

1966

Joseph M. Lewis, Executor of the Estate of Orson Lewis dba, Lewis Bros Stages and Bingham Stage Lines v. Public Service Commission of Utah: Hal S. Bennett, Donald Hacking and Raymond W. Gee, Its Members; and Wycoff Company, Barton Truck Line, Inc., Uintah Freightways, Magna Garfield Truck Line, and Link Trucking, Inc. v. Public Service Commission of Utah Hal S. Bennett, Donald Hacking and Raymond W. Gee, Its Members, and Wycoff Company, Garrett Freightlines, Inc., Lake Shore Motor Coach Lines, Inc., Continental Bus System, Inc., American Bus Lines. Inc .. Denver-Salt Lake Pacific Stage. Rio

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Grande Motorway, Milne Truck Lines, Inc., Palmer Bros. Incorporated, Mt. Hood Stages, Dba Pacific Trailways v. Public Service Commission of Utah: University of Utah Hal S. Bennett, et al., Its Members: and Wycoff Company, Incorporated : Reply Brief of Defendants

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# In the Supreme Court of the State of Utah

JOSEPH M. LEWIS, Executor of the Estate of  
OESON LEWIS, dba LEWIS BROS. STAGES, and  
BINGHAM STAGE LINES, a corporation,

*Plaintiffs,*

—vs.—

PUBLIC SERVICE COMMISSION OF UTAH;  
HAL S. BENNETT, et al., its Members; and  
WYCOFF COMPANY, INCORPORATED,

*Defendants.*

Case No.  
10351

UNIVERSITY OF UTAH

MAY 12 1966

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BARTON TRUCK LINE, INC., UINTAH  
FREIGHTWAYS, a corporation, MAGNA-GAR-  
FIELD TRUCK LINE, a corporation, and LINK  
TRUCKING, INC.,

*Plaintiffs,*

—vs.—

PUBLIC SERVICE COMMISSION OF UTAH,  
HAL S. BENNETT, et al., its Members and  
WYCOFF COMPANY, INCORPORATED,

*Defendants.*

Case No.  
10357

GARRETT FREIGHTLINES, INC., LAKE  
SHORE MOTOR COACH LINES, INC., CONTIN-  
ENTAL BUS SYSTEM, INC., AMERICAN BUS  
LINES, INC., DENVER-SALT LAKE-PACIFIC  
STAGES, RIO GRANDE MOTORWAY, INC.,  
MILNE TRUCK LINES, INC., PALMER BROS.,  
INCORPORATED, MT. HOOD STAGES, dba  
PACIFIC TRAILWAYS,

*Plaintiffs,*

—vs.—

PUBLIC SERVICE COMMISSION OF UTAH;  
HAL S. BENNETT, et al., its Members and  
WYCOFF COMPANY, INCORPORATED,

*Defendants.*

Case No.  
10360

FILED

MAY 2 1966

## REPLY BRIEF OF DEFENDANTS

Filed from the Order of the Public Service Commission of Utah

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### STATUTES CITED

54-7-16 Utah Code Annotated, 1953

# In the Supreme Court of the State of Utah

SEPH M. LEWIS, Executor of the Estate of  
JESSE LEWIS, dba LEWIS BROS. STAGES, and  
UTAH STAGE LINES, a corporation,

*Plaintiffs,*

Case No.  
10351

VS.—  
PUBLIC SERVICE COMMISSION OF UTAH;  
JAMES BENNETT, et al., its Members; and  
MOORE COMPANY, INCORPORATED,

*Defendants.*

UTAH TRUCK LINE, INC., UTAH  
HIGHWAYS, a corporation, MAGNA-GAR-  
AGE TRUCK LINE, a corporation, and LINK  
TRUCKING, INC.,

*Plaintiffs,*

Case No.  
10357

VS.—

PUBLIC SERVICE COMMISSION OF UTAH,  
JAMES BENNETT, et al., its Members and  
MOORE COMPANY, INCORPORATED,

*Defendants.*

BARRETT FREIGHTLINES, INC., LAKE  
SIDE MOTOR COACH LINES, INC., CONTIN-  
ENTAL BUS SYSTEM, INC., AMERICAN BUS  
LINES, INC., DENVER-SALT LAKE-PACIFIC  
LINES, RIO GRANDE MOTORWAY, INC.,  
GREEN TRUCK LINES, INC., PALMER BROS.,  
INCORPORATED, MT. HOOD STAGES, dba  
MT. HOOD TRAILWAYS,

*Plaintiffs,*

Case No.  
10360

VS.—

PUBLIC SERVICE COMMISSION OF UTAH;  
JAMES BENNETT, et al., its Members, and  
MOORE COMPANY, INCORPORATED,

*Defendants.*

REPLY BRIEF OF DEFENDANTS

## REPLY BRIEF OF DEFENDANTS

Come now the Defendants, Public Service Commission of Utah, its Commissioners and Wycoff Company, Incorporated and reply to the briefs submitted by the Plaintiffs in each of the three cases referred to on the title page.

## STATEMENT OF KIND OF CASE

The Public Service Commission of Utah, hereinafter referred to as the "Commission" heard the application of Wycoff Company, Incorporated, herein referred to as "Wycoff" for authority to transport in intrastate commerce contractors' equipment, parts and supplies on scheduled express-type service between all points and places in Utah. After hearing a number of public witnesses (contractors and suppliers of parts and equipment who operate on a state-wide basis), as well as the applicant and protestants, the Commission issued its Report and Order favorable to Wycoff. A Certificate of Convenience and Necessity was issued authorizing performance of the proposed service by Wycoff on an emergency basis on shipments not weighing in excess of 1,000 pounds. The protestants have appealed to this court for review and reversal of the Commission's decision.

## RELIEF SOUGHT

Protestants as plaintiffs in the three consolidated cases, seek reversal of the Commission's findings of

The defendants assert that the Commission acted on a full and ample evidence to support its findings and accordingly request this Court to affirm such Order.

### STATEMENT OF FACTS

At the request of the Court an Abstract of the evidence has been prepared by the plaintiffs and defendants and the plaintiffs have prepared and filed a Supplement to such Abstract which relates to testimony of the applicant and the direct witnesses.

The application was heard upon a request to provide non motor carrier service for "contractors' equipment, equipment parts and supplies, excluding, however, commodities in bulk, and commodities which because of their weight require special equipment". This proposed service was to be over all highways within the state and at the time of the hearing a further restriction was voluntarily imposed that the shipments would not exceed 100 pounds in weight. This application was filed on August 5, 1960 and was finally heard in May of 1964, and the Commission issued its Report and Order on January 14, 1965.

During the interim period between the time of the application and the hearing, the Commission had granted number of temporary permits to Wycoff to enable it to provide service to the contractors in the emergency



movement of their supplies, equipment or parts, hence by the time that the hearing was held, the contractors and their suppliers had experienced the exact type service provided by Wycoff in the movement of supplies, equipment and parts and were able to judge from experience as to the advantages of such service to their business and compare the same with the other available public transportation. The Report and Order issued by the Commission in this case (R. 1225-1229) shows a careful evaluation made by the Commission and the detailed description of the commodities which were authorized to Wycoff under the Certificate No. 11628 which was then issued:

"to operate as a common carrier by motor vehicle in the transportation of emergency shipments, contractor's supplies, contractor's equipment, or parts thereof, in a scheduled service, exclusive of commodities in bulk, or commodities which because of size or weight require special equipment and any shipment weighing in excess of ten pounds, between all points and places in the District. Shipments shall not be separated for the purpose of avoiding this restriction.

"The phrase, "contractor's supplies, contractor's equipment, or parts thereof" as used in the order shall be construed as meaning the supplies and equipment, and parts thereof, which a contractor utilizes in the performance of his work; it does not include materials or supplies which a contractor might use or consume in the course of his work or which become a part of any construction. At the time of any shipment the ultimate

... must have been identified as a contractor, as the intended use of the commodities by a contractor fixed, in order to fall within the phrase "contractors defined, and the transportation herein authorized."

The applicant, Wycoff, introduced Exhibits 1 through 4, and its Executive Vice President and Manager, Mr. Max W. Young, testified concerning the capabilities of the company to perform the services at issue. Exhibit 1 shows the financial condition of the company, attesting its capability to carry forward the service, and its past experience. Exhibit 2 is an equipment list consisting of four pages reflecting the type and kind of motor vehicle equipment available for serving the contractors and their suppliers. Exhibit 3 is a schedule of Wycoff's express service indicating the time of departure and arrival at the principal places within the State of Utah, and Exhibit 4 is an Abstract of shipments mailed to and from contractors for a sixty-day period from November 21, 1963 to January 9, 1964, there being recorded thereon only those shipments which exceeded 100 pounds, it being remembered that Wycoff Company already had an express authority, more or less state wide, for service of shipments under 100 pounds in weight.

The testimony shows that Wycoff already held authority to transport newspapers, motion picture film, United States mail, books, magazines, cut flowers, etc. throughout the State of Utah, and performed such service

on an expedited schedule with direct delivery to the contractors by express trucks. No large tractor semi-trailer was utilized in the performance of this service. Inquiry was made of Mr. Young concerning the determination as to whether the commodities tendered to Wycoff under temporary authority were within the scope of the authorization and he testified that if the shipment was to a construction site, or was in some way associated with a contractor's situation and involved parts, equipment or supplies, then Wycoff would handle the movement. Testimony was also given that deliveries were made at all hours of night and day and, where needed, lockers were provided for the contractors or other recipients into which the commodities would be deposited if no one was present at the time the schedule passed that particular point. The present express authority of Wycoff is limited to shipment which do not exceed 100 pounds in weight and a further restriction of not over 500 pounds on a schedule, and hence a contractor could not have been served under the express authorization if his shipment exceeded 100 pounds in weight or if the contractor's shipments on a particular schedule exceeded 500 pounds. Hence in response to numerous requests made by contractors and by equipment suppliers for this service, an application was filed.

Service is rendered to the contractors and suppliers in both directions, including emergency repair work when equipment is down and deliveries are made.

communities but also to the job sites for contrac-

Exhibit 4 was supplemented by Exhibit 94 which was prepared by Wycoff at the request of the protestants. Exhibit 4 shows two months of shipments solely for service for contractors and from their suppliers which averaged 100 pounds in weight during that period. From Exhibit 94 will be observed that an average weight of about 200 pounds per shipment was made to the contractors. Exhibit 94 reflects only the express shipments to San Juan and Grand counties for a seven-day period as stated by the protestants.

The application was supported by a series of witnesses who were representative of the larger contractors throughout the State of Utah as well as the larger equipment and parts suppliers throughout the state. These contractors and the equipment and parts suppliers operate on a state wide basis and do not restrict themselves to any particular portion of the State of Utah. The testimony of these witnesses has been abstracted by the plaintiffs and supplemented by defendants and it is assumed that the Court will read such Abstract and Supplement so as to have a more comprehensive understanding of the testimony itself. However, because of the great importance of this service to the contractors and the applicant, we will endeavor to summarize the testimony of each of the supporting witnesses so that the

Court will see the relationship of their operations. Report and Order which was granted, and observe the substantial competent evidence was before the Commission prior to the issuance of its Report and Order.

WILFORD C. CLYDE and MAX THORNTON of W. Clyde & Company testified that this company is engaged in general construction, airports, roads, and bridges in all areas of the state and the proper service would be used to save "down time". Some equipment worth a half million dollars and a number of men may be idle in the event of a breakdown away from the part and they are interested in getting the parts, equipment and supplies as quick as they can. Their headquarters are at Springville, Utah and 90% of their supplies come from Salt Lake City. On emergency parts and equipment W. W. Clyde & Company uses the service of Wycoff and on non-emergency parts and equipment utilizes its own trucks and commercial carriers. W. Clyde provides the service two or three times a day and to support the application. Its services were characterized as the "most outstanding carrier that we have dealt with in eighteen years that I have been with the company."

LEO A. CRANDALL of Strong Company testified that its principle place of business is at Springville, Utah, and is a general contracting company specializing in basic highway and canal work. It uses Wycoff service for transportation of repair parts and has found the same

excellent." Presently it is working in the Lehi, Salt Lake and Ogden and Willard areas and is vitally concerned with arrival times. They have no intention to divert regular traffic from regular truck carriers but would accept an emergency type service.

ARTHUR B. BERGNER. Tiago Construction Co. is a general highway and pipeline contracting throughout Utah and in other states. They recently completed work in Salt Lake County, Heber City, Duchesne and the Big Horn area. When possible they ship with Wycoff because they find its service better and it will drop equipment and parts right at the job site. They have approximately 20 to 30 shipments per week and it is important to know when the parts will arrive so that they can schedule their men on the job immediately after the project is repaired.

CLIFFORD WOODLAND. Fife Rock Products, Inc. and Fife Construction Co., Brigham City, Utah — engaged in road and canal construction as contractors. They get parts and equipment from Salt Lake City, Tremonton and Ogden and use the services of all common carriers including Wycoff. The Wycoff services of all common carriers including Wycoff. The Wycoff service has been selected to avoid delays caused by down time for equipment that requires repairs. Any delay in getting equipment or parts is critical because of the short production season in construction work. Wycoff delivers

to their yard and shop or their job sites and if they need a part and give it to Wycoff we know it will be there as scheduled". They require seven-day service in the summer and five-day service in the winter.

DAVID W. LYON of Wasatch Electric Company and Wasatch Line Construction Company, and WILLIAM L. WALKER of Interstate Electric Company. Both testified relative to power and telephone pole construction contract work. Both companies operate statewide and compete with each other for similar jobs and each has very substantial quantities of construction equipment, including heavy earth moving equipment, which they require service and repair parts. Each has used all types of public transportation and each has found the service of Wycoff to be excellent on emergency shipments. Dependability was cited as the main reason why the Wycoff service was so excellent on contractor parts and supplies. A number of current jobs of these contractors are set forth at pages 8 and 9 of the Supplement to the Abstract which show that their operations are on a broad area basis. Each holds itself out for work in all parts of the State of Utah.

A stipulation was entered into between the appellants and the protestants relative to other witnesses who were engaged as contractors in the State of Utah who have not yet come to the hearing but had not yet been called. It was stipulated that they, if called, would have testified similarly to

witnesses who did testify, that were engaged in the general line of business: Harold Whiting of Whit- & Haymond and Paul Thorn of Thorn Construction (general road contractors) if called they would have testified similarly to the witnesses for W. W. Clyde and Strong Company.

The following are contractor's equipment and parts suppliers who appeared at the hearing but did not testify, and the stipulation last referred to above it was stipulated that certain witnesses who had appeared at the hearing, but who had not yet been called would have testified similarly to prior witnesses who did testify had they been called, to-wit:

D. L. Roberts — Foulger Equipment Co.

Keith Reading — Atlas Copac (new equipment dealers)

Roy Larch — Larch Tire Co. (tires, tubes and batteries)

Dick Love — Love Machine Co. (equipment repair)

PAUL ORTON of Cate Equipment Company, Salt Lake City, Utah, is a retail distributor for construction equipment used in road building and mining and 90% of the shipments constitute replacement parts for contractor's equipment. It has used the services of all of the motor carriers and busses and has customers state-wide



requiring service on equipment and parts. The customer "is usually in one awfully big hurry when he makes a phone call" and they utilize Wycoff for such service as fast as ever possible. During 1963, 186 shipments were made by Wycoff as compared to 59 by Continental Trailers, Inc. busses and a like number by Greyhound. Examples of customers requiring service were given from Glen Canyon on the South to Logan on the North, Vernal on the East to Eureka on the West. They take parts after working hours to the Wycoff dock and know with certainty that they will be delivered.

**JACK G. THACKER** — Wheeler Machinery Company. Have over 700 users of their machinery in Utah, 50% of which are contractors. They handle Caterpillar tractors and equipment throughout the state and compete with dealers in Idaho, Nevada and Colorado in such business and for parts and supplies. They used all types of truck and bus service and found that "Wycoff furnishes an emergency service which is extremely important in getting machines back on the job when they are down." The Wycoff emergency type service permits them to deliver to the dock after regular hours and if the truck has left they can stop the truck on the highway and have the shipment loaded but such service is not available by other carriers.

**REG CRANE** of Rocky Mountain Machinery Company handles numerous types of construction equipment such as LeTourneau, Westinghouse, Linkbelt, etc. but

employed and services the entire State of Utah. It regards Wycoff's service to be "excellent" and describes the advantage of Wycoff's service is "that it can make shipments to all areas in the State of Utah, whereas without Wycoff it would be necessary to use five or six different carrier to meet their shipment requirements to various parts of the state. It has used the services of all bus lines and motor carriers with regard to the machinery shipments being handled by Wycoff and the use of Wycoff has increased substantially during the past few years under the temporary authority period. The regular truck lines will not honor phoned requests for pickup after 3:00 P.M. and they need Wycoff much later than that, and such Wycoff provides. Service is tendered to Wycoff except emergency shipments and during 1953 they had 513 shipments via Wycoff and in the first four months of 1964 — 154.

R. L. ARNOLD, Arnold Machinery Company, Construction Machinery and Parts — International Harvester, Northwestern Engineering, etc., at Salt Lake City. They use all transportation companies and have used Wycoff constantly during the past few years, and regard Wycoff's service to be excellent. They carry a large stock of parts (\$500,000.00) and service several hundred contractors in Utah. They prefer the Wycoff service, and if this is at the request of their contractor customers. The freightlines close off calls for service at 3:00 P.M. but they can get Wycoff until 10:00 o'clock P.M.,

and Wycoff has more schedules to more parts of the state and gives them an advantage in getting parts to customers. The bus lines and truck lines will not have drop-offs to the contractor's job site. Wycoff has offered them a service that they did not have before, it does not replace the common carriers but is a supplement. Most of the shipments handled by Wycoff are emergency shipments.

K. P. HEINER, Heiner Equipment and Supply Company, Salt Lake City — front-end loaders, lift trucks, building contractors' supplies, etc. They supply service to contractors for various parts throughout this state of Utah. Wycoff handles 10% of their shipments and they are supporting the application is a matter of business necessity. They compete with Arnold Machinery Company, Wheeler and Rocky Mountain in servicing contractors throughout the State of Utah.

ALBIN M. ROSS — Midvale — Amco Equipment. Ross-Cowen Equipment and Utah Bit and Steel — compressors, wire rope, contracting equipment and tools as well as drill steel and drill bits. They serve the entire state, both for contractors and for mines, and also maintain repair parts for compressors and contractors' equipment of various types. As the business is very competitive they "need that type service where we can get the parts to people the quickest." Wycoff has handled 10 shipments without any complaint on any of them. The

Shipments moving almost every week and every day of the week and have been using Wycoff's service and found such to be excellent. They also use the other motor carriers and the bus lines.

**GORDON DORIUS** — Salt Lake City — Bailey, Incorporated — tires, tubes and batteries, service to contractors on road jobs. They serve 50 to 60 contractors throughout the state and use Wycoff both on customer's requests and on their own initiative in the emergency shipments throughout the state. They utilize all means of transportation and on the larger shipments use truck lines, but seldom use the bus lines because of the requirement that the busses have of wrapping the tires and because of acid in the batteries.

The testimony of the protestants was substantially the same as has been indicated by the shipper witnesses. These truck lines operate normally five days per week, starting from Salt Lake along the particular limited lines that have been assigned to them by the Commission. Their practice is to send out pickup vehicles and bring the commodities to a dock in Salt Lake City, where the commodities are transferred to a large semi-trailer, tractor type rig for movement to terminals upstate or downstate, from which rig they are then transferred at the terminal to a pickup unit for ultimate delivery to the destination point. This slow and cumbersome method of handling these commodities seems to meet the require-

ments of the contractors on their large shipments does not meet the needs of the contractors on the emergency type shipment, where a special part is needed immediately at the destination point. This slow and backward method of handling the commodities, some involving interlines between carriers, does not meet the needs of the contractors in emergencies where a special part is needed due to the failure to order sufficient units of supplies or a breakdown occurs or other emergency type situation has developed in the contracting process. The bus lines generally do not provide delivery service at destination points, but rather drop at the drug store, cafe or some other point in a community downstate or upstate, and it is incumbent upon the person who is the consignee to go to that drug store, cafe or other point and pick up the equipment. Generally no pickup service is provided by the bus lines; however, in Salt Lake City, at an extra charge, separate from the charges made by the bus line for the transporting of the commodities, a pickup service is provided by a bus express company. Lake Shore Motor Coach Line has its own pickup service, but charges a separate fee for the service in Salt Lake and in Ogden. Most busses have a weight limit of 100 pounds and most busses require tires and similar type equipment to be carefully packed and wrapped before they will handle it, whereas Western Company does not make such requirements of shippers and under the contractor's authority will transport parts, supplies and equipment up to 1,000 pounds.

The trucks of the truck lines are different from the type of equipment operated by Wycoff Company, and the dump trucks on the highway operations are 30 to 40 foot trailers or else "doubles", consisting of two trailers each 20 feet in length, pulled in tandem. The goods loaded in the front of one of these vehicles are gotten unloaded when it reaches the destination point because all of the freight that has been loaded on the spot must of course be removed first. The Wycoff Company has side doors, as well as back doors, to enable rapid unloading, and its freight is "line loaded", that is to enable the driver to quickly remove the shipment from the truck as the vehicle proceeds along the particular highway. The busses must give preference to the baggage of the passengers ahead of express, and this delays the handling of express, as well as imposes restrictions as to the size of the bays where the baggage is loaded underneath the bus and the requirement of sweeping of tires and the packaging of contractor's equipment.

Details of the testimony of each protestant as to its contract and service is not repeated here, for the reason that the type service rendered by Wycoff is very different and the requirements of the contractors are special and the authority granted by the Commission is for the ordinary type service.

## ARGUMENT

## POINT I

WYCOFF'S EXPRESS-TYPE SERVICE ON EMERGENCY SHIPMENTS OF CONTRACTOR'S PARTS, SUPPLIES AND EQUIPMENT IS DIFFERENT FROM THE SERVICE PROVIDED BY THE TRUCK LINES AND BUSSES.

At the inception we believe that it should be clear that there will be no substantial diversion of traffic from the motor carriers and the bus lines as a result of the granting of its authority to Wycoff. Each of the witnesses testified that they used the Wycoff service only in the emergency type circumstances where they have an immediate need for moving the repair parts, the supplies or the unit of equipment to a particular location within the State of Utah. Each of the supporting shippers testified that on the large movement of commodities they would continue to use the truck lines and on some of the service where there was no rush they would continue to use the busses on small shipments. It will be noted that the witnesses in some instances, on cross-examination, referred to the service of the large truck lines as "adequate", but the context of the testimony of each witness when considered is that on the large shipments the general motor carrier lines are adequate for the needs but each one has tested the services of the various "Tr"

of carriers available and has found the Wycoff service on these contractors' parts, equipment and supplies in their emergency problems to be the one that really meets their needs. The very fact of these supporting shipper witnesses, representing contractors and equipment dealers who operate on a statewide basis, negates the fact that the ordinary service of the general motor carriers is sufficient for particular needs in this business.

## POINT II

THE SUPPORTING SHIPPERS DO BUSINESS ON A STATE-WIDE BASIS AND REQUIRE EXPEDITED STATE-WIDE SINGLE CARRIER SERVICE TO MEET THEIR SPECIAL NEEDS WHEN BREAKDOWNS OR OTHER SIMILAR PROBLEMS ARISE.

## POINT III

CONTRACTORS AND THEIR SUPPLIERS REPRESENT A LARGE AND VITAL SEGMENT OF THE STATE'S ECONOMY AND ARE ENTITLED TO THIS RAPID SERVICE TO MEET THE EMERGENCY NEEDS OF THEIR INDUSTRIES.

We find with surprise that some of the protestants tried to fragment the testimony of the shippers in an effort to indicate no need for service in partic-



ular areas. Such is an injustice to these businessmen who have testified in support of the application.

All of these contractors, equipment dealers and parts suppliers do business on a statewide basis. Wheelabrator Machinery Company handles caterpillar tractors and similar equipment and has 700 users in Utah, 500 of which are contractors. Rocky Mountain Machinery Company, Arnold Machinery Company, Heiner Equipment Supply Co. and Foulgar Equipment Company, together represent all of the major suppliers of contractors' equipment and parts in Utah. Each has customers widespread in all parts of the state.

It is hard to imagine any type job performed by a contractor which does not at some stage require the use of equipment sold by one of these dealers. From the excavation of the basement for a small dwelling to the construction of a free-way, a dam, a canal or other major project, earth-moving, gravel-crushing, cement-mixing, etc., equipment is a vital part of construction.

On the receiving (or sometimes shipping) end, often parts or equipment must be sent in for rapid repair and quickly returned to a job, we find the typical contractors. These contractor witnesses are impressive in the scope of activities. One cannot travel far on the highways of Utah without encountering a project sign identifying work done by one of these.

W. W. Clyde & Co., Strong Company, Tiago Construction Co., Fife Construction Company, Whiting and Leonard and Thorn Construction Company are all well known dam and canal construction contractors. Not only are their primary places of business widespread, Springfield, Salt Lake City and Brigham City but their jobs are all over the State. Their sources of equipment and parts are at Salt Lake City, Ogden and Tremonton and most have garages for repair work not only at their home base shops but on the job sites.

Many, many millions of dollars of equipment are operated by these contractors and vast numbers of jobs are at stake in their successful operations. Illustrations of the magnitude of operations and the importance of the Wycoff service to the contractors on emergency shipments may be noted from the following:

Wilford C. Clyde said in part concerning Wycoff service:

"On a job sometimes you will have a piece of equipment go down, and while that piece of equipment is down you might have a half million dollars worth of equipment sitting idle until that equipment is fixed, and I think practically every place in the State of Utah, if we call in for parts and they are in Salt Lake say at noon today, we would have them on the job in the morning or by noon the next day." (Tr. 28-29)

Max Thorn (Tr. 66) showed serious need for Wyeoff service by reference to a problem the very day of testimony when they had a \$60,000.00 machine down, hence a crew of men tied up awaiting repairs. S. Company has 100 trucks and 200 other items of contracting equipment. Fife Construction Company explained their need for seven-day a week service during the summer with deliveries at their shops in Big Water City, as well as at their job sites and on cross-country, as stated in part (Tr. 200)

"Q. What you expect from Wyeoff then is a lot of personal attention from Wyeoff, is that correct?

A. Only to the extent that they are offering service wherein, if we have a particular piece of equipment that is down and we need a part, we know if we give it to them we know it will be there."

Arnold Machinery Company has the International Harvester construction machinery, Northwestern Engineering and many other lines and serves mostly contractors with a stock of parts amounting to \$400,000. Heiner Equipment and Supply Co. competes with Arnold & Wheeler and said: (Tr. 238)

"Q. Now would you tell us what type service you need in the delivery of your parts and service here in Utah?

- A. Our business is very competitive. We have to give the best service in order to stay in business. Wycoff has offered us a service we did not have before. It's not a replacing common carrier. It's a supplement."

Faulger Equipment Co. and Atlas Copco are other statewide equipment dealers supporting the application.

Two other types of contractors who operate statewide are very substantial firms. Wasatch Line Construction Co. operates 150 units of equipment, and referred to jobs in progress or just completed at Page, Camp Williams, Manti, Springville, Provo, Uintah Basin, Cedar City, Hill Field, Thiokol and Dugway, Utah; Wasatch Electric Company, its competitor, has 70 to 80 units of equipment, maintains mechanics on its jobs and performed contracts on pole line projects at Mexican Hat, Roy, St. George, Dugway, Milford, Salina, Richfield and Thiokol.

Specialty equipment suppliers such as Amco Equipment and Utah Bit and Steel at Midvale use and support the Wycoff service. Bailey Incorporated and Larch Tire Co. supply tires, tubes and batteries to contractors statewide, and Love Machine Co. performs equipment repairs for contractors and requires two-way service.

We feel certain that the Commission in the performance of its duties weighed the importance of these inter-related businesses and their state-wide operations.

So too, it realized that the absence of an express service such as Wycoff alone performs in Utah, cripple these industries.

In its Finding of Fact the Commission said (Tr. 1226-7):

"The existing and proposed transportation of applicant lends itself to an expeditious, available service with personalized and special attention being rendered to each shipment. This results in part from the timing of scheduling of shipments, personnel, vehicles and other equipment of the applicant.

"There is a public need between all points and places in Utah for emergency shipments of contractor's supplies, contractor's equipment and thereof, in a scheduled service, excluding commodities in bulk, or commodities which because of size or weight require special equipment, and a shipment weighing in excess of 1,000 pounds. The contemplated service of applicant is superior to that of existing transportation facilities in rendering a rapid and expedited haul of said commodities, and the economic and material welfare of the public will be significantly promoted by grant of the application."

#### POINT IV

SUPPORTING SHIPPERS USE AND ARE FAMILIAR WITH TRUCK LINE AND BUS SERVICE, YET NEED AND SUPPORT WYCOFF'S SPECIAL SERVICE.

Almost without exception, each of the supporting businesses utilize all of the regular route motor common carriers and busses (protestants). In spite of the almost exclusive use of such facilities by the many businesses, yet each appeared and presented evidence as to the special and different type service rendered by Wycoff. Each testified that their business uses all of the bus and regular route carriers, yet in emergencies requires the special services of Wycoff.

In the case of *Lake Shore Motor Coach Lines v. Board*, 8 U. 2d, 293, 333 Pac. 2d, 1061 at 1064, the court mentioned that the record in that case failed to disclose that the shippers had used the services of protestants or that "he was aware of the extent of the services presently available." Such criticism cannot be levied in the present case.

As the Abstract and Supplement of the record shows, and as this brief discloses, each shipper does use the other forms of transportation. Each one has, with this knowledge of such other services, nevertheless utilized the temporary authority of Wycoff and supported the need for the Wycoff express type service. Max Thorn of W. W. Clyde Company referred to their use of all truck lines and the bus lines and the problems, and testified that in all their dealings with motor carriers, Wycoff "is the most outstanding carrier." On cross-examination he was asked, for example, as to service into the Uintah Basin

by Link and Uintah Freightways and Wyeoff. The two go to the Basin from Salt Lake City at about the same time as Wyeoff, noon each day, but these two do not do pickup or other service to or for W. W. Clyde at his place of business in Springville. That very morning W. W. Clyde was shipping to the Uintah Basin, via Wyeoff, parts for a \$60,000.00 machine that was down. Neither the cartage companies or Salt Lake County carriers can serve W. W. Clyde or the other contractors at Springville. They have no objection to using the busses or trucks, in ordinary situations, but this does not mean that in emergencies this contractor must be saddled with slow and inefficient motor carrier service.

Examples of service deficiencies by the general commodity motor carriers may be illustrated by these problems. Commodities moving to points north, west or east of Salt Lake City from a point such as Springville require usually at least one extra day, because none of the carriers operating south of Salt Lake City have orders to go to Salt Lake City and hence east, north or west. The practical interline problems make emergency service impossible. The same is true in the opposite direction.

Should a repair or replacement part come from a point north, west or east of Salt Lake City and be destined anywhere south of 33rd South Street, two separate carriers must be used, with the resultant delays. Why not single carrier state-wide service to the contractors to avoid such delays.

It must be remembered that even though Wycoff does not hold "express" authority between Salt Lake City and Ogden or between Salt Lake City and Tooele, Grantsburg and Wendover; yet it does have several truck schedules per day operating between those points in express service on newspapers, cut flowers, U.S. Mail, books and magazines, etc. Hence to most of the major populated areas of the state and between such points, Wycoff has two or more schedules per day available for servicing contractors and their suppliers. By this frequent scheduling, *same-day* service can be rendered to most users.

In the few areas where same-day service is not available, Wycoff effects very early morning deliveries so the contractor has the needed part or unit of equipment well before 8:00 A.M. This is contrasted with the usual service of the truck lines, where the large semi-trailer unit must be unloaded completely at destination (such as Moab) and the lading transferred to pickup type trucks before local deliveries can be made. Wycoff's practice of making most deliveries directly from its highway trucks affords a special type service to shippers and expedites the critical time of delivery of a needed part or equipment unit.

The Commission wisely did not hamstring this industry. It weighed the testimony and needs of each carrier and its capabilities. We could illustrate the knowl-



edge of each supporting shipper, as we have with the very first one, as to the use of other forms of express transportation, and their preference for and need of Wycoff's express-type operations in their emergency. One other example is the expression of Mr. Reginald Rocky Mountain Service (Tr. 159-60)

"Q. Now, have you used other modes of transportation in moving your commodities?

A. Yes; we use Continental Bus Line, Lakeside Greyhound—all of the motor freight carriers from time to time. We use Milne a great deal, Link, Uintah, Carbon—Rio Grande, etc. Palmer, Barton—we use them all.

Q. Are you here supporting the Wycoff application?

A. I am.

Q. Would you tell the Commission why?

A. Wycoff Corporation has a specific type of service. It is unique in one respect at least, from our standpoint, in that we can get express services into almost all areas of the State, and we only have one place that we have to look to for service. This, in the busy part of the season, becomes very important, because it is not infrequent we may have in one night three or four or five emergencies that

have to be taken care of after hours, and they can all be handled in almost all cases by giving them to the Wycoff Company instead of going to three or four or five different particular places to get rid of freight.

Q. Is dependable rapid transportation of any advantage to your Company in meeting competition?

A. Everyone makes good equipment these days. The time of saying, 'His equipment is no good and mine's better,' is past. Everyone makes good equipment. The secret of the whole thing is the service you give it. If the machine doesn't run it can do the best in the world but it is junk if it won't run. Service is really the only thing we have to sell.

Q. Now, in the event that the Wycoff service is authorized by this Commission, will you divert from the other carriers the type shipments that you are now tendering to them?

A. I don't think there would be any change at all."

#### POINT V

THE COMMISSION CAREFULLY WEIGHED THE EVIDENCE, THE NEED FOR SERVICE, ITS EFFECT ON EXISTING CARRIERS AND GRANTED THE CERTIFICATE TO ANSWER THE TRANSPORTATION NEEDS OF THE CONSTRUCTION INDUSTRY.

## POINT VI

THE FINDINGS AND ORDER OF THE COMMISSION  
ARE SUPPORTED BY COMPETENT EVIDENCE  
AND ARE NOT ARBITRARY OR CAPRICIOUS

It has been our purpose to identify some of the competent evidence of record to support the Findings, Conclusions and Order of the Commission. The Commission was not oblivious to existing carriers, both truck and busses. Thus it inserted into the Report and Order the basic safeguards:

(a) Service was authorized only on "emergency shipments;

and

(b) The phrase "contractor's supplies, contractor's equipment or parts thereof" was very carefully spelled out.

By the careful delineation of the authorized service the Commission, the bus lines and the truck line were assured that this particular service would be utilized only in bona fide emergencies by contractors. There could be no diversion of traffic by Wycoff's hauling "stock orders" for supply houses or general commodities to automobile dealers, hardware stores, mine supply houses, etc. The language of the Commission in its Order was that the "ultimate user must have been identified as a contractor."

extended use of the commodities by a contractor and that the great care of the Commission is further evidenced by the specific exclusion even of "materials and supplies which a contractor might use or consume in the progress of his work or which become a part of any construction."

In this last language, lumber, cement, nails, windows, and steel, etc. are excluded. A contractor can look at the order and know with certainty what can be hauled or can in an emergency where his equipment is broken down. He also knows that he cannot utilize the Wycoff order for miscellaneous materials and supplies which are moved by common carrier for his job.

One of the plaintiffs in this proceeding raised the issue that the grant of authority is "ambiguous and uninterpretable." The foregoing paragraphs show how careful the Commission was to make it clear and understandable. When a generator goes out on a tractor and needs repair or replacement to enable the contractor to continue his work, the right to such service is clearly spelled out. Defendants would have this Court believe that if a shipment were in a box, Wycoff could not know whether the authority covered it. We submit that if the generator in question is in a box and is shipped by Wheeler Machinery to W. W. Clyde at a construction project job site, it is obvious that it comes within the authority.

Mr. Young made it clear that if the shipment consisted of contractor's parts or equipment destined for a construction site, they would handle it. Protestants would have the Court assume that neither the contractor's parts supply house nor Wycoff can read and understand the plain English of the Order or know what it meant. "contractor's supplies, contractor's equipment, or parts thereof."

We note also that the protestants give some evidence of what they call "destruction" of their business by the granting of this authority to Wycoff. No evidence of such destruction as a result of the temporary authority was presented. The very type service has been operated on an emergency basis for contractors by Wycoff for over a year before the hearing. The only carrier showing percentages is the Brotherhood States, and at page 11 of their brief the statistics quoted would show that the volume of express on various runs was up in 1964 over the prior year, notwithstanding the Wycoff service. In the Garrett, et al. brief, page 33, we read that Garrett, Milne and Rio Grande "will still be in business irrespective of what happens here." No general dire predictions follow but no evidence of a decline of business was presented to the Commission.

After patiently hearing all of the evidence, including the testimony of the several truck and bus lines, the Commission found, not that diversion of traffic and destruction of protestants' business would result, but rather (R. 1227)

"The contemplated service of applicant is superior to that of existing transportation facilities in rendering a rapid and expedited haul of said commodities, and the economic and material welfare of the public will be significantly promoted by a grant of the application."

A number of witnesses testified that without the proposed service, the contractor or supplier would be forced to get off a man from the job and run a truck in for the transport or equipment in an emergency. The big trucks and busses would not be getting this type business and hence the Wycoff emergency service would not result in any diversions.

The final thrust of the protestants is that the Commission's Report and Order was not supported by the evidence, and the Commission acted in an arbitrary and capricious manner. The brief heretofore has delineated ample evidence to show conclusively that there was adequate evidence before the Commission to justify and sustain its Findings and Order.

What are the tests of whether the Commission has acted arbitrary and capricious? In the *Salt Lake Transfer & Pallet Service Commission* case, 11 Utah 2d 121, 355 P.2d 706, at 710,

"Realizing the limits of this court to review the orders of the Commission, nevertheless, if in relation to the facts before it, the Commission acts

in an arbitrary and capricious manner, that is without authority and must be set aside. We ever the minimum quantity and quality of evidence necessary to justify administrative action, and issued in the complete absence of factual support are clearly arbitrary, capricious and void.

In that case no evidence was presented as to express shipments between Salt Lake City and Ogden, and Commission was reversed.

In the *Lake Shore Motor Coach Lines, Inc. v. Public Service Commission* case (supra) the test was, "upon a showing that under scrutiny is so ephemeral as to practically vanish" (p. 1063). Certainly in this case the testimony is "ephemeral," when you consider the support of 12 major contractors and eleven primary suppliers of parts and equipment, all of whom do business on a statewide basis. We appreciate that mere numbers of witnesses is not a criterion alone upon which to base a Certificate of Convenience and Necessity. Also we know that the Board and Commission do not require that every conceivable commodity and point must be itemized and detailed. In *Salt Lake Transfer v. Public Service Commission* (supra) the Commission affirmed generally the application on "commodities generally" against an attack by only a few witnesses and a few commodities had been shown by the applicant by the following language:

"Where, as here, there is an application for the transport commodities within an accepted class

tion, such as 'commodities generally,' the applicant need not, in the first instance, demonstrate need for the transportation of every conceivable one encompassed by the classification. A contrary view would impose an almost impossible burden upon the applicant."

*See also Ashworth Transfer v. Public Service Commission*, 21 Utah 2d 23, 268 Pac. 2d 990 wherein very few witnesses appeared and the commission granted such authority to applicant to that held by Ashworth Transfer and Salt Lake Transfer. There this court said, 2d 995:

"On review of an order of the Public Service Commission of Utah granting a certificate of convenience and necessity, it is not required that facts found by the Commission be conclusively established or shown by a preponderance of the evidence. The scope of review is limited to an ascertainment of whether the Commission had before it competent evidence upon which to base its decision. U.C.A. 1953, 54-7-16; *Wycoff Co. Inc. v. Public Service Commission*, Utah, 227 P. 2d 323; *Utah Freight Lines v. Public Service Commission*, Utah 229 P. 2d 675."

"The 'convenience' and 'necessity' to be considered is that of the public, *Mulcahy v. Public Service Commission*, 101 Utah 245, 117 P.2d 298, and the statute does not require that the Commission find that the present facilities are entirely inadequate. It merely requires that the Commission 'shall take into consideration . . . the existing transportation facilities'; it is obvious from the



language of the order granting the application, the order denying the petition for rehearing, as well as the evidence, that the Commission dealt with these matters into consideration."

Because a particular contractor does not have a contract on the day of the hearing at every point in time, it is no reason to handicap its future bidding in Utah because no adequate emergency motor vehicle service is available.

The Commission deals with present and future convenience and necessity. No crystal ball gazing is expected of the Commissioners. Rather, they are to exercise judgment of experienced businessmen, the skills developed by them as Commissioners, their knowledge of the growth and development of our state, and make a determination. Due evaluation of existing carrier services has been made by the Commission before issuing its Report and Order.

When the issue of the repeated temporary auto permits for movement by Wycoff of these contractor supplies and equipment came before this Commission, the Court directed the Commission as follows in *Central Bus System v. Public Service Commission*, 16 Utah 2d 396 Pac. 2d 404, 405:

"It should be remembered the Public Service Commission regulates both common and contract

agents for the benefit of the public and are charged with the duty of seeing that the public receives the most efficient and economical service possible. In order to efficiently fulfill this service, it is apparent that within a reasonable period of time a hearing should be granted to all interested parties to the end that the Commission can be properly informed of all facts necessary to enable it to act in granting or withholding authority to an applicant."

The record in this case shows that the application was filed in 1960, heard in 1964 and decided in 1965. Obviously, Wycoff was making an earnest effort to comply with his responsibilities. As emergencies arose while during a time of hearing, the Commission granted temporary permits in response to the numerous demands of the contractors for emergency type service not otherwise available to them. We feel certain that the admonition of this Court in that case, handed down in November 1964 was well before the Commission when it wrote its Report and Order in January 1965.

By this Report and Order it has obeyed the statute and the admonition of this Court, "of seeing that the public receives the most efficient and economical service possible." This Court now should give due value to the efforts of the Commission. Not only did the Commission weigh in for an extended period (the hearings were on 1, 3, 5, 6, 7, 8 and 25, 1964 and the Report and Order was January 14, 1965) but it whittled down the re-

requested service and imposed careful safeguards, not only the needed transportation for the contractor, but their suppliers as shown by the evidence.

Without underestimating the statutory power of the Legislature that the "findings and conclusions of the Commission on questions of fact shall be final and shall not be subject to review" (54-7-16 U.C.A. 1953), we summarize similar pertinent rulings by this Court:

*Ashworth Transfer, Inc. v. Carbon Motor Co.*, 11 Utah 2d 315, 358 Pac. 2d 901, "The Public Service Commission is endowed with the prerogative of determining the facts, and the well-settled rule is that this Court will not disturb its findings when they are supported by competent credible evidence." The case of *Rudy v. Public Service Commission*, 1 Utah 2d 223, 265 Pac. 2d 40, is cited wherein the Court said, "It is well settled that this Court cannot substitute its judgment for that of the Commission if there is sufficient evidence to support the Commission's findings." In turn this case cited a number of antecedent similar decisions.

"It is not required that the facts found by the Commission be conclusively established, nor even that they be shown by a preponderance of the evidence. If there is in the record evidence from which a reasonable mind could believe or conclude that a certain fact existed, a finding of such fact is justified by the justification in the record, and we cannot disturb

*Mulcahy v. Public Service Commission*, 101 Utah 245, 117 Pac. 2d 298 and followed in later cases.

In a more recent case, *Lake Shore Motor Lines, Inc. v. Welling*, 9 Utah 2d 114, 339 Pac. 2d 100, the Commission even though not a single public witness supported the application, the Commission granted the proposed service and this Court upheld such an Order. As to the duties and powers of the Commission and this Court, the decision says in part, 107.

"It is to be kept in mind that the functions of common carriers affect the public interest in such a way that the legislature has deemed it proper to grant monopolistic franchises and consequently subject them to general supervision and control of the Public Service Commission. Upon the assumption that the Commission is staffed by personnel of training and experience in this field, it is vested with broad powers and its decisions and orders are endowed with considerable verity. They are subject to review by this court but the review is limited.

"\* \* \* The review shall not be extended further than to determine whether the commission has regularly pursued its authority, \* \* \* The findings and conclusions of the Commission on questions of fact shall be final and shall not be subject to review. \* \* \*"

## CONCLUSION

This case has presented squarely to the Commission the need of the contracting industry and its customers for a special emergency-type motor carrier service. The applicant already has such an express type operation in existence which, as the Commission found, "lends itself to an expeditious, dependable service with personal attention being rendered each shipment." (1226) Also, the Commission well considered the transportation provided by the large truck lines and bus lines and found, "The contemplated service of applicant is superior to that of existing transportation facilities in rendering a rapid and expedited haul of said commodities, and the economic and material welfare of the public will be significantly promoted by a grant of this application."

All necessary elements of the case have been presented by applicant. The Commission has evaluated the general and special problems of a large and vital industry, has weighed the effect of the grant of the authority on other carriers and has rendered its Findings and Order. The same is supported by adequate, abundant and competent evidence. There is nothing capricious or arbitrary about this decision.

We urge the affirmation of the Report and Order of the Commission as being in the public interest and within the authority and province of the Commission.

Respectfully submitted,

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