

1958

## Lake Shore Motor Coach Lines, Inc. v. Public Service Commission of Utah et al : Plaintiff's Brief

Utah Supreme Court

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

LAKE SHORE MOTOR COACH  
LINES, INC., a corporation,

*Plaintiff,*

—vs.—

PUBLIC SERVICE COMMISSION  
OF UTAH, and HAL S. BENNETT,  
DONALD HACKING and JESSE R.  
S. BUDGE, COMMISSIONERS OF  
THE PUBLIC SERVICE COMMISS-  
SION OF UTAH, and DAVID M.  
WELLING, doing business as DAVID  
M. WELLING CO.,

*Defendants.*

**FILED**

OCT 28 1958

Clerk, Supreme Court, Utah

Case No. 8942

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**PLAINTIFF'S BRIEF**

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PLAINTIFF'S BRIEF

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STATEMENT OF FACT

This case is before the Supreme Court on a Writ of Review, directed to the defendants, and for purposes of reviewing an order of the Public Service Commission of Utah dated June 18, 1958, which granted to defendant David M. Welling, doing business as David M. Welling Company (hereinafter referred to as defendant) Certi-

ficate of Convenience and Necessity No. 1245-Sub 1, embracing operating rights hereinafter set forth.

Defendant Welling's application was filed June 2, 1958, and notice thereof given. However, the application was so defective that the scope of the authority sought could not be determined therefrom. Thus at the outset of the hearing, without further notice, defendant's application was substantially amended to clarify the nature and extent of the authority requested (Tr. 5 to 16). As amended the application requests authority "to transport airplane passengers and their baggage from the Hotel Ben Lomond in Ogden, Utah, Hill Field Main Gate, Naval Supply Base Main Gate, Roy, Sunset, Clearfield, Kaysville, and Layton, on the one hand, and Salt Lake City Municipal Airport, on the other hand, also, from Brigham City and Perry, on the one hand, and Salt Lake City Municipal Airport, on the other hand, both of said services to include a return from said airport to said points and places above named; the transportation from and to Brigham City to be limited to one trip per day." (Tr. 100). The Commission granted authority identical to that outlined in the amended application (Tr. 102). Authority heretofore held by defendant Welling is outlined in Certificate of Convenience and Necessity No. 1245 granted July 18, 1957 (Tr. 105). Under such former grant defendant received authority to transport airplane passengers and their baggage from the Ben Lomond Hotel in Ogden, to the Salt Lake City Municipal Airport, and from said airport to said Ben Lomond Hotel, omitting any inter-

mediate service between said points and limited to four trips per day to and from said airport (Tr. 108).

Hearing before the Commission was held on June 11, 1958, upon application filed June 2, 1958, and the Report and Order was issued June 18, 1958. A total of seven protestants filed appearances (Tr. 1). Mr. David M. Welling appeared as the sole witness for defendant and testified as to the present and proposed operation (Tr. 16-51). The operation presently conducted by defendant Welling commenced pursuant to certificate No. 1245 the last week of July, 1957 (Tr. 16). For a period of three months defendant Welling operated on schedule (Tr. 39), but on November 1, 1957 was forced by financial necessity to reduce his operations to the point of operating only 50% of his schedules (Tr. 40). From November 1, 1957 to the present time, defendant has continued to run only 50% of his schedules and on several days in this period no trips at all were operated (Tr. 16).

Defendant Welling does not propose to add any equipment or drivers, but merely seeks for himself an additional source of revenue in the hope of making his operation economically sound (Tr. 44). In his current operation substantial losses have resulted (Tr. 43). Gross revenue for the period of July, 1957, to December, 1957, amounted to \$2,613.00, while expenditures for that same period totaled \$5,064.41, resulting in a net operating loss of \$2,451.39 (Tr. 42-43). Notwithstanding the admission of his inability to maintain his runs as scheduled and the

fact that he is unable to operate without a substantial loss, defendant Welling proposes to conduct the new operation in generally the same manner as he has the former (Tr. 45). It should be noted that with respect to the financial loss suffered by defendant there was an allusion made to a strike by the employees of Western Airlines, indicating that this was the cause or at least a substantial cause of the failure of defendant's operation to show a profit (Tr. 49). However, the strike referred to occurred some time after the figures for 1957 were compiled and had no affect whatsoever upon the operating loss of \$2,451.39 shown in defendant's statement of December 31, 1957 (Tr. 49). Further inquiry by counsel into the financial aspects of defendant's operation was not permitted, even though on its face the business was shown to make no economic sense (Tr. 49). The relevance of this material was pointed out, but inquiry still refused by the Examiner (Tr. 49-50). Information on this point would seem necessary to any intelligent determination of the feasibility of defendant's proposed operation.

A number of obvious difficulties present themselves with reference to the proposed schedule advanced by applicant in this matter (Tr. 79). These will be considered in greater detail in the argument, but it is evident, even in the face of defendant's avowed intention of running a schedule to meet a single passenger, that, with the alternative times allowed defendant on six of the seven proposed schedules (Tr. 79), many long and tedious waiting periods at the airport by passengers will result.

No passenger witnesses were produced by defendant even though defendant Welling claimed requests for his service, particularly from Hill Air Force Base and the Thiokol Plant near Brigham City. Notwithstanding the alleged urgency of these requests as testified to by defendant over objection of protestant (Tr. 20), neither installation was sufficiently concerned to send representatives to the hearing. In fact, the record affirmatively shows that Hill Air Force Base provides its own transportation to and from the Salt Lake Airport, operating 24 hours a day (Tr. 19).

The operating testimony of plaintiff's witnesses, Alma C. Johnson, shows Lake Shore Motor Coach Lines, Inc., is operating under Certificate of Convenience and Necessity numbers 288 and 545, which authorize plaintiff to transport passengers, baggage and express between Salt Lake City and all points mentioned in this application except Brigham City and the Main Gate and the Naval Supply Depot (Tr. 58), (although plaintiff's buses operate past the east gate on U.S. 91), and plaintiff is currently operating a number of schedules each day to all points authorized (Tr. 58). The buses run by plaintiff on its schedules are at present carrying on the average only a 50% passenger load (Tr. 60). Plaintiff has terminal facilities available downtown in Ogden (Tr. 61), and in the Salt Lake City business district (Tr. 61). Cab service is available at all times at both the Ogden and Salt Lake terminals (Tr. 61), and meets existing schedules.

In 1957 for a period of three weeks plaintiff conducted a limousine service similar to that now proposed by defendant, from Ogden and intermediate points to the Salt Lake Airport (Tr. 62). Plaintiff held itself available to pick up and deliver passengers to all points concerned in this application between the Salt Lake Airport and Ogden (Tr. 63). The operation had to be discontinued however, since so few people requested the service that it was not economically possible to continue (Tr. 64). In fact, from the intermediate points between Ogden and the airport, including points for which authority is here sought, no passengers were carried in the three weeks of operation (Tr. 63). Plaintiff at the present time still holds the authority to conduct this proposed operation, however, further study has indicated that at this time such operation still is not financially feasible (Tr. 66). Plaintiff stands ready at any time and now possesses adequate equipment to re-institute this operation if conditions so warrant (Tr. 67). While the last schedule change adopted by plaintiff offered two additional schedules in the hope of bettering its service to the public (Tr. 69), its business has suffered a drop in revenue of 8% this year (Tr. 67-68), and a further decline would require plaintiff to reduce its service (Tr. 68).

Further evidence of the already adequate existing service in this area and the adverse effect to be realized from the grant of authority herein was offered by protestant Western Greyhound Line. Greyhound operates 13 daily schedules between Brigham City, Ogden and Salt

Lake (Tr. 52). As noted by Warren H. Perry, operating witness for Western Greyhound Lines, this line needs the present volume of business, and any further inroads would be detrimental to existing service (Tr. 54). A third protesting witness, Ray Moss, manager of the Ogden Cab and Transfer Company, indicated that his company has suffered a decline of 10 to 11% in its business in the past few years (Tr. 74), and a further decline would jeopardize that company's position and ability to continue operations (Tr. 74). A substantial decrease has been noted in the Salt Lake business handled by the Ogden Cab and Transfer Company since defendant commenced its operation in July, 1957 (Tr. 74). At this time the cab company averages 15 to 20 trips per month from Ogden and vicinity to the Salt Lake Airport at a fare of \$10.00 per cab (Tr. 76). Moss testified that cabs from his company are available for transportation from Ogden and vicinity to the Salt Lake Airport at all times (Tr. 74).

After the conclusion of the hearing and on June 18, 1958, the Commission issued the Report and Order here under review. By paragraph seven of the Findings of Fact the commission found as follows:

"The service proposed by applicant is an improvement over his present operation and as such will be of benefit to the general public in the areas sought to be served. Improvements in service rendered by already certified carriers should be encouraged, if in the public interest, even though some detriment may result to other carriers (U.P.

Motor Freight Co. v. Gallagher Transfer and Storage Co., Wyo. 264 P. 2d 771 — I.C.C. v. Parker, 326 U.S. 60), and evidence that the route is not at present adequately served is not necessary to the granting of an application for authority to institute an improved service.” (Tr. 101).

It is obvious from this that the Commission made no finding that there was any public need for the proposed service or that any inadequacy existed in the present service. In granting this certificate the Commission completely abandoned the established concept of convenience and necessity and based the grant on the fact that applicant is losing money and offering cheaper rates.

Following issuance of the order herein, plaintiff filed a detailed petition for rehearing (Tr. 110), which was denied by the Commission on July 7, 1958 (Tr. 113).

## STATEMENT OF POINTS

### POINT I.

THE ACTION OF THE COMMISSION IN GRANTING DEFENDANT A CERTIFICATE OF CONVENIENCE AND NECESSITY IS ARBITRARY AND CAPRICIOUS AND DIRECTLY CONTRARY TO THE LAW AND THE EVIDENCE.

(A) THE FINDING BY THE COMMISSION THAT THE ADEQUACY OF EXISTING SERVICES NEED NOT BE CONSIDERED IN THE GRANTING OF A CERTIFICATE OF CONVENIENCE AND NECESSITY IS CONTRARY TO UTAH LAW, AND THE FINDING OF CONVENIENCE AND NECESSITY REQUIRED BY THE STATUTE IS NOT SUBSTANTIATED BY THE EVIDENCE.

(B) THE SERVICE PROPOSED BY THE DEFENDANT IS NOT AN IMPROVEMENT OF THE PRESENTLY EXISTING SERVICE AS FOUND BY THE COMMISSION BUT IS AN ENTIRELY NEW SERVICE.

(C) THE EXISTING TRANSPORTATION FACILITIES IN THE AREA SOUGHT TO BE SERVED ARE ADEQUATE TO MEET ALL NEEDS OF THE PUBLIC.

#### POINT II.

THE REAL BASES FOR THE GRANTING OF THIS CERTIFICATE OF CONVENIENCE AND NECESSITY, (1) THAT IN HIS PRESENT OPERATION DEFENDANT IS SUFFERING FROM SEVERE FINANCIAL LOSSES AND (2) THAT DEFENDANT IS OFFERING CHEAPER RATES THAN THOSE OFFERED BY EXISTING CARRIERS, ARE UNAUTHORIZED AND CONTRARY TO UTAH LAW, WHICH REQUIRES A FINDING BASED ON COMPETENT EVIDENCE OF PUBLIC CONVENIENCE AND NECESSITY.

#### POINT III.

THE ACTION OF THE COMMISSION WILL DIRECTLY AND ADVERSELY AFFECT PLAINTIFF AND OTHER EXISTING CARRIERS BY DIVERTING VITALLY NEEDED TRAFFIC FROM THEIR LINES.

#### POINT IV.

THE COMMISSION HAS MADE FINDINGS OF FACT BASED SOLELY ON HEARSAY EVIDENCE, CONTRARY TO UTAH LAW WHICH REQUIRES THE FINDINGS OF THE COMMISSION TO BE BASED ON COMPETENT EVIDENCE.

## ARGUMENT

## POINT I.

THE ACTION OF THE COMMISSION IN GRANTING DEFENDANT A CERTIFICATE OF CONVENIENCE AND NECESSITY IS ARBITRARY AND CAPRICIOUS AND DIRECTLY CONTRARY TO THE LAW AND THE EVIDENCE.

(A) THE FINDING BY THE COMMISSION THAT THE ADEQUACY OF EXISTING SERVICES NEED NOT BE CONSIDERED IN THE GRANTING OF A CERTIFICATE OF CONVENIENCE AND NECESSITY IS CONTRARY TO UTAH LAW, AND THE FINDING OF CONVENIENCE AND NECESSITY REQUIRED BY THE STATUTE IS NOT SUBSTANTIATED BY THE EVIDENCE.

In finding that evidence of the adequacy of existing facilities need not be considered by the Public Service Commission in granting a Certificate of Convenience and Necessity (Tr. 101) the Commission completely ignored both the controlling Utah statute and Utah case law. Section 54-6-5 U.C.A. (1953) provides:

“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 . . . 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 carrier proposes to operate and the effect thereon, and upon the traveling public using the same,

*and also the existing transportation facilities in the area proposed to be served."*

In construing this section the Utah Supreme Court in *Ashworth Transfer Company v. Public Service Commission*, 268 P. (2d) 990 (1954) said that while a finding of total inadequacy was not necessary, the Commission was required to consider the existing transportation facilities in the area before issuing a Certificate. Dealing again with this specific point the Utah court said in the case of *Mulcahy v. Public Service Commission*, 117 P. (2d) 298, 300 (1949). "It is a definite need of the public where no reasonably adequate service exists." Further, at page 301 the court stated, "If existing services are rendering adequate service, ordinarily a certificate will not be granted putting a new competitor in the field." The action of the Commission in granting the certificate at issue here is directly contrary to the clearly expressed requirements of Utah law.

Rather than apply Utah law, the Commission here looked to the Wyoming case of *Union Pacific Motor Freight Co. v. Gallagher Transfer and Storage Co.*, 264 P. (2d) 771 (1954), and the federal case of *I.C.C. v. Parker*, 326 U.S. 60 (1945). However, both of these cases were decided under statutes substantially different on this point from the Utah statute. Neither statute contains the specific mandate found in the Utah Code that consideration must be given to the adequacy of existing services. The Commission is grasping at straws in relying on the Union Pacific and Parker cases, as neither has the

slightest application here. The facts are in no way analogous, as will be shown, and the statute governing the decisions are completely different. The only possible application is the statement of the United States Supreme Court in the Parker case, *supra* at page 64, that to be valid the findings of the Commission must be based on the proper statutory criteria. The Commission totally failed to apply the Utah statutory criteria.

While in its conclusion (Tr. 102) the Commission stated that public convenience and necessity justifies the granting of the certificate, not an iota of evidence was introduced which would support this conclusion. In its nature the concept of finding that public convenience and necessity exist is dependent, as an essential element, upon the inadequacy of the services being performed by existing carriers. As will be shown, the evidence overwhelmingly shows the total absence of any need for new service. It is apparent that the Commission's conclusion that public convenience and necessity justify the grant is entirely without foundation.

(B) THE SERVICE PROPOSED BY THE DEFENDANT IS NOT AN IMPROVEMENT OF THE PRESENTLY EXISTING SERVICE AS FOUND BY THE COMMISSION BUT IS AN ENTIRELY NEW SERVICE.

As has been shown, the Commission erred in concluding that the adequacy of existing service need not be considered in the granting of a Certificate of Convenience and Necessity. It is also readily apparent that the Commission was in error in finding that a new service was not

involved here. In paragraph 7 of the Findings of Fact (Tr. 101), the Commission found that the proposed service was not a new service but merely an improvement of the present operation. It tacitly accepted the fact that the evidence was inadequate to support the grant and attempted to reach for some other approach, here that this is not a matter of new service at all.

Defendant's present service consists of transporting passengers from the Ben Lomond Hotel in Ogden to the Salt Lake Airport and return. No service whatsoever is rendered to any intermediate points, and no service is extended to Brigham City (Tr. 108). Under the proposed operation defendant will serve the points of Hill Field Main Gate, Naval Supply Depot Main Gate, Roy, Sunset, Clearfield, Kaysville, Layton, Brigham City and Perry, none of which are now served by applicant (Tr. 102). By no stretch of the imagination can this be called an improvement of an existing service, and it constitutes nothing more or less than a new service to points not heretofore served. Indeed the very cases cited by the Commission in paragraph 7 of its Report and Order recognize that where service is extended to points not previously served, such service constitutes a new service and not merely an improvement of an existing service. See *Union Pacific Motor Freight Co. v. Gallagher Transfer and Storage Company*, *supra*, and *I.C.C. v. Parker*, *supra*.

In both cases the courts noted that the grant of authority was limited to points already served by the ap-

plicant. In the Union Pacific case, *supra*, at page 775, the Wyoming court cited the Report and Order of the Wyoming Public Service Commission which said in holding a new service was not involved, "The Union Pacific Motor Freight Company is not seeking to serve new points." Quoting again from the Union Pacific opinion, the court at page 782 in describing an improved operation as contrasted with a new one said, "Applicant does not propose to invade territory of any other carrier. All of the points or stations are on the rail line which applicant has served for years."

It is apparent that providing service to new points is the essence of the operation proposed by defendant Welling.

In light of the authorities cited by the Commission as well as an analysis of the service it is obvious that the conclusion reached by the Commission, that the proposed operation is not a new service, is clearly erroneous.

(C) THE EXISTING TRANSPORTATION FACILITIES IN THE AREA SOUGHT TO BE SERVED ARE ADEQUATE TO MEET ALL NEEDS OF THE PUBLIC.

The burden of proving that public convenience and necessity require the grant of a certificate is placed upon the defendant, and a mere showing of convenience or benefit to the applicant or a few passengers is not a sufficient basis for granting a permit. See *Wycoff Co. v. Public Service Commission*, 227 P. (2d) 323 (1951). An examination of the transcript shows that applicant totally failed to discharge this burden.

No shipper witnesses were presented by applicant. The total testimony presented by him amounted only to vague allegations that he had received requests for the proposed service. Requests for service were reported to have been received from Hill Air Force Base (Tr. 19), but no representative was called from the base to testify as to these requests or any need for new service. The defendant's own testimony shows that Hill Field in fact is supplying its own transportation on a 24 hour a day basis (Tr. 19). In an attempt to bolster defendant's evidence the Commission found in paragraph 8 of the Report and Order that the service was needed to Brigham City for the Thiokol plant, since "the personnel of said company does considerable traveling by air." (Tr. 101). The record is absolutely barren of any evidence which could support this conclusion. The only material in the testimony concerning any requests by the Thiokol plant is found at page 27 of the transcript. There defendant Welling testified as to the Brigham City run as follows:

"Yes; that trip has been requested by the Thiokol people in Brigham City, and most of their people go out in the coach flight at midnight. . ."

Such a statement could not possibly substantiate the conclusion reached by the Commission that the company does considerable traveling by air. No mention was made of how many Thiokol employees travel at all, let alone by air. No witness from the Thiokol plant was produced as would be expected if that plant had a need for the proposed service. Defendant Welling was allowed to testify

as to the existing transportation facilities in the area, even though on voir dire examination counsel showed defendant lacked capacity to so testify (Tr. 34-35). Beyond his own vague statements as to requests received applicant offered no evidence of any need for his service. The only evidence produced by defendant Welling was that he is operating at a considerable loss and is offering cheaper service. It is incredible that a certificate could be granted upon such a showing.

Alma C. Johnson, operating witness for plaintiff, testified that plaintiff serves all points concerned in the application except Brigham City and the Main Gate of the Naval Supply Base (Tr. 58), although plaintiff's service runs adjacent to the Naval Supply Base (Tr. 58). Plaintiff provides 14 schedules per day each way to the points involved herein, and provides additional schedules to Kaysville (Tr. 59). Space is always available on Lake Shore's buses which on the average are running only 50% loaded in this area (Tr. 59, 60). Extra equipment is available to accommodate any increase in traffic (Tr. 59).

Plaintiff's buses run from its terminal in the heart of downtown Salt Lake City to the heart of downtown Ogden where its terminal facilities are located (Tr. 61). Cab service is available at all times at each of plaintiff's terminals to transport passengers to their destinations (Tr. 61, 62). In 1957 plaintiff engaged in the operation proposed to be conducted by defendant (Tr. 62). Its experience in this venture conclusively proves there is no public need for such service (Tr. 63). In the three weeks

advantage of the service. Plaintiff served Ogden and all intermediate points here involved with direct transportation to and from the Salt Lake Airport. Only a few passengers from the Ogden area were hauled and none from the intermediate areas (Tr. 63). The Commission's lack of attention to the evidence presented at the hearing is graphically shown by the totally erroneous fact finding concerning this operation. The Commission in paragraph 6 of its Report and Order found that the *Ogden Cab and Transfer Company* conducted this service and made no attempt to advertise the service (Tr. 101). As a matter of fact, as the transcript clearly shows upon even a casual perusal, it was Lake Shore Motor Coach Lines, Inc., which operated the service (Tr. 62, 63) and the service was advertised through the airlines and information disseminated to all ticket agents in the area (Tr. 65, 66). Plaintiff still holds authority to render this service and has continued to study the situation (Tr. 66). While plaintiff stands ready to re-institute the service if conditions warrant, such change in demand has not occurred (Tr. 67). To accommodate passengers who desire to travel to Salt Lake between the hours of midnight and 6:00 a.m., plaintiff's tickets are honored by the Western Greyhound Lines which operates runs during those hours.

Evidence presented by other protestants add to the evidence that existing services are adequate. Western Greyhound Lines, which serves Brigham City and Ogden to and from Salt Lake City, provides 13 schedules per day each way, an average of one run every two hours (Tr. 52). The Ogden Cab and Transfer Co. provides

cab service from Ogden and vicinity to the Salt Lake Airport and return (Tr. 74). This company has cabs available at all times (Tr. 74) and has been making 15 to 20 trips per month from Ogden to the Salt Lake Airport (Tr. 76).

Considering the facilities now available, it is apparent that faster service is accorded to passengers at the present than would be the case under the proposed operation. An Ogden passenger arriving at the Salt Lake Airport now can immediately get a cab at the airport terminal, alight from the cab at the Salt Lake terminal of Lakeshore Motor Lines and within a short time be on his way to Ogden aboard one of Lakeshore's 14 daily schedules. Arriving at Lakeshore's terminal in downtown Ogden he may immediately take a cab from the terminal to his home (Tr. 61, 59, Ex. 5, Tr. 88, 62). Compare this with the plight of a passenger using defendant's proposed service who arrives by air in Salt Lake at 6:30 a.m. on a morning when defendant's morning run was made to accommodate a passenger arriving in Salt Lake at 5:30 a.m. The later passenger must then wait at the airport until schedule number two arrives in Salt Lake at either 10:20 or 11:30, depending on reservations. He then rides back to Ogden where he is discharged at the Ben Lomond Hotel and takes a cab to his home (Ex. 1, Tr. 46, 79). In another situation a passenger from Ogden whose flight leaves the Salt Lake Airport at 8:00 a.m. must leave Ogden at 4:30 a.m., arrive at the Airport at 5:30 then wait for his flight if defendant has another passenger leaving Salt Lake at 5:30 (Tr. 46, 79, Ex. 1).

Such examples could be multiplied a number of times. To illustrate the Commission's utter disregard of the evidence it is noted that defendant's schedules numbers two and three can't possibly be operated as outlined by defendant (Tr. 79). Welling is operating with a single limousine, and does not propose to acquire additional equipment. His earliest schedule will arrive back in Ogden at 11:20 a.m. Yet schedule three is supposed to leave Ogden at 11:15, five minutes before the limousine has arrived from Salt Lake (Tr. 79). This discrepancy appears without allowing time for the discharge and loading of passengers and baggage. No explanation was offered as to how this phenomenon was to occur, yet the Commission approved the operation as scheduled (Tr. 102).

In light of all the above evidence, clearly the only finding that could be reasonably reached is that there is no need for any additional service.

## POINT II.

THE REAL BASES FOR THE GRANTING OF THIS CERTIFICATE OF CONVENIENCE AND NECESSITY, (1) THAT IN HIS PRESENT OPERATION DEFENDANT IS SUFFERING FROM SEVERE FINANCIAL LOSSES AND (2) THAT DEFENDANT IS OFFERING CHEAPER RATES THAN THOSE OFFERED BY EXISTING CARRIERS, ARE UNAUTHORIZED AND CONTRARY TO UTAH LAW, WHICH REQUIRES A FINDING BASED ON COMPETENT EVIDENCE OF PUBLIC CONVENIENCE AND NECESSITY.

By paragraph two, three and four of its Report and Order the Commission found that defendant was suffering serious financial losses in his operation (Tr. 100) and that passengers utilizing the services of Lake Shore and Ogden Cab Company must pay larger fares than defendant offers (Tr. 100, 101). These findings generally are in accord with the evidence; in fact the only real evidence offered by defendant concerned the losses suffered and rates offered. However, the fare per passenger when traveling via the Ogden Cab and Transfer Company might well in some instances be cheaper than Welling's. The cost of \$10 per cab is shared among the passengers, while Welling's charge of \$3.00 per passenger is constant. These findings of financial losses and cheaper service under the law cannot substantiate a grant of a certificate.

That defendant Welling suffered a loss of \$2,451.39 in five months of operation in 1957 (Tr. 43) shows that the certificate should never have been issued in the first instance. His gross revenue was \$2,613.00, while expenditures amounted to \$5,064.41 (Tr. 43). The Commission made a grave error in allowing defendant to commence operations in 1957 and should not now attempt to rectify this former mistake by granting new and additional authority. The experience of plaintiff in attempting to operate the proposed service a year ago (Tr. 62, 63) demonstrates that such a run is not economically feasible. To allow the certificate for this proposed operation would compound the mistake, throwing the burden of the error

on existing carriers. A policy of the Commission of attempting to cover its mistakes by allowing a dying business to expand operations will ultimately have disastrous consequences for the whole trucking industry.

Defendant Welling testified that at the previous hearing on his first application in July, 1957, he stated that the operation then proposed would produce a profit (Tr. 40). Yet he was able to operate on schedule for only three months (Tr. 39) because he was losing money so fast he couldn't continue (Tr. 26). Since November 1, 1957, defendant has been operating only 50% of his schedule (Tr. 40). By his own testimony defendant Welling admitted his current operation was not economically sound and that his motive in asking for this certificate was to try to make up his losses (Tr. 43). At page 44 of the transcript, he stated:

“ . . . So the purpose of this hearing is to request the things that we feel should be done now to make it economically sound . . . ”

To attract passengers defendant has set his rates at a low level even though such rate is clearly non-compensatory (Tr. 101). As provided in Section 54-6-2 U.C.A. (1953), it is the duty of the Commission to establish rates, and those now charged by existing carriers are in accord with the requirements of the Commission. The action of the Commission in granting authority to another competitor on the ground that cheaper rates are to be charged by the new line is a flagrant abuse of its discretion in light of such authority.

It is essential to the orderly administration of the motor carrier industry that the law establishing the basis upon which certificates are granted be followed, and to do otherwise precipitates a confusion in the industry as to the basis of regulation. Where, as here, grants of authority are issued with indifference to statutory requirements, the entire concept of our legislature in regulation is destroyed.

### POINT III.

THE ACTION OF THE COMMISSION WILL DIRECTLY AND ADVERSELY AFFECT PLAINTIFF AND OTHER EXISTING CARRIERS BY DIVERTING VITALLY NEEDED TRAFFIC FROM THEIR LINES.

The implications of a grant of common carrier authority in an area where such grant will decrease the business of existing carriers are much more far-reaching than the reduction in revenue of those carriers. Operating an efficient transportation service is a costly business and losses in revenue of necessity must require a re-examination of the schedules and facilities offered to the public. If revenue decreases to the point where reduction in service must be made the ultimate effect is that the traveling public must suffer from lack of service. It is this ultimate consequence which renders important the evidence of the adverse effect a new grant of authority will have on existing carriers. In the findings of fact (Para. 7, Tr. 101) it is acknowledged that detriment will result to the other carriers here involved, but the Commission holds that such detriment could be disregarded (Tr. 101).

That all the traffic available in this area is vital to plaintiff and the other carriers is clearly shown in the evidence. Plaintiff is currently running its schedules to Ogden only 50% loaded (Tr. 60). Through the past year Lakeshore has suffered a drop in revenue of seven to eight per cent (Tr. 67). As to further decline in revenue plaintiff's witness Alma C. Johnson testified as follows:

"Q. And what effect, if any, will be produced by a further dilution of your passenger revenues? What is that going to do to the Lakeshore Motor Coach Lines?

A. Well, it will tend to aggravate the present situation, which is that our revenues are declining to the point where we will probably have to reschedule some of our operations." (Tr. 68).

Testimony from other protesting carriers indicate the ill effects will follow the granting of this certificate. Ray E. Moss, operating witness for protestant Ogden Cab and Transit Company, testified that his company has suffered a decline of ten to eleven per cent in business in the past few years (Tr. 74), and that a further decline will jeopardize the company's position (Tr. 74). That further decline may be anticipated as a result of the issuance to defendant Welling of this certificate is illustrated by the fact that Ogden Cab and Transit Company has observed a decrease in the number of trips to Salt Lake since defendant commenced operations in 1957 (Tr. 75). The cab company at this time makes 15 to 20 trips per month to the Salt Lake Airport at a fare of \$10 per cab (Tr. 76). Loss of this revenue would seriously

affect its business. Warren H. Perry, operating witness for Western Greyhound Lines, pointed out that its recent application for rate increase indicates the bus lines need to retain the present volume of business and that any further inroads on this volume would prove detrimental to existing service (Tr. 54).

The Supreme Court of Utah in the case of *Mulcahy v. Public Service Commission, supra*, in addressing itself to this point, said that present certificate holders should be protected insofar as it can be done without injury to the public. Certainly in this case protecting the existing carriers will not produce injury to the public, but will, in fact, protect the traveling public. In order to maintain the standards of service now afforded the public by existing carriers the order of the commission granting a certificate should be reversed.

#### POINT IV.

THE COMMISSION HAS MADE FINDINGS OF FACT BASED SOLELY ON HEARSAY EVIDENCE, CONTRARY TO UTAH LAW WHICH REQUIRES THE FINDINGS OF THE COMMISSION TO BE BASED ON COMPETENT EVIDENCE.

The general rule on this point was clearly set forth in *Desert Turf Club v. Board of Sup'rs of Riverside County*, 296 P (2d) 882 (Calif.) (1956) at page 887:

“While administrative bodies are not expected to observe meticulously all of the rules of evidence applicable to a court trial common sense and fair play dictate certain basic requirements

for conduct of any hearing at which facts are to be determined. Among these are the following . . . hearsay evidence standing alone can have no weight."

This principal is stated as the general rule in 43 AmJur Public Utilities and Services sec. 219, where it is said that a commission may not base an order on incompetent evidence. In 73 C.J.S. Public Utilities sec. 53, the rule is noted that there must be sufficient competent evidence in the record to support the commission's findings. The Utah Supreme Court has repeatedly subscribed to this rule. See *W. S. Hatch Co. v. Public Service Commission*, 277 P (2d) 809 (1954; *Ashworth Transfer Co. v. Public Service Commission*, 268 P (2d) 990 (1954); *Union Pacific R. Co. v. Public Service Commission*, 132 P (2d) 128 (1942); *Mulcahy v. Public Service Commission*, 117 P (2d) 298 (1941).

In this record there is not a single shred of competent evidence on which a finding of a need for this service could be based. No shipper witnesses were introduced by Welling. The entire body of evidence offered by him concerning need for this service consisted of hearsay statements by Welling of requests he claimed had been made (Tr. 16 to 51). In paragraph two of the Findings of Fact (Tr. 100) the Commission acknowledged that there was no competent evidence upon which to base a finding of need when it stated that the only evidence was applicant's testimony as to requests he had received. Even after acknowledging this complete lack of compe-

tent evidence of need, the Commission still granted a certificate solely on the basis of the hearsay evidence, admitted over protest. Such an action is a flagrant disregard of the controlling Utah law.

## CONCLUSION

In conclusion, it is submitted that the action of the Public Service Commission in granting the certificate of convenience and necessity to defendant Welling is arbitrary and capricious and directly contrary to the evidence. The Commission erred in failing to consider the adequacy of services presently existing and in finding that the proposed service is merely an extension of the current service. The grant of authority will adversely affect plaintiff and other carriers which are currently providing adequate service to the area. The finding of the Commission that a need existed is based solely on hearsay evidence, which cannot form the basis of grant.

The order of the Commission should be set aside.

Respectfully submitted,

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