

1966

Utah Parks Company v. Kent Frost Canyon!Land
Tours, a Corporation, and Public Service
Commission of Utah and Mitchell M. Williams,
dba Tag-A-Long Tours v. Kent Frost Canyonland
Tours, a Corporation, and Publijc Service
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In the
Supreme Court of the State of Utah

UTAH PARKS COMPANY,
a corporation,

Petitioner-Plaintiff,

—vs.—

PUBLIC SERVICE COMMISSION
OF UTAH, DONALD HACKING,
HAL S. BENNETT, and D. FRANK
WILKINS, Commissioners of the
Public Service Commission of Utah,
and KENT FROST CANYONLAND
TOURS, a corporation,

Respondents-Defendants.

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Case No. 5680
1966

UNIVERSITY

PLAINTIFF'S BRIEF

Upon Proceedings for Review of Decision
of the Public Service Commission of Utah
Case No. 5680

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Case No.
10635

PLAINTIFF'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is a proceeding to review an order of the Public Service Commission of Utah granting extended authority to Kent Frost Canyonland Tours to engage in transportation of passengers and baggage in charter and sight-seeing operations by motor vehicle in certain counties in southwestern Utah.

The Public Service Commission of Utah will sometimes hereinafter be referred to as "Commission," Kent Frost Canyonland Tours, a corporation, as "Kent Frost Corporation" and the Utah Parks Company as plaintiff or "Parks Company."

Italics and emphasis is ours throughout.

DISPOSITION BEFORE THE UTAH PUBLIC SERVICE COMMISSION

After formal hearing upon written application filed by Kent Frost Corporation, the Commission issued an order (R. 185-192) extending and enlarging the authority of the Kent Frost Corporation to permit it to pick up and discharge sight-seeing passengers in Washington, Garfield, Iron and Kane Counties in Southwestern Utah where it was not theretofore authorized to serve by such pick up and discharge of passengers.

RELIEF SOUGHT ON APPEAL

By review before this Honorable Court the Plaintiff, Utah Parks Company, seeks to have the decision of the Commission reversed and to have the order extending and enlarging the authority of Kent Frost Corporation cancelled and set aside on the basis that there is no substantial evidence in the record to support and sustain such order and that therefore said order is arbitrary, unreasonable and unlawful and by its issuance the Commission failed to regularly pursue its authority.

STATEMENT OF FACTS

The plaintiff, Parks Company, is a Utah corporation, having its principal place of business at Cedar City in Iron County, Utah. It is engaged, under contract with the United States Department of the Interior, in the operation of tourist facilities at what are known as the Southern Utah Parks, particularly, Bryce Canyon Na-

tional Park, Zion National Park and Cedar Breaks National Monument within the State of Utah and the Grand Canyon National Park and Monument in the State of Arizona. In connection with the operation of such tourist facilities, the Parks Company has heretofore had issued to it by the Utah Commission and now holds certificates of convenience and necessity, No. 1176 and others, (R. 189-190) authorizing it to transport passengers and their baggage (together with other items) in charter and sight-seeing service over main highways and to the scenic areas located in Iron, Washington and Garfield Counties and on through Kanab in Kane County into Grand Canyon National Park in northern Arizona, as well as extending over Highway 89 as far north as Marysvale in Piute County, Utah.

The Parks Company has for many years been active in operating said Southern Utah Parks and in operating charter and sight-seeing transportation service in connection therewith. The plaintiff, Parks Company, does not operate any charter or sight-seeing service off the main highways, or to any so-called "wilderness areas" off the main highways, and does not operate any "jeep-type" or 4-wheel drive equipment such as might be necessary for operations in wilderness areas off the main highways. Said Parks Company does operate passenger-car and limousine-type service as well as regular bus-type vehicles, but only on main highways through and to the scenic areas in said four named counties in southwestern Utah.

The Commission found that the Parks Company does not have 4-wheel drive equipment or perform a

wilderness-type of scenic tours (R. 190). Nevertheless, in granting such extended authority the Commission did not limit applicant to the *wilderness-type* scenic tours nor to "4-wheel drive equipment" but granted general authority to engage in charter and special sight-seeing service to and from natural scenic attractions — *which would include the Southern Utah Parks, adequately served by the Parks Company* — in addition to adding "and wilderness areas in" the counties involved.

Charles B. Farmer, doing business as Cameron Scenic Tours, holds authority from the Utah Commission to operate charter and sight-seeing service by motor vehicle from Panguitch, Utah (among other places), to natural scenic attractions and wilderness areas off the main highways to all points in the State of Utah, (R. 190) and he can also go to Cedar City in Iron County to pick up or return passengers who might travel with him on such scenic or wilderness tours.

Kent Frost lives and maintains his base of operations in Monticello, Utah, and, as an individual, has since 1956 held authority from the Utah Commission to engage in charter and sight-seeing service by motor vehicle to the natural scenic attractions and wilderness areas off the main highways in eight counties in southern Utah; namely, Grand, San Juan, Emery, Wayne, Washington, Iron, Garfield and Kane Counties, with the limitation, however, that all service provided by him *must* originate at and return to one or the other of the points of Monticello, Blanding, Moab, Thompson or Green River, Utah (R. 186).

By the application as filed, Kent Frost Corporation sought permission from the Commission to transfer the rights theretofore held by Kent Frost as an individual to the Kent Frost Corporation which Frost had caused to be incorporated. There was no objection from any protestant to the transfer of the existing rights from Kent Frost as an individual to the Kent Frost Corporation.

In addition to the transfer of the existing individual rights of Kent Frost to the Corporation, the application sought to enlarge the authority theretofore held by Kent Frost to include seven new counties extending northerly in eastern Utah to include the Uintah Mountain areas and all counties in eastern Utah (see Exhibit 3), and also sought to remove the limitations on the prior authority so that the Kent Frost Corporation could pick up or discharge passengers or their baggage anywhere in the entire area including all eight of the southern Utah counties as well as the seven new eastern Utah counties where additional authority was sought.

After hearing, the Commission by its order of March 25, 1966 (R. 185-192), denied applicant's request to add the seven northeastern Utah counties to its authorized territory but nevertheless removed the limitations theretofore imposed on the Frost authority and extended applicant's authority so as to permit the Kent Frost Corporation to pick up or discharge passengers anywhere within the eight southern Utah county areas, including the four counties of Garfield, Iron, Washington and Kane, wherein plaintiff Parks Company operates.

Applicant produced no witnesses of a public nature other than one Gerald L. Pulsipher, Assistant Director of Utah Travel Council, who testified that the Council felt that all tourists should be given a wide choice of services, but admitted that the Council would not profess to be able to determine what choice should be given or what would be adequate service (R. 93). He did introduce Item "I" of Exhibit 7 to show an increase in attendance of tourists at Utah National Parks and Monuments. The Commission specifically and correctly found that this witness could not state whether or not the needs of the public were being met by existing carriers (R. 189). The only tourist areas referred to in the four counties of Washington, Iron, Garfield and Kane were the Southern Utah Parks and Monument areas specifically served by and, as far as the record is concerned, very adequately served by the Parks Company.

ARGUMENT

THERE IS ABSOLUTELY NO EVIDENCE, SUBSTANTIAL OR OTHERWISE, CONTAINED IN THE RECORD SHOWING ANY PUBLIC CONVENIENCE OR NECESSITY TO BE SERVED OR NEEDED TO BE SERVED BY APPLICANT OR APPLICANT'S SERVICE IN GARFIELD, KANE, IRON AND WASHINGTON COUNTIES IN THE STATE OF UTAH.

The Commission found (R. 187) from testimony of Mr. Frost himself that most of his clientele are repeat customers who "want the personalized service of a particular carrier," and referred to Frost's theory or idea

that such a "particular carrier should be able to serve in any area and in any way that the customer reasonably requests."

Applicant sought by motion to introduce findings in three prior cases, in some of which all protestants had not appeared. "The protestants objected and the motion was denied" (R. 187).

Nevertheless, the Commission found "Mr. Frost testified concerning the increase of tourists in Utah and *in most of the counties applied for*. He stated that he has had requests for service which would require origination and termination in various points other than those authorized in his present certificate. . . . Applicant also has requests from groups who want to be dropped off for hiking tours, to be picked up at other points (R. 187)." *All of such testimony*, together with testimony with respect to air service and testimony concerning lake or river trips, etc., or what Mr. Frost termed as combination "air, land and water tours," *referred to the area around Lake Powell and the Green, San Juan and Colorado Rivers*. THERE WAS NOT ONE WORD OF TESTIMONY WITH RESPECT TO ANY PROSPECTIVE CUSOMERS OR ANY REQUESTS OR ANY PUBLIC DEMAND OR EVEN INDICATED DESIRE FOR ANY SUCH SERVICE ANYWHERE IN EITHER OF THE FOUR SOUTHWESTERN UTAH COUNTIES OF GARFIELD, KANE, IRON AND WASHINGTON.

Mr. Frost testified that originally he guided river trips down the San Juan and Colorado Rivers and start-

ed taking passengers into wilderness areas of San Juan and Grand Counties in 1950 (R. 114). Most of his work has been from his base of operations in Monticello, and "the Needles country has always been the most popular area to take people into" (R. 19). *Contrary to the Commission's findings* with respect to increase of tourists testified to by Mr. Frost, in "*the counties applied for*" Mr. Frost referred only to "increase in tourist influx into the Lake Powell recreation area." He mentioned several marinas which had been constructed, and referred to points such as Hite, Hall's Crossing, Rainbow Bridge, Bullfrog Basin, Cathedral Butte and Wahweep; and when asked, "Has there been a great influx of tourists into this country," answered, "Yes" (R. 20). With specific reference to pick-up and discharge areas he was asked, "Are you seeking authority to pick up and discharge passengers at any place where they may desire to be picked up or discharged along the lakes and rivers in the areas you now serve?" To which he answered, "Yes." Similar evidence with respect to the extended Lake Powell area was repeated, and he expressed a desire to meet passengers at air strips "anywhere along the lakes and rivers in the areas" he is authorized to serve (R. 30, 31). This "lakes and rivers area" refers to Lake Powell and the Green, San Juan and Colorado Rivers with possible addition of the lake formed back of Flaming Gorge Dam. He insisted that most of his customers had come from his own efforts and in response to his own advertising, and when asked if he had had specific requests to handle such transportation, he answered (R. 35), "Yes, I have had several requests for information about the trip, and we think we have some people sold

already — about three seats sold on that trip.” This, however, referred to a combination trip — “a boat, air and jeep trip.” On cross-examination the three that he had “sold” or lined up on such a trip wanted to go into the Green River area, into the areas of the seven counties in northeastern Utah (R. 80). Art Green, who ran a marina on Lake Powell, had stated he would be willing to discharge passengers along Lake Powell and Dick Smith, who operated an air strip at Monticello, had told Frost he would discharge passengers in the area by aircraft if Frost were able to pick them up (R. 35). There was no reference in any of such testimony to any of the four southwestern Utah counties. When pressed further by his own counsel with respect to requests for service he may have had, he again stated, “Quite often I have requests, people wondering about the possibility of going into the counties north of us,” and then testified with respect to operators of river trips down the Green River and into the Colorado River (R. 60). Again, upon questioning by his own counsel, he was asked if any of his passengers had indicated a desire to be met at places other than the five cities authorized to him. He answered, “Yes,” (R. 65) and then testified (R.66):

“Q. Where do these people want to meet you to commence their tour?

A. Some of them at Squaw Springs and another group at Section 16, and a group at Helper, Utah.”

These included one group of forty people and two groups totalling seventy people. All of these wanted to be taken through the Canyonland National Park (R. 80).

There was no reference whatsoever to any area in the four counties of southwestern Utah. There was quite a bit of testimony from applicant referring to landing strips and operators of small aircraft who would make arrangements with him for combination tours. The only specific landing strips he referred to in connection with any of these, however, were the one operated by Dick Smith at Monticello, one at Moab and some of the landing strips in the 7-county area in northeastern Utah, outlined by a dotted line on the map Exhibit 3 (R. 68).

In spite of the fact that Mr. Frost's testimony had in many areas been general and his only specific reference to requests had been in the eastern and southeastern Utah area, in order to avoid any question, the matter was gone into on cross-examination, wherein Mr. Frost testified as follows:

"Q. Have you ever had any requests from anyone over around Cedar City for you to take them over around the southeastern Utah area?

A. No." (R. 70)

"Q. Have you ever had any request from the Kane County-Kanab country area?

A. No.

Q. Nor around the Garfield-Panguitch area?

A. No." (R. 71)

"Q. Have you ever had anyone seek to join in any business with you from that St. George area?

A. No.

Q. And have none pending at the present time?

A. Not right now." (R. 74)

He did refer, as above stated, to operators of small planes in southeastern Utah, at Moab and Green River, but further testified:

“Q. You have never had any operator who operates airplanes into or out of Kane, Garfield, Iron or Washington Counties that have come over to make arrangements with you, have you?

A. No.

Q. Do you know of any over there that would be interested in that at the present?

A. I haven't contacted any of them.

Q. And none of them have contacted you?

A. No.” (R. 72, 73)

On redirect from his own counsel with respect to this matter, when asked whether he had solicited these combination-type tours with other carriers as had been inquired about on cross-examination and his answer, “No,” his counsel asked, “Why not?” and he answered, “Well, I just haven't seen any reason to do it.” (R. 91). This was with specific reference to the four southwestern Utah Counties. Mr. Frost had contacted, and made prospective arrangements with, Dick Smith and Art Green at Monticello and Moab (R. 35), but there had been no reason to attempt anything of such nature in the four southwestern Utah counties.

On direct examination he testified as to some requests from prior customers who wanted to go into northeastern Utah. On being further pressed on cross-examination, after referring specifically to one group of forty and two groups totalling seventy people who want-

ed to go into Canyonlands National Park, (R. 79) he testified as follows:

“Q. Now you said you had a number of passengers that desired to be met elsewhere. Do you have any now in prospect that desire to be met by you at any particular place?”

At first he didn't answer the question directly, and he was again asked:

“Q. Have you had any requests recently to take any, any place?”

To which he answered, “Yes, people wanted me to pick them up at Hall's Crossing — to take along the old Mormon Trail and back into the Canyonlands National Park.”

“Q. Any others that you can think of that have been recent or have been pending?”

A. Not real recent.” (R. 80, 81)

Cedar City is the most logical point for pick up or discharge of passengers in southwestern Utah, being located on U.S. Highway 91, served by numerous transcontinental bus lines and also served by Union Pacific Railroad Company and Bonanza Airlines. Panguitch, Utah, which is in practical effect the best point of embarkation for Bryce Canyon and the area around there, is the most logical point on Highway 89, and it is served by Transcontinental Bus Service. Charles B. Farmer, who operates Cameron Scenic Tours out of Panguitch, Utah, has authority to operate a type of service similar to that operated by applicant, originating at Panguitch, (R. 190) and also has authority to go to Cedar City to

pick people up in limousine service, but Mr. Farmer indicated by his testimony that there was very little demand even for his service in the Panguitch-Cedar City area. He testified (R. 124):

“Generally when they come into my area, they are going to Bryce, Zion, Cedar Breaks, Kodachrome Flat, Boulder Mountain and Capitol Reef, and darn few of them to Capitol Reef. Most of them are right along in that little area.

“We have taken them to every corner of the state but we don’t have that very often. That is not a general thing.”

Capitol Reef is not located within either of the four southwestern counties. Bryce, Zion and Cedar Breaks are all on main highways served by plaintiff, Utah Parks Company, which leaves very slim pickings for the one additional carrier in that area, Cameron Scenic Tours, to handle people only to go to Kodachrome Flat, Boulder Mountain and Capitol Reef. There is not sufficient business in those areas to provide a survival for Mr. Farmer in his Cameron Scenic Tours, as a result of which he even at times takes people into the Zion, Bryce and Cedar Breaks area, thereby creating a conflict with service to those areas authorized to the plaintiff, Utah Parks Company.

The witness Gerald Pulsipher sponsored the introduction of Exhibit 7, which was introduced solely for its inclusion of paragraph “I” showing an increase of tourist travel into the Southern Utah Parks areas. The only parks mentioned in Paragraph “I”, of Exhibit 7, which are located in the four counties of Garfield, Wash-

ington, Iron or Kane, are Bryce Canyon National Park, Cedar Breaks National Monument and Zion National Park, all of which are specifically authorized to plaintiff, Utah Parks Company, in its service and, insofar as the record shows, are adequately served by the Parks Company. The smallest increase in visitors shown at any of the parks in that area showed a 9 percent increase at Zion National Park. On cross-examination, when Mr. Pulsipher was asked if he knew of any area listed under Paragraph "I" where such tourists did not have proper service, he answered:

"The only instance that I know of is in Zions, where the camp grounds were more than filled and were unable to take care of the increase in camping facilities." (R. 96)

This showed a lack of camping or housing facilities within the park and not any lack of transportation facilities of any kind, and the witness admitted with respect to applicant Kent Frost Corporation that the applicant was not proposing to provide any camping or housing facilities, and that the Park Service provided all such facilities itself (R.97).

The Commission by its order authorized applicant to serve "the natural scenic attractions and wilderness areas" in the eight southern counties, including Washington, Iron, Garfield and Kane. We would ask what are and where are "these natural scenic attractions" and "wilderness areas?" The record refers to a few of them in southeastern Utah, but there is not one word of testimony to show what is considered as "wilderness areas" — if any — in the four southwestern counties. There is

no testimony of any kind, not even a hint or suggestion as to where any such area may be located — where any tourist may be taken or where any tourist or member of the public might want to go — and no showing of public demand or request of any kind. In view of this we would ask, “Where would applicant operate his service in the four counties under such a record?” The only evidence of any kind came from Mr. Farmer with respect to “Kodachrome Flat” and “Boulder Mountain,” both served by him on rare occasions but “not very often.” Aside from these, Pulsipher’s Exhibit 7 (Par. I) and Cameron’s testimony refer to Zions Park, Bryce Canyon and Cedar Breaks. True, these are well known “natural scenic attractions,” but there was an entire absence of evidence as to any need for additional transportation of any kind with respect to those “natural scenic attractions.” Did the Commission intend to authorize applicant to serve these National Park areas from points of pickup and discharge in the four-county area in southwestern Utah? The order is not entirely clear, but if that was the intent, it is entirely without any evidentiary foundation and therefore unlawful.

In view of such a record and the total lack of evidence to support the Commission’s order, it should not even be necessary to cite any case authority, but nevertheless we will refer to a few decisions from this Honorable Court.

This Court has many times held that if there is no substantial evidence to support an order of the Commission, such order is unlawful and must be set aside.

In *McCarthy v. Public Service Commission*, 111 Utah 489, 184 P.2d 220, the Court quoted the statute under which the Commission is authorized to issue certificates of convenience and necessity and then stated: (P.2d at 223)

“To comply with the above quoted provision the Public Service Commission must deny the carrier-defendant’s applications for certificates of convenience and necessity unless presented with evidence from which it could find that there is a public need for the services. * * *.”

Milne Truck Lines, Inc., v. Public Service Commission, 13 Utah 2d 72, 368 P.2d 590: (P.2d at 592)

“The Commission is required by statute to regulate so as to prevent unnecessary duplication of services in areas where the existing transportation service adequately meets the needs of the public.”

The Commission may have had some idea that the authority of all carriers should be liberalized. That seemed to be the theory of applicant, but this is a matter for the Legislature if the requirements of the statute are to be changed. Applicant tried to introduce findings and orders in other cases, but this was denied by the Commission and properly so. In a similar matter this Court held in *Los Angeles & Salt Lake R. Co. v. Public Utilities Commission*, 81 Utah 286, 17 P.2d 287, “the Commission * * * cannot take its special knowledge which it may have gained from experience or from other hearings and base any findings and conclusions upon such knowledge. That is fundamental.” Quoting therein from an Illinois case, the Court said: (P.2d at 291)

“The Commissioners cannot act on their own information. The findings must be based on evidence presented in the case, with an opportunity to all parties to know of the evidence to be submitted or considered, to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal, and nothing can be treated as evidence which is not introduced as such.”

Also, from a United States Supreme Court case: (P.2d at 291)

“* * * data collected by the Commission as a part of its function of investigation constitute ordinarily evidence sufficient to support an order, *if the data are duly made part of the record in the case in which the order is entered.*”

“This case therefore must stand upon the evidence introduced in the case.”

Utah Light & Traction Co. v. Public Service Commission, 101 Utah 99, 118 P.2d 683: (P.2d at 690)

“If the need for new or additional service exists, it is the duty of the Commission to grant certificates of convenience and necessity to qualified applicants, but when a territory is satisfactorily serviced, and its transportation facilities are ample, a duplication of such service which unfairly interferes with the existing carriers may undermine and weaken the transportation set-up generally and thus deprive the public of an efficient permanent service * * *.”

Under the record in the case at bar the grant of the extended authority to the Kent Frost Corporation could do nothing but duplicate the facilities of either Cameron Scenic Tours or Utah Parks Company or both, with no need therefor being shown.

In *Mulcahy v. Public Service Commission*, 101 Utah 245, 117 P.2d 298, this Court held: (P.2d at 300)

“* * * (But) the question as to whether there is competent evidence to justify the action taken, or to be taken, is a legal question, because the official body is authorized to act only according to law, that is, upon competent evidence. An attempt, therefore, to act on a matter without any competent evidence to sustain it is not done according to law, and therefore is not done in the pursuit of lawful authority.”

(P.2d at 305)

“An applicant desiring to enter a new territory, or to enlarge the nature or type of the service he is permitted to render must therefore show that from the standpoint of public convenience and necessity there is a need for such service; that the existing service is not adequate and convenient, and that his operation would eliminate such inadequacy and inconvenience.”

We think the case of *Salt Lake Transfer Company v. Public Service Commission*, 11 Utah 2d 121, 355 P.2d 706, is particularly pertinent to the matter presently under consideration. In that case the applicant had testified and produced evidence as to need of transportation with respect to commodities generally, with nothing specific as to explosives. Protestants gave specific evidence showing no need for additional transportation with respect to explosives. However, the Commission granted additional authority, including authority to haul explosives, and on that basis this Honorable Court reversed and set the order aside.

In the case at bar applicant made a lot of general statements with respect to customers who had requested him to pick up and discharge at points elsewhere than where he was presently authorized but further testimony was elicited on cross-examination showing all of such requests referred to the area surrounding Lake Powell and the Colorado River and its tributaries, and applicant admitted that there had been no demand — no requests — no contact at all from anyone in the area of the four counties of Washington, Iron, Garfield and Kane.

In the *Salt Lake Transfer* case this Court stated in reversing and setting aside the order the Commission had entered: (P.2d at 710)

“While in the first instance an applicant is not required to prove the need for the transportation of every item in a classification, nevertheless, when the need for the transportation of a particular item is challenged and evidence offered in support thereof, the applicant must then introduce evidence rebutting the challenge.”

In the case at bar the applicant introduced no evidence at all with respect to the four southwestern counties, neither by way of original evidence, nor by way of rebuttal even after he had been forced to admit on cross-examination that he had no evidence of need and no requests and no demands whatsoever for his services in any area in any one of the four southwestern Utah counties.

The Court's conclusion in that *Salt Lake Transfer* case is appropos herein, wherein the Court stated: (P.2d at 710)

“* * * whatever the minimum quantity and quality of evidence necessary to justify administrative action, orders issued in the complete absence of factual support are clearly arbitrary, capricious and void.”

CONCLUSION

A thorough study of the record in this case must compel the conclusion that in granting the extended authority to applicant authorizing applicant to pick up or discharge passengers in the counties of Garfield, Kane, Iron and Washington in southwestern Utah, the Commission acted arbitrarily, unreasonably and capriciously. There was no evidence whatsoever showing any public demand or even any individual request. There was no evidence, substantial or otherwise, which would support any finding of public convenience and necessity; and in entering such order with a total lack of supporting evidence, the Commission acted arbitrarily, capriciously and unlawfully and failed to regularly pursue its authority. The Utah Parks Company therefore urges that the order of March 25, 1966, should be cancelled and set aside.

Respectfully submitted

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