

1940

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

Utah Supreme Court

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George R. Corey; and Calvin Behle; Attorneys for Plaintiff;

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# In the Supreme Court of the State of Utah

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UTAH LIGHT AND TRACTION COM-  
PANY,

*Plaintiff,*

vs.

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

*Defendants.*

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## PLAINTIFF'S REPLY BRIEF

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Case No. 6255

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## PLAINTIFF'S REPLY BRIEF

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Defendants' Brief raises certain questions which appear to merit some reply.

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1. Plaintiff at no time has urged that "the Commission is limited in its powers to the regulation of monopolies and cannot ever allow a necessary and beneficial competitive service." (Defendants' Brief, pages 5-6) The point is that the service authorized in this instance was *not necessary*.

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2. On page 7 of defendants' Brief it is stated that *the public good* is the test in each case and that the Public

Service Commission and no one else is to determine what action is in the public good.

But the Legislature determines the policy to be followed and in laying down its standards with which the Public Service Commission must comply it has stated that the test is not "the public good", but "the public convenience and necessity". (Section 6, Chapter 65, Laws of Utah 1935).

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3. On page 8 defendants say that the Traction Company (a) had failed to make a beneficial use of its operating certificate, (b) was failing to fully serve points on its present Murray, Midvale and Sandy route, and (c) was not serving or offering to serve points contiguous to said route which required service.

But *without any substantial evidence to the contrary* the testimony at the hearing shows that the Traction Company has been beneficially using its operating certificates, has served Murray, Midvale and Sandy in accordance with specific orders of the Public Service Commission at rates prescribed and approved by the Commission (R. 433, 434), and has offered to serve the points contiguous to the route which the Commission might find require service (R. 434, 439, 443). A reading of the record in this case, as well as the Statute, will at once establish whether or not the Traction Company or the defendant is correct in these diametrically opposed statements. Not only has the Commission failed to find any inade-

quacies in Petitioner's service, but the Report in this case twice speaks of "more adequate" service to the territory now being served. If anything this is a finding that the present service is "adequate."

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4. On page 12 defendants argue that no findings of fact are necessary—simply a statement of the ultimate fact (conclusion) that the public convenience and necessity justifies granting the application.

But this contention also urged in oral argument is in the teeth of the Utah Statutes and the cases of this court. We again call attention to the case of *Salt Lake City vs. Utah Light and Traction Company*, 173 P. 556, 52 Ut. 210, cited by both parties, wherein on page 562 of the Pacific Reports this court said: "While it is true that the Utilities Act expressly requires the commission to make findings", etc. See page 9 of plaintiff's Brief.

Defendants' argument in this respect appears based on California cases, but the California cases are not at all in point because of the peculiar constitutional situation in that State. There by Constitutional Amendment the equivalent of the Public Service Commission has been established as in effect a fourth department of the government which does not need to make findings and which is not subject to judicial review. As was said by Justice Henshaw in the case of *Pacific Telephone & Telegraph Company vs. Eshleman*, 137 P. 1119, 50 L. R. A. 652, "In view of these considerations we regard the conclusion as

irresistible that the Constitution of this State has in unmistakable language created a Commission having control of the public utilities of the State, and has authorized the Legislature to confer upon that Commission such powers as it may see fit, even to the destruction of the safe guards, privileges and immunities guaranteed by the Constitution to all other kinds of property and its owners.”

Our case involves Utah and not the State of California where an entirely different situation prevails. See also *Pacific Greyhound Lines vs. Railroad Commission* (1938), 80 P. (2d) 971.

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5. On page 13 of defendants’ Brief the Traction Company is accused of overlooking the Commission’s findings with respect to existing service. These findings were given definite attention on page 12 of plaintiff’s Brief and among other “more specific statements” which plaintiff requests would be the fact that the bus service of the Salt Lake & Utah Railroad Company proceeding through Crescent and other “communities in need” is totally omitted. Another example is the complete silence of the Report as to service on 33rd South.

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6. On page 18 of defendants’ Brief defendants urge that the Commission’s findings and orders may be supported by hearsay or surmise, in fact “any evidence” and not “any substantial evidence.”

This contention has been urged in the United States Supreme Court cases involving this point. See *Consolidated Edison Company vs. National Labor Relations Board*, 86 L. Ed. 126, 305 U. S. 197, where Chief Justice Hughes has stated the rule to be as follows:

“Third.—The sufficiency of the evidence to sustain the findings of the Board with respect to coercive practices, discrimination and discharge of employees.—The companies contend that the Court of Appeals misconceived its power to review the findings and, instead of searching the record to see if they were sustained by ‘substantial’ evidence, merely considered whether the record was ‘wholly barren of evidence’ to support them. We agree that the statute, in providing that ‘the findings of the Board as to the facts, if supported by evidence, shall be conclusive’, means supported by substantial evidence. *Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board*, 301 U. S. 142, 147. Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Appalachian Electric Power Co. v. National Labor Relations Board*, 93 F. (2d) 985, 989; *National Labor Relations Board v. Thompson Products*, 97 F. (2d) 13, 15; *Ballston-Stillwater Co. v. National Labor Relations Board*, 98 F. (2d) 758, 760. We do not think that the Court of Appeals intended to apply a different test. In saying that the record was not ‘wholly barren of evidence’ to sustain the finding of discrimination, we think that the court referred to substantial evidence. *Ballston-Stillwater Co. v. National Labor Relations Board*, *supra*.

“The companies urge that the Board received ‘remote hearsay’ and ‘mere rumor’. The statute



provides that 'the rules of evidence prevailing in courts of law and equity shall not be controlling'. The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 44; *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U. S. 88, 93; *United States v. Abilene & Southern Rwy. Co.*, 265 U. S. 274, 288; *Tagg Bros. & Moorhead v. United States*, 280 U. S. 420, 442. But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence."

This is also the holding of the Utah cases involving the Industrial Commission. See Collation, Revised Statutes of Utah 1933, page 557. For example, a finding based on hearsay can not be sustained. *Fish Lake Resort Company vs. Industrial Commission*, 275 P. 580, 73 Ut. 479.

An award based entirely on surmise will not be sustained. *Maryland Casualty Company vs. Industrial Commission*, 278 P. 60, 74 Ut. 170.

"Substantial evidence" is well defined by this court in the case of *Utah Apex Mining Company vs. Industrial Commission*, 244 P. 656, 66 Ut. 529.

Further, where two inferences are equally reasonable a finding for the party having the burden of proof

is not supported by the evidence. *Spring Canyon Coal Company vs. Industrial Commission*, 201 P. 173, 58 Ut. 608.

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7. On page 22 of defendants' Brief it is urged that the failure of applicant to obtain the necessary local permits is a non-prejudicial error if an error at all.

But the Chicago, Burlington & Quincy Railroad Company case cited on this point by defendants involves an entirely different fact situation. In that case the court found that such permits were in fact obtained and by inadvertence had been omitted from the original record and the appellee had applied to correct the omission and have the record correctly show the facts. A reading of this case will at once develop that the authority is a point for plaintiff and not for defendants and that such consents must be obtained before a certificate of convenience and necessity can lawfully be issued.

Plaintiff has by Statute a right to enjoin and be protected against unlawful competition, but must meet and compete with lawful competition. The Statute by its terms is plain and clear that no certificate can be issued until this requirement is made and, therefore, defendants' competition is unlawful until it and the Commission have complied with the Statute.

The fact remains that these local consents have not been obtained to this day by the defendant. Similar consents were held mandatory by the New Jersey Su-

preme Court in the case of *Harmon vs. Board of Public Utilities Commission*, 163 Atl. 428, where that court in 1932 said: "In the present instance no consent was ever obtained from the municipal authorities, and the Utility Commissioners properly refused the application on the ground stated in the opinion filed by that tribunal."

The same ruling was announced in the very recent case of *Tilton vs. Model Taxi Corporation*, decided May 20, 1940 by the Federal Circuit Court of Appeals, 112 F. (2d) 86. Finding that the defendants had neither franchises nor consents from the City and no certificates of convenience and necessity from the Public Service Commission as required by Statute, that court issued an injunction at the instance of operators who had such consents and certificates, saying at page 89:

"The case then is one where the plaintiff was operating street railways and buses under franchises of the local authorities and certificates of the state commission, while the defendants were operating motor vehicles as common carriers without compliance with the statutory requirement as to obtaining consents and certificates, in competition with the plaintiff and to the plaintiff's injury. Without such consents and certificates the defendants are unlawfully on the streets. A common carrier who has a franchise to operate cars or busses and who conducts his business in submission to the regulations laid down by law is entitled to protection against competition at the hands of other common carriers who operate in defiance of the applicable regula-

tions. It makes no difference whether the franchises operated by the plaintiff were exclusive or not.”

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8. On page 24 of defendants' Brief it is urged that the applicant has made due proof to the satisfaction of the Commission of its financial abilities.

But the Commission has found in its Report and Order 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. \* \* \* It becomes evident that \$35,000.00 or more would, therefore, be required to finance this Company on a basis that would be wholly sound.”

Plaintiff has had no notice or opportunity to be heard with respect to additional evidence which would change these findings of the Commission, and the Statute of this State has ordered the Commission to reject the application until the Commission has found and evidence supports the finding that the applicant is financially able properly to perform the service sought. Section 6, Chapter 65, Laws of Utah, 1935. The Commission has no authority to modify this Statute.

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9. The cases are unanimous that under a Statute such as ours where *public convenience and necessity* is the statutory standard which the administrative body must

follow, the evidence and findings must show in order to justify the legal issuance of an application:

(a) That there is a reasonable necessity in addition to a mere convenience for the proposed service. This is what the Statute says and the Statute governs the Commission. For example, see the very able decision in the case of *Railroad Commission vs. Shupee*, 57 S. W. (2d) 295, where the Supreme Court of Texas discusses the meaning of the statutory language "public convenience and necessity" and cites from 42 C. J. 687:

"The convenience and necessity which the law requires to support the public service commission's order for the establishment or extension of motor vehicle transportation service is the convenience and necessity of the public as distinguished from that of an individual or any number of individuals, and this the primary matter to be considered in determining what constitutes such public convenience and necessity in a particular case, and the propriety of granting a certificate to that effect. The necessity for the proposed service must be considered as well as the added convenience thereof, although the word 'necessity' is not used in this connection in the sense of being essential or absolutely indispensable, but in the sense that the motor vehicle service would be such an improvement of the existing mode of transportation as to justify or warrant the expense of making the improvement."

The court held on the facts of this case which are similar to those of the instant case, that there was no public convenience or necessity for the proposed service as a matter of law.

(b) That this need is a need of the public as a whole. For example see the Texas case above;

(c) That existing service is inadequate reasonably to meet the needs of the public; otherwise there can be no necessity for additional service;

(d) That the proposed operations are economically sound; there can be no need for the economic waste of a service not economically sound. *People vs. Board of Railroad Commissioners*, 108 N. Y. Supp. 288;

(e) That the existing utility itself is incapable or unwilling to perform such additional service as may be reasonably needed. Otherwise additional service in territory already served is unnecessary.

See cases cited in plaintiff's opening Brief.

Regardless of the rule where a different standard is established by Statute, there is no escape from the obvious fact that the Utah Legislature has prescribed "public convenience and necessity" as the standard and hence the above rules as to what is "public", what is "convenience", and what is "necessity" are the standards which the Public Service Commission must follow until not it, but the Legislature of this State determines that a different standard should be followed.

For example, the Congress of the United States has prescribed a different standard under the Motor Carrier Act. See *Charles Noeding Trucking Company vs. United States*, 29 Fed. Supp. 537, wherein, quoting from the



*N. Y. Central Securities Company case*, 77 L. Ed. 138, the opinion of Chief Justice Hughes is cited showing that the criterion under the Interstate Commerce Commission Act is "the public interest." But in Utah it is "the public convenience and *necessity*."

So in the decisions under the Federal Communications Act economic injury to existing facilities is immaterial and entirely different standards from those in Utah are established. See *Sanders Brothers Radio Station vs. Federal Communications Commission*, 106 Fed. (2d) 321, and *Woko, Inc., vs. Federal Communications Commission*, 109 Fed. (2d) 665.

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On page 26 of defendants' Brief is set out a verbatim quotation from the case of *Grand Island Transit Corporation*, 27 P. U. R. (N. S.) at page 343. Omitted from this quotation is the sentence "It (protestant) declined to give the service." This omitted sentence is the key which at once distinguishes this case from the present one before this court.

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The claimed mis-statement and untrue suggestions referred to on pages 26 and 27 of defendants' Brief may be checked as to veracity by reading the transcript beginning at page 19. Again on page 29 of their Brief defendants say that plaintiff never at any time offered to render the service closer in which this defendant asked to render. The record shows that service on substantial-

ly the proposed schedule of applicant was rendered during 1939 by order of the Public Service Commission and was discontinued by order of the Public Service Commission. (R. 452 et seq.)

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On page 30 of defendants' Brief the California Commission case of *In re Airline Bus Line Company* is cited. We agree with the principle of this case which is not applicable here because the offer of protestant to render any additional service found to be convenient and necessary for the public made it unnecessary to grant the application with proposed participation in other traffic. And as the proposed service was unnecessary the Statutory mandate, therefore, required the rejection of the application.

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Counsel for defendant admitted in oral argument that the T. V. A. case referred to on page 30 of defendants' Brief was not a motor bus case and, therefore, was not in point. This case held, however, that "Whether competition between utilities shall be prohibited, regulated or forbidden is a matter of state policy." And that policy we submit must be determined by the Legislature and not by the Public Service Commission even though the Public Service Commission may have determined as set forth in the final pages of defendants' Brief, that a regulated, healthy competition in metropolitan motor bus service is now more advantageous than regulated



monopoly as prescribed by the Utah Legislature for the reasons stated by Mr. Justice Brandeis in *New State Ice Company vs. Liebmann*, 285 U. S. 262, 52 Supreme Court 371, 76 L. Ed. 747. The very point is that the Commission as a "little legislature" can not change the legislative mandate of the Legislature of the State of Utah.

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The Grand Island Transit Corporation case again cited by defendants on pages 30 and 31 of their Brief has already been referred to with respect to the omission of the vital part of the quotation. The verbal offer to render service was found by the Commission to be entirely unsatisfactory and, as omitted from the quotation, the Commission found that protestant declined to give the needed service.

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The New Hampshire case of *In re Boston and Maine Transport Company* cited by defendants on page 31 of their Brief is not in point, nor is the Oklahoma case, *Missouri K. N. O. Lines vs. State of Oklahoma*. The reading of that case will indicate that the Commission found additional service into an unserved territory to be convenient and necessary to the public and the existing carrier made no offer to render that service. In addition the court expressly commented upon the fact that the legislative criterion in Oklahoma is radically different than that in Illinois where was decided *the Bartonville*

*Bus case* and other leading cases under Statutes similar to those of Utah cited in Plaintiff's brief.

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The Missouri case of *State ex rel. Pitcairn vs. Public Service Commission* is cited on page 32 of Defendants' Brief. The citation appears erroneous, however, and probably should be 111 S. W. (2d) 222. A reading of that case, however, shows that the proposed service there involved was "necessary" in that the additional extension was required to preserve the existing service and that service given by protestant was definitely inconvenient and protestant had neither offered nor requested to render the service which the Commission had determined to be necessary.

The important thing about this case is to note that the Missouri Statute, formerly akin to that of Utah's, was amended in 1931 to give the Commission considerably more latitude in carrying out the *legislative will* as to when certificates of convenience and necessity should be issued.

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*The Southside Transportation Company case* decided in Virginia and cited on page 32 of defendants' Brief is consistent with plaintiff's contention, and the Statute appears to be similar to that of Utah. That case

did not involve encroaching upon territory served by existing carriers at all!

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A key case involving the Utah test of public convenience and necessity is *In re Dakota Transportation, Inc., of Sioux Falls*, decided by the Supreme Court of South Dakota on April 17, 1940, 291 N. W. 589. This case is an excellent and concise discussion of this entire problem of convenience and necessity.

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Finally, defendants' "Conclusion" beginning on page 39 of their Brief, again develops the conception that makes this case important since it involves in the words of a dissenting member of the Commission "a departure from basic or fundamental principles." There it is stated that the Commission is confessing its inability to perform the duties prescribed by Section 5, Chapter 65, Laws of Utah 1935. These specific statutory duties vest the Commission with power and authority and prescribe it as its duty to supervise and regulate all common motor carriers, to fix and determine just and reasonable rates, to regulate service, operating time and schedules so as to meet the needs of any community to the end that adequate transportation service to the public is assured, and to prevent unnecessary duplication of service which the Legislature has determined is not in the best public interest.

In determining the public policy of the State of Utah the Legislature of this State has adopted the economic theory urged by competent students of utility economics. As was stated in *the Dakota Transportation case*, supra:

“The primary consideration for requiring motor carriers to secure such certificates is ‘to promote good service by excluding unnecessary competing carriers.’ *Buck v. Kuykendall*, 267 U. S. 307, 45 S. Ct. 324, 326, 69 L. Ed. 623, 38 A. L. R. 286. The practical necessity for regulation of this and similar businesses affected with a public interest is clearly stated by Mr. Justice Brandeis in a dissenting opinion in *New State Ice Co. v. Liebmann*, 285 U. S. 262, 52 S. Ct. 371, 376, 76 L. Ed. 747: ‘The purpose of requiring it is to promote the public interest by preventing waste. Particularly in those businesses in which interest and depreciation charges on plant constitute a large element in the cost of production, experience has taught that the financial burdens incident to unnecessary duplication of facilities are likely to bring high rates and poor service. There, cost is usually dependent, among other things, upon volume; and division of possible patronage among competing concerns may so raise the unit cost of operation as to make it impossible to provide adequate service at reasonable rates. The introduction in the United States of the certificate of public convenience and necessity marked the growing conviction that under certain circumstances free competition might be harmful to the community, and that, when it was so, absolute freedom to enter the business of one’s choice should be denied.’ If the need for additional service exists, it is the duty of the Public Utilities Commission to grant certificates of public convenience and necessity to

qualified applicants, but when a territory is already sufficiently and satisfactorily serviced and transportation requirements are not sufficient to support additional service the duplication of service unfairly interferes with existing carriers and may affect the need of the public for an efficient permanent service. It is true that certified carriers benefit from the restricted competition, but this is merely incidental in the solution of the problem of securing adequate and permanent service by the avoidance of useless duplication with its consequent impairment of service and increase of rates charged the public. The public interest is paramount.”

In other words the Legislature has in effect said to the Commission and to the public utilities of this State:

“In the exercise of the police power of this State the State is assuming complete control over the public utilities of Utah, both as to the character of service to be rendered and the rates to be charged and all details of your operations. You, the Public Service Commission, shall be the agent of the State of Utah in exercising this control, and when you shall have first determined the facts in a particular case, you shall then enter the order that these facts call for under the standards and plan of regulation which the State is now prescribing.

“In consideration of that control and as a part of this plan in the public interest, you, the utilities, shall be protected in the territory in which you are serving unless and until it is determined by due process that you can not and will not render to the public of the territory which you serve the transportation service which the Commission determines you should render and the service

which meets the needs of the public of your territory."

To change this broad scheme of public regulation requires a mandate of the Legislature and is not a function of the agent which the Legislature created. It is, therefore, of vital importance for the independent judicial branch of this government here to reassert that the legislative power of the State of Utah is vested in the Legislature and in the people of the State of Utah, and not in its agents (Constitution, Article VI, Section 1, Article I, Section 11); and that administrative officers in carrying out their essential functions in this modern age must observe these constitutional requirements and the directions of the Legislature.

If, as defendants state, the service now being rendered by Airway Motor Coach Lines, Inc., is in fact necessary and convenient to the public of this territory that service should be rendered, but in accordance with the directions of the Legislature.

Respectfully submitted,

GEORGE R. COREY and

CALVIN BEHLE,

*Attorneys for Plaintiff.*



## APPENDIX

**Report of Commission in Case No. 2343,****Omitting Heading and Preamble**

From the testimony adduced at said hearing, and from the record and files in this case, which are made a part hereof by reference, the Commission finds:

That the applicant is a corporation operating under the name and style of Airway Motor Coach Lines, Inc., is organized under the laws of Wyoming, and is duly qualified and authorized to do business in the State of Utah.

The applicant for about two years past has been operating as a common motor carrier of passengers in Provo, Utah, and on specified routes in the southeast portion of Salt Lake County under Certificates of Convenience and Necessity Nos. 494, 501, and 522.

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.

The applicant proposes to charge a rate of ten cents from Salt Lake City to Murray and fifteen cents to Midvale, and five and ten cents between the other communities herein named, as set forth in applicant's Exhibit A on file herein.

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.



In the case 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, and there is at the present time no reason to suppose that such patrons will not continue to enjoy the benefits of these rates.

The proposal of the applicant is to operate so that Murray, Sandy, Crescent, Draper, Midvale, West Jordan, Riverton, Taylorsville and Bennion will all have 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 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, the territory having inadequate or no service at the present time would 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 requires that reasonable precaution be taken to assure a continuance of service through a reasonable period of time.

The statutes of the State of Utah require this Commission to look into the financial responsibility of any applicant seeking to render a common carrier service. In making this provision, the Legislature no doubt had in mind the grave public responsibilities which a common carrier undertakes. It must render a regular, safe and dependable service to the public in accordance with its schedules.

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. The Commission would be remiss in its duty if it were to grant this application without requiring the applicant to have sufficient assets to assure continued service.

Safeguards should be provided such as would make it possible for the applicant to meet conditions that may arise at least over a reasonable period. 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 diminishing in the past two years. Certainly, the continuance of the operations now being performed by this applicant should not be threatened by permitting this small block of capital to be hazarded on a new and economically questionable operation. Neither should an operator, who is known to be improperly financed be permitted to start service which will induce members of the public to construct homes or otherwise make investments, the future value of which in a large measure will be dependent upon the ability of this applicant to render service through the years, unless there is reasonable hope that the applicant can render service in accordance with the public need.

The applicant admits that the territory must be pioneered. If it is to be pioneered over as large an area as is proposed, with the rendition of the type and frequency of service indicated and at the rates set forth, both in the application and at the hearing, the Commission should be sure that the applicant is financed at least to the extent necessary to carry the proposed operation through the pioneering period.

At the present time the current obligations of this Company relating to the Utah operations are approxi-

mately equal to existing assets. These current obligations amount to near \$10,000. The applicant testified that new equipment to perform this operation would cost approximately \$25,000. It becomes evident that \$35,000 or more would therefore be required to finance this Company on a basis that would be wholly sound.

That the interests of the public in this matter may have at least a minimum of protection and a reasonable guarantee of performance through and beyond the pioneering period, the Commission concludes that the granting of authority sought in this application should be contingent upon this Corporation adding to its corporate capital structure to provide for the benefit of the new Utah operations an amount of not less than \$15,000 in cash with which to purchase equipment necessary to enter upon the performances proposed. With the addition of that amount of capital, the applicant should be financially able to perform the operation herein proposed. Anything short of this type of guarantee might result in an uncertain operation, with a possible detrimental effect upon many individuals, particularly where capital investments may have been made by reason of the belief that continued service would be available, and it might be that even whole communities would suffer irreparable loss.

It also appears to the Commission that the highways over which applicant desires to operate are not unduly burdened with traffic. The granting of this application will not substantially detract from, nor impair existing

common carrier service, nor interfere with the traveling public; consequently, it will not be detrimental to the best interests of the people of the State of Utah, or the localities to be served.

The Commission is of the opinion that the proposed service should be instituted on or before the 1st day of June, 1940, and in the event the applicant shall fail to comply with the requirements of the Commission on which the granting of this authority is contingent and institute service at the time heretofore set forth, the authority should be automatically cancelled.

An appropriate order will follow.

WARD C. HOLBROOK (Signed)

W. K. GRANGER (Signed)

*Commissioners.*

(Seal).

J. ALLAN CROCKETT (Signed)

*Secretary.*



**Case No. 2343****Dissent, Omitting Heading**

Dissents with the objective of giving expression to the writer's opinion on facts involved or disputations on questions of law are probably better omitted. Dissents protesting against departure from basic or fundamental principles may serve as an anchor against drifting from safe water. It is because I keenly feel that the decision in the above matter marks such departure that I am impelled to point out what appear to me to be its attendant dangers.

While I did not join in the order handed down herein on March 14, 1940, I withheld dissent in the hope that petition for rehearing might be granted. Such petition has now been denied and I conceive it my duty to state for the benefit of any parties interested that this Commission has not unanimously departed from the principle of regulated monopoly on questions such as is here involved.

Broadly painted, the picture presented to this Commission showed the Utah Light and Traction Company rendering passenger bus service from Salt Lake City to Murray on a 15c fare and from Salt Lake City to Sandy and Midvale on a 20c fare. The applicant, Airway Motor Coach Lines, Inc., offers to render this service at a 10c rate to Murray and 15c to Sandy, and Midvale. As an adjunct to this offer and subsequently appended, it proposes to extend this service to reach Draper, River-

ton and Taylorsville and certain other outlying points for additional charge.

The Commission's report states that the Traction Company would not voluntarily meet the proposed lower rates and concludes that competition is the only answer. It is against such departure from basic principles of utility regulation that this protest is filed. The Supreme Court of this State, in the case of

*Gilmer v. Public Utilities Commission,*  
67 Utah 222, 274 P. 284,

quotes with approval the following succinct statement of the principle:

“The very purpose of the Utilities Act is to prevent one public utility from destroying another.”

The Traction Company renders a scheduled 22½ minute peak load and 45 minute off-peak load service over its route in question, a much more frequent service than the applicant proposes to provide. The quality of the service rendered by the Traction Company appears without question to be adequate and satisfactory. The spearpoint of attack is rates. Regulation of rates is not only the function but the bounden duty of the Commission. 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. By taking the position that the rate is shown to be too high because another offers to perform the service for a lesser charge and therefore the other

will be given the opportunity to compete, the Commission admits either its unwillingness or its inability to function as required by the Act bringing it into existence.

But the Commission needs make no such reflecting admission. Even prior to the time this matter came on for hearing we were in the process of investigating and gathering evidence bearing not only on the rates in question but the rates and returns over the Traction Company's entire system. This is no small task, since it involves returns to the Company from its operations as a whole and the weighing of returns in one section as against another in order that discrimination may be eliminated and both the public and the carrier dealt with fairly.

This work and these principles have, I feel, been thrown into the discard by this decision. Simply because a would-be competitor offers to handle a particular part of the Traction Company's load at a lesser rate we discard the principle of regulation and substitute that of competition.

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.

Such a bald departure from fundamental principles requires some coating to make it palatable to any student of utility law, and so perforce the applicant added a proposed service for the further outlying communities named in its application. However, this proposed service is actually no part of the competitive picture heretofore discussed. If the outlying communities should have and can support a better service than is now available, they are entitled to such service and through applicant if it desires to render the service, but such service must stand on its own feet and may not look for its support to income resulting from paralleling an existing line. Applicant may properly be permitted to render service to these outlying communities, delivering its passengers to the existing lines at proper points and this Commission may determine the reasonable total fare and the proper division of such fare. Service direct from the communities in question to Salt Lake City is also entirely proper if such service is or will prove remunerative, but an existing line may not legally be paralleled and its business pirated under the guise of serving outlying communities.

Stated in other words, the application should be presented and considered as two distinct units. (1) A proposed directly competing line to Murray, Sandy and Midvale. (2) A proposed service to Draper, Riverton, Taylorsville and other outlying points, the latter either

direct to Salt Lake or by transfer to existing service, as the case may be.

When so considered it seems inescapable that to grant the first is merely driving rates down by approving competition, without the slightest inquiry as to proper rates. Such method was outlawed years ago in order to prevent utilities from destroying one another to the ultimate detriment of the public.

The first portion of the application should be considered just as though it were a request to directly compete with any other portion of the Traction Company's service at a lower rate. When that is settled we should proceed to consider the request to render service to and between outlying points and the latter can then be determined on its own merits. I am very fearful that by permitting one distinct phase of the application to be used as a sugar coating to the other, we have been deluded into a departure from principle so fundamental as to strike at the very reason for our existence as a Commission.

Dated at Salt Lake City, Utah, this 18th day of May, 1940.

OTTO A. WIESLEY (Signed)  
Commissioner.

Attest:

J. ALLAN CROCKETT (Signed)  
Secretary.

BEFORE THE PUBLIC SERVICE COMMISSION  
OF UTAH

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In the Matter of the Application  
of AIRWAY MOTOR COACH  
LINES, INC. for a Certificate  
of Convenience and Necessity  
to operate as a common motor  
carrier of passengers (between  
Salt Lake City, Utah, and  
Murray, Sandy, Crescent,  
Draper, Midvale, West Jor-  
dan, Riverton, Taylorsville,  
and Bennion, Utah.)

Case No. 2343

ORDER OF THE  
COMMISSION

Certificate of Conven-  
ience and Necessity  
No. 534

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This case being at issue upon application on file, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings and conclusions, which report is made a part hereof by reference,

IT IS ORDERED, That the Airway Motor Coach Lines, Inc., is authorized to render service as a common motor carrier of passengers between Salt Lake City, Utah and Murray, Sandy, Crescent, Draper, Midvale, West Jordan, Riverton, Taylorsville and Bennion, Utah, over the following described routes:

Outbound: (a) Commencing at 2nd South and Main Street, east to State Street, south on State Street through Murray to Sandy.

Approximately four trips daily to continue or connect with service at Sandy and continue south on State Street from Sandy through Crescent to 134th South, east to Draper. The service between Sandy and Draper to supplant the present service of applicant to Draper from Union on 7th East.

(b) Alternate trips, turn west from State Street at 88th South to Midvale, with approximately four trips daily to continue or connect with the service at Midvale and continue west on 88th South to Redwood Road and West Jordan, and south on Redwood Road through South Jordan to Riverton.

Inbound: (a) Leaving Draper and Sandy, reversing the above route, north on State Street through Murray to 33rd South, west to Main Street, north to 2nd South.

(b) Leaving Riverton and Midvale, north on 6th West to 53rd South, east to 2nd West, north to 48th South, east to State Street, north to 33rd South, west to Main Street, north to 2nd South.

No local service to be performed north of 34th South except that the present Draper service may be extended to permit stops at 33rd South on Ninth East.

IT IS FURTHER ORDERED, That the authority described in the preceding paragraph is contingent upon the applicant securing not less than \$15,000 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, and further, that said money

be raised and service instituted over the above described routes at the scheduled frequencies and at the rates set forth in applicant's Exhibit A, on file herein and which is incorporated herein by reference, on or before June 1, 1940. Otherwise, this order shall be null and void and authority herein granted shall at said date be automatically cancelled.

IT IS FURTHER ORDERED, That applicant shall maintain on file with this Commission the necessary insurance as required by law, and a copy of its tariff schedule, showing rates, time schedules, and rules and regulations, and that it shall operate at all times in accordance with the statutes of the State of Utah, and the rules and regulations which now exist, or which hereafter may be prescribed by the Public Service Commission of Utah, governing the operation of common motor carriers over the public highways of the State of Utah.

Dated at Salt Lake City, Utah, this 14th day of March, 1940.

WARD C. HOLBROOK (Signed)

W. K. GRANGER (Signed)

*Commissioners.*

(Seal).

Attest:

J. ALLAN CROCKETT (Signed)

*Secretary.*