

1940

Utah Light and Traction Company v. Public Service Commission of Utah, and Airway Motor Coach Lines, Inc. : Brief of Plaintiff

Utah Supreme Court

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In the Supreme Court of the State of Utah

UTAH LIGHT AND TRACTION COM-
PANY,

Plaintiff,

vs.

PUBLIC SERVICE COMMISSION OF
UTAH and AIRWAY MOTOR COACH
LINES, INC.,

Defendants.

PLAINTIFF'S BRIEF

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UTAH LIGHT AND TRACTION COM-
PANY,

Plaintiff,

vs.

PUBLIC SERVICE COMMISSION OF
UTAH and AIRWAY MOTOR COACH
LINES, INC.,

Defendants.

Case No. 6255

PLAINTIFF'S BRIEF

I.

STATEMENT OF THE CASE

Statutory Review pursuant to Section 76-6-16, R. S. U. 1933, of a Report and Order of defendant, Public Service Commission of Utah, dated March 14, 1940 (R. 56) issuing Certificate of Convenience and Necessity No. 534 to defendant, Airway Motor Coach Lines, Inc., authorizing the holder thereof to render service as a common motor carrier of passengers between Salt Lake City, and Murray, Sandy, Crescent, Draper, Midvale,

West Jordan, Riverton, Taylorsville and Bennion, Utah, over certain designated routes.

On January 24, 1940 defendant, Airway Motor Coach Lines, Inc., filed with the Commission its application for a Certificate of Convenience and Necessity to render the service authorized under the above order, (R. 1). A hearing pursuant to statute was ordered and a time set, (R. 9) and notice given (R. 10-11). The granting of the application was protested in writing by plaintiff, Utah Light and Traction Company (R. 16, et seq.) and in addition, at the hearing, by the Salt Lake & Utah Railroad Corporation (R. 23) and various other parties, (R. 24 to 26).

Issues of fact raised by the protests (R. 16 to 19) and framed by the statutes of the State of Utah in such cases made and provided (Sections 5 and 6, Chap. 65, Laws of Utah 1935) were:

1. The financial ability of applicant to perform the proposed service.

2. Whether or not the highways to be used pursuant to the application were already over-burdened with traffic.

3. Whether or not the public convenience and necessity require the proposed service, or any part thereof.

4. The effect of the proposed service upon existing service, and whether or not the proposed service would be an unnecessary duplication of serv-

ice between either other common motor carriers or competing steam and electric railroads.

On this last issue plaintiff alleged (R. 17) and defendant, Airways admitted (R. 44) that for many years prior to 1933 plaintiff operated an electric street railway for common carrier passenger service between Salt Lake City, Murray, Midvale and Sandy, for which since that date has been substituted a motor gas bus service operating pursuant to Certificates of Convenience and Necessity Nos. 305 and 409, issued by defendant, Public Service Commission. Plaintiff alleged (R. 18) that a portion of the proposed service was in "direct conflict" with the above service of the plaintiff, that the public in this particular territory was adequately served, that there was no reasonable necessity for the proposed duplication of service which would jeopardize the ability of plaintiff to furnish its existing service, both in this territory and in other territories served by plaintiff, and would result in an economic loss not of benefit to the public as a whole. To this the defendant, Airways, replied, (R. 45) admitting that part of the proposed service was in direct conflict with that of applicant, but was justified because:

(a) Plaintiff's service south of 33rd South was inadequate and irregular;

(b) The public for this reason favored the Airways' application;

(c) Plaintiff's fares were excessive and thus prohibited general public use of its service;

(d) Plaintiff's operations south of 33rd South were unprofitable to date;

(e) Applicant was offering additional service to other communities without service, contingent upon the granting of the entire application.

Defendant, Airways, further admitted (R. 46) that the granting of its Application would jeopardize the ability of plaintiff to continue to render service south of 33rd South and to Murray, Midvale and Sandy, but claimed that the granting of the Application would permit plaintiff to abandon this allegedly unprofitable operation, and thus be of benefit to the balance of plaintiff's system.

Following the hearing at which evidence both oral and written was adduced (R. 27 to 42, Tr. 1 to 362), the Commission filed its Report (R. 51 to 55) and the Order now under attack by the plaintiff. Pursuant to Section 76-6-15, R. S. U. 1933, plaintiff filed its petition for rehearing, (R. 59, et seq.) containing the matters required to be set forth by the rules of procedure of the Commission. This petition was denied without opinion, on May 15, 1940, (R. 105), Commissioner Wiesley of the Public Service Commission dissenting (R. 105), and on May 17 plaintiff applied for a review of the order by this Court.

The Record certified by the Commission to the Court pursuant to the Writ of Review contains also an affidavit

(R. 103-4) filed May 7, 1940 which will hereinafter be referred to by plaintiff, together with a dissenting opinion by Commissioner Wiesley filed May 18, 1940, (R. 107-110).

Apart from the merits of this review certain proceedings in this Court have been had with respect to plaintiff's application for a stay pursuant to Section 76-6-17, R. S. U. 1933.

II.

STATEMENT OF ALLEGED ERRORS.

The alleged errors in the order of the Commission may be classified under the following general headings, and in compliance with statute were presented to the Commission in plaintiff's Petition for Rehearing, (R. 59-62) :

A. That the Commission failed to make findings of fact on issues material to the hearing.

B. That the Commission made findings of fact not supported by any substantial evidence, and in some cases in conflict with stipulated or uncontroverted evidence to the contrary.

C. That the Commission acted contrary to law and in violation of the Statutes of the State of Utah, and in an arbitrary and capricious manner in certain particulars hereinafter set forth.

III.

PARTICULAR QUESTIONS INVOLVED.

The particular questions involved for determination under the foregoing category of errors are as follows:

A. Should the Report and Order be vacated and set aside, and the proceeding remanded, because the Commission failed to make findings of fact on material issues as follows:

(1) As to the extent of the existing service of the plaintiff, Utah Light and Traction Company, into the area affected by the application.

(2) As to the extent of existing service rendered by other common motor carriers and electric railroads into the area affected by the application.

(3) As to whether or not the existing service being rendered by plaintiff in the territory affected is reasonably adequate to meet the needs of the public; and if not, in what respects such existing service is inadequate, and whether or not plaintiff has been and now is willing and ready to render adequate service.

(4) As to whether or not the existing service being rendered by protestants other than plaintiff into the territory affected is reasonably adequate to meet the needs of the public; and if not, in what respects such existing service is inadequate, and whether or not said protestants have been and now are ready and willing to render adequate service.

(5) As to what service, if any, into territories other than those now served by plaintiff and other protestants, is necessary and convenient and in the public interest, and whether or not plaintiff or other protestants has been and now is ready and willing to render such service.

(6) As to whether or not the proposed service would be an unnecessary duplication of service between that rendered by plaintiff and other protestants.

B. Should the Report and Order be vacated and set aside, and the proceedings remanded to the Commission, because the Commission made findings of fact not supported by any substantial evidence, as follows:

(1) "The rates now in effect are the lowest that this Commission has been able to procure. However, voluntary reductions would at any time have been in order. When the Commission has sought reductions the attitude of the Traction Company has been that the operation of this line, as also the operation of the Traction system as a whole yielded little or no return upon the investment, and if the Murray-Sandy line were granted further reductions, it would mean that the now meager net operations of the Traction Company would be further reduced and the users of the service in Salt Lake City would be forced to carry in part the costs of the service beyond the city limits." (Report p. 3, R. 51).

(2) " * * * but in a case such as this where the proposed rates are in some instances as much as forty-

six percent under the present rates * * *. (Report p. 3, R. 51).

(3) “* * * there is at the present time no reason to suppose that such patrons will not continue to enjoy the benefits of these rates.” (Report p. 4, R. 52).

(4) “The granting of this application will not substantially detract from nor impair existing common carrier service * * *.” (Report p. 7, R. 55).

C. Should the Report and Order be vacated and set aside, and the case remanded, because of arbitrary and capricious action contrary to law and in violation of statute in the following respects:

(1) The Commission has issued a Certificate of Convenience and Necessity although applicant has not obtained franchises or licenses from the local County and City authorities concerned, as required by law.

(2) The Commission has issued a Certificate of Convenience and Necessity despite evidence on which it itself has found that applicant has not the financial ability to properly perform the service proposed.

(3) The Commission has issued a Certificate of Convenience and Necessity without taking into consideration the existing transportation facilities in the territory proposed to be served by applicant and the offer of existing facilities to furnish any additional or supplemental service determined by the Commission to be necessary

and convenient, thus creating an unnecessary duplication of service.

(4) The Commission has issued a Certificate of Convenience and Necessity based not upon findings of convenience and necessity, but on a contrast between rates and schedules of the various protestants, concerning which no adequate findings are made, and applicant's proposed rates and schedules.

IV.

BRIEF OF THE ARGUMENT.

Errors set forth in the first two categories are with respect to the Report of the Commission insofar as it failed to make, or erroneously made, findings of fact. Certainly the Report did not pretend to be responsive to the allegations admitted and the issues framed in the pleadings filed by the parties to this case. Plaintiff is mindful, however, of the test which this Court laid down with respect to these matters in the case of *Salt Lake City vs. Utah Light and Traction Company*, 173 P. 556, 52 U. 210, wherein it was said on page 562 of the Pacific Reports:

“While it is true that the Utilities Act expressly requires the commission to make findings, and while it is also true that the commission should be careful to make proper findings respecting the material ultimate facts upon which an order is based, yet we cannot see wherein the plaintiffs, or any one else could have been, or can be, benefited if the findings had been far more

specific. When the findings and the opinion filed by the commission are considered together, as in this case we think they should be, we are of the opinion that the objection that the findings are insufficient is not tenable, and hence that objection must fail.”

Plaintiff is also mindful of the scope of the judicial review of the Commission’s action, this court having said in 1918 in the above case at page 562:

“* * * After a careful examination of the authorities we are more than ever confirmed in the opinion that all that we can review in cases of this kind is whether there is any evidence to sustain the findings of the commission, whether it has exercised its authority according to law, and whether any constitutional rights of the complaining party have been invaded or disregarded. In view that the commission is merely an arm of the Legislature through whom that body acts in matters of this kind, but a moment’s reflection convinces any one that this court may not interfere except for the reasons just stated. If interference were extended beyond those limits, it would, in effect, be an interference by this court with the lawmaking power of this state. It requires no argument to show why that may not be done. We have no more right to interfere with the duties and powers of the Legislature than that body has to interfere with the powers and duties imposed upon us as a court. True, the Legislature could perhaps have given us somewhat greater powers to pass upon the findings and orders of the commission. Such has been done in some other jurisdictions. The Legislature of this state has, however, not seen fit to clothe this court with greater powers of review, and we have neither the inclination nor the right to exercise a power which

is neither inherent nor properly conferred.
* * * ,”

It may not be amiss to note that only in the instant case, involving in so far as plaintiff and at least one member of the Commission are concerned, a “departure from basic or fundamental principles,” has plaintiff sought judicial review of any of the dozens of orders made by the Public Service Commission with respect to the operations of plaintiff, despite the fact that such orders may have been vigorously protested by plaintiff before the Commission. But let us consider the Report and Order now under review:

A. The Commission has failed to make findings of fact on the following material issues:

- (1) As to the extent of the existing service of the plaintiff, Utah Light and Traction Company, into the area affected by the application.**
- (2) As to the extent of existing service into the area affected by the application, rendered by other common motor carriers and electric railroads.**

After setting forth in the preamble (R. 49) the contents of the application, the Commission finds with respect to these matters (R. 50) “there are at the present time two common carriers operating in the territory proposed to be served by applicant. The Salt Lake &

Utah Railroad Corporation operates in the territory adjacent to Redwood Road and has five trains north into Salt Lake City and five from Salt Lake City south per day, which stop approximately every mile to take on and discharge passengers. The Utah Light and Traction Company operates a bus service south upon State Street serving Murray, Midvale and Sandy. Its schedule is 22½ minutes during the peak periods and 45 minutes at other times.”

These findings do not cover the fact that the proposed service would duplicate existing service with the sole exception of cross-county service between Draper and Riverton, Draper and Midvale and Murray, Riverton and Midvale and Murray, Taylorsville and Murray, and a small stretch between Taylorsville and Riverton. Yet this duplication is admitted by the pleadings (R. 45, 46) in so far as Traction Company is involved; was admitted by Exhibit “B” (R. 34) which was prepared by the Traction Company and admitted in evidence as the joint exhibit of all parties to correct an erroneous representation set forth by applicant’s Exhibit (R. 8); and was admitted by the witness Leslie W. Davis, President of the Airway Motor Coach Lines, Inc., (R. 129, Tr. 16). Davis testified that the application did not contemplate any change in existing service to Mill Creek, Holladay and service rendered by applicant under other certificates of convenience and necessity on the east part of

the County to Draper⁽¹⁾; that service down the center of the County would duplicate the present route of the Utah Light and Traction Company (R. 131, Tr. 18)⁽²⁾, and that the only additional service proposed over existing service would be cross connections in the southern part of the County (R. 130, Tr. 17)⁽³⁾.

The Report ignores the fact that the Traction Company service to Murray, Midvale and Sandy has been rendered over a period from 30 to 50 years, and since

(1)Q. Now, referring to the territory in the Mill Creek and Holladay area. As I understand the application there is no change involved as far as that service is concerned?

A. No, sir.

Q. Referring to the present service of the Airway rendered to the Draper area, there are two changes, as I understand it, contemplated; one is to eliminate the direct present route from 96th South and 7th East to Draper by turning west on 7th East and 96th South, being Sandy, to State Street, and then proceeding south on State Street to the Draper junction, and thence east. Is that right?

A. Well, no; not just exactly. We intend to cut that off at that east Sandy junction and turn that Draper bus around and send it back. Draper will be served by another bus from Murray in.

Q. Will there be any substantial change in the service to the Draper area over that now being rendered?

A. Practically, no.

(2)Q. Now, with respect to the third type of operation, the present route of the Utah Light and Traction Company will be duplicated, will it not, with the exception of your amendment on 64th South?

A. With the exception of that amendment, and with the exception of the fact that after we get to 33rd South we will swing over to Main Street, rather than proceed up State Street.

(3)Q. Now, with respect to the proposed service to the western part of the territory, Riverton, Bennion, Hibbard, Taylorsville, and West Jordan, as I look at the exhibit the only additional service that is proposed over existing service is a cross connection between West Jordan and Midvale, and between Taylorsville and Murray. Is that a fair statement, Mr. Davis?

A. And between Taylorsville and Riverton along that small red line.

1917 in accordance with the orders of the defendant, Public Service Commission (R. 434, Tr. 322); and that the present operations are rendered in accordance with certificates of convenience and necessity issued by the Public Service Commission (Stipulation-R. 433, Tr. 321).

- (3) The Commission failed to find as to whether or not the existing service being rendered by plaintiff in the territory affected is reasonably adequate to meet the needs of the public; and if not in what respects such existing service is inadequate, and whether or not plaintiff has been and now is willing and ready to render adequate service.**

A great deal of the testimony was directed to complaints with respect to the service of the Traction Company. Mayor Berger said that there were a great many protests as to the schedules and fares (R. 196, Tr. 83). On cross examination he admitted attending hearings before the Public Service Commission with respect to more frequent schedules and lower fares (R. 200, Tr. 87), but he did not recall the subsequent changes in schedules or fares, probably because he had not used the service for nearly ten years (R. 201, Tr. 88). Further, on cross examination he stated that he thought a 20 minute schedule was adequate (R. 207, Tr. 94); this incidentally was substantially the schedule of plaintiff as set forth in the Commission's findings (R. 51).

The witness, Albert E. White, who used the Traction bus service only occasionally, was of the opinion that the

service of the Traction Company was not frequent enough, and stated that he had had trouble understanding the fare structure (R. 236, Tr. 123). This was based upon hearsay (R. 241-2, Tr. 128-129) which the Commission admitted over objection (R. 241, Tr. 128).

The witness H. M. Morris, had had similar trouble with respect to what he termed were frequent changes in schedule and difficulties with the fares (R. 266, Tr. 153). He knew about the difficulty with respect to the fares because he had a brother riding the bus to the University (R. 267, Tr. 154). He also was grieved because his mother had told him that some months before a particular operator was "pushing the people to get on the bus, yelling at them to get on." He himself had no difficulties. (R. 270, Tr. 157). He did not ride regularly; "just off and on" (R. 271, Tr. 158). Most of the trouble had occurred since a recent fare change; "before they changed the fares everything went pretty smoothly" (R. 272, Tr. 159).

Kenneth Farr was another witness for applicant in this respect and was particularly worried with respect to the change in fares of November 15, 1939. However, on cross examination he admitted that his misunderstanding could have been avoided "if I had sense enough to ask" the conductor for information (R. 316, Tr. 204).

Harry Eckman was the final witness for applicant who testified, not for himself because he rarely rode the bus as he has a car; he felt that the schedule south of Murray was very inadequate (R. 409, Tr. 297); and his

knowledge about the situation was such that he had none with respect to changes in schedules and admitted his testimony was "just hearsay." (R. 410, Tr. 298).

Not one of these witnesses for plaintiff were regular patrons of the Traction Company service. In contrast Mitchell Hayden, appearing in his own interest, did not own a car and used the bus every day. He wanted the Traction Company to continue to serve because their fares would be cheaper for him due to his use of the transfer privilege. Of course the more service and the lower the fares, the better. (R. 301, Tr. 188).

J. H. Sampson, appearing on his own initiative as a witness for plaintiff, was a resident of Murray, a regular patron for 26 years and does not use a car. He thought the service was all right, but wanted lower fares. He too wanted the Traction Company to continue because the transfer privilege afforded lower fares, and if only the applicant should serve Murray "it would cost him double." (R. 362, Tr. 250) He had found the operators of plaintiff to be courteous and efficient. (R. 365, Tr. 253)

H. E. Aamodt, also of Murray, had used the service of plaintiff regularly for 16 years. His testimony was the same as Sampson's, and of course he wanted a more frequent schedule such as was given in 1939. (R. 366, Tr. 254)

With respect to changes in schedules and fares, the testimony of Mr. Jed F. Woolley, General Manager of the Traction Company, was uncontradicted to the effect that the Company was willing to comply with all orders

of the Public Service Commission with respect to matters of fare, convenience to passengers, schedules of service and routing (R. 434, Tr. 422); that the Company kept a constant watch on the use of the present service and whether more service was needed, and took occasional traffic checks by actual count which were available for public inspection (R. 435, Tr. 323); that a route change south of Murray had been put into effect on order of the Commission (R. 438, Tr. 326), the effect of which was to eliminate certain service from State Street, south of 48th South in Murray; and that changes in both schedules and fares, involving the service in question, were made under orders of the Public Service Commission during 1939 (R. 452, Tr. 340, et seq.)

Finally applicant stipulated that the operators of the Traction Company handling the service in question had had a great deal of experience in service, and have endeavored to give courteous service (R. 412, Tr. 300); and that the only change in time schedules since January 1, 1937 was that involving trial service from December, 1938 to December 23, 1939 operated by order of the Commission (R. 412, Tr. 300). Operator Wade also testified that the only change in fares on this line in many years had been the fare reduction effective November 15, 1939, and that after explanation to the passengers there was no trouble (R. 413, Tr. 301).

Let us keep in mind the statement of this court in the case of *Los Angeles & Salt Lake Railroad Company*

vs. Public Utilities Commission, 15 P. (2d) 358, 80 U. 455, "There is no absolute standard of a reasonable, adequate, or efficient service. There is a point at which almost any one might say that services were inadequate, and there is a point above which almost any one could say that the railroad company was giving more in the way of facilities than it should be required to give. But in between these points it would be somewhat of a matter of each man's judgment as to what the quantum of service should be * * *" (in order to meet the requirement of Section 76-3-1, R. S. U. 1933).

In view of the testimony of Mayor Berger we might also call the Court's attention to the cases collated in the P. U. R. Digest, "Monopoly and Competition", Section 50, where the cases are uniform in holding that popular dissatisfaction with existing service because of some personal animosity is no reason for authorization of competing service. In this connection we submit that it was significant that none of the several hundred regular patrons of the service appeared at the hearing in support of the Application; that on the contrary several regular patrons appeared to protest the Application, some of whom did so without solicitation on the part of this Protestant. This testimony contrasts with that of the following witnesses for the Applicant.

Mayor Berger: Hasn't used the bus for years; Commissioner Hansen. Never uses the bus himself; Albert E. White: Uses the bus just occasionally; H. M. Morris: Uses the bus occasionally; Kenneth Farr: Rides the bus

from the University of Utah to Murray (The proposed service will certainly not help him even as to fares); Harry Eckman: Rarely rides the bus.

Despite the admitted efforts by applicant and the city officials of Murray, the attack made on the adequacy of Protestant's service to Murray, Midvale and Sandy was not substantiated.

This Protestant is ready to cooperate with full investigations in connection with complaints made either to Protestant or to the Public Service Commission that its service or rates or schedules in any detail are improper or inadequate. It had no notice, however, that the Application of the Airway Motor Coach Lines, Inc., for a certificate of convenience and necessity in this case, would be a clearing house with respect to these matters. We submit that to bottom the issuance of a certificate of convenience and necessity on such evidence and immaterial issues would be a violation of fundamental concepts, a view perhaps shared by the Commission in this case accounting for the silence of the Report with respect to Findings on this phase of the evidence.

And if Findings were to be made, the evidence could afford no other conclusion but that the existing service was adequate; this is certainly to be presumed from the fact that the service as to routing, fares and schedules was rendered in accordance with orders of the Defendant Public Service Commission, empowered and charged under the statutes (Sec. 5, Chapter 65, Laws of Utah

1935) to assure the public the standard of service prescribed by Section 76-3-1.

- (4) The Commission has failed to find whether or not the existing service being rendered by protestants other than plaintiff in the territory affected is reasonably adequate to meet the needs of the public; and if not in what respects such existing service is inadequate, and whether or not said protestants have been and now are ready and willing to render adequate service.**

With respect to the service of the Salt Lake & Utah Railroad Company, witness Henry Bringhurst of Ben-ion thought that the Salt Lake & Utah Railroad Company operated three trips per day (R. 246, Tr. 133), although the Commission found it to be a fact that five trips each way were operated daily (R. 51).

The witness Davis admitted that he had erred with respect to his consideration of the service rendered by the Salt Lake & Utah Railroad Company, having assumed that the Salt Lake & Utah provided but two trains per day. He did not know anything with respect to where service was rendered or what the time schedules were. He signed the application in question without carefully considering these matters (R. 147-8, Tr. 34-5). The discrepancies in the map attached to the application and Exhibit B (R. 34) have already been pointed out.

The Commission should have made a finding on this point, and as in the case of (c) above, the evidence will

only support a finding that this existing service was adequate and was being rendered pursuant to orders of the Public Service Commission.

- (5) The Commission failed to find what service, if any, into territories other than those now served by plaintiff and other protestants, is necessary and convenient and in the public interest, and whether or not plaintiff, or other protestants, has been and now is ready and willing to render such service.**

Witness Henry Bringham (R. 244, Tr. 131) testified that he lived in Bennion with a population of about 400; that transportation facilities were confined to the Salt Lake & Utah Railroad (in the extent of whose service he was about 50% wrong as above pointed out) and to the use of individual cars which were owned by practically every family in Bennion (R. 248, Tr. 135); that four or five buses per day to Salt Lake would be good service (R. 250, Tr. 137) (the same number of trips being rendered by the Salt Lake & Utah Railroad Company unknown to witness); that about 16 to 18 people per day travel between Bennion and Salt Lake, 90% of whom would use applicant's buses instead of private conveyances or the Salt Lake & Utah (R. 256, Tr. 143); and that he was not interested in costs, but only in service to the community (R. 255, Tr. 142). We submit this testimony may support an argument that the additional service is *convenient*, but certainly not *necessary*.

The same pertains to the testimony of George Hyde of Crescent living $\frac{3}{8}$ of a mile west of the State Highway (State Street); he had discussed the proposed service and thought that 90% of the 200 people in east and lower Crescent were favorable to a bus line; (R. 261, Tr. 148); that about 100% of the families in this district had cars, but that it would be *a nice thing* if there could be a bus in addition; that he was not interested in costs of operation, but in service and what the patrons would have to pay (R. 264, Tr. 151). Incidentally the Town of Crescent already has bus service furnished by the Salt Lake & Utah Railroad Company (Exhibit B, Record 471, Tr. 359).

David Harker (R. 283, Tr. 170) and John Pixton (R. 287, Tr. 174) of Taylorsville have wanted more service; through Pixton's complaints and orders of the Public Service Commission, service was increased by the Traction Company to Murray for a year to about the 24th day of December, 1939, but the additional patronage did not support the increased service and the extra bus was discontinued; fares have been slightly reduced; Pixton believes there is a crying need for bus service between Taylorsville and Murray; there are about 150 to 165 families in Taylorsville, lots of whom work or are students in Salt Lake and drive their cars in to Salt Lake and take their neighbors; Pixton felt it to be very *inconvenient* not to have a 10c fare to Murray and a 22 minute schedule (R. 289, Tr. 176).

Meredith Page of Riverton (R. 335, Tr. 223) testified that there are about 3,000 persons in Bluffdale, Lark and Harriman; that the people in Riverton comment in favor of buses and better services; that there are two or three carloads of private cars and students traveling to Salt Lake each day; and that bus service would be *a lot more convenient* (R. 338, Tr. 226). (Incidentally Lark is eight miles and Harriman six miles from the territory proposed to be served by the applicant.) Page is an automobile dealer and most of the people in this vicinity have their own cars, but bus service *as a stand-by convenience* in addition to private conveyances and the Salt Lake & Utah would be an advantage (R. 339-340, Tr. 227-228).

Royal V. Beckstead of South Jordan testified that there are about 800 people in his community which was served by the Salt Lake & Utah Railroad Company (R. 342, Tr. 230); that when people travel from his community they go to Midvale and on through to Murray and Salt Lake; that most of these people now own and travel by their own cars (R. 343, Tr. 231); that in addition the school district renders bus service for the children; (R. 344, Tr. 232); and that three bus trips a day would be *an additional convenience* if some one could not use their private cars or use existing facilities (R. 344, Tr. 232).

Witness H. W. Jorgensen of West Jordan said that the people in his vicinity, about thirteen to fourteen hundred, were served by the Salt Lake & Utah Railroad

Company (R. 347, Tr. 235); were served by the Jordan School District as far as attendance at school was concerned (R. 351, Tr. 239); and either used their own cars or walked when they did not use the public facilities (R. 354, Tr. 242). The proposed cross-county service would be better than the present lack of public facilities in that respect (R. 353, Tr. 241).

John M. Peterson of Draper represented the Draper Chamber of Commerce (R. 384, Tr. 272). Draper had been served by the applicant for about six months (R. 385, Tr. 273). He had heard no complaints about this service, but the more hours of the day that the service could be handled the better. He would also like to have service from Draper to Bingham and Lark and to Magna and Arthur (R. 386, Tr. 274). (Of course Bingham, Lark, Magna and Arthur are not included in the proposed service.) He also thought that there would be quite a desire to go from Draper to Riverton, but in checking the schedules on cross examination found that the proposed service would hardly fit this need (R. 391, Tr. 279).

The testimony of Joseph Bennion of Taylorsville was similar to that of the other witnesses for applicant (R. 356, Tr. 244).

Witness Woolley for the Traction Company, whose qualifications in the public mass transportation field were stipulated, testified that he had personally checked the territory in question and was familiar with the density of population and the possibilities of obtaining revenue

passengers from mass transportation bus operation in that vicinity, operating either horizontally to feed the State Street line, or north and south of Redwood Road, and based upon this testimony stated his opinion that the territory would not support the cost of operation, (R. 440, Tr. 328). This testimony was likewise adopted by stipulation by the Salt Lake & Utah Railroad Company (R. 443, Tr. 331).

In contrast, witness Davis for applicant, stated that he had made no definite estimate of revenue, but that he felt that the territory would support the cost of the proposed service, and if it did not, applicant would resrequest authority to reduce or abandon service (R. 138, Tr. 25).

Plaintiff submits that it would be difficult to make out a stronger case to show that there is no necessity for bus service into the proposed new territory than was made by the applicant. The most that the testimony of applicant's witnesses in this respect can support is a finding that the proposed mass transportation operations would be a convenient standby service for a majority of the people, and could not hope to pay the bare costs of operation.

A glance at Exhibit "B" a map originally prepared by applicant, but corrected by protestants by stipulation to eliminate a deceptive appearance and to show the true situation, indicates at once that the applicant renders

service into the entire east end of Salt Lake County; the Traction Company to the central part; and the Salt Lake & Utah Railroad Company to the western part and the south-central part; and the only gaps are the cross-county connections which the applicant has thrown in by way of a stub bus operation, (R. 130, Tr. 17), for the purpose of acquiring public support with the success illustrated by the testimony of John M. Peterson of Draper. This witness was particularly anxious on behalf of the Draper Chamber of Commerce for cross-county service from Draper to Bingham, Lark, Magna and Arthur (R. 386, Tr. 274). His attention was called to the fact that the scope of the present application involved only service between Draper and Riverton, which he felt would be well taken care of by granting the application. But on cross examination it developed that the schedule of applicant (which he had not seen previously) would leave him stranded in Riverton without a possibility of returning, (R. 391, Tr. 279).

Certainly if there is a need it is not of the public as a whole, but only of a few individuals whose husbands have their cars, or who, for some other reason, desire a convenient standby service which can be taken rather than any other means of reaching a particular destination. In this applicant's witnesses were unanimous.

The Report of the Commission makes no finding at all on this issue, except to comment that some of the territory has bus service and some has not, and to conclude that “* * * even though some of the territory

is now being given common carrier service, public convenience and necessity would justify the issuance of the authority requested by the applicant, so that the aforementioned territory which does not now have common carrier service might be afforded the opportunity of such service.” (R. 52).

Plaintiff submits that, were findings to be made on the above evidence, applicant has failed to meet its burden of proof to show that the proposed service would not only be a convenience, but also a reasonable necessity for the proposed service as distinguished from the convenience. While the word “necessity” is not used in the sense that the service must be essential or absolutely indispensable, still the need must be such as to warrant the expense of making the improvement. In other words, mere convenience is not enough, but the inconvenience occasioned by lack of service requested must be so great as to amount to a necessity not only of individuals, but to the people of the community or territory affected at large and as a whole. (*Railroad Co. vs. State*, (Okla.) 252 P. 849; *Fornarotto vs. Public Utility Commissioners*, (N. J.) 143 Atl. 450.) But there are no Findings at all!

Finally it should be pointed out that the findings do not cover the undisputed evidence of plaintiff that the Traction Company had been and then was willing to comply with all lawful orders of the Public Service Commission with respect to its existing operations, (R. 434, Tr. 322) and with respect to extensions of service (R. 439, Tr. 327). This testimony adduced through witness

Woolley on behalf both of the Traction Company and the Salt Lake & Utah Railroad Company was repeated (R. 43, Tr. 331) in order that there could be no misunderstanding of the attitude of the protestants.⁽⁴⁾

- (6) The Commission failed to make findings as to whether or not the proposed service would be an unnecessary duplication of existing service rendered by plaintiff and other protestants. (5)**

We discuss hereinafter the reasons why the finding on this issue, if made, would have to be that the proposed service would be an unnecessary duplication. The point made here is that there is no finding responsive to this important issue.

B. The Commission has made Findings of Fact not supported by any substantial evidence:

Not only has the Commission failed to make findings on material and necessary issues, but in at least four

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- (4) "Mr. Behle: This is repetition, but I want to make the point clear.

Mr. Woolley, as manager of the Traction Company, if the Commission should determine by lawful proceedings that there is a need for additional service, and should so find, is your company willing to comply with all lawful orders of the Commission with respect to the rendering of such additional service?

"Mr. Woolley: Yes, sir.

"Mr. Behle: And likewise, with respect to any changes or modifications with respect to the existing service now being rendered by your company?

"Mr. Woolley: Yes."

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- (5) See Point C-3, page 48 *infra*.

respects its so-called findings are not supported by any substantial evidence in the record.

(1) On page 3 of the Report (R. 51) the Commission finds:

“The rates now in effect are the lowest that this Commission has been able to procure. However, voluntary reductions would at any time have been in order. When the Commission has sought reductions the attitude of the Traction Company has been that the operation of this line, as also the operation of the Traction system as a whole, yielded little or no return upon the investment, and if the Murray-Sandy line were granted further reductions, it would mean that the now meager net returns of the Traction Company would be further reduced and the users of the service in Salt Lake City would be forced to carry in part the costs of the service beyond the city limits.” (Report p. 3, R. 51).

The present personnel of this Commission were parties before this Court in the case of *McCarthy vs. Public Service Commission of Utah*, 77 P. (2d) 331, 94 Utah 304, wherein this court said, on page 338, with respect to the Commission’s claim that it could consider its own records in connection with any application:

“* * * It does not appear, however, that these records or permits were put in evidence or made part of the record before the Commission in the matter of the permit No. 125, or in the later record made upon plaintiffs’ petition for rehearing or reconsideration. In such case they are not properly a part of the record on review in this court. *Los Angeles & S. L. R. Co. v. Public*

Utilities Commission, 81 Utah 286, 17 P. 2d 287, 291; Spencer v. Industrial Commission, 81 Utah 511, 20 P. 2d 618. Plaintiffs were never confronted with such records as evidence and have had no opportunity before the Commission to oppose them with objections as to competency, to the inferences or conclusions drawn therefrom, or to rebut the same by other evidence. They are not affected thereby in this court.”

Yet that portion of the report above quoted departs from any evidence at the hearing in setting forth as findings, presumably material to the result reached by the Commission, statements with respect to certain informal conferences which the Traction Company purportedly had with the Commission. Plaintiff, until the time of the promulgation of the Report and Order now under review, had no intimation that the Commission would depart from the record, had no opportunity to cross examine on this “testimony”, was not confronted with these records as evidence, and was not given an opportunity to oppose the inferences drawn therefrom.

(2) On page 3 of the Report (R. 51) the Commission also makes a finding, or at least a contrast, between the present rates of protestants and the proposed rates. Plaintiff submits that the record is barren of any such contrast of 46 percent, and of course the proposed rates of protestants do not appear in the Report on which this fallacious contrast is based.

Exhibit 1-C (R. 42) contrasts the proposed fares of applicant and the fares of the Salt Lake & Utah Railroad Corporation. Exhibit "E" (R. 38) sets forth the Traction Company fares, and the proposed fares of the Airways are set forth in full on page 2 of its application (R. 2). The percentage figure used by the Commission appears incorrect. Yet this portion of the Report has been widely quoted throughout Salt Lake County in order to gain popular support for the applicant, no mention being made of the other general statement on page 4 of the Report, (R. 52) that "In the cases of students, transferees and riders with weekly passes, the rates of the Traction Company are decidedly more favorable than the rates proposed by the applicant. * * *"

(3 & 4) The Report on page 4 (R. 52) finds:

"* * * there is at the present time no reason to suppose that such patrons will not continue to enjoy the benefits of these rates."

Again on page 7 of the Report (R. 55) the Commission finds:

"The granting of this application will not substantially detract from nor impair existing common carrier service * * *."

Not only is there no evidence to support such findings to the effect that the Traction Company or the Salt Lake & Utah Railroad Company will not suffer from the

proposed competition, but the evidence, and the admissions in the pleadings are all to the contrary.

We have heretofore pointed out that applicant admitted through the pleadings the fact that that part of the proposed service in so far as operations between Salt Lake City, Murray, Midvale and Sandy were concerned, was "in direct conflict" with the existing service of plaintiff. (R. 45). The defendant, Airway Motor Coach Lines, Inc., further admitted in the pleadings that the granting of its application *would jeopardize the ability of plaintiff to continue to render service south of Thirty-third South* (R. 46). Responsive to this admission the witness Davis testified with respect to this duplication (R. 129-131, Tr. 16-18, and quotations from testimony set forth in foot-notes 1 to 3 supra). On cross examination he stated that "* * * there isn't room for our operations and the Traction Company operations in this territory." (R. 164, Tr. 51); that by virtue of applicant's lower rates, more frequent schedules, easier riding equipment, more courteous treatment of passengers and better salesmanship, the Airways could successfully compete with the Traction Company's service, but that if the Traction Company lowered its rates to compete with those of the Airways, "that might work quite a hardship upon us" (R. 165, Tr. 52). These admissions and this testimony are consistent with the testimony of the witness Woolley for the Traction Company, to the effect that the result of the proposed duplication would be

that there would not be enough revenue "for either one to even come near breaking even" (R. 459, Tr. 347).

Thus the Order of the Commission (if sustained), based in part upon these erroneous Findings, is now creating and will continue to create a situation of disastrous and destructive competition, harmful not only to the parties involved, but to the public—the public which, based on sad experiences along this line, had legislated to prevent such situations from arising again.

For the reasons hereinabove set forth plaintiff submits that the Report and Order under review should be vacated and set aside, and the proceedings remanded to the defendant Public Service Commission, with directions to comply with the law and make proper Findings. As this Court has said, "the Commission should be careful to make proper findings respecting the material ultimate facts upon which an order is based," and if this had been done in the instant case, the errors hereinafter discussed may not have occurred.

C. The action of the defendant Commission in issuing the Report and Order under review is contrary to law, in violation of statute, and arbitrary and capricious, in the following particulars:

(1) The Commission has issued a Certificate of Convenience and Necessity although applicant has not obtained

franchises or licenses from the local County and City authorities concerned, as required by law.

The Commission by its order has issued a Certificate of Convenience and Necessity, although defendant, Airway Motor Coach Lines, Inc., has not obtained franchises or licenses from the local county and city authorities concerned, as required by law. Sub-section 3 of Section 76-4-24, Revised Statutes of Utah 1933, specifically directs the Commission to condition the granting of a certificate upon a showing that:

“* * * such applicant has received the required consent, franchise or permit of the proper county, state, municipality or other public authority. * * * If a public utility desires to exercise a right or privilege under a franchise or permit which it contemplates securing but which has not yet been granted to it, such public utility may apply to the Commission for an order preliminary to the issuing of the certificate. The Commission may thereupon make an order declaring that it will, therefore, upon application, under such rules and regulations as it may prescribe, issue the desired certificate upon such terms and conditions as it may designate after the public utility has obtained such contemplated franchise or permit. Upon presentation to the Commission of evidence satisfactory to it that such franchise or permit has been secured by such public utility, the Commission shall thereupon issue such certificate.”

Paragraph 13 of the Application admitted that the applicant did not yet have these franchises (R. 3) but

stated that arrangements had been made for obtaining the necessary franchises or licenses. The testimony supported this allegation (R. 148, Tr. 35). Certainly the Commission had this requirement in mind when Commissioner Holbrook called this matter to the attention of applicant (R. 153, Tr. 40).

As stated by witness Davis at this time, (R. 153, Tr. 40), the applicant was following the second alternative provided by the statute above quoted. Yet the Commission has not only made no finding responsive to the allegations of the Application and to the undisputed testimony, but failed to follow the statute in the particulars above quoted and granted the certificate effective immediately. Thus applicant under the Report and Order under review possesses a certificate of convenience and necessity, but has not obtained a permit, franchise, or license from Salt Lake City, Murray, Midvale or Sandy, or from any of the other communities. This situation was not only not contemplated by the statute, but is expressly prohibited thereby.

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- (2) The Commission has issued a Certificate of Convenience and Necessity despite evidence on which it itself has found that applicant has not the financial ability to to properly perform the service proposed.**
 - (3) The Commission has issued a Certificate of Convenience and Necessity without taking into consideration the existing transportation facilities in the territory pro-**

posed to be served by applicant and the effect of the proposed service thereon and the offer of existing facilities to furnish any additional or supplemental service determined by the Commission to be necessary and convenient, thus creating an unnecessary duplication of service.

- (4) The Commission has issued a Certificate of Convenience and Necessity based not upon findings of convenience and necessity, but on a contrast between rates and schedules of the various protestants, concerning which no adequate findings are made, and applicant's proposed rates and schedules.

Before dealing with the foregoing vital points may we outline briefly our conceptions of the basic scope and limitations of and upon the administrative process which we contend the Public Service Commission failed to apprehend.

We conceive the fundamental nature of the administrative process to be well stated in the recent opinion of the Utah Supreme Court in the case of *Rowell vs. State Board of Agriculture*, 99 P. (2d) 1, U., wherein it is said:

“That the Legislature may not surrender or delegate its legislative power is elemental.

“It may, however, provide for the execution through administrative agencies of its legislative policy, and may confer upon such administrative officers certain powers and the duty of determining the question of the existence of certain facts

upon which the effect or execution of its legislative policy may be dependent. * * *

“But in the delegation of such authority the Legislature must clearly mark the course to be pursued, and the principles, facts and purposes to serve as guide posts to enable the officer to carry out, not his own will or judgment but that of the Legislature. * * *”

As we all know the Legislature of the State of Utah in 1917 created the Public Service Commission as an administrative agency for the purpose of providing for the execution of its legislative policies with respect to public utilities. Upon the Public Service Commission was conferred by the Legislature of this State certain powers and responsibilities, including the duty of determining the question of the existence of certain facts upon which the execution of the legislative policy of the State of Utah may be dependent.

The public policy laid down by the Legislature was a mandate for a regulated monopoly in the public utility field for reasons familiar to any student of the public utility question. In the case of *Gilmer vs. Public Utilities Commission*, 247 P. 284, 67 U. 222, decided in 1926, this court said on page 287:

“* * * Mr. Spurr, by reason of his position as the editor of the Public Utilities Reports, is no doubt well qualified to speak upon the subject of state control of public utilities. In discussing that subject in volume 1 of his work entitled

Guiding principles of Public Service Regulation, at page 31, the author says:

“ ‘What do these provisions of the statutes with reference to certificates of public convenience and necessity signify? As a matter of policy, why should a public utility company require commission consent before beginning operation while those engaged in private enterprises can do business where they will? Public and private industries were once on the same footing in this respect. The maxim that competition is the life of trade was held to apply to public as well as private business. Competition, being thought well of, was welcomed in all kinds of business. Experience proved, however, that business rivalry in the public utility field was bad, both for the companies and the public. So the policy of discouraging rather than encouraging competition between public service companies was adopted.’ ”

This case involved motor carriers who desired to participate in the available business on a competitive basis, and on page 289 the Court said:

“ * * * Every public utility necessarily must operate in accordance with both the letter and the spirit of the Public Utilities Act and the authorized conditions imposed by the commission. *The very purpose of the Utilities Act is to prevent one public utility from destroying another.* When, therefore, it is made apparent to the commission that the increase of the number of vehicles or trips by a common carrier which is using the public streets and highways must necessarily result in seriously affecting the ability of another

utility to render service, or perhaps destroy its ability to do so, where the service is rendered by the other public utility partly in the same territory and partly in territory extending beyond the territory served by the utility first mentioned, the commission undoubtedly may interfere to prevent such disastrous results. The commission was created for that very purpose, and, where its orders are within its jurisdiction and the bounds of reason, and are not capricious and arbitrary, this court cannot interfere.” (*Italics ours*).

Lest one think that this public policy of regulated *monopoly* has been changed in the intervening years to one of regulated *competition* despite the continuance on the books of the same Statutes, we quote from the opinion of the same court in 1938, where in the case of *McCarthy vs. Public Service Commission of Utah*, *supra*, it is said on page 335 of 77 P. (2d):

“* * * The available supply of business over a given route or over all routes covered by their common facilities is the source from which the earnings of each carrier must come. Whatever subtracts from the total volume of business is a diminution of earning capacity for those who must compete for and share in the remainder and who have equipped themselves at large expense for carrying a larger share of the business. True, no carrier has a property interest in any specific business or shipment until he actually gets it, connects with it, appropriates it, by contracting therefor with the shipper. But he is entitled to his chance as a competitor at all the business there is as against anyone proceeding unlawfully or without due authorization of the statute to divert or appropriate any part of it. The rights of com-

peting carriers to share in a stream of transportation business flowing over a given route or highway may well be likened to the rights of rival or competing appropriators of water from a natural stream or source of supply, where there is insufficient water in the source to fully satisfy the wants or needs of all. In such case, every appropriator or user of water has a beneficial interest in protecting the supply of water in the natural stream from unlawful diminution, even before it reaches his own headgate and before he has made any specific water in the stream his own. And he is entitled to his day in court or a hearing before the official charged with policing the stream and distributing the water of the stream, to protest against any unlawful act of wastage or distribution of the water."

And again on page 337:

"Every such permit, every act of transportation, tends to produce competition for business, and increased activity to get and control business. But competition is not, in itself and always, a benefit to the public or in the public interest; not any more than is monopoly always in the public interest. Rather, it lies in a medium between the two. As well said in a recent case, *People's Transit Co. v. Henshaw*, 8 Cir., 20 F. 2d 87, at page 90:

" 'The results of such competition, where there is not sufficient business to sustain all of the competitors, is that a season of experience causes all or some to drop out or compels the purchase of competitors (usually at exaggerated amounts), thus causing an increase of capital expenditure of the purchasers upon which the charges to the public must be based and thereby increased.

“These considerations, and others, amply justify differences to protect and preserve the existing permanent system. No new system has a legal right to destroy such existing system and have the public at its mercy. The public welfare is not served, but harmed thereby. The public may protect itself against such results. Nor can any theory of free competition change this situation. Competition is recognized and encouraged for the sole reason that it is supposed to result in the public good. But competition is not necessarily unrestrainable. It cannot be allowed to harm the very public it was designed to protect and aid. It may be restrained for the public welfare just the same as monopoly may be restrained or as competition may be left unrestrained. The test in each instance is the public good. Where the restraint upon competition is for the public good, it is sustainable just as restraint upon freedom of action by the individual is valid where for the public good. Such is the basis of and the reason for the entire police power.’ ”

Insofar as public utilities are concerned, the Legislature of this state, “testing” the public good, has determined by Title 76 to create and regulate monopolies.

In 1935 the Act was amended with respect to common motor carriers and by the provisions of Section 5, Chapter 65, Laws of Utah 1935, the Public Service Commission was empowered and charged as follows:

“76-5-5. Common motor carriers — Powers and duties of commission. *The commission is vested with power and authority, and it shall be*

its duty, to supervise and regulate all common motor carriers and to fix, alter, regulate and determine just, fair, reasonable and sufficient rates, fares, charges and classifications; to regulate the facilities, accounts, service and safety of operations of each such common motor carrier, to regulate operating and time schedules so as to meet the needs of any community, and so as to insure adequate transportation service to the territory traversed by such common motor carriers, and so as to prevent unnecessary duplication of service between these common motor carriers, and between them and the lines of competing steam and electric railroads; and the commission may require the co-ordination of the service and schedules of competing common carriers by motor vehicles or electric and steam railroads, to require the filing of annual and other reports, tariffs, schedules and other data by such common motor carriers, and to supervise and regulate such common motor carriers in all matters affecting the relation between such common motor carriers and the public and between such common motor carriers and other common carriers, to the end that the provisions of this chapter may be fully and completely carried out. The commission shall have power and authority, by general order or otherwise, to prescribe rules and regulations in conformity with this act applicable to any and all such common motor carriers, and to do all things necessary to carry out and enforce the provisions of this act. All laws relating to the powers, duties, authority, and jurisdiction of the commission over common carriers are hereby made applicable to all such common motor carriers except as herein otherwise specifically provided."

With respect to the issuance of certificates of convenience and necessity the Legislature by Section 6 of

Chapter 65, prescribed "guide posts" to enable the Commission to carry out, not the judgment or will of the Commission, but that of the Legislature, in the following terms:

"* * * Before granting a Certificate to a common motor carrier the Commission shall take into consideration the financial ability of the applicant to properly perform the service sought under the Certificate and also the character of the highway over which said common motor carrier proposes to operate and the effect thereon, and upon the traveling public using the same, and also the existing transportation facilities in the territory proposed to be served. If the Commission finds that the applicant is financially unable to properly perform the service sought under the certificate, or that the highway over which he proposes to operate is already sufficiently burdened with traffic, or that the granting of the certificate applied for will be detrimental to the best interests of the State of Utah, the Commission shall not grant such certificate."

Paraphrasing these guide posts by which the Commission "shall be guided" (See opinion of Mr. Justice Wolfe in the Rowell case, page 10 *supra*, as to construction of statutory working "shall consider" to be equivalent of "shall be guided by") we see that the Legislature has ordered the Commission (in addition to finding a public need and convenience) to find from evidence adduced at a public hearing:

1. Whether or not the applicant is financially able properly to perform the service sought under the application.

2. Whether or not the highways over which the applicant proposes to operate will be adequate to accommodate additional traffic.

3. What the existing transportation facilities, if any, in the territory proposed to be served are, and what the effect of the granting of the application will be upon those existing transportation facilities.

Upon the determination of these facts the Legislature has directed the Commission to deny applications if those facts as so found show that (a) Applicant is financially unable to properly perform the service sought under the Certificate, or (b) that the highway over which he proposes to operate is already sufficiently burdened with traffic, or (c) that the granting of the Certificate applied for will be detrimental to the best interests of the people of the State of Utah. In this latter connection the legislative mandate is that the Commission shall prevent unnecessary duplication of service between common motor carriers. (Section 5, Chapter 65, Laws of Utah 1935).

Plaintiff submits that the Commission has violated the legislative mandate of its creator and has failed to perform its statutory duties as hereinbefore prescribed. Unless checked by this court the result will be to repeal the public policy of the State of Utah and substitute in lieu thereof a competitive situation between the Traction Company and the Airway Motor Coach Lines, Inc., with the prospective result which the legislative public policy of this State was designed to prevent. In other words,

as the Order now stands the Traction Company must compete, or be displaced, despite the fact that **“the very purpose of the Utilities Act is to prevent one public utility from destroying another.”** *Gilmer vs. Public Utilities Commission*, supra. Let us see in what respects the Commission has erred in order to reach this state of affairs.

- (2) The Commission has issued a Certificate of Convenience and Necessity despite evidence on which it itself has found that applicant has not the financial ability to properly perform the service proposed.**

With respect to this issue the evidence that applicant has lost \$8,240.00 of its capital of \$9,400.00 in two and one-half years (R. 158, Tr. 145), that it has cash on hand of \$136.48 (R. 6), that operations in Provo resulted in an operating loss of approximately \$4,000.00 (R. 134, Tr. 21), and that the Draper operation was unprofitable (R. 141, Tr. 28), fully supports the finding of the Commission that “the financial condition of this applicant at the present time does not seem to justify the expansion that would be necessary to undertake the proposed service” (R. 53). The Commission further found “the assets of the applicant are only sufficient at present to sustain the operations conducted under the Certificates heretofore issued by the Commission for a period of two more years at the rate at which these assets have been diminished in the past two years. * * * At the present time the current obligations of this Company

relating to the Utah operations are approximately equal to existing assets.” (R. 53, 54).

The mandate of the Statute required that the application, therefore, be denied in accordance with this finding. Yet notwithstanding the statutory provision the Commission granted the application and issued a certificate of convenience and necessity effective immediately (R. 56, 57). The effect of this, it is submitted, was a nullity in that the order was void.

Recognizing this statutory requirement, but seeking to avoid its mandate, the Commission attempted to justify its action by requiring applicant (R. 57) to secure “not less than \$15,000.00 cash in hand through the sale of capital stock in the Corporation, said sum to be used for the benefit of the Utah operations, to finance the purchase of needed equipment of a type to be approved by this Commission, and to assure the financial stability of the Corporation. * * * “on or before June 1, 1940. If the granting of the authority is construed to be conditional upon a further showing, the record discloses no hearing and no such further showing. True on May 7 and after this point had been raised by the Petition for Rehearing, the applicant filed an affidavit (R. 103, 104) to the effect that this additional capital had been raised, but certainly this self-serving affidavit filed ex parte can not be considered a substitute for a further hearing on notice.

The evidence shows that the applicant has failed to meet the expense of its operations in Provo, Mill Creek

and in Draper, and the population in the vicinity of Crescent, Riverton, West Jordan, Bennion and Taylorsville can not pay the costs of mass transportation if the Mill Creek, Draper and Provo territory can not. Substituting "bus route" for "road" the opinion of the New York Supreme Court in the case of *People vs. Board of Railroad Commissioners*, 108 N. Y. S. 288, wherein the action of the Railroad Commission in certifying as to the necessity and convenience for an additional railway service was reversed, is applicable here. We quote:

"* * * From the record it is extremely probable that the road cannot pay running expenses. It therefore would apparently be a financial cripple from the start, and there is no public necessity for the construction of a road which cannot maintain itself and which must inevitably be bankrupt from the beginning. Such a road in this territory cannot be a public convenience or necessity.

"It is unnecessary to go into detail as to the estimated business and the probabilities that the Company may do such business, and the probable cost of operation and maintenance. The evidence as to the probable business and shipments is evidently mere guesswork and greatly exaggerated. A mere statement of the locality of the proposed road and the manner in which that locality is now served by the railroads clearly indicates that there is no necessity for this road."

Applicant has failed to meet its operating expenses despite such economies as paying his bus drivers somewhere between \$80.00 to \$90.00 per month (R. 163, Tr. 50) in contrast to a little over \$130.00 per month paid

employees of the Traction Company (R. 183, Tr. 70). On cross examination by Commissioner Holbrook, Mr. Davis indicated little knowledge with respect to the operations of the Company (R. 156, Tr. 43), and he admitted (R. 160, Tr. 47) that applicant's costs would be 11c a mile not counting depreciation, with prospective revenues something less than 10c a mile. The feeling of the Commission with respect to the failure of applicant to meet its burden of proof on this issue seemed to be summarized in Commissioner Holbrook's statement (R. 170, Tr. 57): "You wouldn't really feel that this Commission would be justified in granting the application based on the financial statement presented with the application, would you?"

Yet notwithstanding this testimony and the findings of the Commission, the Commission adopted the peculiar reasoning that to provide an additional \$15,000.00 which applicant could lose in its operations, would be the equivalent of the statutory mandate requiring applicant to meet the burden of proof of showing that its proposed operations are economically sound and that it is financially able to perform the service sought.

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- (3) The Commission has issued a Certificate of Convenience and Necessity without taking into consideration the existing transportation facilities in the territory proposed to be served by applicant, and the offer of existing facilities to furnish any additional or supplemental**

service determined by the Commission to be necessary and convenient, thus creating an unnecessary duplication of service.

With respect to this guide post delineated by the Legislature the Commission proceeded to ignore uncontroverted evidence and the stipulations of the parties, making no finding whatsoever responsive to the evidence and admissions, and making findings unsupported by evidence as hereinbefore set forth. Turning to the Record for evidence on this issue, we find:

The proposed service at first was designed substantially to duplicate the Utah Light and Traction Company service to Midvale and Sandy (R. 131, Tr. 18). Thereafter the cross-county service between Riverton, Draper, Midvale, Sandy, Murray, Taylorsville and Benning was developed (R. 136, Tr. 23), to be served by a shuttle bus as an adjunct to the main operations duplicating the Traction service (R. 130, Tr. 17), and to be discontinued if unprofitable (R. 162, Tr. 49). Davis at first denied but then admitted that these additions and proposals were offered to obtain popular support (R. 137, Tr. 24). Apparently applicant was willing to make any promise with respect to rates, schedules, routes, service, territory to be served and bonds to be posted (R. 168, Tr. 55) or any other condition, just so applicant could be permitted to start operating. Exact knowledge of either cost of operation or prospective revenue seemed no more important than the fact that applicant had lost \$8,000.00 in its operations during the the past two years.

The President of the Company and its only witness with respect to these matters was not even sure what the extent of applicant's losses had been (R. 158, Tr. 45).

Mr. Davis admitted on cross examination that the first contacts with respect to the proposed service came from Murray (R. 132, Tr. 19)⁽⁶⁾; that Commissioner Hansen on behalf of Murray City offered applicant a franchise as one inducement to make this application (R. 134, Tr. 21); that subsequently applicant contacted officials of Midvale City with respect to an extension of the service to Midvale and Sandy, and proposed a fare of 20c (R. 135, Tr. 22). Having given this figure by oversight (or perhaps finding that this was the Traction Company fare and, therefore, no inducement for obtaining support from Midvale and Sandy) the proposed fare was lowered to 15c (R. 135, Tr. 22). (A twenty-five percent reduction in revenue apparently meant little or nothing, although such a reduction would generally be vital to other businesses.)

Boiled down, we have a Company operating on a small margin and at cut rates planning to invade territory served by protestants, and the problem presented itself of escaping from the provisions of the Utah Statutes providing for a system of regulated monopoly in

(6) Mr. Melville: (R. 93, Tr. 80) "The whole thing is Murray's case, and ours is the same; it is identical."

Mr. Behle: "Your case is Murray's case?"

Mr. Melville: "Yes sir; we are interested in the same things.
* * *"

this respect. The applicant, forced to admit that a duplication of service was proposed which would jeopardize the ability of plaintiff to furnish its existing service, took every conceivable step to create popular support for its application in the hope that the Commission, as it did, would endeavor to side-step the provisions of law. The defendant admitted in its pleadings (R. 45) that the proposed service was a duplication but alleged it was justified because:

1. **Plaintiff's service south of 33rd South was inadequate and irregular.** But as hereinbefore pointed out the the defendant failed in its attack on service; and the matter of inadequate and irregular service was not at issue in this case involving *convenience and necessity*. The only excuse for the existence of the defendant, Public Service Commission, is to regulate and supervise utilities. Section 5, Chapter 65, Laws of Utah, 1935, *supra*, not only vests the Commission with power and authority, *but makes it the duty* of the Commission to supervise and regulate common motor carriers, to fix, alter, regulate and determine just, fair, reasonable and sufficient rates, fares, charges and classifications; to regulate facilities, service, operating and time schedules in order to meet the needs of any community; and *to insure adequate transportation service to the territory served*. Defendant Commission has never hesitated to perform its duty and deal with complaints with respect to service in the way contemplated by Statute, but the entire subject was

immaterial in a hearing on an application involving the *necessity and convenience* for a new service.

2. **The public favored the Airway's application because this service was inadequate and irregular.** But this is immaterial to the case at hand because the public has its remedy with respect to complaints concerning inadequate and irregular service.

3. **Plaintiff's fares were excessive and thus prohibited general public use of its service.** This contention is considered in our final point.

4. **Plaintiff's operations south of 33rd South were unprofitable.** Plaintiff submits that it knows of no legal, moral or social sanction vesting in applicant, Airway Motor Coach Lines, Inc., a duty self-imposed, to perform the services of guardian for the plaintiff, admitting solely for the sake of argument the truth of the contention.

5. **Applicant was offering additional service to other communities without service, contingent upon the granting of the entire application.** This was an admitted addition to accomplish another and the ultimate end (R. 137, Tr. 24). But the new service did not become *necessary* for this reason, because this additional service if needed could be obtained by the proper exercise of the duties of the Commission as pointed out by Commissioner Weisley in his dissent (R. 109).

The conclusion is inescapable that the service authorized was an unnecessary duplication contrary to

law, and the order, therefore void, unless justified by the matter of rates dealt with hereafter.

The Arizona Supreme Court has recently taken occasion to point out to the Arizona Commission the proper procedure required by the statutes in a case decided October 2, 1939: *Corporation Commission vs. Pacific Greyhound Lines*, 94 P. 2d 443. In this case the court reasserted the generally understood rules with respect to such matters in the following language:

“* * * The proper procedure to be followed by the commission, under the circumstances set forth in the record, was as follows: It should first have examined the new service offered by the applicant and determined whether it is more in the interest of the traveling public than that furnished by the plaintiff. If its answer is in the affirmative, it should then offer to the plaintiff an opportunity to furnish such new service, and if plaintiff can, and will, do so, should deny the application. If it cannot, or will not, furnish it, and the new service offered can reasonably be separated into two parts, one being a service which can and will, be furnished by the plaintiff, and the other one which, for any reason, is beyond its power to furnish, and this separation will not injure the interests of the traveling public, the commission should then issue a certificate authorizing the applicant to carry on such portion of the service as it is beyond the power of the plaintiff to furnish, but prohibiting it from giving such service as can, and will, be given by the plaintiff. If, however, the new service offered cannot thus be reasonably separated, the commis-

sion should then issue the certificate of convenience and necessity for the new service to the applicant. This course preserves as a paramount consideration the benefit to the traveling public, while still protecting the interest of the existing certificate holder so far as it can be without injury to that public."

This principle has been given express recognition by this Commission in the past; *In Re Blue and Gray Bus Line*, P. U. R. 1924-A, 449. There the Public Utilities Commission of Utah said:

"To further deplete the revenues of the street railway system by authorizing a competitive bus service, would only result in further restricting the company's ability to give service, and if competition were carried to its logical conclusion, would utterly destroy the service so necessary to the many. It is the necessities of the general traveling public that must be considered, rather than the convenience of the few."

This principle is also to be found in the decisions of every Commission and Court where regulated monopoly is the public policy of the State. For example, see *Bartonville Bus Lines vs. Eagle Motor Coach Line*, 157 N. E. 175 (Ill.); *Egyptian Transportation System vs. Louisville Railroad Company*, 152 N. E. 510 (Ill.); *Chicago Railroad Company vs. Commerce Commission*, 167 N. E. 840 (Ill.); *Annotation 67 A. L. R.*, 957, and cases P. U. R. Digest, "Monopoly and Competition," Section 61, "Opportunity for Present Carrier to Provide New Service," and "Automobiles," Key 83 of the American Digest System.

From the latter Chicago case we quote briefly:

“It is contended that there was no substantial evidence showing that public convenience and necessity required the bus service. It is not the policy of the Public Utilities Act to promote competition between common carriers as a means of providing service to the public. The policy established by that act is that through regulation of an established carrier occupying a given field and protection of it from competition the public will be served more efficiently and at a more reasonable rate than if other competing lines were authorized to render the same public service in the same territory. Methods for the transportation of persons are established and operated by private capital as an investment, but as they are public utilities the state has the right to regulate them by such regulations as are reasonable. The policy of the Public Utilities Act is that existing utilities shall receive a fair measure of protection against ruinous competition. Where one company can serve the public conveniently and efficiently, it has been found from experience that to authorize a competing company to serve the same territory ultimately results in requiring the public to pay more for transportation in order that both companies may receive a fair return on the money invested and the cost of operation. The Commerce Commission has no arbitrary powers. Its orders must be reasonable and lawful and the question whether they are so or not is subject to review on appeal. To authorize the Commerce Commission to grant the coach company a certificate of convenience and necessity and authority to operate its lines to serve the same public already served by the appellants, it was required that it be shown that appellants were not render-

ing adequate and convenient service and that the operation of the bus lines would eliminate such inadequacy and inconvenience. In determining that question the primary consideration is the convenience and necessity of the public. Whether the public convenience and necessity require the establishment of a new transportation facility is not determined by the number of individuals who may ask for it. The public must be concerned as distinguished from any number of individuals. *West Suburban Transp. Co. v. Chicago & W. T. R. Co.*, 309 Ill. 87, 140 N. E. 56; *Choate v. Commerce Commission*, 309 Ill. 248, 141 N. E. 12. To authorize an order of the Commerce Commission granting a certificate of convenience and necessity to a carrier though another is in the field, it is necessary that it appear, first, that the existing utility is not rendering adequate service, and it is but a matter of fairness and justice that it be shown that the new utility is in a position to render better service to the public than the one already in the field. It is in accord with justice and sound business economy that the utility already in the field be given an opportunity to furnish the required service where it offers and is able to do so. *Egyptian Transp. System v. Louisville & N. R. Co.*, 321 Ill. 580, 152 N. E. 510. Where additional or extended service is required in the interest of the public and a utility in the field makes known its willingness and ability to furnish the required service, the Commerce Commission is not justified in granting a certificate of convenience and necessity to a competing utility until the utility in the field has had an opportunity to demonstrate its ability to give the required

service. *Bartonville Bus Line v. Eagle Motor Coach Line*, 326 Ill. 200, 157 N. E. 175.”

This “sugar-coating” of the Application did not, plaintiff submits, make the proposed duplication of service necessary.

- (4) The Commission has issued a Certificate of Convenience and Necessity based on the contrast between rates and schedules of the various protestants, concerning which no adequate findings are made, and applicant’s rates and schedules.**

As indicated hereinbefore, the defendant Airway Motor Coach Lines, Inc. attempted to meet the statutory mandate against an unnecessary duplication by claiming the admitted duplication of service to be necessary because plaintiff’s fares were excessive and thus prohibited the general public use of its service (R. 45).

Analysis of the Report of the Commission indicates that the reasoning for granting the application seems to be based upon three premises—

1. That there is some territory (no specific finding) south of Salt Lake City in Salt Lake County, which does not now have common carrier service, but which might have if the application should be granted. (No finding as to need for this service). (Report p. 4, R. 52). We have heretofore pointed out the errors in this premise.

2. That the granting of the application would not affect the existing service. (Report pp. 4-7, R. 52-55). We have likewise pointed out the errors in this premise.

3. That the applicant offers lower rates in some instances. (Report p. 3, R. 51). This matter is now considered at this point.

Counsel for applicant admitted that the only real basis for support of the application was the matter of fares. In urging the Commission to overrule plaintiff's objection to evidence with respect to rates on the ground that the hearing was as to convenience and necessity for the proposed service and not a rate hearing with respect to existing service, Mr. Melville stated (R. 448, Tr. 336): "if the Commission wants to rule out fares, we are out altōgether. There is no use holding a hearing that I can see. The whole issue is improper fares; that people can't ride—if the fares can't be gone into."

Over plaintiff's objection this matter was considered by the Commission and, as indicated above, appears to be the main factor in the promulgation of the Order under review. We have heretofore pointed out that in some respects the findings of the Commission on this evidence were incorrect as to the contrasting fares, and in many respects were incomplete.

The hearing upon the application of the defendant Airway Motor Coach Lines, Inc. was upon the question of the issuance of a certificate of convenience and necessity pursuant to the provisions of Section 6, Chap. 65,

Laws of Utah 1935; it was not a rate hearing pursuant to Section 5, Chap. 65, Laws of Utah 1935. This the presiding Commissioner himself recognized by his oral comment during the hearing (R. 120, Tr. 7).

So far as we know the cases are unanimous in the States where the public policy with respect to utilities provides for regulated monopoly, to the effect that rate-making has nothing to do with service; that it is not in the public interest to permit established utilities to have their business destroyed by new companies attempting to engage in "cut-throat" competition inviting retaliation with mutually disastrous results; and that complaints with respect to rates are to be corrected by regulation pursuant to statute through rate hearings, and not by destructive competition. To correct excessive rates by proper proceedings is not only within the powers of the defendant Commission, but is its specific duty under the law. (Sec. 5, Chap. 65, Laws of Utah 1935). (See cases digested in the Public Utility Report Digest under the heading of "Monopoly and Competition", Secs. 40 and 48, and "Certificates of Convenience and Necessity", Sec. 89).

As was stated by Commissioner Wiesley (R. 108), to bottom the issuance of a certificate of convenience and necessity upon a contrast of rates is to admit "either its unwillingness or its inability to function as required by the Act bringing it (the Commission) into existence."

* * * The departure seems particularly unfortunate in the instant case, because the utility already in the field

must continue to meet its schedules, or, with our permission, abandon this portion of its service. If the rates proposed by the applicant are fair and proper, then the existing service can and should be required to operate on them. But such rates might well be reasonable with only one operator in the field, and yet result in competing operators with parallel lines and division of the total revenue, both losing money. Here we have the essence of departure from regulated monopoly.”

The claim that a proposal for lower rates by a new utility should be given consideration in granting a certificate of convenience and necessity has been made heretofore without avail, particularly in connection with contrasting rates of existing railway, and proposed motor bus, carriers. Typical are the decisions of the Interstate Commerce Commission under the Federal Motor Carrier Act of 1935, 49 U. S. C. A., Section 301, et seq. The question was first raised in the case of *In Re Wellspeak*, 1 M. C. C. 712, decided April 22, 1937, where the Commission said:

“The evidence shows, however, that the traffic transported by applicants consisted largely, if not entirely, of traffic theretofore handled by other carriers. The only convincing evidence as to the reason for applicants’ ability to obtain this traffic is the fact that they published and applied lower rates. There is no basis for a finding that rates of carriers now in operation are too high and, even if that should be the case, that fact alone would not justify the issuance of certificates to additional carriers in this territory. Any unlawful rates of existing carriers can be cor-

rected by us upon complaint in accordance with the provisions of the Act. The evidence does not warrant a finding that there is public need for the proposed service but, on the contrary, indicates that the existing facilities of carriers who have conducted operations for a number of years are adequate to serve the needs of the shippers."

In the matter of *Harrison & Harrison Common Carrier Application* decided September 7, 1937, 3 M. C. C. 76, the Commission cited the Wellspeak case and said:

"There is no basis for a finding that rates of carriers now in operation are too high, nor would that fact alone be an element to be considered in determining whether the present or future public convenience and necessity require the addition of another operator in that territory. Any unlawful motor-carrier rates can be corrected by the Commission upon complaint in accordance with the provisions of the act."

In that case interested merchants testifying in support of the Application stated that the service rendered by existing carriers was inadequate, inconvenient and unsatisfactory, that shipments were damaged in transit, deliveries made at inconvenient times, and that the transportation charges were exorbitant. On the other hand witnesses called by protestants testified that the existing service was adequate and efficient and that the available traffic was insufficient to support an additional operator.

Finally in the case of *In Re J. N. Youngblood*, 8 M. C. C. 193 decided July 11, 1938, the Commission stated:

“To sum up, the evidence adduced by applicant, in an effort to show that authorization of his proposed operation is required by the present and future public convenience and necessity, shows no definite advantage of any nature which would accrue to the public by reason thereof, except the possibility of lower rates. The evidence shows that the traffic proposed to be transported will consist entirely of traffic heretofore handled by other established carriers. The only convincing evidence as to applicant’s ability to obtain this traffic is the fact that he proposes to charge a lower rate than that now being charged by other carriers. There is no basis for finding that rates now in operation are too high, and even if that should be the case, that fact alone would not justify the issuance of a certificate to an additional carrier in this territory. If the rates of existing carriers are unlawful, they may be investigated by the Commission upon complaint, in accordance with the provisions of the act. The evidence will not support a finding that there is public need for applicant’s proposed service, but on the contrary, it justifies a finding that the existing facilities of carriers which have conducted operations for a number of years are adequate to serve the needs of the shippers.”

We are not aware of any further cases decided on this point by the Interstate Commerce Commission for the reason, as stated at the hearing by Commissioner Granger, (R. 166, Tr. 53) that evidence with respect to contrasting rates is now eliminated entirely in hearings involving convenience and necessity.

The foregoing cases are also interesting in their suggestions as to the nature of the findings which a regulatory body should properly make in a case involving convenience and necessity, and which as we have heretofore pointed out, are totally lacking in the present Report of this Commission. The motor-carrier cases are replete with applications for certificates and we are unable to find a case comparable to the one before the Commission where a certificate has been granted. The rule seems to be uniform that where the evidence shows the existing service to be adequate and all that is justified by the present use thereof, where there is no prospect of increase in demand sufficient to justify an additional operation, where the feasible necessity in the public interest and applicant's ability to carry out the proposed operations are doubtful, and the success of the proposed operation depends on the diversion of patrons from existing operators, the application for a certificate should be denied. This is the evidence in the instant case.

For example see *In Re Speirs Application*, 1 M. C. C. 555; *In Re Ritz Arrow Lines, Inc.*, 1 M. C. C. 339; *In Re Davis Application*, 1 M. C. C. 68; *In Re Land Application*, 2 M. C. C. 759; and the many other cases in the Motor-Carrier Reports collated in the Hawkins Index-Digest-Analysis of decisions under the Federal Motor Carrier Act, Item 510.

This ruling is also enunciated in the case of *West Suburban Transportation Company vs. Chicago & W. T. Railway Company* decided by the Illinois Supreme Court

in 1923, 140 N. E. 56. This case is probably the leading case to what is the public policy under the various regulatory acts regulating new competition and the choice of applicants, and what factors should be given weight and what should not in connection with the issuance of a certificate of convenience and necessity. For example, it is the key case in the Smith, Dowling and Hale "Case-Book on Public Utilities" published in 1936. In view of the importance of this case we take the liberty of quoting extensively from the opinion therein written by Chief Justice Farmer of the Illinois Supreme Court:

"If the transportation facilities furnished by appellee are so inadequate as to subject the public to inconvenience, and the operation of appellant's bus lines would eliminate that inconvenience, the order of the commission was authorized. It is not the policy of the Public Utilities Act (Smith-Hurd Ann. St. c. 111-2/3, Sections 1, 2, notes, Section 3 et seq., and notes) to promote competition between common carriers as a means of providing service to the public. The policy established by that Act is that, through regulation of an established carrier occupying a given field and protecting it from competition it may be able to serve the public more efficiently and at a more reasonable rate, than would be the case if other competing lines were authorized to serve the public in the same territory. Methods for the transportation of persons are established and operated by private capital as an investment, but as they are public utilities the state has the right to regulate them and their charges, so long as such regulation is reasonable. The policy of the Public Utilities Act is that existing utilities shall receive a fair measure of protection against

ruinous competition. Rates of fare charged for service are subject to regulation by the Commerce Commission within reasonable limits, but the commission has no power to make a rule or order regulating a utility which would amount to a confiscation of its property or require operation under conditions which would not provide a reasonable return upon the investment. Where one company can serve the public conveniently and efficiently, it has been found from experience that to authorize a competing company to serve the same territory ultimately results in requiring the public to pay more for transportation, in order that both companies may receive a fair return on the money invested and the cost of operation.

“The Chicago, Burlington & Quincy Railroad runs southwest from the Western Electric plant, through Cicero, Berwyn, Riverside, Brookfield, La Grange, Western Springs, and Hinsdale, and performs a large part of the transportation of the public in those towns. It has 15 stations between the Western Electric plant and Hinsdale, a distance of about 8 miles, and runs 19 to 34 trains each way per day. This suburban service accommodates people desiring to go to points in the city of Chicago, as well as persons desiring to stop at intervening stations between the Western Electric plant and Hinsdale. It does not appear that the public has ever made any complaint that the transportation service in the towns mentioned was inadequate or insufficient, and no proof was offered on the hearing to that effect except the testimony of appellant’s officers, and their testimony is not impressive. Only a comparatively small portion of the population of the West Towns would be more conveniently served by the operation of the bus lines.

“The Commerce Commission has no arbitrary powers. Its orders must be reasonable and law-

ful, and the question whether they are so or not is subject to review on appeal. *Public Utilities Com. v. Toledo, St. Louis & Western Railroad Co.*, 267 Ill. 93, 107 N. E. 774; *Chicago Bus Co. v. Chicago Stage Co.*, 287 Ill. 320, 122 N. E. 477. To authorize the Commerce Commission to grant appellant a certificate of convenience and necessity, and authority to operate its lines to serve the same public already served by an existing utility, it was required that it be shown the existing utility was not rendering adequate and convenient service, and that the operation of the bus line would eliminate such inadequacy and inconvenience. In determining that question the primary consideration is the convenience and necessity of the public. *Public Utilities Com. v. Cleveland, Cincinnati, Chicago & St. Louis Railway Co.*, 288 Ill. 502, 123 N. E. 547. Whether the public convenience and necessity require the establishment of a new transportation facility is not determined by the number of individuals who may ask for it. The public must be concerned, as distinguished from any number of individuals. *Public Utilities Com. v. Toledo, St. Louis & Western Railroad Co.*, 286 Ill. 582, 122 N. E. 158.

“Some individuals—perhaps a considerable number—would be inconvenienced by the operation of the bus lines; but it is clear from the record that to the great body of the public it would be neither a convenience nor necessity. It was not within the authority of the commission to authorize the operation of the bus lines for the convenience of a small part of the public already served by other utilities at no very great inconvenience. The order appealed from stated the bus company proposes to operate its transportation facilities at a lower rate of fare than the public is now paying, and in appellant’s brief it says the fare charged is 5 cents; but the order does not fix

the rate of fare to be charged. Assuming appellant is limited to a 5-cent fare and appellee is charging a larger rate, that was not, of itself, sufficient to authorize the order of the commission. The commission had authority to regulate the rate charged by the appellee, and if its fares were excessive to reduce them. Fares are not the only thing to be considered in a case of this kind. The public is interested and vitally concerned in adequate transportation facilities at reasonable rates, and the state is interested in assisting to get them; but the state cannot, as we have said, require a carrier to furnish service at a rate which will not pay a fair return on the investment and cost of operation. We are not advised that any complaint had ever been made to the commission that appellee is charging excessive rates, and so far as this case is concerned we will assume it is not doing so. The effect of authorizing the operation of the bus lines at a lower fare to serve the same territory would be to decrease appellee's revenues, and, if the rate it is now charging is a reasonable one, to require it to operate at a loss or increase its rates. This would be against the public interest, because appellant's lines cannot accommodate more than a comparatively small portion of the public in the matter of transportation.

“The superior court found and adjudged that the order of the commission was against the manifest weight of the evidence heard, that the operation of the bus lines is not a convenience to the public and a necessary transportation facility, that the present transportation facilities are not inadequate and do not subject the public to inconveniences which will be eliminated by authorizing the operation of the bus lines, and that the order and decision of the commission are unreasonable.

We are of opinion the decision of the superior court was right, and its judgment is affirmed."

Despite the absence of proper findings hereinbefore discussed, the applicability of the above opinion to the instant case insofar as the law and evidence are concerned is readily apparent.

A case appearing in the South Western Reporter advance sheet of March 19, 1940, appears to us to likewise deserve emphasis. *Eldridge vs. Fort Worth Transit Company*, 136 S. W. (2d) 955, decided by the Texas Court of Civil Appeals. It appears from this case that the City of Fort Worth, Texas, is a charter city empowered to grant franchises to utilities, but that such grants are subject to the following restriction comparable to that of the Utah Statutes applicable in the *Airway* case: "* * * such privilege over and upon the same public streets, alleys, highways, and thoroughfares of the City shall not be granted to any person or corporation excepting when public necessity and convenience may require such use * * *." The Fort Worth City Council held a hearing on notice with respect to the application of two individuals for a franchise for the purpose of determining whether or not the public convenience and necessity required the granting of a privilege for the furnishing of additional mass transportation service within the City of Fort Worth. Such hearing was neither called nor conducted as a rate case and the evidence showed without dispute that the service already rendered in the City was adequate, with full

equipment, personnel and schedules, and that the existing company was ready, able and willing to furnish any additional service which might be necessary or reasonably required; further that the existing company's equipment was ample and sufficiently modern, safe, convenient and comfortable, and that if any further service should be authorized pursuant to the application same would be a duplication of the existing service. No evidence was offered showing that the fares charged by the existing company were excessive or unreasonable. The applicant proposed a five-cent fare, however, in contrast to higher existing fares.

After the hearing the City, as did the Commission in the Airway case, found that there was a public necessity and convenience for the proposed service, and the record of the Council indicated, as does the Report in the instant case, that the basis for this necessity and convenience was the lower proposed fare.

The court held that this finding "was arbitrary and capricious and without reasonable basis of fact and was made without proper notice or hearing with respect to such matter." In enjoining further action under the application the court said:

"We hold that whether or not 'public necessity and convenience may require such use' of the streets, as the ordinance here under attack attempts to give, is a question of fact that must be established by competent and satisfactory evidence, in the light of the existing conditions.

“If this conclusion of ours is not sound, then the City Council could arbitrarily and capriciously pass such an ordinance as is under discussion and wrongfully injure the vested property rights of any public service corporation, operating in the City of Fort Worth under a lawful franchise or privilege, by declaring that ‘public necessity and convenience’ requires such action.”

The court pointed out that the Charter of the City gave the governing body ample authority by proper proceedings to regulate rates, and to compel any public service utility to extend its service when there is a reasonable demand therefor.

At the hearing the Commission itself did not seem wholeheartedly to adopt the view urged by applicant, for the Commission directed questions to the witness Davis indicating a foreboding that the application was a prelude to a competitive service and to an auction-block procedure based upon rates. (R. 166, Tr. 53).⁽⁷⁾

(7) “Q. But you figure if their rates are to remain as they are and yours as you propose, you would operate in competition?”

“A. That is right.

“Q. So you are not necessarily asking that their authority be cancelled?”

“A. No.

“Q. Do you believe that the rates should be the major element in determining convenience and necessity?”

“A. I think that the rate plays the major importance; rates and schedules.

“Q. Rates and schedules?”

“A. Yes.

“Q. And your more frequent schedule would become one of the elements?”

“A. Yes.

“Q. Do you know that the Interstate Commerce Commission absol-

The view that the public policy of regulated monopoly should be discarded in favor of competition, as will be the effect if the Order of the Commission in this case is sustained, was also expressed publicly by other witnesses supporting the application, e.g., Mayor Berger of Murray (R. 202, Tr. 89).

Other parties to the proceeding, however, sensed that the injection of the rate factor would result in competition, to the injury of the public.

Thus E. B. Kelsey, appearing for the Street Car Men's Union expressed the view of that organization that the proposed fares of applicant were in no small part possible at the expense of wages paid employes, and would not allow sufficient income to the company to

utely refuses to consider rates as any part of convenience and necessity?

"A. I don't know that.

"Q. Would you feel that if this Commission were to grant this application which you now make and six months from now another applicant should come along and propose a 9 cent fare and a 14 cent fare, with a 15 minute service, that that application should be granted and yours cancelled?

"A. We feel this way about that, if anyone can come along at any time and offer the public something, with assurance that it can be fulfilled that we can't deliver to the public we feel that we are willing to step down at any time.

"Q. And you think that's the element that this Commission should give weight to in reaching a decision?

"A. I think they should; I would consider that public necessity and convenience. First, there are a lot of people in this community, or any other community, to whom rate structure means a lot. There are low-paid people in every community that the difference between 5 and 10 cents over a period of a week means a little difference in something they might have to have to eat in the house over that period of time; and I really believe that a rate is very important, especially in an operation that is conducted for the purpose of transporting people to and from their work."

maintain the standard of wages set up by his organization (R. 373, Tr. 261). Again, Mr. J. R. Wilson, President of the Salt Lake City Federation of Labor (R. 115, Tr. 2), protested the granting of the application for the same reason, and witness Joe Barron of Midvale appearing on behalf of the Midvale Smelter Men's Union 331 (C. I. O.) stated that his local was neutral with respect to the bus lines; but that the standard of living should be kept up, and that if the effect of the granting of the application would result in the replacement of Traction Company employes making approximately \$130.00 per month by employes of the applicant making \$80.00 to \$90.00 a month, their organization opposed the granting of the application; that their organization would likewise oppose any effort of the Utah Light and Traction Company to reduce costs of operating to compete with the applicant's proposed fares by reducing wage rates to a scale comparable to applicant's. While this witness preferred to see better service, and desired at the same time to sustain the wage level, he stated that if a choice were to be made, he would rather pay a higher fare or endure less service by way of schedules than to see the wages cut down (R. 381, Tr. 269).

As stated in Mr. Wiesley's dissenting opinion, "If the Traction Company rates are too high the Commission is derelict in its duty if it fails to investigate, proceed to hearing and order proper and necessary modifications" (R. 108).

As stated by Mr. Woolley, the Traction Company could stand a 35 percent reduction of labor costs before the Traction Company would be paying a scale comparable to that of applicant, and by making this and similar reductions, might meet the fares offered by applicant (R. 461, Tr. 349). But the Airway policy of low rates has not paid even their operating costs in the past, and with the business divided, both companies would continue to lose money, and in competition continue to cut costs until eventually curtailment in service or bankruptcy would affect the very public now clamoring for competition. There is just no escape from the answer that the matter of rates under our system of regulated monopoly has no place in a hearing with respect to the granting of a new certificate of convenience and necessity, and that the Commission has made a grave, serious and fundamental error in this respect.

CONCLUSION

Most members of the Bar and students of Government recognize the merits of and necessities for the existence of administrative agencies such as the defendant Public Service Commission in order to deal efficiently and appropriately with our modern complexities of society. To be constantly guarded and checked, however, are the ever-present dangers of abuse of the administrative process; and the function of the courts is to afford that check by an appropriate judicial review,

but not to stifle or impede the functioning of the administrative tribunal.⁽⁸⁾ The grave and fundamental errors which plaintiff claims have been committed by the Commission in this case arise, we submit, from the failure of the majority of the Commission to understand the procedure by which it is required and permitted to carry out the legislative mandate of its creator. Counsel for plaintiff consider the personnel of the present Commission as ably equipped and conscientious as any public servants of this state. The important issues of this case are not with respect to the result reached, but the procedure of the majority of the Commission in reaching that result.

We sense that the majority of the Commission acted pursuant to their best belief and judgment, expressing their best views for the result reached. Certainly we can appreciate the motivating force of the public pressure put to bear; the public appeal of the applicant with its proffer of lower fares and more frequent service to greater areas regardless of expense; and the lack of substantial revenues over expenses available to the Traction Company on this line, making abandonment of service perhaps the easy way out.

But the Legislature under our Constitution can not transfer its powers and prerogatives to the Commission acting in a legislative capacity, nor has it done so in this case. With respect to a situation such as this the

(8) See 1938 Ross Prize Essay by Prof. Malcolm McDermott, A.B.J., Vol. XXV, No. 6, June, 1939, page 453.

Legislature has directed the Commission as its agent to hold a public hearing on notice, and to make findings with respect to certain fact-situations based upon substantial evidence to be adduced at the hearing, the burden of proof being upon the applicant. In failing to observe this requirement of making findings responsive to the issues, and in stretching the findings made to go far beyond or contrary to the evidence adduced, the Commission has been led from its path of duty; for if it had made these findings carefully and properly, the result required by the Legislature dependent upon such facts would have been clear, not as a result of the exercise of the Commission's best judgment, but pursuant to the legislative mandate. And in reaching that result, the Commission could withstand and answer firmly any criticism, public or private, by the plain fact that it had performed the legislative command and had discharged its duty.

But in reaching a result deemed the better of the alternatives presented to the Commission in this vigorously-contested proceeding, we submit that the majority of the Commission has departed from fundamental principles, has acted in violation of the Statutes of the State of Utah, and albeit in good faith, has acted in an arbitrary and capricious manner.

Respectfully submitted,

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