

1954

W. S. Hatch Co. v. Public Service Commission of Utah et al : Petitioner's Brief

Utah Supreme Court

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Case No. 8182

JUN 14 1954

IN THE SUPREME COURT
of the **FILED**
STATE OF UTAH
JUN 23 1954

W. S. HATCH CO., a Utah corporation,

Clerk, Supreme Court, Utah

Petitioner,

— vs. —

PUBLIC SERVICE COMMISSION
OF UTAH, HAL S. BENNETT,
DONALD HACKING, STEWART
M. HANSON, ITS COMMISSION-
ERS; THE DENVER AND RIO
GRANDE WESTERN RAILROAD
CO., a Delaware corporation; THE
UNION PACIFIC RAILROAD COM-
PANY, a Utah corporation; and GUY
PRICHARD, dba Guy Prichard
Transfer,

Respondent.

PETITIONER'S BRIEF

MARR, WILKINS & CANNON
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PETITIONER'S BRIEF

STATEMENT OF THE CASE

This matter is before the Supreme Court on a Writ of Review for the purpose of reviewing the proceedings, findings and report and order of the Public Service Commission of Utah in the above captioned matter. Petition

for rehearing was filed by petitioner with the Public Service Commission on March 5, 1954. On March 12, 1954, the Public Service Commission issued its order denying said petition for rehearing and on April 9, 1954, petitioner filed its petition for a Writ of Review with the Supreme Court, and on April 9, 1954, said Writ was issued.

STATEMENT OF FACTS

W. S. Hatch Co., petitioner herein, is a corporation duly organized and existing under the laws of the State of Utah. On August 19, 1953, petitioner filed its application with the Public Service Commission of Utah for a certificate of convenience and necessity authorizing petitioner to operate as a common carrier by motor vehicle for the transportation of acid (including used and contaminated acids) in bulk, in tank vehicles over irregular routes from and to all points and places within the State of Utah not then served by applicant under its existing authority. At the time said application was filed applicant held authority to transport acid as a common carrier, in bulk, in tank vehicles for hire over irregular routes between Woods Cross, Utah, on the one hand and all points and places within Salt Lake County on the other as well as to, from and between all points and places in Salt Lake County and four-tenths (.4) of one mile beyond the limits of Salt Lake County and into Tooele County as well as to, from and between all points and places within Salt Lake County. (R. 13)

After due notice, hearing on said application was had on December 1 and December 2, 1953, before the Public Service Commission at its offices in Salt Lake City. The Denver and Rio Grande Western Railroad Co., the Union Pacific Railroad Company, and Guy Prichard, d/b/a Guy Prichard Transfer, hereinafter referred to as Prichard, appeared at the hearing protesting petitioner's application.

Petitioner challenged the right of protestant Prichard to appear in this case (R. 106) on the grounds that Prichard's authority did not cover the transportation of acid and for that reason he had no right to participate in the hearing. After some argument the Commission ruled that Prichard had sufficient interest to participate in the hearing, but reserved the ruling on the question of the construction of his authority to determine whether or not it included the transportation of acid.

Commissioner Hacking made the following statement as to the necessity of construing Prichard's rights in order to determine the issues in the instant application (R. 111).

“COM. HACKING: Of course, in testing the need for the services proposed by the Applicant in this case, I suppose the fact as to whether or not Prichard offers a service in a part of the territory covered by the application would be very material to the consideration of the whole question.”

The evidence shows that petitioner maintains a large number of tractors, trucks and tank truck equipment, the detail of which is reflected on petitioner's equipment list (Ex. 1, R. 12). The equipment owned and operated by petitioner for the transportation of acid in bulk consists of three semi-trailers, one full four-wheel trailer, a tank truck and various trucks and tractors for use in connection therewith (R. 12, 87).

Mr. Carl O. McFarland testified in behalf of the Solar Corporation in Ogden, Utah, that his company manufactures storage batteries and uses 200-250 tons of sulphuric acid per year (R. 165). He testified further that storage facilities maintained by his company for acid were such that it became necessary to deplete their inventory to a dangerously low point before they had capacity to take a full railroad carload (R. 166). Railroad tank cars have a capacity of approximately 6,000, 8,000 or 10,000 gallons, which amounts to a minimum of twice the capacity of a tank truck and/or trailer load (R. 88). He also testified that rail service is slow and that delivery by railroad necessitated the maintenance of a larger inventory than would be the case if his company had truck service available to supplement rail service (R. 167, 169). He further testified that the combination of truck and rail service would afford his company an opportunity for improving safety, inventory economics and savings on pumping expense. The Commission made a finding in accordance with the testimony outlined above (R. 24) and

based on such finding the Commission granted petitioner authority to transport acid between Salt Lake County and Weber County (R. 27). Of this finding and order petitioner makes no complaint.

Mr. Harold Ellison, the production manager for Layton Sugar Company, whose plant is located in Layton, Davis County, Utah, gave similar testimony regarding the need for truck service for the transportation of acid to the Layton Sugar Company plant. The Commission likewise found that public convenience and necessity required the services of petitioner for the transportation of acid from Salt Lake County to all points and places in Davis County (R. 24, 27). Of this finding and order petitioner makes no complaint.

Testimony was given by witness John A. Riddle, the assistant director of the Processing Division of the Atomic Energy Commission, Grand Junction, Colorado, to the effect that sulphuric acid was used in treating uranium ore by what is known as the carbonate or soda ash leaching process (R. 212); and that as a result of the tremendous increase in the exploration, mining and production of uranium ore throughout the Colorado Plateau, which extends to the Henry Mountains in Garfield and Wayne Counties, as well as in the Marysville area in Puite County (R. 210) and in the Southeastern part of the State and the Big Indian area in San Juan and Grand Counties (R. 215), the consumption of sulphuric acid in the southeastern part of the State of

Utah would increase from approximately three to five tons per day, or an average of four tons per day (R. 212) to approximately 25 to 50 tons per day at the Monticello Processing Plant (R. 213). A tank truck trailer can transport approximately 22 tons of acid in one load (R. 88). Thus the increased production at the Monticello plant would necessitate approximately two loads per day compared to the present use of acid requiring approximately one load per week, or a consumption at Monticello alone of approximately 14 times the present use. Mr. Riddle also testified that it will be necessary in the very near future to construct a new processing mill to process uranium ores now being mined in the Big Indian area in San Juan and Grand Counties, and that if such a mill is not built by private concerns the Atomic Energy Commission will build it (R. 216-217). He further testified that the acid consumption at such mill would amount to 100 to 150 tons of acid per day, or five to seven truck loads per day (R. 218). Furthermore, this witness testified that the consumption would be sporadic, thus requiring even greater demands for transportation at times of peak consumption. It is undisputed that there is no rail service to Monticello or to San Juan County or beyond Thompson, in Grand County. The only source for new or unused acid in the State of Utah and to which the outlined testimony refers is the Garfield Chemical Company located at Garfield, Salt Lake County (R. 94). The small amount of acid presently being used at the Monticello plant is now being transported by rail from Garfield to

Thompson and transported by truck from Thompson to Monticello. There are various sources throughout the state for used or spent acid (R. 169-171).

Mr. John W. Blackburn, the purchasing agent and mines auditor of the Vanadium Mines Corporation of America, testified on behalf of that company as to the present and contemplated consumption of acid at the processing mill located at White Canyon or Hite, in San Juan County. He stated that his company was planning to expand the operation of such processing mill from approximately 79 tons of acid to approximately 400 tons of acid per month (R. 237). The acid presently used at the White Canyon Mill is being transported by Vanadium Corporation of America in its own equipment. Mr. Blackburn stated that his company desired the services of a common carrier (R. 237) and would use the services of the petitioner herein if authority for such transportation was granted (R. 238). He further stated that Prichard had delivered one load of acid for his company, and that he was informed that Prichard refused to make further deliveries and for that reason he was not using Prichard's service at the present time (R. 232-236).

Paul Blanchard of Salt Lake City, who is employed by the Utah Power & Light Co. as a steam production engineer, testified that his company will require approximately 2,500 pounds of acid per day at the steam-electric generating plant now being constructed at Castle Gate, Utah (R. 153). Mr. Blanchard testified that availability

of both rail and truck service was necessary because of limited storage facilities and unusual problems in connection with the terrain in Price Canyon where the plant will be located (R. 153, 154). The Commission made a finding that public convenience and necessity required truck transportation of acid to Carbon County (R. 23). It further found that public convenience and necessity required additional truck transportation to the southeastern part of the State (R. 25). Notwithstanding such findings, the Commission denied petitioner's application as it related to these areas. The Commission's report and order was issued on February 23, 1954, granting petitioner authority to transport acid from Salt Lake County to points and places in Davis and Weber Counties, and in all other respects it denied petitioner's application.

STATEMENT OF POINTS

POINT I.

THE COMMISSION ERRED IN CONSTRUING THE RIGHTS OF GUY PRICHARD TRANSFER TO INCLUDE AUTHORITY TO TRANSPORT ACID IN BULK IN TANK TRUCKS.

POINT II.

THE COMMISSION ERRED IN DENYING PETITIONER'S APPLICATION AS TO ALL POINTS AND PLACES IN THE STATE OF UTAH EXCEPT DAVIS AND WEBER COUNTIES.

ARGUMENT

POINT I.

THE COMMISSION ERRED IN CONSTRUING THE RIGHTS OF GUY PRICHARD TRANSFER TO INCLUDE AUTHORITY TO TRANSPORT ACID IN BULK IN TANK TRUCKS.

The report and order issued by the Commission contains the following language (R. 25-26) :

“Guy Prichard Transfer has for many years transported acid, in bulk, from the railhead at or near Thompsons, Utah, to the plant at Monticello, Utah, and has storage facilities on the railroad trackage and special tank truck equipment suitable for this operation. Prichard formerly transported bulk acid on a contract carrier permit. Upon the issuance of the certificate of convenience and necessity which Prichard now holds, the contract carrier permit issued to Prichard was cancelled under the theory that the transportation of acid in bulk would fall within the commodity description contained in the certificate of convenience and necessity issued Prichard. In determining the issues in this matter we find that Prichard has authority to transport acid, in bulk, in tank trucks, specially designed and equipped for that purpose. The acid tank trailer operated by Prichard is now being used only part-time for the transportation of acid from Thompsons to Monticello, Utah, and is otherwise idle. In addition to the acid hauling equipment which Prichard now owns and operates, he has other equipment which might be used in connection with acid tank trailers.”

The following footnote is contained on page 5 of the Commission's report and order (R. 26) :

Footnote 1: "The question as to whether the transportation of acid, in bulk, is included in the authority issued to Prichard by certificate of convenience and necessity No. 741 was made an issue in this case. Since there may be some question as to the language of said certificate in this regard and since Prichard has been transporting acid in bulk since 1946 under the assumption that his authority covered such transportation, it may be necessary for the Commission in a separate order to specifically include in the certificate of convenience and necessity No. 741 authority to transport acid, in bulk, in special tank truck equipment."

The pertinent parts of the authority under which Prichard operates, i.e., certificate of convenience and necessity No. 741, are as follows (R. 20) :

"To operate as a common motor carrier by motor vehicle for the transportation of :

1. Commodities which by reason of their size, shape, weight, origin, or destination require equipment of (or) service of a character not regularly furnished by regular common carriers at the regular line rates, which commodities shall be such as, but shall not be limited to the following: Gasoline tanks, Boilers, Pipes, and Tubing to be used in connection therewith; Cable, Bridge, or Structural Iron or Steel; Concrete Mixers, Culverts, Explosives, Grading and Road Equipment, Harvestors and Threshers; Locomotives, Machinery and Drag-line outfits; Piling, Pipe, Pole Line Construction Material; Telephone or Telegraph Poles;

Rails, Smokestacks; and Heavy Timbers; Machinery, Materials, Supplies and equipment incidental to, or used in, the construction, development, operation, and maintenance of facilities for the discovery, development, and production of natural gas and petroleum or minerals.

2. Commodities in connection with the transporting of which is rendered a special service in preparing such commodities for shipment or setting up after delivery or otherwise rendering a needed service not a part of the ordinary act of transporting and not now regularly furnished by other regular common carriers for the regular line rates.

3. Campsite equipment, camp supplies, fixtures and accessories which shall be transported to camps or to construction sites or locations.

4. All parts, supplies, equipment and appurtenances necessarily connected or to be connected or used with any of the articles described in paragraphs one and two, whenever such parts, supplies, equipment and appurtenances are a part of the same movement.

To perform the services defined between points in Utah where the origin or destination of the movement is in Uintah, Duchesne, Carbon, Emery, Wayne, Grand, or San Juan Counties, on call, over irregular routes."

The Commission apparently recognizes the fact that to construe the above quoted language to include transportation of acid, in bulk, does violence to the English language, and thus reference is made in the Commission's order, to some contract carrier permit which Prichard

formerly held. There is not one shred of evidence in the entire record with regard to what was contained in that contract carrier permit nor from which points it authorized Prichard to haul. There is nothing in the record to indicate the commodities which such permit authorized Prichard to haul, nor the contract or contracts under which the haul was made. The only reference in the record to such permit is made by Commissioner Hacking (R. 107) as follows:

“As I think it (I) stated once before in another case, my recollection is that Prichard held some acid hauling—contract acid hauling authority. He prosecuted an application for specialized hauling as a common carrier, and the Commission in issuing—and the Commission issued some common carrier authority in that case, and when the common carrier authority was issued his specialized hauling, the contract authority held by Prichard was cancelled, under the assumption that the common carrier authority issued included the contract hauling, and it is my understanding that that has been the way the Commission has treated Prichard’s authority since that time.”

Certainly this statement by a Commissioner, sitting in judgment on this case, as to what his recollection was as to some contract carrier authority which Prichard did not see fit to make a part of this record, cannot be considered evidence of any nature.

The effect of the Commission’s order is to grant Prichard authority to transport acid between any and all points in the State of Utah where the point of origin or

destination of the movement is in Uintah, Duchesne, Carbon, Emery, Wayne, Grand or San Juan Counties, that is, the Commission has granted Prichard authority to haul acid throughout the entire area covered by his authority, which can be to *any* point within the state. This it does based upon a recollection of a pre-existing *contract carrier permit* which has been cancelled for many years. Even if there were some evidence in the record regarding this contract carrier permit it certainly could not be the basis for extensive common carrier rights without an additional showing on proper application by Prichard.

A contract carrier is defined in Section 54-6-1, U.C.A. 1953 as follows:

“‘Contract motor carrier of property’ means any person engaged in the transportation by motor vehicle of property for hire and not included in the term common motor carrier of property as hereinbefore defined.”

The same section defines a common carrier as follows:

“‘Common motor carrier of property’ means any person who holds himself out to the public as willing to undertake for hire to transport by motor vehicle from place to place, the property of others who may choose to employ him.”

This court in the case of *McCarthy et al. v. Public Service Commission, et al.*, 111 Utah 489, 184 P. 2d 220, defined a contract carrier as one who entered into individual contracts for each job and did not hold himself

out to the public generally. The court quoted with approval the definition of a contract carrier found in United States Code Annotated, Title 49, Section 303 (a) (15) as follows:

“The term ‘contract carrier by motor vehicle’ means any person which, under individual contracts or agreements, engages in the transportation . . . by motor vehicle of passengers or property . . . for compensation.”

In the case of *Lowe, et al. v. Public Service Commission, et al.*, 116 Utah 376, 210 P. 2d 558, this court again construed the term contract carrier and held that separate corporations which entered into an agreement to form an association to transport their own separate goods were contract carriers.

A contract carrier permit merely authorizes one to transport goods under a specific contract or agreement with a specific person, corporation or association. It is not and cannot be the basis for common carrier authority. The error of the Commission is more clearly pointed up when it is remembered that there is absolutely no evidence in this record as to the commodity, contract, person, origin or destination supposedly contained in the alleged contract carrier permit formerly held by Prichard which is the basis of the Commission's order.

The question now arises as to whether the language of the certificate of convenience and necessity held by Prichard and hereinabove quoted can be fairly construed

to include the transportation of acid in bulk in tank truck vehicles. Prichard's counsel maintains that it does. Although the Commission chooses to base the extension of Prichard's authority on the vague contract carrier rights before mentioned, Prichard's counsel contends that the existing certificate of convenience and necessity includes such authority as is shown from the following quotation from the record (R. 106).

“MR. BOYLE: If the Commission please, I raise a question as to the right of Prichard Transfer to appear in this case.

“As I read their rights, I don't see that they include acid at all. I understand that they are making one isolated haul, but I don't even know under what authority they make that haul—but I challenge their right to protest in this hearing and maintain that their rights do not cover the transportation of acid.

“MR. FINLINSON: Well, we submit it, Gentlemen. We have been over this in previous hearings. We submit that we are entitled under our authority to haul acid *in the area* we are permitted to haul, and we are here properly as protestants, and we submit it.

“COM. HACKING: Well, what is your position on that? We did discuss this in another case, but it hasn't been discussed fully in this case, has it?

“MR. FINLINSON: Well, our position is that *under our authority we can haul acid, in that acid requires special equipment, and under our authority we can haul it.*

"You are familiar with our authority, I think, and the broad language of the—with the approval of the Commission we have been hauling it since this authority was issued. (Emphasis added.)

(R. 109, 110):

"MR. FINLINSON: Gentlemen, I call your attention to paragraph 2 of his authority:

'Commodities in connection with the transporting of which is rendered a special service in preparing such commodities for shipment or setting up after delivery or otherwise rendering a needed service not a part of the ordinary act of transporting and not now regularly furnished by other regular common carriers for the regular line rates.'

Now, gentlemen, I submit that that covers the hauling of acid, and we have been hauling it, and whatever Mr. Pritchard might have said in any statement does not limit or restrict his authority, and the Commission has got to interpret it."

The first paragraph of Prichard's authority gives him the right to transport:

"Commodities which by reason of their size, shape, weight, origin or destination require equipment of (or) service of a character not regularly furnished by regular common carriers at the regular line rates, which commodities shall be such as, but shall not be limited to the following: Gasoline tanks, Boilers, Pipes, and Tubing to be used in connection therewith; Cable, Bridges, or Structural Iron or Steel; Concrete Mixers, Culverts, Explosives, Grading and Road Equipment, Harvesters and Threshers; Locomotives, Machinery and Drag-line outfits; Piling, Pipe, Pole Line Con-

struction Material, Telephone or Telegraph Poles; Rails; Smokestacks; and Heavy Timbers; Machinery, Materials, Supplies and equipment, incidental to, or used in the construction, development, operation, and maintenance of facilities for the discovery, development, and production of natural gas and petroleum or minerals."

We submit that under the familiar rule of ejusdem generis the most compelling argument that acid in bulk in tank truck vehicles is not included within this paragraph consists of a mere reading thereof. Each and every one of the commodities mentioned in this paragraph is a large, bulky, heavy piece of solid equipment which requires special cranes, winches and rigs for the loading and unloading thereof. When Prichard's authority was originally granted it was the subject of an appeal to this court. See *Uintah Freight Lines, et al. v. Public Service Commission, et al.*, Utah, 223 P. 2d 408. The following quotations taken from this court's opinion in that case indicate the nature of Prichard's authority as construed by the court, Commission, counsel and Prichard himself:

"Mr. Prichard, who resides in Price, advertises and holds himself out in eastern Utah as a carrier of heavy commodities and equipment. He owns six trucks equipped with winches and six trailers . . . Prichard has loaded and hauled commodities weighing as much as twenty-five tons on one of his trailers.

* * *

“One Mike Gamber . . . testified in behalf of Prichard’s application. He testified that while it had been necessary to employ the services of a carrier of *heavy commodities and equipment* only once in the past twelve years, it would be a matter of convenience” to have Prichard’s service. * * *

“J. L. Larsen . . . testified that (he) . . . had the need occasionally for the services of a *carrier of heavy commodities* and that it would be a matter of convenience for the company to employ a person in Price * * *

“George Jackson . . . testified . . . that he occasionally has the need of the services of a *carrier of heavy commodities and equipment* in connection with his business and that it would be convenient for him to be able to employ Prichard . . .” (Emphasis added.)

Reference is made to the text of the entire opinion in this case whereby it is most evident that everyone concerned construed the authority which he had sought and obtained from the Commission, as being for the transportation of heavy equipment. This authority is the identical authority now held by Prichard and at this late date construed by the Commission as including acid.

There is little authority that can be cited to show the gross error in such a construction. What the Commission has done is to enlarge the rights of Prichard based upon a showing made by petitioner. In the recent case of *Peterson v. Public Service Commission*, Utah, 266 P. 2d 498, this court reversed an order of the Public Service Commission which attempted to construe

the phrase between Salt Lake City and Provo as excluding transportation from Salt Lake City to Provo. In that case as in this one the Commission attempted to construe this authority in a collateral proceeding. An attempt was made to justify the Commission's action by citing the time-honored rule that the Supreme Court will not disturb a finding of fact made by the Commission on competent evidence. This court properly pointed out that such a construction of authority was not a finding of fact but a conclusion of law and stated that:

"If it were permissible to go back of the language and contradict its plain terms, intolerable confusion and uncertainty would exist with regard to operating rights . . ." (Emphasis added.)

The court further stated:

"Such attempted refinement does violence to the ordinary meaning of words."

The Commission's action in the case at bar parallels its action in the Peterson case, *supra*. It is an attempt to vary the plain, unambiguous language of Prichard's certificate in a collateral proceeding without justification whatever.

Paragraph 2 of Prichard's authority gives him the right to transport

"Commodities in connection with the transportation of which is rendered a special service in preparing such commodities for shipment or setting up after delivery or otherwise rendering a

needed service not a part of the ordinary act of transporting and not now regularly furnished by other regular common carriers for the regular line rates."

First of all, this paragraph must be read in connection with paragraph 1 as it relates to "heavy equipment." Certainly there is no special service necessary on behalf of the carrier in preparing acid for shipment or in setting it up after delivery, nor is there any other special service to be rendered not a part of the ordinary act of transportation. Acid is loaded and unloaded by the use of a common ordinary air hose inserted in the tank containing acid, the pressure from which forces the acid to flow out of the tank into the receptacle receiving the acid. This air hose is in all instances furnished by the shipper or the consignee (R. 176, 177). It is under no stretch of the imagination a special service rendered by the carrier. There is less service rendered in connection with loading or unloading acid than in the case of loading or unloading boxes of canned goods or any other ordinary commodity. There is absolutely no service rendered by the carrier in preparing the commodity for shipment since this is done by Garfield Chemical Company. Prichard's counsel attempted to elicit from witness Hatch testimony that acid equipment was special equipment by the following questions: (R. 120)

"Q. Now, Mr. Hatch, referring to Exhibit 1, you have your first item that you stated was used in the transportation of acid is your item 15-A, which is described as a Utility semi-trailer; is that correct?

A. Yes.

Q. Now, describe that equipment, if you will, please?

A. Well, that is a 3500 gallon tank, steel pressure tank, with pressure valves on it for the purpose of hauling acid, sitting on a Utility—in fact Utility Built it—on a Utility trailer. The utility part is the underneath part, the carriage part.

Q. The wheels and the frame?

A. Yes.

Q. That is specially constructed to haul the tank, is it? — for the tank to sit on it?

A. In this case it was.”

And again (R. 125) :

“Q. And that you had this tank built specially to haul acid?

A. Yes.”

And again (R. 127) :

“Q. So that you have to have specialized equipment to haul it?

A. Yes.”

This attempt to have the witness Hatch state that acid equipment is specialized equipment actually has no bearing on the question. Prichard's authority is limited to transportation of commodities “in connection with the transporting of which is rendered a *special service in*

preparing such commodities for shipment or setting up after delivery or otherwise rendering a needed service." His authority does not relate to special equipment and in any event does not relate to tank truck equipment. If it did his authority would allow him to transport gasoline, fuel oil, crude oil, road oil, asphalt and all petroleum products transported in tank trucks, all of which require the same type of "special equipment" needed for the transportation of acid in bulk. We doubt if even Prichard would go as far as to make such a contention.

On redirect examination Mr. Hatch clarified what he meant by "special equipment" (R. 141).

"Q. . . . I call your attention to the other equipment that you show on your equipment list. What is that generally used for other than this acid equipment? What do you haul in it?

A. We haul gasoline, diesel, light fuels, heavy fuels, road oil and asphalt.

Q. And is that all tank truck equipment?

A. Yes.

Q. And is it specially constructed to comply with the ICC regulations and the regulations of the Public Service Commission?

A. Yes.

Q. And would you consider that equipment to be specialized equipment?

A. Yes."

Paragraphs 3 and 4 of Prichard's authority relate solely to campsite equipment, camp supplies, fixtures and accessories and supplies and equipment and appurtenances connected with the commodities described in paragraphs 1 and 2 whenever they are part of the same movement. There is just as much justification for construing this language as including acid in bulk in tank truck vehicles as there is in construing paragraphs 1 and 2 to include such commodity.

We submit that Prichard's authority does not include acid and that the Commission's finding that it does whether based upon a contract permit which was not in evidence or upon a tortured construction of the language itself, is error.

POINT II.

THE COMMISSION ERRED IN DENYING PETITIONER'S APPLICATION AS TO ALL POINTS AND PLACES IN THE STATE OF UTAH EXCEPT DAVIS AND WEBER COUNTIES.

Notwithstanding the fact that the Commission found that public convenience and necessity required the services of truck transportation of acid in bulk in tank vehicles in various portions of the state, it denied petitioner's application for such authority except for transportation from Salt Lake County to Davis and Weber Counties. *This action was based upon the erroneous conclusion that Prichard had authority to transport acid in various counties throughout the state.* The error urged in

this respect is treated under Point No. 1. However, in addition to this error we submit that apart from a construction of Prichard's authority the Commission erred in denying the stated portions of petitioner's application for two reasons: 1. Even if Prichard's rights specifically included acid he does not maintain sufficient equipment to satisfy the acid transportation needs in this state. 2. Since no motor carrier has authority to transport acid in the State of Utah except the petitioner public convenience and necessity require the granting of petitioner's application in its entirety.

Mr. Prichard testified on direct examination that he had only one tank which he could use in the transportation of acid (R. 257).

“Q. (By Mr. Finlinson) All right, describe the equipment which you have that is used in your acid haul?

A. Well, at the present time we have a Diamond-T 1953 tractor with a 275 Cummings motor, and I have an acid tank built by the Lang Company. It is forty-two feet long—or forty feet long, forty-two inches in diameter. The capacity is around about 2700 gallons.

Q. And is that hauled by this Diamond-T tractor?

A. Yes.

Q. All right, what else?

A. That's all we use is that one tank and the tractor.”

On cross examination Mr. Prichard admitted that the tractor was used for heavy equipment hauling and was not limited to acid transportation (R. 265).

“BY MR. BOYLE:

Q. Mr. Prichard, this money that you have got invested in acid equipment is solely the money you have in your tank; is that right?

A. Storage tank and air compressor.

Q. You use your tractor for other hauls as well, do you not?

A. Oh, yes.”

The storage tank and compressor which Mr. Prichard refers to is the one located at the railhead at Thompson. It is a stationary tank and cannot be used for transportation. The testimony in this case shows that there will be need in the near future for in excess of 10 loads of acid per day to various parts of the state as divergent as San Juan and Weber Counties. Even if Prichard's authority included acid, which it does not, it was error for the Commission to deny petitioner's application on the ground that Prichard had acid authority. This court has held, in accordance with the general rule and decisions of other state and federal courts, that the Commission should look to future requirements as well as present ones. See the case of *Mulcahy, et al. v. Public Service Commission, et al.*, 101 Utah 245, 117 P. 2d 298. In that case the court stated:

“The statute should be so construed and applied as to encourage rather than retard mechan-

cal and other improvements in appliances and in the quality of the service rendered the public. . . . and should look to the *future* as well as the present, providing not only for present urgent needs, *but such as may reasonably be anticipated from the probable growth of the population, industry, and community development.*" (Emphasis added.)

Since there is no motor carrier authorized to transport acid in the state except petitioner, and inasmuch as the evidence clearly shows that truck transportation performs a different service from rail transportation, and is a necessary adjunct to rail transportation, and inasmuch as a large portion of the state is without rail service of any kind, we submit that it was error for the Commission to deny petitioner's application for statewide authority. The evidence shows that spent acid is available at several points throughout the state and that this acid is used in various industries (R. 250, 251) and that new industries requiring the use of acid are coming into being (R. 251). It is not in the public interest to restrict the rights of petitioner to specific counties or points particularly where there is no such service available throughout the state. To require a carrier to make a new application for each specific point to which service is needed from time to time, when there are no other authorized carriers in the state with authority to haul the commodity is an undue burden on the carrier and an abuse of discretion. There should be sufficient flexibility to allow transportation to new points which will in turn encourage the indus-

trial growth of the state. We submit that petitioner's application should have been granted in its entirety and that Commission's denial of portions thereof was error.

CONCLUSION

Prichard has no authority to transport acid, and the Commission's denial of petitioner's application on the ground that he does have, after a finding that public convenience and necessity require the transportation of acid by motor vehicle, is clearly error. The Commission enlarged Prichard's rights in an application and on a showing made by petitioner. Prichard's authority was enlarged on one of two theories:

1. That some vague previously canceled contract permit which was not in evidence and which must necessarily have been for a specific unnamed product, under a specific unnamed contract, for a specific unnamed shipper, could be the basis for the enlargement of Prichard's authority as a *common* carrier for *any* acid haul which originated or terminated in any one of the seven counties named in Prichard's authority. Thus the Commission has given Prichard authority to transport acid to or from *any* point within the state, providing the haul originates or terminates within one of the named counties. At the same time, after giving such an unwarranted grant of authority to Prichard, the Commission has restricted petitioner's application to specific counties even though its evidence admittedly shows a need for such transportation over a much broader area.

2. The only other possible ground for the Commission's action is a construction of Prichard's present authority to include acid. A mere reading of such authority is conclusive proof that it does not. The Commission recognized this fact and attempted to circumvent it by adding a footnote in its order to the effect that it may be necessary to issue a new order to Prichard; all of this action on the Commission's part being done pursuant to petitioner's application and evidence. That such action is arbitrary and capricious and clearly error is, we submit, too clear for argument.

The evidence shows that there is a need for petitioner's services throughout the state, that no other motor carrier has authority to transport acid, that acid is used in various industries and the transportation thereof may originate or terminate at various points. The Commission erred in failing to grant petitioner's application in its entirety.

Respectfully submitted,

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