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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 Commi8Sion of Utah : Brief of Plaintiff Mitchell M. Williams dba Tag-A-Long Tours

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED
AUG 2 6 1966
Clerk, Supreme Court, Utah

UTAH PARKS COMPANY, a corporation,
Petitioner,

— vs. —

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

Case No. 10635

MITCHELL M. WILLIAMS, dba TAG-A-LONG TOURS,
Plaintiff

—vs.—

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

Case No. 10636

BRIEF OF PLAINTIFF MITCHELL M. WILLIAMS DBA TAG-A-LONG TOURS

Appeal from the Order of the Public Service Commission of Utah

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IN THE SUPREME COURT
of the
STATE OF UTAH

UTAH PARKS COMPANY, a corporation, *Petitioner,* - vs. - PUBLIC SERVICE COMMISSION OF UTAH and DONALD HACKING, HAL S. BENNETT and D. F. WILKINS, Commissioners of the Public Service Commission of Utah, and KENT FROST CANYONLAND TOURS, a corporation, *Respondents.*	Case No. 10635
MITCHELL M. WILLIAMS dba TAG-A-LONG TOURS, *Plaintiff,* - vs. - PUBLIC SERVICE COMMISSION OF UTAH, DONALD HACKING, HAL S. BENNETT and D. F. WILKINS, Commissioners of the Public Service Commission of Utah, and KENT FROST CANYONLAND TOURS, a corporation, *Defendants.*	Case No. 10636

BRIEF OF PLAINTIFF MITCHELL M. WILLIAMS DBA TAG-A-LONG TOURS

Defendant Kent Frost Canyonland Tours will hereafter be referred to as Frost; defendants Public Service

Commission of Utah, Donald Hacking, Hal S. Bennett and D. Frank Wilkins will hereafter be referred to as Commission; plaintiff Mitchell M. Williams dba Tag-a-Long Tours will hereafter be referred to as Williams, and plaintiff Utah Parks Company will hereafter be referred to as Parks. Parks is filing a separate brief and except as is necessary, this brief will be limited to the interests of Williams.

STATEMENT OF THE KIND OF CASE

This action involves an application of Frost to extend its existing certificate of convenience and necessity to authorize the transportation of passengers and their baggage in charter and sightseeing service between points and places in Grand, San Juan, Wayne, Emery, Garfield, Kane, Iron, Washington, Carbon, Uintah, Duchesne, Summit, Daggett, Utah and Wasatch Counties, Utah. Its present certificate requires Frost to originate and terminate its services at Monticello, Blanding, Moab, Thompson and Greenriver, Utah, when serving the natural and scenic attractions and wilderness areas off the main highways in San Juan, Grand, Emery, Wayne, Garfield, Kane, Iron and Washington Counties, with the additional authority to render said service from Cave Springs or Squaw Springs to the Needles area in San Juan County and return. Specifically applicant seeks to eliminate the restricted points of pick up and delivery, thus making it possible to pick and deliver anywhere within the counties above referred to, and in addition seeks to add seven new counties to its authority to wit:

Carbon, Uintah, Duchesne, Summit, Daggett, Utah and Washington Counties, Utah. With the exception of Monticello, Cave Springs and Squaw Springs, Utah, Williams has authority to pick up and discharge passengers at any point in Grand, San Juan, Wayne, Emery, Garfield and Kane Counties, Utah. Williams protests the elimination of the restrictions presently exsting in the certificate of convenience and necessity of Frost. The case involves the question as to whether or not convenience and necessity require the issuance of the authority applied for by Frost.

DISPOSITION BY THE PUBLIC SERVICE COMMISSION OF UTAH

The Commission issued its Report and Order granting to Frost authority to operate as a common motor carrier in the transportation of passengers and their baggage over irregular routes in a charter and special sightseeing service to and from the natural scenic attractions and wilderness areas in Grand, San Juan, Wayne, Emery, Garfield, Kane, Iron and Washington Counties, Utah; restricted it from originating tours at Cedar City or Panguitch, Utah, and from establishing as a base of operations Mexican Hat or Bluff, Utah; it denied Frost authority to render a service in Carbon, Uintah, Duchesne, Summit, Daggett, Utah and Wasatch Counties, Utah.

RELIEF SOUGHT ON APPEAL

Williams seeks reversal of that part of the order of the Commission dated the 25th day of March, 1966,

whereby said order eliminates existing restrictions as to points of pick up and delivery in Frost's authority.

STATEMENT OF FACTS

Kent Frost Canyonland Tours, applicant, is a Utah corporation owned principally by Kent Frost and his wife, Fern Frost. It is in the business of conducting guided scenic tours. (R. 15) The principal service areas of Frost are the natural scenic attractions and wilderness areas located in and around the Canyonlands National Park.

In an effort to generate business, Frost circulates brochures, has obtained free newspaper and magazine advertising throughout the country, receives referrals from satisfied customers and takes lecture tours. Its business comes from all over the United States and foreign countries. (R. 15-17)

Ninety-five to ninety-nine percent of Frost's business is on a prearranged basis. This is evidenced by the following:

> "Q. What percentage of the tours which you take are on a prearranged basis and by that I mean arranged in advance of the arrival of the passengers of your place of business?
>
> A. Well practically all of them have been in the past.
>
> Q. Let's say last year to give us an idea.
>
> A. I would say 95 percent of them." (R. 18)
>
> * * *

"Q. I believe you said that 75 percent of the business you have is a result of your own efforts and 95 to 99 percent you have prearranged by either mail or telephone, is that correct?

A. Yes." (R. 74)

The modus operandi of Frost's business is the same today as it has been for 13 years and there is no prospect of it changing today or in the future. This is evidenced by the statement of counsel for Frost as follows:

* * *

"Q. Over the years, let's say since you were certificated, which I think the evidence shows has been 13 years, have you ever had more than 25 percent of your business that came to you by way of drop in or passerby type business?" (R. 31)

* * *

"MR. MACFARLANE: As of today. The purpose of this is to show that it is the same today as it has been for 13 years and there is no prospect of it changing today or in the future. That it is going to remain in all probability as it has in the past and that it is going to be what business he can develop himself." (R. 31-32)

Testimony was adduced from Frost in reference to a combination air, land and water tour and requests for the performance of a pick up and delivery of passengers at points other than those it is now authorized to serve. The questions and answers given in reference thereto were objected to and the evidence admitted over objection.

In general Frost claimed to have an arrangement with Mr. Art Green of Wahweep, Arizona. Mr. Green

runs a marina at Wahweep and takes tourists to the Rainbow Bridge National Monument. (R. 23) Mr. Green's base of operations is at Wahweep and any interline service between Art Green and Frost would originate at Wahweep. (R. 87) The combination tour would involve an arrangement with Mr. Green by the terms of which the passengers would travel by boat provided for by Art Green and by jeep provided for by Frost. (R. 23-24) In addition, Frost claims to have an arrangement with Dick Smith at Monticello, Utah, whereby Smith would transport passengers via air from the lake (Lake Powell) to the Canyonlands National Park near the Needles section. (R. 23-24) Likewise, Frost claims to have explored with Smith, Smith's willingness to discharge passengers at various points and places where aircraft can be landed in the area Frost is authorized to serve, Frost to pick up said passengers at these various points. (R. 34-36)

The combination type tour has been advertised by Frost since the Fall of 1965. Over objection of counsel, Frost was permitted to testify that it had received several requests for further information concerning the package combination trip. (R. 34-36) Again over objection of counsel, Frost testified that passengers had indicated a desire to be met at places other than the four or five cities and two geographical points which it is now authorized to serve. (R. 65) There have been, however, no recent requests. (R. 80) Specifically Frost had a request to perform a pick up at Hall's Crossing: (R. 80) has a group which wants to meet him at Section

16 and a group which wants to meet him at Helper, Utah. (R. 66)

Mr. Pulsipher, Assistant Director of the Utah Travel Council called as a witness by Frost and testified on cross examination concerning the lack of available carrier service in the area covered by the application as follows:

> * * *
>
> "Q. Mr. Pulsipher, in as much as this was introduced and reserving my rights to stand on the objection, I will ask you, do you know of any instance in any of these areas under that paragraph "I" where any of these increased tourists went without proper care or proper service in the area? A. The only instance 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 visitors." (R. 96)

Paragraph "I" is contained within Exhibit 7 and sets forth the percentage increase of travelers into the various park areas covered by the application. (Exhibit 7)

On the 31st day of December, 1965 Frost entered into a sublease agreement with Canyonlands Resort, Inc., which sublease agreement involves a portion of Section 16 of Township 30 South, Range 20 East, Salt Lake Meridian. (Exhibit 10) The purpose of said sublease is to construct and maintain parking and maintenance facilities for motor vehicles. Section 16 is identified in a topographical map. (Exhibit 6) Its exact location to the Canyonlands Park is indicated on Exhibit 3 by a little blue box. (R. 38) At the time Frost's predecessor

in interest received his certificate on the 31st day of January, 1964, the Canyonlands National Park had not been formed. (R. 39) The closest town by road to Section 16 is Monticello, Utah. It is approximately 49 miles away. (R. 54-55) Frost has located on Section 16 a trailer house which he has used as a base of operations and had a vehicle parked there part of the time. Concerning the use of said facilities as a base of operation, Frost states:

> * * *
>
> "A. Well, during the tourist season I would go there about every week or two and then when there isn't any tourists in the country and I don't go down there, it would be a month between visits when I would go there just to check on the trailer house." (R. 55-56)

Cave Springs is approximately one mile from Section 16. Both Cave Springs and Squaw Springs are within the Canyonlands Parks. (R. 56-57) On a prearranged basis Frost can pick up passengers at their camp grounds which are at Squaw Springs.

Williams has a sublease on Section 16 from Canyonlands Resort, Inc., which said sublease is dated the 27th day of May, 1965 and was acquired for the purpose of using said land to construct and maintain a corral for horses, parking and mintenance of vehicles for his motor vehicles, the parking of one or more trailer houses to be used as living quarters and as an office. (Exhibit 9)

Williams' Certificate of Convenience and Necessity, Certificate No. 1500, issued by the Public Service Com-

mission of Utah authorizes him to operate as a common motor carrier in the transportation of passengers and their baggage over irregular routes in a charter and special sightseeing service to and from all of the natural scenic attractions and wilderness areas in the counties of Grand, San Juan, Wayne, Emery, Garfield and Kane, Utah. With the exception of Monticello, Cave Springs and Squaw Springs, Williams has authority to pick up and discharge passengers at any point within the above named counties. (R. 161) In addition to Williams there are other carriers authorized to perform the type of service requested by Frost and within some of the counties covered by its application. (R. 152-168) All of said carriers are actively operating their authorities. (R. 189-190)

The record is void of any evidence disclosing an inadequacy of existing facilities to meet the demands of the traveling tourist public and is void of any evidence adduced from supporting shippers in support of the convenience and necessity of the reqeusted and proposed service.

ARGUMENT

POINT I

THERE IS NO FINDING OF CONVENIENCE AND NECESSITY BY THE COMMISSION AS IS REQUIRED BY TITLE 54, UTAH CODE ANNOTATED 1953.

The findings of fact of the Commission do not contain a finding of convenience and necessity and the Commission does not conclude that convenience and nec-

essity require the grant of a certificate to Frost. The reason for the lack of such a finding and corresponding conclusion is obvious. There is no evidence in the record to support such a finding and upon which a conclusion of convenience and necessity could be based. Section 54-6-5, *Utah Code Annotated* 1953 provides:

> "* * * 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 prayer for, or issue it for the partial exercise only of the privilege sought, * * *"

Section 54-7-16, *Utah Code Annotated* 1953 provides in part:

> "* * * 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* * * *" (Emphasis added)

In the case of *Logan City v. Public Utilities Commission,* (1931) 77 Utah 442, 296 P. 1006, the Court held that *Compiled Laws of Utah,* 1917, Section 4834, which said section, sofar as is applicable to this proceeding, is identical to Secton 54-7-16, *Utah Code Annotated,* 1953, contemplates that the Commission make findings of ultimate facts.

An ultimate fact when used in reference to findings means essential and determinative facts upon which the conclusion was reached. They are the controlling facts without which the court cannot correctly apply law in

rendering judgment. *Star Realty Company v. Sellers,* (1963) 387 P.2d 319, 73 N.M. 207. A review of the findings of the Commission fail to disclose any facts which meet the test of convenience and necessity.

Finding No. 1 has to do with the existing authority of Frost prior to its transfer to Frost and to the scope of the application.

Finding No. 2 is not a finding of fact but merely the *theory* of Frost as to why it should be granted the requested authority.

Finding No. 3 sets forth the fact that there has been an increase in tourist trade. In addition it sets forth the statement of Frost that he has received requests for service and Frost's *desire* to establish combination tours. A naked request for service as set forth in said finding without a showing that existing carriers cannot fulfll that request will not support a finding of convenience and necessity, and in addition, the testimony concerning requests for service is incompetent. A desire on the part of Frost to conduct a particular type of tour is not probative of any issue in this matter.

Finding No. 4 is a conclusion on the part of the Commission that point to point authority is no longer practcal. Not only is this not a finding of fact in support of convenience and of necessity the premise upon which said conclusion is reached, is based upon prior proceedings involving other carriers, which proceedings are not a part of the record. This court in the case of *Utah Power & Light Co. v. Public Service Commission* (1944), 152

P.2d 542, 107 Utah 155, held that the Public Service Commission could not base any findings or conclusions upon knowledge gained from other hearings which were not in the record. This court admonished the Commission to discontinue such a practice.

Finding No. 5 has to do with Section 16. In an effort to justify the grant to Frost of authority to serve Section 16, the Commission without any support in the record refers to Frost's intention to procure as a base of operation Section 16 at the time its predecessor applied for authority to serve Cave and Squaw Springs. The reference to the intent of Frost in a prior hearing again violates the court's ruling in the case of *Utah Power & Light Company v. Public Service Commission,* supra.

Finding No. 6 sets forth the fact that the Utah Travel Council is interested in carriers having authority which would permit full and complete service to the public. It contains the fact that there has been an increase in visitors to the State of Utah. There is no finding that the existing services of Frost would not permit full and complete service to the public or that the public in fact does not have a full and complete service. In fact, the latter part of said finding points to the fact that the witness has no knowledge of the specific needs of visitors to the State of Utah, nor does he have any knowledge as to whether or not the needs of the public were being met by existing carriers.

Finding Nos. 7, 8 and 9 have reference to the authorities and services of protestants, including Williams. The

Commission specfically finds that those carriers authorized to perform the type of service applied for by Frost are actively operating their authorities. There is no finding that their services are in any way inadequate.

Finding No. 10 has to do with the transfer of operating rights, (a matter not involved in this proceeding) the experience and capabilities of Frost and the fact that "there wll be little if any change in the modus operandi."

Finding No. 11 is a finding that Frost had adequate equipment and is financially able and in all other respects capable of providing the service heretofore provided by Kent Frost. The Commission then finds that Frost should acquire the authority of Kent Frost doing business as an individual, and that the corporation should have in addition the extended authority which is the subject matter of this action.

In the case of *Lake Shore Motor Coach Lines, Inc., v. Bennett,* 8 Utah 2d 293, 333 P.2d 1061, (1958), the Court held:

> "* * * Proving that public convenience and necessity would be served by granting additional carrier authority means something more than showing the mere generality that some members of the public would like and on occasion use such type of transportation serice. * * * *Our understanding of the statute is that there should be a showing that existing services are in some measure inadequate, or that public need as to the potential of business is such that there is some reasonable basis in the evidence to believe that*

> *public convenience and necessity justify the additional proposed service.* * * *" (Emphasis added)

The findings of the Commission do not disclose any inadequacy in existing services and in fact disclose to the contrary. The findings of the Commission do not disclose any attempt to obtain the type of service requested by Frost or that said service was wanting. There is no finding that the existing services are in any way unsatisfactory. In the case of *Salt Lake Transfer Company v. Public Service Commission*, 11 Utah 2d 121, 355 P.2d 706 (1960), the court held:

> "* * * Before additional service is authorized by the Commission, the applicant must show that the existing service is not adequate and convenient and that his proposed operation would eliminate the inadequacy and inconvenience."

This case goes far beyond the principals heretofore set out by this court, in that, not only is there no evidence of convenience and necessity contained within the record, but in fact, there is no finding or conclusion of convenience and necessity as required by the Statute. The grant of an authority by the Commission under such conditions constitutes an arbitrary and capricious action and the Commission's order should be reversed.

POINT II

THE RECORD FAILS TO DISCLOSE ANY NEED FOR THE PROPOSED SERVICE AND ANY INADEQUACY IN EXISTING SERVICE AND THE GRANT OF A CERTIFICATE OF CONVENIENCE AND NECESSITY TO FROST IS ARBITRARY AND CAPRICIOUS.

Frost's plea for authority to pick up and discharge passengers at points other than those it is now authorized to serve becomes an illusion and a snare when considered in light of the record.

95 to 98 percent of Frost's business is on a prearranged basis and will continue as such in the future. This being the fact, Frost can and does dictate to its customer the point at which it will originate a tour. Included in Frost's existing certificate is the authority to originate and terminate tours at Monticello, Blanding, Moab, Thompson, Green River, Cave Springs and Squaw Springs. (R. 189) These points constitute the connecting link to airlines, rail service and motor vehicular travel. It is self-evident that a need does not exist for the estabishment of a base of operation at any point other than that Frost is now authorized to serve, nor is it necessary to originate or terminate a tour at any point other than that it is now authorized to serve.

Williams on the 27th day of May, 1965 for a valuable consideration committed himself to a sublease agreement invoving a substantial lease payment. (Exhibit 9) The lease involves a portion of Section 16, which said section is located at or near the entrance to the Canyonlands National Park. The purpose of the lease is for the maintenance of a corral for horses, the parking and maintenance of motor vehicles and trailers, and the maintenance of a business site to be used as an office and living quarters.

Like johnny-come-lately, Kent Frost and Fern Frost

on the 31st day of December, 1965, approximately seven months following the execution of the Williams' lease and subsequent to the fiing of the application of Frost with the Pubic Service Commission, entered into a sub-lease agreement involving a portion of Section 16 for the purpose of parking and maintenance of motor vehicles, the parking and maintenance of trailers and the parking of one trailer to be used as a business site, office and living quarters. (Exhibit 10, R. 169) Ironically the sublease in many particulars is identical to that of Williams. The only evidence to support a claimed need to pick up passengers at Section 16 is the following:

* * *

> "Q. Do you have any specific tours arranged into the Canyonlands area to originate at points other than those where you are now authorized, should the commission authorize you to provide this service?
>
> A. Yes.
>
> Q. How many groups have you got arranged for along that line?
>
> A. Four groups.
> Q. How large are those groups?
>
> A. There are two groups that have a total of about 70 people and another one possbile 40 people and another one of three.
>
> 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." (R. 65-66)

Frost can under its existing authority perform a pick up at Squaw Springs; Helper, Utah is in Carbon County and not the subject of this appeal. The fact that Frost has a tour arranged whereby he will meet a party of people at Section 16 is not evidence of convenience and necessity. The record fails to disclose the inability to obtain service commencing on Section 16 and it affirmatively discloses that Williams has authority from the Commission and an appropriate lease to render said service from this point.

The need to protect Williams in reference to Section 16 until such time as it appears that his services are unsatisfactory is evidenced by the orders involving Eugene D. Foushee (R. 156) and James E. Hunt and Emery R. Hunt. (R. 167)

The *desire* of Frost to establish a combination land, water and air tour, standing alone, is not evidence of convenience and necessity. The record is void of any competent evidence disclosing a need for this type of service. Over the objection of Williams, Frost was permitted to testify concerning the willingness of a Mr. Art Green to discharge boat passengers along Lake Powell for the purpose of providing in conjunction with Frost a land and water tour. In addition, to a question of the competency of said evidence, it becomes apparent in light of the record, that the proposed service constitutes interstate commerce and not under the jurisdiction of the Public Service Commission of Utah. Frost testified as follows:

* * *

"Q. You mentioned a Mr. Art Green. What is the name of his business?

A. Canyon Tours, Inc., I think.

Q. Is this one of the boat tours you contemplate working and interline with?

A. Yes.

Q. It is a fact, is it not, that his base of operations is at Wahweep?

A. Yes.

Q. Wahweep is located in Arizona, is it not?

A. Yes." (R. 87)

* * *

"Q. Let me ask you, would the transportation services wherein you would be interlining with Mr. Art Green and his company originate at Wahweep?

A. Yes.

Q. And terminate in Utah?

A. Yes." (R. 87)

* * *

"Q. I think you would have a joint rate with the man. There would be an arrangement dollarwise where you would charge one fare to the passenger and then divide it between you on some basis?
A. Yes. Those trips originate at Wahweep and they terminate at Wahweep.

Q. In all instances?

A. Yes." (R. 88)

Reference to testimony concerning the establishment of a joint air and land tour was admitted over the objec-

tion of Williams. Frost claims to have an arrangement with Dick Smith, pilot based at Monticello, Utah, where Smith would pick up and discharge passengers at various points within the counties covered by the application. There is no evidence in the record disclosing a need for such service; there is no finding to this effect, nor is there any evidence in the record disclosing the inability of Williams to provide the service were a need to exist.

The record discloses numerous carriers presently capable of performing the transportation of passengers and their baggage in a charter and special sightseeing service to and from the natural scenic attractions and wilderness areas within the counties covered by the application. With the exception of restrictions concerning the origination and termination of service at certain points which Frost is now authorized to serve, existing carriers can and do actively perform the type of service applied for by Frost.

Mr. Pulsipher, Assistant Director of the Utah Travel Council and witness called by Frost, could not relate any incident where a tourist went without proper service or care other than Zions and his reference to Zion had nothing to do with transportation.

Faced with such a record, the Commission, notwithstanding, arbitrariy and capriciously granted an authority. To permit such action would make the Court a mere rubber stamp and make futile effort on the part of existing carriers to protect their authorities and investments. The order of the Commission lacks in its entirety any factual support and is void.

POINT III

THE COMMISSION ERRED IN MAKING FINDINGS OF FACT BASED SOLELY ON HEARSAY EVIDENCE.

The Commission in Finding No. 3 found:

> "* * * He (Mr. Frost) 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. 230)

In support of the above finding is the following:

> * * *
>
> "Q. How long have you been advertising a combination type tour?
>
> A. Since late last fall.
>
> Q. Will you tell the commission what interest, if any, the public has shown in response to that advertising?
>
> MR. RICHARDS: I will object to that. It calls for a conclusion, no proper foundation.
>
> MISS WARR: Same objection.
>
> MR. MINER: We join in it.
>
> MR. SOHM: I presume he can testify as to what response he has had as a result of his advertising.
>
> MISS WARR: It is self serving.
>
> MR. SOHM: You may answer as to what response you have had to your advertising.
>
> A. Yes, I have had several requests for further information about the trip and we think we have

some people sold already, about three seats sold on that one trip.

MR. SOHM: What trip is this again?

WITNESS: That is a package combination trip with the boat and air and jeep trip." (R. 34-35)

* * *

"Q. Now in connection with your trips into the Canyonlands area, have any of your passengers indicated to you a desire to be met at places other than the five cities, four or five cities and two geographical points where you are authorized to meet them?

A. Yes.

MR. RICHARDS: I am going to have to object to that. It calls for hearsay and I can't cross examine." (R. 65)

* * *

"Q. Have any of these people who fly into the area made requests to meet yout at air strips other than where you are authorized to serve now?

A. Yes.

MR. RICHARDS: Object to that as being hearsay.

MR. SOHM: I will overrule the objection. You can answer.

WITNESS: I said yes." (R. 98)

* * *

The questions propounded and the answers given were objected to as being incompetent and hearsay.

The testimony of Frost that it had received requests for service is a declaration of a person or persons who were not put upon the witness stand, were not sworn and not available for cross-examination. The factual finding of the Commission concerning requests for service is not supported by other competent evidence and goes far beyond the ruling in the case of *Lake Shore Motor Coach Lines, Inc. v. Welling,* 9 Utah 2d 114, 339 P.2d 1011 (1959). The testimony is identical to that referred to by Justice Henroid in his dissenting opiniion in the case of *Lake Shore Motor Coach Lines, Inc.,* supra, wherein he states:

> "* * * But the cold facts are that so far as can be gleaned from this record, the order was based (1) on the testimony of *one witness only* — Welling, and (2) any and all the testimony he gave tending to show convenience and necessity was based on the most unsatisfactory kind of hearsay testimony, consisting of unidentified telephone calls by unidentified persons at unidentified times — without any competent evidence of any kind in support thereof."

The Court has consistently held that a finding of fact cannot be based solely on hearsay evidence but it must be supported by a residuum of legal evidence competent in a court of law. *Lake Shore Motor Coach Lines, Inc. v. Welling,* supra, *Board of Education v. Industrial Commission,* 102 Utah 504, 132 P.2d 381 (1942); *Hackford v. Industrial Commission,* 11 Utah 2d 312, 358 P.2d 889 (1961).

Not only would the finding of the Commission:

> "* * * Applicant also has requests from groups who want to be dropped off for hiking tours to be picked up at other points."

be hearsay and subject to the above mentioned court ruling, but the record itself is void of any such evidence.

It being apparent that the testimony concerning requests for service is hearsay and is not supported by any other competent evidence, the finding in reference thereto is error.

CONCLUSION

The Commission having failed to find or conclude that convenience and necessity require the issuance of a certificate of convenience and necessity and Frost having failed to introduce any competent evidence of convenience and necessity, and it affirmatively appearing from the record that existing carriers are actively operating their authorities and that there is no inadequacy in existing service, the grant of a certificate of convenience and necessity constitutes arbitrary and capricious action on the part of the Commission and the order of the Commission should be reversed.

Respectfully submitted,

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