

1968

Lewis Bros. Stages, Inc. v. The Public Service Commission of Utah; Hal F. Bennett, Donald Hacking, and Donald T. Adams, Its Members and Link Trucking, Inc., Uintah Freightways, et al., v. Public Service Commission of Utah, Donald Hacking, Don T. Adams and Hal S. Bennett : Brief of Plaintiff Link Trucking Inc., and Uintah Freightways

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Recommended Citation

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED
MAY 14 1968

LEWIS BROS. STAGES, INC.,
a corporation,

Clerk, Supreme Court, Utah

Plaintiff,

vs.
THE PUBLIC SERVICE COMMISSION OF
UTAH; HAL F. BENNETT, DONALD HACK-
ING, and DONALD T. ADAMS, its members;
and WYCOFF COMPANY INCORPORATED,
a Utah corporation,

Case No 11081

Defendants,

LINK TRUCKING, INC., UINTAH FREIGHT-
WAYS, a corporation, MILNE TRUCK LINES,
INC., PALMER BROTHERS, INCORPOR-
ATED, RIO GRANDE MOTOR WAY, INC.,
LAKE SHORE MOTOR COACH LINES, INC.,
DENVER-SALT LAKE-PACIFIC STAGES,
INC., and CONTINENTAL BUS SYSTEM,
INC.,

Case No 11082

Plaintiffs,

vs.
THE PUBLIC SERVICE COMMISSION OF
UTAH, DONALD HACKING, DON T.
ADAMS and HAL S. BENNETT, Commissioners
of the Public Service Commission of Utah, and
WYCOFF COMPANY, INCORPORATED,

Defendants.

**BRIEF OF PLAINTIFFS LINK TRUCKING
INC., AND UINTAH FREIGHTWAYS**

Appeal from the Order of the Public Service Commission of Utah

**WILLIAM S. RICHARDS
GUSTIN & RICHARDS**
Attorney for Plaintiffs
Link Trucking, Inc. and
Uintah Freightways

PHIL L. HANSEN, Attorney General
Attorney for Defendant Public
Service Commission of Utah
IRENE WARR

Attorney for Plaintiff, Lewis
Bros Stages, Inc.

WOOD R. WORSLEY

Attorney for Plaintiffs Milne Truck Lines, Inc. Palmer Brothers,
Incorporated, Rio Grande Motor Way, Inc., Lake Shore Motor Coach
Lines, Inc., Denver-Salt Lake-Pacific Stages, Inc., Continental Bus
System, Inc.

HARRY D. PUGSLEY

Attorney for Defendant
Wycoff Company, Incorporated

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of the Public Service Commission of Utah, and
WYCOFF COMPANY, INCORPORATED,

Defendants.

BRIEF OF PLAINTIFFS LINK TRUCKING INC., AND UINTAH FREIGHTWAYS

STATEMENT OF THE KIND OF CASE

This involves the application of Wycoff Company, Inc., for authority to operate as a common carrier by motor vehicle for the transportation of general commodities in express service by performing an expedited service on established schedules over irregular routes with guaranteed delivery times, using simplified billing procedures and at premium tariff rates, between all points and places in the State of Utah over established highways.

DISPOSITION BY THE PUBLIC SERVICE COMMISSION OF UTAH

On the 12th day of September, 1967, the Public Service Commission of Utah, hereafter referred to as "Commission," granted to Wycoff common motor carrier authority for the transportation of general commodities in express service between points and places in the State of Utah. Said authority is subject to various restrictions, including weight, rates and schedules.

RELIEF SOUGHT ON APPEAL

Link Trucking, Inc., and Uintah Freightways, plaintiffs, and hereafter referred to as "Link" and "Uintah," seek to have set aside the order of the Public Service Commission of Utah dated the 12th day of September, 1967.

STATEMENT OF FACTS

Twenty-two carriers opposed the application of Wycoff. Not all of said carriers have petitioned this court for a Writ of Review and as to those carriers so petitioning, separate briefs will be filed by their counsel. This brief will be confined to the plaintiffs Link and Uintah.

Link and Uintah hold common motor carrier authority issued by the Public Service Commission of Utah authorizing them to handle the transportation of general commodities between Salt Lake City, Utah and points in Daggett, Duchesne and Uintah Counties, Utah, with authority to serve certain points in Wasatch, Carbon, Emery and Morgan Counties, Utah. (Exhibits 158 and

114) Both Link and Uintah operate scheduled and non-scheduled service seven days weekly and in combination have a minimum of five schedules daily operating between Salt Lake City, Utah and the Uintah Basin, Utah, which said basin encompasses the counties of Duchesne, Daggett, and Uintah, Utah. (Exhibits 116 and 160) Link and Uintah in addition to their regular freight service provide an express service and have on file with the Public Service Commission of Utah express rates. (Exhibits 127, 154, 155, 156) Both Link and Uintah maintain a simplified billing procedure (Exhibit 113) and operate on firmly established schedules and guaranteed delivery times. Same-day service is provided by Link and Uintah between Salt Lake City, Utah and the Uintah Basin. (Exhibits 120 and 162) 24.43 percent of Link's revenue is derived from shipments under 200 pounds. 49 plus percent of Uintah's revenue is derived from shipments under 200 pounds. (Exhibit 123 and 164)

The application of Wycoff as noticed by the Commission reads as follows: !

"Applicant proposes to operate as a common carrier by motor vehicle for the transportation of property, namely, general commodities in express service, by performing an expedited service on established schedules which will be filed with the Commission, over regular routes with guaranteed delivery times, using simplified billing procedures and at premium tariff rates (excluding commodities in bulk and those requiring special equipment).

"Between all points and places in Utah over established highways." (R. 11)

The authority ultimately granted Wycoff and which is pertinent to the instant proceeding is as follows:

“ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, That Wycoff Company, Incorporated, be and is hereby issued Certificate of Convenience and Necessity No. 1608, to operate as a common carrier by motor vehicle for the transportation of general commodities in express service, as herein defined, between points and places in the State of Utah (except commodities in bulk and those requiring special equipment).

Express service for purposes of this certificate is defined as expedited service, primarily on small shipments, on firmly established schedules, over regular routes, with guaranteed times of delivery, using simplified billing procedures, and at premium tariff rates.

A. Except as provided in Paragraphs B and C, the express service hereby authorized shall be statewide, and shall be subject to the following restrictions and requirements:

1. Applicant shall be limited to the transportation of shipments of not to exceed 250 pounds on a weight basis. ‘Shipment’ as herein used shall mean commodities moving on a single freight bill from one consignor to one consignee. Shipments shall not be separated to avoid this restriction.

2. Applicant shall file with the Commission its express schedules and any modifications thereof. In accordance with such filed and published schedules, applicant shall provide at least once daily to all points and communities, and a minimum of next-day service between all such points on all established highways within the State of Utah.

3. As part of the express service hereby authorized, applicant shall render pickup and delivery service to all points including Salt Lake City, Ogden and Provo.

4. Applicant shall publish special express tariff rates to be approved by the Commission.

5. The Commission having continuing jurisdiction may review the operations hereunder periodically to ascertain whether or not increased weights or volumes have adversely affected Wycoff's ability to render express service.

B. Except as provided in Paragraph C hereof, the express authority of applicant between points in Salt Lake County is limited to shipments, as herein defined, of not more than 100 pounds." (R 155-156)

On service to the Uintah Basin, the record discloses that Wycoff operates one schedule daily, departing from Salt Lake City, Utah at 12:01 P.M. and arriving at Vernal, Utah at 5:30 P.M. Said schedule is not operated on Sundays. (Exhibit 5) On traffic originated by Wycoff at points other than Salt Lake City, Utah, the record discloses an interline by Wycoff with Link Trucking, Inc., and the performance of a minimum of next-day service between said points and the Uintah Basin as a result of the interline. (Exhibits 167-171)

In total, Link and Uintah have schedules leaving Salt Lake City, Utah daily at 11:30 A.M.; 12:30 P.M.; 11:00 P.M.; 11:30 P.M. and 1:30 A.M. (Exhibits 116 and 160)

Lorin J Broadbent, Hearing Examiner, in his recommended report and order found the following as to Link and Uintah:

"Link Trucking, Inc., holds authority between Salt Lake City and the Uintah Basin. It transports newspapers along with its general commodities, and offers an express service in the same vehicle with its general freight. General commodity service is 5 days per week, with schedules departing Salt Lake City at approximately noon and midnight.

Uintah Freightways also operates between Salt Lake City and Vernal, serving the Uintah Basin. Its service is 5 days per week. In addition to overnight service it advertises a noon express schedule from Salt Lake City. If sufficient traffic is not available, that schedule does not operate and the freight is placed on the airline to Vernal for delivery. The 'express' and general freight move in the same vehicle on overnight schedules." (R. 112)

In his conclusion the Examiner found as to the adequacy of existing service the following:

"Utah has available truck and bus service of varying types and frequency to all communities on its highways. General freight service has been adequate. Express service from Salt Lake City has been adequate to some communities and areas." (R. 115)

As the application of Wycoff states, premium rates are pled as a restriction on the type of service to be performed by it. The Examiner recognized this when he stated:

“* * * With regard to this application the Commission is confronted with the fact that the language of the application itself specifies that the proposed service is to be rendered at so-called premium rates. * * *” (R. 115)

No evidence was offered to prove premium rates and rather than deny the application as a result of this fatal defect, the Hearing Examiner found that the particularity with regard to rates in a certificate hearing would not be appropriate. (R. 115)

Additional facts, law and argument have been set forth in briefs submitted by the plaintiffs' attorney, and all of which for brevity's sake are incorporated herein by reference. (R. 201-219)

ARGUMENT

POINT I

THE FAILURE TO ESTABLISH PREMIUM TARIFF RATES AS A PART OF ITS APPLICATION PROCEEDINGS IS FATAL.

The application of Wycoff is restrictive in that Wycoff proposes that its express service will be performed at premium tariff rates. The public notice issued by the Public Service Commission of Utah and published in the Salt Lake Tribune contains this restrictive requirement, in that it states as follows:

“Applicant proposes to operate as a common carrier by motor vehicle for the transportation of property, namely, general commodities * * * at premium tariff rates * * *”

It became apparent the first day of the hearing that Wycoff did not intend to charge a premium tariff rate. This is evidenced by the following questions and answers:

“Q. Mr. Young, as part of the application, reference has been made to premium rates.

Now, what is the intention of your company by this provision in the express application?

* * *

Objections to the question.

EXAM. BROADBENT: Well, I don't think your question called for that. I think the answer was not quite responsive.

I **think** he can state what he plans to do in terms of premium rates.

MR. PUGSLEY: All right.

A. We plan to develop rates which, when the shipment exceeds 200 pounds, the rate will exceed the published rate for the common carrier to that destination.

This is a general thing. It is very difficult to be specific because when you talk about rates for the common carriers you are talking about two different type rates. You are talking about class rates and commodity rates, and it depends upon where the comparison is made; whereas, with the express rates they **are rates** — all types. A single rate regardless of the type commodities or class of the shipment, and our proposal is to develop rates which will exceed the common carrier rates at about — shipments in excess of 200 pounds.”
(R. 205, 206)

Following Mr. Young's testimony as above quoted, a motion to dismiss the application on the ground that it affirmatively appeared from the testimony of Max W. Young that the scope of the authority sought was greater than that appearing in the application itself and the notice to interested parties and thus constituted a broadening of the application as published was made. The

Hearing Examiner recognized that rates were an issue and in this connection stated:

"We are going to deny the motion pro forma, but we are certainly limited in this hearing as to what you have applied for in your published application, in my present thinking is, again, that when no minimum is charged but merely a per pound rate, you're going to have to charge in excess of that, and I will have to be educated further before I can decide whether merely meeting or being equal to or below a minimum charged by another carrier can be regarded as a premium, because the minimum itself is a premium.

* * *

I'll have to wait — I'll have to be educated on that, but your application certainly contemplates premium rates for whatever authority you are seeking in the application.

* * *

I believe there is substance to the motion, but we are not about to abort the entire proceeding. It's obvious we can't exceed what is in the application. We may have to receive briefs or hear argument after the evidence is in. The whole problem of rates — considering rates in the context of an application for authority is something that is not really regular, I suppose but we do get involved in rates because of the nature of the application. It is inherent in the application that we get involved in rates, and yet this is not a **rate hearing**.

We'll have to go into it further, no doubt, but I am going to deny the motion for the present. But, as I indicated, I think there is some substance in it, depending upon what Mr. Pugsley

and the applicant intend by their application as published." (R. 207)

On the 3rd day of February, 1966 some twenty-four days after the commencement of the hearing, a foraml motion to dismiss or in the alternative to suspend proceedings was heard before the Commission. (R. 96-98) This motion was predicated on the ground that applicant does not intend to charge premium rates, has failed to establish premium rates and that the establishment of premium rates is a condition precedent and necessary in order to lay proper foundation for the testimony of witnesses, which testimony was to the effect that their need, if any, for Wycoff's service is dependent upon the rate to be charged. The above referred to motion was taken under advisement and ultimately denied by the Commission in its Report and Order.

No effort was ever made by Wycoff to prove a premium tariff rate. Premium is defined in *Webster's Seventh New Collegiate Dictionary* at page 671 as follows:

"1a: a reward or recompense for a particular act b: a sum over and above a regular price paid chiefly as an inducement or incentive c: a sum in advance of or in addition to the nominal value of something d: something given free or at a reduced price with the purchase of a product or service 2: the consideration paid for a contract of insurance 3: a high value or a value in excess of that normally or usu. expected — at a premium : above par : unusually valuable esp. because of demand (housing was at a premium)"

It is apparent from the above quoted definition that a premium can be a sum over and above the regular price paid (that is a rate higher than a normal freight rate); a sum or a reduced charge in order to use a particular service or some other incentive either to perform or use a particular service. The record is silent as to what Wycoff intended by its pleadings.

The establishment of a premium tariff rate became a fact which had to be established preliminary to the testimony of shipper witnesses and the Commission erred in admitting shipper testimony without first requiring Wycoff to prove its premium tariff rate. In the case of *Menejee v. Blitz*, Ore. (1947) 179 P.2d 515, the court states:

“* * * When the respondent swore that his father told him ‘in a general way’ what Mr. Blitz said to the father, it may be that his father told him nothing at variance with the pleading filed in this case by the appellant. When the admissibility of an item of evidence is dependent upon the submission of preliminary proof in the form of ‘a foundation’ or, to use a different term, a condition precedent, the party who offers the dependent testimony must submit the preliminary proof or establish the condition precedent before the dependent fact can be deemed admissible. See Wigmore on Evidence, 3d ed., 654, and 32 C.J.S., Evidence, § 838, p. 768. The reception of dependent evidence in face of the fact that the preliminary proof was never submitted constitutes error: 5 C.J.S., Appeal and Error, § 1725, p. 990.”

The failure of Wycoff to establish its premium rate as part of the application proceedings at a time when

rates were pleaded in reference to the type of service contemplated to be performed is akin to the failure of a plaintiff to prove proximate cause in a negligence action. Protestants pursuant to the application as written were entitled to challenge the contemplated rate structure and show their willingness, ability, or lack thereof, to provide the total service sought to be performed by Wycoff. The testimony of over 200 witnesses was dependent on a fact pleaded and never proved. Wycoff having failed to meet its burden, failed to prove its case and the order as issued by the Commission is unsupported by the evidence, arbitrary and capricious.

POINT II

CONVENIENCE AND NECESSITY DOES NOT REQUIRE THE GRANT OF AN AUTHORITY IN THE AREA AUTHORIZED TO BE SERVED BY UINTAH AND LINK.

The limited record which this court ordered to be brought before it for review affirmatively discloses that there is no need for the service authorized to be performed by Wycoff in the area served by Link and Uintah.

The Commission authorizes Wycoff to perform an express service and defines express service as follows:

“Express service for purposes of this certificate is defined as expedited service, primarily on small shipments, on firmly established schedules, over regular routes, with guaranteed times of delivery, using simplified billing procedures, and at premium tariff rates.” (R. 155)

Link and Uintah offer and provide an express service.

Link and Uintah handle the transportation of small shipments. Link and Uintah maintain firmly established schedules departing at approximately the same time as those of Wycoff. Link and Uintah guarantee times of delivery and use simplified billing procedures. Wycoff has not established premium tariff rates.

In order to guarantee to the public that Wycoff will perform in accordance with the Commission's order, Wycoff is required to provide service at least once daily to all points and communities and a minimum of next-day service between all such points on all established highways within the State of Utah. Wycoff furnishes one daily schedule to the area Link and Uintah are authorized to serve. Link and Uintah in combination provide six daily schedules to said area and on express shipments provide same-day service. Link and Uintah furnish a minimum of next-day service on all interline shipments including those shipments interlined with Wycoff Company. (Exhibit 167 and 171)

Wycoff pursuant to the Commission's order is required to render pickup and delivery service at all points including Salt Lake City, Ogden and Provo. Link and Uintah provide pickup and delivery service throughout the entire area they are authorized to serve.

Wycoff is required to publish special express tariff rates to be approved by the Commission. Link and Uintah have on file with the Commission special express tariff rates.

The Commission concedes and concludes that the general freight service and the express service of Link and Uintah is adequate. In this connection, the Commission states:

“Utah has available truck and bus service of varying types and frequency to all communities on its highways. General freight service has been adequate. Express service from Salt Lake City has been adequate to some communities and areas.”
(R. 115)

In order to escape the tight net placed around the Wycoff application and evidence as a result of the evidence of adequate and superior service of Link and Uintah, the Commission in its conclusions states:

“In the traditional application for motor carrier authority the request is limited to specific geographical areas or routes, or is limited to specific commodities. The evidence before the Commission in such cases is naturally limited to the need and other available transportation for the particular area or the particular commodity. In some instances, the Commission has granted state-wide authority for the transportation of particular commodities even though other carriers may have authority for such transportation in a limited service area. The present application seeks state-wide authority for a special kind of service as proposed by the applicant. From the entire record it is concluded that there is need for such service, as hereinafter limited, on a statewide basis even though the proposed service may in isolated instances and areas duplicate some existing authority and service over particular routes. From a careful consideration of all of the evidence it is

further concluded that it is not in the public interest to perpetuate fragmentation of authority and service in order to prevent such minor duplications." (R. 116-117)

The philosophy contained in the above referred to language might be somewhat persuasive but for the fact that Uintah and Link can and do provide a service superior to that offered by Wycoff even through interline with Wycoff and other existing carriers. An interline with Uintah and Link, carriers having six schedules daily departing from the Salt Lake area to the Uintah Basin, is far more adequate than a service whereby Wycoff interlines with itself in Salt Lake City, Utah and maintains only one schedule daily, a schedule daily, a schedule which is substantially identical to one of the existing schedules of Link and Uintah.

This grant of authority can divert from 25 to 50 percent of Link and Uintah's revenue and of necessity will require said carriers to eliminate other schedules in order to consolidate freight and meet existing operating expenses. The ultimate effect of the grant is not to improve a service which obviously at the present time is more than adequate, but to cause a substantial deterioration in service as freight is further diluted into what is already known to be a sparsely populated area.

This court has heretofore recognized that the Commission cannot grant statewide authority where the evidence shows a need for service within a restricted area only. This is the holding in the case of *Milne Truck*

Lines, Inc. v. Public Service Commission of Utah, 11 Utah 2d 365, 359 P.2d 909, wherein it is stated:

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

Concerning the need for a direct motor carrier service to every point which a shipper desires to ship to, the Interstate Commerce Commission in *Pine Tree Transport, Inc., Extension — Frozen and Canned Fruits; No. MC 111610 (Sub. No. 1)*, 9 F.C.C. 32,534, states:

"* * * The shipper is not entitled as a matter of right to direct motor-carrier service to every point to which it ships when reasonably adequate inter-line service is available. Existing carriers have substantial investments in operating rights, facilities, and equipment necessary to institute and sustain their operations, and they are entitled to all the traffic that they can handle adequately, efficiently, and economically in the territories which they serve without the competition of an additional service. In the absence of convincing evidence, therefore, of a clear-cut public need for applicant's proposed service which the more experienced and better-equipped existing carriers cannot or will not satisfy, we conclude that the applicant must be denied.' "

In the case of *Dixie Highway Express, Inc., et al. v. United States, Interstate Commerce Commission, et al*,

United States District Court Southern District of Mississippi, Eastern Division, 16 F.C.C. 35,769, applicant sought an extension of its existing franchise. The matter was heard before a joint board and testimony was received for fourteen and one-half weeks. 311 witnesses appeared and 730 exhibits were admitted in evidence. The transcript of testimony consumed 10,955 pages. The Interstate Commerce Commission expressed much interest in the large number of these witnesses who testified. The joint board recommended that the application be denied. The Interstate Commerce Commission on appeal reversed that decision which latter ruling was by the court vacated and annulled. The court comments on the facts by stating, among other things, that Braswell offered shippers a nine cent cheaper rate and proposed single-line services on a very attractive time schedule which attracted and intensely interested its witnesses. 211 of the public witnesses giving testimony in support of the application stated that they had never been refused service or had been unreasonably delayed in receiving pickups. The principal desire of the shippers was for a faster service and each was supporting the application on the promise of a scheduled service as outlined by applicant. The court recognized its statutory limitation upon the scope and range of review in cases of the kind before it, but then states:

"* * * still, the Interstate Commerce Commission does not possess any carte blanche authority to disregard positive, undenied, credible testimony and binding judicial opinions and applicable legal precedents in these cases. While a protesting car-

rier does not have any property right in his franchise in the conventional sense which will deprive the Commission of the right and power and sometimes duty to award a competing franchise to another carrier; still the requirements of consistency in the public interest and due process in insuch respect must be observed. Were it otherwise, the Interstate Commerce Commission would fail of its purpose and duty to the public."

The court then goes on to state:

"The Interstate Commerce Commission has made no basic finding as to the inadequacy of the service presently being rendered by these carriers in the subject area to authorize or justify its legal conclusion in this case. * * * On the contrary, by the express adoption generally of the joint board's findings and conclusions, which it has not refuted or disavowed or even disparaged, the Interstate Commerce Commission has said that there is **no inadequacy** of service by the present carriers in the subject area and that to grant a franchise to another carrier therein would be hurtful to the other carriers and the public interest. Yet, in spite of those facts and circumstances, the Commission by a two to one vote has reversed the unanimous decision of the joint board and has decided to grant Braswell a franchise to haul certain designated commodities in the area with some restrictions."

What was done in *Dixie Highway Express, Inc. et al. v. United States, Interstate Commerce Commission, et al*, supra, was done in the instant matter. The Hearing Examiner and the Commission were overwhelmed by the testimony of some 200 witnesses who were influenced

by the array of schedules as set forth in Exhibit 6 and by the substantially lower rates as evidenced by Exhibit 2. The testimony, as the recommended report and order of the Commission discloses, was a desire, not a need, for a single carrier performing a statewide express service without any recognition on the part of the Commission or the witnesses as to the complete adequacy of existing transportation facilities, particularly to the Uintah Basin and furnished by Link and Uintah. The shippers obviously invisioned a single movement from a point such as Tremonton or Kanab, Utah to Vernal, Utah without interchange. Wycoff, we are sure, would admit that on such traffic the same would be reworked over its own docks in Salt Lake City, Utah prior to further movement, a fact which is apparent from its schedules. (Exhibit 5)

It is apparent that as to the area served by Uintah and Link there is no need for the proposed service and the record so states. As above indicated, Uintah and Link provide all of the service which the Commission authorized Wycoff to perform, including, among other things, express, simplified billing procedures, schedules, expedited service and pickup and delivery. The fact that Link and Uintah maintain schedules identical to the one schedule of Wycoff and in addition maintain in total five additional schedules means that all the shippers' needs are and have been met. The grant of the authority on the other hand threatens to divert approximately 25 to 50 percent of Link and Uintah's gross revenues and will require the elimination of other schedules in order

to economically operate. This elimination will result in a substantial detriment to the public at a time when no showing has been made for the grant of an authority.

CONCLUSION

The limited record before this court affirmatively discloses a lack of need for the proposed service in the area Link and Uintah are authorized to serve. The grant of authority as the record discloses will result in a weakening and not a bolstering of service to the public at a time when no need for a new authority exists.

Wycoff has failed to prove a necessary element of its application and the order as issued by the Commission is unsupported by the evidence, arbitrary and capricious and should be set aside.

Respectfully submitted,

**WILLIAM S. RICHARDS
GUSTIN & RICHARDS**

Attorney for Plaintiffs

Link Trucking, Inc. and
Uintah Freightways