1969

Armored Motors Service v. Public Service Commission of Utah, Donald Hacking, Hals. Bennett and Donald T. Adams, Commissioners of the Public Service Commission of Utah, and Frank J. Terry, Dba Bus Express Pickup and Delivery Service Co.: Brief of Plaintiff

In the Supreme Court of the State of Utah

ARMORED MOTORS SERVICE,

Plaintiff,

—vs.—

PUBLIC SERVICE COMMISSION OF UTAH, DONALD HACKING, HAL S. BENNETT AND DONALD T. ADAMS, COMMISSIONERS OF THE PUBLIC SERVICE COMMISSION OF UTAH, AND FRANK J. TERRY, DBA BUS EXPRESS PICKUP AND DELIVERY SERVICE CO.,

Defendants.

Case No. 11672

BRIEF OF PLAINTIFF

SERVICE COMMISSION OF UTAH
REVIEW OF AN ORDER OF THE PUBLIC

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STATEMENT OF KIND OF CASE

This case involves an application to the Utah Public Service Commission by the defendant Frank J. Terry, dba Bus Express Pickup and Delivery Service Co., for a Certificate of Convenience and Necessity which originally contemplated operations as a common carrier by motor vehice for the transportation of packages not to exceed 50 pounds per package between all points and places within Salt Lake, Davis, Utah, and Weber Counties, State of Utah.

DISPOSITION OF THE CASE

By its order dated March 7, 1969, the Public Service Commission of Utah granted to Frank J. Terry dba Bus Express Pickup and Delivery Service Co., a Certificate of Public Convenience and Necessity authorizing Mr. Terry to operate as a common carrier in intrastate commerce, as follows:

> Transportation of general commodities by motor vehicle over irregular routes between all points and places in Salt Lake County, and all points and places in the area of Davis County south of the Junction of U.S. Highways 89 and 91 just north of Farmington, Utah, save and except that there is excluded from said area that part of Salt Lake County which lies west of 4800 West and south of 1300 South but the area to be served shall include the town of Kearns, Utah; provided further, that no service shall be rendered in the transportation of any package or article weighing more than 50 pounds or exceeding 108 inches in length and girth combined, and each package or article shall be considered as a separate and distinct shipment; and provided further, that no service shall be provided in the transportation of packages or articles weighing in the aggregate more than 100 pounds from one consignor at one location to one consignee at one location on any one day; and
>
> Restricted against the transportation of: (1) commercial papers, documents, and written instru-

ments as are used in the conduct and operation of banks and banking institutions; (2) of papers used in the processing of data by computing machines, punch cards, magnetic encoded documents and office records, and (3) of eye glasses, frames, lenses, optical, camera, and hearing aid supplies.

RELIEF SOUGHT ON REVIEW

Plaintiff Armored Motors Service seeks this Court's order setting aside the Commission order granting the said Certificate of Convenience and Necessity to defendant Frank J. Terry.

STATEMENT OF FACTS

Defendant Frank J. Terry made application to the Public Service Commission of Utah on June 12, 1968 seeking intra and interstate motor carrier authority for the transportation of "packages, not to exceed 50 pounds per package, between all points and places within Salt Lake, Davis, Utah, and Weber Counties, State of Utah." (R 428)

At the commencement of the hearing on the application, the area of Utah County was eliminated from the scope of the authority sought so as to eliminate the threat of a protest by the Continental Bus System Companies, Palmer Brothers, Incorporated and Rio Grande Motor-

ways (R 14). At that time the application was also voluntarily restricted against the transportation of commercial papers, documents, and written instruments as are used in the conduct and operation of banks and banking institution, certain computer supplies, and certain optical and hearing aid equipment and supplies. This restriction eliminiated the protest of Bankers Dispatch Corporation (R 8).

Then, after the testimony of the first 22 shipper witnesses who appeared at the hearing had been taken and only one shipper witness was yet to testify, the application was again voluntarily restricted as to the area to be served, the size of the packages to be hauled and the total weight of the shipments allowable. It was also agreed that no interstate traffic was to be hauled. These restrictions were made so as to eliminate the protest of Cole Transfer and Storage, Ogden Transfer and Storage, Redman Moving and Storage Company, Barton Truck Lines, Magna Garfield Truck Lines, Wycoff Company, Incorporated and Lake Shore Motor Coach Lines (R. 375-378). The area which was eliminated from the scope of the application at that time was all of Weber County, all of Davis County north of the junction of U.S. Highway 89 and 91 just north of Farmington, Utah, and that portion of Sat Lake County which lies west of 4800 West and south of 1300 South, except for Kearns, Utah. The size of any package or article to be transported by applicant was restricted to a total of 108 inches in length and girth combined and the aggre-

gate of any one shipment between any one consignor at one location to any one consignee at one location on any one day was restricted to 100 pounds. (R. 376) The 100 pound per shipment restriction was in addition to the 50 pound per package restriction contained in the original application.

Since the specific interest of plaintiff Armored Motors Service was not eliminated by the above described restrictions, it remained as a protestant in the Commission proceedings, cross-examined the final shipper witness and presented evidence in support of its protest.

The applicant, Frank Terry, is a full-time bus driver for Continental Bus Company. (R. 397) In addition, he operates a business which he calls Bus Express Pickup & Delivery Service Company. This business involves transportation within Salt Lake County of packages to and from bus terminals and parcel post to and from post offices. He also has contract carrier authority to transport commodities for General Motors Parts Depot in North Salt Lake to bus depots in Salt Lake County. (R 35) Mr. Terry's motor carrier service has been operated out of his home with the assistance of his wife (R. 97). His financial statements as of the end of 1967 show that his motor carrier operations were not profitable and that at the time of the hearing he showed a negative earned surplus of $3,000.00 in spite of the fact that neither he nor his wife had taken any compensation out of the business for their services (R 396). Mr. Terry

admitted that his past service involving the delivery of packages directly from the consignor to the consignee was "prohibitive costwise" (R 47).

At the commencement of the commission hearing, Mr. Terry testified that he proposed to expand his present operations to serve all points in a three county area and to provide two separate types of service combined under the same operation. On the one hand, he proposed a direct delivery service which contemplates the picking up of a package at the business or home of the consignor and taking that package directly to the consignee without other stops or reshuffling of freights (R 40). On the other hand, he intended to initiate what shall be referred to herein as a redistribution type service. The redistribution type service would involve the picking up packages from various consignors within a given area and taking them to a warehouse where they would be redistributed with freight arriving in vehicles from other areas and reloaded for delivery in other vehicle the follwing a.m. or p.m. (R 41).

For the redistribution type service the applicant proposed to charge a tariff rate ranging from 55c on a package weighing up to 9 pounds to 85c for a package weighing up to 50 pounds for the first package, plus an additional flat rate of 10c for each additional package up to 10 packages and a flat rate of $1.00 per package for each additional package over 10 packages (R 50-51). On the direct delivery type service applicant proposed to

charge the same rate as the charge for the redistribution type service plus an additional 30c for packages moving within the same county area, an additional $2.00 for packages moving between two adjacent counties and an additional $3.00 for packages moving between two non-adjacent counties (R75-76).

The applicant claimed to have made a study or survey with the aid of a friend as to the economical feasibility of the new service which he proposes, but no written study or survey was placed into evidence for examination and applicant's friend did not testify. In connection with this study, the applicant made no analysis as to cost per trip or cost per mile (R 98-99), and he admitted that he had no written or binding lease or purchase agreement for the warehouse facility out of which he proposed to operate (R 102-103).

The applicant placed into evidence a balance sheet showing his financial condition as of November 1, 1968 (Exhibit 1, R 455) from which it was ascertained upon cross-examination that the accounts and notes receivable figure of $566.00 constituted a five year old unpaid loan to a brother (R 80), that the accounts and notes receivable -doubtful figure of $400.00 was probably not collectible (R 81), that the asset designated as "operating authority" in the amount of $3,000.00 was actually the expense incurred by Mr. Terry in obtaining his past operating authorities (R 94), that the $950.00 liability figure designated as notes payable to relatives constituted a four year

old unpaid obligation of the applicant (R 94), and that all assets of the appicant, including real estate, automobiles, and equipment were mortgaged on bank loans or pledged to the Small Business Administration on a prior business loan (R 83).

The applicant estimated that his initial cost in the first year of operation under his proposed service would require a $60,000.00 investment in new vehicles (R 404). He admitted that his financial condition was such that he was not in a position to borrow money (R 87-88).

Most of the testimony of supporting shipper witnesses related to their alleged need for service to points outside of the territory encompassed in the application as finally restricted and granted by the Commission and almost without exception the witnesses admitted that their support of the application was based upon the fact that the proposed rates to be charged by the applicant were lower than rates available from other existing carriers. The appendix which follows this brief consists of an abstract of the testimony of each supporting shipper witness as that testimony related to the witness's need for service within the area for which authority was finally granted by the Commission plus the manner in which the applicant's proposed rates induced his support of the application and the knowledge of the witness as to other presently available public carrier services which he could use. The abstract is not intended to be a complete summary of all testimony.

The plaintiff Armored Motors Service is best known as a carrier of coin, currency and other valuables in armored vehicles. This service is conducted in several states and in Utah under an exemption in the Motor Carrier Act. In addition, Armored has been conducting a package delivery service in Salt Lake County. Authority for this service was acquired from Jiffy Messenger Service pursuant to approval of the Public Service Commission dated November 23, 1966 (R 412). This authority authorizes the plaintiff to operate at a "common carrier by motor vehicle of property in intrastate commerce, to and from all points in Salt Lake County, Utah, over irregular routes, for the transportation of messages and packages not exceeding a weight of 100 pounds per item." (Exhibt 4, R 462)

Upon obtaining its package authority, plaintiff instituted a county-wide package delivery service. In doing so, it employed additional personnel and it purchased five additional Econovan vehicles specifically adapted for the package delivery type service (R 414, Exhibits 5 and 6). It employed a traffic solicitor (R 414), distributed advertising material (R 417 and Exhibit 7), and commenced contacting businesses throughout the county area to determine the feasibility of a major distribution type operation (R 416, 421 & 423). However, it was determined that there was not a sufficient volume of traffic in the area to make feasible, an immediate full-scale redistribution type operation (R 417).

Plaintiff's package delivery service, consists of both a direct delivery service which requires at most one hour of transportation time from the consignor to the consignee (R 415) plus a redistribution type service which results in following day delivery (R 416, 427). The business is conducted through a terminal and dispatcher located in Salt Lake City (R 415). It did not show a profit during either of the two years of its operation up to the time of the hearing, but the volume has been increasing (R 424, Exhibit 8). The plaintiff's witness estimates that about a 20 per cent increase in volume will be necessary to get the operation "into the black" (R 423).

ARGUMENT

POINT I

THE RECORD CONTAINS NO SUBSTANTIAL EVIDENCE OF A PUBLIC NEED FOR THE APPLICANT'S PROPOSED SERVICE.

The record clearly shows that the shipper witnesses who testified at the Commission hearing in support of the application were primarily interested in service to areas which are beyond the scope of the application as finally restricted and granted and it further clearly shows that the witnesses were induced to support the application by the promise of the applicant's proposed cheaper rates. Furthermore, the record shows that all of the stated needs of the supporting shippers can be adequately met by the presently existing public motor carrier services.

Twenty-two of the twenty-three shippers who supported this application did so under the false assumption that the applicant's operations would involve a three county-wide package distrbution service with only a 50 pound weight per package limitations and certain commodity restrictions. A review of the record shows that those witnesses were primarily interested in service from Salt Lake City to Weber County and specifically into the City of Ogden. Also, because the interest of most of the original protestants to the application centered around the Weber County area, the focus of both direct and cross-examination was on the proposed inter county service, and the witnesses showed only passing interest, if any at all, in the local delivery service for which authority was finally requested and granted. As a consequence, the testimony as to need for the local delivery service was only handled as an incidental and peripheral issue.

Furthermore, all of the said 22 supporting witnesses were cross-examined under the misunderstanding that the defendant was offering a complete service over at least three full counties. Had both the witnesses and the protestants known of the very limited area which was to be finally requested and then approved by the Commission, the testimony would in all probability have been entirely different, and the shipper's support of the application would have been extremely questionable. A review of the record shows that most of the supporting

witnesses were not intereted in a package delivery service within portions of Salt Lake and South Davis Counties since they had their own local delivery equipment and they did not intend to abandon their private local delivery service.

The record is further clear that the chief inducement for any of the witnesses to support the application was the applicant's proffered lower rate structure. The applicant admitted that he had discussed his proposed rates with the witnesses and committed himself rate-wise to them (R 70-71). The witnesses were quite candid in admitting that their support of the application was predicated upon the applicant's ability to offer them rates which were either equal to or lower than the present parcel post rates or the cost of their private transportation. Yet, the record shows that the applicant's proposed rates are not economically feasible as will be discussed under Point II of this brief and thus the whole basis of support by the shipper witnesses fails.

It has been a long standing rule of the Interstate Commerce Commission in common motor carrier application proceedings that if the primary advantage to be gained by the proposed service is a lower rate, the application will be denied. (White, Extention of Operations, 14 MCC 25) The reason for such a rule is obvious. Anyone offering lower rates can muster substantial support for his proposed service even though the identical service is already available. Since it is in the public interest that

existing regulated carriers should be allowed to charge compensable rates in order to secure their continued operations and service to the public, the function of regulating rates has been assigned to the Commission. Thus even if it is maintained that the rates charged by existing services are too high, that fact alone would not justify the granting of new duplicating authority since any unlawful rates can be corrected by the Commission. (See Fleet Transport Company of Kentucky, Inc., Extension, 88 MCC 762.) In fact, it would appear that the primary purpose of rate regulation by the Commission is to eliminate cutthroat price competition so as to secure the stability of existing services and to insure their continued service to the public.

An essential element to be considered by the Commission in determining whether or not public convenience and necessity exists for a new proposed service is whether or not the public is afforded sufficient existing transportation facilties of the type proposed. The Utah Public Service Commission is specifically charged with considering this issue by the terms of Section 54-6-5 Utah Code Annotated 1953 which states in part: "Before granting a certificate to a common motor carrier, the commission shall take into consideration . . . the existing transportation facilities in the territory proposed to be served."

It is abundantly clear from the record in this case that the public is already afforded a completely adequate public transportation service for the transportation of

small packages. The area description finally adopted by the applicant was that contained in the typical local cartage authorities presently held by numerous other companies. The applicant himself admitted that he was aware that this same authority had been issued by the Commission to 20 different other people or companies and that 10 additional cartage companies had authority which duplicated his applied for authority at least in part (R 405).

There was no testimony presented to the effect that adequate common carrier service in Salt Lake County was not available. The testimony of the witnesses was simply that they were seeking a service with lower rates.

The commission clearly erred in its finding that "there is not presently any authorized common carrier who is actively attempting to render service of the type proposed." (R 493) Since most of the protesting carriers withdrew from the Commission proceeding prior to the presentation of their own evidence, the record does not contain much detail as to their offered services, but it can be ascertained from the testimony of the supporting shippers that a semi-local small package delivery is offered by several existing carriers. Mr. Pembroke testified that his company is presently using the services of Cardall's City Delivery Service, Eagle Moving and Storage Company, and Wycoff Company, Incorporated for delivery of his packages into Salt Lake and Davis Counties (R 301-

302), and Mr. Foster who testified on behalf of the L.D.S. Church admitted that his use of plaintiff's delivery service had been satisfactory (R 218).

Since plaintiff did remain in the Commission proceeding as a protestant, the record does contain evidence that plaintiff is conducting a package delivery service within Salt Lake County almost identical to the type which the applicant proposes. The applicant admitted that he would probably not be able to immediately conduct a full-scale high volume package service but that the business would have to grow into what he ultimately proposes (R 86). This is exactly what the plaintiff has been attempting to do since the inception of its service in late 1966 (R 416-417).

The applicant attempted to induce the belief that the type of service which he proposes is somehow unique in that it contemplates in part the redistribution of packages at a warehouse. Not only does the record show that the plaintiff engages in this type of service but the applicant admitted that with respect to the method of handling the shipment his proposed operation would be no different than that of the other regular common carriers (R 66). In addition, Mr. Dodge who testified on behalf of Western Electric Company, referred to this same type of reshuffling system offered by Wycoff Company, Incorporated (R 176).

As a practical matter, both the plaintiff's present service and the applicant's proposed service are substantially identical. Both have roving vans in communication with a dispatch service; plaintiff operates on a 6 a.m. to 6 p.m. schedule, six days a week, while the applicant would operate on a 7 a.m. to 8 p.m. schedule, six days per week; and plaintiff has a consolidation service for non-rush order items such as the applicant proposes to establish in his warehouse. In essence, both services are essentially based upon the United Parcel Service idea.

Admittedly, the Commission is not under a statutory duty to prevent all competition, but the Commission did error as noted above in its finding that no presently authorized common carrier is actively attempting to render the type service which is proposed, and the Commission further ignored the obvious effect which the diversion of traffic from the plaintiff's operation would have on the plaintiff's ability to continue in its efforts to establish the precise type of service which the Commission feels is needed.

Mr. DeLue of Armored Motors Service testified that his feasibility studies showed that he could expect a loss operation for at least five years because of the expensive nature of the direct delivery service and the initial low volume which could be generated for the redistribution type service. Inspite of this, he entered the field and established his operation in late 1966. As expected, the

operation showed a loss for both years during which he operated prior to the Commission hearing, but with a substantial increase in gross revenue being generated during that period (R 421-422). In other words, the plaintiff forsaw the initial expense and difficulty involved in establishing a full-scale package delivery service in the Salt Lake Metropolitan area, but he entered the field anyway and was, until the granting of this application, on his way toward establishing such a service.

If the applicant is allowed to enter the field in competition with the plaintiff, substantial traffic, both present and potential, will obviously be diverted from the plaintiff, and the plaintiff's efforts to develop a full-scale and economical service will fail. The Commission's conclusion that "it does not appear that the proposed service would result in any substantial diversion of traffic from the authorized carriers, but that the traffic tendered would be in lieu of private transportation or parcel post," can't possibly be based upon either the record or the realities of business life. Since the applicant proposes to offer the same service as the plaintiff but at lower rates, diversion of traffic from the plaintiff is a foregone conclusion. Shippers will always use the cheaper service, all other things being equal.

With respect to diversion, the probable effect of granting this authority would be to split the available traffic between the two carriers, both of which are

attempting to establish the same type of service, and thus make it impossible for either to economically establish the public service which the Commission is apparently convinced is needed. Certainly if one package delivery service in Salt Lake County cannot yet generate sufficient volume to make a profit, the addition of another such service will simply impose upon the public another loss operation. Such cannot be said to be in the public interest or of public convenience and necessity.

This court has both the legal prerogative and the duty to overrule the Commission's order when it is found to be arbitrary and capricious. This court exercised that prerogative in the case of *Lakeshore Motor Coach Lines vs. Hal S. Bennett,* et al., 8 Utah 2nd 293, 333 P.2d 1061 (1958). In that case the court made certain statements which seem to fit the fact situation in the instant case. This court stated at page 1063:

> ". . . 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 service. In any populous area it is easy enough to procure witnesses who will say that they would like to see more frequent and *cheaper service.* That alone does not prove that public convenience and necessity so require. 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. For the rule to be otherwise would ignore the provisions of the statute; and also would make meaningless the holding of formal hearings to make such determinations and render futile efforts of existing carriers to defend their operating rights." (emphasis added)

Likewise under Interstate Commerce Commission law, it is well-established that in order to foster sound economic conditions in the motor carrier industry, existing motor carriers should normally be afforded the right to transport all traffic which they can handle adequately, efficiently and economically in the territories served by them, as against any person now seeking to enter the field. (See Squaw Transit Company, common carrier application 48 MCC 17 and J. T. Transport Company, Inc., extension 79 MCC 695)

By granting this application, the Commission has arbitrarily ignored the true public interest. The public interest dictates that the plaintiff's efforts to develop a proftable and serviceable package delivery service in Salt Lake County should receive protection from unwarranted and unneeded competition.

The record does not contain any substantial evidence whatever which establishes a need for the service which the applicant proposes. Not only does almost all of the testimony relate to service into areas not now within the scope of the authority granted, but it is abundantly clear that public support of the application came as a result, not of inadequate existing services, but rather through the promise by the applicant of a cut-rate service. Therefore, the order of the Commission granting the applicant his requested authority was an arbitrary and capricious act and entirely beyond the lawful discretionary powers granted to the Commission by statute.

POINT II

THE EVIDENCE CONCLUSIVELY SHOWS THAT APPLICANT'S PROPOSED SERVICE IS NOT ECONOMICALLY FEASIBLE.

Since the rates which the applicant proposes to charge in connection with his new package delivery service are significantly lower than rates charged by other existing package delivery services in this area, it was incumbent upon the applicant to show that his proposed service is economically feasible. This he has failed to do. In fact, a close review of the evidence of record shows that the rates proposed by the applicant are not realistic and would result in devastating losses.

At the outset it should be observed that the applicant did not attempt to show that his proposed rates were feasible by direct evidence. Any specific figures relative to revenues and costs were elicited by cross-examination. Whereas the applicant claimed to have made a study relative to the feasibility of his proposed service, nothing was presented in writing from which the accuracy or authenticity of the study could be determined (R 91) and it became evident through cross-examination of Mr. Terry that his estimates were pure guesses. For example, Mr. Terry admitted that he would have to purchase a forklift, but the record shows that he had not specifically investigated the cost of a forklift (R 61, 78). Also, Mr. Terry admitted that he had not attempted to determine his cost on either a cost per mile or cost per package basis (R 98, 99). He proposes to operate out of a warehouse facility in Salt Lake County at a rental cost of $200.00 per month, although he has no binding lease agreement and he admitted that the reasonable value of the rent on such a facility is $900.00 per month (R 102-103).

Even if one were to blindly accept that the applicant had made a proper study of the feasibility of his proposed service and rate structure, the findings of such a study became entirely irrelevant when the applicant chose to restrict his application against transportation to most of the area originally contemplated since the economic feasibility of the large redistribution type service proposed depends upon the degree of volume of

traffic which can be generated. The applicant's original study was for a service as stated in the original application. It contemplated traffic from Weber County, North Davis County, and all of Salt Lake County which is not now available (R 398). Likewise, the study contemplated the handling of traffic with no per-shipment weight restriction. That restriction limited a volume of expected traffic. The applicant testified that his proposed service contemplated a bus express service in Ogden but that portion of his proposal is also now unavailable to him. Thus the applicant has not made any reliable study to show that he can in fact profitably operate his proposed service at the rates which he proposes and upon which the shipper witnesses based their support.

Other than having simply failed to demonstrate the economic feasibility of his proposed service, applicant actually produced evidence through himself and through his shipper witnesses which shows rather conclusively that his proposed service and rate structure is not economically feasible. The applicant himself estimated that his revenue under his proposed rates would average 55¢ per package (R 84). The applicant did not provide any cost per package figure but the applicant's shipper witness from Professional Pharmacy testified as to his cost experience in connection with his own delivery service and he stated that he experienced a cost of approximately $1.00 per delivery even though he uses college students working part-time at a beginning rate of

$1.25 per hour as drivers and even though his vehicles consist of a small foreign car and an American compact car as opposed to the larger truck vehicles which the applicant would use (R 239-241). In addition, Mr. Snow from Z.C.M.I., who testified on behalf of the applicant, stated that his cost per delivery in connection with the Z.C.M.I. delivery system was between 50c and 75c just for the vehicle and its driver and not including any overhead expenses (R 337).

Thus, if we are to rely upon the revenue and cost per package figures presented as a part of the applicant's evidence, we can determine that the proposed service will most likely cost almost twice as much as the traffic will produce in revenue.

As to the direct delivery portion of the applicant's proposed service, the applicant's evidence likewise demonstrates the probability of a loss operation. Pursuant to cross-examination, the applicant admitted that his tariff for a direct delivery of a package from Salt Lake City to Farmington, Utah would be about $2.60, whereas his cost would be about $4.50 (R 403-404).

Plaintiff submits that the Commission acted arbitrarily in not properly considering the economical feasibility of the applicant's proposed service based upon the evidence of record. Admittedly, it is not possible for the Commission to guarantee the financial success of any

newly proposed operation let alone existing operations, but where the record shows, as it does here, that the proposed service is based and supported almost entirely upon a drastic reduction in rates to be charged, the Commission has a duty to determine whether or not the service as a whole is feasible and if the evidence shows, as plaintiff believes it does here, that such a service is not feasible, then the Commission is remiss in its duties to the public in granting the authority sought.

Certainly the applicant, and the public, as well as the plaintiff, will be damaged by allowing the applicant to initiate his proposed service. The applicant's whole proposal for service is admittedly based upon the United Parcel Service concept which presently operates in larger population areas in the country (R 115). Yet, United Parcel has the entire accounts of large department stores (R 92), and the applicant has received no commitment for such traffic in this area. In fact, the witness from Z.C.M.I. expressed doubts that it would ever be able to switch to the use of the applicant's services entirely. Obviously now that the applicant has substantially reduced the area into which he is to operate, his service becomes of even more limited value to the large department stores who handle deliveries into areas beyond the applicant's territory.

POINT III

THE APPLICANT FAILED TO SHOW THAT HE IS FINANCIALLY ABLE TO RENDER THE SERVICE WHICH HE PROPOSES.

Another one of the specific elements of a public convenience and necessity case which the Commission is directed to consider by the terms of Section 54-6-5 Utah Code Annotated 1953, is the financial ability of the applicant. The statute reads in part: "Before granting a certificate to a common motor carrier, the Commission shall take into consideration the financial ability of the applicant to properly perform the service sought under the certificate . . . " Likewise, this court has specifically held in the case of *Utah Light and Traction Company v. Public Service Commission* 101 Utah 99, 118 P.2d 683, that the Commission must consider the matter of the financial ability of the applicant. At page 689, the court stated "that under the law, the Commission should not issue a certificate to a party financially unable to perform the service permitted. . . " Yet, in the instant proceeding the Commission has totally ignored the issue of the applicant's financial ability to perform his proposed service. Nothing is contained in the Commission's Report and Order on the subject, in spite of the fact that it became one of the principal contested issues at the hearing.

The evidence clearly shows that the applicant is not capable of financing his proposed service. Upon cross-examination it was shown that his balance sheet (Exhibit 1) contained listed assets of a rather questionable nature and it was further shown that since all of the assets were pledged to other loans, the applicant had no borrowing power. In fact, the applicant candidly admitted that

he could not get a loan (R 87-88). The applicant had no commitment from any bank or the Small Business Administration for a loan to finance his operation (R 404). His only possible source of funds were "friends" none of whom were identified or committed to the investment.

Certainly the fact that the applicant had on his books an unpaid obligation of $950.00 which had been outstanding for four years, plus the showing of a loss operation in his past carrier business could not be of any assistance to him in his search for funds. The applicant admitted that he would incur an initial cost for truck equipment of about $60,000 in the first year, but he did not show where he was going to get the funds to cover that cost (R 404).

The purpose of having the Commission pass upon the financial ability of an applicant is obvious. To allow the initiation of under-financed public services would be detrimental to the public interest. Plaintiff submits that the Commission's failure to make any finding on the issue of the applicant's fitness leaves undetermined an essential issue which should have been determined and that by granting the applicant the authority without a proper finding of fitness was beyond the authority of the Commission and thus a basis for this court to set aside the Commission order.

POINT IV

THE PUBLIC SERVICE COMMISSION ORDER WAS NOT BASED UPON A PROPER AND LAWFUL CONSIDERATION OF THE EVIDENCE.

As can be ascertained by a review of the record and as counsel for the defendant Frank Terry will undoubtedly admit, the Public Service Commission hearing in this case was conducted by a hearing examiner with only one of the commissioners sitting in to hear the evidence. Although the transcript of record shows that both Commissioners Hacking and Adams were present at the hearing when it commenced, only Commissioner Adams remained for the hearing. This fact can be deduced by the notation in the record at page 82 to the effect that Commissioner Hacking had reentered the hearing room. He remained at the hearing only temporarily however.

At the close of the hearing, the examiner stated that the matter would be taken under advisement. Thereafter, the Commission issued it own report and order on March 7, 1969 without ever having obtained or reviewed a copy of the transcript. A transcript of evidence was never prepared until ordered by the plaintiff pursuant to this proceeding before this Court. Thus the decision of the Commission in this case was arbitrarily based upon the opinion of the hearing examiner or the commissioner who attended the hearing.

It could not have been based upon any review of the evidence by a majority of the commissioners.

Plaintiff submits that in any proceeding before the Commission where a hearing is held, it is mandatory that a majority of the commissioners review the evidence either by personally attending the hearing or by reviewing a transcript of the evidence before a decision is made. Section 54-1-3 Utah Code Annotated 1953, as amended, provides in part:

> " A majority of the commissioners shall constitute a quorum for the transaction of any business, for the performance of any duty or for the exercise of any power of the commission; and may hold hearings at any time or place within or without the state, and any action taken by a majority of the commission shall be deemed the action of the Commission . . . Any investigation, inquiry, or hearing which the Commission has power to undertake or to hold may be undertaken or held by or before any commissioner or an examiner appointed by the commission. All investigations, inquiries, and hearings by a commissioner or an examiner appointed by the commission shall be deemed the investigations, inquiries, and hearings of the commission; and all findings, orders or decisions made by a commissioner or an examiner appointed by the commission, *when approved and confirmed by the commission* and filed in its office, shall be deemed the findings, orders, or decisions of the commission and shall have the same effect as if originally made by the commission." (emphasis added)

Plaintiff recognizes that Section 54-1-3 Utah Code Annotated 1953 provides that the Commission may utilize one commissioner or an examiner to conduct its hearings. That statute, however, does not allow the one commissioner or the examiner to make the ultimate decision in any case. The Commission is an appointed body with the responsibility of acting in response to the needs of the public and Section 54-1-3 reserves to the entire Commission the right of issuing the final decision or order in each case. The section provides that all findings, orders, and decisions made by an examiner become the order of the Commission only "when approved and confirmed by the commission". It is axiomatic that the Commission cannot "approve and confirm" and examiner's recommendation unless it can review a transcript of the evidence upon which the recommendation is based anymore than this court is capable of properly reviewing and either setting aside or affirming the order of the Commission without the aid of a transcript.

This matter is not new to the Commission or to this court. In the recent case of *Lewis Bros. Stages, Inc., et al. vs. Public Service Commission,* et al., 22 Utah 2d 287, 452 P.2d 318, decided on March 24, 1969, this Court set aside the order of the Commission which granted Wycoff Company, Incorporated certain motor carrier authority and ordered the Commission to complete and review a transcript of the evidence before issuing an order. Plaintiff submits that there is no significant difference between the procedure of the Commission in

that case and the instant case. It is essential to fundamental principles of justice that whenever an administrative body utilizes the services of a hearing examiner in connection with its judicial function, a transcript of the evidence must be made available to those officers of the administrative body charged with the responsibility of making the ultimate findings and issuing the ultimate order.

It is the practice before the Interstate Commerce Commission that where a hearing examiner is utilized, a transcript of the hearing is prepared for review by the body authorized to make the ultimate decision. This procedure is not new nor is it followed just by federal agencies. The proper use of hearing examiners is well-established and is in fact a procedure used by the Utah Industrial Commission relative to workman's compensation hearings. The Industrial Commission follows the established practice of obtaining a transcript of hearings for review by the Commissioners in any case heard by either an examiner or by one of the commissioners. In addition, this writer has had the recent opportunity of participating in proceedings before the Wyoming Public Service Commission and it was noted that that commission also follows the standard practice of requiring a transcript of the hearing to be prepared in advance of any decision by that commission.

Thus the practice of securing a transcript of the evidence prior to an ultimate decision by the Commission where the services of a hearing examiner are utilized is not uncommon or unreasonable. If anything, it results in a more accurate and reasonable decision at the Commission level and it probably reduces the number of cases brought before this Court involving a review of the Commission's orders. But more than being desirable, it is essential to fairness. An order approved by the majority of the Commissioners, without the opportunity to review the transcript of evidence in cases where a hearing examiner is utilized, obviously is arbitrary and the true decision-making function of the Commission is abandoned.

A proper comparison of the instant case with a court proceeding would be a case where a jury assigns to a third person, the duty of hearing the evidence and then telling the jury how to decide the case. In such an instance, this Court would have little difficulty in finding that the jury had not properly assumed its function and that the legal right to trial by jury had been denied. It is just as logical for this Court to find that the Public Service Commission, the legally authorized tryer of fact, cannot assign to a third person its responsibility to ultimately decide the case.

CONCLUSION

Plaintiff submits that the order of the Commission entered in this case on March 7, 1969 is arbitrary and

capricious and not supported by substantial evidence. The record clearly shows that there was no real public support for a package delivery service in the area of that portion of Salt Lake and South Davis Counties for which the applicant was ultimately granted authority, since 22 of the 23 supporting shipper witnesses testified with the false understanding that the services of the applicant would be a three county wide service and their stated need for service was primarily into areas not now covered by the granted certificate.

The record also shows that the shipper witnesses were induced to testify in support of the application by a promise of lower rates than those of existing carriers, not because there was any deficiency in the services of presently authorized carriers.

In addition, the Commission arbitrarily ignored the evidence with respect to the economical feasibility and the financial fitness of the applicants since a careful review of the record shows rather conclusively that the applicant's proposed service is not economically feasible nor is the applicant possessed of sufficient assets or credit to properly establish and finance his proposed operation.

Finally the Commission's order is arbitrary and capricious and not based upon the evidence since the

majority of the Commissioners have never had the opportunity to review the evidence.

Plaintiff respectfully requests this Court to set aside the Commission order.

Respectfully submitted,

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APPENDIX

ABSTRACT OF SHIPPER WITNESS TESTIMONY

1. Martin Gladowski — Regional Sign Company, Salt Lake City, Utah. Testimony related to service from Salt Lake City to Ogden. No discussion was had as to service need in Salt Lake and Davis Counties. The witness admitted that his needs had been met, but "they could be met at a more economically (sic) price." (R 127)

2 Jay Winger — Sperry-Rand Corporation, Salt Lake City, Utah. Mr. Winger stated that his company has a fleet of approximately 15 trucks in operation for delivery service. As to service within the Salt Lake City area, applicant's proposed service would only be used on an emergency basis after 3:00 p.m. (R 141-142) As to local deliveries, he stated that the company's own truck service would be discontinued only if defendant's finally-published rates were lower than Sperry-Rand Corporation could possibly run their own trucks (R 135, 140, 143). When asked if the Armored Motors delivery service had been satisfactory, Mr. Winger stated specifically one instance on October 30, 1968, that delivery took 24 hours (R 144-146). Later, Mr. DeLue of the Armored Motor Service testified that he made an investigation into the aforementioned delay and discovered that the driver who would have made the delivery was in the hospital and that Sperry-Rand had been informed of the consequent delay. (T 422)

3. Neil B. Peterson — Homelite, North Salt Lake, Utah. Mr. Peterson stated that practically all of his shipments are outbound with most of them going into other states and very little local business (R 151). He stated that Wycoff service is "very, very good," and parcel post service was convenient to him and "very good." His only support of the application was for a cheaper method of getting packages from his business to the bus depot. (R 152)

4. Richard W. Crouch — Carr Printing Company, Bountiful, Utah. Mr. Crouch stated that his company now delivers with its own truck. He indicated that Wycoff service had been used with good results (R 160), but the proposed rates by defendant would be a "major factor" in his support of this application (R 162).

5. Al C. Dodge — Western Electric, Salt Lake City, Utah. Mr. Dodge stated that his company now uses Telephone Company trucks for 95 percent of shipments within Salt Lake, Davis and Weber Counties (R 169). The main testimony concerned delivery from the Western Electric plant in Salt Lake to Weber County and specifically Ogden, Mr. Dodge admitting that his only need was for direct delivery on an emergency basis since Wycoff has a reshuffling system and offers otherwise satisfactory service (R 176). He also stated that on emergency shipments within Salt Lake City that Redman and other cartage carriers in the area have given satis-

factory service, although he objected to their cost as compared with defendant's proposed rates (R 173).

6. Walter G. Koplin — Salt Lake Hardware, Salt Lake City, Utah. Mr. Koplin stated that within the Greater Salt Lake area that his company delivered on their own truck. He stated that present services in the area met his needs, "except for the cost." (R 189) Mr. Koplin's primary concern as evidenced throughout his testimony was that of cost.

7. Edward L. Evans — Strevell-Patterson Hardware and Motor Merc, Salt Lake City, Utah. Mr. Evans stated that the company's own vehicles are used in the Salt Lake area. His testimony in the main concerned deliveries into the Ogden area. However, he stated that within Salt Lake County he has used Wycoff Company deliveries, but "the rates that he has proposed here would probably cause us to ship most of the small packages under this 50-pound rate by Terry. In most cases it would divert from Wycoff service or the bus service." (R 202) Mr. Evans stated that he definitely was not considering the discontinuance of use of his own trucks in this area, even for delivery of small packages. (R 207-208).

8. Bobby Lee Foster — L.D.S. Church, Salt Lake City, Utah. Mr. Foster stated that the Church presently uses its own trucks and does not intend to eliminate

them and that his support of the application is contingent upon the rates to be charged by the applicant. His testimony was:

"Q. So, when it finally gets down to the nutcracking, we get down to the rate problem?

A. Well,that is true.

Q. And if the rate structure he proposes is not approved by the Commission, then your support of his application fails?

A. Well, taking all things into consideration, if his rate structure fails, then his whole program fails, doesn't it?

Q. Correct. And your support fails; isn't that true?

A. Well, that is true." (R 216)

As to service, Mr. Foster readily admitted that delivery within the Salt Lake City area by Delivery Service (Armored Motors Pickup and Delivery Service) has been both direct and fast (R 218).

9. Boyd Openshaw — Fred A . Carleson Company, Salt Lake City, Utah. Mr. Openshaw stated that he hadn't attempted in past months to get same-day de-

livery in Salt Lake County by any of the carriers presently serving because his company presently uses their own delivery truck (R 228, 230). Again, defendant's proposed rate was the dominating factor in inducing Mr. Openshaw to testify:

> "A. Yes; this is true. This is what this brought to light was the cost on some of these small shipments in Salt Lake County, that I can't perform the service myself by the same cost as proposed in this deal he's going after.
>
> Q. And so in the event he is not able to perform this at the cost represented to you, then —and he would have to perform at a greater cost, let's say at a cost equal to what you can perform it yourself, then you have no need for his service in Salt Lake County?
>
> A. If it was this high, that would be true, I wouldn't need it.
>
> Q. And so whether or not you can actually support him depends on ultimately what the cost is going to be to you.
>
> A. Yes; that cost has a big factor in it." (R 231)

Mr. Openshaw stated that he had not ever attempted to use the Plaintiff's delivery service (R 231, 232).

10. John Italsano — Professional Pharmacy, Salt Lake City, Utah. Mr. Italsano presently makes prescription deliveries in a small foreign car and an American compact car. He also utilizes college students part time at a beginning rate of $1.25 per hour to make his deliveries. With these economies, he stated that deliveries still cost him approximately $1.00 per delivery, and that defendant's proposed rates are still ower than the cost of his own delivery system. (R 239-241) It is reasonably inferred from Mr. Italsano's present operations and the very nature of his business that only direct deliveries were contemplated.

11. Arthur Holmgren — Ipco Hospital Supply, Salt Lake City, Utah. Mr. Holmgren was interested in delivery into the Ogden area. He stated that he had his own delivery operation in the Salt Lake and Bountiful area and had no plans to discontinue it (R 246, 247).

12. L. A. Marshall — Apex, Inc., Salt Lake City, Utah. Mr. Marshall was mainly desirous of speedy service into the Ogden area (R 259). Again, this witness also had no intention to replace his own truck for delivery service in Salt Lake County, and only contemplated defendant's proposed service to supplement his own if he got into a pinch (R 269). Cost also was a major factor in inducing him to testify.

13. Roger E. Mellor — Westnghouse Electric Supply, Salt Lake City, Utah. Mr. Mellor was primarily interested in the longer haul shipments. He stated that he

used his own equipment in Salt Lake County, and evidenced no disposition to discontinue use of such equipment for local deliveries (R 275). Cost also was "appealing." (R 275).

14. Raymond Peterson — Billinis Distributing, Salt Lake City, Utah. When confronted with the fact that Wycoff service is presently available in Salt Lake County with store door pickup, if requested, Mr. Peterson stated:

> "Q. But, if that service were available as I have outlined, that would obviate the need for the Terry Service, wouldn't it?
>
> A. Well, this is right, because it is basically a comparable service, and they have done a fine job when we have used them." (R 286-287)

Mr. Peterson talked in terms of service into the Ogden area. He owns his own trucks for delivery in the Salt Lake metropolitan area.

15. Woodrow W. Marshall — Pembroke Company, Salt Lake City, Utah. Mr. Marshall stated that he is primarily interested in the Davis County area service if such service could be purchased at a cost less than he could provide it (R 295). He admitted that he would continue to perform his own delivery service in Salt Lake County unless defendant could provide at least comparable service at a cheaper cost than he could perform himself (R 294).

16. Adrian H. Pembroke — A. H. Pembroke Company, Salt Lake City, Utah. Mr. Pembroke stated that he is presently using the local delivery servces of Cardall City Delivery Service and Eagle Moving and Storage Company but he desires the same type of service at a better rate. He expressed the desire for additional competition because "His price schedule looks better than that we are paying now, and to be able to move to Davis and Weber might have some real benefits for us." (R 301)

17. Douglas L. Elton — Stevens-Brown Sporting Goods Company, Sugarhouse, Utah. Mr. Elton stated that his company used parcel post and sometimes their own salesmen deliver in Salt Lake County (R 316). He was not aware of anyone who offered delivery service within Salt Lake County, and had not used any other local package delivery service. (R 318-319)

18. Gordon W. Snow — Z.C.M.I., Salt Lake City, Utah. Mr. Snow stated that Z.C.M.I. presently delivers packages from its stores in downtown Salt Lake, at the Cottonwood Mall in Salt Lake County, and in Ogden, Utah by means of its own fleet of trucks. Mr. Snow estimated that his cost per package per delivery was 50-75 cents just for the vehicle and its driver, and excluding overhead expenses. (R 337) His real interest was defendant's proposed rate schedule. He envisioned use of defendant's proposed service only to handle his overflow deliveries on Christmas and the like, and was un-

willing to commit himself to any complete changeover. (R 338) His testimony was given under the assumption that defendant could offer services into North Davis and Weber Counties rather than to just South Davis and Salt Lake Counties. Moreover, if the rates proposed by defendant were higher, Mr. Snow indicated his company would not be interested in the applicant's service (R 335).

19. Steven A. Hales — Mack Trucks, Inc., North Salt Lake, Utah. Mr. Hales was only interested in deliveries outside of Salt Lake County. When asked if he had need for any kind of transportation service within Salt Lake County, he answered:

"A. No, not within Salt Lake County.

Q. And that would cover the entire county of Salt Lake?

A. Yes, uh-huh." (R 344)

20. Chris Dokas — Alemite Sales, Salt Lake City, Utah. Mr. Dokas indicated that his firm presently has no private delivery service. He was interested in inexpensive delivery service but was not aware that any package delivery service was available in the city at all (R 359). Mr. Dokas therefore was not aware even of what other local cartage companies charged for package delivery service, but was very interested in cost considerations (R 360).

21. Mike Sergetakis — Silver State Supplier, Salt Lake City, Utah. Mr. Sergetakis's testimony was also given upon the false assumption the applicant would make deliveries of small packages throughout the three-county area in question. His support of the application also was because defendant's rate schedule was approximately 30 percent less, in his opinion than other carriers. (R 367) There was no cross-examination.

22. Reginald Grane — Rocky Mountain Machinery Company, Salt Lake City, Utah. Mr. Grane's testimony can be summed up by quoting an exchange by himself and Mr. Richards:

> "Q. Mr. Grane, are you the gentleman who appeared in the Wycoff hearing?
>
> A. You bet.
>
> Q. And do you recall your testimony at that time that so far as Salt Lake County is concerned your company has no need for a transportation service?
>
> A. We have no need for it under the concept of a regular pickup and delivery service. If there is something special it might be interesting. Now, whether it would or not, I don't know.
>
> As I say, to have to call someone to come out and pick something up and deliver it, I don't think I am interested in that, because we have our own pickup and delivery service.

Q. So that you would adhere to the same philosophy today as you did in the Wycoff hearing, that within Salt Lake County you are not supporting the application?

A. I am not supporting the application for Salt Lake County." (R 374-375)

23. Harold Massett — Red Wing Shoe Company, Salt Lake City, Utah. He testified that no difficulties were encountered with parcel post service as to rates (R 384, 386). He presently uses the delivery service of Wycoff Company for small orders and could not say how the rates of Wycoff on small packages compare to the applicant's rates (R 386). His support of the application is based on the 55¢ per package rate quoted to him by the applicant (R 387).