

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 In Support of Petition For Rehearing and Reconsideration By Wycoff Company, Inc.

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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LEWIS BROS. STAGES, INC., a corporation,  
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,  
Defendants.

Case No.  
11081

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

Plaintiffs,

vs.

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

Defendants.

Case No.  
11082

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BRIEF IN SUPPORT OF PETITION FOR  
REHEARING AND RECONSIDERATION  
BY WYCOFF COMPANY, INCORPORATED

## STATEMENT OF THE KIND OF CASE

This is a petition for rehearing or reconsideration of the decision which was issued under date of March 24, 1969, whereby the majority of the court directed that the Certificate issued in 1967 by the Commission to the applicant be set aside and that the entire matter be held by the Public Service Commission until the transcript of the record is complete, has been reviewed by the Commission and then returned to this court. The case was an application by Wycoff Company for an extension of its express authority and was heard before an Examiner duly appointed by the Commission without any objection from any of the parties protestant and the hearings were completed on September 9, 1969. The applicant and protestants submitted briefs to the Examiner and then to the Commission and argued their matters, and the Commission then received the Report, Findings of Fact, Conclusions and Recommended Order from the Examiner on May 10, 1967, and then after hearing arguments and consideration of the briefs of the parties and the report of the Examiner, adopted such as its own and issued its report and recommended order on September 12, 1967.

## DISPOSITION BY THE UTAH PUBLIC SERVICE COMMISSION

As indicated above in the Statement, the Commission appointed a hearing examiner, Mr. Lorin F. Broad-

bent, prior to the time of the commencement of this case and assigned him to hear the evidence on this matter, which he did, and made of course notes thereon and heard the argument of counsel as well as having seen the witnesses themselves, received memoranda from counsel for all parties, and then submitted and filed his findings of fact, conclusions and recommended order to the Commission. Thereafter the Commissioners reviewed memoranda from the parties, argument from the parties and made and filed its report and order, favorable to the applicant, which report and order consist of 21 pages, showing that a very thorough consideration had been given to all of the vital elements, namely: the needs of the shipping public, the rights and responsibilities of the various carriers involved, the protection of necessary service, and a determination was made by the Commission that an extension of the express rights should be granted.

No objection was made at any stage of the proceedings by any of the protestants to the use of an examiner or to the determination so made by the Commission until well after the final decision had been made. Petitions for rehearing and reconsideration were filed by each of the appealing protestants, and in the grounds for rehearing or reconsideration none set forth an objection to:

(a) The use of an examiner for the hearing of the evidence;

(b) The right of the Commission to act in

response to the recommended report of the examiner and the memoranda and arguments submitted by the various parties prior to its consideration and decision; and

(c) The absence of a transcript of the testimony before the Commission at the time of the hearing and determination of the recommended report of the examiner.

The record before the Commission also shows that on May 10, 1967, after the report and order of the Examiner had been filed and made available to all parties, the Commission issued its "Notice and Order Fixing Time on Filing Exceptions", granting to each and all parties 30 days from date of service within which to file exceptions respecting the statements of fact, conclusions of law, and designating that the Commission may hereafter fix an appropriate time and place for oral argument upon the exceptions, if there be any; and then stating:

"The Order herein shall not become an effective order as the order of the Commission until the final order of the Commission issues."

Then such final order was issued on September 12, 1967, consisting of some 21 pages, showing full and thorough consideration.

## STATEMENT OF FACTS

We shall not attempt to repeat the facts as set forth in the briefs, but only as relevant to reconsideration of this particular matter raised by the court as a result of the failure of the protestants to provide to the Commission a transcript of the testimony so that the same could be certified to this court for its consideration on the appeal. To this end, we believe that a chronolgy of the case may be helpful:

1964 - Application for extension of authority filed by Wycoff.

Nov. 8, 1965 - Conference held before the Commission on initial hearing date following notice given by mail and publication and, after discussion, the Commission advised all parties and ordered that the actual hearings would be before the Commissioner's examiner, Lorin J. Broadbent, and would commence at a date upon which notice would be given. No objections were made by any of the protestants to such proceeding.

Jan. 10, 1966 - Hearings commenced before Examiner Lorin J. Broadbent, and were held at Salt Lake City, Logan, Vernal, Moab, Richfield, and Cedar City.

September 9, 1966 - Hearings completed.

November, 1966 - Applicant and the protestants prepared and submitted briefs to the Examiner and the Commission in support of their respective positions.

May 10, 1967 - Examiner's report and order issued and served on all parties (18 pages).

May 10, 1967 - 30 days time fixed for filing exceptions. (Note that all parties had heretofore briefed the matter for the Examiner and the Commission).

July 10, 1967 - Case submitted to the Commission for review of the decision of the Examiner and the briefs, memoranda and exceptions of the various parties.

September 12, 1967 - Report and order of the Commission issuing Certificate Nos. 1608 and 1609, wherein all of the operating authority of Wycoff Company was considered and the new authority recommended and issued in a Certificate authorizing express service on a statewide basis of shipments not to exceed 250 pounds for any shipper on any day.

October, 1967 - Petitions for rehearing and reconsideration were timely filed by the protestants.

October 18, 1967 - Order denying petitions for rehearing and reconsideration issued.

November, 1967 - Petitions for writ of certiorari filed and writs issued directing the Commission to certify the record to this court within 30 days.

March 13, 1968 - Motions of Lewis Brothers

Stages, et al. for extensions of time within which the Commission is required to certify and file the record.

April 1, 1968 - Hearing of motion for extension of time for filing the record (this is the first time anyone heard a suggestion that the case be considered by your court on the basis of the files, exhibits, memoranda and briefs of the parties without a transcript of the testimony).

April 10, 1968 - Order of the Court that the case be presented for review to this Court on the findings and report of the Examiner and upon the memoranda of the respective parties "in lieu of the transcript of the evidence."

July and August, 1968 - Briefs of parties filed.

October, 1968 - Case argued before the Supreme Court, based upon the record prescribed by the court.

March 24, 1969 - Decision.

One further material fact should be considered by the Court, and that is the established practice that the party taking an appeal from an order of the Commission procure, at its expense, from the reporter a transcript of the testimony and supply it to the Commission for certification within a 30 day period. Due to the numerous witnesses involved, the extensive period of time encompassed in the hearing and the unusually busy schedule of Mr. Clair Johnson, the court reporter



serving the Commission, the appealing protestant motor carriers were unable to procure from him a transcript of the testimony within the time required by the original order of the Writ of Review or within the extended time allowed by the court. He has not even yet prepared such a transcript. Whether Mr. Johnson would have prepared such a transcript had the appellants ordered more than one copy does not appear from the record, but the facts are absolutely without contradiction that Wycoff Company had no duty to procure and furnish such transcript of the testimony to the Commission, and has done nothing to prejudice the rights of the appealing parties, and did not make any objection to an extension of time by this court for the supplying of such record until in March of 1968, when the appellant motor carriers represented to this court that it would be "at least one year for him to complete the transcript", which seemed an extraordinarily long time following the issuance of the report and order in September of 1967.

The decision places in doubt the right of the Commission to utilize an examiner, notwithstanding the provisions of the statute making such appropriate and seems to infer that all of the Commissioners must be present at every hearing. This would stifle its capability of conducting the manifold responsibilities imposed upon it by the Utah Legislature, as the Commissioners also act as the Securities Commission, the Department of Business Regulation, etc. A new procedure would

seem to be imposed by this Decision whereby it is necessary that, if an examiner is used, a transcript of the testimony be prepared in every case before submission to the Commissioners, and requiring them to duplicate the efforts of the examiner by rereading the transcript of the testimony before they can receive, accept, adopt and file the report of the examiner.

## ARGUMENT ON PETITION

### POINT I

**APELLANT-PROTESTANTS HAVE NOT COMPLIED WITH SECTION 54-7-17 U.C.A. 1953 FOR A STAY AND THE COURT MAY NOT WAIVE PROOF OF GREAT AND IRREPARABLE DAMAGE AND POSTING OF BOND.**

The Legislature of Utah made provisions for a stay of an order of the Commission pending review by this court. That is set forth in Section 54-7-17, U.C.A. 1953, and the conditions and procedure are detailed as guidance for the court and for all parties who are interested in such a matter. We submit that because the Legislature has acted upon stays, that the procedure as outlined must be followed by this Court and by all concerned. Subsection 1 of that statute provides that the pendency of a writ of review shall not itself stay or suspend the operation of the order or decision of the Commission, and then grants to the

Court, in its discretion, the right to stay or suspend, in whole or in part, the operation of the Commission's order or decision. Subparagraph 2 is very specific that "no order so staying or suspending an order or decision of the Commission shall be made by the Supreme Court otherwise than upon three days notice and after hearing and the order suspending the same shall contain a specific finding based upon evidence submitted to the court and identified by reference thereto, that great or irreparable damage would otherwise result to the petitioner, and specifying the nature of the damage." Here we have no petitioner requesting such relief and we have no allegations upon which a showing of great and irreparable damage could be predicated, and nothing of that nature has been mentioned in the decision of March 24, 1969 issued by this court.

Subparagraph 3 of that statute states that the order of the court staying a decision of the Commission shall not become effective until a suspending bond shall "first have been executed and filed with and approved by the Commission, (or approved upon review by the Supreme Court) payable to the State of Utah and sufficient in amount and security to insure the prompt payment by the party petitioning for the review of all damages caused by the delay in the enforcement of the order or decision of the Commission . . . ."

As applied to our present circumstance, the public and Wycoff Company have come to rely upon the decision of the Commission and the certificate issued by it

in September of 1967, and the service so authorized has been carried forward continuously since that time. Before any order of suspension or stay of the effectiveness of the said certificate issued by the Commission is had, a very substantial bond should be posted by the appealing motor carriers. No showing of any great or irreparable harm has been identified by the appellant-protestant motor carriers upon which the "specific finding" referred to in the statute could be based, and we submit that no such a great or irreparable damage or harm could be shown by any of the motor carriers, particularly at this late date after the Writ of Review has been outstanding for over a year. We feel certain that the appellant-protestants in this proceeding did not ask for a stay because they recognized the responsibility which would adhere to them, had they posted a bond and sought the relief which has been gratuitously extended to them by the order of the court. A careful review of the various petitions for writ of certiorari and review show that each protestant-appellant has sought merely for a review of the proceedings and a reversal of the order of the Commission.

## POINT II

THE USE OF AN EXAMINER FOR THE HEARING OF THE EVIDENCE IS PLACED IN QUESTION.

### POINT III

**THE RIGHT OF THE COMMISSION TO ACT IN RESPONSE TO THE RECOMMENDED REPORT OF THE EXAMINER AND THE MEMORANDA AND ARGUMENTS SUBMITTED BY THE VARIOUS PARTIES PRIOR TO ITS CONSIDERATION AND DECISION SHOULD BE CLARIFIED NOW.**

Since the formation of the Commission it has been empowered to transact business and given quite a wide latitude in its performance of such regulatory powers over the public utilities of the State of Utah. In Section 54-1-3, U.C.A. 1953, it provides that "any investigation, inquiry or hearing which the Commission has power to undertake or to hold may be undertaken or held "by or before any commissioner or an examiner appointed by the Commission. All investigations, inquiries and hearings by a commissioner or an examiner appointed by the Commission shall be deemed to be the investigations, inquiries and hearings of the Commission; and all findings, orders or decisions made by a commissioner or an examiner appointed by the Commission, when approved and confirmed by the Commission and filed in its office, shall be deemed the findings, orders or decisions of the Commission, shall have the same effect as if originally made by the Commission."

In reviewing the legislative history of this, we note that the section as quoted above came into being in that form by the Laws of Utah 1951, Chapter 88, when sec-

tion 76-1-4 of the Utah Code Annotated 1943 was amended, so as to empower the Commission to utilize an examiner. The prior statute had authorized the holding of investigations, inquiries and hearings by a single commissioner, and that the findings, orders and decisions of such single commissioner, when approved and confirmed by the Commission and filed in its office, should be the act of the Commission as a whole. In the 1951 Session Laws, the provision for an examiner was added along with the single commissioner, so that as the statute now reads it is possible for a single commissioner or a single examiner to conduct the hearings; and by following the procedure thus stated the findings, orders or decisions made by the commissioner or the examiner "when approved and confirmed by Commission and filed in its office, shall be deemed the findings, orders or decision of the Commission, and shall have the same effect as if originally made by the Commission."

It would seem apparent that at this point that the decision of the court issued in this case has cast doubt upon the legality of all proceedings had by the Commission during the past years where only one Commissioner has sat in at the hearing, which has generally been the pattern before the appointment of an examiner in 1967, and that all of the decisions made by the examiner since 1967 and approved by the Commission are likewise questionable.

The right of a single commissioner to act on behalf of the Commission at the taking of evidence is now on

the same level and the same basis as the right of the examiner, and vice versa, as a result of the 1951 amendment of the statute. We believe that the Commission would be hard-pressed to show any motor carrier case in which the hearings through the years by a single commissioner or by an examiner have been followed by a transcript of the testimony and submitted to the Commission before it made its determination as a whole. Customarily the orders of the Commission bear the names of all or at least two of the Commissioners, though in only rare occasions have all of the commissioners sat. At the inception of this present Wycoff case in 1966, all of the commissioners were present when the decision was made to utilize an examiner, and no objection was made by any of the protestants to this, as all recognized that this would be a long case, involving a number of witnesses, and the Commissioners themselves did not have the time to devote to a case so extensive as they have a host of other duties and responsibilities which they must perform.

The utilization of an examiner for the taking of evidence and the submission of a proposed report and order is not a unique, new practice which has been dreamed up by the State of Utah without ample consideration. The general pattern of the Interstate Commerce Commission since the time of its formation in the supervision of motor carriers in 1935 has been that an examiner is designated by the commission to travel to the various states and localities where the hearings

are being held to take the evidence, consider the exhibits and then make a recommended report and order to the Commission. Then each party has a right to file exceptions (just as the Commission prescribed in this particular case) and then the decision is made by the Commission as to the final order.

The Public Service Commission of Utah has patterned its activities in this case to follow the established and court-approved procedure of the Interstate Commerce Commission, having in mind the element of fairness and the opportunity for all to present their positions through exceptions to the examiner's report. Before the Interstate Commerce Commission, a party may purchase a copy of the transcript it desires or it may prepare exceptions based upon its own notes and records of the case. So too, in our present case the commission designated an examiner to hear the testimony. The hearings were completed in the various parts of the state by September 9, 1966, and the report and recommended order of the examiner was not issued until May 10 of 1967. During that period of over one-half a year, had the appellant-protestants so desired, they could have procured a transcript of the testimony then, before Mr. Johnson became so busy with some major utility work at a later date.

During that period of time all of the protestants, as well as the applicant, submitted to the examiner memoranda in support of their respective positions, outlining the impact, if any, which the grant of the appli-



cation might have, the needs and requirements of the shippers and the service being performed and available to the public. None of these appellant-protestants elected to purchase a transcript of the testimony at that time, and none has done so to this date, though we recognize that such is probably not their fault, though they delayed until well after the decision by the Commission before ordering such a transcript.

The passage of time in this case, as well as the magnitude of the case, is greater than any which the Commission has ever had on motor carriers before in its history, and by the same token greater care, concern and consideration were given to this case than any other case which has been handled by the Commission in past years. The thoroughness of the report and recommended order of the examiner issued on May 10, 1967 is significant, and in addition to that the even greater thoroughness and completeness of the report and order of the Commission issued September 12, 1967 is impressive in its evaluation of all of the elements necessary for a valid order, the impact upon the other carriers and the granting of a lesser authority than applied for by the applicant. It is to be noted that Section 54-6-5 relating to the granting of certificates of convenience and necessity by the Commission reads in part:

“If the Commission finds from the evidence that the public convenience and necessity require the proposed service, *or any part thereof*, it may issue a certificate as prayed for, *or issue it for the*

*partial exercise only of the privilege sought*, and may attach to the exercise of the right granted by such certificate such terms and conditions as in its judgment the public convenience and necessity may require, otherwise such certificates shall be denied.” (Emphasis ours).

Certainly the mandate of this section has been fully realized, as a lesser amount of authority was granted than prayed, and key restrictions were imposed in the wisdom of the Commission.

This Court has erred in its interim order setting aside the decision of the Commission and its Certificate on a partial record, and in the face of testimony of over 200 public shipper witnesses. The Court, while declaring that it could not decide the case because of lack of a transcript, has nevertheless substituted its judgment for that of the examiner and of the Commission. No vacating and setting aside of the certificate should be granted as the protestant-appellants have had full protection of their positions by the examiner and the Commission.

#### POINT IV

THIS DECISION AND SETTING ASIDE BY THE COURT IS CONTRARY TO THE PROVISIONS OF SECTION 54-7-10, UTAH CODE ANNOTATED, 1953, WHICH PROVIDES THAT ORDERS OF THE COMMIS-

**SION OF THEIR OWN FORCE SHALL  
“TAKE EFFECT AND BECOME OPERATIVE  
TWENTY DAYS AFTER THE SERVICE  
THEREOF.”**

The Legislature in the enactment of the public utility laws, and particularly those relating to motor carriers, felt that once the Commission had entered its Report and Order that such should become effective unless the steps prescribed by statute for the posting of a bond and procuring a stay of the effective date were followed by the appellant-protestants. To this end, in Section 54-7-10 U.C.A. 1953, it was provided that after conclusion of the hearing the Commission shall make and file its order containing its decision. Then a requirement that a copy of such order, certified under the seal of the Commission, shall be served upon the corporation, the persons complained of or its attorney. And then it reads:

“Said order shall of its own force take effect and become operative 20 days after the service thereof, except as otherwise provided in such order, and shall continue in force either for a period which may be designated then or until changed or abrogated by the Commission.”

The Commission's order in this proceeding in issuing Certificate No. 1068 to Wycoff Company, Incorporated imposed no restriction for the effective date and imposed no limitation as to the time and service, but rather directed specifically that the “applicant shall render

reasonable, adequate and continuous service in pursuance of the authority herein granted, and failure to do so shall constitute sufficient grounds for termination and suspension of the said certificate.”

As directed by said order, the applicant did file its necessary tariffs and proceed with the rendition of service, and has been doing so continuously ever since the date of said order in September of 1967.

As we read the statutes, the said order becomes effective and continues in force as prescribed by Section 54-7-10 unless and until there has been a reversal of the order by this Commission after a full hearing of the matter, or there has been a stay granted under the bond and other procedures set forth in Section 54-7-17. No one will contend that there has been a full hearing on review of this case, because the decision of this court makes it very clear that such has not been done, and could not be done without a transcript of the testimony being made available to this court. And who has the duty to provide such a transcript for the Commission to be certified to this court? This duty is imposed by custom and practice on the appellant-protestants, and such duty was known to them at the time of the commencement of this case, at the time of the preparation and the submission of memoranda to the examiner during the better than one-half year that he had the matter under advisement and consideration, and at all times thereafter.

We do not have the problem of a small motor

carrier taking an appeal and being unable to afford the necessary funds to pay a court reporter to transcribe the testimony, but rather here we have the combined financial resources of the major bus lines, the major truck lines of this whole state of Utah, which could be marshalled to pay the court reporter for the transcribing of the testimony which was completed back in September of 1966. Certainly their knowledge of the fact that Mr. Johnson was busy did not foreclose the duty which they had to the Commission to supply a transcript, even if it meant hiring a skilled stenographer to transcribe from the tape of the record which Mr. Johnson took of the entire proceedings, the words which were spoken by all parties, the examiner and the participants in the proceedings. No hardship can be claimed by them except that they have failed to place sufficient financial inducements before either Mr. Johnson or some stenographer to make the transcription so as to have it available for the court so that a complete review of the matter could be had.

We would urge that if a prejudice is to be suffered in this proceeding, that it should not be imposed upon Wycoff Company and the public as a result of this failure, but that the appellant-protestants should suffer part of the responsibility and prejudice, if any does arise. At no time have we ever contended before this court that a full and complete review of the case should be had without a transcript of the testimony. We know, as do all other parties, that such has been the custom

and the practice, and that it is the duty of the appellant to provide it for the court so that the court can be fully advised of the scope of the evidence, the needs of the shipper witnesses, the availability of the protestants' service, etc. But the failure to provide such should not result in a dismissal of the action of the Commission through a suspension and setting aside of the Order which it has granted, but rather should be placed in proper perspective and result only in a continuation of the hearing of the case by the Supreme Court until and when such a transcript has been purchased and supplied to the Commission for certification to this court so the appeal can be completed.

It was not until the hearing of a Motion before this court on April 1, 1968 that the parties had ever considered the possibility of this case being heard by the Court without a transcript of the testimony. It is our recollection that such was at the suggestion of members of the Court as a possible alternate, and only then did any objection come forward from the protestants to that plan. Aside from this being a new and different procedure, we feel certain that the Court had hoped that the parties might agree upon the Statement of Facts as set forth in their briefs. Without claiming any special virtue for the Appendix of the testimony of the supporting shippers, consisting of some 78 pages attached to the brief of the defendant Wycoff Company, and the complete absence of any such summary of the testimony of the shipper witnesses by any other

party to the proceeding, we at least must assert that at this point it is before the court and that there was and is substantial proof of the fact that there was extensive public shipper testimony to support each and every segment of the order of the Commission in this proceeding. The fact that the protestant motor carriers who had the duty to supply the transcript for this court have failed to stipulate or agree to those facts (and we never required them to do so), does not mean that the Commission was without any jurisdiction or basis in its review of the 18 page Report and Order of the examiner, review of the memoranda submitted by the parties and following the recommended report of the examiner while the matters were very fresh in the minds of all parties. The issuance of its report and order and the certificate as has been done in this proceeding was in conformance with its statutory duties.

## POINT V

THIS DECISION AND SETTING ASIDE BY THE COURT REVERSES THE STATUTORY MANDATE OF SECTION 54-7-16 UTAH CODE ANNOTATED, 1953, STATING THAT THE "FINDINGS AND CONCLUSIONS OF THE COMMISSION ON QUESTIONS OF FACT SHALL BE FINAL AND SHALL NOT BE SUBJECT TO REVIEW."

*Lewis v. Wycoff Co., Inc.*, 18 U. (2d) 255, 49 P. 2d 264.

“It is not our prerogative to pass upon the wisdom of the Commission’s decision. It is charged with the responsibility of general supervision and regulation of the common carriers of this state and of seeing that the public receives the most efficient and economical service possible. This requires consideration not only of the immediate advantage that may inure to some members of the public and/or to the applying carrier, but also of the long-range needs of safeguarding the economic stability and continuity of existing services. The power with which the Commission is invested to perform this duty is, of course, not arbitrary. It must be exercised with reason and within the scope of the authority given it by law. The assurance that it does so is safeguarded by the right of review by this court.

“Due to the responsibility imposed upon the Commission, and its presumed knowledge and expertise in this field, its findings and order are supported by certain well-recognized rules of review. They are endowed with a presumption of validity and correctness; and the burden is upon the plaintiff to show that they are in error. We survey the evidence in the light most favorable to sustaining them; and we will not reverse unless there is no reasonable basis therein to support them so that it appears that the Commission’s action was capricious and arbitrary.”

The above stated quotation is not an isolated expression of this Court on the function of the Commission. By statute, Section 54-7-16, and by judicial interpretation the presumption of validity of the proceedings is strong. The burden of persuasion is clear on the appellants (plaintiffs) to show from the record



that the action of the Commission was arbitrary and capricious, or that it has exceeded its jurisdiction.

## POINT VI

### THE COURT ERRED IN MAKING ITS INTERIM ORDER CANCELLING THE OPERATING AUTHORITY.

Without detailing the several other bases of the grounds for reconsideration, may we summarize such in this sentence. Wycoff Company's certificate is being revoked erroneously because the appellant-protestant failed to procure a transcript of testimony for *the* appeal.

The obvious injustice of setting aside a bona fide order of the Commission, without a review of the evidence by this Court, should be apparent. A parallel circumstance would be for this Court, on an appeal from a District Court decision in a law case to reverse and set aside a judgment for the plaintiff on the grounds that the appellant had failed to supply a transcript of the trial to the Clerk of Court for certification of appeal.

The action of this Court is akin to declaring that a trial judge may not make any decision, even after hearing the case without a jury, hearing the argument of counsel and receiving post-trial memoranda from both sides, because he *failed* to have a transcript of testimony prepared before rendering judgment. The

examiner selected and designated by the Commission for hearing applications sits in the same basic position as a trial judge. He is a lawyer trained in the evaluation of evidence and empowered by the Legislature to make findings, conclusions and decisions, the same as any individual Commissioner. That the Commission must ratify and adopt such and file the same before they become binding on the parties does not change the efficacy of the administrative process.

Frequent decisions of this Court have averred to "The time-honored precedent of requiring survey of the evidence in the light favorable to the findings of the trial court and of indulging credit to his determination." The same precedent respect and presumption of correctness applies with even more force to those made by the Commission, because such is fortified by a statutory directive.

The growth and development of administrative law in the past 50 years has been essential to the efficient and equitable application of regulatory statutes. Commissions, such as our Public Service Commission of Utah, are frequently manned by laymen not trained in the law. Their quasi-judicial functions are fully recognized as being part of the due process requirement. When, under proper statutory authorization, the services of a legally trained attorney are engaged in the capacity of a hearing examiner to attend and take evidence on applications, such should be encouraged and not be destroyed by a decision such as this.

May we urge the Court to honor and respect the statutory law, as well as the prior decisions of this Court. The pertinent factors which would appear to sustain the certificate of the Commission against this untimely interim revocation are:

**Section 54-1-6 U.C.A. 1953**

authorizing appointment of an examiner and his powers adopted by the Commission;

**Section 54-7-10**

the orders are effective 20 days after service;

**Section 54-7-16**

findings and conclusions on questions of fact not subject to review.

That the issue of the authority of the examiner to act is a completely new development will be observed from reading the points in the appellant-protestants' briefs. Not one asserted that he had no authority to hear and render a decision to the Court. All parties had wholeheartedly accepted and participated in the hearings without objection.

The nearest any of the appellant-protestants came to this issue was Point III in the Milne et al brief which complained that an absence of a transcript (which they should have provided) "denies the plaintiffs of their lawful rights to a decision by the Commission and to a review by this Court of the Commission's order. The discussion of this point was directed to the provisions of Section 54-7-10 relating to the need of a transcript before this Court for review.

The Court may recall that nothing was said about the role and functions of the examiner in the Wycoff brief because it had not been raised on appeal. However, counsel for Wycoff did, in the oral argument, cite that Section 54-1-6 U.C.A. 1953 to the Court to outline more fully the background and to remind the Court that both the examiner and the Commission had before them the memoranda of all parties prior to the rendition of their respective decisions.

## CONCLUSION

We would most strongly urge the Court to reconsider its decision which has set aside the certificate issued by the Commission in this case. It would appear proper to hold the case before the Court for continuation of the appeal without prejudice to the positions of any party. A mandate should go out directing the preparation and filing of the transcript in accordance with the established custom and granting a reasonable time to accomplish such.

The failure of this Court to rectify the impact of this interim decision will be tragic for all administrative law in Utah. The usefulness of a statutory examiner by an administrative body will be nullified. The possibility for a single Commissioner to hear applications, rate matters, etc., will be negated also. The work of the reporter will be doubled if he must prepare a transcript of every case. The Commissioners are too heavily

burdened with other duties and statutory responsibilities to attend en masse all hearings and their quasi-judicial functions will be crippled.

We cannot possibly over-emphasize the unfortunate impact of this decision on the Commission. So too on Wycoff Company its certificate will be stayed and revoked without the filing of a bond or the giving of any protection to it or the public, nor a showing of arbitrary or capricious action by the Commission.

The Commission's decision is *prima facie* valid and binding. The Court says it cannot review it as the record is not complete, so obviously it should not attempt to affirm or to revoke that decision of the Commission in whole or in part, without a complete record. Common justice dictates the continuance of the Commission's order, made in pursuance of statutory authority, until review of the complete record has been had.

Respectfully submitted,

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