

1949

Owen M. Collett, Cantlay & Tanzola, Inc. and Clark Tanklines Co. v. Public Service Commission of Utah, R. A. Gould, and Lang Transportation Corporation : Brief of Plaintiffs

Utah Supreme Court

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Collett Tank Lines; by Richard and Bird; Cantlay & Tanzola, Inc.; by Lamoreaux and Tuft; Clark Tanklines; by Callister, Callister & Lewis;

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

OWEN M. COLLETT, CANTLAY
& TANZOLA, INC., and CLARK
TANKLINES COMPANY,

Plaintiffs,

vs.

PUBLIC SERVICE COMMISSION
OF UTAH, R. A. GOULD, and
LANG TRANSPORTATION COR-
PORATION,

Defendants.

Case No.
7279

BRIEF OF PLAINTIFFS

COLLETT TANK LINES

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CLARK TANKLINES COMPANY
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STATEMENT OF THE CASE

This case is before the Supreme Court on writ of certiorari issued January 7, 1949, (R. 64) directing the Public Service Commission of Utah to certify for review the record of its proceedings in an application for transfer from one carrier to another of a certificate of convenience and necessity for the hauling of petroleum and petroleum products as a

common motor carrier, or, alternatively, for cancellation of one certificate and issuance of a new one without a showing of public convenience and necessity.

The applicants before the Commission were R. A. Gould, a certificated carrier, and Lang Transportation Corporation, a corporation with common carrier rights in other states and in interstate commerce. These two had entered into a contract (R. 8) for the sale by Gould and purchase by Lang of Gould's equipment, rights, and going business. At the hearing plaintiffs and others protested the requested relief but the Commission granted the application substantially as prayed for. Application for stay and petition for rehearing were filed with and denied by the Commission. Plaintiffs sought and were denied a stay order from this Honorable Court.

The parties will be referred to in the following manner: R. A. Gould as Gould; Lang Transportation Corporation as Lang; Cantlay & Tanzola, Inc., as Cantlay & Tanzola; Collett Tank Lines or Owen M. Collett as Collett; Clark Tanklines Company as Clark; The Public Service Commission of Utah as The Commission.

STATEMENT OF FACTS

The application of Gould and Lang (R. 1-21) alleged that Gould was a common motor carrier of petroleum and petroleum products intrastate in Utah under Certificate of Public Convenience and Necessity No. 784 issued by The Commission August 27, 1947; that Lang was a common motor carrier of such products under Inter-State Commerce Commission authority; that the two had entered into an agree-

ment "to sell and transfer" the operating authority of Gould; that Lang is fit, willing, and able to perform the service; that no hazard or burden on the highways will result from the requested change of authority and that the transfer will be in the public interest. The applicants prayed that the transfer be approved, or, alternatively, that the Gould certificate be cancelled and a like certificate issued to Lang. The attached agreement (R. 8-10) provided in paragraph 1 for sale of "The certificate of public convenience and necessity which Seller owns and holds" for a price of \$20,000.00.

The hearing was protracted. Applicants indicated the opinion that they need show only that Lang was "fit, willing and able" to render the service to obtain the desired result (R. 152, 172-173, 176). Protestants contended that public convenience and necessity must be shown before Lang could obtain the desired certificate (R.183,184). The Commissioners were concerned about "Public interest" (R. 274, 336-337, 347) and one of them talked also of "convenience and necessity" (R. 170, 173,347, 348, 439). Applicants contended "convenience and necessity was not involved" (R. 168, 171-176, 181). The record contains much argument incidental to the testimony (R. 164-186, 305-314, 324-330, 334-339, 346-357, 447-474).

Plaintiffs concede that Lang showed that it was and is "fit, willing and able" to operate as a common motor carrier. Testimony of adverse effect on the public was offered by protestants to show prospective loss of business which, if realized, would impair services offered to the public. No shipper witness was offered to show public convenience

and necessity, although the witness Hurley, representing Tidewater Associated Oil Company, testified (R. 290-321, 392-417) that Lang had in other operations and could be expected in this one to give excellent service (R. 317).

Plaintiffs believe no worthwhile objective would or could be realized in abstracting the testimony in full and therefore suggest hereinafter the salient features of the testimony of each witness relating to the questions of probable interest to this Court.

R. A. GOULD testified that he held Certificate of Convenience and Necessity No. 784 (R. 153, Ex. 1, R. 66) which he had agreed to sell or transfer to Lang (R. 156) in the agreement, Exhibit A (R. 68). He wanted the Commission to approve the agreement and issue like authority to Lang (R. 161). His operating authority and good will were fairly priced at \$20,000 (R. 163, 186-187). If the agreement was not approved by the Commission his down payment of \$5,000 would be returned to him (R. 190), and he would continue to operate the business without any plans for expansion (R. 199).

If the application is denied Gould will keep his certificate and continue to work it (R.266). He is at a disadvantage with the larger operators who pull in a piece of equipment when needed and do not have to sit around and wait for something to happen (R. 266). Gould has been serving the public in practically every Utah county (R. 286).

HOWARD M. LANG is Vice-President and General Manager of Lang (R. 202), the largest petroleum carrier west of the Mississippi and 4th or 5th in the nation (R. 233).

Lang has assets and liabilities of \$2,466,501.56 (R. 71-72), owns and operates 289 pieces of equipment (R. 73,205), with 9 more on order (R. 71, 204-205). Lang has a certificate from the Interstate Commerce Commission to operate between points in Southern California and Southern Utah and other points (R. 74,206). Some equipment is registered in Utah and the Utah business revenue has been steadily increasing over several years (R. 207). This revenue was \$87,922.50 in 1943, \$127,738.48 in 1946, \$146,272.59 in 1947, and \$126,068.10 for the first 8 months of 1948 (Ex. 8, R. 78). Total carrier operating income for the first 8 months of 1948 was \$2,574,727.27 (Ex. 7, R. 79-A). If the application is granted Lang will lease Gould's terminal property in Salt Lake City, employ Gould to manage its "spread" here, and will operate part of Gould's equipment (R. 208), replacing the others with larger units to serve all who call upon Lang (R. 209).

"Q. Now, Mr. Lang, will you explain to the Commission, please, why it is that you undertook to acquire the business of Gould?

"A. Well by this last exhibit you can see the volumn of petroleum products that are moving from the Southern California area into Southern Utah, and I am sort of alarmed at our production situation on the Coast, and I can see gasoline probably produced here out of this new Standard Oil refinery pushing west, and I might wind up some day with this traffic dried up on me. That was really the main reason I was interested in acquiring Gould's operation." (R. 210-211)

Lang has an application for a Certificate of Public Con-

venience and Necessity pending before the Commission from a time prior to its agreement to buy Gould's business. This will be withdrawn or dismissed if this application is successful (R. 211).

Gould is now trucking for Tidewater Associated and Standard Oil Company of California (R. 212). Lang hauls from California into Southern Utah for Standard Oil of California, Shell Company, Texas Company, Tidewater Associated, he thinks some for Union Oil Company (R. 214-215). If the certificate is obtained Lang would seek to serve the companies for which it now hauls in California and from California into Southern Utah (R. 216); is unwilling that the certificate, if granted, be restricted to hauling into Southern Utah. \$20,000 is a fair value for Gould's franchise (R. 226); Lang will compete with other carriers and take such business as it can (R. 235).

EDWARD D. HURLEY of San Francisco is Chief Rate Clerk for Tidewater Associated Oil Company (R. 291). His company purchases products from Utah Oil Refinery and distributes them through Associated Oil and Gas Company and Mountain Oil Company (R. 293) via the Gould Trucking Company (R. 294). Gould has rendered this service for 14 years (R. 294). Tidewater Associated pays the freight for this transportation and controls the routing (R. 298). His company has used Lang for transportation of petroleum products for 25 years and has received "very excellent service" (R. 316). If the application is granted Tidewater Associated will continue to use Lang for intrastate transportation in Utah (R. 393, 406). After delivery

of petroleum products to Associated Oil and Gas Company in bulk, Tidewater has nothing to do with further transportation or delivery (R. 403). Tidewater has also used the services of Cantlay & Tanzola in California and Arizona and occasionally in Utah and their services have been satisfactory (R. 406, 407). They have utilized the services of Collett into Idaho and that service has been satisfactory (R. 407). Witness is not familiar with the services of Clark (R. 406). The reason for preferring to use Lang "is because of a personal relationship * * * with them on the coast" and not because they are more efficient (R. 407).

OWEN M. COLLETT, one of the owners of Collett Tank Lines, is operating under Utah Public Service Commission certificate of convenience and necessity No. 783 (R. 320-321, Ex. 8, R. 80). As of June 1, 1948, Collett operated 70 pieces of equipment (Ex. 9, R. 82) and has discontinued 10 of those since that date because of loss of traffic due to Cantlay & Tanzola's obtaining interstate authority into Idaho (R. 323). (This loss of traffic appears on Ex. 10, R. 84.) Collett's total assets and liabilities are \$334,993.48 (Ex. 11, R. 85). Loss of a substantial amount of business would materially affect his business and granting of the application would probably result in substantial loss of intrastate business (R. 332, 333, 341, 342, 358). During 1948 Collett has had idle equipment, averaging about 10 units, in addition to the 10 that were cut off (R. 358). Loss of traffic and revenue

cause curtailment of services, reduction of personnel, and delays in serving the public who are the shippers and eventual diminution of equipment and of ability to render service. Terminal expense is made excessive and pressure for increased rates gets stronger (R. 359-362). Truck rates in Utah are 20% under rail, while in states to the east and north they are the same as or 20% more than rail (R. 362-363). At the time of Ex Parte 166, states to the east and north of Utah took increases in motor carrier rates and Utah took none (R. 363,365). Collett was giving shippers one and two hour service for shipments moving up to 100 miles during 1948 up to June, with 24 hours per day dispatching service. Since June personnel has been cut and service has been cut to about six hours. This is better service than is given in any of the surrounding states where most carriers give service of from 24 and 36 hours to as high as 3 or 4 days. The keen competition in Utah is the reason for the service given (R. 365-366). Collett is seeking new business and expanded territory to keep present equipment busy (R. 367). There is a place and a need for small equipment in serving Utah intrastate business (R. 368). If additional business, such as Associated Oil, or Shell Petroleum, were tendered, Collett could handle it (R. 369). Documents marked Exhibit 12 are reports of the State Tax Commission (R. 86-125) showing gasoline refined in, imported to, exported from, and consumed in Utah by months from June, 1946, to May, 1948, with some months missing as follows:

Month		Refined In Utah	Imports	Exports	Consumed In Utah
June	1946	14,476,733	3,610,430	4,068,774	13,642,141
September	1946	16,019,949	3,392,646	4,115,192	13,980,591
October	"	15,409,750	3,352,567	4,275,269	13,401,097
November	"	14,398,169	3,071,468	3,116,771	11,750,415
December	"	14,532,783	3,077,418	3,345,639	11,617,556
January	1947	14,452,111	2,997,625	3,078,728	11,099,977
February	"	13,810,513	2,669,318	3,126,097	10,363,305
March	"	14,007,955	2,446,941	4,039,798	12,123,267
April	"	13,779,519	2,671,483	4,681,967	13,064,868
May	"	17,523,031	2,784,901	4,853,681	13,925,940
July	"	17,021,861	3,110,019	6,446,528	17,233,922
August	"	17,918,774	3,115,255	6,580,704	16,893,193
September	"	15,897,642	2,939,365	5,980,956	16,261,613
November	"	18,925,279	1,990,412	3,578,845	12,477,233
December	"	14,858,737	1,899,874	4,066,294	13,041,776
January	1948	16,564,828	2,116,682	3,662,680	12,225,217
February	"	15,827,252	2,014,209	3,028,254	10,855,306
March	"	12,775,668	1,894,763	4,132,271	12,966,404
April	"	17,001,576	2,356,824	4,885,143	14,675,523
May	"	19,257,105	2,810,957	5,704,448	15,142,606

Imports into Utah by the companies served by Lang into Southern Utah (R. 214-215) taken from Exhibit 12 are as follows:

Month		Standard Oil California	Shell	Texas	Union Oil
June	1946	621,145	328,238	165,611	21,130
September	"	612,402	285,183	165,856	27,714
October	"	455,235	275,066	149,358	7,094
November	"	402,522	186,731	99,035	00,000
December	"	367,870	209,305	80,932	00,000
January	1947	261,315	154,284	69,032	00,000
February	"	327,019	182,022	60,780	6,938
March	"	242,310	180,457	70,801	00,000
April	"	385,501	277,125	98,168	00,000
May	"	204,317	355,461	56,360	20,900
July	"	780,067	372,867	18,666	48,395
August	"	546,937	363,416	19,915	50,702
September	"	303,338	924,760	20,965	27,531
November	"	113,507	194,333	56,410	00,000
December	"	88,109	198,278	8,145	00,000
January	1948	99,576	150,969	8,849	7,029
February	"	76,810	271,447	9,215	00,000
March	"	95,350	153,146	12,616	00,000
April	"	127,410	212,443	18,873	20,118
May	"	108,110	376,793	15,916	30,361

(These reports show no imports by Tidewater Associated or Associated Oil.)

The equipment of Gould, Clark, Cantlay & Tanzola, and Collett is more than adequate for the transportation needs in this state (R. 373-374). There is keen competition between the petroleum carriers in Utah (R. 374).

Collett's intrastate traffic for the first eight months of 1948 was probably 10% higher than for the corresponding period of 1947 (R. 378). Gould has been operating longer than Collett and in 1947 had \$89,000 gross revenue compared with Collett's \$800,000 including interstate commerce. Collett's intrastate gross revenue was \$90,000 (R. 381).

Collett's ratio of earnings to gross revenue was 5% in 1947 compared to 11% in 1948. The increase was because the volume was up (R. 386). And when the volume dropped in 1948 the profit dropped better than half (R. 387).

If this application should be granted it is Collett's opinion he would lose 10% of Texas Company and Standard Oil Company business, which together represent 85% of his intrastate business (R. 527). Motor carriers are presently benefiting from the railroad's inability to handle petroleum because of shortage of tank cars (R. 528).

R. M. BRYAN is Utah and Idaho manager for Cantlay & Tanzola which operates under Certificate of Convenience and Necessity No. 785 (R. 418-419, Ex. 15, R. 126). The company has been in business since 1929 and has interstate as well as intrastate authority in California, Arizona, and Nevada (R. 421). They have a large, modern terminal in Salt Lake City where all

general maintenance work and complete repair work is done (R. 421-423, Ex. 16, R. 131). They maintain 15 mechanics and 24-hour dispatch service, and have 26 power units (of which 9 are used in the Idaho business (R. 521)) and 27 trailers stationed at Salt Lake City (R. 423-424, Ex. 17, R. 132). The equipment has special features for use on Utah Highways (R. 427). They have idle equipment quite regularly and could handle additional traffic. They now serve all types of customers throughout the state (R. 428). They hauled 35,705,231 gallons of petroleum products intrastate in Utah in 1947 (Ex. 19, R. 134), and in the first six months of 1948 hauled 18,255,825 with gross revenue of \$198,985.98 (R. 135, Ex. 20). Total assets and liabilities are \$1,365,274.35 (R. 433, Ex. 21, R. 136). Volume of traffic for July 1948 was approximately 125,000 gallons less than for July 1947.

They serve from 75 to 85 points in Utah (R. 435). Should additional equipment be needed in Utah, the company can supply it. They are handling all business tendered and have never been compelled to refuse traffic (R. 437). Cantlay & Tanzola serves the same companies in Utah that Lang serves into Southern Utah interstate (R. 441).

The carriers in Utah are actively soliciting new business in Utah (R. 453). Loss of business reduces the load factor on equipment, increases overhead in proportion to revenue and thus reduces the power to serve the public (R. 440). This increase of costs compels rate increases to give a stable operation in a satisfactory manner (R. 441).

The increase in business the first six months of 1948

compared with the first six months of 1947 was approximately four million gallons and was due to increase in the fuel oil business (R. 481-482). Increasing intrastate business in 1948 was due to shortage of railroad tank cars as compared with 1947 (R. 486-487).

The equipment of Cantlay & Tanzola, Collett, and Clark, could handle all the gallonage being hauled by them and by Gould and render good service to the public (R. 523). His company and Collett could each carry 25 to 30 per cent more gallonage than they are hauling and Clark could carry 50% more (R. 524).

BOYCE R. CLARK is manager of Clark Tanklines Company, operating under Certificate of Convenience and Necessity No. 786, with 26 pieces of equipment (R. 488-490, Ex. 22, 23, R. 138-140). Total assets and liabilities are \$136,892.39 (R. 141). Clark now has idle equipment and is soliciting new business amongst keen competition (R. 492). Clark could haul 125,000 gallons a day if it were available (R. 493).

If Clark loses business because of additional competition, it would put them in "a very unsound financial position" after having bought some new equipment, because of increasing proportionate overhead costs (R. 502,504). This would affect their ability to serve the public because of inability to keep crews and equipment busy (R. 504). Truck rates have not increased lately in Utah and are 20% under rail (R. 505).

Clark has purchased two new trucks and trailers recently although they had idle equipment at the time (R. 509-

510). If Lang were given a certificate it would take some of Clark's business, such as from the Utah Oil account (R. 511).

-:-

The Report and Order of the Commission were issued December 16, 1948 (R. 40-50).

The report consists largely of an argument and justification for cancelling one certificate and issuing a like certificate to Lang in the absence of a showing of convenience and necessity. References to the general qualifications of the two applicants are included and it is found that Lang is financially responsible, fit, willing and able to operate as a common motor carrier and that it will comply with the laws of the State of Utah and not burden the highways unduly (R. 44). The report also discusses the public interest as it would be affected by the claim of protestants that the entry of Lang into Utah intrastate commerce would adversely affect them and impair the service which they could render to the public. The Commission was not satisfied with this testimony and found that the public interest would not be adversely affected (R. 45-46).

On the question of public convenience and necessity the report of the Commission states:

"In Case No. 2882 heretofore heard, being the application of R. A. Gould, this Commission found and determined that public convenience and necessity required the rendering of service by Gould as in said application prayed, and pursuant to its report in said case made,

issued to Gould, on or about the 27th day of August, 1947, Certificate of Conveyance and Necessity No. 784, authorizing Gould to operate as a common motor carrier for the transportation of petroleum and petroleum products, except road oil and asphalt, in bulk, between Salt Lake City and Woods Cross on one hand and all other points and places in the State of Utah on the other (R. 41).

“On or about said 27th day of August, 1947, in other cases then pending, this Commission issued further certificates of convenience and necessity as follows: (Refers to Certificates No. 783, 785, 786 and 834.) (R. 41)

* * *

“This Commission in said cases found and determined that public convenience and necessity required the services of each and all of said carriers as in said certificates authorized and prescribed. Such finding and determination is now final and absolute in each of said cases, and no contention by any party to this proceeding is now made that public convenience and necessity do not continue to require the rendering of the service as in said certificates ordered and authorized by each of the holders thereof, and each of said certificates, including the Applicant Gould, has since the issuance thereof continued and now continues to exercise the rights and perform the service in said respective certificates authorized and to discharge his or its duty to the public thereunder. (R. 42)

“The motor carrier rules and regulations of this Commission now in force and effect preclude transfer from one carrier to another of operating

authority and require that the certificate of convenience and necessity of the retiring carrier be cancelled and annulled and that a new certificate of convenience and necessity with like authority be issued to the carrier who undertakes the performance of the service. If the transaction herein proposed be authorized by this Commission, it must be carried out pursuant to such procedure. (R. 43)

“The contention was made at the hearing and in their briefs by certain parties protestant that Applicants were under the duty of showing in this case that public convenience and necessity now require the service sought in this case to be rendered by Lang. As hereinabove shown, this Commission has determined in a prior proceeding that public convenience and necessity require the services which Gould is authorized to perform under said Certificate No. 784. Lang proposes simply that he may be authorized to enjoy the rights and discharge the obligations and duties of Gould. Lang seeks the right to perform those services which Gould is presently authorized to perform, nothing more. It having been determined by this Commission that public convenience and necessity require such services, that question is not an issue in this case and need not again be determined. The motor carrier rules and regulations of this Commission now and since June 1, 1937, in force and effect so provide; and the procedure of this Commission in cases such as this has been consistently in accordance therewith.” (R. 44)

The order of the Commission simply issues a certificate to Lang and cancels the certificate of Gould and fixes

a time for the effectuation of the order (R. 48-49). Notice of consummation of the transaction was filed with the Commission December 23, 1948 (R. 51) and application for rehearing and for suspension of order was filed December 27, 1948 (R. 52-56). The order denying application for rehearing and for suspension of order was dated December 30, 1948 (R. 57). Petition for writ of certiorari and for supersedeas was filed in this court January 5, 1949, (R. 59-63) and writ of certiorari was issued January 7, 1949. The court subsequently denied the application for supersedeas and the record of the Commission was filed in this court March 22, 1949.

STATEMENT OF ERRORS RELIED ON

Plaintiffs rely upon the following propositions as constituting error in the decision of the Commission.

I. A Certificate of Public Convenience and Necessity issued by the Public Service Commission of Utah is not a property right and cannot be transferred without the approval of The Commission.

II. The Public Service Commission of Utah has no authority to transfer a Certificate of Public Convenience and Necessity in the absence of a showing of public convenience and necessity.

III. The Public Service Commission of Utah cannot take judicial notice of the existence of public convenience and necessity based upon evidence at a prior hearing in another case.

ARGUMENT

I.

A CERTIFICATE OF CONVENIENCE AND NECESSITY ISSUED BY THE PUBLIC SERVICE COMMISSION OF UTAH IS NOT A PROPERTY RIGHT AND CANNOT BE TRANSFERRED WITHOUT THE APPROVAL OF THE COMMISSION.

It is doubtful that defendants Lang and Gould contend anything contrary to this statement. In answer to a question of Commissioner Carlson, Mr. Cornwall stated that he assumed the transfer could not be made:

“We assume that under the regulations of this Commission, that the holder of that certificate enjoys some property right in that operating authority; that if the Commission is satisfied that the Lang Transportation Corporation will exercise those rights and render like service to the public, that the Commission will cancel the authority of Mr. Gould and issue like authority to the Lang Transportation Corporation.” (R. 158).

The consideration of \$20,000 for the operating authority suggests that both the applicants thought Gould had something to sell, and if this Court approves this transfer the certificate issued by the Commission in discharge of a governmental function will be given real monetary value.

In *Effenberger v. Marconnit*, 135 Neb. 558, 283 N.W. 223, 224, a case involving an attempted assignment through the power of the district court, the Supreme Court of Nebraska said:

“In *Pennsylvania Railroad Co. v. Public Utilities Commission*, 155 N.E. 694, the court in discussing the nature of a certificate of convenience and necessity said (Page 696):

“This court has repeatedly declared that a certificate of convenience and necessity, issued by the Public Utilities Commission to the motor transportation company is not a franchise, and that the holder of such certificate does not thereby acquire a property right in the route covered by such certificate; that the issuing of said certificate is authorized only for the purpose of promoting the public convenience and necessity and not for the purpose of conferring upon the holder of such certificate any proprietary interest or franchise in the public highways; that the purpose in limiting the number of certificates that may be granted over the same route is to promote the public convenience and necessity by restricting the number of buses to the needs of the public, and thus occasion as little inconvenience as possible to the public using the highway in the usual and ordinary way, and to insure to the holder of the certificate such immunity from competition as will enable him to serve the public convenience and necessity by regular, continuous public service; any certificate of convenience and necessity is in the nature of a revokable personal

permit and has not the attributes of a property right.'

"The distinction between a franchise and a certificate of convenience and necessity is aptly made in *Re. St. Johns Riverline Company*, 7 P.U.R., N.S., 268, as follows:

" 'A certificate of public convenience and necessity, however, is distinctly different from the grant of a franchise to use and occupy streets. The franchise to use and occupy streets is a grant of a public right for the use of public streets while a certificate of public convenience and necessity is strictly a regulatory measure, and the granting or withholding of a certificate is an exercise of the power of the state to determine whether the rights and interests of the general public will be advanced by the prosecution of the enterprise which it is proposed to carry on for the service of the public.' * * *

"We necessarily conclude that a certificate of convenience and necessity is in the nature of a permit or license and that it is not property in any legal or constitutional sense. It is a mere license that can be amended or revoked by the power authorized to issue it. Such being the case, it is personal in its character, is not transferable and does not pass by succession. It is purely a regulatory measure that can vest no property right in the holder. - - An attempt on the part of the district court to do so is without legal sanction."

To the same effect is *Gilmer v. Public Utilities Commission*, 67 Utah 222, at 235, 247 P. 284.

II.

THE PUBLIC SERVICE COMMISSION OF UTAH HAS NO AUTHORITY TO TRANSFER A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY IN THE ABSENCE OF A SHOWING OF PUBLIC CONVENIENCE AND NECESSITY.

The Commission is a creature of the legislature and has only such powers as have been granted to it. In *Bamberger Electric Railroad Company v. Public Utilities Commission*, 59 Utah 351, 364, 204 P. 314, 320, this court rules:

“It needs no citation of authorities that where a specific power is conferred by a statute upon a tribunal, board or commission with limited powers, the powers are limited to such as are specifically mentioned. Any other rule would make an autocrat of the utilities commission.”

This was confirmed in *Union Pacific Railroad Company v. Public Service Commission*, 103 Utah 186, 134 P.2d 469, 474.

Recognizing, then, that there can be no implied authority to the Public Service Commission, it becomes necessary to determine if there has been an express grant of authority by the legislature to the Commission which would permit them to allow a transfer or sale of a certificate of convenience and necessity, as was attempted in this case.

Title 76, Chapter 5, of the Utah Code Annotated,

1943, deals generally with motor transport corporations. Section 20 of that chapter provides as follows:

“No common motor carrier authorized by this act to operate shall abandon or discontinue any service established under the provisions of this act without an order of the commission.”

Section 32 provides:

“Certificates, permits and licenses heretofore issued to any common or contract motor carrier by the commission shall remain in effect, but such carrier shall comply in all other respects with the provisions of this act.”

Section 35 is as follows:

“The commission may at any time for good cause, and after notice and hearing, suspend, alter, amend or revoke any certificate, permit or license issued by it hereunder.”

The above-mentioned powers were all in the act as passed by the 1935 legislature as Chapter 65 and evidenced a complete consideration of what may or may not be done with a certificate, permit or license issued by the commission. It will be noticed that there is no comment concerning a transfer of such rights. In 1941, however, Title 76, Chapter 5, Section 40 was added to the title by an amendment, which provides for a “transfer of operating rights of deceased owner.” In view of this provision it is clear that the issue of transferring certificates was brought before the legislature and specifically considered by it. Also equally clear is the fact that after such consideration the legislature

felt that the only time when a transfer should be permitted is in the event of death of an operating owner. This theory of statutory construction was adopted at an early date, 1894, by our Supreme Court in *Pettie v. Duke*, 10 Utah 311, 317, 57 P. 568, wherein this statement is made:

“It is a well established rule of construction that where a statute grants a power or right the powers not mentioned in the enumeration are intended to be excluded. *Suth. St. Const. Sec. 325*. In the language of the Supreme Court of the United States in the case of *United States v. Arredondo*, 6 Pet. 725, ‘*expressio unis est exclusio alterius*’, is a universal maxim in the construction of statute.”

This theory of construction was re-affirmed in 1936 in *Utah Rapid Transit Company v. Ogden City*, 89 Utah 546, 551, 58 P. 2nd 1, wherein this statement is made.

“It is one of the well recognized canons of statutory construction that when a statute directs a thing may be done by a specific means or in a particular manner it may not be done by other means or in a different manner. The familiar maxim, ‘*expressio unis est exclusio alterius*’, is especially applicable in the construction of a statute.” (Followed by citation to numerous authorities.)

Also, see *Hansen v. Board of Education*, 101 Utah 15, 25, 116 P. 2nd 936.

The general rule applicable here is stated by Pond on Public Utilities, Third Edition, Section 450, under a

section entitled, "Legislative authority must be express to permit transfer":

"In the absence of express statutory authority a sale and transfer of public utility property and franchise rights is not valid, for, as the court in the case of *People v. Commercial Tel. & Tel. Co.*, 277 Ill. 265, 115 N. E. 379, L. R. A. 1917D, 704, P. U. R. 1917D, 272, says: 'It is now settled by an overwhelming weight of authority that public or quasi public corporations, such as gas companies, water companies, electric companies, telegraph and telephone companies, railway companies, and all similar corporations which owe duties to the public as well as to their stockholders, have no right to transfer their corporate powers and privileges, and thereby disable themselves from performing their public duties, without legislative authority, 12 R.C.L. 217, 5 Thompson on Corporations, Sec. 2906; 37 Cyc. 1616; *Cumberland Telephone Co. v. City of Evansville (C.C.)*, 127 Fed. 18, 3 Cook on Corporations, Sec. 941; *Attorney-General v. Haverhill Gaslight Co.*, 215 Mass. 394, 101 N. E. 1061, Ann. Cas. 1914C, 1266, and notes; *Brunswick Gaslight Co. v. United Gas Co.* 85 Me. 532, 27 Atl. 525, 35 Am. St. Rep. 385, and notes; *Thomas v. West Jersey Railroad Co.*, 101 U.S. 71, 25 L. Ed. 950; *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U.S. 24, 11 S. Ct. 478, 35 L. Ed. 55. * * * The grant in the ordinance to the Westfall Telephone Company was to it alone, and not to it and its successors and assigns, and there were no words used in the grant signifying that its successors or assigns could succeed to the rights of the Westfall Telephone Company. The grant was

therefore not assignable as the statutes of our state do not expressly authorize such a transfer.”

See also cases under Point I of this brief.

Cases under the Interstate Commerce Commission's jurisdiction are of no value as precedents, because the statute there specifically permits the transfer. Section 212 (b) of the Interstate Commerce Act provides in part:

“except as provided in Section 5 any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe.”

Rule 2 (b) published by the Interstate Commerce Commission permits transfer if the transferee is shown to be “fit, willing and able to properly perform the service” and if Section 213 is satisfied. Section 213 has been repealed and Section 5 governs both as to rail and motor carriers and permits acquisitions and transfers subject to a determination of “the public interest”.

It is true that the Commission promulgated a rule permitting a transfer without proving convenience and necessity (Motor Carrier Rules and Regulations No. 3, effective June 1, 1937, page 5, Rule II) but the promulgation of a rule cannot create or establish power or authority not delegated by the Legislature. In *State v. Goss*, 79 Utah 559, 11 P.2d 340 at 342-343, this Court was interpreting a statute granting powers to the State Board of Health where-in there was said:

“And shall have authority to make such rules and regulations not contrary to the law as may be

deemed necessary for the preservation of public health.”

and this Court held:

“The general power to make rules and regulations, unlimited except that they shall not be contrary to law, is coextensive with the state police power as it affects public health. We think it clear that under this general language the state board of health is not empowered to pass rules and regulations having the force of law regulating the conduct of the people of the state with respect to all matters having some relation to the public health. This, indeed, would be the delegation of legislative power if the words of the statute should be so construed. The language must be taken to be limited to the particular matters and things specified in succeeding sections of the statute wherein duties are imposed upon the state board of health with respect to particular subjects or situations with respect to the public health.”

That authority and power cannot be drawn from broad statements concerning the purpose and function of the commission is well shown in the case of *Hansen v. Board of Education*, *supra*, page 25 of 101 Utah, wherein this statement is made:

“The blanket provision that it ‘may do all things needful for the maintenance, prosperity and success of the schools and the promotion of education’ does not enlarge the powers specifically conferred.”

However, the plaintiffs’ case need not rest on this rule

of construction, alone. Laws of Utah, 1927, chapter 42, section 7, later known as Title 76, Chapter 5, Section 5. Revised Statutes of Utah, 1933, provided as follows:

“No permits granted under this title shall be assignable except with the consent, after hearing, of the Public Utilities Commission.”

This chapter of the law was repealed by Laws of 1933, Chapter 53, Section 35, which was repealed by Laws of 1935, Chapter 65, Section 26, and in neither of these subsequent acts was this transfer provision incorporated into the law. From this legislative history it is quite obvious that the legislature intended that no power to approve a transfer or sale of a certificate of convenience and necessity should exist in the Public Service Commission or otherwise, except that in 1941 transfers in the event of death were provided for.

It is worthwhile to notice also that the Public Utilities Commission of Utah promulgated rules and regulations effective July 6, 1933, and designed to carry out Chapter 53 of the Session Laws of Utah, 1933, Rule 1 (c) of which was as follows:

“Certificates of convenience and necessity are not transferable or assignable.”

Thereafter, as above noted, Chapter 53 of the Laws of 1933 was repealed by Chapter 65, Laws of Utah, 1935, although the section requiring certificate of convenience and necessity (Section 6) was identical insofar as here pertinent with Section 7 of Chapter 53, Laws of 1933.

It therefore appears that without any legislative authorization or change in applicable statutory authority the Commission simply decided it would approve the transfer of certificates by the device in Rule II of Motor Carrier Rules and Regulations No. 3, above referred to. Section (c) of this rule follows the earlier rules:

“Certificates of convenience and necessity are not transferable or assignable.”

But Section (d) goes into a new idea and permits a carrier to enter into an agreement with another person to transfer his operating rights and file a joint application for one to discontinue his operations and for the other to assume and take over the operations, and ends with this provision:

“The person desiring to assume said operating rights shall comply with the provisions of Chapter 65, Laws of Utah, 1935, as in filing for a new certificate of convenience and necessity except that said person will not be required to prove convenience and necessity.”

In establishing such a rule the Commission went back to the statutory authorization which existed between 1927 and 1933 and in effect authorized transfers of operating authority without showing of convenience and necessity after the authority to permit such transfers had been repealed by the legislature. Not until 1941, when transfers in the event of deceased owners was permitted by the legislature, did any statute hark back to the rule of 1927 laws which permitted assignments.

On this question also the Court has previously spoken

in a case where the legislative background was parallel. Hansen v. Board of Education of Emery County School District, 101 Utah 15, 25-26, 116 P.2d 936.

“We have heretofore quoted the statutes that vested powers in the Board of Education of county school districts to ‘change or discontinue’ and shown that this provision or grant of power was later taken away. * * * A power once granted by the legislature and then withdrawn, does not leave the matter of invoking the principle of implied power open for consideration. In re Phillips’ Estate, 193 Wash. 194, 74 P. 2d 1015; Ogden City v. Gilbert F. Boreman, 20 Utah 98, 57 P. 843.

“The legislature has not amended the law to vest boards of education with the power to ‘change and discontinue’ but has expressly withdrawn such powers after the power was once given. We find nothing in the statutes showing the legislature had the intention to vest in the boards of education or the successors of the boards of trustees the power vested in the old boards of trustees, i.e., to change or discontinue schools in county school districts.”

Section 76-5-18, U.C.A., 1943, requires a showing of public convenience and necessity before a certificate can be granted. The Commission has no authority to waive the requirement. 76-5-19 provides for notice to interested parties, for a hearing and the submission of evidence, and:

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

Without such finding from the evidence submitted the Commission cannot issue a certificate of Public Convenience and Necessity.

III.

THE PUBLIC SERVICE COMMISSION OF UTAH CANNOT TAKE JUDICIAL NOTICE OF THE EXISTENCE OF PUBLIC CONVENIENCE AND NECESSITY BASED UPON EVIDENCE AT A PRIOR HEARING IN ANOTHER CASE.

The applicants, who are defendants here, have been uncertain of their position in this proceeding. They have proclaimed that they need only show that Lang is fit, willing and able to operate satisfactorily to entitle them to their transfer and yet have been unable to resist doing lip service to the public convenience and necessity requirement.

In his opening statement Mr. Cornwall said:

"Inasmuch as the applicant Lang is simply acquiring the operating rights of Gould, it is our position in this proceeding, of course, that public convenience and necessity is not an issue and not involved. It is simply a question as to whether the Commission will approve the transfer and whether Lang is in a position to render the service to the public which Gould has heretofore and is now rendering." (R. 152)

A little later Mr. Berol argued:

“Under this application a new carrier or a new applicant will merely continue to provide the same service Gould is and has been providing. Therefore, the degree of proof is less than if it was a new applicant, and, under the Statute, it is my view that the only proof that is required here is that the applicant, the Lang Transportation Corporation is financially able to continue to perform the services Gould has heretofore performed.

“In other words, there will be no additional burden on the highway, there will be no new and additional service other than that which exists today. Therefore, if I read the Statute correctly, the showing to be made here is that the new applicant that is proposing to be substituted in lieu of the service provided by Gould, is willing and able and financially responsible to provide the service that is proposed.” (R. 172-173)

And again, Mr. Berol urged:

“Therefore, as I see it, under these circumstances, the degree of the proof that your Commission should require is fitness, ability, and financial ability of the applicant that proposes to substitute his service for the service your Commission has already found is in the public interest.” (R. 176)

But at the same time the applicants were trying to hurdle the public convenience and necessity hurdle without producing the testimony of convenience and necessity which is noticeably absent from the record. Thus, Mr. Cornwall advised Commissioner Carlson:

"Well, of course, Mr. Commissioner, in this case we are not now dealing with the question in the first instance as to whether public convenience and necessity requires the operation. That the Commission has heard and passed upon. They have determined that public convenience and necessity requires that Mr. Gould here, for instance, should perform this service. We are not now reopening that issue.

"The only question that we are concerned with today is whether the person whom he proposes shall be substituted in his stead is in a position to discharge that duty to the public. That is all that we are here concerned with today." (R. 168-169)

And Mr. Berol suggested:

"We have, at the present time, a carrier, Gould, who is serving the public under a certificate heretofore issued by this Commission. This Commission has heretofore decided that public convenience and necessity requires that service. Based on that decision, Gould has been providing and performing that service. That service is now available to the public. All that is being proposed here, under the alternative part of the application is that Gould discontinue. In other words, that his certificate be revoked, which the Statute clearly authorizes you to do, and that in his place and stead a new certificate be issued to the Lang Transportation Corporation, again which the Statute clearly authorizes you to do.

"Now, that leaves a question as to the degree of proof, and I submit here that applicants under this condition, or this Commission, is not put, under the statute, to the same degree of proof as

though a new applicant were seeking to enter the field, and the reason for that is that Gould is in the field, and the Commission had found that public convenience and necessity requires his service. He is providing that service for the public.” (R. 171-172)

(Mr. Berol neglected to point out the statutes which “clearly authorize” the Commission to do as requested.)

And so the applicants chose to offer no testimony whatever of public convenience and necessity and, as Chairman Hacking said, failed “to put in a full fledged case on convenience and necessity”. (R. 181)

When the Report and Order were prepared applicants exhibited the same attitude: unwillingness to risk absence of convenience and necessity and yet realization that they were without any proof of it. And so they asked the Commission to accept public convenience and necessity as already demonstrated by reason of the existence of a carrier with a certificate (R. 41, 42, 44).

The protestants, who are now plaintiffs, took the position that public convenience and necessity must be shown and put in complete evidence of their idle equipment, their efficient service, their efforts to obtain new business, and their ability to handle all the traffic without either Gould or Lang. This position was plainly stated (R. 183, 184) and uniformly pursued.

Is the fact that the Commission had previously issued Certificate 784 to Gould enough to establish public convenience and necessity for Lang? Certificate 784

(Ex. 1, R. 66) was issued August 27, 1947. There is no showing of when the hearing was held pursuant to which the certificate was issued and no suggestion that conditions were unchanged. In this hearing the protestants testified to their ability to serve the public and the equipment they had acquired. Where were the shippers who show the public need? It must be assumed that they are satisfied and could not testify to a need. The witness Hurley represented a shipper and said his company preferred Lang for personal reasons (R. 407) but admitted that Collett and Cantlay & Tanzola had served him well and could again (R. 406, 407).

Exhibit 12 shows a fluctuating picture of gasoline transportation in Utah, even without the impact of production from the two new refineries in North Salt Lake, one of which is now in operation. On Pages 11 and 12 this exhibit is abstracted and shows steady reduction of imports and increase of exports, and since more is exported than imported there is little place for increased intrastate business and no need for Lang who wants to expand, as against Gould who, if the transfer is denied, will continue to operate his business without any plan for expansion (R. 199).

And this study further shows that the companies for whom Lang hauls into Southern Utah have been steadily decreasing their imports and increasing their purchases in Utah, so that Lang must look elsewhere for business and seeks to start with Gould's operation and expand it.

It is notable also that Lang has an application for certificate of public convenience and necessity pending and chooses to short-cut the required showing by buying in (R. 211).

All of this shows that Lang does not seek Gould's operation, but Gould's certificate so as to permit an expansion for which there is no public necessity. Factually, the case is akin to that of the carrier in *Gilmer v. Public Utilities Commission*, 67 Utah 222, 247 P. 284.

This was a case where Joseph Carling had operated a stage prior to passage of the Public Utilities Act. He obtained a certificate of convenience and necessity to operate the automobile stage line. He inaugurated weekly trips in each direction and in 1924 filed a joint application with T. M. Gilmer to transfer the certificate. The old certificate was cancelled and a new one issued to T. M. Gilmer who proceeded to operate. Gilmer filed a schedule of rates for daily service which was suspended "until upon a proper showing made before the commission that public convenience and necessity require such additional service". Gilmer contended that no approval was required, and that the certificate of transfer limiting service to that given by Carling was beyond the Commission's authority. The Commission affirmed the suspension and it was upheld by the Supreme Court on writ of review.

The question of the right to transfer was not before the court in the *Gilmer* case. It was under an earlier statute (Sec. 4818, C.L.U. 1917) which required a certificate only for one desiring to "begin" operations as a carrier. But after the transfer was accomplished and the new carrier showed that he wanted to expand by making daily rather than weekly runs, he was compelled to face the test of public convenience and necessity. Lang should face the same test, since it is not willing to be limited to Gould's operations.

By glossing over the question of convenience and necessity applicants are seeking the benefit of evidence at a prior hearing, involving different parties, at a remote time and in a different kind of hearing. The Commission in so doing was not acting on the evidence submitted, as required by 76-5-19, U.C.A., 1943.

In *Utah Power & Light Co. v. Public Service Commission*, 107 Utah 155, 209-210, 152 P. 2d 542, 567, this Court makes the following extended comment concerning such conduct by the Public Service Commission:

“This brings us to a further specification of error urged by the company. The Commission throughout its report has made several references to matters which cannot be verified from any matters in the records which were certified to this court. The matters to which the Commission thus alluded went beyond the mere references to other reports and decisions. For example, in regard to the discussion of post-war electrical revenues, the Commission referred to testimony of Mr. Gadsby in another case (No. 2652) which was pending before the Commission at about this same time. Mr. Gadsby had no opportunity at this hearing to explain this testimony to show why it would not be applicable to the various situations involved in this case or to deny the conclusions which the Commission drew from it. Such references to matters which the Company has had no opportunity to explain or rebut certainly cannot be commended.

“In *Los Angeles & Salt Lake Railroad Co. v. Public Utilities Commission*, 81 Utah 286, 17

P. 2d 287, 290, a similar point was raised. The question before the Commission was whether a railroad could be permitted to discontinue maintaining a station agent at Faust, Utah, without impairment of the services which the law required it to furnish to the public. At this hearing no evidence was taken regarding the needs of various sheepmen who used the road for movement of livestock and feed. The Commission had had another similar case a short time before this hearing. This earlier case involved the closing of the station at St. John some 12 miles away from the Faust station. In the hearing on the St. John case considerable evidence was introduced concerning the needs of the various sheepmen. In disposing of the case involving the closing of the Faust station, the Commission relied upon evidence which had been introduced in the St. John case. On certiorari this court held that this was error. We said: "The evidence adduced in the St. John Station Case in this regard cannot be considered as evidence adduced in this case. While the same counsel for the railroad may have appeared in both cases, and the same witnesses testified for the railroad in both cases, * * * yet the cross-examination which the railroad counsel might direct in the Faust case to the witnesses who appeared in the St. John case, if they appeared in the Faust case, might vary materially because of the new witnesses who appeared in the Faust case. The Commission, like a jury, can consider such facts in relation to evidence adduced which constitute the common facts of life and which form the common knowledge of mankind and can take judicial knowledge of such facts as a court may take judicial notice of. Such facts permit the

fact finder to interpret evidence and articulate it to the general facts of life. The commission may also, perhaps, take judicial notice of such facts and practices as are generally known throughout the whole field of railroad transportation; * * * but it cannot take its special knowledge which it may have gained from experience or from other hearings and base any findings or conclusions upon such knowledge. That is fundamental.' To the same effect see *Spencer v. Industrial Commission*, 81 Utah 511, 20 P. 2d 618."

In *Mulcahy, et al., v. Public Service Commission, et al.*, 101 Utah 245, 117 P. 2d 298, the shoe was on the other foot. There a contract motor carrier between Salt Lake City and points in Utah north of there applied in 1936 for a certificate of convenience and necessity to serve as a common motor carrier in its territory, which application was, for all practical purposes, denied in 1937. This decision was confirmed by the Supreme Court on December 5, 1939. Prior to that final decision, and on October 13, 1939, the contract motor carrier filed another application with the commission for a certificate of convenience and necessity as a common motor carrier covering the same territory as was involved in the 1936 application. The protestants argued that the prior determination was *res adjudicata* in the second hearing and also argued that a transcript of the evidence in the first hearing was erroneously rejected by the commission at the second hearing because the conditions were presumed to be the same until shown by the evidence in the second hearing to be different. The court held that the first determination was not *res adjudicata* and that since it was not there was no point in offering the transcript

of evidence at the first hearing in the second hearing. At page 304 of 117 P. 2d, the court said:

“It is evident therefore that there was no legal controversy, no controversy at law, to call into operation the exercise of the judicial function or power, and the findings or conclusions made would therefore not be a judicial determination or judgment, and hence not *res adjudicata*. Furthermore Chapter 6 of Title 76, R.S.U. 1933, provides that all hearings are governed by the provisions of the chapter and the rules of practice and procedure to be adopted by the Commission. There is no provision in the chapter limiting the number of times an application can be made. The Commission rule provides it may not be renewed within one year, thus showing the Commission did not intend a rejection to be final.

“Since the order on the 1937 application is not *res adjudicata*, no point is involved in the refusal to receive in evidence the transcript of evidence of that hearing.”

In the instant proceeding the applicants offered no evidence from the hearing, as a result of which certificates were issued to Gould, Collett, Cantlay & Tanzola, and Clark; and did not even offer in evidence the report of the Commission in the Gould application, nor did the applicants request the Commission to take judicial notice of conditions existing at the time the certificates were issued nor was there any suggestion that the conditions, insofar as the public is concerned, were the same at the time of the hearing in the original applications, at the time of the orders issuing certificates to Gould, Collett, Clark, and Cantlay & Tanzola, or at the time of the hearing in this

matter. If the order was not *res adjudicata* in the Mulcahy case, which involved the same parties and the same territory, certainly the certificate of Gould is not *res adjudicata* in this case of the issue of public convenience and necessity.

And the defendants cannot be aided here on the theory of a presumption of the continuing existence of a condition requiring service to meet the public convenience and necessity, if, indeed, a presumption of such a matter would ever be proper. The protestants in this proceeding disputed the existence of public convenience and necessity by advising the Commission that it would have to be proved (R. 183-184) and proceeded to offer evidence that the protestants could handle all of the business without Gould or Lang (R. 373-374, 523, 524) and that the present facilities and equipment of the protestants were not being utilized (R. 358, 428, 492, 493). Certainly, any presumption or inference that might be suggested was rebutted, or at least dispelled by this evidence of protestants.

In the absence of a showing of public convenience and necessity the certificate issued to Lang was improvidently issued and it is not a sufficient answer that under different circumstances and at a different time the Commission saw fit to grant a certificate to Gould on evidence not now before the Commission or the Court and beyond the power of these parties to question, limit or explain.

CONCLUSION

Certificates of Convenience and Necessity are **personal** rights, issued under the authority of the State to those who

can show that public convenience and necessity require their services. In Utah such certificates were once transferrable under the law. The law was changed and they are now transferrable only in the case of a deceased certificate holder and upon the approval of the Commission.

Applicant Lang is therefore entitled to a certificate of convenience and necessity only upon making the showing required by law. To permit Lang to tie onto Gould's operating authority is to permit transfer by calling it a cancellation and re-issue. The re-issue is a new certificate and should be issued only on a showing of public convenience and necessity.

The order of the Commission should be reversed and set aside.

Respectfully submitted,

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