

1979

Pbi Freight Service, Four Corners Trucking, Link Trucking, Inc., Magna-Garfield Truck Line, Uintah Freightways, Garrett Freightlines, Inc. And Milne Truck Lines, Inc v. Wycoff Company, Incorporated, And Public Service Commission of Utah, Et Al. :  
Brief of Defendant Wycoff Company, Incorporated

Utah Supreme Court

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#### Recommended Citation

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

PBI Freight Service, Four :  
Corners Trucking, Link :  
Trucking, Inc., Magna- :  
Garfield Truck Lines, Uintah :  
Freightways, Garrett :  
Freightlines, Inc., and :  
Milne Truck Lines, Inc., :

Plaintiffs, : Case No. 16455

vs. :

Wycoff Company, Incorporated :  
and Public Service Commission :  
of Utah, et al., :

Defendants. :

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BRIEF OF DEFENDANT  
WYCOFF COMPANY, INCORPORATED--

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In conformity with Plaintiff's Brief, plaintiff PBI Freight Service (PBI), Four Corners Truck Service (Four Corners), Link Trucking, Inc. (Link), Magna-Garfield Truck Lines (M & G), Uintah Freightways (Uintah), Garrett Freightlines (Garrett) and Milne Truck Lines (Milne) will collectively be referred to herein as "the plaintiffs" and occasionally as "protestants" or "protesting carriers". Plaintiffs will also be referred to individually by name as indicated above in parenthesis.

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

The defendant Wycoff Company, Incorporated will be referred to as "defendant Wycoff" or "Wycoff" or "applicant".

#### STATEMENT OF THE KIND OF CASE

This proceeding involves an application before the Public Service Commission of Utah in which defendant Wycoff seeks operating authority as a common motor carrier for the transportation of general commodities in express service, with certain exceptions, over regular routes between all points in the State of Utah, limited to the transportation of packages not to exceed 100 pounds each and shipments not to exceed a total of 1,000 pounds from one consignor to one consignee on the same day.

#### DISPOSITION IN LOWER TRIBUNAL

The Public Service Commission of Utah granted Wycoff's application.

#### RELIEF SOUGHT ON APPEAL

Plaintiffs are seeking to have the Supreme Court set aside and nullify the Public Service Commission's order granting Wycoff's application. Defendant Wycoff seeks the Supreme Court to affirm the Commission's order.

#### STATEMENT OF FACTS

This case presents a classical example of litigants dissatisfied with the fact finding of the lower

tribunal and filing their appeal with this Court arguing that the lower tribunal should have adopted their version of the facts rather than the version chosen by that tribunal. The transcript of evidence in this proceeding consists of 1,220 pages, 924 of which contain testimony of the witnesses called by defendant Wycoff. The Commission received 84 exhibits, 78 of which were sponsored by witnesses called by defendant Wycoff. The statement of facts contained in plaintiff's brief refers repeatedly to exhibits 79 through 84, the written prepared testimony offered by plaintiffs. In this regard, plaintiffs' statement of facts does not conform to Rule 75 and Form 35 Utah Rules of Civil Procedure which require:

The statement should be a concise but complete statement of the material facts. They should be stated, not merely as the appellant contends them to be, but viewed, as they must on appeal, favorable to the verdict of the jury [or the finding of the court]. (Utah R. Civ. P. Form 35).

Failure of the plaintiffs to conform to this rule makes the task of defendant and this Court a laborious one. It is the opinion of the writer of this Brief that the most expedient method of stating the facts for this Court and pointing out where in the record such facts appear is to quote the lengthy Findings of Fact of the Commission below and add thereto the record designations where those findings are supported in the record. By utilizing such an approach it can be

demonstrated that the Commission's Findings are not arbitrary or capricious but rather find overwhelming support in the record contrary to the allegations of the plaintiffs. Finding of Fact No. 1 is merely a historical and procedural statement which requires no support from the record as such and hence it is omitted from the following quotation.

Following are the Findings of the Commission. The material contained in brackets ([ ]) is added by the author of this Brief to refer this Court to the supporting portion of the record:

2. The applicant presented three operating witnesses: Bruce Wycoff, Executive Vice-President, General Manager, and Chief Executive Officer of Wycoff Company, Incorporated [R. pp.16-34], Rick W. Oaks, Southern Regional Director responsible for the supervision of all operations within the State of Utah [R. pp.37-42] and Richard H. Casper, Vice-President of Finance [R. pp.43-53]. These three operating witnesses presented 40 pages of prefiled, written testimony [Exs. 1, 10 and 16] together with an additional 15 single and multiple page exhibits in support thereof. [Exs. 2-9, 11-15, 17 and 18]. Taking of appearances, handling of preliminary matters, presentation of applicant's three witnesses, adoption of their prepared testimony and exhibits, cross-examination and redirect examination was all concluded within two hours and ten minutes. [R. pp.3 and 56].

3. The testimony of applicant's three operating witnesses went substantially

unchallenged. [R. pp.18-33, 38-42 and 45-53]. The witnesses were credible and their testimony and exhibits in support thereof were believable. [This statement is strictly within the mind and province of Commissioner Zundel who sat on the case as a hearing examiner.] The admissibility of certain relatively insignificant portions of the operating witnesses' testimonies and exhibits were objected to and overruled. [R. pp. 25-29 and 33-35]. I have given little weight to those matters objected to and their exclusion from the record in this case would have no effect upon my ultimate judgment in this matter. [This statement is strictly within the mind and province of Commissioner Zundel.]

4. Wycoff is managed by Bruce Wycoff who has been actively engaged in the management of the company since 1968, previously holding such positions as Director of Safety, Director of Local Operations, Director of Personnel, Manager of the Air Freight Division, and now Executive Vice President and General Manager. Wycoff's Board of Directors is made up of members of the Utah business, academic and consulting community, the majority of whom have no affiliation with Wycoff except their service on its Board of Directors. Wycoff's officers similarly have been recruited in an attempt to find the best qualified people notwithstanding their prior affiliation with the company, prior affiliation with the trucking industry nor prior affiliation with the

geographic service area of the company.

[Ex. 1 pp.1 and 2].

5. Wycoff presently holds authority issued by this Commission to transport general commodities in express service of shipments not to exceed 100 pounds between all points in Utah except between Salt Lake City on the one hand, and on the other, Wendover and Grantsville; to transport mining supplies between Salt Lake County on the one hand, and on the other, Carbon and Emery Counties, in shipments not to exceed 1,000 pounds; to transport emergency shipments of contractors' supplies and equipment between all points in the State of Utah in shipments not to exceed 1,000 pounds; to transport newspapers, magazines, and periodicals between Salt Lake City, Ogden and Provo, on the one hand, and on the other, all points in Utah without weight limitation; to transport motion picture film and accessories, candies, confections, and popcorn oil between all points in Utah in unlimited weights as well as cut flowers and bull semen; and to transport general commodities to Snowbird, Alta, and Brighton. [Ex. 5 pp.2-5]. . . Recently, they purchased an unlimited general commodity authority within the local cartage area of Salt Lake City. [Ex. 1 p.5]. Wycoff is actively promoting and operating all of their existing authorities. [Ex. 10 pp.5-7 and Exs. 12 and 13]. Further, pursuant to their existing authority and the cartage authority recently purchased from Purolator Courier Corporation, they have instituted a specialized courier service which is a

same-day, expedited, hand-to-hand delivery service. [Ex. 1 pp.5 and 6].

6. On an interstate basis, Wycoff has authority to transport and is transporting general commodities restricted to shipments not to exceed 200 pounds a day from one consignor to one consignee in which there is no single package which weighs more than 100 pounds; shipments having a prior or subsequent movement by air; and motion picture film and various specified commodities such as books, magazines, cut flowers, and snack items. [Ex. 1 p.3] Wycoff has unlimited weight authority intrastate in the State of Idaho [Ex. 1 p.3] and recently acquired similar authority in the State of Wyoming. [Ex. 1 p.6; R. pp.31 and 32]. Wycoff recently opened new terminal operations in Reno and Las Vegas, Nevada, and has commenced serving ten counties in Nevada and 37 Northern California counties through an interline in Reno. [Ex. 1 p.6]. Wycoff has had many years experience successfully handling heavier shipments on an expedited basis. [Ex. 1 p.3].

7. Wycoff's cost of that part of its rolling stock that carries Utah plates was approximately 2.75 million dollars. Wycoff's Utah payroll amounts to five million dollars annually. Its anticipated capital expenditures for its new terminal facilities in Salt Lake City will involve another three million dollar investment in Utah. [Ex. 1 p.10].

8. Wycoff's general offices and principal terminal is located in Salt Lake City and

includes a package handling facility with 4,500 square feet of dock space. In addition, Wycoff has terminal locations at Provo, Helper, Richfield, Vernal, Cedar City, and Ogden. [Ex. 10 pp.2 and 3].

9. Applicant operates 336 pieces of various types of equipment either in whole or in part in the State of Utah and numerous additional pieces outside the State of Utah. [Ex. 10 p.3; Ex. 11 pp.1-9]. This equipment is customized to meet the requirements of the particular job to be performed. They add to their inventory of equipment as the needs of the shipping public require and are prepared to continue doing so to meet their service obligations including any new authority which may be acquired as a result of this proceeding. [Ex. 10 p.4].

10. Wycoff employs numerous techniques to provide a unique, service oriented, transportation service to its customers. Among these are: stationing of employees and contractors in numerous Utah towns where Wycoff does not maintain a terminal; listings in every telephone directory in Utah; no-cost-to-the-customer telephone availability to every point in the state; radio dispatched equipment; automatic daily pick up; pick ups and deliveries both above and below the ground floor and at private residences; employment of an "ice man card"; lock boxes at or near a customer's place of business; outside deliveries when authorized by customers; simple documentation with pre-numbered express bills and with the consignee's and/or consignor's name preprinted and supplied

in continuous computer rolls; express bills so designed that the shipper may fill it in and thus expedite pick up service; handling C.O.D., collect, and prepaid shipments and acceptance of the consignee's check made payable to the shipper; multiple attempts at delivery and use of a "door hanger" to notify the consignee of the shipment. [Ex. 10 pp.7-13].

11. Wycoff presented its audited financial statements comparing the years ended December 31, 1977 and December 31, 1976 [Ex. 17 pp.1-10]. together with its internally prepared financial statements comparing the years ended June 30, 1978 and 1977. [Ex. 18 pp.1 and 2]. It is obvious from these financial statements that Wycoff is a financially healthy company. [Ex. 16 pp.3 and 4]. As of December 31, 1976, Wycoff had assets at a book value of \$5,755,851 of which \$2,204,122 or 38.3 percent was represented by stockholders' equity. [Ex. 17 pp.2 and 3]. On June 30, 1978, those figures were \$6,840,012 for total assets with \$2,579,186 represented by stockholders' equity. [Ex. 18 p.2]. On both of those dates, current assets exceeded current liabilities providing a positive current ratio. [Ex. 17 pp.2 and 3, Ex. 18 p.2]. For the year ending June 30, 1977, Wycoff had total operating revenue from trucking operations in the amount of \$5,337,940 with net income after taxes and all other adjustments in the amount of \$73,418 compared to the year ending June 30, 1978, in which the comparable figures were \$6,124,448 total revenue and \$121,686 net income. [Ex. 18 p.1].

12. Wycoff is proceeding with the construction

of a new terminal facility in Salt Lake City. [Ex. 1 p.9]. This facility will be of sufficient size to handle the increased freight they will experience by grant of this application; and because of Wycoff's expansive operation presently existing throughout the state, it can handle the increased freight generated by the grant of this application with the purchase of little, if any, additional equipment, the hiring of few, if any, new people, or the building of new terminal facilities. [Ex. 1 pp.9, 18 and 19].

13. Wycoff did not propose a level of rates to be charged if this application was granted and there is no legal requirement that they do so. They did propose that they will adopt rates similar to their existing rates which are very simple in their application. These rates will be a single rate progression on freight of all kinds with a released rates provision. Weight and mileage will be the only two factors needed to compute the rate for any commodity. Such rates are different from those of the general commodity carriers in that they have no classification for individual items. Such rates are simpler for the public to use and are an integral part of Wycoff's ability to move a large volume of shipments in a short time. [Ex. 1 pp.19 and 20].

14. While there is no legal requirement that an applicant for a new certificate of public convenience and necessity propose a specific level of rates in support of its application the Commission generally prefers to receive such a proposal and oft times it is impossible to determine the financial feasibility of a proposal without considering the specific level of rates at which the proposed service will be offered. The applicant in

the instant case suggests that an application of the magnitude of this one necessarily requires a great deal of time from its filing until its ultimate conclusion and in view of the current high rate of inflation any proposed rates would be outdated before the application could be granted. Applicant suggests that pro forma financial statements based upon such rates would be highly speculative and of little value to the Commission in its determination. The fact that nearly a year has now passed since the original filing of the application in this case supports their position in this regard. In view of Wycoff's vast experience in profitably and competitively handling freight of the type for which authority is sought herein, together with their existing facilities and capabilities and their strong financial position I find that the proposed operation is operationally and financially feasible. [R. pp.30 and 31, Ex. 1 pp.8-10, Ex. 1 pp.16-22, Ex. 16 pp.2-4, Exs. 17 and 18 and Brief for Applicant at 19 and 20 (Dec. 11, 1978)].

15. Wycoff has a commitment to giving either same-day or overnight service on at least 95 percent of all Utah intrastate traffic. [Ex. 1 pp.10 and 11]. They routinely monitor their transit times for the purpose of determining whether they are maintaining this goal. [Ex. 1 p.11]. For the purpose of this hearing, Wycoff made a transit time study with respect to all of their intrastate traffic handled on express bills in Utah during four weeks throughout the year selected at random. [Ex. 1 p.11]. During the period studied, Wycoff handled 42,103 shipments in intrastate commerce including 736 of which the delivery receipts were undated. [Ex. 1 p.12]. Thirty-nine thousand three

hundred and forty-two of those which were dated, or 95.1 percent, were accorded same-day or overnight service. [Ex. 1 p.12]. This traffic did not include Wycoff's courier division where all traffic is delivered either the same day or overnight. [Ex. 1 p.12]. Had the courier shipments been included, the transit study results would have been in excess of 96 percent same day or overnight. [Ex. 1 p.12]. No protestant in this case offered a comparable transit study and it must be concluded that no protestant can match Wycoff's transit times. [The protestants did offer transit studies but they were limited in scope to certain of the public witnesses and were in no way comparable to Wycoff's systemwide study. See Exs. 79-84 and appendices thereto and compare to Ex. 1 pp.11 and 12 and Ex. 8. Wycoff's transit study went virtually unchallenged.] Applicant abstracted from its transit study every point in Utah that received same-day or overnight service from some other Utah point. During the period studied, they provided same-day or overnight service to 280 Utah points of varied sizes. [Ex. 9 pp.1-3].

16. Forty-eight public witnesses appeared and testified at length on direct and cross-examination in support of this application. The public witnesses represented large and small businesses of all varieties from all actions [sic] of the state and their testimony must be considered as representative of the conditions confronting the general public throughout the State of Utah. Those witnesses established that there is an urgent need for Wycoff's proposed service. The majority of those witnesses were using Wycoff's existing interstate and intrastate authority and

a substantial number of those witnesses were suffering the inconvenience of "splitting" shipments between different days in order to take advantage of Wycoff's service rather than use the services of the common carrier protestants in this proceeding. The witnesses collectively testified as to their need and the inadequacies of the existing services of the protestants between 235 different city pairs. [This is a general summary of the testimony of the 48 public witnesses appearing in Exs. 19-78 and R. pp.57-924. More detailed references appear in the following paragraphs. Appended as Ex. A to the Brief for Applicant (Dec 11, 1978) is a summary of each of the 48 witnesses' testimonies. The page designations footnoted to those summaries refer to the official record. The designation "prepared testimony" refers to Exs. 19-78.] I find that the public witnesses as a group were sincere and credible and their testimony was candid and believable. [This statement is strictly within the mind and province of Commissioner Zundel.] Their testimony compels the conclusion that Wycoff's proposed service will serve the public convenience and necessity in a manner that it is not now adequately being served. [A detailed discussion of the meaning of the phrase "public convenience and necessity" appears in the argument at pages 41 - 44 infra.]

17. Fifteen witnesses testified as to the serious problems caused by the fact that all existing authorities in the State of Utah generally radiate into Salt Lake City where freight must be interlined with another carrier to cross the Salt Lake "gateway" causing substantial delays and higher damage risks. This results in a denial to

that portion of the public residing or doing business outside the Salt Lake commercial zone of those privileges enjoyed by consignors and consignees within that zone. [R. pp.95, 180, 278, 327, 714 and 715, and Ex. 32, Ex. 52 p.3, Ex. 56 pp.3 and 4, Ex. 57 p.3, Ex. 59 pp.2 and 3, Ex. 60 p.3, Ex. 64 p.2, Ex. 66 p.3, Ex. 73 pp.2 and 3, Ex. 75 p.4, and Ex. 77 p.3]. Another of the primary complaints made by some 30 of the public witnesses concerned slow transit times not related to the interline problem. [R. pp.65, 95, 96, 124, 143, 177, 223, 248, 249, 276, 277, 326, 427, 428, 483, 484, 507, 508, 825, Ex. 49 p.2, Ex. 50 p.3, Ex. 52 p.3, Ex. 56 p.3, Ex. 57 p.3, Ex. 60 p.3, Ex. 64 p.3, Ex. 65 pp. 2 and 3, Ex. 66 p.3, Ex. 68 p.3, Ex. 69 p.3, Ex. 71 pp.2 and 3, Ex. 72 p.2, Ex. 74 pp.2 and 3, Ex. 75 p.3, Ex. 77 p.3, Ex. 78 p.2]. A number of the witnesses complained of transit time as it relates to the time of day when delivery is finally made to them. [R. pp. 895-896, Ex. 49 p.2, Ex. 74 pp.2 and 3, Ex. 75 p.4 and 5]. Wycoff, on the other hand, as testified to by witness after witness, [See e.g. Ex. 49 p.2, Ex. 74 p.2 and 3, Ex. 75 p.4 and 5, R. pp.522 and 879]. and as supported by their transit study, [Ex. 8] consistently makes early next morning deliveries throughout its service territory as a standard part of its service commitment. [Ex. 1 p.11].

18. A substantial number of witnesses complained that Wycoff and UPS are the only carriers providing them with a daily delivery service in their rural part of the state. [R. pp.260, 340-345, 375-378, 484, 569 and 570, 576, Ex. 50 pp.2 and 3, Ex. 51 p.3, Ex. 53 p.2, Ex. 58 p.2 and 3]. The protestants are generally providing daily service only along the main corridors of the respective territories they serve. [R. pp.419 and

420, 544, 558, 698, 1129, 1132, Ex. 50 p.2, Ex. 51 p.3, Ex. 54 p.2, Ex. 55 p.2, Ex. 58 p.3, Ex. 61 p.2]. Wycoff, on the other hand, provides daily service to every point in the State of Utah, with the exception of Bullfrog (where service is provided three times each week) and Laketown (where service is provided at least twice weekly). [Ex. 1 p.15]. Two witnesses testified they have no service whatsoever except for Wycoff and UPS. [Ex. 61 p.4 and Ex.76 p.2]. Dammeron Valley Mercantile receives no transportation service because Milne Truck Lines "flatly refuses to deliver freight". [Ex. 61 p.4]. Stringham's General Products at Garden City has no service because there is no general commodity carrier authorized to serve north of Logan, Utah. [Ex. 76 p.2].

19. Other substantial service deficiencies were pinpointed by the public witnesses. These included such inadequacies as poor delivery service, [R. pp.224, 225, 260, 309, 339-341, 401-403, 430, 484-485, 507-508, 513-514, 544, 818, and Ex. 49 pp.2 and 3, Ex. 64 p.3, Ex. 65 p.3, Ex. 73 pp.2 and 3, Ex. 75 pp.3-5] poor pick-up service, [R. pp.89, 143, 200, 510, 531, and Ex. 52 p.3, Ex. 62 p.3, Ex. 63 p.3, Ex. 77 p.3] excessive damage problems, [R. pp.422, 465, Ex. 71 p.3] no Saturday service, [R. pp.287, 429] postdating of freight bills, [R. pp.327 and 328] excessive customer complaints, [R. pp.99 and 100] no allowance on freight rates where the consignee must drive long distance to the carrier's dock to pick up freight, [R. pp.262 and 263, 375 and 376, Ex. 50 p.7] inconsistent arbitrary charges, [Ex. 55 p.2] refusal to accept checks on C.O.D. shipments, [R. pp.402 and 403, 414] lost freight [R. pp.423-425

and Ex. 45] no single carrier with statewide authority, [Ex. 63 p.3] unresponsive and uncooperative attitudes, [Ex. 53 pp.3-6 and Ex. 65 p. 3-5] and refusals to compete by carriers holding competing authorities [Ex. 70 pp.3-6, Ex. 71 p.3, Ex. 73 pp.3 and 4, R. pp.486 and 487].

20. No protestant in this proceeding has statewide authority. Protestant, PBI Freight Service, serves between Salt Lake City and Utah County points and then south along U. S. Highway 89 to Kanab on the Utah-Arizona border serving intermediate and off-route points. PBI also serves south of Utah County along Interstate 15 as far south as Fillmore and points such as Delta in Millard County. [R. pp.937-939]. Four-Corners Truck Service serves primarily between points in Utah County and Salt Lake City on the one hand, and points in Grand and San Juan counties on the other. [R. p.937]. Garrett Freight Lines, Incorporated, basically operates intrastate in Utah between Salt Lake City on the one hand, and on the other, those points south of Crescent Junction providing no service to the intermediate points between Salt Lake City, and Crescent Junction. [R. pp.1060-1064]. Rio Grande Motor Ways serves primarily from Salt Lake City on the north, down U. S. Highways 6 and 50 to Price and Green River. [R. pp. 1083-1088]. Milne Truck Lines, Incorporated, serves northeasterly out of Salt Lake City and Ogden (but not between Salt Lake City and Ogden) up Weber Canyon towards Evanston including the point of Randolph in the northeast corner of the state. They also have authority to move freight between Salt Lake City on the north and points in the southwestern section of the state such as Fillmore, Beaver, Milford, Cedar City, and St.

George. [R. pp.1113-1118]. Uintah Freightways serves between Salt Lake City and points north on Highways 89, 91 and 191 and Utah Highway 30, serving such points as Ogden, Brigham City, Logan, and west as far as Grouse Creek. They also have authority to serve between Salt Lake City on the one hand, and all points in Uintah Basin such as Vernal and Duchesne. Further, they have authority to serve Salt Lake City on the one hand, and Price on the other; but no intermediate points. [R. pp.1144-1147]. Magna-Garfield Truck Line primarily serves the Salt Lake County area. [R. pp.1144-1147]. Link Trucking, Inc., serves primarily between Salt Lake, Utah, and Morgan counties on the one hand, and points in the Uintah Basin on the other hand. They also have authority to serve between Uintah Basin and mine sites in Carbon and Emery counties. [R. pp.1193 and 1194].

21. The evidence presented by the protestants was lacking in candor and credibility to a serious extent. [The 282 pages of cross-examination in the record (R. pp.935-1215) are so replete with examples of half-truths, omissions, and inaccuracies that it would take nearly as many pages to document them all. See e.g. R. pp.934, 957 and 958, 1197-1199, 1168 and 1169]. The operating witnesses for the various protestants, almost without exception, after testifying as to their intimate familiarity with the operations of their businesses and their qualifications to testify on their behalf, were often unable to answer counsel's questions on cross-examination concerning those operations. [R. pp.935 and 936, 1063 and 1064, 1088-1091, 1118, 1149-1152, 1155-1158, 1159-1161, 1194-1197].

22. No protestant presented a Utah system-wide transit study for comparison to Wycoff's Utah system-wide transit study covering in excess of 40,000 shipments. Rather than presenting a comprehensive transit study, the protestants chose to present limited transit studies for certain of the public witnesses. [Garrett presented no transit study; see Ex. 80; Rio Grande presented no transit study, see Ex. 81, R. pp.954 and 955, 1066, 1128-1137 and Ex. 82 and appendices 5-15]. In some cases, the witnesses for whom transit studies were prepared had not complained of transit times. [Compare R. pp.415-431 to R. pp. 1013-1015 and Ex. 79 p.21]. No transit studies were prepared for other witnesses who had complained of transit times. [R. pp.988-995, 1003-1005, 1135 and 1136]. The transit studies presented suffered from deficiencies including omission of shipments, [R. pp.981 and 982, 1179-1182] inclusion of post-dated freight bills, [R. pp. 1018, 1035 and 1035, 1101 and 1102, 1137, 1178 and 1179] and omission of interlining carriers' transit times. [R. pp.955, 1011 and 1012, 1025, 1127 and 1128]. Each protestant presented a study to demonstrate the amount of traffic they are presently hauling which they claim would be subject to diversion if this application is granted. These studies, like their transit studies, contained flaws and inaccuracies and tend to be misleading. They contained traffic which is presently already subject to diversion to Wycoff but on which they are successfully competing, [R. pp.960-973, 1067-1072, 1095-1100, 1119-1126, 1142-1144, 1165 and 1166, 1200-1203] there was no attempt to omit from most of the studies those shipments in which individual pieces exceeded 100 pounds; [R. pp.973, 1067-1072, 1095-1100, 1119-1126, 1200-1203] and, in several cases,

the transit studies contained shipments in excess of 1,000 pounds. [R. p.1203]. With these deficiencies the studies are of little value to the Commission in determining the diversion issue. [Conclusion.] Wycoff's experience with competition from the new service of United Parcel Service was not injurious but was beneficial. It forced Wycoff to become more efficient and service oriented than it had been in the past. The result, on Wycoff's financial statement and the service offered its customers, was positive, not negative. [Ex. 16 pp.2 and 3]. The introduction of the competition of Wycoff, for the portion of traffic which might be affected, may well result in better service from the protestants and greater efficiency in their operations. [Conclusion.] I am not persuaded that any of the protestants will suffer any seriously adverse effect from the granting of the application unless it be from their own lack of willingness to provide an efficient service to the shipping public. [Conclusion.]

23. A granting of the authority sought in this application will not overly burden the state's highways with traffic, interfere with the traveling public, or be detrimental to the best interests of the people of the State of Utah. [Ex. 10 p.14]. Much of the new traffic Wycoff will be moving if this application is granted will come from private carriage or traffic they are presently moving on separate days and to this extent should decrease the traffic burden on the state's highways. [Ex. 10 p.14]. Wycoff does not anticipate adding many, if any, new vehicles to the highways [Ex. 1 p.19] and there will be no undue burden

to those highways nor any interference with the traveling public. (Ex. 10 p.14].

The remaining eight paragraphs of the Commission's findings are primarily discussion and deal with the issue of plaintiffs' allegations of illegal operations by defendant Wycoff. There is very little factual matter contained therein and this aspect of the Commission's findings will be covered in the argument supra. beginning at page 45.

The foregoing quotation of the Commission's findings documented by reference to the record whereat they are supported substantially refutes the various and sundry allegations of the plaintiffs in their Statement of Facts. There are certain specific statements, however, that are so misleading that they should not go unnoticed:

Plaintiffs' Claim: . . . Plaintiffs, individually and collectively through interline, hold authority to and transport general commodities throughout the area sought to be served by applicant. (Exs. 79, 80, 81, 82, 83 and 84). (Brief of Plaintiffs at 3.)

Response: None of the plaintiffs, individually or collectively, holds authority to Wendover, Tooele, Park City, Laketown, or Grantsville, Utah. (Exs. 79, 80, 82, 83 and 84). Mr. C. R. Fish of Dammeron Valley Mercantile testified that Milne Truck Lines, the only plaintiff with authority to provide service to Dammeron Valley, Utah, refuses to do so. (Ex. 61, pp.2-4; R., p.698). Mr. Bryce Stringham of Stringham General Products located at Garden City, Utah, testified that none of the plaintiffs

provides any service to him whatsoever. (Ex. 76, pp. 2, 3). Exhibit 81 is from Rio Grande Motorway, not a plaintiff.

Plaintiffs' Claim: . . . Plaintiffs' documented evidence demonstrates that the service presently being provided for the supporting shippers by plaintiffs meets the alleged needs of said shippers. . . . (Brief of Plaintiffs at 6.)

Response: Many witnesses testified to a need for overnight service between points not served directly by plaintiffs. (R. p.1370 at Exs. A and B). PBI further testified that all exhibits representing transit times showed only the transit time for the PBI portion of the move. (R., p.1011). The plaintiffs' "documented evidence" includes an exhibit of bills of lading taken from May of 1978 for the shipper American Greetings Corporation by Uintah Freightways to refute testimony by Mr. Elder of American Greetings that Uintah postdated freight bills in 1977. (R., p.1168-1169). After certifying that all freight bills for various time periods were included in his exhibits (R., p.1189 and Ex. 83), Mr. Bloomquist introduced an exhibit for NTN Diesel containing two freight bills purportedly representing all shipments for 1978. The witness for NTN Diesel has produced records of at least six shipments by Uintah for the same period. (Ex. 78; R., p.1174). For Rick Warner Ford, a number of bills of lading were not included in the Uintah study for the period. (R., p.1179). For Don's Body Shop a freight bill was introduced by Uintah to refute the

testimony of Mr. Johnson that Uintah does not provide delivery service to his company, but the bill was dated subsequent to Mr. Johnson's testimony before the Commission (R., p.1180). Exhibit 27 by Uintah did not include at least 19 bills (R., p.1181), while Exhibit 30 did not include at least 22 additional shipments. (R., pp.1181, 1182).

Plaintiffs' Claim: . . . In areas served by plaintiffs PBI and Four Corners only a miniscule part of the shipping public appeared in support of the Wycoff application. Principally their testimony involved auto parts. (Brief of Plaintiffs at 6.)

Response: When questioned about Bennett's Paint and Glass, a witness shipping paint and glass to many points in the state of Utah, Mr. Roberts of PBI and Four Corners responded, "That's one of our largest shippers, period." (R., p. 1022).

Plaintiffs' Claim: It was alleged that Uintah post-dates its freight bills. This allegation was completely rebutted through documentary proof. (Emphasis added.) (Brief of Plaintiffs at 7.)

Response: Applicant introduced dated bills of lading and dated freight bills for the months of September and October, 1977 (Ex. 37) and for April and May of 1978 (R., p.992) postdated by Uintah, whereas plaintiff Uintah chose to refute this evidence with bills of lading from August of 1978. (Ex. 83, pp.E5-E7). Furthermore, Mr. Bloomquist, testifying for Uintah, admitted that Uintah postdates freight bills. (R., p.1178).

Plaintiffs' Claim: Uintah . . . found no outstanding claims for loss or damage to be pending, contrary to the allegations of one supporting shipper. (Brief of Plaintiffs at 7.)

Response of Defendant Wycoff: The only allusion to a claim on pages 9 through 11 of Exhibit 83 is by Nolan Smiley of Shell Oil Company. The only reference this witness makes to a claim problem is with Link Trucking, but he did testify that Uintah delivers freight for Link. (R., p.487). His major complaint about Uintah is slow transit time. (R., p. 485).

Plaintiffs at pages 11 through 15 of their Brief have extracted from the record, and in many cases out of context, certain claims and statements of 22 of the public witnesses in an attempt to discredit the same. Following the 22 specific references the plaintiffs conclude that "the above examples cover almost 50 percent of the total testimony. The-remaining testimony was similar." This claim is itself a gross exaggeration. It can be conceded that 22 is almost 50 percent of 48 but surely the plaintiffs do not mean to lead this Court into believing they have quoted almost 50 percent of the total testimony of the public witnesses in less than 5 pages of their Brief. As hearin before demonstrated the testimony of the 48 public witnesses is spread across 60 exhibits (many of which are multi-paged) and 868 pages of the transcript. (Exs. 19-78 and R. pp.57-924). Following are the 22 claims made by plaintiffs together with defendant Wycoff's rebuttal thereto documented with references to the official record:

Plaintiffs' Claim: One witness claimed that deliveries at 12:30 were satisfactory but deliveries one hour and 17 minutes later at 1:47 were too late. Wycoff's times were not recorded. (R. pp.349,356).

Response: The shipment referred to as delivered at 12:30 was not delivered, but the witness was compelled to send his son to Cedar City in order to receive the freight at 12:30. (R., pp.341-342). The witness has phoned Milne Truck Lines late in the afternoon because his shipment has not arrived and Milne Truck Lines has refused to deliver the freight. The driver, however, on occasion, has delivered merchandise to the witness in his personal vehicle. This is not satisfactory service. (R., pp.343, 354). Wycoff delivers between 9:00 and 10:30 in the morning. (R., p.345). If the witness does not have early deliveries, his customers drive to Cedar City themselves, seventeen miles away, to obtain the needed merchandise. (R., p.340).

Plaintiffs' Claim: Another complained of shipments being delivered too early by PBI. The witness has complained to the Commission in writing about poor Wycoff service. (R., pp.430, 431, 433 and 439-442).

Response: Plaintiffs' reference to deliveries made too early is taken out of context. The 8:00 a.m. delivery is too early only when delivery is expected at 8:30 and the witness brings in extra help to assist with deliveries and stocking inventory. The witness has suggested a 7:30 a.m. delivery, but PBI was unwilling. The witness asks only for consistency in deliveries. (R., pp.430,431). Plaintiffs overlook the major complaint of this witness which is the high rate of damaged freight from Salt Lake City via PBI. (R., p.421). The witness also complained that when it is necessary to make shipments in excess of 100 pounds from Richfield to

Gunnison or Panguitch, by splitting the shipment over two days by Wycoff the transit time is as fast as shipping by common carrier. (R., p.420). Milne Truck Lines refuses to provide service to the witness. (R., p.419). Wycoff produced 130 freight bills for a similar period to the PBI survey, and there were no shortage or damage notations on any. (R., pp.456-457).

Plaintiffs' Claim: A complaint of transit time could not be attributed to shipper, carrier or otherwise. (R., p.465).

Response: The witness complained primarily of damaged merchandise and testified to the need for a carrier that does not damage the merchandise. (R. pp.465, 471). The Complaint alluded to by appellants was a general rather than specific complaint. (R., p.465).

Plaintiffs' Claim: One witness 'spoke' in his canned testimony of a phone call. When asked what specifics he could remember, he replied 'That long ago - that long ago, I do not.' (R. pp. 515, 516).

Response: The phone call referred to by appellants was mentioned only to illustrate the lengths to which the witness has gone to improve the service of PBI. After the witness phoned previous PBI drivers, he placed a call to PBI at Orem to see if an answering service could be installed. (R., pp.509-510). Appellants' characterization of the witness' response, when questioned about specifics, is intentionally distorted, incomplete, therefore misleading. After naming the driver who suggested he call Orem, in recounting the call to Orem, the witness was asked if he

remembered to whom the call was placed. His entire response was: "That long ago - that long ago I do not. I know it wasn't the president. I talked to the - I understand he was the head dispatcher and then the man over him. I talked to two of them up there but I couldn't give you the names." (R., pp.515-516). The principal complaint of this witness is that PBI is unable to effect delivery to his business in order to meet log trucks making trips into the timber so that disabled equipment may be repaired. In order to make equipment operative the same day, the freight must be delivered by 9:00 a.m. PBI never makes the first truck. In order to make the last truck of the day, delivery must be made by 2:30 p.m. PBI delivers in time to make the last run only about fifty percent of the time. (R., pp.507-508).

Plaintiffs' Claim: Still another Wycoff witness indicated that Uintah provides a consistent overnight service with deliveries being made around noon. (R., p.523).

Response: Wycoff not only provides overnight service with early morning delivery but also provides same day service which is important to the witness. (R., p.525). Uintah, on the other hand, does not consistently deliver at noon, with deliveries right up until the evening. (R., p.525). The witness testified that if deliveries are not made until noon or later, it usually means an extra day to his customers. The car owner is then unhappy with his customer, and, in turn, his customer is unhappy with him. (Ex. 49 p.2).

Plaintiffs' Claim: Another has complained to the Public Service Commission concerning the service of Wycoff.

specifically complaining of shortages; (R., p.549) and testified that he is required to file a claim for loss or damage with Wycoff an average of twice per month. (R., p.555).

Response: The complaint referred to by plaintiffs was resolved immediately to the satisfaction of the witness. (R., p.552). The witness experiences this same problem with Milne Truck Lines, yet Wycoff has a more convenient and expeditious method of dealing with claims. The witness has asked Milne Truck Lines for more prompt attention to his shortages, but the request was denied. (R., p.553). The witness, together with other businessmen in his community, went before the Public Service Commission in 1977 seeking to obtain better service than once a week deliveries from Milne Truck Lines. Milne Truck Lines now delivers twice a week, which is still not at all satisfactory. (Ex. 51, p.3).

Plaintiffs' Claim: One witness was so misinformed about the service proposal of Wycoff that it was his understanding that upon approval of the application, Wycoff would haul 1,000 lb. shipments and charge the witness less for the transportation than what is now charged for 100 lb. shipments. (R., p.563).

Response: The witness is very clear on the fact that PBI offers service only on Thursdays and, if it is not convenient for PBI to deliver on Thursdays, then delivery is not attempted even then. (R., p.561 and Ex. 53, p.3). The rate structure is not why this witness is concerned. With Wycoff he can count on delivery each morning at 7:00. (R., p.564). After the witness testified to being charged for excess weight on a carpet, PBI took no action to refund the excess monies collected from him. (R., p.1002).

Plaintiffs' Claim: Another had little or no knowledge of the shipping practices of a regular weekly supplier. He does not know what day his shipments originate in Clearfield, Utah. (R., p.607). He was not sure about how his shipper selects a routing to be used, but knew that the arrangements for transportation were made by his shipper and not by himself. (R., p.608, 609). Although indicating a high level of familiarity with his 'canned' written testimony, in at least one case he could not define or even pronounce the language contained in the statement. (R., p.613).

Response: Contrary to appellants' assertion that the witness "had little or no knowledge of the shipping practices of a regular weekly supplier", Mr. Smith testified that he is called each week from Bartlesville, Oklahoma for his order. He generally receives it on Monday. He was only unsure of the shipping date in each instance. (R., p.607). In at least one instance, if Wycoff had been able to provide overnight service, he would not have lost the sale of some filters. (Ex. 67, p.3). When questioned as to whether he would divert freight from PBI to Wycoff, the witness responded affirmatively if he had his way, and Phillips usually gives him his way on things like that. (R., p.611). The witness testified that he had read his statement and had adopted it as conveying his testimony to the Commission. Although unable to take a word out of context to give it a specific definition, he was familiar with the meaning of the sentence wherein the word was used. (R., p.614).

Plaintiffs' Claim: Another 'witness' had little, if any specific information about his company's needs for transportation service and testified 'It's not my job to know that. I have somebody working for me that would make that decision \* \* \*' (R., p.636). He further indicated that he is never involved in routing nor which, if any, of his

destination points require an interline. (R., p.637 and 638). The witness could not even name the protestants. (R., p.644). Portions of the testimony were overstated, attributable to the fact that a Mr. Dick Reese employed by applicant prepared the testimony. (R., p. 647, 648). After learning that Uintah provides direct service without interline from Ogden, Utah to Roosevelt, Utah, providing overnight service, the witness concluded '\* \* \*It means that they were probably pretty good at picking it up in Ogden and getting it where it goes. \* \* \*' (R., p.649 through 652). The witness summed up his lack of knowledge concerning his company's transportation needs when he was asked if he was qualified to testify as to the amount or quality of service available to his company at the present time by answering 'I am not by any stretch of the imagination the duty expert, no.' (R., p.657).

Response: Mr. Young's statement to the Commission qualifies himself as overall supervisor for a six month period of J. G. Read. He does not claim to be intimately familiar with every shipment coming to or going from his place of business nor the specific carriers involved for such moves. (Ex. 59 p.1). His statement is that customer complaints of slow transit time have caused his company to split some shipments by Wycoff and deliver others to carriers at Salt Lake City that serve points directly. (Ex. 59 p.3). "Portions of the testimony were overstated" is itself an overstatement. The witness agreed the exact passage stating that all shipments in excess of 100 pounds would be tendered to Wycoff is a little overstated since it should be qualified. (R., p.647). The witness testified his knowledge was based on conversations with some of his 1,700 to 2,500 customers and did in no way represent himself as the duty expert for the total quantum or quality of service available. (R., p.655).

Plaintiffs' Claim: A witness was asked if he had reason to deny that Uintah was providing consistent overnight service. His answer was 'No. I have no complaints about Uintah Freightways.' (R., p.671). Concerning interline shipments, he was asked, 'Wouldn't you agree with me that that statement is grossly overstated and that Uintah Freightways serves lots of points beyond Salt Lake City, do they not?' Answer: 'That's true.' (R., p.671).

Response: The question to which the witness responded he had no complaints about Uintah dealt with overnight service provided by Uintah on shipments from Salt Lake City, which shipments were not the basis of his complaint to the Commission. (R., pp.670-671). The statement purportedly "grossly overstated" by the witness was with respect to Uintah only. The witness qualified the statement by explaining that Uintah does not go to all the places served by the witness. (R., p.672).

Plaintiffs' Claim: Another was asked about size of shipments. He responded, 'Probably - well, that's hard to say. This is our busy time of year. It very well could have been over 100 or a little bit under it. There is no way of knowing.' (R., p.709, 710). When asked if he would use the presently authorized service of M & G and PBI, he indicated that he would not, even though he knew the service was available. (R., p.713, 716). He indicated that he has not used interline service, would not use interline service, and that any testimony given by him concerning interline service was pure supposition. (R., p.722).

Response: The witness testified that he was refused a pickup when he phoned PBI requesting them to do so. (R., p.712). He also testified that his company uses M & G approximately twice per month. (R., p.710). The witness testified that he would not use interline service because many items shipped are small and the company does not want to run the risk of losing any part of the shipment. (R., p.720).

The witness also testified that Wycoff is the only carrier serving all points directly; therefore, it would be much more convenient to use Wycoff. For example, to Grantsville, Utah, the company must use its own equipment due to customer complaints of poor motor carrier service. There is no direct service to Park City or Ephriam, two troublesome areas. (Ex. 62, pp.3 and 4).

Plaintiffs' Claim: A witness 'requiring' pickup at 5:00 p.m. agreed that he would be in trouble if every carrier came at 5:00 p.m. as he has only one loading door. (R., p.734).

Response: The witness testified it is inconvenient to be required to use as many carriers as he does in order to ship freight throughout the state, especially since Wycoff serves each of his customers. There is further inconvenience due to the fact Amware must submit to pickups throughout the afternoon because of limited dock facilities and the number of required carriers. (Ex. 63, pp.2 and 3). Additionally, PBI will pick up only when they want to and not when asked to and Rio Grande sometimes will not pick up at all. (R., p. 734, Ex. 63, p.3).

Plaintiffs' Claim: Another did not prepare a transit study showing the present Wycoff service, even though the documents for such a study were available to him. (R., p.764).

Response: The appellant produced a transit study (Ex. 79, p.25) and admitted that all dates represent only the PBI portion rather than the transit time for the entire movement. (R., pp.1011, 1025).

Plaintiffs' Claim: One from Ogden has never even attempted to use the services presently available from Uintah because all of his shipments are small or are separated to avoid the restriction in the Wycoff authority. (R., pp.795, 796).

Response: The witness testified he had received customer complaints about Motor Cargo (Uintah's predecessor) and stopped using them. He has had no requests from customers to utilize Uintah. (R., p.795). The witness also testified he has no direct service to points such as Orem and St. George for shipments over 100 pounds. (Ex. 66, p.3).

Plaintiffs' Claim: Another testified concerning service received from Wycoff and from Park City Truck Lines, but did not document any of his general statements with delivery receipts from either company. (R., p.809).

Response: The witness testified, ". . . however, on those shipments over 100 pounds, the only common carrier available us is Park City Truck Lines and their service commonly takes two to three days out of Salt Lake City and is not at all consistent. This causes us serious problems. We often place an order for goods we need for an upcoming busy weekend on Wednesday or Thursday to our suppliers in Salt Lake. If the order is under 100 pounds and comes via Wycoff, it arrives the following day and satisfies our needs. However, if that same order comes via Park City Truck Lines, it generally will not be delivered to us until the following Monday and this does not meet our needs. . ." (Ex. 68, p.3).

Plaintiffs' Claim: A Logan witness was 'dissatisfied' over consistent next day Uintah service with deliveries made around 11:00 a.m. the day following shipment from Salt Lake. (Ex. 69, R., p.818-820).

Response: The witness receives same day service by Wycoff from Salt Lake City. (Ex. 69, p.3). He asked Uintah to provide the same service but they did not. (R., p.815). In order to obtain the needed service to save a sale, if Wycoff cannot handle the shipment, the witness drives to Salt Lake City. (R., p.817). Uintah is not even consistent at delivering by 11:00. Sometimes it is 11:00, sometimes it is 2:00 in the afternoon. (R., p.818).

Plaintiffs' Claim: A Salt Lake shipper indicated that all shipments which could be documented for his customers in Price and Helper, Utah, were delivered by Uintah Freightways overnight. (R., p.832). He was so unfamiliar with his own written testimony that he was bewildered by the questions concerning Frank's Glass and Fred's Glass, even though these were the two accounts he specifically 'spoke' of in his 'canned' testimony. (R., pp.838, 839).

Response: After receiving customer complaints, the witness began to send his own trucks to Price and Helper leaving fewer shipments to be transported by the common carriers. (R., p.832). The witness was not unfamiliar with his testimony. In his statement, he only had mentioned that in the past he had received complaints from both Fred's Glass and Frank's Glass along with complaints from other customers. His only confusion was why all questions were addressed to Fred's Glass and Frank's Glass when he has several customers in Price. (Ex. 70, p.2, R., p.838). The witness also testified to a need for direct service from stores at Logan, Cedar City, Ogden, and Provo, Utah, which only Wycoff is able to provide. (Ex. 70, p.4).

**PBI refused to handle freight to Fillmore for the witness**

and Rio Grande Motor Way occasionally picks up only that freight destined to points for which Rio Grande has competitors. (Ex. 70, pp.3 and 4).

Plaintiffs' Claim: One stated his belief (Ex.71) that certain shipments were delayed and that he could not explain the problem. A comparison of actual freight bills and bills of lading showed all shipments being delivered on time. (R., p.854).

Response: The witness testified that his freight has been left sitting on the dock by Uintah; therefore, even though the freight bill can show overnight service, it is actually two or three day service, whereas with Wycoff he receives the freight the following day. This situation has necessitated his running his own truck to pick up his freight. (R., p.858). The record establishes that Uintah has postdated freight bills. (R., pp.992-994).

Plaintiffs' Claim: A Roosevelt witness was asked about his complaints concerning interline service. His response was "Well, I believe it does because they have two freight tickets. I am not - I don't know if they are direct or anything about that. \* \* \*" (R., p.865). He was unaware of the ability of Uintah Freightways to provide direct single line service for him from Brigham City, Utah. (R., p.866).

Response: This witness was responding to a question about shipments from Provo which he had already explained were infrequent. The statement gleaned by appellant is out of context. The remainder of the witness' statement is, " . . . all I know is I order it from Provo and they ship it to Salt Lake and then it comes out here. It is one of the two [Link of Uintah] . . ." (R., p.865). The

confusion of this witness deals with Link and Uintah. When he complained to the Link driver that service was inadequate and the witness intended to use Uintah if Link did not improve, the witness was told it makes no difference since Link and Uintah are the same. (R., p.868). The witness has also received freight on a Uintah truck with a Link bill. (R., p.869).

Plaintiffs' Claim: PBI provides consistent overnight service from Salt Lake City, Utah to Nephi, Utah with deliveries between 8:30 and 11:00 every morning. (R., p.878 and 879).

Response: The witness testified, " . . . Palmer Brothers delivers here at approximately 8:30 in the morning which is six hours later than I can usually receive freight from Wycoff Company; nevertheless, that six hours is extremely important to a trucker whose livelihood depends on his transporting a load to market but is temporarily frustrated by a breakdown . . . " (Ex. 74, p.3). The witness wants Wycoff service so he will not need to send his man to Salt Lake City for shipments and lose twenty dollars per hour in the shop doing so. (Ex. 74, p.3, R., p.880).

Plaintiffs' Claim: Uintah provides consistent overnight service on inbound shipments to Brigham City, Utah, from Salt Lake City. (R., pp.904-907). When asked if he brought any documentary evidence with him to support his allegations pertaining to outbound shipments, he responded "I was not asked to do so. In fact, I have nothing with me." (R., p.909).

Response: The witness states that he has no complaint with inbound service since it is unimportant. His complaint

is that the only way he can compete with his competitors in Salt Lake City is to run his own freight in excess of 100 pounds per shipment because there is no direct service to many points he serves. (R., pp.906 and 907). Hardy Roberts of PBI testified that PBI and Uintah do not provide overnight service beyond the Wasatch Front on a regular basis. (R., p.987).

Plaintiffs' Claim: Still another attempted to document his complaints but his documents did not show delivery information. The only bill that did show delivery information showed overnight service performed [sic] by Uintah. (R., pp.916-918). The witness characterized the service of Wycoff as excellent and Uintah as "\* \* \* a little better. \* \* \*" (R., p.920).

Response: The testimony of the witness is that the exhibit is for illustrative purposes only, to show his company moves shipments in the weight categories for which Wycoff service is needed. (Ex. 78, p.3). The statement made by the witness describing the Uintah service as "a little better" was not in reference to Wycoff's service but was in reference to previous Uintah service which has forced him to drive to Salt Lake City to pick up his freight when he needs it quickly. (R., pp.920, 921; Ex. 78 p.3).

## ARGUMENT

### POINT I

THE SCOPE OF THE SUPREME COURT'S REVIEW OF DECISIONS OF THE PUBLIC SERVICE COMMISSION IS LIMITED.

The legislature has provided for the review of decisions of the Public Service Commission of Utah. (Utah Code Ann. § 54-7-16) but that review is a limited one:

The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the state of Utah. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review. (Utah Code Ann. § 54-7-16.)

This Court has on numerous occasions recognized the limited scope of its review of the decisions of the Public Service Commission in transportation cases. In what has become a landmark decision in the regulation of carriers in Utah, this Court noted the limitations on its scope of review as follows:

Our power of review is limited to questions as to whether the Commission in the exercise of its authority proceeded in the manner required by law, and whether the findings of the Commission are justified by the evidence. [Citations omitted.] . . . If there is in the record competent evidence from which a reasonable mind could believe or conclude that a certain fact existed, a finding of such fact finds justification in the evidence, and we can not disturb it. . . . Issuing a certificate of convenience and necessity is an act of the executive department of state government, and when done pursuant to law is not subject to judicial annulment. Mulcahy v. PSC, 117 P.2d 298, 299, 301 (1941).

In a more recent case this Court notes the special training and experience of the Commission and its staff as the reason for the broad deference given the Commission's decisions:

. . . Commission is staffed by personnel of training and experience in this field, it is vested with broad powers and its decisions and orders are endowed with considerable verity. They are subject to review by this Court but the review is limited. ". . . the review shall not be extended further than to determine whether

the Commission has regularly pursued its authority, . . . The findings and conclusions of the Commission on questions of fact shall be final and shall not be subject to review [Utah Code Ann. § 54-7-16].

Lake Shore Motor Coach Lines, Inc. v. Welling, 9 Utah 2d 114, 339, P.2d 1011, 1013, 1015 (1959).

See also, Lewis v. Wycoff Co., 18 Utah 2d 255, 420 P.2d 264, 266 (1966) and Garrett Freight Lines, Inc. v. Hunt, 19 Utah 2d 234, 429 P.2d 981, 982, 983 (1967).

In at least seventeen other cases this Court has noted the limited scope of its review of decisions of the Public Service Commission in transportation cases: Fuller-Toponce Truck Co. v. PSC, 99 Utah 28, 96 P.2d 722 (1939); Utah Light and Traction Co. v. PSC, 101 Utah 99, 118 P.2d 683, 691 (1941); Union Pac. R.R. v. PSC, 103 Utah 459, 135 P.2d 915, 918 (1943); Salt Lake and Utah RR Corp. v. PSC, 106 Utah 403, 149, P.2d 647, 648 (1944); Goodrich v. PSC, 114 Utah 2d 296, 198 P.2d 975 and 977 (1948); Collette v. PSC, 211 P.2d 185 (1949); Wycoff v. PSC, 119 Utah 342, 227 P.2d 323 (1951); Uintah Freight Lines v. PSC, 119 Utah 491, 229 P.2d 675 (1951); Ashworth Transfer Co. v. PSC, 2 Utah 2d 23 (1954); 268 P.2d 990, 995 (1954); Rudy v. PSC, 1 Utah 2d 223, 265 P.2d 400 (1954); Lake Shore Motor Coach Lines, Inc. v. Bennett, 3 Utah 2d 293, 333 P.2d 1061 (1958); Utah Freightways, Inc. v. PSC, 9 Utah 2d 414, 346 P.2d 1079 (1959); Milne Truck Lines v. PSC, 13 Utah 2d 72, 368 P.2d 590 (1962); Ashworth Transfer, Inc. v. Barton Truck Line, Inc., 14 Utah 2d 258, 382 P.2d 209 (1963); Lake Shore Motor Coach Lines, Inc. v. Salt Lake Transportation Co., 21 Utah

2d 422, 446 P.2d 416 (1968); Armored Motor Service v. PSC, 23 Utah 2d 418, 464 P.2d 582 (1970); PBI Freight Service v. PSC, No. 16212 (August 14, 1979).

The author of the instant Brief has found only four instances where this Court has reversed the Public Service Commission's decision involving the regulation of motor carriers in Utah. Union Pac. R.R. v. PSC, 132 P.2d 128 (1942); McCarthy v. PSC, 184 P.2d 220 (1947); Milne Truck Lines, Inc. v. PSC, 11 Utah 2d 365, 359 P.2d 909 (1961); and Lake Shore Motor Coach Lines, Inc. v. Bennett, 8 Utah 2d 293, 333 P.2d 1061 (1958). The only case relied upon by plaintiffs herein in which this Court reversed the Commission's decision is Lake Shore Motor Coach Lines, Inc. v. Bennett, 8 Utah 2d 293, 333 P.2d 1061 (1958). An examination of that case will show that plaintiffs' reliance thereon is misplaced. The applicant in that case (which happens to have been Wycoff Company) presented 42 public witnesses who testified in general concerning their need for Wycoff's service throughout the state. At the conclusion of the applicant's evidence a stipulation was entered into limiting the scope of the applicant's proposed service whereupon most of the protestants withdrew. Ultimately only two protestants appealed the final decision to this Court, two bus lines, Lake Shore Motor Coach Lines and Lewis Brothers Stages. Subsequent to the stipulation and withdrawal of the other protestants the remaining protestants called 102 public witnesses to testify concerning the adequacy of their service. The Court's language in that

case reveals that none of the 42 public witnesses testifying for applicant testified concerning any service deficiencies of the two plaintiffs Lake Shore Motor Coach Lines and Lewis Brothers Stages:

. . . [U]pon a survey of the record, we find no witness that made showing for the defendant: that he 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. (333 P. 2d at 1063-1064.)

A comparison of the Lake Shore case with the instant case show there is no similarity between the two. In the instant case 48 public witnesses testified on behalf of applicant Wycoff complaining of numerous specific inadequacies and service deficiencies on the part of plaintiffs herein. (See this Brief supra at 12-16.)

In Lake Shore the protesting plaintiffs called 102 public witnesses who testified concerning the adequacy of their existing service. (333 P.2d at 1063.) No public witnesses were called by the protesting plaintiffs in the instant case and their claims concerning the adequacy of the service being rendered by them are based entirely upon the self serving testimony of their own officers, employees and agents (Exs. 79-84) which the Commission found to be "lacking in candor and credibility to a serious extent." (See Findings of Fact Nos. 21 and 22 and this Brief supra at 17-19.)

The findings and conclusions of the Commission in this proceeding are overwhelmingly supported by the record and must be sustained on the review.

## POINT II

### THE PUBLIC CONVENIENCE AND NECESSITY REQUIRE THE SERVICE PROPOSED BY DEFENDANT WYCOFF.

The matters to be considered by the Commission in hearing an application for a certificate of convenience and necessity are set forth in Utah Code Ann. § 54-6-5 which provides in pertinent part as follows:

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, or issue it for the partial exercise only of the privilege sought, and may attach to the exercise of the right granted by such certificate such terms and conditions as in its judgment the public convenience and necessity may require, otherwise such certificate shall be denied. Before granting a certificate to a common motor carrier, the Commission shall take into consideration the financial ability of the applicant to properly perform the service sought under the certificate and also the character of the highway over which said common motor carrier proposes to operate and the effect thereon, and upon the traveling public using the same, and also the existing transportation facilities in the territory proposed to be served. If the Commission finds that the applicant is financially unable to properly perform the service sought under the certificate, or that the highway over which he proposes to operate is already sufficiently burdened with traffic, or that the granting of the certificate applied for will be detrimental to the best interests of the people of the state of Utah, the Commission shall not grant such certificate.

The phrase "public convenience and necessity" is not susceptible of precise definition but is dependent upon

the facts and circumstances of each case, Mulcahy v. PSC, 117 P.2d 298, 300-301 (1941); Union Pac. R.R. v. PSC, 103 Utah 459, 135 P.2d 915, 918 (1943); PBI Freight Service v. PSC, Utah Supreme Court No. 16212 at 3 (August 14, 1979). The determination of whether public convenience and necessity requires the proposed service is a policy issue within the sole province of the Public Service Commission and not subject to judicial review unless it appears that the Commission's findings are not supported by the record. Mulcahy v. PSC, 117 P.2d 298, 300-301 (1941).

In determining whether public convenience and necessity requires the proposed service, the Commission is required to take into consideration "the existing transportation facilities in the territory proposed to be served." (Utah Code Ann. § 54-6-5). But the Commission is not required to find that the present facilities are entirely inadequate. Ashworth Transfer Co. v. PSC, 2 Utah 2d 23, 268 P.2d 990, 995 (1954); Lake Shore Motor Coach Lines, Inc. v. Welling, 9 Utah 2d 114, 339 P.2d 1011, 1015 (1959).

Among the factors that are appropriate for the Commission's consideration in reviewing the existing transportation facilities is the necessity of those existing facilities to interline one with the other to effect delivery of their freight. PBI Freight Service v. PSC, Utah Supreme Court No. 16212 at 4 (August 14, 1979) and the issue of competition or lack thereof. Union Pac. R.R. v. PSC, 103 Utah 459, 135 P.2d 915, 918 (1943); PBI Freight Service v. PSC, *supra* at 2.

In the instant case the Commission received the lengthy testimony of the public witnesses. These witnesses testified as to a need for Wycoff's proposed service and complained of numerous serious service inadequacies in the existing transportation facilities. (See this Brief supra at 12-16.) The Commission listened to the testimony of the plaintiffs and their cross-examination by defendant's counsel. The Commission considered the present operating authorities of the plaintiffs and reviewed their transit studies and diversion studies. (See this Brief supra at 16-19.) The Commission considered the effect that additional competition would have upon the plaintiffs. (See the Commission's Finding No.22.) The Commission received un rebutted testimony concerning the character of the highways over which Wycoff proposes to operate and the effect of Wycoff's proposal thereon and its effect upon the traveling public using the same. (Ex. 10 p.14). The Commission received un rebutted testimony that the granting of the certificate applied for would not be detrimental to the best interests of the people of the state. (Ex. 10 p.14). The Commission considered the financial ability of applicant and the financial and operational feasibility of applicant's proposal. (This Brief infra at 44-45.) It heard evidence concerning and considered Wycoff's fitness to be granted additional operating authority. (This Brief infra at 45-49.) Having considered these and numerous other factors, the Commission concluded that the public convenience and necessity require the transportation

services proposed by defendant Wycoff. The plaintiffs' unsupported allegations that the Commission acted arbitrarily, capriciously or unreasonably are totally without merit.

### POINT III

DEFENDANT WYCOFF HAS THE FINANCIAL AND OPERATIONAL ABILITY TO PROPERLY PERFORM THE SERVICES SOUGHT HEREIN.

The Commission's findings 2-15 cover nothing but the present operations of Wycoff and how they relate to and support the conclusion that Wycoff's proposal in the instant case is both financially and operationally feasible. As is demonstrated on pages 4-12 of the statement of facts supra those findings are overwhelmingly supported by the record in this case. The plaintiffs' allegations that Wycoff's proposal is neither financially nor operationally feasible is nothing short of ludicrous.

Wycoff's Vice-President of finance appeared and testified concerning Wycoff's financial fitness. (Ex. 16). He presented to the Commission copies of the audited financial statements for Wycoff Company for the years ended December 31, 1976 and 1977. (Ex. 17). He also presented to the Commission copies of internally-prepared financial statements for the first six months of 1978 compared with the same period a year earlier and balance sheets as of June 30, 1978, 1977, and May 31, 1978. (Ex. 18). Based upon his education and experience and based upon his knowledge of Wycoff's financial condition and its proposal in the instant case he stated his opinion that Wycoff is financially able

to properly perform the service sought in this proceeding. (Ex. 16 pp.3 and 4). Mr. Casper's credentials, experience and opinion concerning Wycoff's financial fitness went entirely unchallenged. (R., pp.45-50 and 52-53). The record contains not a scintilla of additional evidence concerning Wycoff's financial fitness. For plaintiffs to pull a couple of figures from Wycoff's financial statements sponsored by Mr. Casper and seek this Court to conclude therefrom that Wycoff is financially unfit is a perfect example of the lack of merit in their appeal.

The first 15 exhibits in this proceeding (Exs. 1-15) many of which are multi-paged, were submitted strictly for the purpose of showing the operational feasibility of Wycoff's proposal. Again there is not a scintilla of evidence in rebuttal. Plaintiffs allegations to the contrary are again totally lacking in substance and merit.

#### POINT IV

#### DEFENDANT WYCOFF IS A FIT AND PROPER PARTY TO BE GRANTED ADDITIONAL OPERATING AUTHORITY.

Plaintiffs claim that defendant Wycoff is not a fit and proper party to be granted additional operating authority because the public witnesses testified they are "splitting" shipments between different days to satisfy the 100 pound weight restrictions in Wycoff's existing authority, that Wycoff has historically failed to file its express schedules with the Commission, that Wycoff does not provide daily overnight service to all points within the state of Utah, and that one of Wycoff's "agents" has

not properly placarded her delivery truck. (Brief of Plaintiffs at 17-25). An examination of these claims, even as stated in plaintiffs' Brief, will show them to be so lacking in substance as to be totally without merit.

There can be no question about the fact that the shipping public of the State of Utah using Wycoff's services manage their shipping practices so as to take the greatest advantage of Wycoff's superior service by dividing their shipments into pieces weighing under 100 pounds each and shipping them on consecutive days where possible. (See e.g. Ex. 60, p.3, Ex. 66 p.2, R. pp.841-842 and 878). Even assuming for the moment that such a practice violates the restriction contained in Wycoff's present operating authority, there is no evidence in the record indicating that Wycoff in any way encourages or participates in this practice and the plaintiffs have failed to demonstrate otherwise. If such practice is a violation it is a violation by Wycoff's customers, not by Wycoff or its officers, agents or employees. There can, therefore, be no willful violation shown on the part of Wycoff in this regard.

The failure of Wycoff to file its express schedules and modifications thereof with the Commission was brought to the attention of the Commission and the plaintiffs by Mr. Bruce Wycoff in his direct prepared testimony. (Ex. 1, pp. 13 and 14). No other evidence exists in the record concerning this alleged violation. As Mr. Wycoff testified, they have never filed such schedules with the Commission and such failure has been simply a matter of oversight by

both Wycoff and the Commission. Furthermore, additions to their base certificate have never required a similar filing and they are apparently the only carrier in the state of Utah having such a requirement imposed upon them. (Ex. 1, pp. 13 and 14).

Likewise, Wycoff's failure to provide daily service to two points in the state of Utah was also brought to the Commission's attention in the direct testimony of Mr. Bruce Wycoff. (Ex. 1, pp. 14-16). The two points in question are Laketown which receives service at least two days per week and Bullfrog which receives service three days per week. (Ex. 1 p.15). As to overnight service, Wycoff provides same day or overnight service on 95% of all shipments handled within the State of Utah and second day delivery on an additional 4% of all such shipments, notwithstanding weather, equipment failures, and a wide variety of commodities being handled (including commodities requiring special handling and shipments substantially exceeding 100 pounds in many cases). (Ex. 1, p.16). These alleged violations have been the subject of extensive comment by the parties. (R. pp. 1264-1318 and 1351-1410). On its own motion, the Commission sought additional briefs on the "split shipment" issue and the "agency" issue. (R. p.1217).

The Commission, in its findings, carefully reviewed the historical and factual circumstances of plaintiffs' allegations in regard to Wycoff's fitness (Findings 24-30) and concluded (1) that the Commission never intended to

prohibit the shipping public from splitting shipments for shipment on consecutive days; (2) that the one alleged "agency" violation was not shown to be willful and that the Commission has pending before it the whole unresolved issue of agency operations in the state of Utah; (3) that service to every point in the state of Utah except Laketown and Bullfrog with next day service provided on 95% of all shipments handled by Wycoff is substantial compliance with the specific service requirements contained in Wycoff's operating authority; and (4) that the unique requirement in Wycoff's authority for filing of its express schedules is antiquated, and in any event, the purpose of the Commission in establishing such a requirement has been met by Wycoff's extraordinary service. (Findings 24-30). These findings and conclusions are supported by the record. (Ex. 1 pp. 11-16, Applicant's Objection and Memorandum in Support Thereof to Protestant's Motion to Dismiss beginning at 1283, and Applicant's Brief in Response to Specific Issues beginning at 1351.)

In any event, it is within the exclusive province of the Commission to determine Wycoff's fitness:

Our statutes do not prohibit granting of a permit to one who has violated the law. The matter of illegal operations is certainly an important factor for the Commission to consider, but it is still for that tribunal to determine whether, under all the circumstances shown by the evidence, the statutory requirements for issuance of a permit have been met, and the public interest and the interest of the parties involved will be served by granting the application. (Uintah Freightlines v. PSC, 119 Utah 491, 229 P.2d 675, 679 (1951)).

See also Utah Freightways, Inc. v. PSC, 9 Utah 2d 414, 346 P.2d 1079, 1082 (1959) and Milne Trucklines v. PSC, 13 Utah 2d 72, 368 P.2d 590, 592 (1962).

Wycoff is a fit and proper party to be granted additional operating authority and the Commission's findings to that effect are clearly supported by the record and the applicable law.

### C O N C L U S I O N

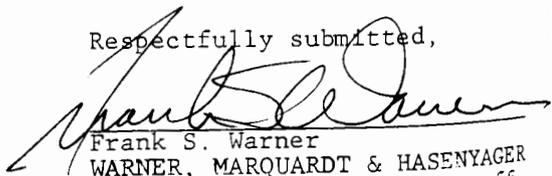
The Public Service Commission received evidence from 57 witnesses in this proceeding. Their oral testimony is spread across 1220 pages of the transcript. In addition, the Commission received 84 exhibits most of which were several pages in length. Some of the exhibits with attached appendices exceeded 100 pages in length. The Commission called for and received briefs on every aspect of the issues before it. It handled the receipt of evidence even-handedly and considered each point raised by the applicant and the protestants carefully and at length. The Commission determined that the public convenience and necessity require the new and unique service proposed by Wycoff. They determined that Wycoff had the financial ability to properly perform the service sought. They took into consideration the character of the highways over which Wycoff proposes to operate and the effect of the proposed operation thereon and the effect upon the traveling public using the same. They heard a voluminous amount of evidence concerning the existing transportation facilities and carefully considered their adequacies and inadequacies and the effect that the

granting of the proposed application would have thereon. The Commission concluded that it would be in the best interests of the people of the state of Utah to grant to the defendant Wycoff Company, Incorporated the additional operating authority sought in this proceeding.

Plaintiffs herein have wholly failed to demonstrate any lack of support for the Commission's findings and conclusions. The plaintiffs have historically each enjoyed a monopoly or near monopoly in transporting general commodities in each of their territories. In those few instances where the operating authorities of the plaintiffs overlap the plaintiffs have conspired together to effectively eliminate any competition. The position of plaintiffs is best summarized at page 34 of their Brief where they boldly assert, "A grant of authority to Wycoff can only work to upset the present transportation scheme."

The people of the state of Utah have suffered for years from the inadequacies of the "present transportation scheme." The public convenience and necessity require the proposed service of Wycoff Company, Incorporated. The decision of the Commission is overwhelmingly supported by the record and applicable law. It is not arbitrary, capricious or unreasonable and this Court should not set aside that decision.

Respectfully submitted,



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CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of the foregoing Brief to each of the following parties: Rick J. Hall, Attorney for Plaintiffs, Post Office Box 2465, Salt Lake City, Utah 84110; and upon Mr. Arthur Allen, Jr., Assistant Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114 by first-class mail, postage prepaid, this 16th day of October, 1979.

  
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Suzann Fries