

1960

# Milne Truck Lines et al v. Public Service Commission of Utah et al : Plaintiffs' Brief

Utah Supreme Court

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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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,  
DONALD HACKING and JESSE R.  
S. BUDGE, Commissioners of the  
Public Service Commission of Utah,  
and CLARK TANK LINES, INC., a  
corporation,

*Defendants.*

FILED

APR 1 1960

Supreme Court, Utah

Case No. 9293

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PLAINTIFFS' BRIEF

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and WOOD R. WORSLEY and JOHN F. PIERCEY

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# INDEX

	<i>Page</i>
PRELIMINARY STATEMENT .....	1
STATEMENT OF FACTS .....	4
STATEMENT OF POINTS .....	22
ARGUMENT .....	24
POINT I. THE ACTION OF THE COMMISSION IN FINDING PUBLIC CONVENIENCE AND NECES- SITY REQUIRED ANY GRANT OF AUTHORITY HEREIN IS ARBITRARILY, CAPRICIOUS AND CONTRARY TO THE EVIDENCE .....	24
(A) THE EVIDENCE ESTABLISHES THAT THE EXISTING SERVICE IS ADEQUATE TO MEET THE NEEDS OF THE SHIPPING PUBLIC .....	24
(B) THE EVIDENCE OF PRESENT OR FUTURE NEED FOR THE AUTHORITY GRANTED HEREIN IS SPECULATIVE AND CONJEC- TURAL, AND A GRANT OF AUTHORITY BASED THEREON IS CONTRARY TO LAW .....	34
POINT II. THE ACTION OF THE COMMISSION IN GRANTING AUTHORITY TO ALL POINTS AND PLACES IN THE STATE OF UTAH IS NOT SUB- STANTIATED BY THE RECORD WHICH IS AB- SOLUTELY DEVOID OF EVIDENCE EXCEPT AS TO THE RESTRICTED AREAS HEREINAFTER OUTLINED, AND SUCH A BROAD GRANT OF AUTHORITY IS ARBITRARY, CAPRICIOUS AND CONTRARY TO LAW .....	36
(A) THE ONLY EVIDENCE INTRODUCED RE- LATING TO FLOUR INVOLVED A MOVE- MENT FROM OGDEN TO SALT LAKE CITY.....	37
(B) THE ONLY EVIDENCE INTRODUCED RE- LATING TO EDIBLE SALT INVOLVED A MOVEMENT FROM SALT AIR TO SALT LAKE CITY .....	38

## INDEX

	Page
(C) THE ONLY EVIDENCE INTRODUCED RELATING TO POWDERED MILK INVOLVED A MOVEMENT FROM BEAVER TO SALT LAKE CITY .....	39
(D) THE ONLY EVIDENCE INTRODUCED RELATING TO SUGAR INVOLVED A MOVEMENT FROM WEST JORDAN TO SALT LAKE CITY .....	40
POINT III. THE ACTION OF THE COMMISSION WILL ADVERSELY AFFECT PLAINTIFFS AND OTHER EXISTING CARRIERS BY DIVERTING VITALLY NEEDED TRAFFIC FROM THEIR LINES .....	43
CONCLUSION .....	48

## CASES CITED

Lake Shore Motor Coach Lines, Inc. v. Bennett, 8 Utah 2d 293, 333 P2d 1061 (1958) .....	33-47
Mulcahy v. Public Service Commission, 101 Utah 245, 117 P2d 298 (1941) .....	32
Ralph E. Sorkness, Extension—Carbon Dioxide; No. M.C. 38673 (Sub No. 9); 8 FCC 32,246 .....	36
Salt Lake Transfer Co. and Ashworth Transfer, Inc. v. Public Service Commission and Barton Truck Lines, Inc., (Utah, 1960) Case No. 9082 .....	41
Wycoff Co. v. Public Service Commission, 119 Utah 342, 227 P2d 323 (1951) .....	31-47

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corporation, CARBON MOTORWAY  
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Case No. 9293

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PLAINTIFFS' BRIEF

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PRELIMINARY STATEMENT

This case is before the Supreme Court on a Writ of  
Review directed to the defendants, and for the purpose

of reviewing an order of the Public Service Commission of Utah, dated April 28, 1960. Such order granted to defendant Clark Tank Lines, Inc., Certificate of Convenience and Necessity No. 1051-Sub 7, authorizing operating rights on certain specified commodities between all points and places in the State of Utah.

The approach of the Public Service Commission in this case is of particular concern to plaintiffs in that the statewide grant of authority is totally without support in the evidence and was made without reference to the well established concept of that degree of proof required to establish convenience and necessity. It is obvious that the Commission failed to make even a casual study of the evidence, preferring instead to make a blanket grant without regard to the testimony.

Clark Tank Lines was granted authority in accordance with its application to transport flour, sugar, edible salt and powdered milk in dry form, in bulk, between all points and places in the State of Utah and non-edible salt, in dry form, in bulk, from Saline to points and places in the state north of, but not including, Tooele, Salt Lake, Wasatch, Duchesne and Uintah counties. Plaintiffs are not contesting that portion of the order permitting service on non-edible salt from Saline to points north of the indicated counties.



The only evidence introduced by Clark related to transportation of (1) flour from Ogden to Salt Lake; (2) sugar from West Jordan to Salt Lake; (3) edible salt from Saltair to Salt Lake; and (4) powdered milk from Beaver to Salt Lake. Plaintiffs do not concede that any of this evidence would support a finding of convenience and necessity for any of these commodities to any of these points.

In this order the Public Service Commission completely abandoned the principle that there must be evidence of need for the proposed transportation service on the commodities named and into the territories involved. The evidence is inadequate to sustain any grant of authority. Moreover, there is not a scintilla of evidence to sustain the grant to all points and places within the state.

As hereinafter outlined, plaintiffs' authority extends generally from Salt Lake City south on U.S. Highways 89 and 91 into southern Utah, and east on U.S. Highways 6 and 50 into eastern Utah. However, the statewide grant of authority has a direct and adverse affect on plaintiffs' interlining operations as well as affecting plaintiffs in the areas they serve directly. Consequently, this appeal is directed to the entire order, except that portion authorizing transportation of non-edible salt from Saline to points in northern Utah.

## STATEMENT OF FACTS

Clark Tank Lines, Inc. (hereinafter referred to as defendant) filed an application January 25, 1960 seeking a Certificate of Convenience and Necessity to operate as a common motor carrier for the transportation of flour, sugar, powdered milk and salt, in bulk, in dry form, between all points and places in the State of Utah. Notice of the application was given and hearing was held before the Public Service Commission April 8, 1960. A total of nine protestants filed appearances. (R. 1). At the hearing defendant amended its application limiting transportation of non-edible salt to the origin point of Saline. The Commission's Report and Order, issued April 28, 1960, granted defendant authority to operate as a common carrier for 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, and for the transportation of non-edible salt, in bulk, in dry form, from Saline to all points in Utah north of, but not including, Tooele, Salt Lake, Wasatch, Duchesne and Uintah Counties.

Defendant is a common carrier with operating rights in Utah for the bulk transportation of petroleum, petroleum products, anhydrous ammonia, ammonium nitrate, solid ammonium nitrate, ammonium sulfate, dry and



liquid fertilizers and magnesium chloride brine solution between various points and places within the state. (Ex. 1). In addition, defendant holds certain interstate operating rights, including authority to transport bulk flour and salt. (R. 27). Defendant presently has no equipment suitable for the transportation of edible commodities in bulk (R. 18) but has arranged for the construction of a trailer to enable it to operate its interstate authority. (R. 49, 50). It is this unit that defendant intends to use for the transportation of the commodities involved herein. (R. 37). Regardless of the disposition of this application, defendant will have to purchase this trailer to operate its interstate authority. (R. 49, 50).

As applicable here the authority of plaintiff Milne Truck Lines, Inc. under Certificates of Convenience and Necessity Nos. 465, 531 and 826, and various subs thereunder, authorizes transportation as a common carrier of general commodities, including the commodities involved herein, from Salt Lake City to Levan and all points south on U.S. Highway 91, and from Levan and all points south on U. S. Highway 91 to Salt Lake City. Local service is provided to all points between Levan and Santa Clara, inclusive. Additionally, Milne holds authority for general commodities over irregular routes to, from and between all points and places in Beaver County in conjunction with its authorized regular operations. Authority is also held for the transportation of general commodities between Beaver and Milford via Utah Highway 21, serv-

ing all intermediate points, together with authority to other points and places in the southern portion of the state. Milne is specifically authorized to transport salt products between Panguitch and Gunnison and all points in Washington County, except points on U.S. Highway 91 north of the junction of Utah Highway 15 and U.S. Highway 91. (Ex. 9).

Plaintiff Salt Lake-Kanab Freight Lines, Inc. is authorized under Certificate of Convenience and Necessity No. 1169 to transport as a common carrier general commodities, including the commodities involved herein, from Salt Lake City south on U.S. Highway 89 to Kanab, serving intermediate points. Additionally, this plaintiff serves intermediate points on U.S. Highway 91 between Salt Lake City and Nephi, inclusive, and on Utah Highways 11 and 28 between U.S. Highways 89 and 91 in central Utah. Salt Lake-Kanab has authority to serve from the Morton Salt Company plant at Saltair to points lying between Fairview and Marysville, inclusive, and Mona and Pigeon Hollow Junction, inclusive. (Ex. 14).

Plaintiff Carbon Motorway, Inc. holds authority under Certificate of Convenience and Necessity No. 1042 as a common carrier of general commodities, including the commodities involved herein, from Salt Lake City south on U.S. Highway 91 to Spanish Fork and southeasterly to the Emery County-Sevier County line over U.S. Highway 6 to Price, and Utah Highway 10 to the

County line, together with other indicated routes, serving all intermediate points. Within Emery County such carrier is authorized to serve all points and places within 20 miles of Utah Highway 10 together with other off-route points. Carbon holds authority to operate as a carrier of general commodities between Spanish Fork and Payson over U.S. Highway 91, serving all intermediate points. General commodity authority is held between Price and the Utah-Colorado state line, serving all intermediate points on U.S. Highways 6 and 50. Specific authority for the transportation of salt is held between the Morton Salt Company at Saltair and Salt Lake City over U.S. Highway 40. (Ex. 17).

Each of these plaintiffs maintain substantial terminal facilities at various points in the areas served and each has a large fleet of equipment. While none of plaintiffs possess a bulk unit similar to that described by defendant, their operating witnesses stated they were willing to acquire such additional equipment, singly or in association, as traffic may warrant. (R. 218, 219, 236, 245).

The defendant produced six shipper witnesses.

Mr. Lynn H. Denkers testified on behalf of the Pillsbury Company, which manufactures flour at Ogden. This witness testified that Salt Lake City and Ogden are the only communities in Utah to which bulk flour moves from

Pillsbury. (R. 60). Pillsbury ships bulk flour by truck from Ogden to one customer in Salt Lake City at the present time. (R. 62). One other Salt Lake customer, presently receiving his shipments of flour in bags, is contemplating converting to bulk facilities although the witness did not know when such conversion would occur. (R. 63, 66). Denkers indicated his company desired to ship flour to Pelton's Spudnuts in Salt Lake. (R. 76, 77). However, Pelton's is already equipped to handle bulk flour, and is served by rail from General Mills in Ogden. Pillsbury has had contract carrier service available for such a proposed movement to Pelton's. (R. 60, 180). There was no showing that the granting of this application would enable this shipper to supply bulk flour to Pelton's Spudnuts at Salt Lake City.

Pillsbury is presently being served on its bulk movements of flour by truck by a duly certified contract carrier, Salt Lake Flour Mills division of the Colorado Milling & Elevator Company, which uses equipment similar to that which the defendant proposes to acquire for this transportation. (R. 61). The equipment of this contract carrier is utilized by Pillsbury three days a week. (R. 61). Denkers testified that his company had encountered no difficulty with the services of the contract carrier. (R. 75). As to the adequacy of this service, he said:

“Q. Is it your testimony here that they do not have adequate equipment at the present time?

\* \* \*

A. It is adequate for the points we serve right now." (R. 81).

Denkers also stated:

"Q. But you do not need any additional service at this point?

A. Not unless this additional customer converts." (R. 71).

The witness admitted Pillsbury had never asked the contract carrier to acquire additional equipment and had no reason to believe any such request would be refused. (R. 81, 82).

Ninety-five percent of Pillsbury's flour is presently transported in bags. (R. 67). Denkers said that any bulk movements of flour to Utah points other than Salt Lake and Ogden are "strictly conjecture." (R. 68). On cross-examination, counsel inquired specifically into the needs of this shipper into the territories served by plaintiffs. It is obvious this shipper has absolutely no need for the proposed servied into these areas. Denkers testified:

"Q. Mr. Denkers, let me ask you, at the present time you are using Milne Truck Lines for bags into southern Utah?

A. We are, yes.

Q. And have you found this service satisfactory?

A. Yes.

Q. You never made any requests of them for bulk movement, have you?

A. No.

Q. And will you make the same statement as to Carbon Motorway in the area which they serve?

A. That's true; the same is true.

Q. And Salt Lake-Kanab?

A. Yes." (R. 77, 78)

No other evidence was adduced from Pillsbury with respect to transportation into these areas.

Morton Salt Company was represented by D. Leon Johnston. This company is located at Saltair, about ten miles west of the Salt Lake City airport. (R. 132). Morton owns and operates its own equipment and transports edible salt in both bulk and bags. (R. 136, 137). The fact that Morton has no need for any bulk service on edible salt was succinctly stated by Johnston when he said:

“Q. Do you have occasions where your own equipment is fully used for other purposes and you would have bulk shipments which you would have to give to other carriers?

A. Only in case of the coarse salt.” (R. 137).

Morton uses its own equipment insofar as possible and handles its own transportation from Payson on the south to Logan on the north, and Heber City on the east to Tooele on the west. (R. 139, 142). At this time Morton has contract carrier service available for excess traffic it cannot handle and calls on common carriers only infrequently, and such calls would continue to be unusual. (R. 142, 144). The largest request for a bulk shipment of edible salt that this shipper has ever had in Utah was an order for 15 tons which was handled with Morton’s own equipment. (R. 141). The witness was asked whether Morton would continue to use its own trucks in the transportation of edible salt in bulk and replied:

“A. That is correct, unless the requirements of the customer was such that we didn’t have the equipment to do it.

Q. Do you know of any requirements at the present time which make your equipment unsuited for the transportation in bulk of edible salt—I mean edible for human consumption?

A. No sir.



Q. Are you presently transporting that type of salt in bulk within your local area?

A. Yes.” (R. 142, 143).

With regard to the area south of Provo, the absolute lack of need by this shipper was clearly demonstrated when Johnston was asked:

“Q. Now so far as edible salt, in bulk, do I correctly interpret your testimony to mean that you have no known movement there, for instance, to points such as Provo—you have no user there?

A. That’s right.

Q. In fact, any place in Utah south of Provo you would have no occasion to move edible salt in bulk?

A. That is correct.” (R. 143).

This company has no market for edible salt in Uintah, Duchesne, Carbon, Wayne, Grand, Emery and San Juan Counties and no use for any trucking services into those areas. (R. 145, 146).

Theo M. Merrill appeared representing Brooklawn Creamery. This company manufactures powdered milk in Beaver and is presently shipping its product in bags

and fiber drums. (R. 121). The witness admitted that his company has no customers at the present time who utilize bulk facilities in the handling of powdered milk. (R. 126). His interest Merrill said:

“A. . . . is in satisfying any potential customers who may develop.” (R. 122).

This shipper is presently utilizing the facilities of plaintiff Milne Truck Lines from Beaver into Salt Lake City. Concerning this service he stated:

“Q. Are you here complaining about the service of Milne from Beaver to Salt Lake on these bag shipments to this particular customer?

A. Absolutely not.

Q. That service has been very satisfactory?

A. Very satisfactory.” (R. 125).

Merrill strictly limited the points with which his company is concerned, stating:

“Q. You have no need for services to any other points than Beaver and Salt Lake City?

A. No.” (R. 129).

The present movement on Milne Truck Lines of powdered milk from Beaver to Salt Lake City occurs approximately once a week. (R. 132).

The potential customer to which this shipper referred, Pelton's Spudnuts, uses about 12,000 to 13,000 pounds of powdered milk a month. (R. 184). On defendant's proposed 45,000 pound capacity equipment, this movement would amount to approximately one truck load every four months. On the other hand, this traffic constitutes a valuable backhaul for Milne Truck Lines (R. 219, 220) and would be lost to Milne whether in bulk or in bag, by the granting of this application. (R. 131). With respect to Brooklawn's need for bulk service, Merrill's testimony demonstrates that it has not previously anticipated such a need. He stated with respect to Milne's solicitation:

“Q. Their purpose in coming, as they have made clear I presume, is to see what traffic they can move for you; is that right?

A. That's right.

Q. Now nothing has ever been said by you or by them actually about transporting powdered milk in bulk equipment. The subject has never come up?

A. That's right.” (R. 132).

Utah-Idaho Sugar Company was represented by Mr. Clisbee Kimball. This company has manufacturing plants located in West Jordan and Garland. His testimony dealt with transportation to the Salt Lake plant of Pelton's Spudnuts.

Kimball admitted that no sugar in bulk is presently being shipped from either of Utah-Idaho Sugar Company's plants. (R. 149). All of its product is at present moving in bags and liquid form. (R. 149). He stated, however, that his company is presently "dickering" with one customer, Pelton's Spudnuts, for the sale of bulk sugar. (R. 150, 163). Kimball indicated that this customer had not yet decided whether the conversion of its facilities will be designed to accommodate truck or rail movement of bulk sugar. (R. 155). If the Spudnut people elect to convert to bulk sugar movement to be served by trucks, Utah-Idaho Sugar would supply sugar from West Jordan, relying on the Garland plant only in emergencies. (R. 164).

This company presently delivers sugar in bags from its West Jordan plant into the Salt Lake area and south into Provo via its own trucks. (R. 158, 159). In other areas, this shipper utilizes the services of plaintiffs into the territory served by them and finds such services satisfactory. (R. 165, 166, 168).

The fact that Utah-Idaho Sugar has absolutely no need for transportation of sugar in bulk into the area served by plaintiffs was clearly demonstrated by the witness. Regarding the territory served by plaintiff Milne Truck Lines, he said:

“A. We don’t have any potential users in the territory they operate in at the present time.

Q. That’s right. The same would be true of Salt Lake-Kanab Freight Lines—you are familiar with them?

A. Yes.

Q. You would have no even potential users there in the foreseeable time on bulk?

A. I wouldn’t say foreseeable, but presently, no—it might develop.

Q. That would be some later time, highly conjectural as to when?

A. It is conjecture.” (R. 165, 166).

Referring to plaintiff Carbon Motorway’s territory, he said:

“Q. Now with reference to Carbon, I suppose your statement as to servicing such points as Price—your statement—

A. Yes.

Q. That would probably be true, would it not, of any points served by Carbon Motorways, excluding for the moment Provo?

A. Yes.

Q. Now taking for the moment the point of Provo, which they serve, you can't give us anything concrete as to a potential user there?

A. No." (R. 167).

Although this shipper has been solicited by plaintiffs for the purpose of developing any freight plaintiffs could handle, it has never mentioned any need for a bulk transportation movement. (R. 170).

Mr. Lee Scott appeared for Pelton's Spudnuts, a Salt Lake confectionary firm. He indicated that his company was the prime mover in the filing of this application. (R. 187). Pelton's Spudnuts uses each of the commodities involved, flour in bulk, and sugar, salt and powdered milk in bags. He testified his company intends to convert its operation to bulk as soon as feasible. (R. 183).

After this conversion, Scott stated his company will utilize 40,000 to 60,000 pounds of bulk sugar a month. (R. 183). Pelton's is presently receiving sugar from

Layton Sugar Company in 3,000 pound nesta-bins. (R. 179). The witness stated that if his company purchased sugar from Utah-Idaho Sugar, the commodity would move from West Jordan to Salt Lake. (R. 183). No other points or places of origin or destination of this product were mentioned.

Pelton's is presently equipped to handle and is handling its flour in bulk. (R. 183). It receives this commodity at its plant via rail from General Mills in Ogden. (R. 180). Any need for the transportation of flour was specifically negated by this witness. He stated in response to a question whether he would need bulk shipments of flour coming by truck:

“A. Not the flour. The situation on the flour is very compatible as our present operation is.” (R. 193).

Scott said there was a possibility that Pelton's might ship one truckload of bulk flour per month. (R. 193). However, contract carrier service is available for any such bulk transportation by truck. (R. 60). With regard to the movement of flour, the only points in the state even referred to were Salt Lake and Ogden.

Pelton's uses 12,000 to 13,000 pounds of powdered milk per month which it is now receiving in 100 pound bags from Beaver via Milne Truck Lines. (R. 184). On



defendant's proposed 45,000 pound capacity truck this traffic would amount to about one truck load every four months. Milne's service has been found to be satisfactory on this movement. (R. 203). Scott admitted that Pelton's had been solicited by Milne Truck Lines but no mention had ever been made of a need for bulk transportation of powdered milk. (R. 203). The Beaver to Salt Lake movement was the only movement of powdered milk about which evidence was produced.

Edible salt is presently received by Pelton's from Morton Salt Company in bags via the Morton trucks. (R. 180). While Morton has bulk equipment for the transportation of edible salt and uses it regularly (R. 136, 137), the witness did not know such service was available. (R. 201). This shipper's need, if any, for transportation of edible salt in bulk can be handled by Morton without the issuance of any new authority. Again, no evidence was introduced regarding a movement of edible salt to any points other than Salt Lake from Saltair.

Protestant Milne Truck Lines was represented by Mr. Henry Dahn. This company operates numerous daily schedules throughout the territory it is authorized to serve, particularly between Beaver and Salt Lake City. (R. 212). It is, and has been for some time, transporting the powdered milk supplied by Brooklawn Creamery for Pelton's Spudnuts, and Milne's retention of this traffic, whether in bags or in bulk is highly desirable to it. (R.

219, 220). Milne transports sugar for Utah-Idaho Sugar Company and flour for Pillsbury into the territory it is authorized to serve. (R. 77, 165). There have been no requests made of Milne for transportation of the commodities involved in bulk during the two years preceding this hearing (R. 216), even though each of these shippers had been solicited by Milne. (R. 220). In fact, Milne, in its operations, has not observed an indication of a trend to bulk transportation. (R. 220).

While Milne now has excess equipment, it stands ready to acquire such additional equipment as traffic may warrant. (R. 216). It has discussed with other dry freight carriers in Utah the possibility of acquiring dry bulk equipment in association when the combined traffic of all the carriers warrants. (R. 218, 219). However, in Dahn's opinion, the present volume does not justify the acquisition of such equipment. Milne's costs are rising and the diversion of traffic is a serious matter to it. It is particularly concerned with losing the valuable backhaul movement from southern Utah represented by the Brooklawn Creamery account. The loss of any traffic will increase the difficulty of meeting its costs at its current rates. (R. 219, 220).

Mr. Bernard Hale represented plaintiff Salt Lake-Kanab Freight Lines. This carrier provides daily service between points it is authorized to serve and is moving all of the commodities involved in this hearing in bagged

form at the present time. (R. 234). Its solicitors have contacted each of the shippers involved here and no requests for bulk transportation have been made. Salt Lake-Kanab has a substantial fleet of equipment and is willing to acquire such additional equipment as traffic requires. The witness indicated his company had studied and agreed to join in the purchase of dry bulk equipment with other dry freight carriers in Utah when traffic warrants. (R. 236). A diversion of traffic would have an adverse effect on Salt Lake-Kanab since its operating costs are already high and contact wage increases were scheduled to go into effect shortly after the hearing. (R. 235).

Plaintiff Carbon Motorway, Inc. was represented by Mr. Wayne Cushing. Carbon has authority to transport the commodities involved here, including specific authority on salt from Morton Salt Company to Salt Lake City. For a time after the granting of this salt authority, Carbon transported bulk salt for Morton but none has been handled since July 1, 1958. (R. 234). Although Carbon serves and solicits the shippers appearing at the hearing, none has requested transportation of the commodities in bulk. (R. 247). However, along with plaintiffs Milne Truck Lines and Salt Lake-Kanab Freight Lines, Carbon has agreed to purchase, alone or in association, such dry bulk equipment as may be required by the traffic. (R. 245). Any diversion of traffic from Carbon's lines, directly or by interline, would be harmful to Carbon since

its operating costs are extremely high and, due to increased wage contracts, will become higher (R. 248).

Following issuance of the order herein, plaintiffs filed a detailed petition for rehearing (R. 342) which was denied by the Commission on May 25, 1960. (R. 348).

## STATEMENT OF POINTS

### POINT I.

THE ACTION OF THE COMMISSION IN FINDING PUBLIC CONVENIENCE AND NECESSITY REQUIRED ANY GRANT OF AUTHORITY HEREIN IS ARBITRARY, CAPRICIOUS AND CONTRARY TO THE EVIDENCE.

(A) THE EVIDENCE ESTABLISHES THAT THE EXISTING SERVICE IS ADEQUATE TO MEET THE NEEDS OF THE SHIPPING PUBLIC.

(B) THE EVIDENCE OF PRESENT OR FUTURE NEED FOR THE AUTHORITY GRANTED HEREIN IS SPECULATIVE AND CONJECTURAL, AND A GRANT OF AUTHORITY BASED THEREON IS CONTRARY TO LAW.

## POINT II.

THE ACTION OF THE COMMISSION IN GRANTING AUTHORITY TO ALL POINTS AND PLACES IN THE STATE OF UTAH IS NOT SUBSTANTIATED BY THE RECORD WHICH IS ABSOLUTELY DEVOID OF EVIDENCE EXCEPT AS TO THE RESTRICTED AREAS HEREINAFTER OUTLINED, AND SUCH A BROAD GRANT OF AUTHORITY IS ARBITRARY, CAPRICIOUS AND CONTRARY TO LAW.

- (A). THE ONLY EVIDENCE INTRODUCED RELATING TO FLOUR INVOLVED A MOVEMENT FROM OGDEN TO SALT LAKE CITY.
- (B). THE ONLY EVIDENCE INTRODUCED RELATING TO EDIBLE SALT INVOLVED A MOVEMENT FROM SALTAIR TO SALT LAKE CITY.
- (C). THE ONLY EVIDENCE INTRODUCED RELATING TO POWDERED MILK INVOLVED A MOVEMENT FROM BEAVER TO SALT LAKE CITY.
- (D). THE ONLY EVIDENCE INTRODUCED RELATING TO SUGAR INVOLVED A MOVEMENT FROM WEST JORDAN TO SALT LAKE CITY.

## POINT III.

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

## ARGUMENT

## POINT I.

THE ACTION OF THE COMMISSION IN FINDING PUBLIC CONVENIENCE AND NECESSITY REQUIRED ANY GRANT OF AUTHORITY HEREIN IS ARBITRARY, CAPRICIOUS AND CONTRARY TO THE EVIDENCE.

- (A) THE EVIDENCE ESTABLISHES THAT THE EXISTING SERVICE IS ADEQUATE TO MEET THE NEEDS OF THE SHIPPING PUBLIC.

An analysis of the evidence fails to reveal any basis for the Commission's finding that public convenience and necessity requires the grant of authority made herein. Considering the evidence on each commodity separately, it is clear that no public need was shown and that the carrier services available are adequate to meet the needs of the shipping public.

The only testimony relating to the transportation of flour came from the Pillsbury Company and Pelton's Spudnuts. The Pillsbury flour plant is located at Ogden. Its representative stated that Ogden and Salt Lake City are the only points in the State to which bulk flour is shipped. (R. 60). Pillsbury has only one customer in Salt Lake City at the present time to which shipments of bulk flour are made. (R. 62). One other Salt Lake custo-

mer is considering a conversion to bulk flour utilization, however, the witness had no idea as to when, if ever, such conversion would take place. (R. 66). The customer referred to did not appear at the hearing and there was no concrete evidence of any firm intention by such customer to convert to bulk facilities.

To accomplish its bulk flour transportation, Pillsbury uses the services of a duly certified contract carrier, Salt Lake Flour Mills Division of the Colorado Milling and Elevator Company. This carrier's services are used three days per week. (R. 61). The service and equipment provided are satisfactory and adequate for Pillsbury's present needs. (R. 70, 81). Pillsbury has not requested additional equipment from this carrier and has no reason to believe it would not provide such equipment if requested. (R. 81, 82). No difficulty has been encountered by Pillsbury with the contract carrier's service. (R. 75).

The only other evidence relating to flour was in the testimony of Lee Scott, representing Pelton's Spudnuts of Salt Lake City. Pelton's now receives bulk flour by rail from the General Mills Plant in Ogden. (R. 180). Although Pillsbury would like to ship flour to Pelton's, (R. 76, 77), when asked whether it would be of any convenience to Pelton's to have service available by truck, Scott stated:



“A. Not the flour. The situation on the flour is very compatible as our present operation is.”  
(R. 193).

In its operation, Pelton's might anticipate at the most one bulk shipment of flour by truck per month. (R. 193). Of course, the contract carrier service presently available could handle this movement. No other evidence on this commodity was produced.

In substance, this evidence shows Pillsbury has one movement of bulk flour from Ogden to Salt Lake which is presently handled by a duly certified contract carrier whose services are utilized by Pillsbury three days a week. Pelton's service is perfectly adequate and satisfactory. The only reasonable conclusion which could be reached is that the service available to Pillsbury and Pelton's for the transportation of Bulk flour is adequate to meet their needs. There was not a shred of evidence on which a finding of convenience and necessity could be made.

The evidence pertaining to a movement of edible salt involved only the transportation from Morton Salt Company at Saltair to Pelton's Spudnuts in Salt Lake City. An examination of the evidence produced by Morton conclusively demonstrates that the Commission's grant of authority is contrary to the evidence. Morton owns and operates its own equipment and transports

edible salt on such equipment in both bulk and bags. (R. 136, 137). It moves its own product insofar as possible through the area bounded by Payson on the south, Logan on the north, Heber City on the east, and Tooele on the west. (R. 139, 142). Morton is presently providing Pelton's with edible salt in bags on its own trucks. (R. 180). The complete lack of need for additional service on edible salt was made clear by the Morton witness who testified:

“Q. Do you have occasions where your equipment is fully used for other purposes and you would have bulk shipments which you would have to give to other carriers?

A. Only in the case of coarse salt.” (R. 137).

Morton intends to continue to use its own trucks in the transportation of edible salt in bulk. (R. 142). The witness testified:

“Q. Do you know of any requirements at the present time which make your equipment unsuited for the transportation in bulk of edible salt—I mean edible for human consumption?

A. No sir.

Q. Are you presently transporting that type of salt in bulk within your local area?

A. Yes.” (R. 143).

In addition to having its own transportation facili-

ties, there is an abundance of carrier service available to Morton. Contract carrier service is available for excess traffic Morton's trucks cannot handle. (R. 144). Although it has authorized common carrier service, Morton calls on them only infrequently and anticipates that such calls would continue to be unusual. (R. 142). Plaintiff Carbon Motorway is authorized to serve the Morton Salt Company to Salt Lake City. (Ex. 17).

In the face of this evidence, it is incredible that the Commission found that public convenience and necessity required the grant of authority for the transportation of edible salt in bulk. Such an obviously erroneous conclusion is arbitrary and unreasonable and should be reversed.

Testimony relating to the transportation of powdered milk was restricted to a single movement, from the Brooklawn Creamery in Beaver to Pelton's Spudnuts in Salt Lake City. Brooklyn Creamery is presently shipping powdered milk in bags and fiber drums to Pelton's via Milne Truck Lines. (R. 121). This movement occurs approximately once a week. (R. 132). The witness for this shipper admitted that his company had no customers at the present time who utilized bulk facilities in the handling of powdered milk and stated his interest was:

"A. . . . satisfying any potential customers who may develop." (R. 122).

Pelton's Spudnuts uses 12,000 to 13,000 pounds of powdered milk a month. (R. 184). On the equipment defendant is acquiring, this movement would amount to approximately one truck load every four months. On the other hand, the Milne witness indicated its willingness to acquire bulk containers to effect this movement in bulk if requested. (R. 226). Such containers, similar to the 3,000 pounds nest-a-bins in which sugar is presently supplied Pelton's (R. 179), would require a minimum amount of handling at Pelton's plant. Such service could be made available to Brooklawn Creamery by Milne at any time the shipper may request. However, the fact that there is no need for a bulk service here is made evident in the Brooklawn witness' testimony relating to Milne's solicitation:

“Q. Their purpose in coming, as they have made clear I presume, is to see what traffic they can move for you; is that right?

A. That's right.

Q. Nothing has ever been said by you or by them actually about transporting powdered milk in bulk equipment. The subject has never come up?

A. That's right.” (R. 132).

Milne has solicited Pelton's but has never received an inquiry about bulk transportation of powdered milk.

(R. 203). The movement from Brooklawn to Pelton's constitutes a valuable backhaul for Milne which would be lost by the granting of this application. (R. 131, 219). Milne's service for this shipper has been adequate and satisfactory. (R. 125).

This evidence cannot support a finding that public convenience and necessity require the granting of a certificate for the transportation of powdered milk. Adequate service is available to this shipper. The evidence shows Brooklawn has no customers presently using bulk powdered milk and the only anticipated conversion involves a small amount which could be handled adequately by Milne. If such conversion occurs, the existing carrier should be afforded the first opportunity to transport the commodity involved.

The only evidence pertaining to the transportation of sugar was produced by the Utah-Idaho Sugar Company and related to a proposed movement from its plant in West Jordan to Pelton's Spudnuts. The witness for Utah-Idaho Sugar admitted that no sugar in bulk is presently being shipped from either of that company's plants, which are located in West Jordan and Garland. (R. 149). With regard to the proposed movement to Pelton's, Utah-Idaho is only negotiating for the sale of bulk sugar. (R. 150). The witness indicated that Pelton's had not yet decided whether its conversion to bulk sugar facilities will be designed to accommodate truck or rail

movements. (R. 155). Pelton's is presently provided with sugar from the Layton Sugar Company. (R. 179).

Utah-Idaho Sugar is now delivering from its West Jordan plant into the Salt Lake area and south into Provo on its own trucks. (R. 158, 159). In other areas this shipper uses the services of plaintiff and finds such services satisfactory. (R. 165, 166, 168). Further evidence of lack of need for a new bulk service on this commodity is demonstrated by the fact that although this shipper has been solicited by plaintiffs for the purpose of developing any freight which they could handle, it has never requested service or mentioned any need for a bulk transportation movement. (R. 170).

On the strength of this evidence the Commission made a finding that public convenience and necessity require that defendant be granted authority to transport flour, edible salt, powdered milk and sugar, in bulk, in dry form, to all points and places in the state of Utah. It is axiomatic that if existing transportation facilities provide adequate and reasonable service, a Certificate of Convenience and Necessity cannot be awarded. See *Wycoff Co. v. Public Service Commission*, 119 Utah 342, 227 P.2d 323, (1951). This grant of authority based upon a finding that convenience and necessity require additional service for the transportation of these commodities is unreasonable and contrary to the evidence and applicable law.

The most that can be said for defendant is that the nature of the evidence would appear more logically to relate to a carrier application for the right to serve Pelton's Spudnuts. However, even such an application would have to be denied since no evidence of any need for additional service was shown. The fact that Pelton's might find such a service convenient and desires to use the services of defendant is not enough to support the order of the Commission. To sustain a finding of convenience and necessity the need must be public rather than private. As stated in *Mulcahy v. Public Service Commission*, 101 Utah 245, 117 P.2d 298 (1941):

“There can be no fast rule or clear line of demarcation between the convenience and necessity of individuals and the convenience and necessity of the public, because after all the public is made up of a collection of individuals. But a thing may be a convenience or a necessity for many individuals and yet not be a public convenience and necessity. The ‘convenience’ and ‘necessity’ required to support an application for a certificate are those of the public, not those of individuals. ‘Necessity’ and ‘convenience’ are not to be construed as synonymous. Convenience is much broader and more inclusive than necessity, but effect must be given to both.”



In defining the nature of a public need, the court said in the *Mulcahy* case:

“It is a definite need of the general public for such service where no reasonably adequate service exists.

\* \* \*

“The mere matter of convenience to certain shippers does not establish public convenience and necessity. If existing utilities are rendering adequate service, ordinarily a certificate will not be granted putting a new competitor in the field.”

Here the service proposed by defendant amounts to no more than a mere convenience for a few shippers. Under the law, when a carrier applies to institute a new service, the Commission must take into account, not only the immediate advantage to some members of the public in increased service, but must make long-range plans for the protection of the existing carriers. See *Lake Shore Motor Coach Lines, Inc. v. Bennett*, 8 Utah 2d 293, 333 P.2d 1061 (1958). The evidence is clear that adequate service already exists to meet any needs for the transportation of these commodities. Under such circumstances, the law requires the grant of common carrier authority be set aside.

(B) THE EVIDENCE OF PRESENT OR FUTURE NEED FOR THE AUTHORITY GRANTED HEREIN IS SPECULATIVE AND CONJECTURAL, AND A GRANT OF AUTHORITY BASED THEREON IS CONTRARY TO LAW.

Before there can be any utilization by the shippers involved of the service authorized, Pelton's Spudnuts must convert their sugar, powdered milk and salt facilities to bulk equipment. As indicated above, although Pelton's has bulk equipment for flour, by its own admission, the service presently provided for this commodity is adequate to meet Pelton's needs. (R. 193). The conversion to bulk with respect to the other three commodities is pure conjecture when talking in terms of a need for common carrier service. Pelton's witness indicated that a conversion to bulk salt and powdered milk facilities will only be accomplished when that company deems it "feasible." (R. 183). While he indicated that bulk sugar equipment has been ordered, the witness from Utah-Idaho Sugar Company testified it had been indicated to him that no determination had been made by Pelton's whether such facilities would be designed to accommodate rail or truck service. (R. 155). The fact that we are dealing with speculation rather than need here is emphasized by the fact that, although solicited by each of the plaintiffs, neither Pelton's nor any of the other shippers had ever requested that bulk service be provided. The witness for Brooklawn Creamery testified:

“Q. Now nothing has ever been said by you or by them (Milne) actually about transporting powdered milk in bulk equipment. The subject has never come up?

A. That’s right.” (R. 132).

That the alleged need was pure speculation was further emphasized by the fact that although Morton Salt Company has available bulk equipment for the transportation of edible salt and has performed that service regularly (R. 136, 137), and delivers bagged salt to Pelton’s, Pelton’s was unaware that any such service existed and has never inquired. (R. 201).

In light of the evidence that none of these shippers has ever requested or mentioned bulk transportation to the solicitors of plaintiffs, although such solicitations are made for the purpose of developing the traffic, the need alleged cannot reasonably be regarded as present or in the reasonable or foreseeable future. Particularly this is true when, for example, bulk service on edible salt has been available for some time from Pelton’s supplier, and yet Pelton’s has never been sufficiently concerned to make inquiry.

The law is well settled that a speculative or conjectural need is not a sufficient basis to sustain a grant of common carrier authority. As stated by the Interstate

Commerce Commission in *Ralph E. Sorkness, Extension—Carbon Dioxide*; No. MC 38673 (Sub. No. 9); 8 F.C.C. 32,246:

“A mere possibility of a future need for the proposed service, however, is insufficient to sustain a finding that such service is required by the present and future public convenience and necessity.”

## POINT II.

THE ACTION OF THE COMMISSION IN GRANTING AUTHORITY TO ALL POINTS AND PLACES IN THE STATE OF UTAH IS NOT SUBSTANTIATED BY THE RECORD WHICH IS ABSOLUTELY DEVOID OF EVIDENCE EXCEPT AS TO THE RESTRICTED AREAS HEREINAFTER OUTLINED, AND SUCH A BROAD GRANT OF AUTHORITY IS ARBITRARY, CAPRICIOUS AND CONTRARY TO LAW.

As previously indicated, the evidence introduced by defendant was insufficient to establish a need for any grant of authority herein. However the Commission granted defendant the right to serve on all the indicated commodities — flour, edible salt, powdered milk and sugar — between all points and places in the state of Utah. On the basis of this record, such a finding is incredible since the shipper witnesses expressly denied any traffic movement into the areas served by these plaintiffs, with the exception of the powdered milk movement from Beaver to Salt Lake City.

The evidence affirmatively refutes the finding that additional transportation facilities are needed between all points and places within the state.

(A). THE ONLY EVIDENCE INTRODUCED RELATING TO FLOUR INVOLVED A MOVEMENT FROM OGDEN TO SALT LAKE CITY.

As outlined above, the only movement of flour in the state about which testimony was introduced involved the movement from Ogden to Salt Lake City by the Pillsbury Company. Without re-examining the argument relating to a need for a service between Ogden and Salt Lake, it is clear that there is absolutely no evidence which would justify a finding that authority to transport flour was needed between any other places. Pillsbury ships 95% of its flour in bags. (R. 67). An abundance of service throughout the state is available for that movement. Pillsbury's witness expressly limited the movement of bulk flour to Ogden and Salt Lake when he testified:

“Q. Now, then, you mention the trend to bulk, flour in bulk is only feasible for a relatively large user of it; is that correct?

A. That is generally true, yes.

Q. And at this point they are located in Salt Lake and Ogden?

A. Right." (R. 75).

This shipper has been served by plaintiffs into the area each holds authority and the service provided has been satisfactory.

(B). THE ONLY EVIDENCE INTRODUCED RELATING TO EDIBLE SALT INVOLVED A MOVEMENT FROM SALTAIR TO SALT LAKE CITY.

The entire testimony relating to the movement of edible salt involved the Morton Salt Company transporting from Saltair to Pelton's in Salt Lake City. Morton uses its own equipment for its transportation needs throughout the area bounded by Payson on the south, Logan on the north, Heber City on the east and Tooele on the west. At the present time it has only one customer in the state which uses edible salt in bulk, Swift & Company of Ogden, which is served by rail. (R. 137, 147).

Again the evidence affirmatively established that Morton has no need for any transportation into the area served by these plaintiffs. The witness testified:

"Q. Now, so far as edible salt in bulk, do I correctly interpret your testimony to mean that you have no known movement of that, for instance, to points such as Provo—you have no user there?

A. That's right.

Q. In fact, any place in Utah south of Provo you would have no occasion to move edible salt in bulk?

A. That is correct." (R. 143).

Further, the witness testified his company has no market for edible salt in Uintah, Duchesne, Wayne, Grand, Emery and San Juan Counties and no use for a trucking service into those areas. (R. 145, 146).

(C). THE ONLY EVIDENCE INTRODUCED RELATING  
TO POWDERED MILK INVOLVED A MOVEMENT  
FROM BEAVER TO SALT LAKE CITY.

Brooklawn Creamery is located in Beaver and transports powdered milk into Salt Lake City. However, at this time this shipper has no customers who use the commodity in bulk form. (R. 126).

Here again the witness expressly restricted the territory to which any bulk movements would be destined. He stated:

"Q. You have no need for services to any other points than Beaver and Salt Lake City?

A. No." (R. 129).



The facilities of plaintiff Milne Truck Lines, Inc. have been used by this shipper and found to be very satisfactory. (R. 125).

(D). THE ONLY EVIDENCE INTRODUCED RELATING TO SUGAR INVOLVED A MOVEMENT FROM WEST JORDAN TO SALT LAKE CITY.

The Utah-Idaho Sugar Company was the only manufacturer of sugar represented at the hearing. It maintains manufacturing plants at West Jordan and Garland, but both this company's witness and the witness from Pelton's Spudnuts indicated that the sugar involved in this application would move from the West Jordan plant, except in emergencies. (R. 164, 183). No bulk sugar is presently shipped from either of these points. (R. 149).

The shipper witness once again restricted the area into which bulk sugar would move, saying that such movements would be into the Salt Lake area. (R. 150). In fact, the witness said that Pelton's was the only potential customer even in Salt Lake City. (R. 163). This shipper has no customers present or potential in the areas served by plaintiffs. The services of plaintiffs Milne and Carbon have been utilized by this shipper and found to be satisfactory. (R. 165, 168).

Without a shred of evidence to support it, in fact all of the testimony affirmatively to the contrary, the Commission has authorized defendant to transport all of these commodities between all points and places within the State of Utah. Obviously the evidence is devoid of any reference to transportation needs from such areas as Price to St. George; Cedar City to Logan; Brigham City to Monticello; Salt Lake to Kanab; Ogden to Richfield; in fact, from any point in the state to any other point in the state. Under the law, a grant of authority must be restricted to areas in which at least some evidence of need has been introduced. In the very recent case of *Salt Lake Transfer Co. and Ashworth Transfer, Inc. v. The Public Service Commission of Utah and Barton Truck Line, Inc.*, Case No. 9082, the court struck down an analagous action by the Public Service Commission. There Barton applied for certain authority, including explosives. At the hearing the applicant failed to offer any evidence concerning transportation of explosives, and plaintiffs offered evidence challenging the need on such commodity. The court reversed the Commission's order and held that, while in the first instance an applicant need not demonstrate a need for every conceivable item encompassed by a classification, where evidence is offered challenging a need for a particular item, the applicant must introduce evidence rebutting the challenge, and failure to do so will defeat the application. The court said:

“Whatever the minimum quantity and quality of evidence necessary to justify administrative action, *orders issued in the complete absence of* factual support are arbitrary, capricious and void. (Emphasis added)

\* \* \*

“A search of the record reveals nothing upon which to base the conclusion that the addition of Barton’s service will in any way add to public convenience and necessity with regard to explosives. As the record now stands, Ashworth and Salt Lake Transfer are rendering an adequate service in the transportation of explosives. Before additional service is authorized by the Commission, the applicant must show that the existing service is not adequate and convenient and that the proposed service would eliminate the inadequacy and inconvenience.”

The territorial problem in this case is closely analogous to the commodity problem presented to the court in the *Salt Lake Transfer* case. As noted by the court, to require applicant in the first instance to demonstrate a need for the transportation of every item to every point within the state would impose a heavy burden upon him. However, when protestants challenge the need into any particular area and offer evidence in support of such challenge, the applicant must introduce evidence establishing a need into that specific territory. Plaintiffs here challenged the need for transportation of all of the commodities into the areas in which they serve. Con-

clusive evidence was offered in support of that challenge and applicant failed to offer any rebutting evidence. Since there are no facts within the record to justify the statewide grant of authority, under the rule of the *Salt Lake Transfer* case, the order of the Commission is arbitrary and capricious and must be reversed.

### POINT III.

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

Among the considerations involved in arriving at a finding that convenience and necessity require the granting of common carrier authority is the effect of such grant upon existing carriers. The operating witnesses of plaintiffs each testified that the grant of authority herein would have a serious adverse effect upon the carriers.

Plaintiffs are presently transporting all of the commodities involved in bags and a grant of bulk authority would divert a portion of that traffic. This diversion is most direct and serious in the case of the powdered milk authority from Beaver to Salt Lake City. The witness for Brooklawn Creamery testified that the powdered milk previously transported by Milne will be

diverted to defendant by this grant (R. 131). The importance of that movement to Milne was emphasized by its operating witness, who testified:

“Q. What, is any, effect would the granting of authority here have on Milne?

A. Very possibly we would lose the Brooklawn Creamery account from Beaver to Salt Lake City.

Q. And is that of any importance to Milne, and if so why?

A. It is extremely important to Milne Truck Line because it is all backhaul traffic, and anything you can develop from southern Utah is highly desirable traffic, and we just hesitate to see any of it taken away from us.” (R. 219, 220)

Any diversion will, of course, have an effect on the revenue of Milne. The intrastate economic problems were outlined by the witness who testified:

“Q. As to the local intrastate operations within Utah, do you face any economic problems in maintaining service at current rates and expenses, particularly labor?

A. We are faced, come the first of May I believe it is, with a new labor contract that,

of course, is going to cost our company more money, and so far as our intrastate operating rights are concerned we find it very difficult to earn a profit on our transportation at the current rates, and we feel that if we are going to lose any more traffic then it is going to be a serious matter to us.” (R. 220).

The problem encountered by Salt Lake-Kanab is similar. The witness for this carrier stated:

“Q. And did you hear their statement as to the problem which confronts their common carrier in Utah in the event of diversion of traffic from bagged to bulk?

A. I certainly was.

Q. Would it be your testimony — and I only say this to expedite the matter, Mr. Hacking — would your testimony be the same in substance as that of the operating witness for Milne Truck Lines?

A. It certain would, sir.

Q. Is there any problem Kanab has in connection with potential diversion that has not been covered by Mr. Dahn?

A. There certain has, sir. We are constantly battling with diversion possibilities in intra-



state traffic. It is very marginal at present and I think, as Mr. Dahn stated, much more of a loss is going to be felt even worse.

We, too are being shadowed with a close-to-hand labor increase cost-wise.” (R. 235, 236).

The testimony of the witness for plaintiff Carbon Motorway testified that his company faced the same problem:

“Q. And would your testimony be the same as to the effect of traffic diversion were it to occur over the lines of Carbon Motorway — and by that I mean the effect on you would be extremely adverse?

A. Yes, it would. We have already experienced that on the salt.

Q. What about your general operating condition today on intrastate commerce over your area — and when I say ‘condition’ I refer to your operating ratio.

A. We are — find ourselves in a position where our operating ratio is up at a serious peak at the present time, running at 98% and 99%.

Q. Are you similarly confronted with wage contracts, which on that item of expense alone would generate a substantial increase in May of this year?



A. Yes; we just went through a wage increase the first of February, and we have another in May." (R. 244).

In granting this authority the Commission failed to take into consideration the effect upon plaintiffs' operations. Such action by the Commission is contrary to law. As pointed out by the court in *Wycoff Co. v. Public Service Commission*, 119 Utah 342, 227 P.2d 323, (1951):

"It might be true that the granting of the application for contract carrier authority to serve two of the theaters in the area would be advantageous to the two theaters operated by contractee, but on the other hand such action would have a tendency to decrease the amount of merchandise to be hauled by defendant and might result in other theaters being furnished unsatisfactory service. Competition is desirable if the volume of business will permit solvent operations, but if the field is not limited, insolvency and unsatisfactory service result.

As noted in *Lakeshore Motor Coach Lines v. Bennett*, 8 Utah 2d 293, 333 P.2d 1061, (1958), the Commission

". . . must plan long-range for the protection and conservation of carrier service so that there will be economic stability and continuity of service. This obviously cannot be done unless existing carriers have a reasonable degree of protection in the operations they are maintaining."

## CONCLUSION

The action of the Commission in this case indicates a disregard of the evidence and applicable law. It is submitted that the order granting authority herein is arbitrary, capricious and directly contrary to the evidence and law. The order of the Commission should be set aside.

Respectfully submitted,

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