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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 Commission of Utah : Brief of Respondents

In the
Supreme Court of the State of Utah

UTAH PARKS COMPANY, a corporation,
Petitioner,

- vs. -

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Case No. 10635

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

Case No. 10636

BRIEF OF RESPONDENT

Appeal from the Order of the Public Service Commission of Utah

PHIL L. HANSEN
Attorney General
VAN COTT, [illegible]
CORNWALL & [illegible]
Attorneys for [illegible]

A. U. MINER, BRYAN P. LEVERICH,
HOWARD F. CORAY, SCOTT M. MATHESON
and NORMAN W. KETTNER
Attorneys for Utah Parks Company

WILLIAM S. RICHARDS
GUSTIN & RICHARDS
Attorneys for Mitchell M. Williams dba Tag-A-Long Tours

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STATEMENT OF THE KIND OF CASE

This is an appeal from a report and order of the Public Service Commission. The appeal challenges the provisions of the order which eliminate restrictions regarding the pickup and discharge of passengers from the certificate of a wilderness tour operator.

DISPOSITION BY THE PUBLIC SERVICE COMMISSION OF UTAH

Applicants, Kent and Fern Frost, herein called the Frosts applied to the Public Service Commission for approval to the transfer of their existing operating rights to a family corporation. The application also sought extension of the certificate to include additional counties and to eliminate restrictions in the existing certificate so that the Frosts could pick up and discharge passengers at any place within the counties they were authorized to serve.

The Public Service Commission approved the transfer; denied the application to extend the certificate to include additional counties, and granted the application to originate and terminate tours at all points and places within the counties they were originally authorized to serve with the exception that the Frosts are not permitted to provide transportation from point to point along the highways and further that Frosts may not originate tours at Cedar City or Panguitch and may not maintain a base of operations at or near Mexican Hat or Bluff (R. 191).

RELIEF SOUGHT ON APPEAL

Petitioners seek reversal of the order of the Public Service Commission insofar as it eliminates restrictions from the Frosts' certificate.

STATEMENT OF FACTS

Kent Frost has been a tourist guide in the wilderness areas of southern Utah since 1938 and has conducted his own tours in that area since 1953 (R. 14, 15). He has been certified by the Public Service Commission since 1956 (R. 15). Kent's wife, Fern, has worked with her husband over the years as a driver, guide and in the management of the family business. Mr. and Mrs. Frost incorporated their business in 1965.

The certificate of the Frosts' as it read before the order from which this appeal has been taken, authorized them to transport passangers and their baggage for charter and sight-seeing purposes off the main highways in the counties of Grand, San Juan, Wayne, Garfield, Kane, Iron, Washington and Emery. The certificate, however, required that tours originate and terminate either at the towns of Monticello, Blanding, Moab, Thompson, Green River or from Cave Springs or Squaw Springs (which are located in the Needles area of San Juan County).

The business of the scenic tour operator is vastly different in nature from that of the transportation company usually identified with the term "common carrier." First, the scenic tour operator draws from a prospective clientele of vacationers, sight-seers and adventurers located throughout the world. The demand for the service is limited only by the operators' imagination, ingenuity, industry, and personal ability to interest and bring others into the area. The conventional carrier is confronted with the fact that there is but a limited demand for trans-

portation of passengers or property from one point to another solely for transportation's sake.

Secondly, the service provided by each carrier is unique because the primary feature of the service is personal guide service. Thus, each such business operation has its own personality and appeal, depending upon the background and experience of the guide. One guide may place emphasis on local history and another geology or Indian lore. Cooking, services, equipment and a myriad of other factors tend to further distinguish each small operator from the others. In addition, each guide has his own favorite scenic areas. Thus, the client may well desire to take the same trip in the same geographical area but with another tour operator, for in one trip the client may learn to see and appreciate the geologic wonders of the area and yet in another learn to see and appreciate an entirely different facet such as Indian lore or local history. These distinctions are important because they indicate that the tour operators compete with each other only in a very limited sense and in fact it might be said that each compliments the business of the other in the accomplishment of his endeavors to bring tourists into the scenic areas.

Frosts develop their clientele principally through their own advertising and promotion efforts. Brochures depicting their service are printed by the thousands and distributed world wide (R. 16). The advertising approach as well as the tour guide service is highly personal and distinctive (R. 19, 48). 75% of Frosts trade is engenered by their own efforts as opposed to referral

business (R. 17). Much of their trade is referred by previous satisfied customers (R. 66). Furthermore, 95% of their tours are on a prearranged basis (R. 18) and 45% of the business is repeat or return business (R. 18).

Scenic tours conducted by the Frosts involve travel to the vast areas of scenic interest which are located off of the main highways in southern and southeastern Utah. Frosts operate only 4-wheel drive or other high traction vehicles designed to negotiate wilderness terrain unsuited to vehicles generally engaged in the commercial transportation of passangers. Public highways are used only as necessary to reach the scenic wilderness areas.

The Frosts have arrangements with certain air and water tourist services for combination land, water and air tours in order to promote increased tourist trade into scenic wilderness areas and to satisfy an obvious tourist need therefor (R. 23, 25). Air taxies serve many small towns in the scenic areas involved (R. 28). In addition, numerous airstrips exist which, although originally constructed by uranium and oil prospectors, are available to private aircraft and air taxis in order to make quickly accessible to tourists some of the most scenic parts of the canyonlands country (R. 30).

The recent development of Lake Powell is marked by the establishment of several marinas providing pleasure boating and tourist excursions (R. 19, 20). In addition to the marinas, the topography of several locations along the lake shore is such as to permit four-wheel drive vehicles to transfer to or pick up passengers or their baggage from watercraft (R. 23).

Kent Frost testified as to specific requests of his clientele which could not be served because of the restrictions in his certificate (R. 80, 91, 92) and that there had been considerable interest with his clientele for the combination type tour (R. 35).

In order for wilderness sightseeing operators such as the Frosts to effectively promote trade and provide flexible service to new and repeat customers, a general need has been manifest among such operators to take advantage of the air and water services and facilities by promoting combination scenic tours. Standing in the way of the combination tour were the restrictions which were written into most of the carriers' certificates. These restrictions strictly limited the points of origin and termination of tours. Prior to the hearing on the application of the Frosts, three tour operators operating the same type service separately applied to the Commission for removal of restrictions from their certificates.

Petitioner, Mitchell M. Williams dba Tag-A-Long Tours appeared before the Commission in October, 1965. The Commission amended Williams' certificate by removing the pickup and discharge restrictions thereby permitting Williams to pick up and discharge passengers and their baggage at most any point in the wilderness areas of Grand, San Juan, Wayne, Emery, Garfield and Kane Counties, tUah. The Frosts are authorized to operate in all of these counties under their restricted certificate (Case No. 5436 — Sub 2, See R. 157). James E. and Emery R. Hunt, dba Canyon County Scenic Tours, Eugene D. Foushee, dba Tours of the Big Country, Canyon-

eers, Inc. and Lake Powell Ferry Service all appeared as intervenors in support of Williams.

Eugene D. Foushee dba Tours of the Big Country also appeared before the Commission in October, 1965. By order of the Commission dated December 17, 1965, Foushee's certificate was amended by removing the pick-up and discharge restrictions. Canyon Country Scenic Tours, Inc., Mitchell M. Williams, dba Tag-A-Long Tours, and Canyoneers, Inc., all appeared as intervenors in support of Foushee. The Frosts appeared as protestants but withdrew their protests after hearing the evidence (Case No. 5098 — Sub 1. See R. 152).

James E. and Emery R. Hunt dba Canyon Country Scenic Tours, a partnership, and Canyon Country Scenic Tours, Inc. appeared at a consolidated hearing with Williams and Foushee. The Hunt's certificate was also amended to eliminate the same restrictions which the Commission has eliminated from the Frost's certificate in the case at bar.

In the case at bar the application of the Frosts for removal of restrictions from their certificate was heard by the Commission on February 16, 1966. The commission's order granted the same relief as had been granted the operators in the three previous hearings.

While all four of the applications discussed supra permit pick-up and discharge of passengers and their baggage at any point within the counties respectively authorized to the various carriers, their certificates re-

main restricted in that no carrier may base its operations at the base of another carrier although tours of other carriers may originate at the base of another on a prearranged basis.

ARGUMENT

POINT I

THE ORDER OF THE PUBLIC SERVICE COMMISSION IS WITHIN ITS JURISDICTION; IS FOUNDED UPON A SOUND LEGAL BASIS AND IS NOT ARBITRARY OR CAPRICIOUS.

The Motor Vehicle Transportation Act grants broad powers to the Public Service Commission to grant certificates to motor carriers in the furtherance of "public convenience and necessity" and also directs that a certificate "shall not" issue if the Commission finds "that the applicant is financially unable to properly perform the services sought under the certificate, or that the highway over which he proposes to operate is already sufficiently burdened with traffic, or that the granting of the certificate applied for will be detrimental to the best interests of the people of the State of Utah" (54-6-5 UCA 1953). There is no contention made in this case that the Frosts are not financially able to perform the service or that the highways are overburdened or that the elimination of the restrictions from the Frosts' certificate will be detrimental to the best interests of the public. The contrary is the case here.

The sole issue presented by the various arguments of the petitioners is whether or not the Public Service

Commission acted reasonably and within its jurisdiction. Under the statute the Commission has authority to grant a certificate if it finds that "the public convenience and necessity require the proposed service or any part thereof" (54-6-5 UCA 1953). The terms "necessity" and "convenience" are defined as follows in *Mulcahy vs. Public Service Commission et al,* 101 Utah 245, 117 P.2d 298: (101 Utah 245, 250-251

> "'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. Necessity means reasonably necessary and not absolutely imperative. * * * (Cases cited). It does not mean 'necessary' in the ordinary sense of the term. The convenience of the public must not be circumscribed by holding the term 'necessity' to mean an essential requisite. It means a public need without which the public, people generally of the community, would be inconvenienced or handicapped in the pursuit of business or wholesome pleasure, or both. It is necessary if it appears reasonably requisite, is suited to and tends to promote the accommodation of the public. (Cases cited). * * * The statute should be so construed and applied . . . to look to the future as well as the present, providing not only for present urgent need, but such as may be reasonably anticipated from the probable growth of population, industry and community development to the end that both the quality and quantity of that which is offered to the public for its necessity, convenience and pleasure may be improved and increased, and community development and life enriched and encouraged."

The Commission is therefore charged with the responsibility to determine convenience and necessity in light

of what is "reasonably necessary" to promote the public convenience and to eliminate "handicaps" or to "accommodate" the public in the "pursuit of business or wholesome pleasure or both." In doing so the Commission should consider not only present but also future need which is "reasonably to be anticipated."

It should be kept in mind that the controlling considerations deal with *public* need and convenience and not the convenience or needs of other carriers. In *Ashworth Transfer Co. vs. Public Service Commission,* 2 Utah 2d 23, 268 P.2d 990, protesting carriers contended that present transportation services were adequate and that the Commission therefore had no jurisdiction to grant additional authority. In considering this point the court said: (2 Utah 2d 23, 30)

> "The 'convenience' and 'necessity' to be considered is that of the public . . . and the statute does not require that the commission find that the present facilities are entirely inadequate. It merely requires that the commission 'shall take into consideration . . . the existing transportation facilities';"

Williams principal attack upon the order in the case at bar is that "there is no finding of convenience and necessity . . . as is required by Title 54" (Williams Brief Page 9). It is apparently the contention of counsel for Williams that the order may not stand, since there is no single paragraph in the findings which categorically uses the words "convenience and necessity." The words themseves are conclusions to be drawn from evidentiary findings and there are ample findings to support the

ultimate conclusion of the Commission that the certificate should be enlarged by eliminating the pickup and discharge restrictions.

In *Utah Light and Traction Company vs. Public Service Commission,* 101 Utah 99, 118 P.2d 683 a protesting carrier also attacked the verbal precision of the Commission's findings as a basis for reversal. In dealing with this issue, the Supreme Court said: (101 Utah 99, 106)

> "These findings are not set forth in the detail and particularity used by courts of law whose judgments determine ultimate rights of life and property, title, nor need they be so definite nor orderly."

In the case at bar the findings of the Commission recited the evidence to the effect that the clientele of the Frosts are principally customers who want the personalized services of the Frosts; that the Frosts' clientele have made numerous requests for service which require origination and termination at various points other than those authorized in their present certificate; that the character of the tour business has changed since the Frosts and others were first authorized to serve; that the certificates of the other principal tour operators based near the Frosts have been amended to eliminate pickup and discharge restrictions; that the Frosts desire to avail themselves of the need and potential for combination tours with other carriers to include transportation by air and water; and that there are numerous potential points of pickup and discharge of passengers at airstrips and boat launching sites within the areas

the Frosts are authorized to operate. The Commission then by its finding No. 4 recites as follows:

> "4. *Because of the variety of pickup and termination sites and the increased demand by the public for non-restricted flexible service, point to point authority, or authority to designated areas and return are no longer practical. This has been well illustrated in recent hearings before the Commission. The protestant, Mitchell Williams, was joined by several carriers in a recent proceeding involving several cases to form a solid front in support of the proposition that all carriers need flexible authority in order to satisfy the needs of a demanding public. Some of the carriers supporting this contention were James E. Hunt and Emery R. Hunt, doing business as Canyon Country Scenic Tours; Eugene D. Foushee, doing business as Tours of the Big Country; Canyoneers, Inc.; and Lake Powell Ferry Service. The uniform position taken by all of these carriers indicates a public need for more flexibility in respect to points of pickup and discharge, and service in combination with other type tours.*" (Emphasis added)

It is clear from a reading of the entire report and order that the Commission has made findings on basic facts which show that the public convenience and necessity required amendment of the Frosts' certificate so that the Frosts would have the privilege theretofore granted to other similar carriers to serve the needs of their clientele within the geographic areas in which they were previously authorized to serve.

It appears to counsel for the Frosts that the findings of the Commission amply support the determination that

the versatility permitted by the elimination of the pickup and discharge restrictions was "reasonably necessary to accommodate" both present need and also a future need "reasonbly to be anticipated."

It is difficult to understand why or how the amendment of the Frosts' certificate adversely affects either the Parks company or Williams. Counsel for the Parks company acknowledges on page 3 of his brief that his client:

> "Does not operate any charter or sightseeing service off the main highways, or to any so-called 'wilderness areas' off the main highways, and does not operate any 'jeep-type' or four-wheel drive equipment such as might be necessary for operations in wilderness areas off the main highways."

The certificate issued to the Frosts provides in part: (R. 191)

> "Applicant shall use the main highways only insofar as it is necessary to reach the natural scenic attractions and wilderness areas above specified which are off main highways. Applicant in rendering the services hereby authorized shall use vehicles appropriately equipped and suitable for serving the authorized scenic areas and shall in no case furnish transportation service from point to point along the main highways."

It is thus apparent that the Frosts and the Parks company are engaged in a different type of service.

Williams has been an advocate for the very policy which motivated the Commission in the case at bar. On the same basic evidence the Commission found in the

Williams case that wilderness tour operators are unable to meet the "convenience and need of the public desiring to use [their] services" with such restrictions in their certificate and that

> ". . . the restrictions frustrate the ability of applicant *and others* [tour operators] to adequately and properly promote and develop the tourist trade and create an unrealistic situation which unduly burdens the operator in his ability to provide a complete service to the public."

(See paragraph 6 of Report and Order in the Matter of the Application of Mitchell M. Williams dba Tag-A-Long Tours. R. 160.)

Mitchell in protesting the application of the Frosts now speaks out of the other side of his mouth by arguing that public convenience and necessity does not in effect require the elimination of pickup and delivery restrictions from the Frosts' certificate so that they may adequately serve their own clientele.

The decision to grant the Frosts authority to serve in their authorized geographical area without onerous pickup and discharge restrictions actually involves the determination of a matter of policy. Our Supreme Court in *Mulcahy et al vs. Public Service Commission et al, supra* dealt with a similar question in determining whether a new or different transportation system should be rendered by existing carriers or by the new applicant. On review this court said: (101 Utah 245, 261)

> "Should such new service be rendered by existing carriers or by the new applicant? This question

> poses for the Commission, not the finding of a factual answer, but the determination of a matter of policy."

In the case at bar the decision to remove restrictions which limit the ability of the wilderness tour operator to serve his clientele and to promote a new type of service (the combination type tour) is a matter of policy which is within the exclusive province of the Public Service Commission.

In *Salt Lake and Utah Corporation vs. Public Service Commission,* 106 Utah 403, 149 P.2d 647, a motor carrier urged that it should be granted the authority to make its service adequate before the certificate of a competitor be amended to extend the operation of the latter into additional territory. The court on review held that the decision in such a case rested entirely within the discretion of the Commission and particularly so if the protesting carrier furnished no evidence that additional competition would so impair its revenues as to prevent it from adequately serving the public.

There is no dispute in the evidence with respect to the highly personal nature of the business of each wilderness tour operator nor is there any evidence whatever that the enlargement of the Frosts certificate would impair the revenues of the protestants.

Both Williams and the Parks company place considerable emphasis upon their contention that the public need is fulfilled by existing carriers. This argument overlooks the fact that the need in this type of service

is created by the carrier itself, and also that the testimony in this case shows a present need of *Frosts' clientele* for the new type service. Appropo of this point is the following quotation from *Mulcahy et al vs. Public Service Commission et al* (101 Utah 245, 252-253)

> "And if a new or enlarged service will enhance the public welfare, increase its opportunities, or stimulate its economic, social, intellectual or spiritual life to the extent that the patronage received will justify the expense of rendering it, the old service is not adequate."

Furthermore, where the service applied for is merely auxiliary to that already authorized, the question of adequacy of existing facilities is not material. *Chesapeake & O.R. Co. vs. Public Service Commission*, 81 SE 2d 700 (W. Va. 1953).

Finally, petitioners place considerable reliance upon their contention that the testimony of Kent Frost is hearsay. This contention is answered in the case of *Lakeshore Motor Coach Lines vs. Welling*, 9 U.2d 114, 339 P.2d 1011 where the Supreme Court held that an experienced operator was competent to give his appraisal of the need for the service which he proposed; that such testimony was a reflection of knowledge gained in the activity of the witness in carrying on his carrier's services; and that the testimony was not hearsay and was sufficient to provide a basis for the finding of a public need for the service.

The petitioners in this case have failed to make a showing sufficient to overcome the presumptions of reg-

ularity. The Commission in reviewing the evidence before it and taking into consideration its special knowledge of the transportation industry has seen fit to grant to the Frosts (who have been in business much longer than Williams) the same authority previously granted to Williams, so that each could adequately serve their own clientele. In doing so, it has not invaded the province of either Williams or the Parks Company.

CONCLUSION

It is submitted that the order of the Commission is within its jurisdiction; is founded upon a sound legal and evidentiary basis, and is not arbitrary or capricious. The order should be affirmed.

Respectfully submitted,

VAN COTT, BAGLEY,
CORNWALL & McCARTHY
Grant Macfarlane, Jr.
Thomas M. Burton