

1979

PBI Freight Service and Four Corners Trucking v. Public Service Commission of Utah et al : Brief of Plaintiffs in Support of Petition for Rehearing

Utah Supreme Court

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Lon Rodney Kump; Richards, Bird & Kump; Attorneys for Respondent;

Rick J. Hall; Richards, Brandt, Miller, Nelson & Zarr; Attorneys for Plaintiffs;

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IN THE SUPREME COURT OF THE STATE OF UTAH

PBI FREIGHT SERVICE AND FOUR
CORNERS TRUCKING,

Plaintiffs,

v.

CASE NO. 16212

RAY BETHERS TRUCKING, INC.
and THE PUBLIC SERVICE
COMMISSION OF UTAH, et. al.,

Defendants.

BRIEF OF PLAINTIFFS
PBI FREIGHT SERVICE and FOUR CORNERS TRUCKING
IN SUPPORT OF PETITION FOR REHEARING

Plaintiffs PBI Freight Service and Four Corners Trucking will collectively be referred to herein as "the plaintiffs" and occasionally as "protestants" or "protesting carriers," the latter designation having been used during the course of proceedings before the Utah Public Service Commission.

The defendant Public Service Commission of Utah will be referred to as the "Commission."

The defendant Ray Bethers Trucking, Inc. will be referred to as "defendant Bethers" or "Bethers" or "applicant," the latter term having been used during the course of proceedings before the Utah Public Service Commission.

STATEMENT OF THE CASE

This proceeding involves an application before the Commission in which defendant Bethers seeks operating authority as a common motor carrier for the transportation of gypsum, gypsum products and materials used in the manufacture and distribution thereof from Sevier County, Utah to all points and places within the State of Utah.

DISPOSITION BY THE PUBLIC SERVICE COMMISSION OF UTAH

The Commission, without any competent evidence demonstrating a need and necessity for the proposed service, granted the application of Bethers. Plaintiffs filed a Petition for Reconsideration and Rehearing with the Commission and defendant Bethers replied. The Commission denied the Petition for Rehearing and Reconsideration.

RELIEF SOUGHT ON APPEAL

By Decision filed August 14, 1979, the Supreme Court affirmed the Decision of the Commission: Plaintiffs now seek to have the Supreme Court rehear and reconsider its Decision and upon said rehearing, to have the Supreme Court

set aside and nullify the Orders of the defendant Public Service Commission dated June 8, 1978, and December 4, 1978.

STATEMENT OF FACTS

By application filed November 25, 1977 and heard February 23, 1978, defendant Bethers, a Utah corporation, seeks authority to transport:

"gypsum, gypsum products and materials used in the manufacture and distribution thereof from Sevier County, Utah to all points and places in the State of Utah." (R. pp.5 and 6).

The application was opposed by plaintiffs. Plaintiff PBI holds authority from the Commission to originate all of the traffic defendant Bethers seeks to transport. (R. p.114). Only two shippers have facilities and ship from the involved territory. At the time of hearing, PBI was providing a transportation service for both shippers. (R. p.116). Directly and by expedited interline with plaintiff Four Corners (a carrier controlled by PBI) and with other carriers, a service is provided by plaintiffs throughout the territory sought to be served by defendant Bethers. (R. pp.117 and 121).

PBI has the capacity to transport 12 to 15 loads of wallboard per week; however, was being tendered only three. (R. 131). The transportation of gypsum is required by PBI in order to balance its operations and economically

serve the shipping public in southern Utah. (R. 119-121, 133). The transportation of sheet rock provides PBI with 5% of its total revenue and as much as 40% of its total profits (R. 119-121), and has historically helped PBI keep costs down for its shipping customers. (R. 133).

Only one shipper, Georgia Pacific, supports the application. PBI has never damaged any wallboard shipments handled for Georgia Pacific (R. 134), and in eight years of transporting gypsum wallboard for Georgia Pacific, there has been only one minor complaint concerning the PBI service. (R. 126-128).

A grant of authority to applicant and the resulting loss of traffic to PBI affects the ability to provide service to the small communities in southern Utah. (R. 143). PBI operates seven flat-bed trailers suitable for transporting wallboard, at the time of hearing, it was being tendered only enough wallboard to use two of the trailers. (R. 115).

Although statewide authority is sought by Bethers, almost all loads terminate in northern and central Utah, with the majority terminating in Salt Lake City. (R. 28). Bethers was unable to demonstrate the operational feasibility for its proposal in terms of costs compared to tariff levels and could only estimate the same on an intrastate basis. (R. 24-25, 36).

The supporting shipper, Georgia Pacific, has need for the transportation of approximately 50 truck loads per month moving to points within the State of Utah. (R. 57). Many of these loads are transported by Georgia Pacific Trucks and trucks of its customers. (R. 57). PBI has the capacity to transport 60 loads per month. (R. 131). Production and the requirements for transportation have not increased recently, but have remained steady. (R. 78 and 79). This supporting shipper's use of Bethers was not precipitated by any increase in production at the Sigurd, Utah (Sevier County) location. (R. 85).

The witness indicated acceptable service to be pickup in Sevier County one day and delivery at any point in Utah the following day. (R. 87). PBI directly and through interline performs such a service. (R. 263 and 125-126). The supporting witness has never indicated to PBI that its service was lacking in any way. (R. 102).

The actions taken by the Commission, as affirmed by this court, are unsupported by both the facts and the law, exceed the authority of said defendant Commission and are contrary to the evidence and thereby unlawful, all of which requires this Honorable Court to set them aside.

ARGUMENT

POINT 1:

THE SUPREME COURT'S AFFIRMANCE OF THE COMMISSION'S ORDER IS IN ERROR BECAUSE SAID ORDER IS NOT SUPPORTED BY COMPETENT EVIDENCE; THERE HAS BEEN NO SHOWING THAT EXISTING SERVICES ARE INADEQUATE OR THAT THERE IS ANY PUBLIC NEED AS TO POTENTIAL BUSINESS NOR DOES THE EVIDENCE PROVIDE A REASONABLE BASIS UPON WHICH TO CONCLUDE THAT THE PUBLIC CONVENIENCE AND NECESSITY JUSTIFIES THE ADDITIONAL PROPOSED SERVICE.

The Decision of the court concerning the issues outlined above is based on two prior cases, Lake Shore Motor Coach Lines, Inc. v. Bennett, 8 Ut.2d 293, 333 P.2d 1061 (1958) and Milne Truck Lines, Inc. v. Public Service Commission, 11 Ut.2d 365, 359 P.2d 909 (1961). In the Lake Shore case, supra, this court set aside an expansion of operating authority for the reason that the applicant had not shown the existing transportation facilities to be inadequate. The basis for this conclusion was stated by the court at 8 Ut.2d 297 as follows:

"Proving that public convenience and necessity would be served by granting additional carrier authority means something more than showing the mere generality that some members of the public would like and on occasion use such type of transportation service. In any populous area it is easy enough to procure witnesses who will say that they would like to see more frequent and cheaper service. That alone does not prove that public convenience and necessity so require. Our understanding of the statute is that there should be a showing that existing services are in some measure inadequate, or

that public need as to the potential of business is such that there is some reasonable basis in the evidence to believe that public convenience and necessity justify the additional proposed service. For the rule to be otherwise would ignore the provisions of the statute; and also would make meaningless the holding of formal hearings to make such determinations and render futile efforts of existing carriers to defend their operating rights." (Emphasis added).

In specifically addressing itself to the evidence before it, the court said at 8 Ut.2d 298:

" . . . we make this generalization: there is ample specific evidence of the adequacy of carrier service in those areas and there is no specific affirmative showing of either lack or inadequacy of service in such areas by anyone who knew of and had attempted to use the services which were available." (Emphasis added).

The court also found in the Lake Shore case that the shippers knew of the carrier service available but failed to use those services or found the services to be adequate when used. At 8 Ut.2d 298, the court said:

"Nevertheless, upon a survey of the record, we find no witness that made showing for the defendant (applicant): that he (shipper witnesses) was aware of the extent of the services presently available; that he had attempted to make use of them and found the services wanting; nor did the witnesses express actual dissatisfaction with the services presently offered. There being no such evidence, we see no basis for a finding that public convenience and necessity require additional service. The finding to that effect was therefore capricious and arbitrary." (Clarification supplied and emphasis added).

The concurring opinion in Lake Shore, supra, is to similar effect at 8 Ut.2d 299 as follows:

"HENROID, Justice (concurring):

"I concur for the sole reason that no one has shown from the record any evidence reflecting any inadequacy of service resulting from the operations of plaintiffs in their respective spheres, while on the contrary the service affirmatively was shown to have been satisfactory.

"Existing carriers that have expended risk capital, and have complied with tariff and other Commission requirements, ordinarily are entitled to protection against competition until a proposed competitor or someone else establishes by substantial evidence a failure to perform the service which the Commission has authorized and ordered them to perform." (Emphasis added).

Plaintiffs have proven through documentary evidence that the service provided is adequate to meet the needs of the shipping public. This was affirmed by the supporting shipper himself. (R. 102, 134-135).

In the Milne case, supra, the court cited the case of Mulcahy v. Public Service Commission, 101 Ut. 245 117 P.2d 298 (1941) and held:

"The Commission must take into account the long-range plans for the protection of existing carriers, as well as the immediate convenience of certain members of the public. Common carriers which are expected to maintain regular service for the movement of freight in whatever quantities offered to and from all points on specified routes cannot operate economically and efficiently if other carriers are permitted to invade

such routes for the sole purpose of handling special commodities on an irregular route basis." (Emphasis added).

This is exactly the situation we have at hand.

The applicant, Bethers, seeks to handle special commodities on an irregular route basis, diverting such shipments from PBI and Four Corners. As was demonstrated on the Record, these shipments are vital to the operations of the plaintiffs, and allow the plaintiffs to provide an efficient service in the transportation of them while maintaining their other regular general commodity service for the members of the shipping public.

The criteria of the Lake Shore case and of the Milne case both require that the Order of the Public Service Commission in the instant matter be set aside. Defendant Bethers has not met the statutory criteria for a grant of operating authority as set forth in Section 54-6-5, Utah Code Annotated, (1953 as amended) as expanded upon by said cases.

The Petition for Rehearing of Plaintiffs demonstrates that no competent evidence exists to support the Commission's Findings that the public convenience and necessity justifies the service of Bethers. For the court's convenience in rehearing this matter, the following is offered to supplement Plaintiffs' Petition for Rehearing.

1. At the time of hearing, Bethers held state-wide intrastate Utah authority for the transportation of gypsum products from Sigurd, Utah on a temporary basis. (R. 197).

2. PBI holds irregular route authority throughout the populated area of Salt Lake County by virtue of its authority in Certificate No. 1334 to serve Salt Lake City, Utah and thereby its commercial zone. (R. 254). The contrary testimony of Mr. Roberts of PBI at page 114 of the Transcript did not take into account the Salt Lake City Commercial Zone Authorization over irregular routes consistent with the Commission's General Order 81. However, at page 140 of the Transcript, Mr. Roberts indicated that he does have authority to serve the City of Bountiful, which is under the Commercial Zone Irregular Route Extension of Authority. A copy of the Commission's General Order 81 is attached hereto as Appendix A and made a part hereof by this reference.

3. PBI operates 42 tractors (R. 264), any of which could be used to transport gypsum products. (Transcript p. 132).

4. Wycoff holds authority to transport general commodities from Sigurd, Utah. (Transcript p.114).

5. The interchange between PBI and Four Corners on a shipment between Sigurd, Utah and points in Grand or

San Juan Counties would take place at either Thistle or Springville, Utah. (Transcript p.141). The circuitry involved in such transportation is of little or no significance because of the small number of such shipments, only four to six per year. (Transcript p.142). Four Corners is authorized to use whatever route it chooses (irregular routes) and if operationally convenient, it could use the section of interstate authority from Salina to Green River under its existing authority. (R. 262).

6. Although required to do so, the Commission and this court have failed to afford to plaintiffs the requisite reasonable degree of protection of their operations they maintain. The granting of the application is detrimental to the best interests of the people of the State of Utah and moreover, the existing transportation service provided by plaintiffs is adequate and reasonable.

7. The Commission's Findings are not supported by competent evidence and therefore, must be set aside by this court. As pointed out herein, and as pointed out in Plaintiffs' Petition for Rehearing as well as by all of the other pleadings filed by plaintiffs in this court and with the Commission, the facts and evidence in this case do not support the Findings of the Commission as affirmed by this court. The facts have been misconstrued, misstated, and

overstated. The fact of the matter is that PBI and Four Corners provide an adequate service in accordance with the professed needs of the supporting shipper and at the same time, provide operational advantages to the shippers and receivers of general commodities in the southern and central Utah areas.

8. Nowhere in the Record has it been demonstrated that the existing transportation services are in any measure inadequate to provide for the needs of the shipping public. The Commission so found in its Report and Order dated June 8, 1978 in its Finding No. 13. (R. 294). Although not included in the Decision of the Supreme Court, it is interesting to note that, as pointed out at oral argument in this matter before the Supreme Court, the defendant Public Service Commission did not appear at oral argument nor did it file a Brief in this matter.

There is likewise no showing on this Record of any need for transportation of future potential traffic as the supporting shipper has already reached full potential in terms of production (i.e. maximum production). (R. 78-79).

9. As was pointed out in Plaintiffs' Petition for Rehearing and is pointed out herein, there does not exist sufficient competent evidence from which a reasonable mind could believe or conclude that the facts contained in

this Commission's Findings have justification in the evidence. This is the standard for review of a Commission Order by this court and upon rehearing, the court must now conclude that no such competent evidence exists and that setting aside of the Commission's Orders is required. This contention is likewise borne out by the cases cited in the court's decision as explained above.

10. Consistent with paragraph 4 above, Wycoff has intrastate authority to serve the point of Sigurd, Utah. There are also a number of trucking companies serving Sigurd, Utah on an interstate basis. With or without the service of defendant Bethers, there is no lack of available transportation on shipments of gypsum and gypsum wallboard products originating at Sigurd, Utah.

11. The court has affirmed the Findings of the Commission that are without competent evidence in the record for their basis. The court has ignored the Findings of the Commission that are supported by substantial evidence, i.e., Finding No. 11 of the Commission's Report and Order dated June 8, 1978 wherein the Commission found "* * * Protestant's (PBI) main shipper has been U.S. Gypsum. Witness Seim for Georgia-Pacific conceded that U.S. Gypsum's ability to transport and deliver has been sufficiently good that it could give U.S. Gypsum a competitive advantage* * *" and in

the Commission's Finding No. 13, "By means of interlining and leasing equipment and drivers, protestant, PBI Freight Service, Inc. is able to provide service, without physical off-loading and reloading, to virtually all points within the State of Utah, and is able to do so in most cases for same-day or next-day delivery." (R. 294). The Commission further found in its Finding No. 16, "Georgia-Pacific has used protestant, PBI Freight Service, Inc. in the past and has not lodged a complaint with that company regarding service."

12. Consistent with paragraph no. 8 above, the existing service of plaintiffs is sufficient for the existing business or its potential, the potential of said supporting shipper's business having already reached its peak. (Transcript pp.84-84). PBI's general commodity authority does not conflict with its ability to transport gypsum wallboard and the Commission so found in its Finding No. 19 in the Report and Order dated June 8, 1978. (R. 295). PBI also proved the necessity of the wallboard traffic in properly maintaining its general commodity service and in properly providing for the needs of the shipping public in an efficient and economical manner. (Transcript pp.118-121). In over eight years of transporting gypsum wallboard from Sigurd, Utah, only one complaint has ever been lodged with

PBI and the uncontroverted testimony is that even in that case, the service requested was provided. (Transcript pp.126-128).

The Commission found in its Finding No. 15 of its Order dated June 8, 1978, that PBI's documentary records substantiated that Georgia Pacific orders transportation several days in advance and that Georgia Pacific has not experienced a delay in obtaining equipment for loading from PBI. (R. 295 and Transcript pp.146-157).

13. Georgia Pacific is very much in the business of transporting its products. (R. 291-292). PBI has 42 semi-tractors rather than three as the court's Decision indicates. (R. 264). The court's Decision indicates that Bethers hauled 40,500 truckloads to California for the supporting shipper since 1974. Said figure is a typographical error at page 58 of the Transcript. The correct figure is 4,500, which is ascertained from reading the witness' testimony at page 56 of the Transcript where a maximum figure of 90 loads per month is indicated.

14. PBI maintains the proper types of equipment and protection devices for the transportation of gypsum wallboard. (R. 264, Transcript p.115). In transporting gypsum wallboard for the supporting shipper for over eight years, PBI has never damaged any sheet rock. (Transcript p.134).

15. Because there are only four to six shipments per year moving between Sigurd, Utah and points in the sparsely populated southeastern portion of Utah, the savings, if any, by granting direct authority to Bethers is miniscule. (Transcript pp.141-143). The operations of PBI are well suited for transporting sheet rock from Sigurd on flatbed equipment because PBI transports oversize loads to southern Utah on flatbeds. Such operations are vital to PBI and allows PBI to avoid dead-head mileage. (Transcript pp.132, 133).

16. As discussed previously, under paragraph no. 2, PBI is not precluded from providing direct delivery to customers located throughout the populated area of Salt Lake County over irregular routes under its existing authority. (R. 254 and Appendix A attached hereto).

17. The transportation of wallboard, which traffic has been lost to Bethers, provided PBI with as much as 40% of its net profit. (Transcript p.120). PBI has present capacity for transporting 48 to 60 loads of wallboard per month which is more than adequate to transport the 50 loads per month indicated available by the supporting shipper. (Transcript p.131). PBI can purchase, borrow, and/or lease additional equipment as needed. (Transcript p.132).

18. The court has misconstrued the testimony of

with the supporting shipper about the filing of an application similar to that filed by Bethers. The testimony is contained at pages 129 and 130 of the Transcript and speaks for itself. It is clear from the testimony of Mr. Roberts that he did not consider it prudent to expend the funds necessary to obtain authority because the present service was adequate. To testify before the Commission that additional authority was needed when the present service was already adequate would be to perjure himself. For this reason, Mr. Roberts did not apply for the statewide authority as the present PBI authority, either direct or through interline, meets the needs of the supporting shipper. The supporting shipper himself agreed that the PBI service is adequate. (Transcript pp.98-102 and R. 220).

Bethers seeks authority as a common carrier from all points in Sevier County to all points in the State of Utah. No need for such service can be demonstrated by the record. The only supporting shipper was from Portland, Oregon and represented a manufacturer of gypsum products that maintains a facility located at Sigurd, Utah. The other manufacturer, also located at Sigurd, United States Gypsum, did not appear. Likewise, no consignees appeared. By applicant's own admission, service has not been performed "statewide" pursuant to temporary authority, but rather has

been confined almost exclusively to the populated areas of Utah, chiefly between Provo on the south and Ogden on the north. It is thus clear that the record in this proceeding cannot support a grant of the authority sought, especially in the light of the pronouncements of this Honorable Court in the case of Milne Truck Lines, Inc. v. Public Service Commission, 11 Ut.2d 365 (1961) at 368 where the Order of the Commission was set aside and the court held:

"The evidence before the Commission showed a need for the service proposed by the defendant, Clark Tank Lines, Inc. within a restricted area, and by a small number of shippers. Such evidence is insufficient to support the order as made by the Commission, granting to Clark Tank Lines authority to render the proposed service between all points and places within the State of Utah."

It cannot be said that a public need exists statewide for both shippers of gypsum located at Sigurd, Utah when only one even appeared. No consignees of either shipper appeared. Even so, the effect of the Commission's Order is to strip the totality of the traffic from plaintiffs.

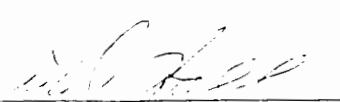
Thus, it is clear that the Commission's Findings and Conclusions in its Report and Order dated June 8, 1978 and in its Erratum Order dated December 4, 1978 are not in accordance with the evidence, and are not supported by sufficient competent evidence to be affirmed by this court.

CONCLUSION

Defendant Bethers seeks to institute a new motor carrier service at a time when plaintiffs are providing an adequate service. Plaintiffs rely upon the revenues derived to allow them to adequately and economically serve the shipping public and thereby serve the best interests of the people of the State of Utah. The Commission and the Supreme Court have ignored the failure of Bethers to adequately demonstrate that the public convenience and necessity require the proposed operation and have likewise ignored the detrimental effects upon plaintiffs which will in turn, inure to the shipping public. This Honorable Court must rehear this matter and upon said rehearing, should set aside the Report and Order and the Erratum Report and Order of the Commission as unreasonable and not supported by competent evidence and as being thereby unlawful.

Respectfully submitted,

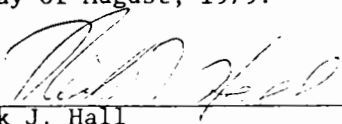
RICHARDS, BRANDT, MILLER,
NELSON & ZARR



RICK J. HALL
Attorneys for Plaintiffs
PBI Freight Service and
Four Corners Trucking

CERTIFICATE OF SERVICE

I hereby certify that I personally delivered two copies of the foregoing Brief as well as two copies of Plaintiffs' Petition for Rehearing to each of the following parties: Lon Rodney Kump, Attorney for Defendant Bethers, 333 East 4th South #200, Salt Lake City, Utah 84111 and upon Mr. Donald K. Hales, Division of Public Utilities, Department of Business Regulation, State of Utah, 330 East 4th South, Salt Lake City, Utah 84111 and Mr. Arthur A. Allen, Jr., Assistant Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114 this 30th day of August, 1979.


Rick J. Hall

A67-05-81: Rule Defining the Commercial Zones and Terminal Areas which Common Carriers May Serve in Connection with their Authority Intrastate in Utah —

1. **It Is Hereby Ordered** — That the following rule be and it is hereby approved and adopted by the Public Service Commission of Utah as applicable to all common carriers of general commodities in the State of Utah operating in intrastate commerce, together with definitions as hereinafter set forth.

a. A certificate of Public Convenience and Necessity issued by this Commission to a motor carrier of property authorizing service to any city, town or village shall be construed as authorizing service at all points which are within the State of Utah and not beyond the territorial limits, if any, fixed in such certificate on the authority granted, as follows:

(1) The municipality itself, hereinafter called the base municipality.

(2) All municipalities within the State of Utah which are contiguous to the base municipality.

(3) All other municipalities within the State of Utah and all unincorporated areas within Utah which are adjacent to the base municipality as follows:

(a) When the base municipality has a population of less than 2,500 all unincorporated areas within two miles of its corporate limits and all of any other municipality any part of which is within two miles of the corporate limits of the base municipality;

(b) When the base municipality has a population of 2,500 but less than 25,000 all unincorporated areas within three miles of its corporate limits and all of any other municipality any part of which is within three miles of the corporate limits of the base municipality;

(c) When the base municipality has a population of 25,000 but less than 100,000 all unincorporated areas within four miles of its corporate limits and all of any other municipality any part of which is within four miles of the corporate limits of the base municipality; and

(d) When the base municipality has a population of 100,000 or more all unincorporated areas within five miles of its corporate limits and all of any other municipality any part of which is within five miles of the corporate limits of the base municipality.

(4) All municipalities wholly surrounded, or so surrounded except for a water boundry, by the base municipality, by any Utah municipality continuous thereto, or by any Utah municipality adjacent thereto, which is included in the commercial zone of such base municipality under the provisions of (3) of this order.

(A-67-05-81:1b)

b. A Certificate of Public Convenience and Necessity issued to a motor carrier of property authorizing service to any unincorporated community having a post office of the same name shall be construed as authorizing service at all points which are within the State of Utah and not beyond the territorial limits, if any, fixed in such Certificate on the authority granted, as follows:

(1) All points within two and one-half miles of the post office in such unincorporated community if it has a population of less than 2,500 within four miles if it has a population of 2,500 but less than 25,000, and within five and one-half miles if it has a population of 25,000 or more.

(2) At all points in a municipality any part of which is within the limits described in (e) of this order.

(3) At points in any municipality wholly surrounded, or so surrounded except for a water boundary, by any municipality included under the terms of (2) of this order.

2. **Definitions and Explanations** — For the purpose of this order, the following terms are defined:

a. "*Municipality*" means any city, town, or village which has been created by special legislative action or which has been, otherwise, individually incorporated or chartered pursuant to the laws of the State of Utah, or which is recognized as such, under the constitution or by the laws of the State of Utah, and which has a local government.

b. "*Contiguous municipality*" means municipalities which have at some point a common municipal or corporate boundary.

c. "*Unincorporated area*" means any area not within the corporate or municipal boundaries of any municipality as defined herein.

d. Air line distances or mileages from corporate limits of municipalities and the post office of unincorporated communities shall be used.

e. The populations of any municipality or unincorporated community shall be deemed to be that for that municipality or unincorporated community in the last decennial census.

Effective 1 December 1961.

Reference ARM File No 32