demand certificate of public convenience and necessity procured a temporary authority to initiate operations on May 29, 1949, upon the filing of the application for the certificate and prior to the notice period during which protests could be filed. (Exhibit 65, ¶8 and Exhibit 1 attached to Exhibit 66, F. 672.) No protests were filed in this proceeding, but the temporary authority was issued before this was known. It further appears that a temporary authority was issued by the Commission on May 27, 1966 to Clinton Aviation to lease its operating authority to Denver Air Charter, Inc., at a time when formal application therefor, which was protested by both Aspen and R M A (then Vail Airways) had been heard but not decided. (Exhibit 68, Application No. 21980-Lease, F.672.)

It also appears that on December 20, 1968, after the temporary authority was issued to R M A and had expired, but before the bringing of this lawsuit, Aspen applied for and was issued a temporary authority from the Commission to conduct scheduled air

service between Denver and Rifle, pending issuance of a decision by the Commission on its application for a certificate authorizing such service. (Exhibit 65, ¶9 and Exhibit 2 attached to Exhibit 66, F. 672.) Decision No. 72655 of the Commission which granted to Aspen the certificate sought by it, shows that there were two protestants, Rio Grande Motor Way, and Denver and Rio Grande Western Railroad Co., but that the protests were withdrawn at the time of the hearing.

R M A'S COUNTERCLAIMS AGAINST ASPEN

The facts underlying the counterclaim by R M A against Aspen are based upon R M A's claim that Aspen carried on call and demand (charter) operations and solicited business therefor at its offices in Denver in violation of strict prohibitions against such in its operating authorities, and to the injury of R M A which lawfully conducts such charter operations and solicits business therefor from its Denver offices and base of operations.

The facts, as set forth in R M A's statement appear at Folios 362-367 and are undisputed except as noted. They are as follows:

"25. Aspen's certificate of public convenience and necessity issued by the Commission for charter service is subject to several restrictions, including the following:

a) To a base of operations at Aspen, Colorado, and airports within a ten (10) mile radius thereof.

b) No office or branch shall be established for the purpose of developing or soliciting business at any town or city other than Aspen, Colorado, and airports within a ten (10) mile radius thereof.

(See Exhibit 1.) Aspen's certificate for scheduled service has since July 29, 1963 provided that "applicant shall not set up an office in any other town or city than Aspen, Colorado, and Denver, Colorado for

solicitation of business, said solicitation to be limited to the scheduled intrastate air service of applicant, fares solicited or paid for in the Denver office to be for passage only between Denver, Colorado, and Aspen, Colorado." (See Exhibits 2 and 3.) The effect of the foregoing restrictions, so far as Commission jurisdiction is concerned, is that Aspen can have an office and can solicit business in Denver in connection with scheduled service but not in connection with charter service. Notwithstanding the foregoing, since 1964, Aspen has had no planes stationed at Aspen, Colorado for charter service and all charter operations have since then been initiated at Stapleton as a base of operations. Aspen's listings in the yellow pages of the Denver telephone directories since 1970 under "Air Line Conmpanies" and "Aircraft Charter, Rental and Leasing" hold out the availability of its charter service and list only its Denver telephone number."

"26. Aspen's records of charter flights (Exhibits 40-47) show intrastate charter flights between 1968 and 1975, where the business was transacted at, and the passage was paid for at the Denver office."

"27. During all of the time since before 1968, and continuing to the present time, R M A has been the owner and operator of a certificate of public convenience and necessity authorizing it to operate an intrastate charter service by air between all points in Colorado, restricted to offices for solicitation of business at Denver, Colorado and at Eagle and Vail, Colorado and airports within a 35-mile radius of Vail within Eagle and Summit counties. (Exhibit 35.) R M A maintains its principal office and the base of operations at Denver's Stapleton International Airport and conducts substantial charter business there. Its gross revenues from charter business have exceeded $100,000 per year for each year since 1966 except one."

" 28. R M A claims that Aspen's maintenance of an office for the solicitation of charter business, including intrastate charter business at Stapleton Airport at Denver constitutes direct competition by Aspen at Denver with R M A's authorized intrastate charter service. Aspen claims that at present only minimal competition, if any, is involved because its charter service utilizes only large aircraft with passenger capacity of 44, and R M A's largest aircraft has passenger capacity of 19."

The only portion of the foregoing statement not agreed to by Aspen is in the last two sentences of paragraph 27 as to which counsel expressed hesitancy to agree "that their charter business is substantially based upon revenues of $100,000 per year since 1966, and so forth." (Folio 581.)

IV

SUMMARY OF THE ARGUMENT

In response to Aspen's claims of invalidity of the temporary authority under which R M A operated scheduled air service between Denver and Aspen, it is R M A's position that the Public Utilities Commission clearly had the power to issue such authority without notice or hearing in order to respond to a public need of an immediate and urgent nature. Such power flows directly from Article XXV of the Constitution and this Court's construction thereof, and was exercised by the Commission for many years, prior to being expressly recognized and procedurally regulated by legislative act in 1969. R M A understands Aspen's contention to be that under no circumstances did the Public Utilities Commission have power to issue such a temporary authority without notice and hearing and that, therefore, the nature and urgency of the emergency to which the Commission is responding is irrelevant. R M A contends that not only does the power reside in the Commission but that the circumstances required an immediate exercise of that power by the Commission.

R M A further contends that Aspen waived any objection to the lack of notice in connection with the issuance of the temporary authority by appearing before the Commission acknowledging that the action was justified, and thereafter asking that the temporary authority be terminated, without ever challenging its validity, questioning the Commission's powers or raising any question of notice.

R M A further contends that Aspen was bound to pursue its administrative remedy before the Commission which it failed to do, and that in any event it relied in good faith upon the authority without notice of any claims of invalidity thereof, and therefore may not be found liable to Aspen.

In respect to the counterclaims, it is R M A's position that its remedy lies with the Court and not with the Commission, for damages and injunctive relief arising out of Aspen's solicitation at Denver of intrastate air charter business in clear violation of the restrictions in its certificates against such solicitation. Such acts on Aspen's part placed it in unauthorized direct local competition with R M A without any warrant or color of authority therefor. The injury to R M A did not flow from any act of, or authority from, the Commission, but in derogation thereof and there was no administrative remedy to pursue. There was no contention by Aspen that R M A had failed to pursue its administrative remedy, or that one was available. It is R M A's position that the Court clearly erred in summarily dismissing the counterclaims on the basis that there had been a failure to pursue administrative remedies.

V

ARGUMENT

A. IT WAS WITHIN THE JURISDICTION AND AUTHORITY OF THE PUBLIC UTILITIES COMMISSION TO ISSUE A TEMPORARY AUTHORITY TO R M A ON FEBRUARY 20, 1968.

Aspen bases its position that the temporary authority issued by the Commission was void upon essentially two propositions. First, that the Commission had no statutory or constitutional authority to issue such an authority on February 20, 1968; and second, that the action of the Commission was rendered void because of failure to give notice to Aspen and conduct a hearing relative to the temporary authority.

It is R M A's position that the Public Utilities Commission clearly did have the jurisdiction to issue a temporary authority to R M A on February 20, 1968, quite apart from its authority to issue certificates of public convenience and necessity, when in its judgment and for good cause shown the public interest required such authority to be issued on a temporary basis. We are not talking about a certificate of public convenience and necessity which, unless specifically restricted otherwise, is an authority of a permanent nature which partakes of a property right. A temporary authority is a creature of expedience and of immediate urgent public need, and in the regulation of Public Utilities in the public interest the power to issue temporary authorities is an important tool. Plaintiff correctly states that the Public Utilities Commission's power to issue temporary authority was not treated, recognized or restricted by the Legislature until the general revision and modernization of the State Public Utilities Laws which was accomplished by Chapter 267, Session Laws of 1969, effective July 1, 1969. By Section 51 of that Act a new section was added to Article 6 of Chapter 115, CRS 1963 ((CRS (1973) §40-6-120)) reading in part as follows:

> "40-6-120. Temporary Authority.-(1) To enable the provision of carrier service for which there appears to be an immediate and urgent need to a point or points or within a territory having no carrier service capable

of meeting such need, the commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier, or a private carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the commission shall specify, but for not more than an aggregate of one hundred eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter."

"(4) No temporary authority or approval may be issued by the commission unless, under such general rules as the commission may prescribe governing the application therefor and notice thereof to interested or affected carriers, any such interested or affected carrier shall have been given five days' notice of the filing of the application and afforded an opportunity to protest the granting thereof. If the commission is of the opinion that an emergency exists it may issue temporary authority or approval at once by making specific reference in its order to the circumstances constituting the emergency in which case no notice need be given, but any such emergency authority or approval shall expire no later than fifteen days after it was issued."

Prior to the adoption of the 1969 revision of the Utilities Laws by the Legislature the subject of temporary authorities had not been treated by the Legislature. This being the case, the Public Utilities Commission's authority to issue temporary authorities came directly from Article XXV of the Colorado Constitution which provides in pertinent part as follows:

ARTICLE XXV

PUBLIC UTILITIES

"In addition to the powers now vested in the General Assembly of the State of Colorado, all power 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; ****."

Under this constitutional language the Public Utilities Commission had prior to the adoption of the 1969 Act, as much authority in relation to the issuance of temporary authorities,

by direct constitutional delegation, as the Legislature possessed prior to the adoption of Article XXV in 1954. It was so held in the case of Miller Bros., Inc. et al. vs. Public Utilities Commission, et al., 185 Colo. 414, 525 P.2d 443 (1974). There the Court said, at page 451:

> "We need not and do not reach the question of whether absent constitutional authority in the Commission, the legislative delegation to the Commission is invalid for failure to prescribe guidelines. This is so because Colo. Const. Art. XXV has granted to the Commission authority to issue certificates of public convenience and necessity. Seltzer v. Commissioners of Land Office, Okl., 258 P.2d 1172 (1953), is a case very much in point. This is a legislative function (In Re Application of Shanks, 173 Neb. 829, 115 N.W.2d 441 (1962) and until the General Assembly restricts it, the Commission has as much authority as the Legislature possessed prior to the adoption of Article XXV in 1954." (Emphasis supplied.)

The language of the Court in the Miller case and Article XXV of the Constitution make it very clear that the Commission has had the constitutional authority to issue temporary authorities at least since 1954, unless precluded by Sections 115-5-1 (1) and 115-5-3 (1) ((Now CRS (1973) 40-5-101 (1) and 40-5-103 (1)) which provided in part as follows:

> "40-5-101 New Construction - Extension.-(1) 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.*****."

> "40-5-103. Certificate - Application for - issuance. (1) ****. 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."

These sections of the Statute have been on the books since 1913. They treat only the subject of certificates of public convenience and necessity and the construction of a new facility, plant or system or extension of a facility, plant or system. A review of the cases citing these statutory sections

indicates that they relate to matters of a permanent or ongoing nature, not to the type of temporary activities contemplated by a temporary authority issued to solve an urgent public need on a temporary basis. Furthermore, the cases citing these statutory sections in most cases relate to gas and electric companies, rather than carriers. Despite the existence of these sections the Public Utilities Commission has followed the practice of issuing temporary authorities without hearing or notice in proper cases for many years. (See Exhibits 65 and 67 at Folio 672.) In fact, it issued such temporary authorities prior to the adoption of Article XXV in 1954. (See Exhibit 1 attached to Exhibit 66, Folio 672.) The Legislature confirmed the practice and imposed legislative guidelines in 1969 by adopting Section 40-6-120, quoted above. This was a part of a comprehensive revision and modernization of public utilities laws, including Article 5 in which Sections 40-5-101 (1) and 40-5-103 (1) appear. (See Chapter 267, S.L. 1969.) The Legislature did not see fit to modify the language of 40-5-101 (1) and 40-5-103 (1) quoted above, thus concurring with the Commission's long held administrative interpretation that these Sections were not involved with the temporary authority process. It follows that these Sections never impinged upon the Commission's power to provide temporary authorities, and that in 1968 it was within the Commission's jurisdiction and authority to issue them.

Finally, it should be kept in mind that in exercising its powers, the Public Utilities Commission should always give the interests of the public first and paramount consideration. (Public Service Company v. Public Utilities Commission, 142 Colo. 135, 350 P.2d 543 (1960); Public Utilities Commission v. Home Light and Power Company, 163 Colo. 72, 428 P.2d 928 (1967). On the record as established herein, at the time of the issuance of the temporary authority there had been a complete cessation of scheduled air service by the Plaintiff, the only air carrier serving

between Denver and Aspen, at the height of the ski season. On these facts, there can be little argument with the proposition that the granting of the temporary authority by the Commission was perfectly consistent with its duty to give the interests of the public paramount consideration.

In reference to the cases cited by Aspen relative to its assertion of lack of statutory authority, it should be noted that the cases are, at best, of limited applicability to the issues involved herein, since they apply to situations where the Commission failed to give notice and provide a hearing contrary to an express statutory provision.

The citing by Aspen of City and County of Denver v. Public Utilities Commission, 181 Colo. 38, 507 P.2d 871 (1973), is an attempt to extend the holding of the case beyond its intended limits. A reading of that case indicates that it was directed at one narrow question related to the authority of the Commission to regulate municipal utilities outside, as opposed to inside, the territorial boundaries of a city. The citation of the case for the broad proposition that the sole purpose of Article XXV was to grant specific authority to regulate privately owned utilities within home rule cities is an oversimplification which should be obvious from a reading of the language of Article XXV itself:

> "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 (emphasis supplied) facilities and service and rates and charges therefor within home rule cities and home rule towns . . . (Colorado Constitution Article XXV)"

The Article's use of the word "including" clearly indicates an intent to include facilities within a home rule city or town as a sub-category in the much larger category of all facilities of public utilities subject to Commission control. Therefore, there can be no reasonable contention that the only purpose of the

Article is to allow regulation of public utilities within home rule cities and towns by the Commission. The case of Miller Bros. vs. PUC, supra, expressly holds otherwise.

B. THE TEMPORARY AUTHORITY ISSUED TO R M A ON FEBRUARY 20, 1968 WAS NOT RENDERED VOID BY FAILURE TO GIVE NOTICE AND HEARING ON THE APPLICATION PRIOR TO ITS ISSUANCE.

Since the Public Utilities Commission did have authority, under proper circumstances, to issue a temporary authority to R M A, and since no Statute treated the subject to temporary authorities, the Public Utilities Commission under the language of Miller Bros., Inc. v. Public Utilities Commission, supra, had as much authority with respect to the issuance of temporary authorities as the Legislature possessed prior to the adoption of Article XXV in 1954. It follows that only the due process requirements of the Federal and State Constitutions provided the procedural limitations on the Commission's actions. It should be noted that this is a unique case at this point in time, because CRS (1973) §40-6-120 which now imposes procedural restrictions upon the Commission's power to issue temporary authorities has been in effect for eight years, and this precise question is not likely to come up again. However, the enactment of §40-6-120 in 1969, as a limitation on the Commission's power under Constitution Article XXV and the Miller Bros. case, supra, is evidence that the power to issue temporary authorities resided with the Commission unrestricted by statutory limitation prior to that section's adoption. The statute was simply a legislative imposition of procedural requirements to be observed in the Commission's exercise of the preexisting power. The statute does not purport to be a legislative determination of the full measure of the Commission's powers under procedural due process requirements prior to the adoption of the 1969 Act.

Aspen argues that CRS (1973) 40-6-120 "tests the scope" of the powers possessed by the Commission prior to the adoption of that Section. By this we presume that Aspen is arguing that in all events the procedural requirements of 40-6-120 outline the maximum scope of the Commission's procedural authority prior to its adoption. The Court's language in Miller Bros., Inc. v. Public Utilities Commission, supra, that "until the general assembly restricts it, the Commission has as much authority as the Legislature possessed prior to the adoption of Article XXV in 1954" clearly shows Aspen's argument to be incorrect.

Section 40-6-120 does show us, however, that in the Legislature's view it was appropriate for the Commission in a proper case to issue a temporary authority valid for a period up to one hundred and eighty days, without holding a hearing. The Legislature also determined that it was within the scope of the Commission's constitutional authority to issue an immediate temporary authority without notice and without hearing for a period not to exceed fifteen days if the Commission is of the opinion that an emergency exists. The question to be addressed is, prior to the imposition of the Statutory fifteen day restriction on emergency temporary authorities, for what period of time could the Commission under its constitutional powers validly issue a temporary authority where an emergency exists, without notice and hearing? We suggest that when tested by the requirements of due process the answer must depend upon the extent and duration of the emergency, the nature of the interest of the party claiming the right to notice and all oth surrounding citcumstances. In the instant case, the nature and the existence of the emergency was clear. It consisted of the complete cessation of scheduled air service by Aspen, the only air carrier serving between Denver and Aspen, in the middle of the ski season, the height of that community's greatest need for air transportation. (See Exhibit 67, ¶6; Exhibit 65, ¶12, at Folio 672.)

That an emergency situation not only existed but justified the issuance of the temporary authority was acknowledge on April 16, 1968 by S. R. Severtson, then President of Aspen Airways by his letter to the Commission which appears as Exhibit 3 attached to Exhibit 66, at Folio 672). In that letter Mr. Severtson makes the following statements among others:

> "On February 16, 1968, Aspen Airways received the unsolicited attention of the Teamsters' Union in the form of an 'informational picket line.' This and the 'encouragement' directed at our employees not to report for work resulted in a temporary disruption of our service.
>
> "Ray, you are aware of our efforts to return our service to normal, which we achieved, I believe, in a remarkably short time.
>
> "During the height of our travail, the PUC saw fit to give our competitor 'temporary authority to serve Aspen until Aspen Airways, Inc.' restored adequate service. With this we could not disagree inasmuch as the public must be served. All we have to sell is service, and this was temporarily disrupted." (Emphasis supplied.)

Other surrounding circumstances at the time of the issuance of the temporary authority were that there was pending before the Commission a proceeding on R M A's application for authority to provide scheduled passenger air service between Denver and Aspen on a one-stop basis through Eagle. (Application No. 22605-Extension) Aspen Airways had protested and the matter had been the subject of extensive hearings which ended in September, 1967 and in February, 1968 the matter was still awaiting a decision by the Commission. (See Exhibit 65, ¶11, at Folio 672.) The Commission, instead of making the temporary authority effective for a fixed period of time issued it "pending final determination by the Commission in Application No. 22605-Extension." This was a period of time over which the Commission had exclusive control. The subject matter of the temporary authority and the subject matter of Application No. 22605-Extension were germane to each other in that the one-stop authority requested in the application was the same as that which was included in the temporary authority, and both pertained to the providing of

additional scheduled air service between Denver and Aspen, the temporary authority being based upon emergency needs, and Application No. 22605-Extension being based upon a claimed need for additional service arising out of an alleged substantial inadequacy of service on the part of Aspen Airways. There is nothing in the record to indicate that anyone knew what the duration or probable duration of the complete interruption of Aspen Airways' scheduled service would be when the temporary authority was issued. At the time the reputed reason for the cessation of service was a strike of Aspen Airways' employees. Later it was established that the primary reason was that Aspen Airways had provided insufficient spare engines for its aircraft. (Exhibit 7, Page 7 attached to Exhibit 66, at Folio 672.) *

There was a valid and urgent basis for the granting of immediate temporary authority without notice on February 20, 1968. Was that grant of authority made void because no prior notice thereof was given to Aspen Airways, the only authorized provider of scheduled air service between Denver and Aspen, where it was the interruption and cessation of Aspen Airways' scheduled air service which created the emergency giving rise to the need of the temporary authority? We think it obvious that under these circumstances the lack of notice to Aspen Airways did not render the authority void. Was the temporary authority, validly based upon an emergency need for service, rendered void because it was issued "pending final determination by the Commission in Application No. 22605-Extension" rather than for a fixed period of time? We think not. The Commission was in complete control over the matter with respect to the timing involved in the issuance of its Decision No. 71286, and also in its ability to suspend the temporary authority at any time. Nothing appears in the record to indicate that the fact that the temporary authority was issued pending final determination of Application No. 22605, which

*See Part D of this argument for further evidence of the inadequacy of Aspen's service which gave rise to the emergency situation.

been heard and was under advisement awaiting decision was reasonable under the circumstances, so as to prevent the temporary authority from being valid when issued.

C. THERE WAS A GENERAL APPEARANCE BEFORE THE COMMISSION BY ASPEN, AND THEREFORE ASPEN WAIVED OBJECTIONS GOING TO NOTICE.

Having established that the temporary authority was valid at its inception, did anything happen during the pendency of it to render it void? R M A contends that the record shows just the opposite. The letter of Mr. Severtson, President of Aspen Airways, dated April 16, 1968, clearly states that Aspen could not disagree with the issuance of the temporary authority. He then asserts that adequate service has been restored and expresses the hope that the Commission would not view the termination of the temporary authority as an academic matter. The letter implies a desire on Mr. Severtson's part to see the temporary authority terminated. The implication of the letter is equally strong that no earlier inquiry had been made as to termination of the authority because Aspen Airways understood and agreed with the necessity for it.

Approximately four weeks later under date of May 14, 1968, John F. Mueller, then attorney for Aspen Airways, made an explicit request on its behalf by letter to the Commission that the temporary authority be formally terminated and revoked. (See Exhibit 4 attached to Exhibit 66, at Folio 672.) Mr. Mueller's letter does not challenge the validity of the temporary authority but notes that the Commission's decision in Application No. 22605 had been handed down, asks for termination of the temporary authority by reason of the fact that "Aspen Airways now has two DC-3 aircraft and an Aero Commander in service. It will have another DC-3 aircraft in operation by the end of this week." Mr. Mueller's letter further states: "There is no reason why temporary operations should further be conducted by Vail Airways."

Clearly, by appearing before the Commission in April and indicating agreement with the necessity for the issuance of the temporary authority, and by further appearing by counsel in May without making any challenge to the validity of the authority, or the notice or lack thereof, and asking the Commission to formally terminate and revoke the same, Aspen Airways waived any right to challenge the authority collaterally based upon lack of notice or the length of its existence. The Commission responded the following day by notifying both Aspen and R M A that the temporary authority would terminate as of the effective date of the order of the Commission in its Decision No. 71286. (The decision on Application No. 22605.) These acts on the part of Aspen assumed and conceded formally to the Commission the validity of the Commission's order and asked that the temporary authority be terminated. This constituted a general appearance and waiver of all objections to jurisdiction by reason of lack of notice. In 7 C.J.S. Appearances §13, the following language appears:

> "Broadly stated, any action on the part of defendant, except to object to the jurisdiction over his person which recognizes the case as in court, will constitute a general appearance. It is usually held, in accordance with this doctrine, that the filing with the papers in the cause of any writing not going to the jurisdiction of the court and which asks or consents to action by the court in the cause constitutes a general appearance."

Furthermore, an appearance need not be made in any formal manner. As is stated in 5 AmJur 2d Appearance §14:

> "A defendant 'appears' when he gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him or has his appearance entered in open court. But a general appearance that will be fully effective to submit the defendant to the jurisdiction of the court is often made otherwise than by the formal methods prescribed by statute or by rules of practice. In determining the character of an appearance, the court will always look to matters of substance, rather than form, and a party's conduct, as well as other circumstances, are to be considered in determining whether he has actually appeared. Thus, a general appearance may arise by implication from the defendant's seeking, taking, or agreeing to take some step or proceeding in the cause, beneficial to

himself or detrimental to the plaintiff, other than one to contest jurisdiction over his person only, or from some act done with the intention of appearing and submitting to the court's jurisdiction. The distinction between a special and a general appearance is not so much in the manner in which, or the proceeding by which, the appearance is made, as in the purpose and the effect of the appearance. The test is the relief asked."

In Hammond vs. District Court, 30 N.M. 130, 228 P. 758,761, 39 ALR 1490, the New Mexico Court said:

"The expression which recognizes the case as in court as used in some if not all of these several cases, means that it recognizes the case as pending in court with jurisdiction of the subject-matter and of the parties. In order to do this, the defendant must seek some affirmative relief at the hands of the court, or he must ask a favorable decision upon some matter of a substantive character, or endeavor to secure a continuance or postponement. The reason underlying the doctrine is that no such action can be taken without the court possessing jurisdiction over his person, and he is not entitled to any such affirmative relief or favorable ruling unless the court possesses jurisdiction over his person, and when he seeks such relief, he necessarily assumes the attitude that such jurisdiction has been acquired, and having taken that position, he is bound thereby, and will not be heard afterwards to say otherwise."

Even a motion to vacate a judgment made on any ground other than a challenge to the jurisdiction of the Court over the person of the movant, is a general appearance which waives any such defects. In Matthies vs. Union Products Co., 138 Kans. 764, 28 P.2d 754, 755, the court said:

"Where a defendant in a motion to vacate a judgment challenges the sufficiency of the petition as to stating a cause of action, it constitutes a general appearance and a waiver of objections that defendant had not been properly or legally served with a summons, as fully as if he had appeared and answered on the merits of the action."

Aspen Airways did not challenge the sufficiency of anything. It appeared and asked for a termination or revocation of the authority. It may not now be heard in this collateral proceeding to challenge the notice nor the authority. By that general appearance it became bound to pursue its administrative remedy which it did not do.

D. THE DOCTRINE OF COLLATERAL ESTOPPEL PREVENTS ASPEN FROM DENYING THAT AN ADEQUATE FACTUAL BASIS EXISTED FOR ISSUANCE OF THE TEMPORARY AUTHORITY AND THAT ITS SERVICE DURING THE PERIOD IN QUESTION WAS SUBSTANTIALLY INADEQUATE.

Aspen Airways is estopped from denying in this case that an adequate factual basis for the issuance of the temporary authority existed. In its argument on the necessity for a hearing before issuance of the temporary authority plaintiff asserts that the Commission in granting the authority violated Aspen Airways' rights under the doctrine of regulated monopoly. This clearly is not a jurisdictional argument and has no place or validity in a collateral attack on the temporary authority. But beyond that, Aspen Airways, after the temporary authority was issued and expired, but before institution of this action, did litigate that very question against this same defendant, before the Public Utilities Commission. That was in the matter of Rocky Mountain Airways' Application No. 23270 for non-stop scheduled authority between Denver and Aspen in which Aspen Airways appeared and protested and in which extensive hearings were held. By decision No. 72542, dated February 11, 1969, the Commission granted Rocky Mountain's application after adopting extensive findings of fact of the hearing examiner and making additional findings of its own. Decision No. 72542 is attached to the affidavit of Harry A. Galligan, Jr., as Exhibit 7 attached to Exhibit 66, F.672. The Commission found, as an essential part of its decision, that service of Aspen Airways during the period preceding the filing of the application on June 27, 1968, which included the 1967-68 ski season, was substantially inadequate. A specific finding of fact which supported its finding of substantial inadequacy of service was that Aspen Airways

> "had inadequate equipment and parts. The very serious service disruptions which it experienced in February and March of 1968 can primarily be attributable to the fact that it had insufficient spare engines."

This decision was affirmed by the District Court and became final. The significance of the finding with respect to the lack of spare engines is that the reputed cause for the stoppage of service on February 16, 1968, was an employees' strike, which does not necessarily imply any fault on the part of the operator. But under the finding of lack of sufficient spare engines as the cause for the service disruptions, the fault is fixed squarely upon Aspen Airways.

The Colorado Supreme Court has defined collateral estoppel in the following terms:

> "Collateral estoppel, on the other hand, refers to the 'issue preclusion.' The doctrine holds that the final decision of a court on an issue actually litigated and determined is conclusive of that issue in any subsequent suit. See Hudson v. Western Oil Fields, 150 Colo. 456, 374 P.wd 403; Sylvester v. J. I. Case Co., 21 Colo.App. 464, 122 P. 62. Collateral estoppel is broader than res judicata in that it applies to a cause of action different from that involved in the original controversy. It is narrower, however, in that it does not apply to matters which could have been litigated but were not." Pomeroy v. Waitkus, 153 Colo. 344, 517 P.2d 376, 377 (1974).

Under the principles of collateral estoppel, Aspen Airways may not now be heard, as plaintiff in this action, to deny that its service during the period of the temporary authority was substantially inadequate. It was entitled to no protection under the doctrine of regulated monopoly. Likewise, it may not in this action be heard to deny that the admitted cessation and stoppage of its scheduled service on February 16, 1968 was due to its own fault, nor that adequate emergency reason did not exist for the issuance of the temporary authority. (See Severtson letter dated April 16, 1968; Exhibit 23 at f. 670.)

Finally, as a matter of law, Aspen Airways cannot suffer damages by the institution of a competing scheduled service where its own service was substantially inadequate. At page 14 of Decision No. 72542 the hearing examiner concludes:

> "2. That the service, facilities and operations of Aspen Airways, Inc., Protestant, have been and now are substantially and materially inadequate and unsatisfactory and that said Aspen Airways, Inc., is unable or unwilling to perform the necessary

service and provide adequate and satisfactory service to fulfill said need.

"3. That the grant of authority hereinafter recommended will not impair the service, facilities or operations of Protestant, Aspen Airways, Inc., contrary to the public interest."

There followed the grant of a certificate of public convenience and necessity authorizing Rocky Mountain Airways, Inc. to provide scheduled non-stop service between Denver and Aspen. R M A already had, under Decision 71286 entered May 9, 1968, permanent authority to provide one-stop service between those points.

In view of Aspen Airways' present estoppel from denying the substantial inadequacy of service on its part during the existence of the temporary authority, and the finding by the hearing examiner that its service would not be impaired by the authorization of the competing scheduled service, how can Aspen now say it was damaged by the operations under the temporary authority? We submit that it cannot. In Ephraim Freightways, Inc. vs. Public Utilities Commission, 151 Colo. 596, 380 P.2d 228, the Court said:

> "In accordance with the 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."

It follows from this, we submit, that where existing service is indeed inadequate, public convenience and necessity does require that additional service be instituted. This fact, of inadequacy of service, undeniable at this point by plaintiff, forecloses it from claiming damages in any event.

E. ASPEN FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES WITH RELATION TO THE TEMPORARY AUTHORITY.

What has been said above in relation to Aspen's ...al appearance and waiver of notice requires the Court to ... in our view, that Aspen has no standing to challenge the ...lity of the temporary authority in the instant cause. How-... in addition to the fact that Aspen waived any objections ... to the jurisdiction of the Commission over the person of ... and the fact that the Commission did have power to issue the ...rary authority, Aspen also totally failed to exhaust its ...inistrative remedies with respect to the temporary authority. ... has been previously mentioned, the temporary authority was ...nted by the Commission pending a decision on R M A's request ... Application No. 22605-Extension for one-stop authority to serve ... City of Aspen. That application had already been heard by ... Commission and stood submitted for decision. If Aspen felt ... was being harmed by the temporary authority or R M A's opera-... under it, it was in our view bound to apply to the Commission ... relief. Aspen knew of the temporary authority within "several ..." after February 20, 1968 (F. 527). Aspen had correspondence ... the Commission concerning the temporary authority and R M A's ...vities under it on March 22, April 16 and May 14, 1968, and ... in fact, apply for termination of the temporary authority on ... 14, five days after the issuance of the decision on Application ...22605-Extension, without making or suggesting any challenge to ... validity of the temporary authority or notice in relation ...reto. The Commission responded by informing Aspen that the ...porary authority would expire on the effective date of its deci-... on Application No. 22605-Extension, which would not become ...ective in any event until the expiration of the 20-day period ...vided by statute for the filing of a petition for rehearing.

Aspen did, in fact, file a Petition for Rehearing of the ...ision on Application No. 22605-Extension, which granted permanent ...hority to R M A for one-stop service between Denver and Aspen

via Eagle. The petition filed by Aspen made absolutely no mention of the alleged invalidity of the temporary authority, but instead attacked only the decision of the Commission granting permanent authority on the basis that there was insufficient evidence to support the finding that Aspen's service was inadequate. Nor did Aspen file any other petition or request for rehearing or other documents with the Commission relating to the validity of the temporary authority or the Commission's orders in relation thereto.

In the field of administrative law, there is scarcely any principle more well settled than that a party to an administrative procedure must exhaust its administrative remedies prior to seeking the aid of the courts. A reading of several cases from other jurisdictions shows this principle to be applicable to proceedings before a Public Utilities Commission. In West Brothers, Inc. v. Mississippi Public Service Commission, et al., 186 So. 2d 202 (Miss., 1966), a case in which a truck line sought an injunction against the Public Service Commission restraining the Commission from interferring with the operations of the truck line, the Court stated:

> "The Legislature has afforded an administrative tribunal with the statutory purpose of regulating common carriers. If the appellant should maintain its contention, the Legislature's purpose would be almost completely defeated. We hold that appellant must pursue his administrative remedies before seeking aid of the courts." (186 So. 2d at 205.)

Likewise, in another case where a motor carrier sought similar relief, the court, in quoting an earlier case, stated:

> "As a general rule, where a matter is committed to an administrative agency, one who fails to exhaust the remedies provided before such agency will not be heard in equity to challenge the validity of its orders. (citing cases)" Atlantic Grayhound Corporation v. North Carolina Utilities Commission, 47 S.E. 2d 473, 477 (N.C., 1948).

Based on these authorities, it is clear that in addition to waiving any objections that it might have had by making a general appearance before the Commission, Aspen also totally failed to exhaust its administrative remedies by failing to mention the

alleged invalidity of the temporary authority, either in its appearances directly relating thereto, or in its petition attacking the sufficiency of the evidence relative to the Commission's grant of permanent authority to R M A to serve the City of Aspen on a one-stop basis. Having failed to make any mention of the alleged invalidity of the temporary authority Aspen cannot now be heard to attack the temporary authority in this collateral proceeding.

F. ASPEN, WHICH HAS SOUGHT, RECEIVED, AND OPERATED UNDER TEMPORARY AUTHORITIES ISSUED BY THE COMMISSION, IS EQUITABLY ESTOPPED FROM BRINGING SUIT AGAINST R M A FOR IDENTICAL CONDUCT.

As mentioned previously in the STATEMENT OF FACTS herein, both Aspen and R M A knew of the Commission's practice of issuing temporary authorities. In fact, the original owner of Aspen's call and demand certificate of public convenience and necessity procured a temporary authority to initiate operations on May 29, 1949, upon the filing of the application for the certificate and prior to the notice period during which protest could be filed. (See Exhibit 1 attached to Exhibit 66 at Folio 672.) Furthermore, Aspen was party to a proceeding whereby Clinton Aviation was granted a temporary authority on May 27, 1966. (See Exhibit 68 at Folio 672.) Finally, on December 20, 1968, after the temporary authority involved in this controversy had been issued to R M A and had expired, Aspen applied for and was issued a temporary authority from the Commission to conduct scheduled air service between Denver and Rifle, pending issuance of a decision by the Commission on its application for a certificate authorizing such service. (See Exhibit 2 attached to Exhibit 66 at Folio 672.)

In Montezuma Valley Irrigation District, et al. v. Longenbaugh, 54 Colo. 391, 131 P. 262 (1913), the court considered an action brought by a landowner attacking the validity of an irrigation district and seeking to enjoin the collection of district taxes. The landowner had signed a petition for the establishment of the district which included his land. The district was thereafter created and for two years the owner paid district taxes. Subsequently, a judgment was rendered establishing the validity of the district and confirming the issuance of bonds, and the owner took no appeal from the judgment. Approximately two years thereafter, pursuant to the judgment, the district incurred a large indebtedness. It was at this point that the landowner brought his action to attack

the validity of the district. On these facts, the court held that the landowner was estopped to assert the invalidity of the district.

Based on the above authority, it is clear that Aspen, which itself has partaken of the benefits of the procedure for obtaining a temporary authority from the Public Utilities Commission prior to the enactment of the 1969 statute is equitably estopped to complain that others have done the same by attacking the validity of the temporary authority granted to R M A by the Commission.

G. R M A WAS ENTITLED AND OBLIGATED TO RELY ON THE TEMPORARY AUTHORITY WHICH WAS REGULAR ON ITS FACE, AND TO WHICH A PRESUMPTION OF VALIDITY ATTACHED.

The temporary authority issued to R M A was regular on its face in accordance with previous practice and procedure for the issuance of temporary authorities by the Commission. Furthermore, R M A had no notice of any defects in the temporary authority. Under the Colorado Constitution and Statutes then in force, and the practice used by the Commission at that time, all questions of the giving of notice and setting of a hearing were reserved to the Commission and its actions and procedures in the matter were in accordance with the customary practice. There is no evidence that R M A knew of any substantial question as to the validity of the order, or that it knowingly procured the order by any illegal means, or that it would have operated under the authority had it suspected that there was a substantial doubt as to its validity. In fact, all of the evidence is to the contrary effect. (See Exhibit 67 at Folio 672.)

The giving of notice of an application (or the determination that no notice is required for issuance of an emergency temporary authority) has always been the responsibility of the Commission, not the applicant. At the time R M A filed its application for the temporary authority in February of 1968, this responsibility of the Commission was spelled out in Section 115-6-8(2), C.R.S. 1963, quoted at Page 21 of Aspen's brief. R M A did not in its application suggest or urge that no notice be given of the filing of its request for temporary authority. The issuance of the temporary authority without hearing and without notice was consistent with the Commission's long established administrative practice in cases where it determined that there was a public need for such action. We submit that it is too much to expect R M A under such circumstances to second guess the Commission's determination that no notice and hearing was required, or to refuse to operate

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...der the temporary authority which it as a public utility ...d a responsibility to operate. It had no reason to question ...e validity of the temporary authority.

A number of Colorado cases have established the principle ...at the findings and orders of the Public Utilities Commission ...re entitled to a presumption of validity. City and County of ...enver v. Mountain States Telephone and Telegraph Company, 67 ...olo. 225, 184 P. 604 (1919); McKenna v. Nigro, 150 Colo. 335, ...2 P.2d 744 (1962); Contact-Colorado Springs, Inc. v. Mobile ...adio Tel. Service, Inc., ____Colo.____, 551 P.2d 203 (1976). It logically follows that R M A was not only entitled to rely upon the presumption of validity that attached to the temporary authority, but in fact had an obligation to provide service under the temporary authority. This being the case, R M A may not now be held liable for acting in good faith upon the authority.

The only case in which the Colorado Supreme Court has attached liability by one carrier to another for operating under color of an operating authority is Donahue vs. Pikes Peak Automobile Company, (1962) 150 Colo. 281, 372 P.(2) 443. There the defendant commenced its unlawful operation without the color of any authority from the Public Utilities Commission at all, and thereafter after purportedly obtaining such authority, and after the same was declared unlawful and invalid by the Court on review, continued to operate for a protracted period of time lasting in excess of three years. During this period the Supreme Court affirmed the invalidity of the Commission's first action at 138 Colo. 492, 335 P.2d 285 (1959), and the Commission purported to issue a new operating authority, which was in turn held invalid by first the District Court, and then the Supreme Court in 145 Colo. 499, 359 P.2d 1024 (1961). The essence of the Court's holding in the case reported in 150 Colorado was that after the District Court held the original order invalid, the defendant's continued operation of the purported authority was at its own peril. This sets the matter apart from the facts of the instant cause. Here there are no facts in the

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record to indicate that R M A was ever ordered or ever asked by the Commission, the Court, or any person to stop operating under its temporary authority, or that R M A failed to comply with any order teminating it. There was never any order entered or charge filed finding the temporary authority invalid or placing it in doubt.

The only possible theory upon which there could be any liability by R M A to Aspen is the theory, apparently espoused by Aspen, that any public utility receiving an order from the Public Utilities Commission must comply with such order only at its peril. Simply to state the theory refutes it.

There is a similarity between the kind of unlawful competing service which can never be used as evidence to establish public convenience and necessity as against any existing authorized operator, and the kind of unlawful act or operation that would give rise to liability under 40-7-102 (1) CRS 1973. Each requires that the evidence must establish that the carrier knowingly carried on an unauthorized operation with the intent to violate the law or with a reckless disregard for the law. Donohue vs. Public Utilities Commission, 145 Colo. 499, 359 P.(2) 1024; Donohue vs. Pikes Peak Automobile Co., 150 Colo. 281, 372 P(2) 443; Public Utilities Commission vs. Verl Harvey, 150 Colo. 158, 371 P(2) 452. It was held in Red Ball Motor Freight, Inc. et al vs. Public Utilities Commission (1974) 154 Colo.329 525 P(2) 439; Miller Bros., Inc., et al vs. Public Utilities Commission (1974) ___Colo.____, 525 P(2) 443, and D & G Sanitation, Inc. vs. Public Utilities Commission (1974) ____ Colo.____, 525 P(2) 455 that at least where regulated competition was the operational theory, an operator who was in fact operating unlawfully, but not in intentional violation of the law, nor in direct or knowing defiance of any order, nor with persistence in reckless disregard for the law, could nevertheless use evidence

his unlawful operations to establish public convenience and necessity to convert a private carrier permit to a common carrier certificate of public convenience and necessity. submit that Section 40-7-102(1) was not enacted to impose bility upon one who acts in good faith under color of thority. It was enacted primarily for the protection of the blic. It is submitted that there is considerably less reason hold it applicable to defendant's acts in this case than there uld have been reason to hold that the unlawful acts of the applicants Red Ball, Miller Bros. and D & G Sanitation, supra, could not used to establish public convenience and necessity. There is a l parallel between the circumstances there and here. There e practices of contract carriers in acquiring customers on an discriminate basis went on for years with acquiescence on all ides until they were obviously unlawfully acting as common rriers. The practice of the issuance of temporary authorities in appropriate cases, if unlawful at all which R M A denies, went for years with acquiescence by carriers regulated by the mission, including Aspen. Under the circumstances, R M A's ood faith acceptance and operation under a temporary authority hich was issued with a great deal of factual justification, nnot result in liability being imposed upon defendant.

H. THE TRIAL COURT ERRONEOUSLY DENIED R M A'S COUNTERCLAIMS WITHOUT CONSIDERING THE MERITS OF THE SAID COUNTERCLAIMS.

Turning now to the assertions of error by R M A on its cross appeal, it seems appropriate to initially set forth the court order entered on July 9, 1976, which denied the counterclaims of R M A in their entirety. The entire substance of the order was directed to the claims of Aspen and the position taken by R M A relative to those claims; i.e., to the question of the authority of the Commission to issue temporary authority on February 20, 1968. The substance of the order extended over approximately four typewritten pages. At the conclusion of its remarks relative to the claims of Aspen, the court made the following, and only the following, remarks relative to the counterclaims of R M A:

> "The counterclaim in the form of mandatory relief is denied for failure of defendant to exhaust its administrative remedies.
>
> "In view of the above, all other prayers for relief are hereby denied."

It should also be noted at the outset that at no place in the pleadings filed by the parties had Aspen asserted a failure on the part of R M A to exhaust its administrative remedies. In addition, there were absolutely no facts developed at the trial herein based on the stipulation of facts submitted by the parties which dealt with the question of whether R M A had failed to exhaust administrative remedies.

The facts are set forth at ff 362-367 (R M A's Statement) and at ff 139-150 (Aspen's Statement). It is undisputed that Aspen's call and demand certificate of public convenience and necessity was restricted:

> "(a) To a base of operations at Aspen, Colorado, and airports within a ten (10) mile radius thereof
>
> "(b) No office or branch shall be established for the purpose of developing or soliciting business at any town or city other than Aspen, Colorado, and airports within a ten (10) mile radius thereof."

and that Aspen's certificate of convenience and necessity authorizing scheduled air service between Denver and Aspen provided that "applicant shall not set up an office in any other town or city than Aspen, Colorado, and Denver, Colorado, for solicitation

usiness, said solicitation to be limited to the scheduled rastate air service of applicant, fares solicited or paid for the Denver office to be for passage only between Denver, orado and Aspen, Colorado." (f. 363, 364.)

It is also undisputed that Aspen conducted its charter rations out of its Denver office exclusively and actively licited charter business from that point. (f.364.) Further, it undisputed that R M A is the holder of a statewide call and and certificate of pbulic convenience and necessity authorizing to maintain offices for the solicitation of business at Denver d maintains its principal office at Denver's Stapleton Airport. 365-366.)

Considering the rather complete manner in which the trial urt considered the claims of Aspen in the substance of its der, and comparing this with the summary manner in which the urt dismissed the counterclaims of R M A, it is apparent that he counterclaims of R M A were not considered on their merits the court. This seems particularly clear when it is remembered at the issue of exhaustion of administrative remedies by M A had not been dealt with in the pleadings or at the trial rein. This being the case, no citation of authorities should necessary to support R M A's contention that it is entitled to new trial for the consideration of its counterclaims based the failure of the trial court to consider the said claims their merits.

I. THE TRIAL COURT ERRONEOUSLY DENIED R M A'S COUNTERCLAIMS FOR FAILURE TO PURSUE ITS ADMINISTRATIVE REMEDIES, WHEN R M A'S REMEDIES UNDER THE FACTS ALLEGED IN THE COUNTERCLAIMS LAY WITH THE COURTS RATHER THAN THE PUBLIC UTILITIES COMMISSION.

It should be noted at the outset that the claims asserted by Aspen differ in one very material regard from the counterclaims of R M A. Aspen bases its cause of action on a reliance by R M A upon a temporary authority granted by the Commission which Aspen claims to be void. Notwithstanding this, there can be no argument that at least the Commission took some action in granting the temporary authority upon which R M A relied. In distinction, the counterclaims of R M A are based on the fact that Aspen was operating call and demand (charter) operations at Stapleton International Airport without any color of authority of the Public Utilities Commission, and without any reliance on an existing authority issued by the Commission.

Since R M A acted in reliance upon action taken by the Commission, Aspen had available to it a number of administrative remedies with which to attack the actions of the Commission. On the contrary, R M A had no such recourse to administrative remedies since Aspen was acting totally outside the scope of, and not in reliance upon, any authority granted by the Commission.

Based on the distinctions set forth in the preceding paragraph, it is clear that R M A had no administrative remedies to exhaust. Its only remedy lay with the courts of the State of Colorado. An examination of Article VII of Title 40, C.R.S. (1973), which relates to enforcement and penalties, shows that the Commission has no inherent power to correct infractions of the Public Utilities Laws. Section 40-7-101 provides as follows:

> "40-7-101. Enforcement of laws. It is the duty of the Commission to see that the provisions of the Constitution and Statutes of this State affecting public utilities, the enforcement of which is not

specifically vested in some other officer or tribunal, are enforced and obeyed and that violations thereof are promptly prosecuted and penalties due the state therefor recovered and collected, and to this end it may sue in the name of the people of the State of Colorado. (emphasis supplied) Upon the request of the Commission it is the duty of the attorney general or the district attorney acting for the proper county or city and county to aid in any investigation, hearing, or trial had under the provisions of Articles 1 to VII of this title and to institute and prosecute actions or proceedings for the enforcement of the provisions of the Constitution and statutes of this state affecting public utilities and for the punishment of all violations thereof."

It is obvious that the Commission does not have authority to enforce compliance with its orders, but must take the position of a party before the courts of the state in seeking to enforce the laws of the state.

Furthermore, the succeeding section of Article VII relating to liability for violations provides that:

"40-7-102. Liability for violations-punitive damages. (1) In case any public utility does, causes to be done, or permits to be done any act, matter, or thing prohibited, forbidden, or declared to be unlawful, or omits to do any act, matter, or thing required to be done, either by the state Constitution, any law or this state, or any order or decision of the Commission, such public utility shall be liable to the persons or corporations affected thereby for all loss, damage, or injury caused thereby or resulting therefrom. If the court finds (emphasis supplied) that the act or omission was willful, the court (emphasis supplied), in addition to the actual damages, may award exemplary damages. An action to recover such loss, damage, or injury may be brought in any court of competent jurisdiction by any corporation or person. (emphasis supplied)"

Once again, it is clear that enforcement of constitutional and statutory law relative to public utilities by way of a civil action is to be accomplished through the courts of the state.

Finally, in relation to actions to restrain violations of law relating to public utilities, the Colorado statutes once again provide for relief through the courts:

"40-7-104. Actions to restrin violations. (1) whenever the Commission is of the opinion that any public utility is failing or omitting to do anything required of it by law or by any order, decision, rule, direction, or requirement of the Commission or is doing anything or about to do anything or permitting anything or about to permit anything to be done contrary to or in violation of law or of any order, decision, rule, direction, or requirement of the Commission, it shall direct the

attorney general to commence an action or proceeding in the District Court in and for the county or city and county in which the cause or some part thereof arose, or in which the corporation or person complained of, if any, has its principal place of business, or in which the person, if any, complained of, resides, in the name of the people of the State of Colorado, for the purpose of having such violations or threatened violations stopped and prevented, either by mandamus or injunction."

Based upon the above cited statutory authority, it is obvious that R M A had no administrative remedies before the Public Utilities Commission to exhaust prior to asserting its counterclaims herein. There was no administrative order for R M A to attack or appeal, for Aspen was operating outside the scope of any authority granted to it by the Commission. This is amplified by the fact that Aspen, which was represented by competent counsel, never asserted anywhere in the pleadings or at the trial herein that R M A had failed to exhaust its administrative remedies. Therefore, the court clearly erred in denying R M A's counterclaims for its failure to exhaust administrative remedies.

J. THE TRIAL COURT ERRED IN THAT IT FAILED TO MAKE ANY CONCLUSIONS OF LAW WHEN DENYING R M A'S COUNTERCLAIMS AS REQUIRED BY RULE 52 (a), C.R.C.P.

As mentioned previously, the findings and conclusions of the trial court in relation to R M A's counterclaims were as follows:

> "The counterclaim in the form of mandatory relief is denied for failure of defendant to exhaust its administrative remedies.
>
> "In view of the above, all other prayers for relief are hereby denied."

Because the judgment herein was based upon stipulatins of fact for the most part agreed to between theparties , there was probably no necessity for the trial court to set forth detailed findings of fact relative to the claims of the parties. However, it was the duty of the court to set forth conclusions of law relative to R M A's counterclaims similar to those conclusions of law set forth relative to the claims of Aspen

A number of Colorado cases have held that findings of fact and conclusions of law by a trial court sitting without a jury must be made so explicit as to give a reviewing court an opportunity to determine on what grounds the trial court reached its decision, and whether that decision was supported by competent evidence. Hipps v. Hennig, 167 Colo. 369, 447 P.2d 700 (1968); Westland Nursing Home, Inc. v. Benson, 33 Colo. App. 245, 517 P.2d 862 (1974). See also: Mowry v. Jackson, 140 Colo. 197, 343 P.2d 833 (1959); Murray v. Rock, 147 Colo. 561, 364 P.2d 393 (1961); Bulow v. Ward Perry and Company,155 Colo. 560, 396 P.2d 232 (1964); Twin Lakes Reservoir and Canal Company v. Bond, 156 Colo. 433, 399 P.2d 793 (1965); and American National Bank v. Quad Construction, Inc.,31 Colo. App. 373 , 504 P.2d 1113 (1973). As stated in Mowry v. Jackson, supra, Rule 52 (a) uses mandatory language requiring the court to make findings of fact and conclusions of law. There is no discretion in the trial court to dispense with such findings and conclusions.

When tested by the rules set forth in the above cases, it is evident that the conclusions of law stated by the trial court were not made explicit enough to give a reviewing court an opportunity to determine on what ground the court reached its decision, and whether that decision was supported by competent evidence.

The latter part of the standard requiring that the conclusions must be explicit enough so that a reviewing court can determine whether the decision was supported by competent evidence is certainly not met when it is remembered that the issue of exhaustion of remedies by R M A was never raised by Aspen as an affirmative defense, nor was there anything in the record establishing such a defense. Nevertheless, without any basis in the record, the trial court arrived at the simplistic conclusion that R M A had failed to exhaust its administrative remedies.

In one of the cases cited above, Twin Lakes Reservoir and Canal Company v. Bond, supra, the court found that the findings and conclusions of the trial court were sufficient based partially on the fact that the pleadings in the case had clearly formulated the issues. As mentioned, the issue of exhaustion of administrative remedies had not been formulated in the pleadings of the instant cause at all. Furthermore, in the Hipps v. Hennig case, supra, the Appellate Court found the findings and conclusions sufficient based on the fact that, although the trial court had not made conclusions of law at the end of the trial, the court had remedied this defect by setting forth conclusions at the hearing on motions for new trial. In this regard, it should be noted that the trial court in the instant cause made no additional conclusions of law at the hearing on motions for a new trial filed by the parties herein.

Based on the authorities cited above and a reading of the simplistic findings and conclusions of the trial court, it is clear that the court did not meet its duty to set forth findings

and conclusions so explicit as to give a reviewing court an opportunity to determine on what ground the trial court reached its decision, and whether that decision was supported by competent evidence. This being the case, R M A is entitled to have the case remanded for a new trial.

VI.

CONCLUSION

The authorities cited in this Brief establish that the trial court correctly concluded that the Public Utilities Commission had authority to issue a temporary authority to R M A on February 20, 1968, and that the authority was not made void because no notice or hearing was given to Aspen. Furthermore, the trial court's action can be justified on any of a number of other grounds contained in R M A's affirmative defenses. For these reasons, it is respectfully submitted that this Court should affirm the decision of the trial court as it relates to the claims of Aspen.

Furthermore, based on the authorities contained herein as they relate to the dismissal of R M A's counterclaims by the trial court, it is respectfully submitted that this Court should remand the case to the trial court for a new trial on the issues raised by R M A's counterclaims only.

SHOEMAKER AND WHAM

By _____
Robert S. Wham #1789
Attorneys for
Rocky Mountain Airways, Inc.
1421 Court Place Building
Denver, Colorado 80202
534-6386

CERTIFICATE OF MAILING

I hereby certify that I have this 11th day of August, 1977 mailed, postage prepaid, two copies of the above and foregoing Brief of Appellee to:

John M. Cogswell
2510 Lincoln Center Building
1660 Lincoln Street
Denver, Colorado 80264

Connie B. Alvarez