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

Utah Supreme Court

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IN THE  
**SUPREME COURT**  
OF THE  
**STATE OF UTAH**

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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

---

**Reply Brief of Plaintiffs**

---

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**FILED**

CLERK, SUPREME COURT, UTAH

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**Reply Brief of Plaintiffs**

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It is our opinion that plaintiffs' original brief in this case contains the answers to the problems and questions suggested by the brief of the defendants. In the hope that a direct reply to some of the arguments of defendants will be of assistance to the court, and for the purpose of

giving the court the benefit of our examination of some of the records of the Public Service Commission, this reply brief is submitted. We shall follow the arrangement adopted by the defendants which has added subdivisions to the second of the three points of our argument.

## POINT 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.

Defendants offer no authority in support of their assertion that a certificate of convenience and necessity entails a property right of some sort. Plaintiffs' brief at page 22 refers to *Gilmer v. Public Utilities Commission*, 67 Utah 222 at 235, 247 P. 284. At the cited page the Utah Supreme Court makes this statement:

"Practically every proposition that is urged by plaintiff's counsel in their brief is considered and decided against their contention in the foregoing cases. For example: It is contended that Mr. Carling operated the stage line before the Utilities Act was adopted, and hence that he had acquired a property right which he had a right to transfer to the plaintiff without being controlled by the commission. That contention is fully answered in *Westhoven v. Pub. Util. Comm.*, *Estabrook v. Pub. Util. Comm.* and *Lane v. Whitaker*, *supra*."

This seems a sufficient answer to the argument of defendants.

And Section 76-5-40 does not help defendants. Authorizing the transfer of a certificate in the event of death of the owner Section 76-5-40, U.C.A. 1943, refers to "rights, permits, certificates or licenses" and vests these incorporeal rights with no characteristics not theretofore existing, except the right of transfer subject to the approval of the Public Service Commission in the event of death of the holder. If the property right contended for by defendants existed, the right of transfer would be implied, rather than require legislative authorization before transfer could be permitted.

## POINT 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.

SUBDIVISION 1. Under subdivision 1 the defendants refer to the statutes and the Commission's regulations. Defendants do not refer to the prior rules promulgated by the Public Service Commission quoted at pages 29 and 30 of plaintiffs' brief. We deem it significant that the prior rules prohibited transfers of certificates. The present rules repeat that same rule and then proceed to authorize a transfer by a procedure which is set out as a cancellation and re-issue. We point out, also, that there was no statutory change which justified the Commission in setting up a

procedure for making these transfers at that time and the rule under which this procedure was brought appears to be simply an usurpation of authority.

Defendants also refer to Section 76-4-32, U.C.A., 1943, as to which at this place in our reply brief we point out two facts: (1) This section is a part of Chapter 68 of the Laws of Utah, 1935, which related to consolidation, merger, and combination of public utilities and refers to acquisition of control by purchase of property or of stock, and nothing in that chapter can be interpreted as granting authority to transfer certificates of convenience and necessity unless the authority already existed, nor does anything in the language seem to suggest that incorporeal rights in a license or certificate are within the words "properties" or "facilities"; (2) The same year that Chapter 68, Laws of 1935, was enacted, Chapter 65 was also enacted which deals with motor transport corporations. From that date on, the motor transport chapter should control transfers of operating rights and of properties of motor carriers, rather than the earlier chapter which deals primarily with utilities having immovable assets as their operating properties.

SUBDIVISION 2. Under defendants' subdivision 2 they discuss the Gilmer case, *supra*. Of course, as pointed out in our brief at page 37, the question of the right to transfer a certificate of convenience and necessity was not before the Supreme Court in the Gilmer case, the action appealed from having been a later action questioning expansion of service by the transferee, there having been no challenge in the Supreme Court of the transfer and no continuation before the Public Service Commission of the



protests against the transfer. We agree with defendants in our inability to have found any case in this Court passing upon this question or any other case where this Court has had before it a certificate of convenience and necessity previously transferred to one of the parties. The interesting thing about the Gilmer case should be the reason for failure to appeal to the Supreme Court the order allowing the transfer of the certificate of convenience and necessity originally issued to Joseph Carling and transferred by him to T. M. Gilmer in 1924 with the approval of the Commission. This court can take judicial notice of the report and order of the Commission in that transfer case. It was Case No. 690 before the Commission, entitled "In the Matter of the Transfer of a Certificate of Convenience and Necessity from Joseph Carling to T. M. Gilmer," resulting in the issuance of Certificate of Convenience and Necessity No. 214. It was strongly argued by the protestants in that case that the Commission had no authority to transfer a certificate of convenience and necessity and that it had to consider the application as though it were a new application for a certificate. The Commission referred to the statute, Section 4818, Compiled Laws of Utah, 1917, and to the language thereof which made it applicable to a public utility which would "henceforth establish or begin the construction or operation" of a carrier. (This quoted language still exists in Section 76-4-24, U.C.A., 1943.) The Commission underscored this quoted language in its report and said:

"This case may be differentiated from those cases where the Commission granted certificates of convenience and necessity to automobile common carriers establishing or beginning their

operation after the passage of the Public Utilities Act.”

And it is significant that after that case was decided the Public Utilities Commission promulgated its rules effective July 6, 1933, designed to carry out Chapter 53, Session Laws of Utah, 1933, and ruled against transfer or assignment of certificates, as pointed out at page 29 of plaintiffs’ brief. This was based on section 7 of said Chapter 53 which became Section 76-5-18, U.C.A., 1943, which is not restricted to establishment of a common carrier operation, but which says simply:

“It shall be unlawful for any common motor carrier to operate as a carrier in intrastate commerce within this state without first having obtained from the Commission a certificate of convenience and necessity.”

Thus the basis of the Commission’s decision in the Gilmer case was removed by the legislature in 1933, and this was reflected in the Commission’s rules of 1933.

SUBDIVISION 3. Defendants’ subdivision 3 deals with administrative interpretation of the statute and refers to a few well-recognized rules but does not take cognizance of two factors:

- (1) The administrative interpretation for eleven years which defendants rely on was broken by the positive legislative pronouncement in 1941 authorizing transfer of operating rights of deceased owners by enactment of Chapter 64, Laws of Utah, 1941. If Rule II

relied on by the defendants were the law in 1941, the legislative enactment would have been superfluous as the Commission already had authority to transfer a right which was not personal to the owner without a showing of public convenience and necessity. And if the legislature had wanted to permit transfers of operating rights in all cases and not restrict such to instances where the owner is deceased, the legislature would have so provided. The language of the act and the scheme for effectuating the transfer strongly suggest that the scheme in Rule II was either not known to the legislature or was being disapproved by it.

- (2) At page 18 of their brief defendants quote from Black on Interpretation of Laws, Second Edition, Section 94. The portion quoted is taken from a decision of the Utah Supreme Court in *State Board of Land Commissioners v. Ririe*, 56 Utah 213, and the asterisks appearing at page 18 of the brief appear likewise in the Supreme Court decision. In the place where the second set of asterisks appear Black makes this statement:

“And if the statute to be construed is a recent one - - so that official action cannot be seriously deranged, nor private rights be very much affected, by a change in its interpretation - - the mere fact that subordinate officers have already begun to read it in a certain way and to regulate their action accordingly will have no weight or influence with the courts in their search for the true meaning of the law.”

As applied to the facts of this case, the rule stated by Black suggests that any administrative interpretation should be ignored. There is no showing or suggestion that applicants for motor carrier permits have obtained them in the belief that they were transferable and no showing that any person will be damaged by a ruling that they are not transferable. An examination of the public records of the Commission shows that in practically every case of a transfer there has been no protest and therefore no public question arises and no question of damage to private interests.

SUBDIVISION 4. At page 18 to 20 defendants emphasize the number of transfer cases where the Commission has acted pursuant to Rule II. There is no showing or suggestion in the brief that any of these cases were protested or contested or that anyone had any adverse interest in the transfer.

One case which was contested was Case No. 2276 in the matter of the application of Salt Lake City Lines and Utah Light & Traction Company for consent and approval of the Commission to the acquisition by the former company of the transportation property of the latter company. This resulted in issuance of Certificate of Convenience and Necessity No. 640 to the Salt Lake City Lines under a report and order dated July 12, 1944. This report shows that the price paid was based solely on the value of physical property, with no mention of any price being paid for a certificate of convenience and necessity, although the petitioners requested cancellation of the certificates of the Traction Company and issuance of a certificate of con-

venience and necessity to the Salt Lake City Lines. The report recites that the Board of Commissioners of Salt Lake City had approved, ratified, and confirmed a transfer to Salt Lake City Lines of certain rights, privileges, and franchises theretofore granted to, held, possessed and exercised by the Traction Company under which a license tax of not less than \$5,000 and not more than \$15,000 was payable annually to Salt Lake City. (Page 6 of report.) At page 8 the Commission quoted Section 76-4-32, U.C.A., 1943, as the controlling statute and thereafter examined into the fairness of the price paid for the physical properties, and whether the public interest was affected by acquisition of the property by a foreign holding company without any local stock ownership. At page 8 the Commission said:

“There is no contention that public convenience and necessity does not require passenger transportation service in the area now served by Traction Company. There is no issue on this point. The question of public interest, however, becomes a matter at issue in the case now before us.”

Thus, the Commission expressly left open, as it had done many years earlier in the Gilmer case, the question of its right to make a transfer of a certificate against the protests of interested persons and without a showing of public convenience and necessity. In the Traction Company case that issue had been solved by the exclusive franchise issued by Salt Lake City and the failure of anyone to make a protest on this ground.

Another contested transfer case was *In re Fuller-Toponce Truck Company*, Cases 1747, 1748, 1749, de-

cided by report and order dated August 12, 1935. In that proceeding a partnership sought to transfer its operating authority to a corporation formed by the partners. They sought cancellation of several certificates of convenience and necessity and re-issue to the corporation of one certificate. But it was stipulated by all the parties that the evidence of public convenience and necessity supporting issuance of the original certificates was part of the record in the transfer case and on that stipulation the Commission made a finding of public convenience and necessity.

It therefore appears that, far from a uniform interpretation as contended by the defendants, this is probably the first case where the Public Service Commission has squarely passed upon the question involved in this case, and so far as counsel on both sides can determine the matter has not previously been submitted to this Court.

SUBDIVISION 5. In this subdivision the defendants attempt to lift themselves by their own boot straps by quoting from the report and order undoubtedly prepared by them and signed by the Commission. There is no issue on the question whether the Commission adopted the defendants' theory of the case. The issue here is whether the Commission had the authority to do what it did, and the report and order which it signed contain an able exposition of the theory but hardly constitute authority for that position before this Court.

SUBDIVISION 6. The argument here is notable for its reference to two cases on page 26 defining the word



“facilities” and taken from a number of cases in *Words and Phrases* where “facilities” is defined. Other cases collected in *Words and Phrases* are different from those used by the defendants and none of them seems to have any application to the question before the Court.

SUBDIVISION 7. Defendants argue under this subdivision that Section 76-4-32 authorizes transfers of certificates inter vivos and that Section 76-5-40 constitutes the same authority where the holder of a certificate is deceased, and conclude at page 28 of their brief, in referring to 76-5-40:

“Its enactment rounds out the entire matter of acquisitions.”

We agree that 76-4-32 relates to acquisitions but do not find that word used in 76-5-40 where the question dealt with by the legislature was “transfer”.

We note, also, that 76-4-32 relates only to acquisitions by an existing public utility, and presumably one doing business in this state under the definition of public utility at 76-2-1. 76-5-40 is not confined to a transfer to a public utility but permits transfer of the rights of a deceased owner to any person making application to the Commission and obtaining its approval as being fit, willing, and able to perform the required services, to conform to the provisions of the act and the requirements, rules, and regulations of the Commission. The theory of defendants would leave completely unprovided for any applicant

except an operating public utility in this state, unless the would-be transferor were deceased. There is no nice precision of statutory control. There is only a statutory authority for transfers where the holder is deceased. The reason for this falls within the area of legislative discretion and there is before the Court no challenge of that law as discriminatory. It represents the one statutory exception to the requirement of Section 76-5-18 that a common motor carrier shall not operate in this state without obtaining a certificate of convenience and necessity in the manner established by that statute, which includes a showing of public convenience and necessity.

There is good reason back of the view taken by the legislature. Many certificates are issued to corporations and do not lapse upon the death of an officer, even though the principal stockholder. As a means of offsetting this advantage the legislature permits the personal representatives to carry on a deceased carrier's business and to make a transfer to a qualified person.

But this is no sanction of dealing in certificates of convenience and necessity and bargaining to sell to the highest bidder a license or certificate bestowed by the state without cost or favor but in the public interest. (See *Estabrook v. Pub. Util. Comm. of Ohio*, 147 N.E. 761, 762.) When a certificated carrier desires to go out of business, let all interested persons make application for a certificate and let them show that the public convenience and necessity at that time require issuance of a certificate. Should not other persons with applications pending be heard on the question of who gets the certificate if the



public convenience and necessity require it? (See *Chicago Railways Co. v. Commerce Commission, et al.*, 336 Ill, 51, 167 N.E. 840, 67 A.L.R. 938, 955-956.) For instance, W. S. Hatch was a protestant before the Commission in this case (R. 535). His application for a certificate of convenience and necessity was denied in part (Exhibit 25; R. 179). He would like to have a certificate to replace Gould's if one is to be issued (R. 179-181). Should the certificate gravitate to the large foreign corporation which is able to buy Gould out, or should all applicants be heard? These are questions for the legislature and it has not acted unreasonably in permitting a transfer without a showing of convenience and necessity only where the certificate holder is deceased.

### POINT 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.

Defendants try at pages 28 to 31 of their brief to becloud the issue stated by us and which defendants appear to have contemplated in their arguments before the Public Service Commission and in the language of the report signed by the Commission. If the contention of plaintiffs that there is no statutory authority for a transfer of a certificate of convenience without a showing of public convenience and necessity is sound, then defendants can prevail in this

Court only on one of two theories: (1) that public convenience and necessity was shown in this case; or (2) that public convenience and necessity was shown in an earlier case and can be judicially noticed by the Commission in this case.

Of course, there is no contention that any public convenience and necessity was shown in the hearing before the Commission and the defendants did not directly ask the Commission to take judicial notice of the existence of public convenience and necessity as established at prior hearings which involved different parties and different issues. We believe that the Utah cases cited at pages 38 to 41 of our original brief amply sustain point III of our argument. And we believe the passages quoted at pages 32 to 38 of our original brief show that defendants apprehended the question raised by point III of our argument but did not meet it.

## CONCLUSION

The Public Service Commission, in permitting a transfer of a certificate of public convenience and necessity where the holder is not deceased is acting beyond statutory authority. To call the process a cancellation and re-issue of a new certificate when no showing of public convenience and necessity is required is simply a recognition by the Commission that it knew it had no authority to permit a transfer. There being no showing of public convenience and necessity to the applicant Lang Transportation Corporation, this Court should rule that the Public Service Commission ex-

ceeded its jurisdiction, should reverse the order of the Public Service Commission and direct that a further hearing be held either in this case or in the pending application of Lang Transportation Corporation (R. 211) for issuance of a certificate of public convenience and necessity so that the question of public convenience and necessity can be determined.

Respectfully submitted,

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