

1960

Milne Truck Lines et al v. Public Service Commission of Utah et al : Brief of Defendant Clark Tank Lines Co.

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

MILNE TRUCK LINES, INC., a corporation,
CARBON MOTORWAY, INC., a corporation,
and SALT LAKE-KANAB
FREIGHT LINES, INC., a corporation,

Plaintiffs,

vs.

PUBLIC SERVICE COMMISSION OF
UTAH and HAL S. BENNETT, DON-
ALD HACKING and JESSE R. S.
BUDGE, Commissioners of the Public
Service Commission of Utah, and CLARK
TANK LINES INC., a corporation,

Defendants.

17
Supreme Court, Utah
Case No.
9293

BRIEF OF DEFENDANT CLARK TANK LINES
COMPANY

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BRIEF OF DEFENDANT CLARK TANK LINES COMPANY

PRELIMINARY STATEMENT

On January 25, 1960, Clark Tank Lines Company, one of the defendants herein, filed its application before the Public Service Commission of Utah, also defendant herein,

seeking a certificate of convenience and necessity as a common motor carrier for the transportation of special bulk commodities.

A full hearing was had during which oral and documentary evidence was offered by the applicant and by protestants.

On April 28, 1960, defendant Public Service Commission, having found that a need existed for the applicant's service, issued its Report and Order, granting Clark Tank Lines a certificate of public convenience and necessity and authorizing operations as a common carrier as follows:

“ . . . (F)or the transportation of flour, sugar, powdered milk and salt used or suitable for human consumption, in bulk, in dry form, between all points and places in the State of Utah and on return movements to transport rejected shipments; also, the transportation of non-edible salt in bulk, in dry form, from Saline, Utah, to all points in Utah north of, but not including Tooele, Salt Lake, Wasatch, Duchesne and Uintah Counties, Utah.”

On May 18, 1960, protestants Milne Truck Lines, Inc., Carbon Motorway, Inc., and Salt Lake-Kanab Freight Lines, Inc., (hereinafter sometimes designated “Milne”, “Carbon” and “Salt Lake-Kanab” respectively) who are plaintiffs herein, filed their Petition for Rehearing and Reconsideration before the Commission. A reply thereto was filed by Clark, and on May 25, 1960, the Commission made its unanimous order that plaintiff's petition, “ . . . having been duly considered by the Commission, the same is hereby denied.”

On June 17, 1960, the matter was brought within the jurisdiction of the Supreme Court by way of Writ of Review.

At the outset it should be pointed out that the present controversy is not a contest as to what party should be awarded the new authority. Clark is willing to serve and desirous of obtaining the present certificate, and thereafter satisfy the public demand for the bulk carriage. *Plaintiff carriers are unwilling to provide this service, but prefer that Clark not be granted the sought-after authority.*

It is the position of defendant Clark that, after a full hearing wherein evidence was presented by all parties, defendant Public Service Commission thoroughly and painstakingly examined into the matter, and that the conclusion reached in its ten page Report and Order was well reasoned, abundantly supported by the evidence, and well within the authority and broad discretion with which said Commission is vested.

It is further the position of Clark that the plaintiffs are asking the court to go beyond its own previously established limits for judicial review.

STATEMENT OF FACTS

The recital of evidence is to show the basis upon which the Commission exercised its discretionary authority in granting a certificate.

(a) *The Parties Involved:*

Clark, the applicant, is a common carrier of commodities in bulk and bags throughout eleven western states. The company also has intrastate authority for transportation of bulk commodities within the State of Utah (Exhibit 1). Its

home office is in Salt Lake City (R. 12). About 75 per cent of the operations of the company have been the hauling of bulk petroleum products (R. 29). The present operations are such that a high seasonal employment variation results, employment being high in the summer and low during the winter (Exhibit 4). Clark Tank Lines has embarked on a program of obtaining proper authority which would spread out the work during the course of the year rather than concentrating it in the summer months; this would result in better use of the equipment with attendant economies of operation (R. 16). It has recently obtained interstate authority to transport dry flour in bulk from Idaho to five western states, and all forms of dry salt and dry salt products in bulk from points in Utah to eleven western states (R. 38, 29). At the request of several companies who desire to use bulk transportation facilities, Clark made this application for intrastate dry bulk authority for the hauling of salt, flour, powdered milk and sugar (R. 20). Since the transportation of these commodities involves the use of the same basic equipment as that needed to fulfill Clark's *interstate* authority (R. 27), a greater use of this equipment would be realized through *intrastate* operations, and would result in economic benefits to the company, and ultimately to the shippers (R. 50).

Milne, Carbon and Salt Lake-Kanab are the plaintiffs herein. Other carriers who filed appearances as protestants at the original hearing (R. 1, 2), are no longer resisting the application and are not parties before this Court.

The three remaining protestants, plaintiffs herein, are all regular route motor carriers operating in and about points and

places in the State of Utah under various operating authorities (Exhibits 9, 14, 17). All are generally regarded as dry freight carriers, none possessing the equipment necessary for the transportation of the commodities in bulk which are here involved (R. 212, 253, 232).

Milne now hauls *packaged* powdered milk from Beaver to Salt Lake City (R. 211, Exhibit 13). It also handles packaged flour shipments from Salt Lake City and Ogden, but this requires interlining with the exception of local deliveries (R. 215, Exhibit 13). The same is true of *packaged* sugar shipments from West Jordan (R. 215, Exhibit 13). Of the four commodities which are the subject of the application, Milne's only direct single line movement is that of *packaged* powdered milk from Beaver to Salt Lake City (R. 222, Exhibit 13).

Carbon, with respect to the commodities here involved, presently engages in hauling *packaged* flour from Ogden but any such shipments require interlining (R. 252). *Packaged* sugar from West Jordan or Garland would also require interlining, as would *packaged* powdered milk from Beaver (R. 252). The company has salt authority between Royal Crystal, Salt Lake City and Morton's plant at Saltair but has not carried bulk salt since 1958 (R. 243) and has carried no salt, packaged or bulk, from Morton's to Salt Lake City within the last two years (R. 253).

Salt Lake-Kanab, similarly, has no authority to haul, either packaged or in bulk, sugar from West Jordan or Garland to Salt Lake City, flour from Ogden to Salt Lake City, or powdered milk from Beaver to Salt Lake City, and any such movements

would require interlining (R| 237). The same is true with regard to salt movements from Saltair to Salt Lake City (R. 237).

(b) *Bulk Carriage Needs of Shippers:*

Six shipper witnesses supported Clark in its application for intrastate bulk authority for flour, salt, sugar and powdered milk.

Mr. Lynn H. Denkers testified on behalf of Pillsbury Company, which manufactures flour at Ogden. At present, all of its intrastate bulk flour shipments are to Ogden and to Salt Lake City (R. 58-60). Pillsbury presently has one customer in Salt Lake City for bulk flour. It has other customers in Salt Lake City who take packaged flour shipments by truck. Pillsbury has been requested by one of its Salt Lake City customers to draw engineering plans for the conversion of its plant to receive bulk flour shipments, and it is contemplated that this customer will convert to bulk (R. 63).

Pillsbury is presently shipping about 80,000 pounds per week to its Salt Lake City bulk customer. The Salt Lake City customer which is contemplating conversion to bulk shipments is presently receiving an estimated 1,000 bags per week. Flour bags generally weigh 100 pounds (R. 65). Pillsbury ships packaged flour to all the principal cities of the State of Utah (R. 67). When asked whether there was any expectancy that in the future there would be bulk movements to points in Utah other than Salt Lake City and Ogden, the witness answered in the affirmative (R. 68). When questioned as to any general trend from bag to bulk shipments, the witness replied:

"A. From the knowledge I have of the flour business, the western half of the country is rather slow to a trend in bulk handling. However, there are many big companies now converting to bulk in the western part of the United States, and I would say the growing trend is to bulk, yes.

Q. What is the advantage to handle bulk rather than a bagged service?

A. *There is a considerable saving to the customer, not only in the form of labor and handling, but the handling also, the elimination of bags.*" (R. 64-65). (Emphasis added).

Bulk movement of flour requires the use of specialized equipment having a stainless steel interior. *The only such trucking equipment available to Pillsbury is owned by their competitor, Salt Lake Flour Mills* (R. 59, 69).

Pillsbury is supporting Clark Tank Lines Company in its application (R. 69). There would be an advantage in using Clark since the company would then feel free in soliciting the customers now served by their business competitor who is now providing their transportation facilities (R. 81). On this basis, the present service is restrictive (R. 68). The present equipment is being used to capacity (R. 80), and the company will need additional service if the Salt Lake City customer converts to bulk as contemplated (R. 71). The witness does not feel that his competitor will put on additional equipment (R. 82). Pillsbury cannot use the railroads for Utah shipments since none of its customers are located on rail sidings (R. 69-70).

Mr. Theo M. Merrill testified on behalf of the Brooklawn Creamery Company. Their manufacturing plant is located at

Beaver, Utah. The company produces powdered milk and ships it to various points in Utah. Most of their output is currently shipped in packaged form (R. 121). Brooklawn is interested in bulk movements from Beaver to Salt Lake City. They wish to satisfy potential customers who may be developed (R. 122). Brooklawn also has a Salt Lake City customer in the bakery business who plans to convert his operations to bulk. This customer has indicated that if Brooklawn wishes to keep his business, Brooklawn will have to accommodate him (R. 122-123). This customer presently uses about 35,000 pounds of powdered milk per month. This amounts to one truck load (R. 123).

On behalf of its Salt Lake City customer, Brooklawn is supporting Clark in its application for dry bulk authority (R. 127). *The witness knows of no other carrier having suitable equipment bulk carriage facilities* (R. 124). The equipment Clark intends to purchase is the type necessary for hauling powdered milk (R. 124). Brooklawn is interested in seeing *that bulk carriage service is available* (R. 127).

Mr. D. Leon Johnston testified on behalf of the Morton Salt Company. The Morton plant is located at Saltair Junction, which is about ten miles west of Salt Lake City (R. 135). This company ships about 3,000 to 4,000 tons of edible salt annually to points within the State of Utah. About 20 per cent of this is shipped in bulk (R. 136). Most of Morton's bulk shipments are in the Salt Lake City-Ogden-Provo area. Not many of these are accessible by rail (R. 146). Morton has its own equipment which is used in the transportation of its product but has no stainless steel units similar to those that Clark proposes to furnish (R. 137-138). The advantage of having such equip-

ment available to Morton as supplement to its own equipment was demonstrated when the witness testified:

"Q. Did you hear of the type of unloading facilities that would be on this equipment?

A. They were briefly explained to me.

Q. *And to your knowledge, is that the type that is going to be necessary to unload it into the consignee's place of business?*

A. *As far as I know it is.*

Q. *Do you know of any other carrier that has that type of equipment?*

A. *No, sir.*" (R. 138-139). (Emphasis added).

Mr. Clisbee Kimball testified on behalf of the Utah-Idaho Sugar Company. This company has intrastate sugar shipments originating from West Jordan, twelve miles southwest of Salt Lake City, and from Garland, ninety miles northwest of Salt Lake City. At present, none of these shipments are transported in bulk (R. 148-149). The company's concern with bulk carriage facilities for its product was shown by the following testimony:

"Q. Is this a new type of movement?

A. It is a new service that is fast developing, and as the service is provided, then we can service our customers. *Until the service is provided we are handicapped. We can't go out and solicit that kind of business.*

Q. Now, will you explain that? At the present time does your company solicit business in Utah?

A. Oh, yes.

Q. Can you solicit sugar sales in Utah at the present time?

A. *No, because we have no facilities for delivering bulk sugar.*

Q. To what type of customers would you desire to solicit in the sale of bulk sugars?

A. Bakers, confectioners, freezers and packers.

Q. Can you tell me, are they located in various parts of Utah?

A. Well, principally in the Salt Lake area, but they could be located in other areas, of course." (R. 149-150). (Emphasis added).

When asked whether or not bulk sugar sales would be increased if proper facilities were available, the witness replied with an unqualified "Absolutely" (R. 151). Utah-Idaho Sugar's engineering department has been working with Clark and with a Salt Lake City customer in order to develop equipment suitable for bulk sugar hauling (R. 151-152). Concerning other areas of bulk sugar traffic, the witness testified:

"Q. Do you have any customers in Murray, for example, that would be large enough to take bulk movements if you had the service available?

A. Not presently.

Q. Why not presently, sir?

A. Because we have never contacted them for this kind of business, because there has been no service available *and as soon as the service is available we will go out and get the business.*

Q. Can you tell me any place besides Murray where you would have customers large enough for bulk

movements you could contact if you had the service available?

A. Probably Provo, Ogden, Brigham City, and maybe Logan." (R. 152). (Emphasis added).

Regarding these future needs, the witness stated later in his testimony:

"A. *And there are lots of users who are going to bulk, both liquid and dry granulated, and as they convert or want to convert, then we have to be prepared to furnish the service and get the sugar to them.*" (R. 166) (Emphasis added).

Rail service for bulk sugar is not available from West Jordan because the railroad does not have the equipment necessary for such movements. Utah-Idaho Sugar has requested the railroad involved to provide this equipment for a period of about five years but this request has not been met (R. 152-153). The witness testified that the advantages to his company of truck transportation over rail service from West Jordan and Garland to points in Utah would be flexibility, faster service and delivery directly to the customer's place of business (R. 153-154). Furthermore, railroad units equipped with air slides have a capacity of 120,000 pounds and it is contemplated by the witness that their intended consignees for bulk sugar would not be able to receive more than 40,000 pounds per shipment (R. 172).

Mr. Lee Scott testified on behalf of Pelton's Spudnuts of Salt Lake City (R. 178). In the manufacture of its confectionary mixes, the company uses quantities of sugar, salt, powdered milk and flour (R. 179). Of these, only the flour is now handled in bulk and is shipped by rail from Ogden

(R. 179-180). Pelton's business has increased such that automatic mixing is now used. The plant is now on a semi-bulk basis. As to those ingredients which now arrive in packaged form such as sugar, salt and powdered milk, it is now necessary to convert these into bulk at the plant. This is unsatisfactory to Pelton because their costs are higher and because foreign material is more likely to get into the commodities. Bagged shipments cost more and require more handling (R. 181-182). Pelton started using bulk flour about three years ago. Then they started using bulk shortening. Now they have ordered bulk sugar equipment and intend to convert to bulk handling on all other ingredients as soon as is feasible (R. 183).

Pelton's sugar need (from Utah-Idaho sugar and Layton Sugar) will be from 40,000 to 60,000 pounds—one to one and a half truck loads—per month, and will be sent from West Jordan. Regarding powdered milk, (from Brooklawn Dairy) monthly requirements will be from 12,000 to 13,000 pounds and will be sent from Beaver. Salt shipments (from Morton) will be from 10,000 to 15,000 pounds per month and will be from Morton's. As to flour, (from General Mills) Pelton uses 100,000 pounds per week of one type, 120,000 to 150,000 pounds of another type and lesser quantities of other types (R. 183-1-85).

As to bulk transportation facilities, the witness knows of no carrier presently available to transport the involved commodities when the company converts to bulk (R. 186-187). The minimum rail shipments are more than the plant can handle on all but one commodity (R. 192-193). It is best for the company to use motor carrier for these movements. In no event could powdered milk be shipped by rail since Beaver

has no rail service (R. 194). Pelton also contemplates using truck service for a new type of flour they are going to use. The quantities will be 40,000 to 50,000 pounds monthly—one truck load—which is less than the minimum rail shipment (R. 193).

Pelton is supporting Clark's application for the new bulk authority. When the company realized it had to convert to bulk and started contacting carriers, Clark seemed most receptive and has cooperated with Pelton in regard to meeting its needs (R. 187). Pelton has made certain suggestions concerning the equipment Clark proposes to obtain and is satisfied with its specifications (R. 186).

Mr. Scott was most candid concerning what would happen if this application were denied:

“Q. What will happen, Mr. Scott, if this application is not granted?

A. I will be sitting with an \$8,000.00 investment, I guess.

Q. Is there any other carrier that you know of that has the type of equipment necessary to transport these commodities?

A. No, sir.” (R. 186-187).

Mr. Harold D. Pence testified on behalf of the Lake Crystal Salt Company. The company is located in Saline, Utah (R. 86). It is concerned only with non-edible salt (R. 99) which does not require specialized stainless steel units (R. 101). When asked whether there was a trend from bagged to bulk shipments, the witness stated that his company has more bulk than bagged shipments and is building additional

facilities for bulk shipments (R. 90). It ships to the northern and southern parts of Utah, but the northern part is heavier (R. 88-89). Railroad service is used when available (R. 91), *but about 50% of the company's Utah customers are located off rail* (R. 102).

The only intrastate motor carriers now available are Clark, operating on temporary authority, and Williams Grain and Produce Company (R. 87). The service of the latter company has not been good and their services are not always available when needed (R. 87-88). Lake Crystal has used Clark's services and has found it satisfactory (R. 87). Clark purchased special equipment for level unloading and for unloading in bins which the other carrier does not have (R. 94). The company has to make split deliveries, and Clark will handle this type of movement for it (R. 91). Lake Crystal supported Clark in its application for temporary authority (R. 87) and it is advantageous to the company to have these services available (R. 90-91).

(c) Equipment Requirements:

Mr. H. E. Barker of Clark testified as to the equipment which would be required to carry the commodities for which intrastate authority was sought. Pure food laws require that special attention be given to the design of trailers used in the transportation of commodities used for human consumption. Additionally, customer delivery problems may require the discharging of material to heights of as much as 100 feet above the ground. After consultation with the shippers and trailer manufacturer it was determined by the Clark people that a stainless steel unit equipped with a compressed air discharger known as an air slide would fill these needs (R.

22-23). It was determined that two self-contained air compressors would be adequate, operated either singly or in unison, to discharge any of the commodities to heights of as much as 150 feet (R. 23). It was additionally determined that for handling sugar in bulk, a hydraulic lift on the front of the unit would be required to elevate the front of the trailer at least 15 degrees for gravity assistance (R. 24). Such a multiple purpose dry bulk commodity carrier would cost approximately \$35,000 (R. 25).

The shipper witnesses testified that this type of equipment was needed to transport the named commodities in dry bulk (Witness Denkers: R. 61, 69; Witness Merrill: R. 124; Witness Johnson: R. 138-139; Witness Kimball: R. 151, 157; Witness Scott: R. 186).

(d) *Plaintiffs' Facilities:*

Plaintiff Milne was represented by Mr. Henry Dahn. The company is now involved in sugar, flour and powdered milk movements (Exhibit 13, R. 215) in *dry packaged form*. All such movements are in packaged form, as Milne has no equipment suitable for bulk carriage of these commodities (R. 212, 213). Milne has discussed with plaintiffs Carbon and Salt Lake-Kanab and with other dry freight haulers, the feasibility of acquiring specialized bulk equipment in association for common use. This carrier's primary concern with Clark's application is the possible loss of the Brooklawn powdered milk movement to Salt Lake City which Milne now hauls in packaged form (R. 211, 219). The carrier's direct interest was clearly set forth as follows:

“Q. Can you haul powdered milk from Beaver to Salt Lake City?

A. Yes, sir.

Q. In bulk?

A. Yes, sir.

Q. And that is shown in your operating right?

A. Yes, sir.

Q. And that is your only direct interest as a single-line carrier in this application?

A. Yes, sir, with the exception of the fact that we can perform interline service.

Q. Yes, that's right. I said as a single-line service.”
(R. 222-223).

It would not be economically feasible for Milne to purchase the specialized bulk equipment solely to accommodate this movement (R. 217, 226).

Plaintiff Salt Lake-Kanab was represented by Mr. Bernard Hale. The company does not handle any of the movements mentioned by the testifying shippers.

“Q. Now let me ask you this: Are you authorized in intrastate commerce to serve in transportation of bulk sugar from West Jordan and Garland to Salt Lake City?

A. No, sir, we are not.

Q. How about from Ogden to Salt Lake City on flour?

A. No, sir, we are not.

Q. Powdered milk, Beaver to Salt Lake City?

A. No, sir, we are not.

Q. Salt, Saltair, the Morton plant, to Salt Lake City?

A. No, sir." (R. 237).

Salt Lake-Kanab does not own any equipment suitable for bulk hauling of these commodities (R. 232) and since the traffic over their lines is not sufficient to warrant such purchase, it would not be economical to do so (R. 239-240). The company is "willing" to join with other common carriers in the purchase of specialized bulk carriage equipment if this becomes necessary (R. 236). But the witness candidly admitted that his company does not feel it is economical now.

"Q. Are you presently satisfied that there is a present market that would warrant the economical purchase of this equipment?

A. Over our line from the testimony that has been given, no.

Q. Even from without the testimony, forgetting the hearing today, if based on your knowledge would you buy?

A. *No, sir, we would not.*" (R. 239-240). (Emphasis added).

Plaintiff Carbon was represented by Mr. Wayne Cushing. The company is not involved with any of the movements of the testifying shippers except by interline (R. 251). Carbon does have bulk salt authority between Morton's plant at Saltair and Salt Lake City, but has not handled any such movements, in either bulk or packaged form within the last two years (R. 253). The company owns no equipment suitable for bulk hauling of the edible commodities involved (R. 253). Based on present operations, it would not be feasible for Carbon to purchase the specialized equipment needed. The witness would

not even recommend to his company that the equipment be purchased in association with plaintiffs Milne and Salt Lake-Kanab (R. 254-255).

"Q. Now, based upon the testimony that you heard in today's hearing here, would you recommend to your company buying a stainless steel tank with compressor and air slide unloaders?

A. In view of the cost of that piece of equipment, I think it would be very foolish for the amount of tonnage that has been shown to be involved." (R. 254).

* * *

"Q. And you would not so recommend to your company, that either your company alone buy it or in conjunction with the other two companies buy it?

A. Not for the movement of this one account.

* * *

Q. *Then these witnesses who testified as to some need would not have available to them a stainless steel piece of equipment and would have to continue to ship by bags; is that correct?*

A. *Yes, that is correct.*" (R. 255) (Emphasis added).

(e) *Clark's Proposal:*

At the request of several shippers, Clark made it application for intrastate dry bulk authority (R. 20). No such authority now exists on a common carrier basis. Clark has studied the needs of the shippers and has developed specifications for a multiple purpose bulk edible commodity trailer which will perform the requested service (R. 22-23). The company has recently obtained interstate authority to haul

flour in dry bulk from Idaho Falls to Arizona, Utah, California, Montana and Colorado, and authority to haul all forms of salt from Silsbee, Saline and Salt Lake City to eleven western states (R. 38-39). *The same specialized equipment is needed for the interstate movements as is required for the proposed intrastate carriage* (R. 27). The interstate movements would not keep the equipment busy full time and it would be an economy to Clark to be able to secure intrastate hauling so as to more fully utilize the equipment (R. 50). Thus, Clark proposes to fulfill the needs of the shippers while accomplishing a better balance of its own operations. These economic benefits gained by the company would ultimately be reflected as a benefit to the shipping public (R. 50).

Clark's qualifications for this service include five years previous experience in dry bulk hauling (R. 31-32), secure financial condition (Exhibit 6), sufficient and suitable equipment (R. 17-19, 49-50), and a position of respect among the shipping public (R. 80, 163, 187).

* * *

Upon this evidence, the Commission granted Clark Tank Lines Company the certificate of convenience and necessity for which it had applied, except as to authority to transport non-edible salt in certain counties where need was not established.

STATEMENT OF POINTS

POINT I

THE FINDING OF THE COMMISSION THAT PUBLIC
CONVENIENCE AND NECESSITY WOULD BE BEST

SERVED BY GRANTING THIS CERTIFICATE IS ABUNDANTLY SUPPORTED BY THE EVIDENCE.

- (A) THE NEED FOR BULK CARRIAGE AUTHORITY IS CLEARLY ESTABLISHED BY SUBSTANTIAL EVIDENCE.
- (B) THE EVIDENCE CLEARLY SHOWS PRESENT SERVICE INADEQUATE AND ALMOST NON-EXISTENT.
- (C) APPLICANT'S COMPETENCY AND ABILITY TO FULFILL THIS NEED ARE UNDISPUTED.
- (D) EXISTING CARRIERS WILL NOT BE ADVERSELY AFFECTED TO ANY SUBSTANTIAL DEGREE.

POINT II

GRANT OF STATE-WIDE OPERATING RIGHTS FOR NEWLY ESTABLISHED AUTHORITY IS A POLICY MATTER BASED UPON A FINDING OF PUBLIC CONVENIENCE AND NECESSITY.

- (A) IN GRANTING THE NEW AUTHORITY, THE COMMISSION ACTED REASONABLY AND REMAINED WELL WITHIN THE BROAD DISCRETIONARY POWERS WITH WHICH IT IS VESTED.
- (B) PLAINTIFFS ARE ATTEMPTING TO GO BEYOND THE BOUNDS OF PROPER JUDICIAL REVIEW.

ARGUMENT

POINT I

THE FINDING OF THE COMMISSION THAT PUBLIC CONVENIENCE AND NECESSITY WOULD BE BEST SERVED BY GRANTING THIS CERTIFICATE IS ABUNDANTLY SUPPORTED BY THE EVIDENCE.

Development of the argument under Point I will not be for the purpose of convincing this Court that a certificate of convenience and necessity should be issued to Clark. Rather, it is proposed to here cite the evidentiary facts which *support* the findings made by the Public Service Commission. It is axiomatic that these findings will not be upset by this Court if they are supported by the evidence. Legal propositions and citation of authority will be developed in Point II of the Argument.

(A) THE NEED FOR BULK CARRIAGE AUTHORITY IS CLEARLY ESTABLISHED BY SUBSTANTIAL EVIDENCE.

Throughout their brief, plaintiffs attempt to separate Clark's application for limited edible bulk authority into individual commodity groups. The application is not, however, one for bulk flour authority; nor is it for powdered milk authority or sugar or salt authority. Clark is responding to the need for bulk transportation of all the principal commercial edible commodities, and in applying for such authority has simply designated the specific edibles involved.

(The non-edible phase of the application has escaped comment by plaintiffs, and it must be assumed that no objection

is made to this point of the permanent authority which was granted.)

With regard to the newly established carriage authority, the evidence of present need must be taken as a whole. The Commission may properly grant a motor carrier a certificate to transport commodities requiring special equipment on a representative showing, despite the fact that the carrier does not show a need for service to each point in the state, where the evidence discloses a general need for that type of hauling. Legal authority will be cited later.

Let us look at the findings made by the Commission pertaining to need for the new carrier authority, and the evidence upon which these findings were based.

(1) In its Report and Order, the Commission found that:

"Pelton's Spudnut, Inc., operates a plant in Salt Lake City at which it manufactures sputnut and other confection mixes. These mixes are shipped from Salt Lake City to company outlets all over the United States. It uses large quantities of flour of various types, sugar, powdered milk salt and shortening for its mixes. For a number of years this company has been in the process of converting its plant operations to provide for automatic feeding of ingredients into its mixing process. It has been unable to accomplish automation as fully as desired for the reason that it has not had available bulk transportation of all ingredients in quantities to fit its requirements. The handling of ingredients in bags or drums in addition to being inefficient and costly has the further disadvantage of permitting for-

eign matter to get into the bins, in spite of all precautions.

"Pelton's Spudnut, Inc., now uses from 45,000 to 60,000 lbs. of sugar per month, which it received from Layton Sugar Company in Nesta Bins delivered by the sugar company on its own flat rack trucks. Spudnut, Inc., uses about 100,000 lbs. of one type flour per week, from 120,000 to 130,000 lbs. of another type flour and is experimenting with still another type flour of which it would use approximately 25,000 lbs. per week. The flour is now shipped from Ogden by the Union Pacific Railroad Company, which service is satisfactory, except that on occasions shipments in less than carload quantities are desirable. Spudnut is now upping 10,000 to 15,000 lbs. of powdered milk per month, which it purchases from Brooklawn Creamery at its plant in Beaver, Utah. There is no rail service available at Beaver and the powdered milk is now transported in packages or drums by Milne Truck Lines, Inc. Pelton now uses from 10,000 to 11,000 lbs. of edible salt which it procures from Morton Salt Company and which is delivered in bags by the salt company on its own trucks. Pelton procures its shortening in bulk by rail from outside the State of Utah. The representative of Pelton's contends that much of the company's expenditure for automation is wasted unless it can procure satisfactory bulk transportation of all its principal ingredients."

That these findings were based on evidence was clear. Pelton's Salt Lake City plant manufactures spudnut and other confection mixes (R. 178-179) for shipment throughout the

United States, Alaska, Canada and Hawaii (R. 191). The company uses quantities of flour, sugar, powdered milk, salt and shortening for its mixes (R. 184, 179, 183). When asked why the company contemplated converting to bulk receiving of the various commodities involved, Pelton's representative testified fully and in detail as to every phase of its operational need for bulk (R. 181-183).

As to bulk transportation facilities, the witness stated that he knew of no carrier presently available to transport the commodities involved (R. 186-187).

Pelton will need from 40,000 to 60,000 pounds of sugar per month (R. 183). Sugar is now received from the Layton Sugar Company in 3,000 lb. nesta-bins (R. 179). Pelton now uses about 100,000 lbs. of hard wheat flour per week, about 120,000 to 150,000 lbs. of soft wheat flour per month, and smaller quantities of other types of flour (R. 184). The company will also need from 40,000 to 50,000 lbs. of a different type of flour per month for a new product which they are going into (R. 193). The flour is now being shipped from Ogden by the Union Pacific Railroad Company (R. 189), which service is now satisfactory except for shipments of less than carload quantities (R. 193). Pelton is now using about 12,000 to 13,000 lbs. of powdered milk per month, which is received from the Brooklawn Creamery in Beaver (R. 184). There is no rail service available from Beaver (R. 194), and is now transported in packages or drums by Milne Truck Lines, Inc. (R. 180, 203). Edible salt requirements are from 10,000 to 15,000 lbs. per month, which is procured from Morton Salt Company and delivered in bags by the salt company on its

own trucks (R. 185, 180). Concerning Pelton's conversion to bulk receiving and the need for suitable bulk transportation facilities, the company representative testified:

"Q. What will happen, Mr. Scott, if this application is not granted?

A. I will be sitting with an \$8,000.00 investment, I guess.

Q. Is there any other carrier that you know of that has the type of equipment necessary to transport these commodities?

A. No, sir." (R. 186-187).

(2) As to the need for new common carrier authority to haul powdered milk products, the Commission made the following finding:

"A representative of Brooklawn Creamery testified that unless it is able to obtain carrier service for movement of powdered milk in bulk, the company will lose business." (R. & O. 7).

This finding is well supported by the testimony of the representative from Brooklawn Creamery in reference with a Salt Lake City customer:

"Q. And will you tell me, sir, has he requested in the future at some given time shipments of powdered milk in bulk whereas up to now you have been shipping by bags and drums?

* * *

A. He has indicated that he is going into that type of business and if we want to keep his account we would have to accommodate our facilities to correspond with his." (R. 123).

(3) The Commission's findings with regard to need for dry bulk transportation facilities for edible salt were:

"A witness from Morton Salt Company testified that it has orders for edible sale in bulk from meat packers, bakeries and Spudnut, Inc. The edible salt moving in bulk from the salt company's plant west of Salt Lake City to Swift and Company in Ogden, moves by rail, but Swift and Company on occasion desires less than box car quantities and other customers who do not have rail service available or who do not use salt in box car quantities are desirous of receiving salt in bulk. Morton Salt Company operates its own equipment for package deliveries as far north as Logan, Utah, and as far south as Payson, Utah. The company's own trucks are not suitable for bulk movement of edible salt, although they have on occasion been used for that purpose by force of circumstances."
(R & O 7).

The evidence well supports there findings. The company ships bulk salt in edible form to meat packers, bakeries, creameries (R. 136) and "food people," such as Pelton's Spudnuts (R. 138). The Morton plant at Saltair Junction, which is about ten miles west of Salt Lake City (R. 135) ships about 3,000 to 4,000 tons of edible sale annually to points within the State of Utah. About 20% of this is shipped in bulk (R. 136). Concerning these movements, the company representative testified:

"Q. You indicated that most of the customers that you will have for bulk shipments are in the Salt Lake-Ogden-Provo area.

A. That's right.

Q. And I assume that most of those customers are served by rail?

A. No, I don't think so. I think there is a large number of them I think in this city that are not.

Q. That are not on rail?

A. That's right." (R. 146-147).

The witness further stated that of their present intrastate customers for edible salt in bulk, only Swift & Company, in Ogden, would be able to take rail shipments in carload quantities (R. 147). The company operates its own equipment within an area bordered by Payson and Logan on the north and south, and Heber City and Tooele on the east and west (R. 142). Regarding the use of their own equipment for bulk movements of edible salt the witness stated that the company's van type vehicles are now used (R. 137), but further testified:

"Q. Have you heard described the type of equipment that Clark Tank Lines proposes to purchase?

A. Yes.

Q. The stainless steel? Would the availability of such equipment for movement to food places like Pelton's Spudnut be of any advantage to your company?

A. Yes.

Q. Why, sir?

A. Because there would probably be rules and regulations there, or regulations on the part of that company or food laws, and so forth, that would require a stainless steel type truck, which we do not have.

* * *

Q. Do you know any other carrier available to you that has that type of equipment?

A. No, sir.” (R. 138).

(4) As to the need for bulk transportation facilities for sugar, the findings of the Commission were:

“A representtaive of Utah-Idaho Sugar Company testified that his company has two sugar plants in Utah, equipped to ship sugar in dry bulk, one at West Jordan served by the Denver & Rio Grande Western Railroad Company and Magna-Garfield Truck Line; and one at Garland, Utah, served by the Union Pacific Railroad Company and Consolidated Freightways Corp. of Delaware. Two other sugar plants operated in Utah, one by Layton Sugar Company at Layton, Utah, and one by Amalgamated Sugar Company in Lewiston, Utah, are equipped to ship sugar in dry bulk form. None of these sugar plants now has available motor carrier service for shipment of sugar in bulk in dry form. Sugar is shipped in liquid form in tank trucks. The Union Pacific Railroad Company furnishes good transportation service on the movement of bulk sugar and the Utah-Idaho Sugar Company has for some time made requests of The Denver & Rio Grane Western Railroad Company to provide air slide equipped cars for dry bulk sugar movements. Utah-Idaho Sugar Company delivers bag sugar in its own trucks in the Salt Lake and Utah County area. Before the sugar companies can freely solicit dry bulk sugar sales it is necessary that motor carrier service be available. Numerous customers have inquired respecting dry bulk delivery of sugar, but are unwilling to equip for bulk

delivery until truck transportation service is available.”
(R & O 7-8).

These findings were well supported by the evidence. Bulk sugar produced by Utah-Idaho Sugar Company originates in West Jordan and Garland (R. 148). West Jordan is served by the Denver & Rio Grande Western Railroad Company and Garland is served by the Union Pacific Railroad Company (R. 152, 169). Two other sugar plants are located in Utah, the Layton Sugar Company at Layton, and the Amalgamated Sugar Company located at Lewiston (R. 179, 159). The witness testified that he did not know of any motor carrier available at the present time with equipment required for the transportation of dry bulk sugar (R. 151), although some shipments are now made in liquid bulk (R. 149). The company now uses Union Pacific Railroad Company cars equipped with air slide units in dry bulk sugar movements from the Garland plant (R. 169. Regarding rail service from the West Jordan plant, however, the witness testified:

“A. It isn't available from West Jordan because the D. & R. G. does not provide bulk air slide equipment and we cannot bring Union Pacific cars down from Garland to West Jordan to operate exclusively on the D. & R. G. W.

Q. *Have you requested the D. & R. G. W. to supply that type of equipment?*

A. *We have been after them for five years to get some of that type of equipment.*

Q. *Have they done it?*

A. No.” (R. 152-153). (Emphasis added).

The Utah-Idaho Sugar Company delivers bagged sugar

by their own trucks in the Salt Lake area (R. 158). It is not, however, equipped to handle movements in bulk (R. 158), and before the company can freely solicit dry bulk sugar sales, it is necessary that such motor carrier service be available (R. 150). In this connection, the Utah-Idaho Sugar Company representative testified:

“Q. Can you solicit bulk sugar sales in Utah at the present time?

A. No, because we have no facilities for delivering bulk sugar.

Q. To what type of customers would you desire to solicit in the sale of bulk sugars?

A. Bakers, confectioners, freezers and packers.

Q. Can you tell me, are they located in various parts of Utah?

A. Well, principally in the Salt Lake area, but they could be located in other areas, of course.” (R. 150).

The witness further testified that if proper facilities were available, the company’s bulk sugar sales would absolutely be increased (R. 150-151). This witness further indicated that if the facilities were available, the company had customers large enough for bulk movements in Murray, Provo, Ogden, Brigham City and possibly Logan (R. 152).

(5) Concerning the need for flour transportation facilities in dry bulk, the Commission found that:

“Pillsbury Flour Company now ships flour in bulk from its plant in Ogden by contract motor carrier. This flour company does not use rail service for transpor-

tation of flour in bulk in Utah because of customer location. It does ship approximately 80,000 lbs. of bulk flour per week at the present time, and has another customer ready to change to bulk use when motor carrier service is available. Salt Lake Flour Mills, a Division of Colorado Milling and Elevator Company, is the contract motor carrier used by Pillsbury for bulk transportation of flour. This contract carrier transports its own flour in bulk and also performs bulk transportation of flour for General Mills, Inc., between all points and places in Salt Lake, Davis, and Weber Counties, Utah. This contract carrier service has been satisfactory except that the three flour companies are competitive in the Utah area, and their association together in the use of the truck equipment of Salt Lake Flour Mills Division of Colorado Milling and Elevator Company for the transportation of flour in bulk, handicaps each of the three flour companies in soliciting business. This contract carrier arrangement arose from the fact that no common motor carrier service is available for the transportation of flour in bulk." (R & O 8-9).

The evidence supporting these findings are as follows: the Pillsbury plant in Ogden presently makes intrastate flour shipments in dry bulk to Ogden and to Salt Lake City (R. 59-60). The company now ships approximately 80,000 pounds of bulk flour per week to a Salt Lake City customer (R. 65). Another Salt Lake City customer is presently receiving an estimated 1,000 bags per week and it is contemplated that this customer will convert to bulk. (Flour bags generally weigh 100 lbs) (R. 65). *In addition to these two customers,*

Pillsbury would like to ship flour in bulk to Pelton's Spudnuts in Salt Lake City, and considers Pelton a potential customer (R. 76-77). The only suitable trucking equipment presently available to Pillsbury is owned by their business competitor, Salt Lake Flour Mills (R. 59, 62). This company has its own piece of equipment and in addition to transporting flour from Pillsbury, the carrier transports its own flour in bulk and also performs bulk transportation of flour for General Mills, Inc. (R. 62, 73). Although Pillsbury now uses rail service for out of state bulk flour shipments, the company cannot use the railroads for shipments since none of its customers are located on rail sidings (R. 69-70). When asked whether there would be any advantage in using Clark over Salt Lake Flour Mills, their competitor, the witness testified:

"A. Well, I would say there might be, inasmuch as our present carrier is a competitor of ours. It might involve—at the present time we can't go out and solicit their customers, or we don't go out and solicit their customers, put it that way.

Q. Are you restricted on that basis?

A. Yes sir." (R. 68).

(6) The findings of the commission with regard to the need for bulk transportation facilities for non-edible salt were:

"Lake Crystal Salt Company operates a salt plant at Saline, Utah, located on the Southern Pacific Company tracks approximately 21 railroad miles west of Ogden. The plant is reached by highway via Brigham City and Corinne, Utah. The highway distance between Saline and Ogden is about 80 miles. This salt company ships substantial quantities of salt to points in the

northern part of the State of Utah for use on winter roads, water treatment plants, ice plants, livestock, food processing, etc. About 60% of this company's sales are in bulk. About 50% of its bulk shipments are to off rail points or to customers who cannot handle carload shipments. The salt company has very little business in the Salt Lake area and the southern part of the state, because of the competition of the salt companies in Salt Lake and Tooele Counties. Lake Crystal Salt Company is entirely satisfied with the railroad service it receives when shipping to customers located on rail trackage who use salt in rail car quantities, but is seriously handicapped for lack of truck transportation on salt in bulk where rail services do not fit the customer's needs." (R & O 8).

The evidence well supports these findings. Lake Crystal Salt Company is located at Saline, which is about three miles from Promontory Point (R. 86-87). Saline is serviced by rail by the Southern Pacific Company (R. 84-85). The company ships to the northern and southern parts of Utah, but the northern business is heavier (R. 88-89). About 60% of the company's sales are in bulk (R. 90). The principal users for their product are for feeds, livestock, packing plants, water treatment, and for control of winter roads (R. 89). Railroad service is used when available (R. 91), but about 50% of the company's Utah customers are located off rail (R. 102). This company's major concern has been for its off rail movements and for those movements in less than carload quantities (R. 115), but since Clark has obtained temporary authority for this type of hauling, the company has been very satisfied with the service (R. 115-116).

There is no question but that *each of the above specific findings* made by the Commission was adequately and abundantly supported by the evidence. Plaintiffs contend that the present and the future need for bulk transportation of the named commodities is speculative and conjectural. This consideration must, however, be viewed in light of the fact that there is now no such common carrier facility available. Under these circumstances, the public has been forced to conform to existing available facilities, and only those shippers whose business needs are acute are likely to have made other arrangements (such as using their competitors' trucks). The granting of *new authority* involves a "chicken and egg" proposition in the sense that there cannot be any use until there is service available. It would therefore seem proper to consider not only present demands, but also reasonable foreseeable probabilities. In an expanding economy, such as that which is now being enjoyed in Utah, it is reasonable to anticipate from the evidence here of record the development of further needs for this service over and above those which now manifest themselves, and those which will be immediately stimulated by the availability of the new common carrier authority.

In this respect, the Commission commented upon "*the growing trend toward bulk handling of dry products by quantity users*" (R & O 5). Even this remark, almost an "aside," is supported by the evidence. The representative for Pillsbury Flour Company when questioned as to any general trend from bag to bulk shipments, replied:

"A. From the knowledge I have of the flour business the western half of the country is rather slow to a trend in bulk handling. However, there are many

big bakery companies now converting to bulk in the western part of the United States and I would say the growing trend is to bulk, yes.” (R. 64).

The representative of the Brooklawn Creamery testified that his company had an interest in seeing that bulk service is available in order to satisfy any potential customers who may develop (R. 122). The representative from the Utah-Idaho Sugar Company testified in this regard:

“A. And there are lots of users who are going to bulk, both liquid and dry granulated, and as they convert, or want to convert, then we have to be prepared to furnish the service and get the sugar to them.” (R. 166).

The representative for the Lake Crystal Salt Company, when questioned whether there was a trend from bagged to bulk shipments, stated that his company has more bulk than bagged shipments and is building additional facilities for bulk handling (R. 90).

Not only were the specific findings of the Commission with regard to present need well supported by the evidence, but additionally, the evidence clearly indicates the presence of an expanding future need for the newly established authority. There can be no doubt that the Commission was well justified in reaching its ultimate finding that: *“The evidence adduced in this record clearly shows a need for highway transportation in bulk in dry form of the commodities specified in the application”* (R & O 9).

(B) THE EVIDENCE CLEARLY SHOWS PRESENT SERVICE INADEQUATE AND ALMOST NON-EXISTENT.

Plaintiffs' overriding attitude regarding the service presently available seems to be that plaintiffs are capable of hauling the edible commodities *in packaged form* and that therefore *the shippers should not convert their facilities to bulk*. It is submitted that this attitude represents a flagrant disregard for the shippers' present and expanding future needs, and is an unwarranted attempt to control the shipping practices of the public.

Plaintiffs' argument begs the real issue. The primary question is whether the shipping public may be allowed to transport their edible commodities in bulk upon showing that its business needs and convenience so require it. Regarding the need for transportation in dry bulk, the service of plaintiffs is totally inadequate; the Commission so found and the evidence well supports this finding.

In this connection, the Commission found that:

"All of the four above named carriers [referring to Milne Carbon, and Salt Lake-Kanab, and including Barton Truck Lines, Inc., an original protestant no longer a party to this action] render general motor freight transportation service within their respective service areas, and interline freight with each other and other motor carriers for through movement and in cases of truck or trailer load movements, the loaded equipment is interlined without transfer of cargo. These four carriers are financially able to serve their respective areas and their representatives stated in this case, that they are willing to acquire equipment for the transportation of edible products in dry bulk form at such time as the volume of available business warrants.

They contend that the volume of business testified to in this record does not warrant the acquisition of such equipment either on the basis of individual purchase by the carriers, or purchase of a unit of equipment in association to be used by all carriers; nor, in their view, does the volume of business testified to in this record warrant the acquisition of such equipment by applicant.” (R & O 4-5). (Emphasis added).

Milne has no equipment suitable for dry bulk carriage of sugar, flour and powdered milk (R. 212). The company representative testified that should the volume warrant the acquisition of equipment to transport flour, sugar and milk, the company would be prepared to do so (R. 216). He further testified, however, that it would be economically unsound to purchase such equipment solely for transportation of these commodities to present intrastate users, but that it might be feasible in conjunction with other interstate hauling (R. 226-227).

Salt Lake-Kanab does not own any equipment suitable for dry bulk hauling of the commodities involved (R. 232). Concerning their attitude towards such acquisition, the company representative testified:

“Q. Are you presently satisfied that there is a present market that would warrant the economical purchase of this equipment?

A. Over our line from the testimony that has been given, no.

Q. Even from without the testimony, forgetting the hearing today, if based on your own knowledge would you buy?

A. *No, sir, we would not.*" (R. 239-240). (Emphasis added).

Carbon Motorway, Inc., owns no equipment suitable for bulk carriage of the edible commodities involved (R. 253). Concerning the possibility of acquiring such equipment, the company representative testified that:

"Q. Now, based upon the testimony that you heard in today's hearing here, would you recommend to your company buying a stainless steel tank with compressor and air slide unloaders?

A. *In view of the cost of that piece of equipment I think it would be very foolish for the amount of tonnage that has been shown to be involved.*" (R. 254). (Emphasis added).

The witness further testified:

"Q. And you would not so recommend to your company, that either your company alone buy it or in conjunction with the other two companies buy it?

A. Not for the movement of this one account." (R. 255).

In the light of this evidence of plaintiffs' present and future equipment facilities, there can be no doubt but that the Commission was well justified in reaching its ultimate finding that: *"The present service offered by protestants does not meet this need (for transportation for edible commodities in dry bulk), except as to non-edible salt in bulk, where the destination point is in Salt Lake County and other counties to the east and south."* (R & O 9).

(C) APPLICANT'S COMPETENCY AND ABILITY TO FULFILL THIS NEED ARE UNDISPUTED.

In considering an application for a certificate of convenience and necessity, the ability of this applicant to fulfill the public need manifested has not been challenged.

Clark's qualifications to perform this service include five years of previous experience in dry bulk hauling (R. 31-32), secure financial condition (Exhibit 6), sufficient and suitable proposed equipment (R. 17-19, 49-50), and a position of respect among the shipping public (R. 80, 163, 187). It is significant that throughout the entire record, not one fact appears that is detrimental to the qualifications of this applicant. As to economic feasibility of the new service, even plaintiffs' representative, Mr. Henry Dahn, admitted that the Pelton's Spudnuts shipping alone might be feasible in conjunction with other intrastate and interstate hauling (R. 226-227).

It would seem clear, then, that Clark's proposal will not only fulfill the needs of the requesting shippers, but will accomplish a better balance of Clark's own operations. Based on this evidence, the Commission was well justified in reaching its ultimate finding that "*Applicant, Clark Tank Lines Company, is in all respect qualified to perform the transportation service here proposed . . . The proposed operation will serve a useful purpose responsive to a public need.*" (R & O 9).

(D) EXISTING CARRIERS WILL NOT BE ADVERSELY AFFECTED TO ANY SUBSTANTIAL DEGREE.

Throughout their brief, plaintiffs make repeated assertions that the evidence of need for bulk hauling facilities as testified

to by shipper witnesses, is insufficient to economically justify making such new service available. They further contend (inconsistently, it appears) that the light hauling Clark is undertaking will have economic repercussions within plaintiffs' companies. Despite a variety of general statements concerning "bad operating ratios," "marginal business," "increased labor costs," and the like, there has been absolutely no showing made by plaintiffs as to their gross revenues and as to what degree, if any, their revenues would be affected by the granting of the new authority. In the light of plaintiffs' failure to establish their possible potential economic losses, it would seem that their previous objections concerning "speculative and conjectural factors" might well now be directed towards them.

Regarding evidence of diversion of traffic from its own lines, the representative for Salt Lake-Kanab testified with respect to conversion to bulk movements by Pelton's Spudnuts:

"A. In answer to your question, I would say yes, we would not be affected by any loss in tonnage.

Q. You would not be affected by any loss in tonnage?

A. Right." (R. 238).

In fact, this company does not handle any of the movements mentioned by the testifying shippers (R. 237).

Plaintiff Carbon, likewise, is not involved with any of the movements of the testifying shippers except by interline (R. 251). Carbon does have bulk salt carriage authority between Morton's plant at Saltair and Salt Lake City but has not handled any such movements, in either bulk or packaged form, within the last two years (R. 253). The representative

of this company clearly showed their attitude toward the limited traffic involved when he testified:

"Q. Now, based upon the testimony that you heard in today's hearing here, would you recommend to your company buying a stainless steel tank with compressor and air slide unloaders?

A. In view of the cost of that piece of equipment, I think it would be very *foolish for the amount of tonnage that has been shown to be involved.*" (R. 254). (Emphasis added).

Only Plaintiff Milne made any direct showing as to possible potential diversion of traffic. This company's only direct straight-line haul as to the movements mentioned by the testifying shippers is the transportation of powdered milk from Beaver to Salt Lake City. Naturally, the company would prefer not to lose this business. It is significant, however, that Milne wholly failed to establish by any evidence to what degree, if any, the possible loss of this traffic would have upon their overall operating revenues. It is clear that the Commission took into consideration the possible loss of this business to Milne in reaching its final conclusion (R & O 5).

It is further clear that the Commission based its ultimate conclusion upon findings of fact which were abundantly supported in every respect by the evidence produced at the hearing. There is no question but that the Commission was entirely justified when it found:

"From the foregoing findings the commission concludes that convenience and necessity require that the application be granted, except as it relates to the transportation of non-edible salt in bulk, from Saline, Utah,

to points in Tooele, Salt Lake, Wasatch and Duchesne and Uintah Counties, and all other counties in Utah south thereof." (R & O 10).

POINT II

GRANT OF STATE-WIDE OPERATING RIGHTS FOR NEWLY ESTABLISHED AUTHORITY IS A POLICY MATTER BASED UPON A FINDING OF PUBLIC CONVENIENCE AND NECESSITY.

Under Point I of the Argument, the specific findings and ultimate conclusion of the Commission have been demonstrated to be well supported by the evidence. Under Point II, it will be shown that where the Commission has based its findings upon competent evidence, it has absolute discretion in the granting of a certificate of convenience and necessity, and that this court has itself held that the power of judicial review is limited to the sole determination of whether or not the Commission has based its findings and conclusions upon such competent evidence.

(A) IN GRANTING THE NEW AUTHORITY, THE COMMISSION ACTED REASONABLY AND REMAINED WELL WITHIN THE BROAD DISCRETIONARY POWERS WITH WHICH IT IS VESTED.

In order to carry out the broad responsibilities with which it has been charged by the Legislature in regulation of intrastate commerce, the Public Service Commission has been granted wide discretionary powers designed to implement its complex and intricate responsibility. These discretionary powers in-

volving the issuance of certificates of convenience and necessity is based upon Section 54-6-5 of the Utah Code Annotated of 1953 which 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 the 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 certificate shall be denied. Before granting a certificate to a common motor carrier the commission shall take into consideration the financial ability of the applicant to properly perform the service sought under the certificate and also the character of the highway over which said common motor carrier proposes to operate and the effect thereon, and upon the travelling public using the same, and also the existing transportation facilities in the territory proposed to be served.”

In the present matter, it seems clear that the Commission has well performed each and every duty required of it. In the exercise of its discretion, for example, it did not issue the certificate prayed for, but upon finding that public convenience and necessity did not require it, limited Clark's application for transportation of non-edible salt to only those counties in which the need for such transportation was established. Likewise, it is clear that the Commission in its Report and Order, took into consideration the applicant's financial ability, the effect upon the public highways (although the need for only one or two vehicles is indicated), and also *the existing transportation facilities in the territory proposed to be served.*

In connection with the existing transportation facilities, it must be borne in mind that Clark's application was for the transportation of certain *commodities in dry bulk*. The findings of the Commission and the evidence in support thereof were based upon the needs of representative shippers, adequacy of available facilities, equipment requirements, and ability of the applicant, all *as related to the transportation of commodities in dry bulk*. After due consideration, the Commission granted Clark authority to transport specific commodities in dry bulk.

It is difficult to understand why plaintiffs continue to point out the availability of their facilities to haul in *packaged form*. The Commission found that there was a need for equipment capable of hauling in bulk, not simply for trucks in general. It may be conceded that plaintiffs individual or combined trucking facilities are considerable, but for all the record shows, there is, at present, not one piece of equipment within the entire state capable of carrying the named *commodities in dry bulk*, nor under common carriage, nor did plaintiffs assure the Commission that they would secure the same.

It was the duty of the Commission to exercise its discretion with respect to public convenience and necessity, *and it here did so*. In this regard, it was stated by this court in the case of *Ashworth Transfer Co. vs. Public Service Comm.*, 2 U.2d 23, 30; 268 P.2d 990, 995 (1954):

“ . . . (T)he 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’. ”

The findings of the Commission clearly show that the existing facilities were considered but found totally inadequate with respect to the hauling of commodities in dry bulk.

That the Commission has wide *discretionary power* is a salutary principle of law, needing little citation of authority. As was said by this court in *Union Pacific R. Co. vs. Public Service Comm.*, 103 U. 459, 466; 135 P.2d 915, 918 (1943):

"The discretionary power granted the Commission by the act, to grant or withhold certificates, negatives the idea that it was intended to grant and maintain a monopoly in any field."

A particular point raised by plaintiffs (after in effect conceding certain evidence of need at least as between many stated points) is that if the application was to be granted, it should be granted on a limited point to point basis. To this we will answer directly and challenge such contention.

The Utah Public Service Commission has frequently in the past granted statewide authority particularly in specialized service such as bulk hauling. Obviously showing was not made as to movements between *every point*, but rather as a policy matter, testimony comprising *representative shipments* have always been accepted. Without going outside this record we have examples of this type of grant:

Exhibit 1 (page 1) Certificate No. 1051 for the transportation of petroleum and petroleum products in bulk "*between all points and places within the State of Utah.*"

Exhibit 2 (page 3) Certificate No. 1051 sub. 1 for four chemical commodities between a given pro-

ducing origin point and "*all points and places in the State of Utah.*"

It is entrusted to the regulatory body by the legislature to delineate the territory to be served (so long as the action is not capricious or arbitrary). Here we have a very substantial showing by representative shippers, and full and careful consideration of the same by the Commission, so the action of *granting per se* is not arbitrary or capricious.

The delineation of the territory is clearly a policy matter left to the experienced judgment of the administrative tribunal and will not be tampered with by the judiciary. This has been so salutary a principle of regulation that it requires brief citation. This court has been called upon to consider this narrow concept. In an analogous situation the court was reviewing a certificate granted for a large group of specified commodities where the evidence of the need was representative only, covering far less than listed (and granted). In the *Ashworth case*, *supra*, this court stated in part as follows:

"The question presented to us for review may be consolidated as follows: (1) May the Commission grant a certificate of convenience and necessity for a carrier to transport a large group of specified commodities when evidence of the need was not produced on each of the various items . . . ?

* * *

"In the present case, then, if the classification by the PSCU was a reasonable one, evidence of the need for an ability to perform hauling of the general category would be sufficient to justify the order of the commission.

* * *

“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 and the order denying the petition for rehearing, as well as the evidence, that the Commission did take these matters into consideration.”

Since it is clearly established by the evidence that plaintiffs have no facilities available for the dry bulk transportation of the commodities involved, any territorial limitation placed upon the newly established authority would leave those areas without any service. Admittedly, there are combinations of points within the state where no immediate need for this service was established of record, but, as this court said in the case of *Salt Lake & Utah R. Corp. vs. Public Service Comm.*, 106 U. 403, 405; 149 P.2d 647, 649 (1944):

“Whether or not the existing common motor carrier should have been given a further opportunity to furnish the required services before allowing a competing carrier to enter the field is a *matter of policy which is entirely within the province of the Public Service Commission*, especially where there is no evidence that the additional competition would so impair the revenues of the [carrier involved] as to impair its ability to serve the public.” (Emphasis added).

Even if plaintiff carriers had manifested a willingness to supply the needed bulk facilities, which they most emphatically did not, the Commission would have been well justified in granting Clark statewide certificated authority on the ground that the

volume of bulk hauling is sufficiently limited that only one profitable operation may presently be pursued. In this connection, it was held by this court in the case of *Wycoff Co. vs. Public Service Commission*, 119 U. 342, 227 P.2d 323, 327 (1951):

“[The conclusion of the commission] that one common carrier can properly service an area and that another carrier competing for the same service in the same area would be detrimental to the best interests of the public *cannot be held to be arbitrary* by this court, if there is evidence which reasonably tends to establish that *the volume of business permits only one profitable operation.*” (Emphasis added).

Specific evidence of the need for dry bulk authority was established between numerous combinations of points and places within the state by representative shippers. Furthermore, there was considerable testimony concerning the trend to bulk shipments by quantity users. Although the Commission did not necessarily indicate that it based its decision to grant state-wide authority upon this evidence of a trend to bulk, it *would have been justified* in giving this evidence its due consideration. In the *Ashworth Transfer Co.* case, *supra*, this court said:

“Evidence of growth of an industry within the state is *competent* in a hearing to determine public convenience and necessity. *Uintah Freight Lines vs. Public Service Commission*, Utah 223 P.2d 408.”

Plaintiffs, in their brief, cite the case of *Salt Lake Transfer Co., et al. v. Public Service Commission*, case No. 9082 (1960), as standing for the proposition that although an applicant need not demonstrate a need for every conceivable item encompassed by a classification, where evidence is offered chal-

lenging the need for a particular item, the applicant must introduce evidence rebutting the challenge. Plaintiffs further attempt to analogize this case to the territorial problem under discussion. This recent case is not helpful, however, since it involved competition between two carriers for the authority to haul the *same commodity* in the *same fashion* within the *same territory*. In the present matter, the plaintiffs desire to haul the various commodities *in packages*, whereas, Clark is responding to the shippers' need for *bulk transportation*. Under these circumstances, Clark need only make a representative showing as to the need for bulk transportation service, and evidence that these facilities are presently inadequate or unavailable. This, Clark did, and the findings of the Commission were based upon this evidence.

Where other regulatory bodies have discussed this issue—and courts have passed upon it—it has been uniformly held that this is a policy matter entrusted to the respective commissions.

The Interstate Commerce Commission, dealing with this type of matter frequently, has so held. In the case of *G & M Motor Transfer Co., Inc.*, 43 MCC 497, 500 (1944), it was said:

“Authority to operate within a specified ‘territory’ may include permission to service all points in that area. On the other hand, it may be restricted to designated points therein or it may extend to all points in a part of that area and to selected localities in another part. *The precise delineation of the area or the specifications of localities which may be serviced has been entrusted to us by the Congress.*” (Emphasis added).

For other illustrative cases, see also: *Rowley Interstate Transportation Co., Inc., Extension—Virginia*. 67 MCC 415 (1956); and *Everts Commercial Transport, Inc., Extension, Richmond*, 78 MCC 717 (1959).

The Federal Courts have consistently sustained the said Commission in its finding on this narrow point. In the case of *Alton Railroad Co. vs. United States*, 315 U.S. 15 (1942), (dealing with a "grandfather" determination as to territorial scope and granting a whole state), the court stated:

"The appellant railroad companies earnestly contend that the Commission was without authority to authorize Fleming to serve a whole state where, as here, his services had been in fact limited to only a few points in the State.

* * *

"But the question remains as to the power of the Commission to authorize operation in an entire State where only a few points in that State have been served.

* * *

"The Commission has taken the characteristics of various transportation services into consideration in determining the scope of the territory covered by certificates under the 'grandfather clause.' Thus, operations on irregular routes within a wide territory have been authorized in case of common carriers of household goods. *Bruce Transfer & Storage Co.*, 2 MCC 150; *William J. Wruck*, 12 MCC 150. Similar broad authority has been granted common carriers of oil field equipment and supplies. *Charles B. Greer, Jr.*, 3 MCC 483; *Union City Transfer*, 7 MCC 717; *L. C. Jones Trucking Co.*, 9 MCC 740. And a like result has been reached in case of automobile transporters such as the applicant in the instant case.

"In view of the scope of his holding out and the nature and characteristics of the highly specialized transportation service rendered, the Commission authorized continuance of his service to all points in the enumerated States. *That is a judgment which we should respect.* Certainly we cannot say that it was a wholly inappropriate method for creating that substantial parity between future operations and prior bona fide operations which the statute contemplates. The special characteristics of this roving transportation service make tenable the conclusion that Fleming's prior limited opportunity for service could not be preserved unless statewide areas, within the scope of his holding out and partially covered by his previous operations, were kept open for him. *That judgment is for the administrative experts, not the courts.*

* * *

"The weighing of such evidence involves in part a judgment based on the characteristics of the highly specialized transportation service involved. *Thus, we have said, that function is peculiarly one for the Commission, not the courts.*" (Emphasis added).

For further federal authority on this principle, see also *United States vs. Carolina Freight Carrier Corp.*, 315 U.S. 475 (1942); and *Howard Hall Co., Inc. vs. United States*, 315 U. S. 495 (1942).

Thus where evidence is adduced (and substantial evidence here) to show *a need* between representative points there can be no error if the Commission grants statewide authority where in its expert judgment (a) no other carriers can serve or have offered to serve; (b) where the trend towards bulk movements indicates future need, and (c) where the require-

ments of Section 54-6-5 have been met. This was policy determination of the Commission.

(B) PLAINTIFFS ARE ATTEMPTING TO GO BEYOND THE BOUNDS OF PROPER JUDICIAL REVIEW.

The legislature has authorized the procedure whereby action of the Public Service Commission may be reviewed by the Supreme Court. The scope of this inquiry has been limited by Section 54-7-16 of the Utah Code Annotated of 1953, which provides, in part:

“The review shall not be extended further than to determine whether the commission has regularly pursued its authority including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the state of Utah. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discriminations.”

Plaintiffs do not agree with Clark as to the need for *dry bulk* hauling facilities for the commodities involved. They do not agree with the shipper witnesses as to this need. After the Commission found *as a fact, based upon substantial and abundant evidence*, that such need existed, plaintiffs are still not convinced. They believe that their facilities for transporting these commodities *in packaged form* are satisfactory and that the shipper witnesses should not, therefore, convert to bulk movements. Such contentions are more properly addressed to the Commission, who is the exclusive fact finding body.

Plaintiffs' attempt to have this court re-analyze the evidence by way of review constitutes a request to exceed the bounds of proper judicial review. This court, on numerous occasions, has so held.

The Supreme Court is bound, and has so held it is bound, by the findings of the Commission when there is evidence to support the decision, notwithstanding the wisdom of its decision or whether the court's conclusions on the evidence would have been the same. *Jeremy Fuel & Grain Co. vs. Public Utilities Comm.*, 63 U 392, 226 Pac. 456 (1924); *Fuller Toponce Truck Co. vs. Public Service Comm.*, 99 U 28, 96 P.2d 722 (1939).

Nor will the Supreme Court disturb a decision of the Commission unless such decision is capricious or arbitrary, or is not based on sufficient competent evidence. *Union Pacific R. Co. vs. Public Service Comm.*, 102 U 465, 132 P.2d 128 (1942). In another case, also involving the Union Pacific Railroad Company, that of *Union Pacific R. Co. vs. Public Service Comm.*, 103 U. 459, 135 P.2d 915 (1943), this court stated:

“And unless some justiciable question arises, unless some point is juridicially present, this court will not substitute its judgment for that of an administrative tribunal, charged by law with carrying out matters of non-judicial character. (Citations of authority).

* * *

“We cannot consider the expediency or wisdom of the order or whether or not on the evidence we would have made a similar ruling.”

In a more recent case, that of *Ashworth Transfer Co. vs. Public Service Comm.*, *supra*, decided in 1954, this court stated with regard to its scope of review:

“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; Uintah Freight Lines v. Public Service Commission, Utah, 229 P.2d 675.” (Emphasis added).

As previously pointed out, not only were the findings of the Commission based upon convincing and abundant evidence from representative shippers, but even the very considerable evidence showing the trend to bulk facilities have been properly taken into consideration by the Commission in reaching its conclusions.

On this very issue of the court's scope of inquiry, the federal courts have taken a parallel position with that of the Utah Supreme Court in interpreting their respective regulatory statutes.

In *Watson Brothers Transportation Co., Inc., vs. United States*, 59 F. Supp. 762 (1945), the court in reviewing a partial denial by the Interstate Commerce Commission, stated in part as follows:

“In a case of this character the inquiry of the court is limited. Controlling judicial decisions have defined its boundaries, *beyond which this court must not venture*. This proceeding invites neither a trial de novo of the plaintiff's original demand nor a judicial review after the manner of an equity appeal of the Commission's determination. In the exercise of the jurisdiction

committed to them under 49 U.S.C.A. Paras. 17(9) and 305(g), and 28 U.S.C.A. Paras. 41 (27, 28) 42-47 'the courts will not review determinations of the Commission made within the scope of its powers *or substitute their judgment for its findings and conclusions*'. [Citations of Authority.]

* * *

" 'The hearings of evidence is an exclusive function of the Commission and it may disbelieve or disregard any evidence as (if?) it seems unconvincing; and it may give as much or as little weight to evidence as (to) it seems proper', *Loving vs. United States, D.C.*, 32 F.Supp., 464, 467, affirmed 310 U.S. 609, 60 S. Ct. 898, 84 L.Ed. 1387, (and cases there cited) *so long as it does not fail or refuse to consider any of the relevant evidence* or act arbitrarily or capriciously in the consideration of the evidence presented to it. [Citations of authority].

"Even upon recourse to it, the court is not allowed independently to weigh and appraise the evidence before the Commission. *It is the Commission's own findings that are to be either sustained or overturned*. Generally, too, the court may not, upon its own analysis of the evidence, support an order of the Commission upon a ground or theory other than that relief upon by the Commission.

* * *

"That the making of an order denying to a common carrier by motor vehicle of general commodities authority to render service to and from intermediate and off-route points on a regular route between whose termini the order allows service, if within the clear constitutional and statutory authority of the Commission cannot be questions. 49 U.S.C.A., Sections 17(9) and 308 (a), '*Authority to operate within specified*

*'territory' may include permission to service all points in that area. On the other hand it may be restricted to designated points therein. Or * * * it may extend to all points in a part of that area and to selected localities in another part. The precise delineation of the area or the specification of localities which may be serviced has been entrusted by the Congress to the Commission'. [Citations of authority].*

* * *

"But the weighing of the evidence was the task of the Commission only." (Emphasis added).

Other jurisdictions having comparable review statutes have recognized this same limitation on the scope of judicial review. Under a statute similar to that here involved, the California Supreme Court, for example, held in the case of *Southern Pacific Company vs. Public Utilities Commission*, 41 C.2d 354, 367; 260 P.2d 70, 78 (1953):

"This court will not attempt to resolve conflicts in the evidence on the question of public convenience and necessity nor substitute its judgment for that of the commission on a subject so peculiarly within its jurisdiction as justifiably based on the record before it. It also is not for the court to say that the commission was wrong in [reaching its conclusion]." (Emphasis added).

Plaintiffs having conceded that there was evidence of *need* (plaintiffs' brief page 3) (and much more than *de minimus*) seek here to have this Honorable Court substitute its judgment for that of the Utah Public Service Commission; the Commission which has been specifically charged with determining the very issue here challenged. Such a request by plaintiffs is contrary to judicial findings in the past of both this court and other courts.

CONCLUSION

Contrary to the allegations made by plaintiffs in their brief, each and every finding of the Commission is abundantly supported by the evidence. Plaintiffs are here seeking by way of review to have this court re-analyze the evidence and act independently in an area wherein the discretionary powers of the Commission is absolute. This court has frequently reiterated that not only *will it not*, but *that it cannot*, make such re-evaluation. It is therefore respectfully submitted that the order of the Commission should be affirmed.

Respectfully submitted,

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