

1940

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

Utah Supreme Court

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In The Supreme Court of the State of Utah

UTAH LIGHT AND TRACTION
COMPANY,

Plaintiff

-VS-

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

Defendants

Case No. 6255

Defendant's Reply Brief

A. C. Melville

Glen E. Howe (Murray City Attorney)
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Motor Coach Lines, Inc.

J. Allan Crockett, Attorney for Public
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I. STATEMENT OF THE CASE

The only matter we wish to amplify in connection with Plaintiff's statement of the case is the fact that a hearing on this defendant's application was regularly held in Murray City, Utah, on February 16 and 17, 1940, after due notice given, (R. 10, 11, 47, 48) and the Public Service Commission thereupon heard testimony and received evidence for two full days, and gave ample opportunity for all interested parties and persons to be heard. The Report and Order of the Commission granting defendant's application was made on March 14, 1940, wherein the Airway Motor Coach Lines was ordered to commence operations on or before June 1, 1940, or the authority granted would automatically be cancelled (R. 55).

Thereupon, the Airway company ordered equipment and made necessary preparations to commence operations, and did actually institute service pursuant to the certificate on May 21, 1940, and ever since has been and now is operating the service contemplated by the certificate of convenience and necessity.

We do not assent to the statement of alleged issues before the Commission, (pp. 2 and 3 of Plaintiff's brief) as being a proper and pertinent statement of the case before this court, for the reasons hereafter given.

II. QUESTIONS INVOLVED FOR DETERMINATION

The statute prescribes the limits and scope of review and questions to be determined by the Supreme Court in cases of this type. Commencing at about the middle of Section 76-6-16, R.S.U. 1933, it reads:

“No new or additional evidence may be introduced in the supreme court, but the cause shall be heard on the record of the commission as certified by it. The review shall not be extended further than to determine **whether the commission has regularly pursued its authority**, including a determination of whether the order of decision under review violates any right of the petitioner under the constitution of the United States or of the State of Utah. **The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review.** Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination. * * *

In other words, there are only two questions before the court for review on this appeal:

1. Has the Commission regularly pursued its authority?
2. Does the Order or decision under review violate any right of the plaintiff under the constitution of the United States or of the State of Utah?

Nowhere in its brief or argument does plaintiff claim that the order or decision under review violates any of its rights under the constitution of the United States or of the State of Utah. The only question remaining for consideration by this court then, is whether or not the Commission regularly pursued its authority.

III. DID THE PUBLIC SERVICE COMMISSION REGULARLY PURSUE ITS AUTHORITY?

1. In General

Authority conferred by the Legislature upon the Commission is contained in Section 76-6-1, R.S.U. 1933, which reads:

“All hearings, investigations and proceedings shall be governed by this chapter and by rules of practice and the procedure to be adopted by the public utilities commission; in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation or proceeding, or in the manner of taking testimony, shall invalidate any order, decision, rule or regulation made, approved or confirmed by the commission.”

Admittedly this is a broad authority. In reviewing the errors which plaintiff asserts have been committed, the statute just quoted will answer many, if not all of plaintiff's arguments. This court and other courts, which have considered similar provisions in other statutes have uniformly held that they will not substitute their judgment for that of the Commission and that the extent of the courts inquiry will be limited to a determination of the questions remitted to them by the Legislature. The general rule is stated at 51 C.J. 82:

“The order will not be set aside unless positive illegality or invalidity appears, and then only to the extent of such unlawfulness. * * * Where the conclusion arrived at by the Commission finds justification in the evidence, the court will ordinarily not

review the facts, and it will not substitute its judgment for that of the Commission.”

Any number of authorities can be cited in support of this established rule, which probably will not be questioned. We refer to one Utah case which clearly defines the extent and limitations for review of a decision or order of the Public Service Commission under our statute. In the case of Salt Lake City, et. al., v. Utah Light and Traction Company, 52 Utah 210, 173 Pac. 556, Case No. 3209, the present plaintiff, Utah Light and Traction Company was successful in having a decision of the Public Service Commission upheld. We might profitably incorporate by reference a portion of their brief and argument in that earlier case on the scope and limitations of the Commission’s authority and review thereof by the court. However, the decision is sufficiently explicit for our purposes. The court said at p. 562-3 of 173 Pac.:

“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.
* * * 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 the 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 orders of 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 or the right to exercise a power which is neither inherent nor properly conferred. * * *

Plaintiff outlines its present conceptions on the scope and limitations upon the administrative process on pages 36 to 45 of its brief.

Rowell vs. State Board of Agriculture, 99 P (2) 1, cited by plaintiff, (Brief, 36) of course, involves a different delegation of authority by the Legislature than that delegated to the Public Service Commission, although we are not inclined to question the general principles which plaintiff quotes from the case.

We part company with plaintiff when it attempts to construe the statutes and cases, and particularly, Gilmer vs. Public Utilities Commission, 67 Utah 222, 247 Pac. 284 (Brief, 37) to mean that the Commission is

limited in its powers to the regulation of monopolies and cannot ever allow a necessary and beneficial competitive service. This conception is perhaps the fallacy which caused Plaintiff to neglect its responsibilities and duties to fully serve the public, and to leave the door open to the present application to serve.

In 1935 the Legislature declared:

“The Commission is vested with power and authority and it shall be its duty to supervise and regulate all common motor carriers * * * 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 the Commission may require the coordination of the service and schedules of **competing common carriers** by motor vehicles,” etc. Laws of Utah, 1935, Chap. 65. Quoted, Pl. Brief, 42).

It is not uncommon in this state or elsewhere for two or more common carriers to serve the same area or route.

No “unnecessary” duplication of service is proposed by the Order of the Commission in this case. This court will not accept Plaintiff’s assertion on that point as against the opinion of the Commission. Plaintiff concedes that the majority of the Commission acted “pursuant to their best belief and judgment, expressing their best views for the result reached.” (Brief, 74)

If there is an inconsistency between what plaintiff terms the “regulated monopoly” statutes of 1917, and

the 1935 laws governing duplicating and competing common carrier service, we submit that the later enactment would control. Is this "the departure from basic or fundamental principles" which is complained about? (Brief, 11) The case of *McCarthy vs. Public Service Commission*, 94 Utah 304, 77 Pac. (2) 331, does not declare the 1935 law invalid or uphold monopoly under all circumstances, as plaintiff seems to infer. (Brief, 39-41) On the other hand, the court recognized the propriety of competitive service in proper cases, when it said:

"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."

The court then quotes from a case to the same effect, which says the test in each instance is the **public good**. And who is to determine that? Obviously, the Public Service Commission, and no one else.

As the New York Commission recently said in a case similar to the present one:

"Regulated monopoly has certain rights to be protected from unjust or unreasonable competition, but not from fair and reasonable competition, and certainly not at the expense of restricting the use of new and improved public facilities by the public. We do not consider the proposed competition either unjust or unreasonable." *Re Grand Island Transit Corporation*. 27 P.U.R. (NS) at 343.

Plaintiff quotes from the *McCarthy* case, *supra* (Brief 39-40) a splendid comparison of the rights of

competing carriers to share in a stream of transportation business flowing over a given route, to the rights of rival 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. If a hearing had been held in the McCarthy case, and the evidence had shown, as it did in the instant case, that the present operator had failed to make a beneficial use of its operating certificate; was failing to fully serve points on its present Murray, Midvale, Sandy route, and was not serving or offering to serve points contiguous to said route which required service, the court would then undoubtedly have concluded as the Commission did in the present case, that the area was open to additional service (appropriation) to fully meet the convenience and necessity of the public. The analogy is sound and pertinent. McCarthy case was reversed for the reason that the decision was made *ex parte*, without notice or hearing, and as the court said, the Commission "did not regularly pursue its authority under the governing statute." (77 Pac. (2) at 338) That is the whole and only question now before this court.

A statement from the Gilmer case is emphasized (Brief, 37, 45 and R. 108) that "the very purpose of the Utilities Act is to prevent one utility from destroying another," to which we wholeheartedly subscribe as being **one** purpose of the Act. However, we do not believe that Plaintiff's conclusion on that question of fact, viz.

that one utility will destroy another in the present instance, is to be accepted in preference to the presumption that the Commission acted in the best interests of not only the utilities involved, but for the public which they are supposed to serve. Furthermore, there is no evidence or reason to believe that if the southern portion of Plaintiff's route No. 12 were competitive or even if it were eliminated, that it would destroy or even impair the Plaintiff corporation. The suggestion is ridiculous. On the other hand, there is good reason to believe that the Plaintiff would materially benefit either (1) by discontinuing service beyond 33rd South on its Route 12, or (2) by stimulated use of the bus facilities over a period of time. (R. 53).

Plaintiff seems to be under the misapprehension throughout its brief that the so-called Utilities Act is for the exclusive benefit of the utilities. But consider Chapter 66, Laws of Utah, 1935 which reads:

“If the Commission finds from the evidence that the **public convenience and necessity** require the proposed service or any part thereof, it shall issue the certificate as prayed for.”

We understand the Act to mean that the **public** should be given first consideration. It is significant that the Legislature recently changed the name of the Commission from “Public Utilities” to “Public Service”.

The Commission had no thought of permitting the Airway Company to destroy the Traction Company—

a mouse to destroy a lion. Rather, it performed its duty by providing a practical solution to a very real and practical problem. That problem might be summarized thus:

(1) The Traction Company for years has been operating at a loss, or at most breaking even on its Murray, Midvale, Sandy operations south of 33rd South, and has expressed a desire to "forget everything south of 33rd South." (R. 50, 173, 205, 225, 446.)

(2) The citizens in that area do not enjoy adequate or satisfactory bus service or fares, and the public convenience and necessity requires additional service. There exists an antagonism on the part of the public toward the existing operator due to long-standing differences. (R. 196-197, 201, 213, 222, 230, 236, 242, 268, 273, 287, 400)

(3) An improvement in the service and fares of the Traction Company cannot be made without causing further injury and loss to it on this operation. (R. 51, 454, 466)

(4) A group of six communities farther out in Salt Lake County; to wit, Riverton, Crescent, West Jordan, South Jordan, Bennion, and Taylorsville, contiguous to the Murray, Midvale, Sandy area, are without bus transportation at all, and the public convenience and necessity require such service. (R. 261, 286, 298, 338, 348, 357, 400) The Traction Company sees no need for such service. (R. 442-3)

(5) The Commission has before it the application of the Airway Motor Coach Lines, Inc., to serve the outside area and to provide the needed additional service to the Murray, Midvale, Sandy area at satisfactory fares, which application has received general public endorsement. (R. 221, 222) It has no such application from the Traction Company, or any other applicant.

The Report and Order of the Commission solved these problems with one stroke: It enabled the Traction Company to eliminate or at least minimize its loss on an unprofitable route. It gave the people in the "served" area just what they required, wanted and fought for years to obtain in bus transportation. It gave the outside communities the bus transportation which they sought, and needed, and it allowed the application which was before it to serve an unserved area and provide this needed additional service to the Murray, Midvale, Sandy area. On the basis of these established facts, the Commission's decision is well-reasoned and well-founded in law, and it regularly pursued its authority under the governing statutes in the present case.

2. Analysis of Plaintiff's Brief and Argument

Plaintiff asserts that there are three questions involved in this case, three alleged errors which are identical in substance to the questions involved, and its entire brief and argument is based upon these three principles. These principles upon which Plaintiff bases its case are succinctly stated in the index of its brief as follows:

(A) The Commission has failed to make findings of fact on material issues.

(B) The Commission has made findings of fact not supported by any substantial evidence.

(C) The action of the defendant Commission is

contrary to law, in violation of statute and arbitrary and capricious.

The (A) and (B) points of plaintiff's brief are based on alleged inadequate and improper findings of fact. Before entering into a discussion of the merits of these points we wish to demur to them. In other words, do they constitute an argument for a review of the decision of the Commission? Is not the Report of the Commission sufficient to meet the requirement of Sec. 76-6-1, R.S.U. 1933, above quoted? We believe it is, and that the demur should be sustained.

The Commission probably went further than was necessary in writing up its Report. It would have been sufficient if it had simply stated the ultimate fact that the public convenience and necessity justified granting the application. And Plaintiff incidentally admits that the Commission found there was a public necessity and convenience for the proposed service. (Brief, 69) The California supreme court, under a similar statute, makes just such a holding when it says:

“Here the Commission found the ultimate fact that the public convenience and necessity did not require the exercise of the privileges in controversy, and neither the sufficiency of the evidence, nor the soundness of the reasoning, upon which that finding was based, can be considered on this proceeding.” Oro Electric Corporation vs. Railroad Commission, 147 Pac. 118; at p. 119.

The (A), (B) and (C) points upon which Plaintiff rests its case will now be considered individually, but

without waiving our demur thereto.

3. Plaintiff's point (A) pertaining to failure of the Commission to make findings on material issues.

In particular, plaintiff complains that the Commission failed to find (1) as to the extent of the existing service of the Plaintiff, and (2) other common motor carriers and electric railroads into the area affected by the application.

The fact is the Commission went thoroughly into the operations of Plaintiff and "others" affected by this application. Exhibit "B" was received in evidence (R. 3, 127) which is a map showing all operations of all common carriers in that area affected by the application. Plaintiff complains that there is no finding on that matter. It apparently has overlooked the statement of the Commission contained in its report (R. 50-51) which reads:

"There are at present 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 southward upon State Street, serving Murray, Midvale and Sandy. Its schedule is 22½ minutes during the peak periods and 45 minutes at other times."

What more specific statement could Plaintiff ask

for? These are the only common carriers operating in the territory involved, and Plaintiff's contention that "other common motor carriers and electric railroads" were not considered in the findings is collateral and obviously without foundation. We submit that matter without further comment.

Plaintiff next contends (Brief, 14-28) that the Commission failed to make findings as to whether or not Plaintiff's service is adequate to meet the needs of the public, and if not wherein it is inadequate and whether Plaintiff has been and now is willing and ready to render adequate service. Also the need for the service proposed by the defendant Airway Motor Coach Lines, Inc., and whether it would be a duplication of existing service. This question is also raised later on and is fully discussed hereafter.

Plaintiff does not discuss the Report of the Commission to which its criticism is directed, but launches into a discussion of the testimony of various witnesses. In this discussion we do not suggest that Plaintiff has not properly represented the testimony, but it has selected brief extracts to make a point, and we suggest that a more complete reading is essential to understand the very definite trend of the facts and opinions. For instance, it will appear by a more complete reading that the reason several of these witnesses, as well as a great many other persons did not fully utilize the services of the Traction Company was because the service was in-

adequate and unsatisfactory. (See summary p. 10 supra, R. 201)

Even the only three witnesses produced by Plaintiff who were not in its employ turned out to be critical of the service. One, Hayden (R. 303-5) had a lot of complaint about the service, and was not opposed to the application. One, Sampson (R. 365) lived north of Murray City and south of 33rd South, and while the rates charged were not particularly adverse to him or perhaps to those living in that limited area, he recognized the unreasonableness of the fare structure as far as Murray City residents were concerned. Plaintiff's third witnesses, Aamodt (R.366) complained about the service and fares, and rode home with his boss at night rather than utilize the Traction Company service. The testimony of all of the other witnesses who were users or potential users of the existing service strongly condemned it. Of course, the employee witnesses of Plaintiff quite naturally testified that their own service was satisfactory, and it was stipulated that they would testify that they had endeavored to give good service. The Commission however, was not bound by their testimony or by counsel's stipulation which Plaintiff construes (Brief, 17) to be a stipulation that the operators in fact endeavored to give courteous service. But a discussion of testimony, as we have indicated, seems to be beside the point which Plaintiff here raises pertaining to the findings of the Commission.

We again quote from the Report of the Commission,

and submit that in the light of the foregoing statutory requirements, and decisions interpreting same, that its findings and conclusions are sufficient, and do not afford a basis for the objections advanced by plaintiff. The Commission stated in its Report (R. 50-53):

“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 & Traction Company operates a bus service southward upon State Street, serving Murray, Midvale, and Sandy. Its schedule is 22½ minutes during the peak periods and 45 minutes at other times.

“Witnesses for the applicant testified that the rates charged by the present operators are so high that people refrain from using the service and resort to other means of transportation. 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. (R. 50-51)

“ * * * The proposal of the applicant is to operate so that Murray, Sandy, Crescent, Draper, Midvale, West Jordan, Riverton, Taylorsville, and Bennion will all have the bus service. These constitute the population centers in the area south of Salt Lake City in Salt Lake County. The applicant's proposed operation would institute a common carrier bus service to West Jordan, Riverton, Taylorsville and Bennion, which do not now have any such service.

“The Commission is of the opinion 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 a service.**

“Further, it appears proper to grant to the public in the remainder of the territory the privilege of enjoying more adequate facilities at such savings to themselves as this applicant proposes. Doubtless, lower rates with a service so frequent as here proposed would add to the convenience of the traveling public and would contribute over a period of time to a **greater use** of the common carrier facilities. In addition, benefit materially through having a new or a better system of transportation into Salt Lake City and between various communities within the County.

“It was testified that with better service at lower rates new homes and new enterprises would develop in the territory beyond Salt Lake City limits, and that general development of that area would be promoted by the granting of this application. This, of course, places a responsibility upon the carrier and upon the Commission, which re-

requires that reasonable precaution be taken to assure a continuance of service through a reasonable period of time. (pp. 215 of Commission Order; R. 50-53)

And Plaintiff says, "there are no findings at all!" (Brief, 27)

Under Plaintiff's conception of "necessity", "the need must be such as to warrant the expense of making the improvement." (Brief, 27) The statement may contain some truth as applied to "utility necessity", but it is an approach to the problem from the wrong direction. A clear-cut definition of "public necessity" is made by the Oklahoma Supreme Court, viz:

"A public need, without which the public is inconvenienced to the extent of being handicapped in the pursuit of business or wholesome pleasure, or both without which the people generally of the community are denied to their detriment that which is enjoyed by other people similarly situated." *Missouri K. & O. Coach Lines, Inc. v. State*, 81 Pac. (2) 660, 664; 26 P.U.R. (NS) 517.

4. Plaintiff's point (B) pertaining to findings not supported by substantial evidence.

There is nothing in the statute or elsewhere compelling the Commission to base its findings upon "substantial" evidence. This court has definitely said that "all we can review in cases of this kind is whether there is **any evidence** to sustain the findings of the Commission" etc. *Salt Lake City v. Utah Light and Traction Co.*, 52

Utah 210, 173 Pac. 556. Fuller-Toponce Truck Co. v. Public Service Commission, et. al., 96 Pac. (2) 722, 98 Utah. Plaintiff may be confused by the rule in an ordinary appeal in a law case, or perhaps by an Illinois statute which requires "substantial" evidence in utility cases, and it has cited at least three Illinois cases in its brief. The cases decided under the Utah statute and the California statute which is similar are unanimous in saying that **any evidence** is sufficient.

Plaintiff contends that there is no substantial evidence to support the Commission's findings with respect to the matter of rates. (Brief, 29) Rates are only one of the elements upon which the decision of the Commission rests. The dealings of the people and the Commission with the Traction Company at various times with respect to rates was thoroughly gone into. (R. 196-7, 287-9) The testimony on this matter must have proven embarrassing to the Traction Company. Just as an example, take Mayor Berger's testimony, where he said:

"There have been a great many protests in times past at the service and fares that the Utah Power and Light, or Traction Company, have put into effect. We have a continuous stream of people coming in to see the Murray City Commission either as a commission, or individually, to protest the schedule and fares that are now in effect by the Traction Company. Now, sometime ago, (I am not prepared to say just when) this new bus company, Airways, contacted us to see whether we would be favorable toward granting them a franchise to

operate in Murray City. Murray City's Commission's attitude was that they would be glad to grant anyone a franchise or a privilege that would come in here and better our service and reduce the fares; do something toward making a more pleasant attitude between the people that are using the bus service than was going on at present. There seems to be a very hostile attitude toward the Traction Company for the way they have treated Murray over a number of years in regards to franchises, promises that they have made as to what they would do toward giving us better service and reduce fares. So of course we were open to suggestions for better service for our locality here; and from what investigating we have done of the service that this new company could give us, it seems quite superior to anything that the Traction Company has given us in the past. Of course we went on record as saying that we would be glad to do what we could to get this service if the Public Service Commission granted them the privilege of coming into our territory. (R. 196-7)

The second matter on which plaintiff claims the Commission made findings not supported by substantial evidence (Brief, 30) is the conclusion of fact by the Commission that there is as much as 46% difference between the rates of Plaintiff and the Applicant's proposed rates. That conclusion, and perhaps many others could be arrived at on the basis of the general confusion which existed as to fares being charged by Plaintiff. (R. 237, 267, 288, 306, 451) However, the findings which Plaintiff complains of finds basis in the evidence that a passenger could pay two tokens, or a total of 16 $\frac{2}{3}$ cents

for two fares from Murray to Salt Lake City, while he might ride upon the Applicant's bus for 9 cents, or 54 percent of $16 \frac{2}{3}$ cents. It is true that the passenger also might ride for 15 cents cash fare upon Plaintiff's bus, but there still is a wide difference in the amount of fare charged.

The decision of the Commission is not predicated wholly upon this particular statement in the Report which Plaintiff stresses. It could be stricken or ignored without affecting the result and decision arrived at. The statement was probably intended as a polite rebuke, justly due the Plaintiff in the light of the severe testimony which was given against it.

The third and fourth extracts from the Commission's Report which Plaintiff claims has no support in the evidence, is a conclusion to the effect that the existing service will not be substantially impaired and that patrons will continue to enjoy the benefits of existing rates. (Brief, 31) There is evidence to the effect that by granting the application the business into the area could easily be doubled or trebled. (R. 223-6, 242) This conclusion of the Commission, based on this or upon other evidence is logical, and should be accepted as against contrary opinions and conclusions of the parties or even the court. In any event, it is a conclusion of fact supported by evidence and therefore not subject to review.

5. Plaintiff's Point (C), that the Report and Order of the Commission is contrary to law, in violation of statute and arbitrary and capricious.

The first ground for complaint under Plaintiff's point (C) is that the Defendant Airway lacked the necessary local franchises. This matter is entirely collateral to the interests of the Plaintiff, and we challenge its right to raise the question. In the case of *Chicago Burlington and Quincy Railroad Co. vs. Commercial Commission*, (Ill.) 178 N.E. 157, the protesting utility assigned as error that the applicant had not filed the consent of the Department of Public Works and Buildings required by the Illinois statute, and that the Commission had made no finding thereon. To this contention, the court replied, at page 161, para. 3:

“We find no authority for this contention * * * It is objected that the consent was not issued until after proofs were closed before the Commission. Appellant's rights were not prejudiced thereby.”

The holding of that case is in accordance with the general law, that a decision will not be reversed because of a non-prejudicial error, if we may assume such to be an error.

Section 76-4-24, subsection 3, R.S.U. 1933 provides:

“Every applicant for such a certificate shall file in the office of the Commission such evidence as shall be required by the Commission to show that such applicant has received the required consent, franchise or permit of the proper county, city, municipal or other public authority * * * .”

Testimony given by Mr. Davis for the Applicant was as follows:

“Q. You do have a franchise in Salt Lake City, do you not?”

“A. Oh, yes, we have a franchise in Salt Lake City.”

“Q. I think you said you had arranged for other necessary franchises?”

“A. Yes, we have made arrangements for those franchises.”

Again at R. 123 (Trans. 10):

“Q. Now, you have the necessary franchises, or arranged for them, for the operations applied for under this application?”

“A. Yes, sir.”

Finally, Chairman Holbrook of the Commission interrogated Mr. Davis on the matter (R. 153) and presumably the evidence furnished was satisfactory to the Commission, as required by the statute.

In the instant case, the proposed service was largely inter-city, with the exception of Murray. Mr. Howe, of counsel, appeared at the instance of Murray City (R. 114, 201); and the Murray City officials testified for the Applicant, (R. 195, 211) and stated that a franchise would be available to Airway. (R. 216)

It is the prerogative of the local authorities to require local franchises, and the statute was enacted for their protection. Plaintiff's complaint on this point is not well taken, particularly when it apparently does not come into court with clean hands to make complaint

about the Airway's local franchises. (R. 197, bottom of page.)

Plaintiff next departs in its brief (pp. 36-45 inclusive) to discuss its conception of the scope and limitations upon the administrative process. This matter has already been given thorough consideration (p. 3-10 herein) and the arguments here advanced by Plaintiff are fully answered.

The second ground under Plaintiff's point (C) brings the financial ability of the defendant Airway to perform the proposed service into question. This question of fact is one to which the Commission gave a great deal of attention, both at the hearing and in preparing its decision. The Commission was clearly within its rights in granting the certificate of convenience and necessity and making it contingent upon Applicant procuring \$15,000 cash in addition to its other assets. A precedent for this procedure may be found in the case of Chicago, B. & Q. R. Co. v. Commerce Commission, 178 N. E. 157.

The supreme court of Washington also has recognized the propriety of this procedure in the case of Mahoney Auto Freight vs. Department of Public Works, 6 Pac (2) 64. In the first paragraph on page 67 of that case it said, speaking of the applicant carriers:

“All have, or **can obtain**, adequate means to finance the proposed operations.”

This is one of the questions of fact which the legis-

lature has specifically delegated to the Public Service Commission to determine. The possession of credit is an asset which the Commission might properly consider. The Applicant proffered a performance bond, which was discussed at length. (R. 320, et seq.) It is sufficient to say that the financial resources of the Defendant were thoroughly gone into, (R. 156) and the Commission required it to raise \$15,000 in outside capital, after which the Commission implied that the Applicant would be fully qualified financially. This the Applicant did, and made due proof thereon, to the satisfaction of the Commission. (R. 103)

Plaintiff is simply insisting on arguing a question of fact, with respect to which the judgment of the Commission should be regarded as conclusive.

Next, Plaintiff again contends (Brief, 48) that the Commission failed to consider the existing transportation facilities in the territory proposed to be served, and the belated offer of the Traction Company to render the needed service. The first part of this contention has already been discussed (p. 13 herein) and shown to be obviously untrue. The service of the Traction Company was thoroughly considered, almost unanimously deplored, and found to be inadequate. (R. 34, 50-52, 203, 213, 236, 269, 287, 302, 306, 394, 400.)

With respect to the second part of the contention, the Traction Company never at any time filed its application to render the needed service. It left the door open to defendant's application. The Commission could not

compel the Traction Company to file such an application, especially with respect to a service which it claims is not feasible. (R. 442-3) The Commission could only act on an application which was before it; not on a general verbal offer, the sincerity of which is questionable. (R. 298) How similar is the case of Re Grand Island Transit Corporation, 27 P.U.R. (NS) at p. 343, where the Commission said:

“Finally, it cannot be overlooked that the I.R. C. as the principal local transportation agency in the territory was first offered the opportunity to render the desired service which presumably it could have done with a minimum of loss to itself and a minimum reduction in its existing mainland service. This it had a perfect right to do, but it now stands in the weak position of opposing the rendering of the service by another company. It may say ‘I will not’. It may not say ‘You shall not’.”

Plaintiff has misstated the fact with respect to the Defendant Airway's application. (Brief, 49) It is made to appear that the original purpose of Applicant was to duplicate the Traction Company's service to Midvale and Sandy, and the service into territory beyond there was developed as an afterthought. The indisputable fact is that for years the people beyond Murray, Midvale and Sandy have sought bus service on their own initiative. The Traction Company was not interested in giving this service and did not hear their pleas because they were ready to abandon their service south of 33rd South rather than expand or extend it. The Traction Company

has never filed an application to render the service farther out, and in fact doubts the feasibility of the service there (R. 442-3) as it has on other routes which the Airway now operates. (R. 456)

The original application of the Airway (R. 1) included service into the entire area, and there was no afterthought or anything subsequently appended to include the outside territory as suggested in Plaintiff's Brief (p. 49, 52) and in Commissioner Wiesley's dissenting opinion. (R. 107) Those suggestions are absolutely untrue, and represent a further attempt to explain away the failure of the Plaintiff over a number of years to provide needed service into southern Salt Lake County, and the resulting resentment of the people against that operator. The application was not "sugar-coated" (Brief, 57, R. 110); it simply appeared sweet in contrast to the unsavory treatment and service accorded the public by the Plaintiff, whose vested rights and operating privileges seem to have blinded it to the convenience and necessity of the public whom it was supposed to serve. We give to the Plaintiff credit, more than to anyone or anything else, for the spontaneous public support which it complains the defendant Airway has received. (Brief, 51)

We do not deem it advisable or properly within the issues before this court to review the arguments and pleadings which were before the Public Service Commission. (Brief, 51-52) These matters are fully consid-

ered elsewhere, except perhaps the ironic suggestion (Brief, 52) that the Airway has vested itself with a duty self-imposed to perform the services of guardian for the Plaintiff. The defendant Airway assumes no such task. However, the legislature anticipated that the Plaintiff, along with other utilities would need such a guardian in the interest of the public, and imposed that duty upon the other defendant, Public Service Commission, which is now attempting to discharge that mandate. The only question for this court now to determine under our statute, as we have previously discussed, is whether or not the Commission regularly pursued that authority.

6. Supplemental and Duplicating Service.

Plaintiff's points (A) (3) and (C) (3), (Brief, 14, 48) are based on the fallacy that the Commission should take the initiative and compel the Traction Company to increase and extend its operations, and that its general verbal offer at the hearing (R. 434) to comply with all "lawful" orders precludes this Defendant's application.

Appropriation of volume of traffic has been compared to appropriation of a quantity of water. (p. 7 supra) If a carrier abandons or fails to fully utilize its franchise, the door is left open to the application of another to serve where service is lacking. It was incumbent on the Plaintiff—not the Commission—to protect its operating privileges by giving complete service. Plaintiff never at any time made application to serve

the unserved area, and never at any time offered to render the service closer in (regular 20 minute service to Murray, and 40 minute to Midvale and Sandy) which this Defendant asked to render, and which the public convenience and necessity required. In view of the public need, the Commission had no alternative but to grant the only application that was before it.

Even if we could assume that the Murray, Midvale, Sandy service of the Traction Company was adequate, it was proper for the Commission to permit the Applicant to participate in the business south of 33rd South in order to enable the Applicant to serve the "outside" territory. The physical condition is such that the outside area consisting of seven small communities must necessarily be served in connection with the service to Murray, Midvale and Sandy, and this Defendant's application to serve the outside was necessarily made contingent upon service to the closer-in and more populous centers. In the words of the Commission:

"The Commission is of the opinion 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)

That finding and conclusion alone is probably sufficient to support the Order of the Commission. It was

a “necessary” duplication of service in the opinion of the Commission, and properly permitted under Chap. 65, Sec. 5, Laws of Utah, 1935. Here are some precedents:

The California Commission in a similar situation made a similar ruling, and held that where it appears that a carrier must be allowed to participate in other traffic in order to be able to render adequate transportation service in a territory requires it, a certificate permitting such participation is justified. *Re Airline Bus Line Co.* (1938) 41 Cal. R. C. R. 602; P.U.R. Digest (1933-39) Vol. A, 241.

The United States Supreme Court recently said that the authorization of a new and competitive motor bus route depends solely upon whether the facts warrant a finding that public convenience and necessity require the service and whether as a whole it will be self-supporting. *Tennessee Elec. Power Co. v. Tennessee Valley Authority*, 50 Sup. Ct. 366, 27 P.U.R. (NS) 1.

The New York Public Service Commission allowed an application recently which was similar in fact to the one under consideration. As in the present case, the proposed service benefitted an unserved area in addition to the served area. The existing operator filed no application to render the proposed service, but did make a verbal offer to render the proposed service. In granting the application, the Commission said:

“Any vested rights which an existing motor carrier may have will not prevent similar service by

another carrier on new, more economical and more direct routes." Re Grand Island Transit Corporation, 27 P.U.R. (NS) 337, at 342-3.

The New Hampshire Commission also explains that it cannot disregard the convenience of the travelling public, merely to protect the interest of a private operator. (1936) Re Boston & Maine Transport Co. 18 N.H. P.S.C.R. 40; 11 P.U.R. (NS) 419.

The supreme court of Oklahoma in a recent case which is remarkably similar in fact to the one now before this court, upheld the Commission of that state in granting a certificate of convenience and necessity to serve a territory already being served in order to provide service to an unserved territory. In its decision the court said:

"While priority in the field is an element to be considered, it will not of itself govern the granting of certificates of convenience and necessity for operation of motorbus lines. The proper consideration is which applicant, under the circumstances, shown by the evidence, will best serve the public interest." Missouri, K. & O. Lines, Inc. v. State, 81 Pac. (2) 660 and 664; 26 P.U.R. (NS) 513, 517.

In the case of Bartonville Bus Line vs. Eagle Motor Coach Lines, (111.) 157 N.E. 175, twice cited by Plaintiff (Brief, 54, 57) it was held that the lack of through service between particular points under the existing carrier service warranted the granting of a certificate of convenience and necessity to a competing bus line. It

should be noted by way of comparison, that through, or express service is contemplated between Salt Lake City and 34th South street on the route in question.

The Missouri supreme court, in the case of *State ex rel Pitcairn vs. P.S.C.* 222 S.W. (2d) 228, held that it was within the discretion of the Public Service Commission to grant operating rights to a competing service even though the existing carrier service was convenient and adequate and even though such existing carriers would be adversely affected thereby because the legislature had made the public service commission the judge of public convenience and necessity.

A good statement of the proposition is also contained in *Southside Transportation Company vs. The Commonwealth of Virginia*, 161 S.E. (2d) 895, which holds that if it is necessary to duplicate existing service so that the public may be benefitted, the courts and commissions have no hesitancy in granting authority to competing carriers.

This is by no means the first instance where the Utah Commission has authorized duplicating and competing service. At least three carriers operate between Salt Lake City and Ogden, Utah and Salt Lake City and Provo, Utah. In all of the cases we have read upon this subject, the reasoning is based upon the fundamental proposition that the **public interest** is the paramount consideration.

Finally, the general law on the subject of duplica-

tion of service is well stated by Mr. Pond, the foremost writer on the subject, taken from *Georgia Highway Express vs. Harrison*, (Ga.) 157 S.E. 464, (see also, *Pond on Public Utilities*, 4th Ed., Vol. 3, at p. 1850):

In determining whether such certificate of convenience should be granted the public convenience ought to be the Commission's primary concern, the interest of the public utility companies already serving the territory secondary, and the desires and solicitations of the applicant of a relatively minor consideration * * * The discretionary power of the Commission to grant or withhold certificates of convenience and necessity to public utility companies is broader than its power to govern rates and service of such companies. * * * Time and again this court, consonant with the prevailing attitude of courts throughout the country, has declared that it will not substitute its judgment for that of some ministrative tribunal created by legislative authority for dealing with matters of non-judicial character."

7. The Importance of Rates

Finally, Plaintiff contends (Brief, 57) that the certificate of convenience and necessity issued by the Commission is based on the contrast of rates and schedules of Protestant concerning which no adequate findings are made, and applicant's rates and schedules.

When Plaintiff complains about no "adequate" findings, its quarrel, as we heretofore indicated, is with the Utah statute which permits the Commission to base its decision on conclusions and ultimate facts, rather than "adequate findings".

However, the Report and Order of the Commission in this case is not based exclusively or even mainly upon rates as Plaintiff (Brief, 58) and the dissenting opinion (R. 108) suggest. The offer of a company to operate at a lower rate in itself is not sufficient reason to grant an application, yet under our statutes (Sec. 5, Chap. 65, Laws of Utah, 1935) and all of the cases in point, it is an element which may properly be considered.

This is precisely the position the Commission has taken in its Report and Order in the present case. The Report reads:

“Ordinarily the question of rates should not be given major consideration as an element of convenience and necessity, but in a case such as this where the proposed rates are in some instances as much as forty-six per cent under present rates, and where a pledge of service is given which would meet the demands of the public more adequately, these elements must be given consideration by the Commission.” (R. 51)

In other words, rates are directly tied into service. Improper rates may, and in the present case did unduly prevent the public from utilizing the common carrier service. That was the point counsel had in mind when he made his extemporaneous statement emphasizing rates (Brief, 58) which Plaintiff seems to think was the basis of the Commission's decision. The Commission necessarily, and very properly considered rates as an element in reaching its decision.

The suggestion is made that if the rates of an ex-

isting carrier are improper, then it is the duty of the Commission to investigate and order the necessary modifications. But is the Commission limited to that remedy alone where there is inadequate and unsatisfactory service also? Must it protect the existing utility at all costs? Must it continue to deprive the public in an adjacent territory of bus service in order to protect the net return of an existing operator?

The cases were more favorable to such protection where a company had a large fixed investment in a railway, buildings and equipment in an area. In the later cases involving motorbuses where, as in the instant case, the operator's entire investment is on wheels, and is moved out of the area involved each night, the need to protect the operator is not so great. The Traction Company has no fixed investment south of 33rd South street whatever—not even good-will—and the public convenience and necessity is the primary consideration.

It was brought out that it costs the Traction Company about 20 cents per bus mile to operate, (R. 448) and the Airway at least one-third less. (R. 140, 156) It would be difficult if not impossible as a practical matter, to prove that the operating costs of the Traction Company are excessive, except by comparison. An operator should not be protected and the public penalized if its operating costs are excessive. Mr. Davis of the Airway Company was very frank and open, and represented a modern viewpoint on motorbus transportation when he told Commissioner Holbrook:

“If anyone can come along at any time and offer the public something, with the 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.” (R. 166)

Rates are an element of public convenience and necessity, particularly in connection with metropolitan mass transportation of persons to and from work. Rates become relatively less important in inter-state and long hauls. The distinction in fact as well as in law should be born in mind in connection with the Inter-State Commerce Commission cases cited by Plaintiff. (Brief, 60-63)

The cases quoted by Plaintiff are not inconsistent with what we have here asserted. No case is cited by Plaintiff which holds that rates should not be given any consideration at all. Rather, they substantiate our contention that they are one element to be considered. Take the case of *West Suburban Transportation Co. v. Chica-*

go, W. T. Ry. Co., 140 N.E. 56, which is quoted at length by Plaintiff (Brief 64-68), and re-read the first sentence quoted:

“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.”

Exactly the case here! But in that case, the court also made this distinction:

“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.”

Read the complaints in the testimony of practically every witness before the Commission in the present case. Further on (Brief, 67) the court explains that **fares are not the only thing** to be considered in a case of this kind. Obviously it is one thing that can be considered, which is all that we claim.

The last case cited by Plaintiff, (Brief, 68) Eldridge vs. Fort Worth Transit Company, 136 S.W. (2) 955, is similar. The evidence showed without dispute that the service already rendered in the City was adequate. The evidence shows just the opposite with respect to the service of Plaintiff into Murray and the other communities. If the only matter involved was the offer of

the Airway to operate at a lower fare, the Commission would probably never have granted the application. But that, with inadequate service, unsatisfactory service, and the need for service by an adjoining area affords ample grounds upon which to base the order of the Commission.

The testimony of certain purported labor representatives who were in no way affected by the proposed or existing service as patrons should carry no weight in a hearing on an application for a certificate of public convenience and necessity. Their testimony (R. 369, 379) on the whole was unimportant, and certainly incompetent.

To say that the Commission has acted in an arbitrary and capricious manner is somewhat of a catch-all phrase. To re-quote this court in the recent Fuller-Toponce Truck Co. case, 96 Pac. (2d) 722, 98 Utah, last paragraph:

“Whatever may be our opinion as to whether the Commission found well or wisely, or whether our conclusions on the evidence would have been the same, we are bound by the findings, when there is evidence to support them.”

Plaintiff's argument would have been more to the point had it adhered more closely to the statutes (Sec. 76-6-1, 16, R.S.U. 1933) which fix the scope of review before this court, and defines the prerogatives of the Public Service Commission.

PART IV. CONCLUSION

A fact summary of this case as it was presented to the Public Service Commission is set forth on page 10 herein. To that we wish only to add a further word of explanation.

If the case were simply a matter of adjusting the rights of two private corporations, the decision might be relatively simple. In effect, it involves the bread and butter transportation for thousands of persons in southern Salt Lake County. It is, in fact their case. This Defendant stepped into the breach at the instance of these people in a fight for service and adequate service which has extended over a period of years. Mr. Howe, of counsel, associated himself in this case at the instance of Murray City, as its city attorney.

True, the Airway company was and is anxious to render the service, and is eminently satisfied with the results of its operations to date. But it would never have made the application and taken the necessary risks in what it expected might be, and has proven to be a hotly-contested enterprise, had it not been assured of the almost unanimous support of the people which it proposed to serve. This spontaneous public support, which seems to irk the Plaintiff, is a significant, obvious fact. The Airway lacked the means to stir up such enthusiasm. It came about as a result of the long and intolerable domination of the public transportation facilities by the Plaintiff monopoly. It is the natural reaction of a re-

buffed public. If the public is again compelled to adjust itself to the skimpy service proffered by Plaintiff, it will feel truly thwarted. Not a few will lose faith in the democratic processes. For even if it is within the power of the Commission by means of expensive and comprehensive investigations, orders and undoubtedly prolonged litigation, to correct the faulty service and fares of the Traction Company in the "served" area, the public knows from experience, as does the Commission that it is well-nigh impossible to prove the fact of inadequate service, excessive operating costs and improper fares and then to compel compliance thereof upon an unwilling operator. But as we have pointed out, it is not legally incumbent upon the Commission to do so in this case, nor is it incumbent upon this Court to require the Commission to do so.

The public in the area involved are now experiencing and seeing demonstrated a complete solution to their transportation problem, and in addition they are now being accorded courteous treatment—an item to which they are morally, but not legally entitled. The public in Salt Lake City proper where Plaintiff's principal operations exist, since the advent of Airway has been blessed with extensions, additions and improvements theretofore lacking, and with respect to which Plaintiff was vulnerable. A regulated, healthy competition in metropolitan motorbus service is recognized by courts and commissions as a modern, practical and effective method in securing public convenience and neces-

sity. The railroad traveller notes a vast difference in the treatment accorded him twenty years ago, and the present service with its air-conditioned, streamlined stewardess-equipped coaches. These modern improvements were brought about through healthy competition, rather than compulsion by means of a Commission or court mandate.

Throughout its brief, Plaintiff has emphasized its monopolistic rights, and said little about the public convenience and necessity. Although Plaintiff incidentally admits that the Commission found there was a public necessity and convenience for the proposed service. (Brief, 69) Public convenience and necessity is the only excuse for existence of a public utility, and should be the primary consideration in a case of this kind. It is the fundamental reason which the Public Service Commission had in granting the application. It is a question of fact, which has been determined after a full and complete hearing and investigation, and with respect to which we submit the judgment of the Commission should be upheld.

Respectfully submitted,

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