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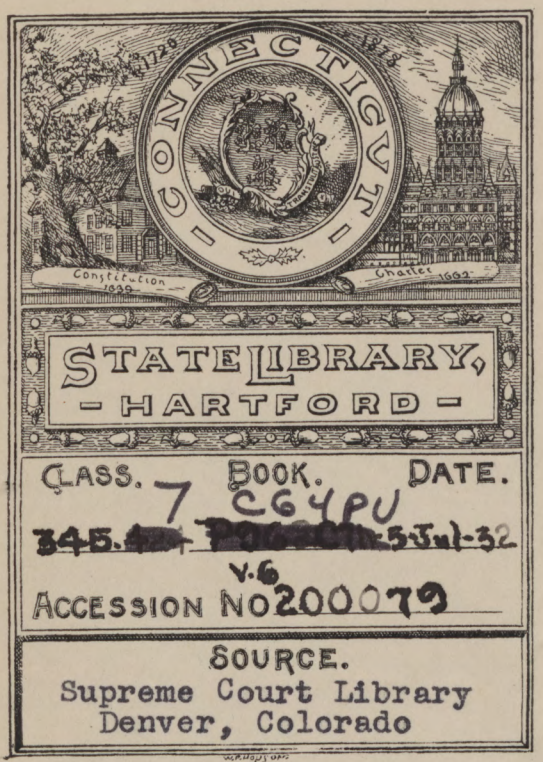

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REPORTS OF DECISIONS

OF

THE PUBLIC UTILITIES COMMISSION

OF THE

STATE OF COLORADO

FROM JANUARY 1, 1920, TO DECEMBER 31, 1930

VOLUME 6

(Cited "6 Colo. P. U. C.")

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MEMBERS OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

WORTH ALLEN, Chairman

DAN S. JONES EDWARD E. WHEELER

JOHN W. FLINTHAM, Secretary

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OTHER MEMBERS OF THE COMMISSION WHO HAVE SERVED SINCE DATE OF PUBLICATION OF VOL. 5

Name	Appointed	Term Expired
AARON P. ANDERSON	Jan. 18, 1917	Jan. 9, 1923
GRANT E. HALDERMAN	Jan. 15, 1919	Apr. 17, 1925
FRANK P. LANNON	Feb. 10, 1920	Apr. 17, 1927
*TULLY SCOTT	Jan. 9, 1923	May 4, 1924
OTTO BOCK	May 16, 1924	Feb. 16, 1931

*Died May 4, 1924.

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PREFACE

None of the Commission's decisions made since the year 1919 heretofore have been printed. The number of applications, cases, etc., filed in recent years has been large. There were made more than twice as many decisions in the last three years of the decade ending in December, 1929, as were made in the preceding seven. It has not been deemed advisable to ask the Legislature to appropriate enough money to print in full all of the decisions.

An attempt has been made to have printed in full the more important decisions. While the selection of decisions by another undoubtedly would vary somewhat, we believe the variance would not be substantial. In addition all abstract propositions and many concrete in nature based upon a particular set of facts have been printed in separate digest or abstract paragraphs.

When no points or propositions were found in an order disposing of an application or case which had been heard, a statement appears herein showing merely the action taken by the Commission.

In order to make the decisions as valuable as possible to those practicing before the Commission, headnotes have been printed at the beginning of the fully reported decisions. There has been printed also a general subject-matter index. We have tried with few exceptions to follow the classification used by Public Utilities Reports, Inc. That company very kindly gave its permission to use the headnotes in those decisions of the Commission appearing in its Public Utilities Reports, Annotated. With rather rare exceptions use has been made of them.

No report is made of numerous Investigation and Suspension orders. Many of them were followed by withdrawal of the rates suspended or abandonment of the action forbidden. Where hearings were held and decisions made, those decisions are reported. Neither is any report made of applications, cases, etc., which were dismissed for lack of prosecution or on motion of applicants or complainants. Many orders have been made authorizing railway carriers to waive collection of undercharges or to open grade crossings. None of such orders, when purely formal and containing no points or propositions, are reported.

WORTH ALLEN,
Chairman of the Commission.

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PUBLIC UTILITIES REPORTS

THE SMUGGLER LEASING CO.

v.

THE ROARING FORK ELECTRIC LIGHT & POWER CO.

[Case No. 178. Decision No. 316.]

Complaint—Necessary number of signers.

1. Demurrer to written complaint by one consumer against electric rates sustained, statute (Sec. 2954, C. L. 1921) requiring complaint to be signed by "not less than twenty-five."

Complaint—On Commission's own motion.

2. Order for investigation of electric rates issued on Commission's own motion after sustaining demurrer to complaint filed by single consumer.

[January 8, 1920.]

Appearances: Hughes & Dorsey and E. I. Thayer, for complainant; Pershing, Nye, Fry & Tallmadge and Robert G. Bosworth, for defendant.

STATEMENT.

By the **Commission**: On January 16, 1919, The Roaring Fork Electric Light & Power Company, hereinafter called the Electric Company, filed with this Commission rate schedule P. U. C. Colo. No. 3, cancelling rate schedule P. U. C. No. 2, advancing rates for electric service at Aspen, Colorado. On February 27, 1919, the proposed rates were suspended, and on April 25, 1919, an order was entered which permitted the schedule to become effective, with certain modifications as specified in such order.

On July 14, 1919, The Smuggler Leasing Company, filed its complaint herein, alleging that the rates for power established by the above new schedule are unreasonable, unjust, and dis-

criminatory, and requesting this Commission to investigate the reasonableness of such rates.

The Electric Company filed a demurrer, alleging that the Commission has no jurisdiction to hear or determine the matters alleged in the complaint, and relied upon the following provision of the Public Utilities Act to support its contention:

Section 45, page 493, Laws Colo., 1913:

"Provided, that no complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates, or charges of any gas, electrical, water, or telephone corporations, unless the same be signed by the mayor or the president or chairman of the board of trustees or a majority of the council, commission, or other legislative body of the county, city and county, or city or town, if any, within which the alleged violation occurred, or not less than twenty-five consumers or purchasers or prospective consumers or purchasers, of such gas, electrical, water or telephone service."

It appearing that the complaint is not signed as provided by the Act, it is necessary to sustain the demurrer. The Commission will, however, in view of the importance of the questions raised by the complaint, avail itself of the provisions of the Public Utilities Act, and this day order an investigation, on its own motion, of the reasonableness of the power rates of the Electric Company.

IT IS THEREFORE ORDERED, That the demurrer of The Roaring Fork Electric Light & Power Company to the complaint herein be and the same is hereby sustained, and the complaint dismissed.

RE EDWARD C. MASON AND JOHN H. KLEIN,
DOING BUSINESS AS
OVER-LAND MOTOR EXPRESS CO.

[Application No. 62. Decision No. 320.]

Certificate of convenience and necessity—Reasonable—Not absolute.

1. Only a reasonable, and not an absolute necessity, is required to be shown for the granting of a certificate of convenience and necessity required under subsection (e) of Secs. 2 and 3, of the Colorado Public Utilities Act.

Certificate of convenience and necessity.

2. Mere fact one of two motor vehicle carriers engaged in business for some time procured certificate first, immaterial in application of other.

[January 17, 1920.]

Appearances: Edward C. Mason, for applicants; A. W. Fitzgerald, for the Green Transfer Company.

STATEMENT.

By the **Commission**: On October 21, 1919, an application was filed with the Commission by Edward C. Mason and John H. Klein, copartners under the name of the Over-Land Motor Express Company, for a certificate of public convenience and necessity, for the operation of a motor truck line between Denver and Boulder and intermediate points for the transportation of freight and express, under the provisions of Section 35 of the Public Utilities Act, approved April 16, 1917. Applicants also filed with the application a rate tariff, rules and regulations and an operating schedule, in compliance with the requirements of the Act and the rules of the Commission.

Notice of the filing of the application was given to the Green Transfer Company which is engaged in like business between Denver and Boulder by auto truck, and which had theretofore applied for and had received from the Commission o certificate of public convenience and necessity.

The application of the Over-Land Motor Express Company sets forth that said company is a copartnership composed of Edward C. Mason and John H. Klein, and that they are engaged in the business of motor transportation of freight between the cities of Denver and Boulder, Colorado, and all intermediate points and territory adjacent thereto; that an office and depot are maintained at 1658 Market Street, Denver, and at 1329 Thirteenth Street, Boulder; that the cities of Denver and Boulder and territory between and adjacent thereto are thickly populated, and that the necessity for quick and extensive service in the transportation of large quantities of freight is a public necessity, and that such freight can be transported by motor

trucks at a great convenience to the public. The application prays authority of the Commission for applicants to operate a motor freight transportation line between said cities and in the territory adjacent thereto.

Upon due notice to the applicants and to the Green Transfer Company, the matter was heard by the Commission at its hearing room, State Capitol, Denver, Colorado, at 10 o'clock A. M., January 5, 1920, Edward C. Mason, a member of the Over-Land Motor Express Company appearing for the company, and A. W. Fitzgerald of Boulder, appearing for the Green Transfer Company in opposition to the granting of the certificate applied for.

The testimony submitted at the hearing on the part of the applicants discloses that the Over-Land Motor Express Company is a copartnership composed of Edward C. Mason and John H. Klein, who entered into the business of transporting freight and express between Denver and Boulder and intermediate points, principally Broomfield, Lafayette and Louisville, about April 1, 1919, over the main traveled highway between said cities and towns; that applicants operate motor trucks daily, except Sundays and holidays, and that more than one truck is operated on such days as the volume of traffic requires; that the daily service is maintained upon substantially the operating schedule filed with the Commission; that applicants' equipment consists of six motor trucks of sundry makes, of from one to three and one-half tons capacity; that permits or licenses in such of said cities and towns as require permits or licenses have been obtained, and that all trucks bear state vehicle licenses as required by law.

It further appears from the evidence of applicants that the reason they had not applied for a certificate from the Commission prior to October 21, 1919, was because of ignorance of the requirements of the Public Utilities Act in that regard; that they knew of the existence of the motor truck line operated by the Green Transfer Company, and had adopted the rates of that company as their guide, and had adhered to such rates except in the matter of prepaid freight by Denver merchants

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as set forth in their tariff on file; that most of the freight tonnage is outbound from Denver. Witness for the applicants testified that they had invested in equipment and other property in the conduct of their business the sum of $12,500.00. The testimony was further to the effect that applicants maintain depots and offices at Denver and Boulder as set forth in their application; that during the nine months of operation they have developed a fairly satisfactory tonnage, and that no attempt has been made to encroach upon the business of the Green Transfer Company by solicitation of its customers or otherwise.

All the above facts, if not conceded, are not denied by the testimony produced on behalf of the opposing company, the Green Transfer Company. It appears from such testimony that the Green Transfer Company succeeded, by purchase, to the property and business of the Hickox Transfer Company on March 1, 1919; that the last named company had been engaged in motor trucking between Denver and Boulder for several years, but that it had not made application for a certificate nor did its successor, the Green Transfer Company, apply for such certificate until July, 1919, though the Green Transfer Company had begun a regular business two years prior to the purchase of the Hickox company in March, 1919, according to the testimony of Bert Green.

The opposition to the granting of a certificate of convenience and necessity to the Over-Land Motor Express Company is based solely upon the ground that public convenience and necessity do not require the operation of another truck line between Denver and Boulder, and that the Green Transfer Company adequately and efficiently meets all the requirements of the public.

Upon this issue the only evidence submitted was that of Bert Green of the Green Transfer Company and Mr. Hickox, formerly in the business and succeeded by the Green Transfer Company, in opposition, and that of Mr. Mason for the applicants. Such evidence was entirely one of opinion, the witnesses in opposition being of the opinion that the public were better served by one than two truck transportation lines, while witness for the applicants frankly stated the belief that the public obtained bet-

ter service since the Over-Land Motor Express Company began operations.

Two lines of railroad have for many years been in operation between Denver and Boulder, the Union Pacific via Brighton and St. Vrain, and the Colorado & Southern through Broomfield direct to Boulder. The Colorado & Southern also has branch lines to Louisville and Lafayette.

Subsection (e) of Section 2, and Section 3 of the Public Utilities Act brings the business of the applicants and the Green Transfer Company within the purview and subject to the provisions of the Act. The Green Transfer Company apparently contends for a strict construction of the statute which reads:

"No public utility shall henceforth begin the construction of a new facility * * * without first having obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such construction; * * *." (Sec. 35, Public Utilities Act.)

It becomes necessary, therefore, to construe the legislative intent and meaning of the phrase "public convenience and necessity" as used in the Act, this question not having heretofore been presented to the Commission relative to public utilities of the character under consideration.

If the legislature intended that a real, actual necessity should be shown to exist in the given case, then the word "convenience" coupled with the word "necessity" in the Act would be superfluous, if not meaningless; for surely whatever is necessary to the public is also convenient for its use. If a necessity strictly must exist to warrant the granting of a certificate of "convenience and necessity," then no such showing was made or can be made by the Green Transfer Company for the granting to it of such certificate, as the lines of railroad traversing this territory certainly were able to and did transport all freight offered for transportation between the points reached long prior to the advent of the motor truck, and but for the development of this comparatively recent method of transportation, would be doing so yet.

The question was before the Public Service Commission of New

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York, where the Troy Auto Car Company, Inc., sought a certificate of convenience and necessity to operate a line of auto busses over certain streets of the city of Troy. The routes selected by the Auto Car Company paralleled within distances of two to six blocks the trolley lines of the United Traction Company, who appeared in opposition.

In an opinion granting the certificate, the New York Commission said, *inter alia,* in which this Commission concurs, as follows:

"The phrase 'convenience and necessity' as used in the law is not to be split in two. If an enterprise is necessary it is certainly convenient, so that if it be required that a general necessity be established the word 'convenience' would be superfluous. Chief Justice Marshall said in M'Culloch v. Maryland, 4 Wheat. 316, 4 L. Ed., 570: 'It is essential to just construction, that many words which import something excessive should be understood in a more mitigated sense,—in that sense in which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison, and is often connected with other words which increase or diminish the impression the mind receives of the urgency it imports.' So here, the word 'convenience' is connected with the word 'necessity,' not as an additional requirement, but to modify what might otherwise be taken as the significance of necessity. Chief Justice Marshall was considering the phrase 'necessary and proper' when he said: 'If the word "necessary" was used in that strict and rigorous sense for which the counsel for the state of Maryland contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word the only possible effect of which is to qualify that strict and rigorous meaning.' So here, to analyze the phrase and to attempt to give each word a separate meaning would be an extraordinary departure from the usual course of the human mind, as it would prefix a word wholly meaningless when taken in connection with a more rigorous word following. Taking the phrase as an entity, it does

not mean to require a physical necessity or an indispensable thing. It is dangerous to undertake to formulate abstract definitions in deciding a concrete case, but we take it that for such purposes as are involved in this and similar applications a public convenience and necessity exists when the proposed facility will meet a reasonable want of the public and supply a need if existing facilities, while in a sense sufficient, do not adequately supply that need. Re Troy Auto Car Company, Inc., P. U. R. 1917A, 700, 706 and 707."

The mere fact that the Green Transfer Company was granted a certificate first in order of time when both it and the Over-Land Company had been engaged in business for some little time prior to its application is a matter of no importance.

An order, therefore, will be issued, to the applicants, granting the certificate of convenience and necessity sought.

ORDER.

Edward C. Mason and John H. Klein, copartners, under the name of the Over-Land Motor Express Company, having applied to this Commission for a certificate of convenience and necessity to operate a line of motor trucks for the transportation of freight and express between the cities of Denver and Boulder and intermediate points, over the route described in their application, and a public hearing having been held thereon, and the Commission being now sufficiently advised in the premises, it is hereby declared that the present and future public convenience and necessity require and will require the exercise of the rights and privileges sought by applicants in their petition, and this order shall be held and deemed to be a certificate of public convenience and necessity therefor.

J. P. ADAMS, *et al.*

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD CO.

[Case No. 170. Decision No. 321.]

Commission—Jurisdiction—Capital expenditures during government control—Construction of station.

Supplement No. 2 amending Supplement No. 1 to General

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Order No. 12 of Director General of Railroads did not deprive Commission of power to order railroad company to make capital expenditure in excess of $1,000.00.

[February 2, 1920.]

STATEMENT.

By the **Commission**: On September 24, 1919, the Commission issued its order in this cause requiring the Chicago, Burlington & Quincy Railroad Company, on or before 90 days from the date of said order, to erect a suitable station building, install an agent therein, with other facilities, at a point on its line of railroad near the center of Section 25, Township 2 North, Range 61 West, Weld County, Colorado, and upon certain conditions prescribed in such order.

On October 30, 1919, a petition was filed by the railroad company for a rehearing, and as grounds for such motion alleged error on the part of the Commission.

Argument was had upon the motion for a rehearing on December 2, 1919. On December 3, 1919, this Commission ordered that the time in which the railroad company shall do the things prescribed in the order dated September 24, 1919, be extended for an additional period of 90 days.

On December 2, 1919, at the hearing then held, the complainants filed in compliance with the conditions of the original order, a quit claim deed from Warren E. Pardee to the Chicago, Burlington & Quincy Railroad, conveying a strip of land for additional right of way; a written offer by Wilbert W. Liese to do the excavation work in pursuance of the terms of the order, with agreement to furnish a sufficient surety bond for the performance of the work; together with duly certified order of the Board of County Commissioners of Weld County, Colorado, ordering the opening of the road to the proposed station site as set forth in the order.

The principal matter urged by the railroad company in the argument and motion for rehearing is that Supplement No. 2

dated July 9, 1919, amending Supplement No. 1 to General Order No. 12 of the Director General of Railroads, deprives this Commission of the right conferred on it by the Public Utilities Law to order anything involving a charge to capital account in excess of $1,000.00.

The Commission is of the opinion that such supplement to said general order does not constitute a limitation on the authority of this Commission, and is solely directed to relations between local operating officers and the directing heads of the Railroad Administration; and that General Order No. 58 of the Director General of Railroads was not modified thereby.

On June 3, 1919, long after original order No. 12 was issued, Walker D. Hines, Director General of Railroads, issued his order to regional directors on the subject of public improvements, containing, *inter alia*, the following:

"Representatives of the Railroad Administration should at all times make it clear to the public authorities that responsibility for capital expenditures rests upon the railroad corporations and not upon the Railroad Administration, and unless specifically authorized by the Division of Law, shall speak only for the Railroad Administration in proceedings before public service or state railroad commissions, or officials of cities, counties, or municipalities."

It appears from the foregoing that the railroad company is clearly the sole proper party defendant in this case. Furthermore, nothing is found in this order of June 3, 1919, to indicate that the construction contended for by the railroad company should be placed on Supplement No. 2 above mentioned.

The Commission being now fully advised in the premises is of the opinion that the petition of the Chicago, Burlington & Quincy Railroad Company for a rehearing should be denied.

ORDER.

It Is Therefore Ordered, That the petition for rehearing filed with the Commission October 30, 1919, by the Chicago, Burlington & Quincy Railroad Company be, and it is hereby, denied.

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MILLS
v.
ROCKY MOUNTAIN PARKS TRANSPORTATION COMPANY.

[Case No. 181. Decision No. 323.]

Commission—Jurisdiction—Motor vehicle line not operating in competition with railroads or street railways.

Under chapter 133, Colorado Sess. Laws, 1915, p. 392, and chapter 134, Colorado Sess. Laws, 1915, p. 393, an automobile transportation corporation, in order to come within the jurisdiction of the Commission, as a public utility, or common carrier, must be operating in competition with railroads or street railways.

[February 9, 1920.]

Appearances: Lee & Shaw, for complainant; John W. Graham, for defendant.

STATEMENT.

By the **Commission**: Complainant filed complaint against the defendant on September 19, 1919, alleging, *inter alia*, that complainant is the keeper of, and operates, the Long's Peak Inn, a hotel in Larimer County, Colorado, in the Estes Park region, now designated as the Rocky Mountain National Park, and that his post office address is Long's Peak, Colorado; that defendant is a corporation engaged in the transportation of passengers, freight and express between fixed points over established routes, by means of automobiles, indiscriminately accepting and laying down passengers, freight and express over such routes, and that its post office address is Estes Park, Larimer County, Colorado; that complainant's hotel is about nine miles distant from Estes Park village, and that from May to November in each year, a period of about seven months, it enjoys a large patronage from tourists or visitors to the Estes Park region, and that it is essential that complainant have transportation for his guests and their baggage over the roads affording access to complainant's hotel; that one such road is from Loveland, Colorado, and the Big Thompson Canon to Estes Park, and thence via the public highway to the hotel of the complainant; that the other such road is via the South St. Vrain creek route from the city of Longmont; that for years past tourists and visitors have en-

joyed the privilege of going to complainant's hotel via either of the said routes, and it is desired from the standpoint of the convenience and the pleasure of visitors that they be afforded opportunity to use both of said routes; that in the past visitors usually have gone in by one of the said routes and out by the other in order to enjoy the scenic beauties of the trip to Estes Park, and that a curtailment of this privilege will result in impairing and diminishing complainant's business.

Complainant further alleges that defendant is in the business of carrying passengers and freight in automobiles, for hire, and that it is a common carrier as defined by Section 2 (e) of chapter 127, S. L. 1913, as amended, and that defendant operates automobiles into and out of the Estes Park region between Estes Park village and Loveland and Estes Park village and Longmont, and throughout the Estes Park region, and into and through the Rocky Mountain National Park wherein complainant's hotel is situate.

Complainant also alleges that defendant enjoys a virtual monopoly of the transportation business into, through and out of the Rocky Mountain National Park and contiguous territory, by virtue of a certain contract had with the United States through the secretary of the Department of the Interior, and that for this reason complainant is obliged to rely and depend upon defendant for service in transporting visitors to and from his hotel in said Park; that for several years past the defendant has operated a stage service leaving Estes Park post office in the morning to Long's Peak post office, which last named post office is at complainant's hotel; that at the beginning of the season of 1919 defendant discontinued morning stage service and refuses to reinstate such service, which is greatly to the detriment and inconvenience of the patrons of complainant's hotel and of such hotel business. Complainant alleges on information and belief that such morning stage service has been remunerative to defendant in the past and that it could be operated without loss as it had in the past been operated by defendant.

The fifth paragraph of complaint alleges that prior to about

August 1, 1919, defendant had sold tickets to Estes Park from Longmont by the way of the South St. Vrain route, which passed by complainant's hotel and returned by the same route, and that on or about August 1, 1919, defendant refused and continues to refuse to sell such tickets, and has since that date conveyed only such passengers as requested it by way of the South St. Vrain route to Longmont, but refuses to carry their baggage, which compels passengers desiring to go out via the South St. Vrain route to Longmont to have their baggage hauled from complainant's inn to Estes Park and thence out via Thompson Canon route to Loveland at a cost of $2.50 per cwt.; that the baggage rate from Estes Park to the railroad is $1.50 per cwt., and prior to the inauguration by defendant about August 1, 1919, of the foregoing practice passengers could have baggage hauled to the railroad at Longmont via South St. Vrain road at $1.50 per cwt., which rate is the same as then and now charged for baggage hauled over the Thompson Canon road; that defendant has ample facilities for the transportation of passengers and their baggage from complainant's hotel to Longmont over the South St. Vrain road and would incur no expense for equipment in addition to that now owned and used by defendant in operating its stage line aforesaid.

Complainant also states that prior to making complaint he made demand upon the defendant for the resumption of service from Estes Park village to said Long's Peak Inn and for the carriage of baggage at the regular rate of $1.50 per cwt. over said St. Vrain road which demands were refused, and that the discontinuance of such morning service by the defendant from Estes Park to complainant's hotel and the refusal to carry baggage over said South St. Vrain road to or from Longmont, is wholly arbitrary and done with intent to discriminate against complainant and to require guests of complainant to pay an unreasonable and discriminatory charge for transportation of their baggage, and to compel prospective guests of the complainant's inn coming from Estes Park village to pay an exorbitant, arbitrary and unreasonable charge for special transportation service between such points. Complainant further alleges that the fore-

going practices of the defendant are against and contrary to the provisions of Section 13 (a) and (b), Section 18 and Section 23 (a) of the Act, and that such practices are unfair, unjust and discriminatory as against complainant within the meaning of the Public Utilities Act.

Complainant prays that a hearing be had on the allegations of his complaint and that the practices of the defendant complained of be declared unfair, unjust and discriminatory; that defendant be required by this Commission to resume the morning service between Estes Park and Long's Peak Inn, and that it be required to transport passengers and their baggage to and from complainant's hotel and Longmont at reasonable rates to be fixed by the Commission.

On October 10, 1919, defendant filed motion to dismiss the cause on the ground that this Commission has no jurisdiction whatsoever over the defendant, and in support of said motion it relies upon the records, files and proceedings in the cause, and the conclusions heretofore reached by the Commission in relation to the defendant and to the conduct of its business. Defendant also filed its verified answer contemporaneously with the filing of the foregoing motion.

The cause was set down for oral argument upon the motion of the defendant to dismiss the cause, and argument was heard by the Commission at its hearing room, Capitol Building, Denver, on November 6, 1919.

Upon the oral argument defendant's counsel relied upon the opinion of the Attorney General of Colorado given the Commission October 25, 1915, in response to an inquiry as to whether or not the Commission had jurisdiction over automobile companies carrying passengers or freight to points within the state to which no railroad extends, under the provisions of Section 2 (e) of the Act, as amended, chapter 134 S. L. 1915, and also upon the informal opinion given by the Commission February 2, 1918, in answer to a letter of inqury from the defendant dated January 31, 1918. The opinion of the Commission was to the effect that the defendant was not in competition with a common carrier as such competition is defined in the Act, and that there-

fore the Commission had no jurisdiction over the acts or business of the defendant, which opinion was founded upon the formal opinion theretofore and in 1915 given the Commission by the Attorney General of the State of Colorado.

The issue to be decided in this cause is one of law raised by the pleadings, which is:

"Under the allegations of complainant's complaint (which for the purposes of this motion are deemed to be true) is the defendant a 'common carrier' under the provisions of the Public Utilities Act as amended by chapter 134 S. L. 1915, and is the defendant a public utility within the meaning of chapter 133 S. L. 1915?"

It was the contention of the defendant at the oral argument that it was neither a "common carrier" nor a "public utility" within the meaning of the above laws, and by the opinion of the Attorney General above referred to, that contention is sustained. (See report Attorney General, 1915-1916, pp. 55-58.)

On the other hand, counsel for complainant vigorously contended that defendant's business is such that the Commission has jurisdiction over it through the operation of the Public Utilities Act, and that it is a "common carrier" within the meaning of Section 2 (e) as amended by chapter 134 S. L. 1915. The Acts of 1915 above referred to read as follows:

"Chapter 133 S. L. 1915, p. 392 . . .

"Section 1. Any person, firm, association of persons or corportation, now or hereafter engaged in transporting passengers, freight or express for hire in this state in any automobile or other vehicle whatever, and operating for the purpose of affording a means of transportation similar to that afforded by railroads or street railways, and in competition therewith by indiscriminately accepting, discharging and laying down either passengers, freight or express, between fixed points or over established routes is hereby declared to be affected with a public interest, and to be a public utility, and subject to the laws of this state now in force and effect or that may hereafter be enacted pertaining to public utilities."

"Chapter 134 S. L. 1915, p. 393 . . .

"Section 1. That subdivision 'e' of Section 2 of an Act entitled 'An Act Concerning Public Utilities, Creating a Public Utilities Commission, Prescribing Its Powers and Duties and Repealing Certain Acts and Parts of Acts in Conflict Therewith' be and the same is hereby amended to read as follows:

"2 (e). The term 'common carrier,' when used in this Act, includes every railroad corporation; street railroad corporation; express corporation, dispatch, sleeping car, dining car, drawing room car, freight, freight-line, refrigerator, oil, stock, fruit, car loaning, car renting, car loading; and every other corporation or person affording a means of transportation, by automobile or other vehicle whatever, similar to that ordinarily afforded by railroads or street railways, and in competition therewith, by indiscriminately accepting, discharging and laying down either passengers, freight or express between fixed points or over established routes; and every other car corporation or person, their lessees, trustees, receivers, or trustees appointed by any court whatsoever, operating for compensation within this state."

Chapter 134 was approved April 9, 1915, and Chapter 133 three days later on April 12, 1915, and as they relate to the same general subject both Acts should be construed together in arriving at the legislative intent.

The phrase "in competition therewith" found in both the above Acts is responsible for the issue of law in this cause, for without it in the Act no trouble would be encountered in construing the Act. The original Act of 1913, commonly called the "Public Utilities Act," did not contain this phrase, nor, indeed, any reference to automobiles *eo nomine*. The general assembly at its twentieth session in 1915 saw fit to legislate upon the subject as expressed in the above enactments.

Mr. Graham for the defendant contends that the Commission has no jurisdiction over automobiles or other means of transportation of passengers or freight, even though conducted over established routes or between fixed points, unless such points or routes are served by railroad or street car competition directly as the word "competition" is generally defined and understood; and as it is admitted that there is no line of railroad or street

railway into Estes Park from either Loveland or Longmont or, as a matter of fact, from any other point at all, the business being conducted by defendant, though affording service similar to that ordinarily afforded by railroads by the indiscriminate acceptance and discharge of passengers, freight and express between those points, is not in competition with "railroads" or "street railways" for the simple reason that there is no railroad or street railway line into Estes Park to be in competition with; hence defendant is not within the meaning of the Act as expressed, and the Commission is without jurisdiction.

Mr. Lee has filed a voluminous and exhaustive brief fortifying his position at the oral argument, that the kind of competition meant by the statute is not that for which another is striving at the same time, but that by the phrase "in competition therewith" is meant the kind of competitor that indiscriminately accepts, discharges and lays down passengers, freight or express between fixed points or over established routes similar to that service as ordinarily furnished and afforded by railroads or street railways. The contention is upheld by complainant's counsel with a degree of perseverance as commendable as is the ingenuity and accomplishment of counsel in the preparation of the brief. But to sustain that theory of interpretation would be to ignore the ordinary and well understood meaning of the phrase quoted, "and in competition therewith"; indeed, it would become necessary to read the statute as though the phrase were not there, for without the use of the words of qualification, the clear meaning of the statute would be as contended for by complainant.

But under all the canons of construction of statutes, no court, much less this Commission, may disregard the usual and well known meaning of words in common use; for when such words are used it is to be presumed that the legislature intended thereby the usual and common meaning as understood by people generally, and there would appear to be no doubt concerning the usual and common meaning of the words "and in competition therewith" to be that striving to secure an object or thing indulged in by two or more persons or corporations at the same

time. The use of the word "competition" conveys to the mind a clear, distinct and definite meaning as it ordinarily is used in this statute. As was said by Chief Justice Marshall in construing the legislative meaning of the words "necessary and proper" in the case of M'Culloch v. Maryland "if the word 'necessary' was used in that strict and rigorous sense for which the counsel for the state of Maryland contend it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word the only possible effect of which is to qualify that strict and rigorous meaning." M'Culloch v. Maryland, 4 Wheat. 316; 4 L. Ed. 570.

So in this case to give to the words "in competition therewith" the construction so forcibly contended for by counsel for complainant "would be a departure from the usual course of the human mind, as exhibited in composition." The Commission is satisfied that the legislature meant something by the use of the words of qualification or limitation and that the meaning was such as would not be a departure from "the usual course of the human mind, as exhibited in composition," and that the intent was to give jurisdiction to the Commission only in event an automobile service for the carrying of passengers and freight is in actual competition with a railroad or street railway in the conduct of its business over an established route or between fixed points.

In thus holding, the Commission recognizes the logic and reason advanced by complainant's counsel, and from the broad standpoint of the public interest such automobile service ought in any event be made the subject of state regulation, but that is a matter for the legislature to correct, if thought needful, and not for this Commission, when it is dependent upon a construction of a statute contrary to the plain and usual meaning of the words of common usage and understanding.

The Colorado statute is distinctive as pertains to the subject under discussion, and the Commission can find no statute of a similar wording in the public utilities acts of the various states. The authorities cited by complainant are not applicable to this case for this reason, and the cases examined disclose such a

radical difference in the language used from that of the Colorado statute, that decisions of other jurisdictions are entitled to but little consideration as affording precedents in the construing of the Colorado statute.

Complainant urges as a further reason for the construction contended for, that a different construction would render the statute unconstitutional as being in conflict with Article V, Section 22, of the constitution of this state, which forbids class legislation. In view of the enactment by the people of this state of a law amending Section 1 of Article VI of the constitution, S. L. 1913, p. 678, title "Recall of Decisions," the power to question the constitutionality of any law of this state being vested solely in the Supreme Court, the Commission will not assume to pass upon such question.

For the reasons stated, therefore, the Commission is of opinion that the motion of the defendant to dismiss this cause for want of jurisdiction is well taken.

ORDER

IT IS THEREFORE ORDERED, That the motion of the defendant, The Rocky Mountain Parks Transportation Company, to dismiss this cause for the reason that this Commission has no jurisdiction to hear and determine the same under the allegations of complainant's complaint by virtue of the statute, be, and the same is hereby, sustained, and that this cause be, and the same is hereby, dismissed.

FARMERS ELECTRIC & POWER COMPANY

v.

TOWN OF AULT.

[Case No. 167. Decision No. 334.]

Certificates of convenience—Construction before application—Effect.

1. The fact that a town began the construction of an electric light plant before it had secured a certificate of convenience and necessity from the Commission, does not preclude the Commission from subsequently granting a certificate to it upon a proper showing.

Monopoly and competition—Occupied territory—Service at time of threatened competition.

2. A public utility may not perform its duty of furnishing adequate service to its patrons in a negligent, careless, and inefficient manner, until complaint is made and then correct its service and insist upon the field being protected against competition.

Certificates of convenience and necessity—Consent of municipality—What constitutes.

3. A vote by the board of trustees of a town to install an electric light plant sufficiently shows the consent of a municipality to the grant of a certificate of necessity by the Commission, required by subdivision c of Sec. 35 of the Public Utilities Act.

Certificates of convenience and necessity—Municipal plant—Taxpayers' vote.

4. The fact that the majority of the taxpaying voters of a town has not by vote approved the construction of an electric plant, as required by Sec. 6325 of the Colorado revised statutes of 1908, does not operate to prohibit the town from receiving a certificate of convenience and necessity from the Commission, the legality of the municipality's action being a question for the courts.

Certificates of convenience and necessity—Matters at issue—Materiality.

5. Allegation by a town that it had made a bargain for the purchase of the distribution system of an electric utility, and denials of such allegation by the utility are immaterial, upon the issue of the public convenience and necessity for the construction of an electric plant by the town.

[May 5, 1920.]

Appearances: Harry E. Churchill, Esq., for complainant; F. R. Lilyard of Lilyard & Simpson, for defendant.

STATEMENT.

By the **Commission**: This cause has been before the Commission since the 22nd day of January, 1919, upon which date complainant filed its complaint against the defendant town. Two hearings have been held at Ault, Colorado, for the purpose of taking testimony, and two hearings have been held at the hearing room of the Commission in its office in the State Capitol, Denver, Colorado, for the consideration of demurrers, motions and other pleadings filed in the cause.

To the complaint filed January 22, 1919, the defendant town demurred and upon hearing and consideration of the grounds thereof, the Commission entered its order and decision on May 6,

1919, overruling said demurrer. In its said order the salient features of the alleged facts as set forth in the complaint were stated, so that a repetition thereof is unnecessary.

Farmers Electric & Power Co. v. Ault, 1919-E, P. U. R. 371; s. c. 5 Colo. P. U. C. 693.

The demurrer challenged the jurisdiction of the Commission to entertain the complaint, for the alleged reason that the Public Utilities Act, Ch. 127, Laws 1913, conferring upon the Commission jurisdiction over cities and towns engaged in or proposing to engage in operating the kinds of business denominated public utilities by the terms of the act, was unconstitutional under certain sections of the constitution of the state of Colorado, and of the constitution of the United States, which are specified in the decision above. Upon the overruling of the demurrer the defendant answered the complaint within the time allowed, in which answer the defendant reserved its objection and exception to the order overruling the demurrer, and expressly reserving and not waiving its contention as to matters alleged in its demurrer.

Defendant's answer was filed on May 29, 1919, and in addition to denying the material allegations of the complaint, admitted that the defendant was constructing an electric light and power system within the limits of the town of Ault as alleged in the complaint, and admitted that it had not applied for nor received a certificate of convenience and necessity therefor as alleged in the complaint.

Defendant further pleads in said answer four different and separate answers, cross complaints and defenses, the allegations of which will not here be summarized for the reason that permission was granted it to file an amended answer, which it subsequently did.

On June 5, 1919, the complainant filed its reply to the answer of the defendant, which reply denied all the material allegations of the answer, cross complaint and defense, and also by way of demurrer, questioned that part of said answer styled "Further Answer, Cross Complaint and Defense," four in number, set forth on pages 2 to 17 inclusive of said answer, on the ground

that said further separate answers, cross complaints and defenses, nor either of them, do not state facts sufficient to constitute a defense to complainant's cause of action.

Subsequently and on July 16, 1919, complainant filed its motion, supported by affidavit, for an order of this Commission restraining and enjoining defendant from further operating its municipal electric plant until it shall have obtained from this Commission a certificate of public convenience and necessity therefor. Such restraining order was not issued, but upon agreement of the defendant town with the members of the Commission that no further effort would be made by defendant to extend the operations of its electric light and power plant until such time as a hearing before the Commission was had, and it received authority so to do, the matter rested during the summer vacation until on September 16, 1919, when upon due notice having been given to all parties, the cause came on regularly for hearing at the armory in the town of Ault, before the entire Commission. At such hearing complainant introduced evidence in support of its complaint, to the effect that no vote had ever been taken by the taxpayers of the town of Ault upon the question of the construction of such electric light and power plant, and that no authority of said municipality had ever been given for the construction of such plant, except by a resolution or motion of the board of trustees of said town passed at its meeting of October 4, 1918, which was *ultra vires*, invalid and void.

The defendant town sought to introduce evidence at said hearing of September 16, 1919, in substantiation of the allegations of its answer and such parts of its cross complaint and defense as had not theretofore been stricken. The Commission refused the admission of such testimony unless the defendant town applied for a certificate of public convenience and necessity under the Public Utilities Act, and the defendant town, through its counsel, then expressly refused to so apply, and also refused to have its answer treated and regarded as an application for a certificate of public convenience and necessity; and the proof so sought to be introduced was denied. Defendant town, however, did make an offer of such proof, and was given ten days

within which to make application for a certificate of public convenience and necessity should it elect so to do.

On September 25, 1919, the defendant town filed with this Commission its amended answer and cross complaint in which it reserves its objection to the action of the Commission in overruling its demurrer to the complaint and expressly reserves and does not waive its contention as to the matters set forth and alleged in its demurrer. In its amended answer and cross complaint the defendant admits the allegations contained in paragraphs 1 and 2 of the complaint and denies upon information and belief the allegations of paragraph 3 of the complaint, except that it denies the allegations set forth in the last paragraph of page 4 of the complaint. Defendant town denies the allegations contained on pages 5 and 6 of the complaint, except that defendant admits that it is constructing and has constructed an electric light and power system within the limits of the town of Ault and that it has not heretofore made application to this Commission for a certificate of authority.

The answer contains also four so-called and styled "Further Answers, Cross Complaints and Defenses." Upon motion of the complainant the second and third of said further answers, cross complaints and defenses were stricken as being irrelevant and immaterial to any issue in this cause.

The first "further answer, cross complaint and defense" alleges that defendant is a municipal corporation organized under the general laws of the state of Colorado; that on the 4th of March, 1913, the defendant granted to Walter J. Farr the privilege of constructing and operating an electric light and power system within the corporate limits of the town of Ault, and that such right or privilege was not and is not an exclusive privilege; that one of the conditions for the granting of the said privilege was that the said Walter J. Farr, his successors and assigns, should install and keep in good order all poles, posts, wires, pipes and other appliances placed upon or under the streets or highways of said town, but that said Farr and his successor, the complainant, have wholly failed to comply therewith, in that the present condition of the system maintained and operated by

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the complainant is now, and for a long time last past has been, in such condition as to be a menace to the life and property of the inhabitants of the town of Ault; that many of the wires are without insulation; that transformers are insecurely and improperly installed and poles are in bad condition; that plaintiff maintains a high tension line running through the main street of the town carrying 6600 volts which is in bad condition, and endangers the life and property of the inhabitants of said town. It is further alleged by the defendant that the transmission system of the complainant is composed of the poorest kind of wire from which the insulation has been worn off in many places and which the complainant fails to replace; that the wires of the distributing system are in such poor condition that they sag and that the wind causes them to come together, causing sparks and fire which is dangerous to the lives and property of the inhabitants of the town; that the lights furnished to consumers are frequently out for hours and sometimes days at a time because of broken wires and poor condition of the system, and that the complainant company requires hours and sometimes days before it attempts to make the necessary repairs; that the complainant maintains no employe in the town of Ault, or any person whatever, to whom the defendant and its inhabitants may report trouble; that on many occasions the residents of Ault have been compelled to remain in darkness many hours; that the merchants of the town are caused a great deal of inconvenience and loss of property and sales of merchandise through the negligence of the complainant on occasions when the lights are out.

It is further alleged that the distribution system installed and operated by complainant is an ungrounded system and that by reason of that fact, the wires, fuses and lights are easily burned out, and that by reason of its being an ungrounded system it constitutes a menace to the lives and property of the inhabitants of the town.

It is further alleged that during the summer of 1918 the town was without street lights for a period of approximately three weeks occasioned by the neglect of the complainant company to make necessary repairs; that by reason of the faulty construc-

tion of its lines, garages, blacksmith shops, machine shops and other establishments are often for hours at a time, and occasionally for days at a time, without light or power because of the lack of current.

It is further alleged that those who have desired to have their properties connected with complainant's system have on many occasions been kept waiting for months without light by reason of the neglect or refusal of complainant company to make proper connections; that by reason of faulty construction of complainant's distributing system, a storm will render the system unserviceable; that at one time the lights were out every Saturday night for a period of about two months, causing loss and inconvenience to the merchants of the town as well as to the inhabitants generally; that on many occasions the operation of moving picture shows has been interfered with because of lack of current, causing loss of revenue to the owners thereof.

The tenth paragraph of said first "answer, cross complaint and defense" alleges that the officers of the town have repeatedly requested, petitioned and importuned the complainant to repair its system and place the same in proper condition so as to give satisfactory service to the users of complainant's power and light and place its system in a safe condition so as not to endanger the lives and property of inhabitants of the town, but notwithstanding such requests the complainant continued to allow its distribution system to deteriorate and be a menace to the lives and property of inhabitants of the town, and others, and complainant continues to operate said system in a negligent manner, with the result that light and power users and consumers are greatly inconvenienced thereby and do not receive adequate and efficient service.

The fourth "answer, cross complaint and defense" in said amended answer alleges in a general way that the electric system maintained and operated by the complainant within the corporate limits of Ault is in a poor state of repair, its construction faulty and of poor material and that the complainant refuses to repair the same so that it is of little value; that the town of Ault is increasing in population and business and dwelling

houses, and that it requires and demands a modern system of electric light and power in order that its citizens and inhabitants may be safely and conveniently furnished with such light and power.

Said fourth defense further alleges that the defendant is not interfering or attempting to interfere with the operations of complainant's system, but that the safety and convenience of residents of the town necessitate and require the construction and operation of the plant and system now constructed by the town, and that operation of the town's plant will in nowise interfere with the operation of complainant's system. The town further alleges that during the pendency of the action it will refrain from furnishing power or light to any others than those who are now being served through its system, and will do no further work thereon other than to keep the same as now constructed in a safe condition to efficiently serve the purposes for which it was built in serving users of its current for power and electric light.

It is further alleged that the complainant maintains no power plant for the generation of its electric current within the said town of Ault, but complainant attempts to furnish light and power to said town and its inhabitants through a system which derives current at Greeley, or near the city of Greeley, where it receives electric current generated at or near the town of Louisville, in Boulder county; and that by reason thereof the complainant is unable to furnish either light or power to Ault or its inhabitants in an efficient and satisfactory manner as is its duty to do, and as is necessary for the public safety and convenience of the town and its inhabitants.

It is further alleged in the cross-complaint that effort had been made by the town to purchase the complainant's distribution system, and that relying on the representations of said complainant company that it would dispose of its distribution system to the town, the defendant town began negotiations for the construction of an electric generating plant in the town, and that after the town had begun such construction and obligated itself for large sums of money for the installation of said light

and power plant, that then the complainant notified the town that complainant would not dispose of its distributing system to said town.

That by reason of the facts and matters set forth in defendant's amended answer, the defendant town began the construction of its said electric light and power plant and has completed the same, and that the defendant and its inhabitants are desirous that this Commission grant to it proper relief in the premises, including the issuance of a certificate of authority to construct and operate an electric light and power plant within the corporate limits of the town of Ault, to the end that the residents thereof may be safely and adequately provided with electric current for lighting and power purposes; and prays that the complainant's complaint be dismissed and that complainant be forbidden to interfere with defendant town in the construction and operation of its said electric system, and that upon hearing the Commission issue to it a certificate of public convenience and necessity.

On the same day that said amended answer of the defendant was filed, to-wit, September 25, 1919, the Commission made and entered its order herein in and by which the Commission found that although the town of Ault was furnishing street lighting for the town of Ault, and also electric service to certain consumers in said town, early hearing of the matters involved in this cause could not be had, and that to order a total discontinuance of service by the defendant would cause considerable inconvenience to the public; therefore the Commission found under all the circumstances of this cause, the defendant town should, and it was thereby commanded absolutely to, refrain and desist from furnishing light or power to any others than those who were then being served by said municipal system, and that the defendant town should not in any particular extend its system further than the same was then constructed; and the defendant town should do no more construction work save and except such as was necessary to keep its system as then constructed in a safe condition, and that defendant should not connect any additional customers or consumers of light or power to its plant or

in any way or at all extend the operations of its present system and plant for furnishing light or power pending the final determination of this cause.

Farmers Elec. & P. Co. v. Ault, 5 Colo. P. U. C. 826, 852.

On September 30, 1919, complainant filed its motion to strike from defendant's amended answer certain parts and portions thereof, and also demurred to a part or portion of defendant's said amended answer. Said motion and demurrer was heard by the Commission at its hearing room, State Capitol, Denver, Colorado, on October 8, 1919, all parties being notified and represented and oral arguments were heard thereon.

On October 9, 1919, the Commission made and entered its decision and order in and by which the motion to strike the second and third defense, answer and cross complaint of the amended answer of the defendant town, was sustained and said second and third defense, answer and cross complaint were stricken from said amended answer. The motion to strike the first and fourth defense, answer and cross complaint was denied, the demurrer of the complainant was overruled, and complainant given time within which to reply to said amended answer and cross complaint.

Farmers Elec. & Power Co. v. Ault, 5 Colo. P. U. C.

On October 23, 1919, the complainant filed its reply to defendant's answer and answer to defendant's cross complaint in which it admits that the defendant town is a municipal corporation organized under the general laws of the state of Colorado; admits that defendant municipality on March 4, 1913, granted to Walter J. Farr, his successors and assigns, the privilege of constructing and operating an electric light plant as alleged in the cross complaint; admits that one of the conditions of the granting of such privilege to said Farr, his successors and assigns, was to install and keep in good order all poles, posts, wires, pipes and other appliances, but denies that said Farr, his successors or assigns, including complainant, has failed in any manner to comply with the terms of the franchise; denies that said system as maintained and operated is now and for a long time past has been in such condition as to be a men-

ace to the lives and property of the inhabitants of Ault; denies that many of the wires are without sufficient insulation; denies that its transformers are insecurely and improperly installed, and denies that the poles of its system are in bad condition; complainant admits that it maintains a high tension line of 6600 volts through the main street of the town, but denies that the same is in bad condition or that in many places the same is wholly without insulation, or that the condition of the same endangers the lives and property of the inhabitants of Ault; denies that its transmission system is composed of the poorest kind of wire from which insulation has been worn off, and denies that the wires on complainant's system are poorly strung and in such a poor condition that the wind causes them to come together, causing sparks and fire and thereby endangering the lives and property of the inhabitants of Ault. Complainant denies that the lights furnished to its consumers are frequently out for hours and sometimes days at a time and that complainant has required an unusual number of hours or days before it attempted to make necessary repairs. Complainant denies that it maintains no employe or any person at the town of Ault to whom the defendant or its inhabitants may make complaint, and denies that on many occasions the residents of the town have been compelled to remain in darkness when lights were out; denies that merchants were caused great inconvenience and loss of property and sales of merchandise through the neglect of complainant on occasions when said lights were out.

The fifth paragraph of complainant's reply admits that its installed system is what is known as an ungrounded system, but complainant denies that by reason thereof wires, fuses and lights are easily and often burned out, and denies that because its system is ungrounded it is a menace to the lives and property of inhabitants of the town.

Complainant admits that during the summer of 1918 the town of Ault was without street lights for a short time, but denies it was for a period of three weeks, and denies that it was by reason of the negligence of the complainant in not making repairs, and avers that complainant was unable to keep said street lights in

repair by reason of the fact that it was then unable to secure material or sufficient experienced labor to repair its said system promptly, on account of war conditions.

The seventh, eighth, ninth, and tenth paragraphs of the reply deny categorically said numbered paragraphs of defendant's said amended answer.

Complainant admits that it maintained no plant for the gentained in what is styled "further answer, defense and cross-complaint," commencing at the top of page 7 and terminating near the top of page 8 of said amended answer.

Complainant admits that it maintained no plant for the generation of electric current within the corporate limits of the town of Ault as alleged in what is styled "further answer and affirmative relief," on page 8 of defendant's amended answer, admits that it furnished light and power to the town of Ault by means of current derived from The Western Light and Power Company and delivered to complainant at or near the city of Greeley, but denies that it is unable to furnish either light or power to the citizens and inhabitants of Ault in an efficient and satisfactory manner as is necessary for the public safety and convenience.

Complainant further denies that during the years 1917 and 1918 the defendant town had made numerous efforts to purchase complainant's distributing system and denies that it expressed to members of the town board of trustees a willingness or a desire to sell its said system within the town of Ault, and denies that the town of Ault in reliance upon the promises of complainant began negotiations for the construction of an electric light and power plant within the town of Ault; but avers on the contrary that without complying with the law in any particular whatsoever, without having submitted the matter to a vote of the taxpayers of the town or having obtained a certificate of public convenience and necessity from this Commission, the said town of Ault began negotiations for the construction of an electric light and power plant within the town of Ault, and that it entered into a contract for such construction and obligated itself for a large sum of money for such construction,

and that it has built a large portion of its system as now constructed. Complainant further denies that it ever informed the defendant town that it refused to sell to the defendant town its said system pursuant to the provisions of the statute in that behalf.

Complainant admits that the defendant town began the construction of said electric light and power plant and has completed the same, but denies that the citizens of Ault who are taxpayers have expressed themselves in favor thereof, or that they are desirous that this Commission grant to the town of Ault a certificate of authority to construct and operate an electric light and power plant within the corporate limits of said town.

Further answering said amended answer, complainant avers that the defendant town is not entitled to have issued to it by this Commission a certificate of public convenience and necessity to construct and operate its system now already constructed, for the reason that said town has not heretofore, by its board of trustees, passed any ordinance or submitted the matter as to whether or not said town should erect an electric light plant or works to a vote of the taxpayers voting on the question at any general or special election, nor has the town been authorized by a majority of the voters and taxpayers of said town under the law of voting on the question to construct and operate an electric light and power plant within the said town as required by law.

Complainant further alleges that the defendant constructed a light and power plant without first having asked for and obtained a certificate of public convenience and necessity; that defendant's application to this Commission for the issuance of a certificate of public convenience and necessity for the construction and operation of its electric light system within the town is contrary to law, and especially to subsections a, b, c, d, e and f of Section 35 of the Public Utilities Act, effective July 16, 1917, and complainant prays that this Commission enter an order denying to defendant town any certificate of public convenience and necessity for the construction and operation of an electric light and power plant in said town, and to enter an

order absolutely prohibiting the town from further constructing or operating in any way or at all its electric light and power system, until the defendant shall have made application to this Commission showing that it has complied with the law entitling it to construct and operate such system as a public utility, and also prays for general relief.

On November 6, 1919, defendant town filed its replication to complainant's reply to defendant's amended answer, in and by which the defendant town denies all allegations of new matter in paragraphs 6 and 8 of complainant's reply, and denies all allegations set forth in complainant's reply except that the town admits that it has not yet obtained from this Commission a certificate of public convenience and necessity.

On February 21, 1920, complainant filed its motion, supported by affidavit, alleging violation of the order of the Commission of September 25, 1919, by the defendant town, in that it had connected and furnished electric light to divers and sundry citizens of said town in violation of said order of September 25, 1919, and asking that a citation issue adjudging said town in contempt of said order and that it be punished therefor. In pursuance thereof a citation was issued by the Commission directed to the town of Ault on February 25, 1920, directing and commanding said town, to show cause, if any there be, why it should not be adjudged in contempt for violation of said order and subjected to the penalties provided by the Public Utilities Act. Said citation was made returnable March 1, 1920, at the town of Ault at the same time as the final hearing on the main issues involved herein was to be held. At the hearing on March 1, 1920, the defendant town asked for and was given fifteen days within which to make a return to said citation, and said return was filed on March 15, 1920. So far as the issues involved in the alleged violation by the town of the order of the Commission of September 25, 1919, are concerned, such matter will be considered and determined in a separate proceeding and be made the subject matter of a supplemental order herein.

Pursuant to notice to all parties concerned the Commission held a final hearing upon the merits of the matters involved in

this case, at 11 o'clock A. M. March 1, 1920, in the town of Ault, Colorado, at which all parties interested appeared. Testimony was heard by the Commission at the hearing which consumed all of March 1 and the greater portion of March 2, including one night session. The issue inquired into was upon the question as to whether public convenience and necessity require the construction of an electric plant or system by the town of Ault under the allegations contained in its amended answer and denied by complainant. Such testimony was voluminous and much of it was irrelevant and immaterial to the real issue in the cause, such real issue being: Does the public convenience and necessity require or will it require the construction of an electric light and power facility by the town of Ault, and the granting to said town by the Commission of a certificate of public convenience and necessity therefor? That was the issue and the only issue before the Commission which may properly be considered.

It is true that the town proceeded to construct and had begun to operate said electric facility without first having applied to the Commission and having obtained from it a certificate that the present or future public convenience and necessity require or will require such construction, as provided by subsection (a) of Section 35 of the Public Utilities Act effective July 16, 1917, which reads:

"No public utility shall henceforth begin the construction of a new facility, plant or system, or of any extension of its facility, plant or system, without first having obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such construction; * *"

The defendant town admits that it began the construction of its plant or system and practically had completed the same without complying with the provisions of the above Act, and complainant contends that, it being admitted that defendant town did not first obtain such certificate, the Commission is thereby precluded from granting the defendant town a certificate of public convenience and necessity. This involves a construction

by the Commission of the legislative intent in the use of the language of subsection (a) of Section 35 aforesaid, and while the Commission deprecates and condemns the methods pursued by the defendant town in the construction of its electric facilities and its ignoring of the plain requirements of the statute in that regard, yet the Commission is not prepared to say that the prior obtaining of a certificate is under all circumstances a prerequisite to its power and right to grant such a certificate. A public utility constructing a plant or system without first having obtained such certificate is incurring the risk that it may be unable to prove when it does apply that it is entitled to a certificate of public convenience and necessity. So far as the existing utility is concerned it is in no worse condition if the certificate be granted after than before construction. The real crux of the matter is: Does the public convenience and necessity require or will it require such construction? It therefore becomes necessary for the Commission to construe subsection (a) of Section 35 of the Public Utilities Act, and in construing it to mean that a certificate of public convenience and necessity may be issued after construction, the Commission announces that this decision will not be taken as a precedent to govern its future action in that regard.

The matter presents many difficulties and the Commission has not been cited to any authority, nor has it been able through diligent effort to find a similar statute construed. The construction of the statute is therefore a matter of first impression, and the Commission believes the true legislative intent to mean that if the public convenience and necessity require or will require the construction of a public utility, upon a proper showing the Commission may issue a certificate of public convenience and necessity therefor even though construction may already have begun. As before said, it is solely a matter of fact as to whether or not the public necessity and convenience require or will require the construction of such a plant.

Upon that issue numerous witnesses testified on behalf of the defendant town as to the inefficient and inconvenient service that was being rendered by complainant to the town and its inhabi-

tants prior to September 25, 1919, the date defendant town applied for such certificate. The evidence conclusively shows that the town and its inhabitants were inconvenienced; that complainant maintained no office or employe at the town of Ault to conduct its business and aid in remedying defective and unsatisfactory service; that the distribution system of the complainant in the town of Ault was not kept in an efficient condition; that complainant's system was ungrounded, and indeed the reply of the complainant admits that its distribution system in the town of Ault was what is known as an ungrounded system; that frequently during the years 1917 and 1918 and at times during 1919 the lights went out so that more or less difficulty was experienced by the users of complainant's electric current in the town of Ault. This testimony was not controverted by complainant except and solely by the testimony of Walter J. Farr and Roscoe S. Farr, the president and manager, respectively, of complainant company. No citizen of the town or user of complainant's system was sworn to testify that the service rendered to the town of Ault and its inhabitants during said period was good or satisfactory; indeed there was no testimony as to the manner and method of furnishing the town of Ault, or its inhabitants, electric energy save that of said mentioned officers who are, of course, interested in the complainant's electric system. The testimony shows that the main office of complainant is located at the town of Eaton, about 6 miles distant from Ault, and that in case of complaint of outages, delays in service, or for any other cause, such complaints could only be made by telephoning to the manager of the company at Eaton, and that delays in making the necessary repairs to correct the service have been frequently incurred by reason of that fact.

A public utility is charged with the duty of furnishing to its patrons reasonably satisfactory and efficient service. It may not perform this duty negligently, carelessly, inefficiently, or in any other unsatisfactory manner, until complaint is made, and then correct its service and still insist upon the field being not invaded by a competitor.

In re Lamar, 1919-C. P. U. R. 309; s. c. 5 Colo. P. U. C. 632.

Complainant has filed a voluminous, exhaustive and very able brief in which it is contended further that the town has not complied with subdivision c of Section 35 of the Act, which reads:

"* * Every applicant for a certificate shall file in the office of the Commission such evidence as shall be required by the Commission to show that such applicant has received the required consent, franchise, permit, ordinance, vote, or other authority of the proper * * municipal or other public authority."

Complainant insists that this section of the statute has not been complied with; therefore that the Commission is without authority to grant to the defendant town a certificate of public convenience and necessity as prayed for in its amended answer.

The evidence shows that this subject was before the board of trustees of the defendant town at a meeting of the town board held September 20, 1918, at which it was voted not to construct a municipal electric light and power plant on account of existing war conditions; that at a meeting of the town board held September 27, 1918, a motion prevailed that the matter of constructing a municipal electric light and power plant be reconsidered; that said action was taken upon a petition signed by some fifty or more of the taxpayers of the town; that at an adjourned meeting of the board of trustees of Ault held October 4, 1918, a motion prevailed to the effect that the board of trustees proceed to install an electric light and power plant, and the record discloses that this motion carried by a majority of one vote, which was cast by the mayor of said town. It is insisted by complainant that the above action of the board of trustees was of no effect and a nullity for the reason that the mayor had no power to vote upon such question. Such contention, however, is not in harmony with the statute law of this state, as Section 6581, R. S. 1908, expressly provides:

"* * The mayor * * shall preside at all meetings of the board of trustees, but the mayor shall have no vote upon any

question except in the case of a tie vote, when he shall be allowed the casting vote. * *"

It would seem, therefore, that the motion to install an electric light and power plant was legally passed. The statute requires merely that an applicant for a certificate of public convenience and necessity shall file in the office of the Commission such evidence as shall be required by the Commission to show that the applicant has received the required consent of the municipality. Whether the evidence is filed with the Commission before the application is made or during the proceedings instituted to procure a certificate of public convenience and necessity is immaterial. The crux of the matter is: Does the municipality or other authority give its consent? The town acts through its board of trustees, and by action of the board of trustees of the defendant town on October 4, 1918, the town gave its consent for the construction of an electric light and power plant, and for aught the record shows no citizen or taxpayer has at any time or at all objected or made any protest to this Commission or otherwise that said electric plant or facility should not be installed.

The Commission therefore will hold that the required consent of the municipality has been given for the construction and installation of its municipal electric plant. A different situation would be presented were the applicant other than the municipality itself, but it seems to the Commission that the main purpose of the legislature in enacting subsection (c) of Section 35 of the Public Utilities Act, was to prevent a privately owned utility from entering a town without first having obtained express consent of the town so to do, the evidence thereof being shown to the Commission before any certificate of public convenience and necessity may issue.

Complainant further objects that the defendant town did not obey the mandate of Section 6325, R. S. 1908, which, *inter alia*, provides:

"The * * board of trustees of towns shall have power to purchase or erect * * electric light works, or to authorize the erection of the same by others; but no such works shall be erected

or authorized until a majority of the voters of the city or town, who are taxpayers under the law, voting on the question, at a general or special election, by vote approve the same. * *"

It is admitted by the defendant town that the above section has not been complied with. Whether or not non-compliance with such statutory mandate by a town operated to prohibit it from receiving from this Commission a certificate that the public convenience and necessity require or will require the construction of a public utility by the municipality, is another queston not free of difficulty that is raised by the complainant. Said section has been the statutory law of this state for many years and long prior to the creation of this Commission by legislative enactment in 1913. In the opinion of the Commission a violation of said provision might properly be made the basis of a suit by a taxpayer of the municipality before a court of competent jurisdiction to enjoin and restrain the municipality from proceeding to do an unlawful act, but upon the issuance of a certificate of public convenience and necessity an entirely different question is presented. If the applicant for such certificate by competent proof establishes the fact that the public convenience and necessity require and will require the construction of a public utility, the manner or method by which such utility shall be constructed or the legality of its method of procedure are not involved in such case. It must always be borne in mind that *the* issue and the *only* issue in this case is whether or not the public convenience and necessity require or will require the construction of an electric plant by the defendant town? If that question be resolved in favor of the municipality, questions as to whether or not the municipality complies with the requirements of the statute in erecting or constructing such plant are questions for determination by the courts.

In the pleadings and in much of the evidence considerable attention is given to the alleged bargain and sale to the town of the distribution system of complainant, it being alleged by the town that it made such overtures to purchase, which were denied by the complainant. This issue the Commission deems entirely irrelevant to the issue in this cause. If the defendant

desired to purchase the distributing system of complainant the Public Utilities Act provides a plain, speedy and adequate method by which such purchase may be effected, whether there be an agreement therefor or not. In the opinion of the Commission the municipality may elect. It has two methods of procedure. One is in the method prescribed by the Act to purchase the existing utility, and the other is to apply for a certificate that the public convenience and necessity require or will require the construction of a new utility by the municipality. The latter method seems to have been adopted by the town in this case. Whether such action was wise or unwise is a question within the realm of conjecture, but entirely without the sphere of this Commission.

The Commission concludes under all the facts as disclosed by the testimony in this cause that the public convenience and necessity require and will require, as of the date of September 25, 1919, the construction and installation of an electric light and power plant or facility by the town of Ault, and that the order herein shall be adjudged and considered a certificate of public convenience and necessity therefor. In reaching this conclusion, however, the Commission desires again to emphasize its disapproval and condemnation of the method of procedure pursued by the defendant town to obtain such certificate of convenience and necessity. Had it not repeatedly and obstinately refused and declined to apply for such certificate until compelled so to do by the straits to which it had been driven, and had it duly made application for such certificate in apt time, the controversy would have been decided more than a year ago and without vexation to itself and all parties interested, including the Commission. And this decision, it is repeated, shall not be considered, deemed or construed as a precedent at all binding upon this Commission in future application to it for a certificate of public convenience and necessity.

ORDER.

IT IS THEREFORE ORDERED, That the public convenience and necessity require and will require the construction and operation of an electric light and power plant or system by the de-

fendant town of Ault, to serve itself and its inhabitants with electric light and power, and that this order shall be construed, deemed and held to be a certificate of public convenience and necessity therefor.

TOWN OF HAXTUN
v.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

[Case No. 182. Decision No. 336.]

Adequacy of railroad station—Carload shipments not considered.

1. In determining adequacy of railroad station facilities, demands of local shipments of freight and express and of passenger business, but not carload freight shipments should be considered.

Adequacy of railroad station—Duty to mere spectators.

2. Railroad company owes no duty to provide station facilities for people frequenting same as mere spectators or as a matter of idle curiosity.

[May 10, 1920.]

Appearances: Avery T. Searle, for the Complainant; John L. Rice, for the Defendant.

STATEMENT.

By the **Commission**: The town of Haxtun, a municipal corporation, in Phillips county, Colorado, filed its complaint and petition with the Commission December 18, 1919, wherein it prayed that the Commission upon hearing order and direct that a new depot structure be erected at said town by the Chicago, Burlington & Quincy Railroad Company, that the security and convenience of the public might be promoted and that adequate facilities for serving the public at said station be provided.

The petition sets forth the location of the town of Haxtun as being on a branch line of said C. B. & Q. R. R. Co. about midway between Sterling, Colorado, and Holyoke, Colorado, said branch line extending from Sterling eastwardly to and connecting with the main line of said railroad at the city of Holdrege,

Nebraska. By proper averments it is further set forth in the petition that Haxtun has a population of about 1250 people, that the territory surrounding said town for a number of miles in either direction is well populated and that it produces an abundance of wheat, corn and other farm products, and also is extensively devoted to the livestock industry; that there are four grain elevators at said town, stockyards, implement and machinery warehouses, and that said town is enjoying a continuous and steady growth.

It is further alleged that said railroad company has a depot, 20 by 60 feet, which contains three rooms, one of which is used for freight and express, another for passenger and waiting room, and another for the office of its employes; that there is no separate waiting room for women and children, and that when trains arrive at said station the depot waiting room is badly crowded with people and that the waiting room is often used for the storage of express packages. By general appropriate averments it is alleged that the depot facilities at Haxtun have been and now are entirely inadequate and insufficient to meet the reasonable requirements and demands of the traffic and business of the railroad company at said station, and that in consequence thereof perishable freight and express are often left on the depot platform and thereby subjected to injury and damage.

The eighth and ninth paragraphs of the complaint allege that the railroad company in the month of November, 1919, upon its own initiative moved the then existing depot structure back from the railroad track a few feet and was proceeding to add a frame room to said depot structure 20 by 24 feet in dimensions, but that such addition was in violation of an ordinance of the town of Haxtun which prohibits the erection of frame buildings or extensions or additions thereto within the fire limits of said town as designated by ordinance No. 67, and that the town upon learning of the intent and purpose of the railroad to so construct a frame addition to its depot structure in violation of said fire ordinance applied to the District Court of the Thirteenth Judicial District of the state of Colorado, for an order restraining the railroad company from proceeding with the erec-

tion or completion of said frame addition; and that a restraining order as applied for was issued by the said District Court on the 15th day of November, 1919.

The complaint also sets forth that the revenue derived at said station has approximated the sum of $30,000 a month and that this business is composed of carload freight and in large part of local freight, express and passenger revenues; that the business men of said town have frequently requested the railroad company to provide additional facilities for the business at Haxtun, but that upon negotiations and complaints so made the company proceeded to erect the 20 by 24 foot extension as above described, and that it is unwilling to do anything further in order that the needs and requirements of said town and the country adjacent thereto may be satisfied.

Paragraphs 12 and 13 of the petition aver that the present structure is entirely composed of wood; that it is heated with stoves; that it is thereby subjected to the hazards of fire which would destroy valuable freight and express as well as the records of said railroad company; and that as a result of the alleged inadequate and insufficient depot facilities that have been and now are afforded to said town by said railroad company, much business has been kept away from the town of Haxtun and has gone to other lines of railroads and stations that would have come to Haxtun but for the inadequate and insufficient depot facilities. The petition prays that upon hearing the Commission order the construction and erection of adequate depot facilities at said town of Haxtun, and that if a new depot structure is erected within the fire limits of the said town as designated by ordinance No. 67, that such structure be erected of brick, concrete or stone with a roof of gravel composition or other non-inflammable material.

December 31, 1919, the railroad company filed its answer to the complaint and petition wherein the allegations thereof as to the location of the said town and its being situate on defendant's line of railroad are admitted, and that it has maintained a depot on said road at said place; but the answer alleges that in the fall of 1919 the railroad company commenced and had

nearly completed an addition to said depot; that the town had passed a pretended fire limit ordinance, known as ordinance No. 67, and that the completion of said addition was temporarily restrained by the District Court aforesaid for the alleged violation of said ordinance, and that in October, 1919, a meeting was had between the citizens of said town and the representatives of the United States Railroad Administration concerning depot facilities at Haxtun. Each and every other allegation contained in said petition or complaint is denied.

The third paragraph of the answer alleges that the railroad and all its property including the depot and the station facilities at Haxtun are and have been since December 31, 1917, in the exclusive possession and control of the government of the United States by or through the Director General of Railroads; and that said railroad and all of its property is and since said date has been operated by said Director General of Railroads, and that the defendant has no control thereover so as to enable it to make improvements of any kind thereto.

The fourth paragraph of the answer alleges that in the fall of 1919 the Director General of Railroads moved said depot further back from the tracks and commenced the erection of an addition thereto and rearrangement of the interior and the repair and remodelling of the said depot generally, and that said addition and improvements to said depot would have been long since completed but for said temporary injunction and restraining order which, it is alleged, complainant wrongfully caused to be issued; that said restraining order is still pending and undetermined; that the additions and improvements to said depot will when completed be provided with a metal roof as soon as said railroad is permitted so to do, and that when such additions and improvements are completed, the depot facilities will be commodious, convenient, safe, ample and in every way sufficient to house, take care of, and handle all of the business of said railroad and needs of said town and of the community served thereby.

It is further alleged that at the present time the cost of material and labor is high, and that the business transacted at said town does not and will not justify a greater expenditure than

that already undertaken, and that the depot facilities of said town other than those undertaken, but not permitted by the court to be completed, are unnecessary at the present time, and under the present circumstances should not be ordered. It is further alleged in the answer that said claimed fire ordinance was passed for the express purpose of bringing said depot within the fire limits to prevent the railroad company, or the Director General of Railroads, from erecting the proposed frame addition and to compel the erection of a brick depot solely for the sake of appearance and without regard to any actual need therefor for the business or accommodation of the public; and finally it is alleged that by virtue of government control of said railroad and of the general orders of the Director General of Railroads this Commission is without power or jurisdiction to order or require the erection of facilities that will require an expenditure of more than $1000 until and unless the same has been specifically authorized by the division of capital expenditures of the United States Railroad Administration.

Defendant railroad prays that the addition and improvements to the present depot in said town undertaken and commenced by the Director General of Railroads be approved by this Commission and ordered completed, and that no further depot facilities be ordered at the present time and that the town's complaint be dismissed.

On January 9, 1920, the complainant town filed its reply which largely is a denial of the averments of the answer; and in addition thereto contains averments relating to the passage of ordinance No. 67 concerning fire limits, and that the said ordinance is but a modification of a theretofore existing valid ordinance (No. 30) and was passed by said town without design upon the depot facilities but merely in the exercise of the town's police power in the extension of its fire limits. Complainant denies that said injunction was but temporary; denies that it wrongfully caused same to be issued and denies that said suit is still pending and undetermined and that the addition to said depot if or when completed, if defendant be permitted to complete the same, will be either commodious, convenient, safe, ample or in

any way sufficient to house and care for all freight, passenger, express and other business of said town and the community served thereby, and complainant town renews its prayer as contained in its petition herein.

Upon notice to all parties in interest the matter came on for hearing at the town of Haxtun, Colorado, on the 12th day of March, 1920, at which hearing numerous witnesses testified on behalf of the parties complainant and defendant.

A goodly portion of the testimony was directed toward the issue framed by the pleadings as to whether or not ordinance No. 67 extending the fire limits of said town, passed on September 15, 1919, was adopted by said town for the express purpose of locating said depot in the fire limits and thus preventing any frame additions or extension thereto. In the opinion of the Commission that question is immaterial to the real issue in this cause, and one which may not properly be considered by the Commission even though it were material, inasmuch as all matter concerning or affecting said fire ordinance have been made the subject of a civil proceeding in a court of competent jurisdiction, which proceeding the evidence shows is pending and undetermined at the present time.

The real and only issue in the case as the Commission views it, is upon the question of whether or not the depot facilities at the town of Haxtun existing at the time of the filing of the petition and complaint of the complainant, to-wit: December 18, 1919, were reasonably adequate to care for and accommodate the business of said railroad arising at the town of Haxtun and in the territory adjacent thereto. Complainant town avers such facilities are insufficient and inadequate, which the railroad company denies. And it is to a consideration of that issue that the Commission will apply the law and the testimony in determining this cause.

The testimony clearly discloses that the existing depot facilities at Haxtun are such as customarily exist at towns or communities of a similar size and character of Haxtun, but on the other hand the testimony as clearly shows, that the volume, character and extent of the railroad business at the town of

Haxtun in the aggregate exceeds the business ordinarily derived by a railroad from towns or communities of like proportion.

It is quite obvious that but for the restraining order served upon the defendant at the instance of the town an addition of 20 by 24 feet with metal roof and tile floor would have long since been completed by defendant, and that the facilities of the railroad would have been thereby increased to that extent. The structure before any addition was begun had been moved back some eight feet from the track, according to the testimony, and a vitrified brick platform had been built in the front and at both ends of the depot; the building had been painted and underpinned with new timbers; the depot grounds improved and cleaned up, and, according to the testimony of the mayor, were in much better condition than he had ever seen them in his eleven years of residence in Haxtun. The testimony of defendant discloses that the defendant railroad in making the improvements and additions proposed had incurred an expense of $2,346 at the time work was stopped by said injunctive order; that the total investment in depot facilities at Haxtun approximated $5,040; that a new structure of frame providing facilities equal to those now maintained at Haxtun would require an investment of $6,000 to complete and build; that a new structure of equal capacity built of brick to conform to the fire ordinances would involve an expenditure of more than $12,000, and that the cost of a veneered building would approximate $9,000, and the testimony is also to the effect that the value of the old material, contained in the present structure, would merely be that of salvage difficult of estimation.

The testimony of the numerous witnesses for the complainant town is to the effect that the depot facilities are inadequate to serve the needs of the town and community; that with respect to the accommodation of passengers at the time of arrival and departure of trains, the depot waiting room is badly crowded, and that in a general way there has not been, and will not be, even though the addition is permitted to be built, sufficient room properly to care for and house the perishable freight and express matter consigned to the citizens of Haxtun and vicinity. As dis-

closed by complainant's exhibit 2, which is a tabulated statement of business of said railroad done at Haxtun for the calendar years 1918 and 1919, identified as being correct by the superintendent of the railroad, it appears that the major portion both of tonnage and revenue throughout said two-year period has been that of carload shipments as distinguished from less than carload shipments. Obviously shipments in carloads of either incoming or outgoing freight do not involve the question of depot facilities; hence the matter is reduced to a consideration of the facilities as may be required by the demands of local shipments of freight and express and of passenger business.

It appears from the evidence that the depot is located on the main street of the town about two blocks from the business center and that but two passenger trains, one eastbound at 9:05 o'clock in the morning and the other westbound at 4:03 o'clock in the afternoon are operated by defendant railroad. There was some evidence to the effect that in small communities where depots are located contiguous to the center of towns, many people go to the depot at such times as passenger trains arrive as spectators or as a matter of idle curiosity. Without such testimony, however, it is a matter of common knowledge that under such circumstances many such persons of both sexes congregate at the depot upon arrival of passenger trains, and particularly so when there is only two such trains per day. This being true it will hardly be contended that a railroad company should maintain depot facilities sufficiently large and commodious to comfortably accommodate all the people who may congregate about its station. So far as local freight and express are concerned it may be conceded there are intervals when accumulations thereof somewhat congest the room at said depot and probably somewhat retard or delay the prompt delivery of freight and express. If the 20 by 24 foot addition to said depot had been completed, or shall be completed by permission of the Court, the Commission is of the opinion that no very great inconvenience will be experienced by shippers or citizens of Haxtun with respect to depot facilities for the next ensuing three or four years.

It should be borne in mind that the railroads of the country

have but recently been returned to their owners by the federal government, and that during the period from March 1, 1920, the date of the return of the carriers, to September 1, 1920, the federal government, as provided by the act of Congress of February 28, 1920, commonly designated the "Transportation Act, 1920," has guaranteed the railroads a return similar to that guaranteed during the period of federal operation; also that the country has but entered upon a period of reconstruction which, it is hoped, will lead to a re-establishment of normal conditions. The Commission, therefore, does not feel that it would be justified, under the facts and circumstances disclosed by all the evidence in this case, in ordering the defendant to make the expenditure which would necessarily be entailed in the construction of new depot facilities at Haxtun at the present time.

With respect to the questions involved in the pleadings concerning the operation of the railroad by the Director General of Railroads and the contention that this Commission is without authority to order improvements which entail an expenditure in excess of $1,000 without prior approval of the division of capital expenditures of the United States Railroad Administration, consideration need not be given thereto in view of the conclusion that has been reached for the reason that no useful purpose would be served thereby.

Defendant prays that the addition and improvements to said depot heretofore commenced should be approved by this Commission and ordered completed. This the Commission will not do in view of the fact that such matter is already the subject of judicial determination by the District Court of the Thirteenth Judicial District of the state of Colorado sitting within and for the county of Logan.

ORDER.

It Is Therefore Ordered, That the defendant the Chicago, Burlington & Quincy Railroad Company, shall not be required to provide additional depot facilities at the town of Haxtun at this time, and that the petition and complaint of complainant town be dismissed without prejudice.

RE REASONABLENESS OF PROPOSED ADVANCES IN PULLMAN SLEEPING CAR FARES.

[I. & S. Doc. No. 44. Decision No. 340.]

Rates—Pullman.

Commission's order suspending the Pullman Company's tariff designated Supplement No. 1 to tariff Colo. P. U. C. No. 1, increasing rates, vacated, and schedules contained therein allowed to become effective, in view of evidence showing loss on operations.

[June 5, 1920.]

Appearances: H. P. Clements, General Passenger Agent, and William Hough, Assistant Comptroller, for The Pullman Company.

STATEMENT.

By the **Commission**: On March 27, 1920, The Pullman Company filed with the Commission its tariff designated Supplement No. 1 to tariff Colo. P. U. C. No. 1. On April 15, 1920, by its order in Investigation and Suspension Docket No. 44, the Commission suspended the effective date of the tariff and fixed Monday, May 10, 1920, at 10 o'clock A. M., as the date and time of hearing upon the reasonableness of the increases proposed in the tariff. Notices of the date and place of hearing were sent to newspapers and commercial organizations throughout the state, and on May 10, 1920, a hearing was held at the hearing room of the Commission, Denver, Colorado.

On May 4, 1920, the Chamber of Commerce of the City of Glenwood Springs filed with the Commission a copy of a resolution adopted by the Chamber of Commerce of that city protesting against any increases in Pullman fares in Colorado. With the exception of Glenwood Springs, there were no protests filed with the Commission. No one appeared at the hearing to offer testimony on the part of any protestant against the said increases.

The Pullman Company appeared at the hearing and offered testimony supporting the increases proposed. H. P. Clements, general passenger agent for The Pullman Company, testified in part as follows:

"I think it is a matter that is generally recognized throughout the country that there have been very extensive increases and

costs in all lines of businesses, and that such a condition of increase has been particularly true of the operations of The Pullman Company. Our wage payrolls had been increased to the extent of eleven million dollars at the time this was filed and I am informed that since that time they have still further increased and more increases are to come; that they have been increasing ever since that time. In explanation partly of that the company has had no control before over the payroll features, a large portion of which was directed by the United States Railroad Administration at Washington, D. C., prior to the return to the company of its own corporate control, and during the action of the wage commission these increases are continued. However, it affects our branch of public service; particularly I will say that we are affected in the labor end of the service all the way down the line from the general offices and their clerks to our district local forces and our yard forces, conductors, and porters; after they also made that very heavy increase in the wage payrolls they also caused very heavy increases in the costs of all materials for the conduct and operations, equipment, maintenance and repair of The Pullman Company's property and operations, so much as to this end of the expenses that we are not prepared to state the full increase, but these other tremendous increases have also been all the way from 60% to almost 300%.

"As to the service of our patrons you will appreciate that a good deal of our costs are for the linen used, which has increased the heaviest among some of the items; that cost has increased 295%, and that ratio extends all the way nearly through every commodity of manufacture that we use and called upon to use in our service. In the immense increase in labor and materials generally we also have the increase in the cost of laundry work, work over which we have no control. Our work is put out by agreement or contract, and all we have had to do is to pay the increases whenever they asked them. This is the first time The Pullman Company since 1867 has ever asked an increase in rates. In our application to the Interstate Commerce Commission we requested authority under date of March 5, to publish and file

supplements making the new rates effective May 1, which was granted. They are now in effect throughout the country on all interstate business and also locally with all of the states with the exception of about six states, where we have been holding hearings, just as we are holding this hearing in Colorado today, and we have not yet received their decisions."

The following table contains a list of some of the most important increases, as testified to by witnesses:

INCREASE IN COST OF CERTAIN MATERIALS USED IN CONNECTION WITH REPAIRS AND MAINTENANCE.

	Price 1914	Price 1920
Wheels, each	$20.00	$59.00
Axles, per 100 lbs.	1.56	4.05 to $ 4.32
Plush, per yard	2.40	5.22½
Brake Shoes, per ton	43.00	73.00
Carpet, per yard	2.05½	5.30
Plate Glass, per light	2.04	6.47
Berth Curtain Material, per yard	2.00 to $1.62½	5.97
Sheets, each	.50	2.27½
Slips, each	.11⅜ to .13½	.55⅜
Hand Towels, per doz.	1.47 to $1.50	2.90
Oil Boxes, each	3.80	13.75
Blankets, each	5.17½	12.66 to $13.12
Elliptic Springs, per 100 lbs.	2.45	7.15
Equalizer Springs, per 100 lbs.	1.50	5.15

The following tables have also been summarized and compiled by the Commission from the testimony of witnesses and tables introduced by the applicant: Table No. 1 shows the number of cars operated in Colorado; Table No. 2 shows the gross earnings in Colorado for the year ended December 31, 1919; Table No. 3 shows the average earnings per car in Colorado for the year ended December 31, 1919. (Contract revenue excluded.)

Table No. 1.

NUMBER OF CARS OPERATED IN COLORADO.

	Standard Cars			Tourist Cars	
	Intrastate	Interstate	Total	Interstate	Total
AT&SF Ry.	3.72	19.07	22.79	4.79	27.58
CB&Q RR.	....	13.68	13.68	....	13.68
CRI&P Ry.	....	6.76	6.76	....	6.76
C&S Ry.	2.40	6.38	8.78	....	8.78
D&RG RR.	12.07	18.11	30.18	5.36	35.54
MP RR.	....	2.67	2.67	....	2.67
UP RR.	....	14.36	14.36	3.05	17.41
TOTAL	18.19	81.03	99.22	13.20	112.42

Table No. 2.

GROSS EARNINGS IN COLORADO, YEAR ENDED DEC. 31, 1919.

	Standard			Tourist	
	Intrastate Cars	Interstate Cars	Total	Interstate Cars	Total
AT&SF Ry...	$ 34,094.05	$ 6,260.46	$ 40,354.51	$1,329.10	$ 41,683.61
CB&Q RR...	.....	7,704.73	7,704.73	.....	7,704.73
CRI&P Ry...	.....	2,517.59	2,517.59	.....	2,517.59
C&S Ry.....	19,486.75	3,550.24	23,036.99	.....	23,036.99
D&RG RR...	107,515.80	22,323.45	129,839.25	4,139.10	133,978.35
MP RR.....	.....	4,131.75	4,131.75	.....	4,131.75
UP RR.....	.....	4,873.56	4,873.56	78.00	4,951.56
TOTAL....	$161,090.60	$51,361.78	$212,458.38	$5,546.20	$218,004.58

Table No. 3.

AVERAGE EARNINGS PER CAR IN COLORADO, YEAR ENDED DEC. 31, 1919.
(Contract revenue excluded)

	Standard			Tourist	
	Intrastate Cars	Interstate Cars	Intra and Interstate Cars	Interstate Cars	All Cars
AT&SF Ry.....	$7,457.53	$8,915.42	$8,844.84	$6,550.79	$7,305.11
CB&Q RR.....	.....	8,814.54	8,814.54	.....	8,814.54
CRI&P Ry.....	.....	8,420.79	8,420.79	.....	8,420.79
C&S Ry.....	7,250.00	6,724.54	7,105.85	.....	7,105.85
D&RG RR.....	8,203.84	9,431.72	8,940.06	5,808.61	8,467.78
MP RR.....	.....	7,562.37	7,562.37	.....	7,562.37
UP RR.....	.....	9,089.99	9,089.99	5,119.19	8,362.68
TOTAL.....	$7,925.37	$8,833.21	$8,687.82	$5,918.63	$8,362.68

Table No. 3 shows the average earnings per car in Colorado for the year ended December 31, 1919, on both the intrastate and interstate cars. The average expenses of operation of a car on the entire system during the same period was $7,719.08. According to the testimony, the estimated increase in the average expense per car for the year 1920 will be not less than $1,000.00, which, added to the figure for 1919, would make the total expense per car $8,719.08. Using the latter figure as the estimated expense per car for the year 1920, and the earnings per car for 1920 the same as for the year 1919, the following results are shown in the net earnings per car: Intrastate standard cars, deficit of $793.71; interstate standard cars, net earnings of $114.13; both intra and interstate standard cars, deficit of

$31.26; interstate tourist cars, deficit of $2,800.45; all cars, standard and tourist, both intrastate and interstate in Colorado, deficit of $356.40.

The car operating revenues for 1919 for the operations of the entire company were $69,071,548.25, expenses $48,618,253.26, and the net revenue from car operations $20,453,294.99. The Pullman Car Lines were under federal control during this period, however, and no payments were made to the railroads under their various contracts which would be necessary if under private control. According to the record this would have amounted to $9,500,000.00 for the year 1919, from which would have been deducted a credit of $400,000.00 as estimated mileage revenue. Had the respondent been required to make this net deduction from revenue of $9,100,000.00, the operating revenue would have been $59,971,548.25.

The expenses would have been increased also, had the respondent been under private control, as it now is. According to the record, the amount of the increase would have been $6,650,000.00, based on the following items: An increase of $1,500,000.00 for heating, lighting, lubricating, water and ice furnished by the railroads; $1,900,000.00 income and profits taxes; $250,000.00 additional general expense items; and $3,000,000.00 estimated deficiency in maintenance. The operating expenses with the foregoing additions would have been $55,268,253.26, leaving a net operating revenue of $4,703,294.99. Deducting $1,293,511.12, the tax accruals for the year, would leave an operating income of $3,409,783.87.

From the testimony in this case it appears that the operations of The Pullman Company in Colorado, including the operation of cars in wholly intrastate traffic and those in interstate traffic originating or terminating in the state, were conducted at a loss during 1919. The respondent has made no allocation to Colorado of those revenues properly assignable to Colorado from traffic which moves through the state, and the Commission is therefore without definite knowledge of the relation of revenues and expenses on such interstate cars.

However, the increase proposed herein for intrastate traffic

in Colorado is the same percentage as that made for interstate traffic, and now effective upon such business under authority of the Interstate Commerce Commission by order dated March 13, 1920. As stated by the respondent at the time of the hearing, the same increase has become effective on intrastate traffic in all but six of the states through which it operates and that the proposed increase is the subject of consideration by the state commissions in those states.

The Commission has considered the matter and is of the opinion that it should issue an order vacating the order of suspension, now in effect. An order, therefore, will be issued permitting the proposed increase on Colorado intrastate traffic for the same period of time as that allowed by the Interstate Commerce Commission.

ORDER.

It Appearing, That on April 15, 1920, the Commission entered upon an investigation concerning the propriety of the increases and the lawfulness of the rates, charges, regulations and practices stated in the schedules contained in the tariff designated as follows: Pullman Company, Supplement No. 1 to Colo. P. U. C. No. 1, and subsequently ordered that the operation of said schedules contained in said tariff be suspended until August 29, 1920.

It Further Appearing, That an investigation of the matters and things involved has been had, and the Commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof.

It Is Ordered, That the order of the Commission heretofore entered in this proceeding suspending the operation of said schedules be, and it is hereby, vacated and set aside as of June 15, 1920.

It Is Further Ordered, That the schedules contained in the tariff under suspension in this proceeding be, and they are hereby, permitted and allowed to become effective as of June 15, 1920, and remain in effect for such period as allowed and permitted on interstate traffic by the Interstate Commerce Commission.

FARMERS ELECTRIC & POWER COMPANY

v.

TOWN OF AULT.

[Case No. 167. Decision No. 344.]

Fines and penalties—Violation of orders—Liability of town.

1. A complaint that a town has violated an order of the Commission enjoining it from furnishing light or power to new consumers, must be dismissed, where it does not appear that the town authorized, ratified or approved the connections complained of, although one such connection was made on the premises of a member of the town council.

Fines and penalties—Contempt—Duty of Complainant.

2. One preferring charges of contempt because of violation of an order of the Commission, owes a duty of aiding in establishing the truth of the charges made.

[June 21, 1920.]

STATEMENT.

By the **Commission**: On September 25, 1919, the Commission issued its order in the above cause, pending final hearing upon the merits, in which, *inter alia,* it was ordered,

"that the defendant, the town of Ault, Colorado, its officers, agents, attorneys and employees, or anyone acting by, through or under it, be, and they are hereby commanded and enjoined absolutely to refrain and desist from in any manner furnishing light or power to any person or corporation whatsoever other than those who are now being served by said system constructed by the said town of Ault * * and that after the date hereof defendant shall not connect any additional customers or consumers of light or power to its present plant * * pending the final determination of this cause." 5 Colo. P. U. C. 826.

On February 21, 1920, complainant moved the Commission for the issuance of a citation directed to the defendant town of Ault to show cause why it should not be penalized for

"* * violating the order of this Commission made and entered in this cause on the 25th day of September, 1919, and that the Commission make and enter herein such further order in this case as it shall deem necessary to compel the town of Ault, its

officers and employees, to comply with this Commission's order so entered herein."

The above motion of complainant was based upon and supported by the affidavit of Roscoe S. Farr, general manager of complainant corporation, which set forth nine or ten specific instances of alleged violation of the Commission's order of September 25, 1919, by as many different persons, charging that defendant town had violated said order by making connections with its electric light system and furnishing electric energy to each of the persons designated, after the date of the aforesaid order.

Upon such ex parte showing the Commission did, on February 25, 1920, issue its citation directed to the defendant town to appear before the Commission on March 1, 1920, at 11 o'clock A. M. at the town of Ault, and

"Then and there show cause to the Commission why, if any reason there be, the Commission should not subject the defendant to the penalites provided in Section 61 of the Public Utilities Act of 1913, Chapter 127, for failure to comply with the order of the Commission,"

which citation was duly served by registered mail upon the mayor of said defendant town February 26, 1920.

On Monday, March 1, 1920, a hearing upon the merits of the case was held at Ault, at which time the defendant town asked for, and was granted, 15 days additional time within which to make return to the citation issued against it February 25, 1920, and on March 15, 1920, return of defendant town thereto was filed. In the return the defendant town denied violation of said order in any manner and specifically denied making connections for, and furnishing electric energy to, the several persons enumerated in the Farr affidavit aforesaid.

On April 16, 1920, the matter was set for hearing before the Commission at its hearing room, Capitol Building, Denver, April 26, 1920, at 11 o'clock A. M., and all parties were duly given notice. On April 19, 1920, complainant filed its memorandum brief for consideration upon the hearing on citation, and notified the Commission that complainant would not appear

at said hearing on April 26th, and the brief was filed in lieu thereof. At the request of defendant town the date of said hearing was continued to April 27, 1920, at the same hour and place, and the complainant was given due notice of such continuance. Upon said date, April 27, 1920, the hearing upon citation was held. F. R. Lilyard appeared for defendant town, there being no appearance for the complainant other than by brief as herein stated. The defendant town submitted evidence at the hearing in the nature of affidavits of each of the persons charged in the Farr affidavit with violation of the Commission's order of September 25, 1919, except as to John W. Duncan, a member of the Board of Trustees of defendant town, who appeared in person and testified as to the charge of violating the order, at an adjourned hearing of the matter held on May 11, 1920.

All of the alleged violators except Duncan, eight or nine in number, filed affidavits which were submitted in evidence to the effect that, on the date specified in the Farr affidavit,

"he, without permission or authority from the town of Ault, made connection or caused connection to be made to his residence (or store) from the system of the town of Ault, but that the making of said connection and the use of current * * was unknown to any member of the town council so far as affiant knows, and that in the making of said connection he acted upon his own volition."

Hence, so far as the charges against the defendant town is concerned, pertaining to the eight or nine persons other than Trustee Duncan, under the evidence presented the town was without knowledge of the acts of the persons whose homes or business places were connected with the town's electric system, and, it follows, cannot be held in contempt of the Commission's order. The degree of moral turpitude to which the persons charged with violation, admitted by their several oaths, is reprehensible and stamps them as citizens having little, if any, regard for lawful authority; but that fact does not prove or tend to prove guilt of the town itself. A thief may not lawfully and, as

the Commission thinks, rightfully, by his unlawful act, besmirch the character of the person robbed.

When the hearing of April 27th had concluded, it was made to appear by defendant's counsel that Duncan, the town's trustee alleged to have violated the order, was ill, and the hearing was continued by the Commission to May 11, 1920, at the same hour and place, to permit of the taking of Duncan's testimony.

At said adjourned hearing Mr. Duncan testified positively that he had been forbidden to connect his place of business (the village hotel) with the town system, but that having had the service of complainant discontinued shortly thereafter, because of failure to have a Genco lighting system installed as he had anticipated, he had a man connect his hotel up with lights without designating with which system; that he discovered the next morning that the man had connected his hotel to the town system, but because he "needed lights" he did not have them disconnected, and without the knowledge of the town council or of the mayor continued to make use of the town's lighting system for about 30 days, and until the citation of February 25, 1920, was served upon the town, when by order of the Mayor, his hotel was disconnected from the town system upon the same day as the eight or nine other persons unlawfully using said lights were disconnected. Duncan admitted knowledge of the Commission's order and admitted that he personally was knowingly violating the order of the Commission. The Mayor testified that no one of the nine or ten persons admitting the offense had done so with the knowledge or consent, direct or indirect, of the town authorities; and a thorough questioning of the mayor and of Duncan while upon the stand satisfied the Commission that such was the fact, although at first blush it would seem almost incredible that so many persons could be taking current from the town's electric light system without it in some manner becoming known to the town's executive officers.

The act of Duncan, a member of the board of trustees of the town, doing the thing he says he did, knowingly and surreptitiously, cannot be too severely condemned; and the serious question his act presents is whether or not his act was the act of the

town, so as to subject the town to a charge of contempt for the violation of the order of the Commission. Upon careful investigation of the law applicable it is believed that the true rule is that

"a municipal corporation is not *prima facie* responsible for the trespasses or wrongful acts of its officers, although done *colore offici.*"

28 Cyc. 1274-e.
Snow v. Brunswick, 71 Me. 580.
Thayer v. Boston, 19 Pick. 511—31 Am. D. 157.
Everson v. Syracuse, 100 N. Y. 577—3 N. E. 784.
Columbus v. Dennick, 410 St. 602.
Caspary v. Portland, 24 Pac. 1036.
Bowditch v. Boston, 101 U. S. 16.

It must appear that such acts were expressly authorized by the municipal government or were subsequently ratified or adopted by it.

Chicago v. Hannon, 115 Ill. App. 183.
Chicago v. McGraw, 75 Ill. 566.
Elliot v. Philadelphia, 75 Pa. St. 347—15 Am. Rep. 591.
Bowditch v. Boston, supra.

Or, that the act was done in pursuance of the general authority to act for the municipality on the particular subject.

Dunbar v. San Fran., 1 Calif. 355.
Hilsdorf v. St. Louis, 100 Am. Dec. 352.
Lee v. Sandy Hill, 40 N. Y. 442.
O'Donnell v. White, 24 R. I. 483—53 Atl. 633.

Tested by these rules, the act of Duncan, although a member of the town council, was not the act of the town under the evidence introduced, and the Commission must therefore hold that the defendant town did not violate the Commission's order of September 25, 1919, and that it was not proved to have been in contempt of said order. It is not enough to show that the circumstances are such as that the municipality might or should have learned of the acts violating the order; but it must be made

to appear that the town authorized, ratified or approved said acts.

While the defendant town was remiss in its moral duty by not knowing the law was being violated by its citizens, the complainant is also guilty either of negligence, carelessness or of good faith by failure to follow up the charges it brought. One preferring charges of contempt owes a duty of aiding in establishing the truth of the charge made, but complainant seems to be satisfied by merely preferring the charge without further effort of any character to prove it, though having due notice of each step of the proceedings.

ORDER.

IT IS THEREFORE ORDERED, That the return to the citation, and the evidence submitted in support thereof by defendant, the town of Ault, have satisfied the citation issued, and the defendant town be, and is, hereby exonerated from the charge of contempt made against it.

RE THE CANON GAS COMPANY.

[Application No. 92. Decision No. 347.]

Rates—Gas—Highest possible.

Gas company, in view of its financial condition, held entitled to highest rate possible without loss of business through competition with other fuels.

Service—Gas utility—Abandonment.

Gas company instructed to ask for authority to cease operating if it cannot give reasonably efficient and safe service.

[June 30, 1920.]

Appearances: Adams and Gast, of Pueblo, for applicant company; Augustus Pease, City Attorney, for city of Canon City.

STATEMENT.

By the **Commission**: On June 12, 1920, the applicant filed with the Commission its application for permission to increase its rates for gas, the material allegations being as follows:

That applicant is a Colorado corporation; that its present rates and charges were fixed by this Commission in an order dated May 21, 1918; that the rates and charges which it desires to substitute therefor are set forth in a schedule attached to the application, marked "Schedule B"; that applicant's plant represents an investment in excess of $65,000.00 and was originally constructed in 1903 by The Canon City Gas Company, with a then bonded debt of $41,500.00; that thereafter the company, being unable to meet its bond interest, was placed in the hands of a receiver and reorganized as The Canon Gas Company, the applicant herein; that applicant's bonded indebtedness is $15,000.00, with delinquent interest thereon amounting to $4,950.00; that its floating debt is $8,584.06; that the total operations of the company for the year 1919, under the rates and charges now in effect, resulted in a net profit of only $573.41, without making any allowance whatever for a return on investment or depreciation; that a fair allowance for depreciation and interest would be not less than $7,000.00 per annum; that applicant's costs of making gas have increased so enormously that its gross receipts under its present rates will be insufficient to meet the actual cost of manufacturing and distributing gas, to say nothing of a return on the investment or depreciation, all of which is due to the enormous increased cost of oil, coke and coal, together with an increased cost of labor which its employes have demanded and which must forthwith be given, which alone amounts to $960.00 per year; that some of the immediate increases in costs which will have to be met by the company in prices over those of 1919 are as follows:

Oil	$2,095.80	per annum
Coke	47.40	" "
Coal	657.00	" "
Labor	960.00	" "
Total	$3,760.20	" "

It is alleged that applicant serves the smallest community in Colorado which is supplied with gas; that it has endeavored to comply with all of the suggestions for economical and efficient operation of its plant which were heretofore made by this Com-

mission; that it cannot greatly increase the volume of its business and that it cannot continue to operate its property unless it immediately receives permission to increase its rates. Applicant asks that it be permitted to charge $2.00 net, or $2.10 gross, per 1,000 cu. ft. for all gas sold.

No protests were filed by anyone objecting to the increase asked for by applicant. The City Council of Canon City passed a resolution, which was filed with the Commission, stating that the increase asked for by the applicant is justified and that the Council is satisfied that said company is operating at a loss; that it will have to cease business unless said increase is granted and that, therefore, the Council will not oppose the application. The resolution, however, asked that the Commission require the company, as a consideration for granting said application, that the company furnish a good quality and quantity of gas to its patrons, as provided in Sec. 2 of its franchise from the city.

A similar resolution was also adopted by the Chamber of Commerce of Canon City, which resolution was also filed with the Commission.

This case was heard on its merits at the City Hall, Canon City, Friday, June 25, 1920, at 9 o'clock A. M., all parties being duly notified of the hearing. Adams and Gast, attorneys, appeared for the applicant company; Augustus Pease, city attorney, appeared for the city of Canon City.

The testimony shows that The Canon Gas Company was incorporated May 22, 1907, and commenced operations July 1, 1907, with a capital stock of $75,000.00; that it now has a bonded indebtedness of $15,000.00, together with delinquent interest thereon amounting to $4,950.00; that it has a floating debt of $8,584.06.

A report of the Commission's electrical engineer shows that the present plant indicates an original cost of approximately $65,647.00 for rate-making purposes, but this does not indicate its present value for any other purpose.

The Canon Gas Company operates a small water gas plant and supplies gas for fuel and illumination in Canon City. The character of the plant and the method of operation are clearly

outlined in the engineer's report. For the reasons given by him, he did not consider an inventory and appraisal necessary as a basis for rate-making, as any value that is likely to be claimed as reasonable for this plant is a very small factor in indicating what relief through increased rates is necessary if operation is to continue. Rather, it is a matter for some study on the part of the Commission to determine whether the increased rates requested will really give the revenue needed.

It seems obvious that an investment for a gas plant in Canon City at the present time would be unwarranted and that, even at the time the plant was built, the investment may have been ill advised. It appears that the plant is not entirely suitable for present day fuel, and the economies practiced in other gas plants, due to improved equipment, cannot be expected in this plant, except after extensive alterations. Hence any improvements to the plant liable to be made will give merely nominal relief.

The report of the Commission's statistician contains the following income statement for the years 1918 and 1919, taken from the books of the company, the surplus of $1,168.99 for the year 1919 being without any deductions for depreciation or any return on the investment:

OPERATING REVENUES	1919	1918
Commercial Earnings	$12,742.41	$11,631.60
Earnings from Residuals	177.24	132.40
Profit on Mdse. Sales	314.98	1,109.80
Profit on Piping and Connections	261.42	117.97
Total Operating Revenues	$13,496.05	$12,991.77
OPERATING EXPENSES		
Water Gas Production	$ 6,323.82	$ 5,865.48
Distribution Expense	1,851.93	1,462.55
Commercial Expense	257.98	239.86
New Business	71.45	296.46
General Expense	1,810.61	2,522.49
Total above items	$10,315.79	$10,386.84
Taxes	654.45	676.22
Total Operating Expenses	$10,970.24	$11,063.06
Net Operating Revenue	$ 2,525.81	$ 1,928.71

DEDUCTIONS FROM INCOME		
Interest on Funded Debt	$ 900.00	$ 900.00
Interest on Unfunded Debt	317.27	360.00
Miscellaneous Deductions	139.55	144.79
Total Deductions	$ 1,356.82	$ 1,404.79
Surplus	$ 1,168.99	$ 523.92

The company is asking for a rate of $2.10 per 1,000 cu. ft. gross, or $2.00 net. The application of a net rate of $2.00 per 1,000 cu. ft. for all gas sold based upon the sales for the year 1919 shows:

Annual sales 8,357,700 cu. ft. at $2.00 per 1000	$16,715.40
Actual net revenue gas sales year 1919	12,742.41
Excess in earnings of proposed rate over 1919	$ 3,972.99

From the testimony of the company, its estimated increase in costs for 1920 will be:

Gas Oil	$2,095.80	
Coke	47.40	
Coal	657.00	
Labor	960.00	
Total		$ 3,760.20
Excess of increased earnings in proposed rate over estimated increased costs		$ 212.79

A $2.00 rate amounts to a very material increase on some of the larger consumers and at that, does not promise a return which will much more than take care of increased costs.

On the basis of what has usually been considered as a fair return for public utilities the following figures are significant.

Estimated operating expense requirement based on 1919 gas sales and present market prices	$16,502.61
8% return upon $65,647	5,251.76
4% depreciation reserve fund requirement upon $65,647	2,625.88
Total return requirement	$24,380.25
Average net rate per 1000 cu. ft. required to produce above total and based upon gas sales, year 1919, approximately	2.92

The obvious conclusion seems to be that the Commission should allow the highest rate for gas which is possible without loss of

business through competition with other fuels, and at that without too much assurance of improved service. On the other hand, the company should develop and expand its business if it expects to continue operations for long even at the new rate. To increase its business, it is very essential that satisfactory service be rendered, and if the Canon Gas Company is to continue in business it is difficult to understand how it can do so unless alterations are made in order to cut down operating expenses and increase the number of satisfied customers.

The testimony disclosed general complaints as to the quality and quantity of gas supplied by the company. The testimony also disclosed that in some instances the pressure was so low that when an oven was lighted for baking, owing to the lack of pressure or otherwise, the flame died out after the oven doors had been closed; that later the pressure came on again, and when the doors were opened, the gas accumulated in the oven exploded. Such a situation is fraught with grat danger to persons using the gas. It is intolerable and the Commission ought not and will not permit it to exist.

The rates hereinafter allowed by the Commission will be probably the highest of any company operating in the state. These rates the Commission feels that it is compelled to allow on account of existing conditions. If the applicant, after a fair trial of these increased rates, finds that it is unable to improve these conditions and give reasonably efficient and safe service, it ought not longer to continue its operations, and should apply to the Commission setting forth the facts and its inability to perform its duties and ask for an order to cease operations. The city, and the citizens thereof, can then consider some other plan of supplying their needs.

ORDER.

It Is Therefore Ordered, That the Canon Gas Company be, and it is hereby, permitted to file with the Commission, charge and collect the following rates, as set forth in the following schedule, said rates to become effective July 1, 1920:

ILLUMINATING OR FUEL GAS.

Rate:

For all consumption, $2.10 per 1000 cubic feet.

Prompt Payment Discount:

A discount of 10 cts. per 1000 cu. ft. will be allowed on all bills paid within the discount period.

Minimum Guarantee:

Each consumer must guarantee a net minimum monthly bill of 75 cts.

Meter Deposits:

Before installing a meter a deposit of $5.00 is required of those who own no real estate or have not a favorable commercial rating.

PREPAY METERS.

Rate:

$2.10 net per 1000 cubic feet.

IT IS FURTHER ORDERED, That The Canon Gas Company, within a reasonable time, shall make such improvements in its system as will enable it to supply a reasonable quality and quantity of gas to its customers, and eliminate the present danger in the use of the same.

RE APPLICATION OF ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY, THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, THE COLORADO AND SOUTHERN RAILWAY COMPANY, A. R. BALDWIN, Receiver of the property of THE DENVER AND RIO GRANDE RAILROAD COMPANY, W. R. FREEMAN and C. BOETTCHER, Receivers of the property of THE DENVER AND SALT LAKE RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, THE RIO GRANDE SOUTHERN RAILROAD COMPANY, THE DENVER AND INTERMOUNTAIN RAILROAD COMPANY, THE COLORADO AND SOUTHEASTERN RAILROAD COMPANY, THE GREAT WESTERN RAILWAY COMPANY, THE SAN LUIS CENTRAL RAILROAD COM-

PANY, THE COLORADO, WYOMING AND EASTERN RAILWAY COMPANY, THE CRIPPLE CREEK AND COLORADO SPRINGS RAILROAD COMPANY, Applicants, and THE SAN LUIS SOUTHERN RAILWAY COMPANY, THE COLORADO-KANSAS RAILWAY COMPANY, THE MIDLAND TERMINAL RAILWAY COMPANY, Intervenors.

[Application No. 91. Decision No. 355.]

Rates—Passenger, baggage, freight, etc.—Increases allowed.

Increases in passenger fares, excess baggage, freight rates, etc., authorized.

[August 25, 1920.]

Appearances: Henry T. Rogers and Earl H. Ellis, for Atchison, Topeka & Santa Fe Ry.; E. E. Whitted and J. Q. Dier, for Chicago, Burlington & Quincy R. R.; Wm. V. Hodges, D. Edgar Wilson, Geo. W. Martin, for Chicago, Rock Island & Pac. Ry.; E. E. Whitted and J. Q. Dier, for Colo. & Southern Ry.; Yeaman, Gove & Huffman, for Colo. & Southeastern R. R.; Charles E. Sutton, for Colorado-Kansas Ry.; Gerald Hughes and E. G. Knowles, for Denver & Intermountain Ry.; Charles R. Brock and Elmer E. Brock, for Denver & Salt Lake R. R.; Caldwell Martin, E. R. Griffin and H. F. Lambert, for Great Western Ry.; C. C. Hamlin, for Cripple Creek & Colo. Springs R. R.; Fred Matthews, for Midland Terminal Ry.; C. C. Dorsey and Edward G. Knowles, for Union Pacific R. R.; J. G. McMurray, for Denver & Rio Grande R. R., Missouri Pacific R. R., Colo., Wyo. & Eastern Ry., Rio Grande Southern R. R., and San Luis Central Ry., and, also, appearing generally for all carriers not specially represented.

Fred Farrar, for Colorado & Wyoming Ry., and the Colorado Fuel and Iron Company.

Harry Dickinson, for The Denver Transportation Bureau, T. A. McHarg, for the Boulder Commercial Association, Albert L. Vogl, for The Consumers League of Colorado, A. W. Ward, for the Colorado Springs Chamber of Commerce.

STATEMENT.

By the **Commission**: This cause arises on application, filed May 19, 1920, by the carriers named as applicants herein for an order of this Commission permitting the establishment of rates on state traffic in Colorado in conformity with such increases in rates on interstate traffic as might be allowed by the Interstate Commerce Commission in connection with applications then pending before it. On July 26, 1920, a supplemental application was filed, requesting that, in event the Interstate Commerce Commission should allow additional increases in freight rates or passenger fares necessary to meet wage increases granted by the United States Railroad Labor Board, this Commission authorize corresponding increases in the intrastate freight rates and passenger fares applicable in the state of Colorado.

The applications before the Interstate Commerce Commission were filed by the carriers under section 422 of the Transportation Act, 1920, which provides a new section, 15 (a), to the Act to Regulate Commerce. Under that section the Interstate Commerce Commission is required to

"initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country."

The Interstate Commerce Commission further is required to determine and make public what percentage constitutes a fair return thereon, but, during the two years beginning March 1, 1920, such fair return to be taken shall be a sum equal to 5½ per cent of such aggregate value, with a further sum added

thereto, in the discretion of the Commission, not exceeding one-half of 1 per cent to make provision for additions, betterments, equipment, etc.

Applications were filed before the Interstate Commerce Commission by the carriers located in the three classification territories: Official, Southern and Western. The application of the western carriers recited that "the revenues derived from existing rates yield less than 2 per cent upon such aggregate value and are wholly insufficient to enable them to provide and maintain an efficient service of transportation." The alleged aggregate value of the western carriers was shown as $8,963,883,753, and the claim was made that, in order to provide a return of 6 per cent on such value an increase in rates *on all state and interstate* freight traffic would be necessary.

Subsequent to the filing of the petitions before the Interstate Commerce Commission and this Commission the United States Railroad Labor Board, on July 20, 1920, made an award increasing the pay of railroad employes, effective May 1, 1920, the result of which, according to the estimates of the carriers, would increase the operating expenses of the carriers of the United States by approximately $626,000,000 per annum. Supplemental petitions were thereupon filed by the carriers asking that such wage award be considered in granting the necessary relief, through additional rate increases.

The hearings before the Interstate Commerce Commission were commenced on May 24, 1920, and concluded on July 6, 1920. In all 38 volumes of transcript and exhibits were submitted, numbering 10,600 pages. At the hearing before this Commission the applicants herein tendered in evidence the transcript and the same was received as Carriers' Exhibits Nos. 1 to 38 inclusive.

After consideration the Interstate Commerce Commission, on July 29, 1920, filed its opinion and order in the cause before it, Ex Parte 74, (58 I. C. C. 220-260). That Commission found the value of the steam railway property of the western group carriers held for and used in the service of transportation, for the purposes of the particular case, to be approximately $8,100,000,000. A return of 6 per cent on such amount would be

$486,000,000. The Commission divided the western territory into two groups, stating:

"The record shows that the principal railroads serving the territory west of the Colorado common points, especially the so-called transcontinental railroads as a whole, are in a substantially better financial condition than other carriers in the western territory. It also shows that the rates, generally speaking, are materially higher in the region west of the Colorado common points than in the part of the western territory lying east thereof. Considering the whole situation it is our view that the territory west of the Colorado common points and the traffic to and from that territory may properly be given separate treatment."

A line was therefore drawn from the boundary of Canada to El Paso, Texas, dividing the two groups, which were thereupon designated the Western group and the Mountain-Pacific group. By this subdivision the state of Colorado is placed within the two groups, the line describing the western boundary of the western group being as follows:

"* * and on and east of a north and south line running as follows: Following the boundary line between the state of North Dakota and the state of Montana and the boundary line between the states of South Dakota and Wyoming and Nebraska and Wyoming to the line of the Union Pacific extending east from Cheyenne, Wyo.; then following the line of the Union Pacific westward to Cheyenne and from Cheyenne running southward through Denver, Colorado Springs, Pueblo and Trinidad, Colo.; then following the line of the Atchison, Topeka & Santa Fe Railway through Raton and Las Vegas, N. Mex., to Albuquerque, N. Mex.; then south along the line of the Atchison, Topeka & Santa Fe Railway to El Paso, Tex."

It is further stated, elsewhere in the order, that it is not intended that the group boundaries above described should be strictly observed in the construction of rates in accordance with the findings, but that the territorial boundaries heretofore recognized should be observed.

The division of the western territory into two groups for rate making purposes by the Interstate Commerce Commission order

of July 29, 1920, results in the continental United States being divided into four groups, the Eastern, Southern, Western and Mountain-Pacific, instead of the three groups heretofore existing, to-wit: Official or Eastern, Southern and Western groups, and that order authorized increased fares and rates in the four groups, as follows: 40 per cent in the Eastern, 25 per cent in the Southern, 35 per cent in the Western, and 25 per cent in the Mountain-Pacific territory, on all interstate freight rates, with increase common to all groups of 20 per cent on interstate passenger fares, 20 per cent on excess baggate rates, a surcharge upon passengers in sleeping and parlor cars of 50 per cent of the charge for space used, to accrue to the rail carriers, and 20 per cent on rates for milk and cream carried on passenger trains, besides certain additional increases in switching and special service charges. These increased rates granted the carriers of the country were for the purpose of yielding the 5½ per cent return on the aggregate value of the property of the carriers during the two-year period ending March 1, 1922, as provided in the Transportation Act, 1920, and one-half of 1 per cent for betterments, improvements and equipment to enable the carriers to render efficient transportation service to the commerce of the country.

Upon due notice to all parties and to the public the matter was heard at the hearing room of the Commission, Capitol Building, Denver, Colo., on August 12, 1920.

During the course of the proceedings several objections were filed by shippers to any increase upon certain commodity rates, but in view of the general scope of the hearing such matters will be disregarded in this proceeding, and will be made the subject of readjustment at a later date upon due application therefor.

As previously stated, at the hearing before this Commission, the applicant carriers introduced as evidence, in transcript form, the evidence presented to the Interstate Commerce Commission, pertaining to the Western and Mountain-Pacific groups, and other documentary evidence. A witness for applicants gave testimony as to the interpretation placed upon certain phases of the Interstate Commerce Commission order by the carriers.

Evidence also was presented as to the award of the United States Railroad Labor Board and of the effect of that award. No evidence was tendered as to the value of applicants' property held for and used in intrastate traffic in the state of Colorado nor as to operating revenues and operating expenses of the applicants in such intrastate traffic. To have done so would have been impracticable, if not impossible, within the limited time between the date of the issuance of the Interstate Commerce Commission order and the effective date thereof. The order sought is of a temporary or provisional nature in the existing emergency to harmonize intrastate rates with the interstate rates authorized by the Interstate Commerce Commission, and it is quite apparent that a final order cannot be entered herein at this time.

It is urged by applicants that unless advances of intrastate rates are permitted to become effective at substantially the same time the increased interstate rates go into effect, there will be wide discrimination between interstate and intrastate rates; that this will create a chaotic condition in transportation service and will be disastrous to the business of the country. The Commission is obliged to deal with this as an emergency application and to apply to it the rules by which it is governed in passing upon such applications. Upon an application of this character it is, therefore, impossible at this time to analyze accurately the vast volume of evidence before us as such evidence applies to the railroads within the state of Colorado. On original applications for increases in rates and fares the burden is upon the applicant to justify the proposed increases. The Interstate Commerce Commission has by its order found justification for the increase of rates and fares in the Western and Mountain-Pacific groups as a whole.

The applicant carriers submitted no evidence of a satisfactory nature as to the value of their properties in Colorado or as to operating revenues and expenses in this state. The Interstate Commerce Commission, however, has had opportunity for a complete investigation of the affairs of the carriers in the different groups. In view of that fact and the further fact that in arriving at its conclusions the Interstate Commerce Commission

contemplated that the revenues necessary to yield a 6 per cent return upon the aggregate value of the carriers' property would be derived from intrastate as well as interstate traffic, this Commission will authorize temporarily the same increases on intrastate traffic as have been authorized by the Interstate Commerce Commission on interstate traffic, with the exception that no increase will be allowed in rates on milk and cream carried on passenger trains. As has been stated, accurate findings by this Commission at this time as to values, operating revenues and operating expenses of the applicant carriers within the state of Colorado are impossible upon this record.

Owing to the incompleteness of the record in this proceeding as to the percentage of revenues required by applicants properly assignable to intrastate traffic in Colorado, the finding as to increases hereinafter allowed must be understood to have been made upon authority and weight of the evidence presented to the Interstate Commerce Commission, as applied to the respective groups, and the applicants and the public will understand that such increases are authorized temporarily and may be made subject to readjustment or modification at any time application is made in that behalf, and that upon such application being made the carrier or carriers will be required to justify such increase.

The Interstate Commerce Commission in *Ex parte* No. 74 makes the statement that "the records shows that the principal railroads serving the territory west of the Colorado common points, especially the so-called transcontinental railroads as a whole, are in a substantially better financial condition than other carriers in the western territory. It also shows that the rates, generally speaking, are materially higher in the region west of the Colorado common points than in the part of the western territory lying east thereof."

Whle this may be true regarding the so-called transcontinental railroads as a whole, in the western territory, this Commission is not at all satisfied that it is true as to all of the railroads within the state of Colorado. The Commission is aware that within the state of Colorado and west of the Colorado common points there are intrastate roads which are not in as good financial condition

as the average road east of Colorado common points. This will emphasize the duty of the Commission with reference to later applications by lines west of the Colorado common points as well as to specific rates being made the subject of future investigation and adjustment by this Commission.

By order of the Interstate Commerce Commission joint or through line rates from one group to another are increased 33⅓ per cent, and by the same order, as interpreted by the carriers, rates for a movement of freight upon and east of the line of the Colorado common points—being a line from Cheyenne southward through Denver, Colorado Springs, Pueblo and Trinidad—will bear a 35 per cent increase and will give a 35 per cent increase to the western group carriers instead of the 25 per cent increase granted to the Mountain-Pacific group west of the Colorado common points. This Commission is not prepared to say that the evidence presented to it justified such an interpretation, especially as applied to the fixing of rates as permanent charges for transportation within the state of Colorado, and particularly is this true as applied to certain commodity rates. Therefore the Commission would again emphasize the fact that intrastate rates may be made the subject of further investigation and adjustment as the exigencies of the respective cases may require when the same are made to appear unequal or unjust in their application.

Heretofore the carriers have justified their failure to render adequate and efficient service through lack of revenue, and the rates and fares hereinafter permitted are authorized in the expectation that the carriers shall hereafter render adequate and efficient service within the state of Colorado.

Considering the record as a whole the Commission finds that the expenses of the applicants in operating their lines have been largely increased by increasing cost of materials and supplies and by advances in wages now effective, and that unless prompt relief is granted the carriers will be seriously embarrassed in providing funds with which to operate their lines; that charges for freight service, including switching and other special service now in force within this state, are insufficient and the increases

hereby authorized are fair, just and reasonable temporarily to meet the emergencies and needs of the carriers; that for the purposes of this order the rates and fares hereinafter authorized are just and reasonable temporary rates and are fair to the public and to the applicants and intervenors, and they are therefore authorized to go into effect subject to such readjustment as actual experience may prove to be necessary.

In promulgating this order the conditions under which it is made must be kept constantly in mind, to the end that injustice may not be done the commerce of the state; and this idea can be no better expressed than in the language of the Interstate Commerce Commission on pages 255 and 256 of its Report in Docket Ex parte No. 74, which reads as follows:

"Most of the factors with which we are dealing are constantly changing. It is impossible to forecast with any degree of certainty what the volume of traffic will be. The general price level is changing from month to month and from day to day. It is impracticable at this time to adjust all of the (intrastate) rates on individual commodities. The rates to be established on the basis hereinbefore approved must necessarily be subject to such readjustments as the facts may warrant. It is conceded by the carriers that readjustments will be necessary. It is expected that shippers will take these matters up in the first instance with the carriers, and the latter will be expected to deal promptly and effectively therewith, to the end that necessary readjustments may be made in as many instances as practicable without appeal to us."

ORDER.

It Is Therefore Ordered, That the applicants, Atchison, Topeka & Santa Fe Railway Company, Chicago, Burlington & Quincy Railroad Company, The Chicago, Rock Island & Pacific Railway Company, The Colorado & Southern Railway Company, The Cripple Creek & Colorado Springs Railroad Company, A. R. Baldwin, receiver for the property of The Denver & Rio Grande Railroad Company, W. R. Freeman and C. Boettcher, receivers for the property of The Denver & Salt Lake Railroad Company, Missouri Pacific Railroad Company, Union Pacific

Railroad Company, The Rio Grande Southern Railroad Company, The Denver & Intermountain Railroad Company, The Colorado & Southeastern Railroad Company, The Great Western Railway Company, The San Luis Central Railroad Company, and The Colorado, Wyoming & Eastern Railway Company, and the intervenors, The San Luis Southern Railway Company, The Colorado-Kansas Railway Company and The Midland Terminal Railway Company, be and they are hereby authorized to make effective upon September 1, 1920, by the giving of not less than one day's notice to the Commission and to the public, by filing and posting in the manner prescribed in the Public Utilities Act, schedules of rates constructed in accordance with those hereinafter set forth and including the increases hereinafter specified.

The rates herein authorized shall continue in effect until the further order of the Commission, with the right hereby expressly reserved to modify the same upon its own motion or upon the application or complaint of any person or party in interest.

IT IS FURTHER ORDERED, That applicants or intervenors shall not be permitted to file any rates in accordance with the authority herein granted to take effect at a later date than October 15, 1920.

IT IS FURTHER ORDERED, That increase in rates shall be as follows:

1. In passenger fares, an increase of 20 per cent. A surcharge upon passengers in sleeping and parlor cars amounting to 50 per cent of the charge for space in such cars; such charge to be collected in connection with the charge for space, and to accrue to the rail carriers temporarily until the further order of the Commission.

2. In excess baggage rates an increase of 20 per cent, provided that where stated as a percentage of or dependent upon passenger fares, the increase in the latter will automatically effect the increase in the excess baggage charges.

3. An increase of 35 per cent on freight rates upon intrastate traffic in that territory in the state of Colorado lying on and east of the line determined by the Interstate Commerce Commission from Cheyenne, Wyoming, running southward through Denver,

Colorado Springs, Pueblo and Trinidad, then following the line of the Atchison, Topeka & Santa Fe Railway through Raton and Las Vegas, N. M.; an increase of 25 per cent on freight rates upon intrastate traffic in that territory in Colorado lying west of said line; an increase of 33⅓ per cent on through freight rates applying from one territory into the other, until the further order of the Commission, subject to readjustment as hereinbefore stated.

4. The rates or charges for switching, transit, weighing, diversion, reconsignment, storage (not including track storage) and transfer where carriers provide separate charges against shippers for such service, shall be increased the same percentages as applied to freight rate increase and should be determined by the percentage applicable in the group where the service is performed. When tariffs now provide for the absorption by one carrier of another carrier's charges in specific amounts, such absorptions should be revised in harmony with the increases herein authorized.

5. It Is Further Ordered, That for lack of evidence the application for advance in rates for transportation of milk and cream on passenger trains be and it is hereby denied.

6. It Is Further Ordered, That the minimum charge per shipment for less than carload traffic, the minimum charge per car on carload traffic applicable to line haul movements, the minimum class rates, and the charges for other special services not enumerated herein, shall not be increased.

It Is Further Ordered, That for the reasons as stated in the report of the Interstate Commerce Commission, the provisions of this order shall be applicable to the original applicants and intervenors herein.

It Is Further Ordered, That in order to simplify tariff publications, the applicants and intervenors are hereby authorized to file increase of rates authorized in blanket supplements, when found expedient, to the same extent that said carriers and intervenors have been authorized to depart from similar tariffs and regulations prescribed by the Interstate Commerce Commission in its order in Docket No. *Ex parte* 74, dated July 29, 1920.

IT IS FURTHER ORDERED, That in computing and applying all increased rates authorized herein, fractions will be treated as follows:

Where rates are stated in amounts per 100 pounds or any other unit, except as provided in the succeeding paragraph, fractions of less than one-fourth of a cent will be omitted. Fractions of one-fourth of a cent or greater but less than three-fourths of a cent will be stated as one-half cent. Fractions of three-fourths of a cent or greater will be increased to the next whole cent. This rule will also be followed in computing passenger fares.

Where rates are stated in dollars per carload, including articles moving on their own wheels, when not stated in amounts per 100 pounds or per ton, amounts of less than 25 cents will be dropped. Amounts of 25 cents or more but less than 75 cents will be stated as 50 cents. Amounts of 75 cents or more but less than one dollar will be raised to the next dollar.

RE W. R. FREEMAN AND C. BOETTCHER, Receivers, THE DENVER & SALT LAKE RAILROAD COMPANY.

[Application No. 108. Decision No. 356.]

Rates—Increases allowed.

Receivers of The Denver & Salt Lake Railroad Co. authorized to make increases in rates in addition to those authorized in Application 91.

[August 30, 1920.]

Appearances: Charles R. Brock and Elmer L. Brock, for the applicants.

STATEMENT.

By the **Commission**: The application herein was filed August 14, 1920, and alleges substantially as follows:

That applicants joined in the general petition of the railroads in the state of Colorado, which was designated as Application No. 91, for a general increase in rates in conformity with such increases as might be made by the Interstate Commerce Commission. That at the time of said application, and at all times prior

thereto, applicants' railroad had been included in what was designated the Western group of railroads, and petitioners assumed that the increases awarded to the roads in Western Classification Territory would be in all respects uniform; that petitioners were surprised that the Interstate Commerce Commission by its order in case *Ex Parte* 74 created a new group as the Mountain-Pacific group, and that in said order there was established an increase of 35 per cent to accrue to railroads on and east of the Colorado common point line, and 25 per cent to carriers in the Mountain group and west of the Colorado common points. That petitioners' railroad lies wholly in the Mountain-Pacific group, which the Interstate Commerce Commission found to be in a more prosperous condition than the roads operating in the Western group.

That the adoption by this Commission of a 25 per cent increase in state rates to accrue to petitioners' road will necessarily operate as a disastrous discrimination against petitioners; that to enable petitioners to continue the operation of said road, and to pay the necessary operating expenses incident thereto, and without receiving any net return whatever, it is necessary for them to have at least as high a rate of increase as that granted to carriers in the Western group.

That no Pullman cars are transported on petitioners' line of railroad; that there are no milk or cream rates to be increased, and that the road of petitioners extends from Denver, Colorado, to the town of Craig, in said state of Colorado, and has no western connections whatever. That for the period beginning July 1, 1918, to June 30, 1920, inclusive, a deficit resulted from the operation of the road of petitioners in excess of two and one-half million dollars. That the application of a 35 per cent increase upon all intrastate freight rates to the same amount of business transacted during the calendar year 1919, with all other increases allowed by the Interstate Commerce Commission, would still result in a deficit of more than eight hundred thousand dollars.

Petitioners pray that in addition to the relief prayed for by them in Application No. 91, a further increase upon freight

traffic be allowed, so as to give petitioners the same total increase thereon as provided by the Interstate Commerce Commission in application *Ex Parte* 74 upon freight in Western Classification Territory, or, in other words, that they be allowed such increase in freight rates in this proceeding as will, when added to any increase allowed to petitioners under Application No. 91, equal 35 per cent upon all existing intrastate freight rates.

A hearing was held by the Commission in its hearing room, State Capitol, Denver, on August 27, 1920, in the above entitled application.

The Commission, in its order in Application No. 91, provided for an increase of 25 per cent on all existing intrastate freight rates, and the same will accrue to petitioners' road.

At the time of the hearing there were introduced in evidence from the towns of Craig and Steamboat Springs resolutions recommending the proposed increases and assenting to the same.

The testimony discloses that about 85 per cent of all the traffic of this road is the carrying of coal. There was filed with the Commission a petition signed, as the evidence discloses, by the producers of over 90 per cent of the coal along this line asking the Commission to allow the increases as applied for by petitioners. The Commission also received a telegram from the Chairman and Secretary of the District Commercial Club of the Town of Kremmling, which opposed the granting of the proposed increases.

The application of petitioners is that its rates, both local and joint, should be increased to the extent of 35 per cent. It appears to the Commission that many of the reasons actuating the Interstate Commerce Commission in allowing a smaller increase to the roads in the Mountain-Pacific group than in the Western group are not at all applicable to the Denver & Salt Lake Railroad. It has no western connections, carries no Pullman cars, and has no milk or cream rates. The increase allowed to the applicant company in the order in Application No. 91 on switching rates will result in no increase in revenue to the Denver & Salt Lake Railroad. The record in this case establishes fully the necessity for a further increase in the rates of petitioners'

road and the Commission finds that the difficulties encountered in the operation of this road, as well as its financial condition, warrants such increase; in fact, the serious question for the Commission to decide is whether the receivers will be able to continue operation at all, even on the basis of the increase in rates sought in this application.

The testimony discloses that the result of the operation of this road from July 1, 1918, to June 30, 1920, as certified to the Interstate Commerce Commission, was that the road failed by $2,531,227.47 in meeting its operating expenses. The testimony of the auditor of the Denver & Salt Lake Railroad is to the effect that if the full increases applied for are granted by this Commission, based upon the result of the business of the road for the year 1919, there would still be a deficit of $843,167.00 in operating expenses.

The record is full and complete as a basis for the finding of the necessity for this increase. The road is now in the hands of receivers and, while the record is sufficient to establish the facts as found by the Commission, the Commission has full information or knowledge of the condition of this road, of the difficulties of its operation, the high altitudes, long snow blockades, and that it traverses a sparsely settled country.

ORDER.

IT IS THEREFORE ORDERED, That the Receivers of The Denver & Salt Lake Railroad Company be, and they are hereby, authorized to increase, in addition to the increases authorized by order of this Commission in Application No. 91, all rates on freight traffic having origin and destination in the state of Colorado, as follows:

Ten per cent of the rates on all local shipments and 1⅔ per cent upon all traffic moving under joint rates published in tariffs issued by the Denver & Salt Lake Railroad and filed with this Commission. The increases herein authorized shall not, together with the increases authorized in Application No. 91, exceed 35 per cent of the rates in effect on the date of this order.

The rates or charges for switching, transit, diversion, weigh-

ing, reconsignment and storage shall be increased the same percentage as applied to freight rate increases.

IT IS FURTHER ORDERED, That said increase of 1⅔ per cent on said joint rates shall accrue entirely to the Receivers of The Denver & Salt Lake Railroad Company.

The increases herein approved may be made effective upon not less than one day's notice to the Commission and to the general public.

RE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.

[Application No. 91. Decision No. 358.]

Rates—Fractions of a cent—Disposition.

1. Atchison, Topeka & Santa Fe Ry. Co. et al. ordered in computing passenger fares to waive and omit fraction of one-half cent or less and to collect whole cent where fraction is more than a half.

Rates—Passenger tickets sold—Dishonor and redemption.

2. Atchison, Topeka & Santa Fe Ry. Co. et al. denied authority to dishonor and redeem after Sept. 1, 1920, round trip tickets sold but not used prior to that date.

[August 31, 1920.]

STATEMENT.

By the **Commission**: On August 30, 1920, an application was filed by the parties in the above proceeding for an order permitting them to establish the following rules and regulations, applicable to passenger traffic between points in Colorado:

"I. Where fractions occur in passenger rates, fares and charges, enough is to be added to make the fare end in full cent.

"II. Round trip tickets sold prior to September 1, 1920, upon which passage has not commenced by that date, will not be honored for passage on or after September 1, 1920, but will be redeemed at fare paid therefor."

Applicants contend that it is impracticable to make a passenger fare end in one-half cent in conformity with that part of the Commission's order in Application No. 91 which provided

that: "Where rates are stated in amounts per 100 pounds or any other unit, except as provided in the succeeding paragraph, fractions of less than one-fourth of a cent will be omitted. Fractions of one-fourth of a cent or greater but less than three-fourths of a cent will be stated as one-half cent. Fractions of three-fourths of a cent or greater will be increased to the next whole cent. This rule will also be followed in computing passenger fares." And the carriers ask that in all cases when computing passenger fares, enough be added to make the fare end in full cent. A fairer method, and one that is practicable, in computing fares ending in fractions, is to omit fractions of one-half cent or less, and to add the full cent when fraction amounts to more than one-half cent.

In support of their request for permission to establish the rule designated Rule II above, the applicants state that "It is deemed desirable to have tariffs quoting intrastate fares in conformity with those quoting interstate fares."

In all probability there are not many round trip tickets now outstanding as pertains to intrastate traffic, and to sanction the rule asked for within this state, would probably result in great inconvenience to such purchasers, and we think it but fair to the traveling public that the carriers be required to carry out all passenger contracts regardless of the date the same were issued.

ORDER.

IT IS THEREFORE ORDERED, That that part of the Commission's order in this cause providing for the disposition of fractions in computing rates and fares be, and the same is, hereby amended to read as follows:

"Where rates are stated in amounts per 100 pounds or any other unit, except as provided in the succeeding paragraph, fractions of less than one-fourth of a cent will be omitted. Fractions of one-fourth of a cent or greater but less than three-fourths of a cent will be stated as one-half cent. Fractions of three-fourths of a cent or greater will be increased to the next whole cent. The rule in computing passenger fares to be followed will be that when such computation results in one-half cent or less the

fraction of a cent thus derived shall be omitted, and when such computation results in more than one-half cent but less than a whole cent the fraction thus derived shall be increased to the next whole cent.''

IT IS FURTHER ORDERED, That the application for permission to establish a rule providing that round trip tickets sold prior to September 1, 1920, upon which passage has not been commenced by that date, shall not be honored for passage on or after September 1, 1920, but instead will be redeemed at the fare paid therefor, be, and the same is hereby, denied.

RE TRINIDAD ELECTRIC TRANSMISSION RAILWAY.

[Application No. 85. Decision No. 360.]

Return—Reasonableness as a whole—Different departments of utility.

1. The expenses and earnings of the street railway department of a utility, also operating electric and gas departments, must be considered separately, although the utility has been granted valuable franchises and street lighting contracts upon the understanding that the car lines should not be operated at a profit for some time, and the return of the company as a whole is reasonable.

Service—Street railways—Abandonment—Liability for paving.

2. The fact that a street railway company will be compelled to spend a large sum for paving a street is of slight materiality upon the question of the right of the company to abandon service upon the street, since the expense of paving is not a continuous expense.

Service—Street railways—Abandonment.

3. A street railway company was refused permission to abandon a certain line where it appeared that the company would save only about $500 or $600 per annum thereby, and the passengers accommodated by the line would have to walk approximately one-half the distance to their place of business in order to reach another line.

[September 8, 1920.]

Appearances: E. E. Whitted, Esq., and James McKeough, Esq., for Applicant; Henry Hunter, Esq., for the City of Trinidad.

STATEMENT.

By the **Commission**: The application was filed herein May 10, 1920, and recites substantially that the applicant is engaged, among other things, in the operation of a street railway in the city of Trinidad, Colorado; that for a considerable period of time it has operated said railway across the Las Animas River on Commercial Street, thence along Pine Street to the junction of Pine and San Juan streets; that there is practically no business derived from the operation of said street railway line along Pine Street and there is no necessity for a further continuance of said operation; that it is practicable for applicant, by operating the line on Arizona Avenue, Baca Street, San Juan Street, Stonewall Street and Main Street to serve the public in a satisfactory way, and that it is the opinion of applicant that the public can better be served by abandoning the line on Pine Street and rerouting the cars along Arizona, Baca and San Juan Streets, and thence across the Las Animas River to Main Street into said city; that the maintenance of the track on Pine Street is a useless expense and economic loss and that the grade of the line runs from 1 per cent to 6.5 per cent, making it a dangerous line to operate. Applicant prays that the Commission order the abandonment of all service over said line from Arizona Street to San Juan Street and that applicant be permitted to take up its track thereon.

On May 24, 1920, the city of Trinidad filed its answer to the application, in which it alleges substantially as follows: It admits the operation of said street railway system and alleges that predecessors in interest of applicant herein under a franchise passed by the city council of the city of Trinidad, were granted for the term of fifty years the exclusive right to maintain and operate within the city of Trinidad a street railway system over and along the streets in said application mentioned; that under and by virtue of the agreements and covenants in said franchise contained, it became the duty of the predecessors in interest of applicant herein, or its assigns, to run and operate cars over the lines and between the points designated in said franchise; that said applicant is, among other things, the owner

and engaged in the operation of a street railway line in the city of Trinidad; that in addition to, and as a part of its street railway system, it owns and operates interurban lines extending from said city to outlying towns and coal mining camps, which said lines are connected with and form a part of a general system operated by applicant as a whole, and are in no sense separate or independent lines or branches; that said applicant operates these lines and all of said branches as one system under one general government and control, using in said city the same tracks, cars and employees; that that part of said system which is employed largely in interurban traffic is also employed in part in urban traffic and carries passengers within said city and particularly over the branch or portion of said line sought to be abandoned; that in addition thereto said lines are employed and used as one system in carrying freight, baggage, express and United States mail; that applicant became the owner and possessor of these valuable rights and privileges through mesne transfers, conveyances and assignments and is now exercising all the rights and privileges pertaining thereto; that applicant has not surrendered, nor does it intend to surrender, its franchise nor any of its rights and privileges thereto; that said railway system and particularly that part sought to be abandoned has become a necessity to accommodate the inhabitants of the city of Trinidad, and the abandonment would cause great inconvenience and hardship upon the inhabitants of the city; that the street occupied by that portion of the line sought to be abandoned is a part of the paving district of said city; that by the terms of the franchise heretofore mentioned applicant covenanted and agreed to stand the expense of paving between the rails and two feet on each side thereof along said street railway system; that the city has made preliminary surveys, plans and specifications, including the grading and paving to be done by said applicant; that applicant seeks to abandon said line for no other reason or purpose than to avoid the assessment and payment of its share of the improvement which is being carried forward.

A stipulation was filed with the Commission containing cer-

tain facts to be considered as a part of the testimony in the case, the same being signed by the applicant and protestant. In the stipulation the main facts of interest agreed upon herein are that the city of Trinidad granted the predecessors of applicant the exclusive right for the term of fifty years to maintain and operate a street railway system over and along the streets in said application mentioned, more particularly Pine Street; that the said franchise contained the following section:

"Section 4. It is hereby understood and agreed that the city of Trinidad in granting this right of way and franchise, expressly reserved the right to pave and macadamize and improve all or every one of said streets, etc.; that the right is hereby reserved by the city of Trinidad to order any paving or macadamizing or other improvements between the rails of said track and for two feet on either side thereof, to be done at the same time and in the same manner and of the same material by assessment, as other improvements may be done under general contract for the improvement of any street over and across which the right to construct said railroad is hereby granted. The grantee of this franchise shall pay for macadamizing or paving said roads between the rails and for two feet on either side thereof, with the same material as the city uses on the streets over which said road runs, respectively, and keep the same continually in repair, flush with streets; and provide with suitable crossings and to make the roadbed at all times conform to the established grade of the street, all repairs and grading to be made under the instructions and to the satisfaction of the city engineer of the city of Trinidad; said grantee shall have the right to excavate and remove portions of said streets necessary to properly construct and operate said railroad."

All the parties were duly notified and a hearing was held in the city hall, Trinidad, on June 17, 1920, at 10 o'clock A. M. The evidence discloses that the lines of the Trinidad Electric Transmission Railway and Gas Company are operated as both urban and interurban lines. The interurban lines enter the city from the west. The line from the junction of Stonewall Avenue and San Juan Street continues north on San Juan Street to

Pine Street, which is the west end of the Pine Street line that is proposed to be abandoned and where the Pine Street line branches off. The main line, however, continues north on San Juan Street three blocks to Baca Street, thence east on Baca Street five blocks to Arizona Avenue, thence west again on Arizona Avenue four blocks to the junction of Arizona Avenue and lower Pine Street. This point is also the east end of the Pine Street line which is proposed to be abandoned. The main line from there continues up Commercial Street, one of the main business streets of the city. It will be observed that the Pine Street line, which is proposed to be abandoned, is a cutoff extending from San Juan and Pine Streets to Arizona and Pine Streets, saving about half the distance in reaching the junction of Arizona and Pine Streets, before entering the business section. This cutoff is about 3,000 ft. in length and runs through a thickly populated section of the north side of the city of Trinidad. If the line is abandoned the patrons living along Pine Street, in order to reach the business section by street car, would be compelled to walk three or four blocks north to Baca Street, or four or five blocks south to Stonewall Avenue, which in many instances would be as much as half the distance they would be compelled to travel if they walked all the way into the business section. The evidence shows that interurban cars now entering the city use the Pine Street cutoff to reach the center of the business section, but that if the Pine Street line were abandoned the cars could be rerouted around by Baca Street with practically no added expense.

The evidence is conflicting as to the number of passengers that originate on Pine Street destined for the business section, the company contending that they are very few. However, a number of witnesses in their testimony strenuously protested that it would be a great inconvenience to them, and that rather than walk to the other lines, they would prefer to walk all the way down town. The evidence which has the greatest force with the Commission, and which has not been contradicted by the protestant, is to the effect that the street car system as a whole is now being operated at a loss of approximately $9,000 annually.

It is vigorously contended by protestant that when the present franchise was granted to the company, both the citizens and the company understood the car lines could not be operated at a profit for some time, and that for this reason valuable rights of way and valuable and liberal city lighting contracts were entered into by the citizens and the city with the company, which have all been carried out, and that with these valuable contracts the company as a whole, including electric, gas and street car service, is earning a reasonable return on its investment. The financial condition of the company as a whole, including gas and electric operations, not being in issue in this case, no evidence was introduced thereon. Unfortunately for this contention of the protestant, while it may be a reasonable and equitable contention, the Public Utilities Act requires that each public utility, such as electric, gas and street car service, as to earnings and expense, must be dealt with separately, so far as a return on the investment in each utility is concerned. A reasonable return must be allowed by the Commission on each investment.

The reason for this law becomes apparent. For instance, if it were otherwise, a user of electricity might be required to pay more for electricity than it is worth, to the end that the expense of car service might be met, when in fact he might never use the car lines. The law contemplates that rates for electricity shall be no higher than will pay the cost of operation, maintain and produce a reasonable return on the electric investment, while on the other hand, a user of street car service shall pay rates sufficient to pay the cost of operation and maintain and pay a return on the investment in this branch of the service.

The testimony of the applicant went into detail as to the manner of charging to the street car system its proper share of the expense of operating the system as a whole, including the manner of charging the street car company with electricity at cost of production for operating its cars. The earnings and expenses of the street car company as a whole is before the Commission in a detailed statement, and it is apparent that the

street car system is being operated at a considerable loss to the company at the present rate of fare.

Considerable testimony was introduced to show that a plan for paving the street occupied by the Pine Street line is under way and that if the company is not allowed to abandon this line it will be compelled to expend a large sum in paving, as provided in its franchise. The Commission does not consider this evidence material, except as it imposes an added expense upon the operation of the street car lines which are now being operated at a loss. However, this item of paving would not be a continuing charge upon the operating expenses for the future, and the company is not asking to discontinue the whole system. If the Pine Street line, however, were discontinued and the patrons using this line were to continue to ride on the other lines, the cost of operation of this line would be saved. However, the testimony of the company is to the effect that if the Pine Street line is abandoned, the only saving of expense to the company outside of the cost of paving would be the cost of maintenance of this line, which would amount to $500 or $600 per year; that there would be no saving in the cost of operation. Conceding the estimate of the cost of maintenance of the Pine Street line to be correct, this would be a comparatively small saving to the company compared with the inconvenience to the patrons along Pine Street and as compared to the total loss of operation of approximately $9,000 per annum.

After considering all the testimony, the Commission is of the opinion that it should not grant the application for permission to abandon the Pine Street line; that to grant the application would not give the company permanent relief from the condition in which it finds itself, nor relief commensurate with the injury to patrons along this line. The only real and permanent relief must come through additional earnings to the company in operating its car system. It has been heretofore announced by the Commission, and recently has been affirmed by our Supreme Court, that before permission to abandon shall be granted a common carrier, it must prove to the Commission that after a fair trial its property is unable to earn its legitimate operat-

ing expenses, and that an increase in rates commensurate with the value of the service, if permitted by the Commission, will not increase the revenue of the utility sufficient to meet its legitimate operating expense. App. of the D. B. & W. R. R. Co. to Discontinue Service. 5 Colo. P. U. C. 54. Decision No. 149; also, In Re Denver, Laramie & Northern Railroad Co., 4 Colo. P. U. C. 316; also App. 59, Application of Durango Railway & Realty Co., to Discontinue Service.

While in these cases the application was for the discontinuance of the whole line or system, the case under consideration involves the same principle, as the main reason advanced by the applicant for a discontinuance as disclosed by the evidence is the inability of the company with its present earnings to meet the legitimate operating expenses of its street car service. There may be other reasons for allowing the discontinuance of a branch or part of a system in a case where the whole system is not paying its legitimate operating expenses, when such abandonment might save the balance of the system, but in this instance the discontinuance would have very little effect, according to the company's own testimony, in relieving it from its present embarrassment, other than to escape the cost of paving. The item of paving is a serious item, and in the opinion of the Commission should be given serious consideration by the city authorities, as the car system is admittedly being operated at a loss. However, it is not in the nature of such a continuing drain on the cost of operation as would warrant the abandonment of the Pine Street line.

From the financial condition of the street car system as disclosed by the present record, the abandonment of the Pine Street line is not as serious a question for the citizens to consider as the probable ultimate abandonment of the whole street car system. In view of this admitted condition, the city authorities ought to consider carefully any proposed added burdens to be placed upon the company. The testimony of all the witnesses for protestant was that there would be no protest on the part of the patrons to an increase of fares to 7 cents. The record shows that the company is entitled to this increase and the Com-

mission will, by the company's filing an amended or a new rate schedule providing for such increase and giving the proper notice as required by law, allow the company to charge a 7 cent car fare on its urban lines.

The Commission has read and considered the briefs filed by the parties in this cause, and as to the main question raised as to its jurisdiction to grant the relief asked, it entertains no question as to its jurisdiction to grant such relief upon a sufficient showing. The permission to abandon is refused on the ground that if granted it would have a comparatively small effect in decreasing the cost of operation or in insuring a continued operation of the street car system as a whole.

ORDER.

IT IS THEREFORE ORDERED, That the application of The Trinidad Electric Transmission Railway and Gas Company for permission to abandon service over its line of street railway on Pine Street between Arizona and San Juan Streets in the city of Trinidad, Colorado, and to abandon and take up its tracks on Pine Street from State Street to a connection with its line on San Juan Street, in said city, be and the same is hereby denied;

IT IS FURTHER ORDERED, That the applicant company, by filing with the Commission an amended or a new schedule of passenger fares in the manner prescribed in the Public Utilities Act, may increase its passenger fares on all its urban lines to seven (7) cents.

RE DURANGO RAILWAY & REALTY COMPANY

[Application No. 59. Decision No. 366.]

Return—Reasonableness—Interest—Income.

1. Interest is not a proper item to be deducted from income in determining the return of a public utility company for rate-making purposes.

Service—Abandonment—Fear of decreased revenue period.

2. A street railway company, having received valuable rights and privileges from the public, and having entered upon

the enjoyment of them, cannot be permitted to cease its activities upon the mere fear that decreased income will result from an increase in fare.

Service—Abandonment—Exhaustion of reasonable efforts to continue. 3. A street railway company should not be allowed to abandon service where it has not exhausted all reasonable and practicable means to meet its operating requirements.

[Supplemental Application.]

[October 7, 1920.]

Appearances: A. R. Mollett of Mollett & Clements, Durango, for The Durango Railway and Realty Company.

STATEMENT.

By the **Commission**: On August 3, 1920, The Durango Railway and Realty Company of Durango, Colorado, filed application for permission to discontinue service on its electric street railway, which extends from a point near the Denver & Rio Grande passenger depot in Durango through the city of Durango, Brookside Addition and North Durango and to Second Street in Animas City, comprising nearly two and one-half miles of track. This application is supplementary to a request for authority to cease operations filed by the same applicant October 1, 1919, heard at Durango November 8, 1919, and denied on December 6, 1919. Hearing upon the present application was held at the hearing room of the Commission in the State Capitol, Denver, September 17, 1920.

At the original hearing on November 8, 1919, it was shown that there was a deficit caused by operating expenses exceeding revenue from fares paid, over a period of several years, but on account of the opinion of Colorado courts affirming a previous ruling of this Commission that no public utility should cease operations until after a trial of higher rates, the Commission deemed it unwise to allow the abandonment of service until after a fair trial had been given increased fares. Accordingly applicant was permitted to increase its cash fares from five to seven cents, and to sell ten tickets for sixty-five cents.

The evidence now shows that notwithstanding an increase of two cents in cash fares and an increase of one and one-half

cents for tickets, for the eight months period up to September 1, 1920, the deficit continues. Revenue for this period was $8,-325.24. Expenditures for the same time were $8,594.72, thus showing a net loss of $269.48, without any return on the investment. It is also shown there was a decrease of population in Durango of about 500 during the last ten years.

The entire force of operatives of applicant consists of four motormen and a superintendent, all working for meagre wages. The Superintendent receives but $75.00 per month, while the motormen are paid only 42c per hour, and even then have left part of their pay with the company to assist in the operation of the road. The testimony shows that 2,000 ties would have to be procured next year at a cost of $3,200.00. As there are no funds available, this would be impossible of accomplishment. Had the ties been supplied this year as actually needed, and a broken axle replaced on one of the cars, the total deficit for the eight months to September 1 of the present year would have been $1,869.48. Sixty thousand dollars was originally spent in building and equipping this line. The owners offered to sell it to the city of Durango for $25,000, but the proposition was not accepted.

The property is now assessed at $13,000. A reasonable return on this would be about 6 per cent. Although great depreciation has taken place in the property, none has ever been charged off, and no return has been possible on the investment during the last eight months. On the contrary there is a deficit.

The condition of the tracks in 1914 was such that in the interest of safety of travel a fifteen-minute service had to be abandoned and a slower twenty-minute service established. This reduced the speed from ten to seven and one-half miles per hour.

It has been conclusively shown that this utility has been operated with the utmost economy; that if it is to continue to operate an increase must be granted its employes or the company will be confronted with a strike of its motormen; that the increasing use of the automobile is detracting from its earnings; in fact, that this company is confronted with so many irremediable conditions that it would be manifestly unfair and

work an unjustifiable hardship on The Durango Railway & Realty Company for this Commission to insist upon further operation of said railway. For the reasons stated it is thought wise that the prayer of the applicant be granted and the company allowed to discontinue service. After the most careful consideration of all the circumstances surrounding the operation of the street railway system of The Durango Railway & Realty Company the Commission therefore finds that said street railway can only be operated at a financial loss.

The testimony discloses that applicant, in the event it is permitted and authorized to discontinue its street railway service, will surrender its franchise to the city of Durango, remove its rails, ties and poles from the streets, and place such of the streets that it operates over in a reasonably safe condition for use by the public, and that such service is not proposed or desired to be discontinued until after the La Plata County fair has been held in the early part of October, 1920, as the street railway accommodates a large number of persons at such time. According to the testimony, the said fair is to be held and concluded prior to October 9, 1920, and the Commission will sanction such discontinuance of service only upon the conditions above stated, to-wit, that applicant will, upon demand of the proper authorities, surrender its franchise rights to the city of Durango, and will place the streets of said city over which its cars and tracks now operate in reasonably good condition for use by the public, removing all its rails, ties, wires and poles therefrom all within a reasonable length of time after such service has been discontinued, as herein allowed and permitted; and also, that such street car service will be continued in operation till midnight of October 9, 1920, for the accommodation of patrons of the county fair to be held at the city of Durango prior to said date.

ORDER.

It Is Therefore Ordered, That said applicant, The Durango Railway & Realty Company, be, and it is hereby, authorized and permitted to discontinue the operation of its street railway system in the city of Durango and adjoining territory at and

after midnight of October 9, 1920; it being understood as a condition of the effectiveness of this order that said applicant shall within a reasonable time after said date surrender its franchise to the city of Durango, remove all rails, ties, poles, wires and other obstructions caused by it from the streets of said city, and leave such streets in a reasonably good and safe condition for the use of the public.

RE CITY OF DURANGO.

[Investigation and Suspension Docket No. 38. Decision No. 370.]

Public utilities—What constitutes public service—City carrying water for another municipality.

1. A city which carries in its pipe line, from the source of supply, water belonging to a second municipality, and delivers it to the latter for distribution to its inhabitants, is not rendering such a service as is contemplated by the Public Utilities Act, and subject to the regulations and control of the Commission.

Intercorporate relations—Power of Commission—Joint use of facilities.

2. The provisions of the Public Utilities Act, empowering the Commission in a proper case to authorize the use of the conduits and pipes of one utility by another, has no application to a case where the parties have executed a contract for such use of the facilities.

Commissions—Powers—Construction and validity of contract.

3. The Commission has no jurisdiction to pass upon the question of the validity and effect of a contract providing for the use of the facilities of one utility by another.

Commissions—Powers—Specific enforcement of contract.

4. The Commission has not been granted equitable power and jurisdiction by any act of the legislature, and consequently it may properly dismiss, for want of jurisdiction, the proceeding which seeks the enforcement of the specific performance of a contract.

Constitutional law—Impairment of contract—Contracts involving private service.

5. The principle that the state may by its paramount power, change rates fixed by contract, has no application to contracts for the performance of service other than public service, such as, for instance, a contract for the carrying of water by one municipality for another.

[October 27, 1920.]

Appearances: Jas. A. Pulliam, for protestant; Messrs. Russell and Reese, for respondent.

STATEMENT.

By the **Commission**: This matter comes before the Commission by virtue of a petition of the city of Durango, filed November 29, 1919, which sets forth that petitioner is a city of the second class in La Plata County, Colorado, and that it is the owner of a system of water works supplying itself and its inhabitants with water for domestic, irrigation, manufacturing and other purposes. The petitioner further alleges that from about February 1, 1909, it has had in effect a schedule of rates for the use of water as set forth in ordinance No. 469, a copy of which ordinance is attached to the petition and marked Exhibit "A"; that the city desires to change its present schedule of rates and adopt a new schedule in lieu thereof to become effective and in operation January 1, 1920, which proposed schedule of rates is attached to said petition and marked Exhibit "B."

The petition further alleges that the city desires to change its water rates for the reason that the old rates do not afford revenue sufficient to pay expenses of operating and maintaining its water system and to pay interest on its water bonds; further, that the revenue derived by petitioner from the old schedule of rates amounts to about $22,000.00 per annum, while it is stated that operating and maintenance expenses of the system and interest charges upon the water bonds amount to more than $30,000.00 per annum.

The petition further alleges that the old rates are in some cases too high and in others too low for the service rendered, and that the petitioner has endeavored to remedy the inequality, as well as the providing for more revenue, in the new schedule of rates. The prayer is for permission for the new schedule of rates to become effective and in operation on and from January 1, 1920.

Upon the filing of said petition, notice thereof was given to the users of water from said water system by publication in the

newspapers of Durango and in the usual and customary methods, that if objections or complaints were not made by the water users, the new schedule of water rates proposed would be allowed and become effective January 1, 1910, in accordance with the prayer of said petition.

On December 19, 1919, there was filed with the Commission a protest by the town of Animas City, Colorado, which protest alleges the incorporate capacity of the town of Animas City and of the city of Durango, and that the town of Animas City is adjacent to and joins the city of Durango, and that protestant has constructed a water system at a cost of $25,000.00, and has issued water bonds of said town for such amount, which bonds are outstanding.

Protestant further alleges that it is the owner of water and water rights out of the Florida River in La Plata County, Colorado, of three-fourths of one cubic foot per second of time under three separate priorities. It is further alleged that the point of diversion of the water rights of the respondent, the city of Durango, and said protestant, town of Animas City, in and to the water of said Florida River is at an identical point on the west bank of the river, and that for the purpose of carrying and distributing to the town and its inhabitants the water of Animas City to a point on the pipe line of the city of Durango, the said city under date of August 16, 1910, made and entered into an agreement with the said town to carry said water through its pipe line, and the protest sets forth said contract and agreement in full in the sixth paragraph thereof.

Said contract so entered into states that the town of Animas City is the owner of a water right and priority to the use of water of the Florida River in a quantity sufficient to supply said town and its inhabitants with water, and that there is no means of carrying the water of said town from said river to Animas City, and that the town desired to carry its water through the pipe line owned by the city of Durango to what is known as the upper reservoir on the mesa above said town. The contract aforesaid was entered into upon authority of a resolution attached thereto and made a part thereof. The con-

tract also provides that said town may have turned into the pipe line of said city at the headgate on the Florida River whatever is owned by the town of the water of the Florida River as is necessary to supply said town and its inhabitants with water for irrigation, fire and domestic uses; that the town is to take the necessary steps to authorize whatever officer may be charged with the duty of apportioning the water of Florida River under the law to turn the water belonging to the town into said headgate, and that the city of Durango shall not be liable in any event for a failure of said water officer to turn said water into said headgate. The contract provides that Animas City at its own expense shall take said water from the pipe line at some point agreed upon by the water committee of Durango and the board of trustees of Animas City, such point to be above the lower reservoir of said city, and the town shall be at the whole expense of tapping said pipe line and carrying its water from the pipe line to the town and its inhabitants, and that the town shall, at its own expense, procure and place at such point at or near where the town takes its water from said pipe line, a water meter of such kind and size as may be selected by said city, through which to measure the water carried by said pipe line for said town.

It is further agreed that the town shall pay the city for carrying the said water at the rate of 3c per thousand gallons for the amount carried, as measured by said water meter, payment to be made quarterly; and it is agreed that the water meter shall be under the control of the city and that the readings of the meter to determine the amount of water carried to said town shall be made by the water superintendent of said city, and that said town shall exercise no jurisdiction or control over said water meter whatever.

The sixth paragraph of the contract further safeguards the city from liability for failure to carry the water of said town on account of any leakage, seepage through or by said pipe line or other matters pertaining to the damage of the pipe line, whereby it is made necessary to cut off the water from the pipe line in order to rebuild or repair the same. The same para-

graph provides in substance that if at any time the pipe line should prove to be of insufficient size to carry all water needed by the city, as well as the water of said town, the city shall have the right to the use of the town's space in said pipe line for carrying the city's water supply, and in that event, the amount of water to be delivered to the town shall be determined by a board of arbitration chosen as therein specified.

The eighth paragraph of the contract expressly disclaims the sale of water or any agreement of Durango to sell water to Animas City, and only agrees to carry such water belonging to Animas City as Animas City may have a right to have turned into Durango's pipe line under said agreement; and the ninth paragraph prevents the town from claiming any right to any of the water or priority of said city as they then existed. The tenth paragraph of the contract sets forth the duty of the city as to the carriage of the town's water from the headgate to the water meter, and the eleventh paragraph provides that the city shall have the right to the use of the pipe lines of said town free of expense in case of necessity or emergency.

The twelfth paragraph provides that unless the carriage charge made to said town is paid promptly, and if said town fails to pay such charges for two successive quarters, then the city shall have the right, without notice, to terminate the agreement, to turn off the water at the meter and refuse longer to carry the same. The thirteenth paragraph fixes the term of the agreement for a period of twenty years from its date.

There are many other features in the contract, but the foregoing are the important and salient ones with respect to the matter in controversy.

The seventh and eighth paragraphs of the protest of Animas City allege that the city of Durango by virtue of ordinance No. 565, adopted and approved December 2, 1919, abrogates and sets aside the foregoing contract and seeks to compel protestant town to pay a charge for the carrying of its water in an amount equal to one-half of the meter rates to be paid by the water users of the city of Durango; that said rate fixed in ordinance No. 565 as applied to the charge for carrying the water

of said town is excessive and burdensome, and if allowed to be put into effect by said city will work great hardship and damage to water users in the said town.

The protestant asks that the respondent be required to live up to and perform the terms and conditions of the aforesaid contract, and to carry the water of said town at the price or charge fixed in said contract, to-wit: 3 cents per thousand gallons, based upon the amount carried as indicated by said water meter.

On December 22, 1919, the respondent filed its answer which admits the allegations of the first and second paragraphs of the protest; admits that protestant is the owner of water rights it claims out of the Florida River, and admits that the point of diversion of the water rights of the town and city are the same; admits said town joins the city of Durango, and admits said town owns a water system costing $25,000.00, and further admits the entering into by said city and said town of the contract set forth in the sixth paragraph of the protest hereinabove referred to. Respondent city also admits the passage of ordinance No. 565 by the city of Durango on December 16, 1919, whereby the charges proposed to be imposed upon protestant town for the carrying of said town's water through the pipe line of the city are fixed as one-half the meter rates set forth in ordinance No. 565 to be paid by water users in the city of Durango.

Respondent denies the rates attempted to be fixed by the city of Durango in ordinance No. 565 are excessive and burdensome, or that it will work any hardship or damage to water users of protestant, and avers said rates are reasonable and no more than the town should pay, and that they will not produce sufficient revenue to pay the city a just proportion of the maintenance and upkeep of its pipe line used jointly by said city and town.

For a second defense the answer alleges the entering into of the contract set forth in the sixth paragraph of complainant's protest, and alleges a further contract entered into by said city and said town on July 12, 1916, which was to supersede the contract originally entered into in 1910, from July 12, 1916, to and including May 1, 1919; and that at its expiration the terms of the original contract of 1910 became and were in full force and

effect as though the second contract had not been entered into. The third paragraph alleges that by the terms of the second contract the city agreed to carry in its pipe line the water of said town from its headgate on the Florida River to said town, such water as was necessary for the domestic and other needs of Animas City, for the sum of $9.00 per month, payment to be made on or before the 10th day of July, October, January and April of each year; and further alleges that in event said town fails to pay promptly for the carriage of said water for two successive quarters, the city has the right, at its option and without notice to the town, to terminate the agreement and turn the water off from said meter and refuse to further carry the same. It is further alleged that the town has failed to pay any compensation whatever to the city under the second agreement since August 12, 1919, and that more than two quarters had elapsed before ordinance No. 565 was adopted, and more than two full quarters will have elapsed between then and the time said ordinance goes into effect, to-wit: January 1, 1920. Respondent city avers that in passing the ordinance it only exercised the rights given it under said contract of August 16, 1910. It alleges that the town by its said failure to make the payments as required by the contract has forfeited its right to rely upon the same, and that said contract is now void and of no effect.

For a third defense it is alleged that the laws of the state of Colorado and the rules of the Public Utilities Commission of the state of Colorado supersede and render void any and all contracts between the city of Durango and all persons taking or using water from the water system of said city, so far as they conflict with or are discriminatory against said rights; and it is alleged that the contract of Animas City aforesaid is discriminatory and conflicts with the rights given by the city of Durango to other water users and the same ought not to be enforced as against the city of Durango.

On January 8, 1920, protestant filed its replication to the answer of respondent which alleges that the water rights owned by the town and said city in the waters of the Florida River

are amply sufficient to supply both protestant and respondent with water for domestic and other uses. It admits entering into the contract of July 12, 1916, but alleges that it has expired, and was entered into only because of the failure of the meter to properly register the flow of water. It is further alleged that the town paid to the city the sum of $27.00 on April 8, 1919, which is in full payment for carrying the town's water to and until July 1, 1919; and that by virtue of the contract first entered into, the city is to furnish the town readings of said water meter showing the amount of water carried to the town, and that the city is to furnish the town with statements of the amount due for carrying its water, but that said city has neglected, failed and refused to furnish said town with the readings of the meter and of the amounts due for carrying its water, though requested by said town so to do; and that about October 1, 1919, the town made demand, and again on December 27, 1919, demanded that it be furnished a statement showing the amount due for the carrying of its water, but that respondent has neglected, failed and refused to render any statement to the town showing the amount due, or to furnish readings of meter showing the amount carried by the city. Then follows an allegation that the town is willing, ready and able to pay the city the sum due for carrying its water, as per the 1910 contract, and alleges that said contract is in full force and effect, and further that the town has offered to pay the city for carrying the town's water, but that the city has refused and still refuses to accept payment. It denies that the laws of the state of Colorado supersede or render void said contract, and denies that said contract is discriminatory and conflicts with the rights given by the city of Durango to other water users. Protestant asks that the defendant carry water to the town of Animas City as provided for in its said contract.

On December 22, 1919, the Commission entered its order suspending the effective date of the schedule of rates filed by the city of Durango November 29, 1919, which is designated as said city's Colo. P. U. C. No. 2 in the following particular only: As to the meter rates to be charged Animas City set forth in

said schedule as follows, "Animas City to be charged 50 per cent of city rates." In all other respects the schedule of rates filed by the city on November 29, 1919, became effective January 1, 1920.

The matter was set for hearing at the city of Durango, June 2, 1920, upon due notice to all parties, and was heard upon that day at the District Court room of the Court House in said city before Commissioners Anderson and Halderman. Much testimony was submitted at the hearing, a considerable portion of which, in the view of the matter taken by the Commission, was and is irrelevant to any issue involved. Subsequently briefs were filed by the parties in support of their respective contentions.

At the outset, the controversy arose from the filing with the Commission by the city of Durango of a schedule of rates proposed to be charged for the use of water to the inhabitants of the respondent city and other users of the Durango water system, included among which, from the city's standpoint, is the town of Animas City; and it was proposed in the schedule to charge the town of Animas City 50 per cent of the rate charged metered water users in the city. Subsequently and in April, 1920, there was filed with the Commission a new schedule of meter rates which were to supersede those specified in ordinance No. 565, as included in the first schedule filed, the new schedule being approved by the city under ordinance No. 568, passed by the city May 18, 1920. In ordinance No. 568 the meter rates were changed and the rate to Animas City was fixed at 75 per cent of the rate charged metered water users of the city of Durango.

From the pleadings, and from the admissions which the testimony fully sustained, it is established that the contract entered into by the town of Animas City and the city of Durango on August 16, 1910, as set forth in the sixth paragraph of the protest of Animas City, provides for the carriage of the water belonging to Animas City in the pipe line owned by the city of Durango from the city's headgate to a point on said pipe line adjacent to the town of Animas City, there to be measured

through a water meter to Animas City; which said contract was to continue for a period of twenty years; and for such service Animas City was to pay at the rate of 3 cents per thousand gallons for water carried by Durango in its pipe line to Animas City.

This being true, the first question that arises is this: Is the carriage of water by one utility for another utility such a service as is contemplated in the terms of the Public Utilities Act, so as to make such service the subject of regulation and control by the Public Utilities Commission? The testimony discloses, and in fact it is conceded by all parties, that the water carried to Animas City through the Durango pipe line is water belonging to Animas City, and that provision is made for the measuring of all such water through a measuring meter to Animas City, the city of Durango having no further control over it. It then becomes the duty of Animas City to distribute its own water to its own consumers through its own water distributing system in such manner as Animas City desires, without any regard to the city of Durango. Durango has no more power or right to dictate the price charged consumers or the manner or method of distributing the water in Animas City than has Animas City the power to regulate the manner or method of the city of Durango in distributing its water, or the price charged its water consumers, in and adjacent to, the city of Durango.

The whole purview of the Public Utilities Act, lodges generally, and gives to the Commission the power to regulate rates, charges, fares, etc., of public utilities when engaged in serving the public. Can it be said that the city of Durango is performing a public utility service when it is carrying water for and to the town of Animas City when such water is owned by Animas City? We think not. In carrying water for Animas City the city of Durango is performing a private service for Animas City, using a surplus of plant not dedicated to public use, as distinguished from its duty to serve its patrons as a public utility.

Much stress has been laid upon the duty of the Commission

under Section 28 of the Act, which reads: "Whenever the Commission after a hearing had upon its own motion or upon complaint of a public utility affected, shall find that the public convenience and necessity require the use by one public utility of the conduits * * pipes * * or any part thereof, on, over or under any street or highway, and belonging to another public utility, and that such use will not result in irreparable injury to the owner or other users of such conduits * * pipes * * or in any substantial detriment to the service, and that such public utilities have failed to agree upon such use or the terms and conditions or compensation for the same, the Commission may by order direct that such use be permitted, and prescribe reasonable compensation and reasonable terms and conditions for the joint use, etc." (Public Utilities Act, 1913, Section 28.)

The above section of the Act, it will be observed, requires as a condition precedent to the exercise of the power or jurisdiction of the Commission, that the public convenience and necessity require such joint use, and that the joint use will not result in irreparable injury to the owner of such conduits * * pipes * * etc., and that the public utilities involved have failed to agree upon such use, and have failed to agree upon the terms and conditions and compensation for the same. But in the case under consideration, as it appears by the contract of August 16, 1910, if said contract be in full force and effect, the public utilities involved, to-wit: the city of Durango and the town of Animas City, have agreed upon the use and the terms and conditions and compensation to be paid for the same. Whether or not the contract, under which all these things are agreed upon by these two municipalities, has become void and of no effect because of the default of the town of Animas City to comply with the terms and conditions of said contract, or for any other cause, is a question to be submitted to a court of competent jurisdiction for determination, this Commission having no power under the Act creating it, or any amendment thereto, to entertain and determine such question.

It will be noticed that the protestant prays that "said city of Durango be required to live up to and perform the terms and

conditions of its said contract of August 16, 1910, and to carry the water of said town of Animas City from the headgate on the Florida River to the point from which said water is taken by said town, for the price of 3 cents per thousand gallons based upon the meter readings." In effect this is seeking the enforcement of a specific performance of the contract between Durango and Animas City—a purely equitable procedure.

The Commission has not been granted equitable power and jurisdiction by any act of the Legislature, and hence it might properly dismiss the protest of complainant for want of jurisdiction and power to grant the relief asked. But in view of the distinction drawn between the service rendered in the instant case—that of engaging to carry the water of Animas City for a given term and for a specified compensation, instead of the city of Durango carrying and distributing its own water to Animas City and its inhabitants—it is entirely proper for the Commission to decide the case on the facts as established at the hearing rather than upon the prayer of the complainant. The facts as established at the hearing preclude the Commission from exercising jurisdiction to fix such rate.

As to whether or not the contract of August 16, 1910, is void and of no effect because of the default of Animas City to comply with its terms and conditions, no opinion is expressed. The evidence on that point is conflicting, and besides, that is a question to be submitted to a court having jurisdiction.

As to the allegation in respondent's third defense, so-called, which embraces a question of law only, the Commission readily concedes the law to be as so stated. Such is the decision of the United States Supreme Court in a late case in language so decisive that the question is no longer an open one. (Union Dry Goods Co. v. Georgia Public Service Corporation, 246 U. S. 372; P. U. R. 1919, C. 60.)

The trouble with defendant's contention is that the principle of law does not apply to the facts of this case. Were the defendant city furnishing its own water to the inhabitants and city of Animas City under a contract the regulatory body, upon a proper showing, undoubtedly would have the power to fix a

fair and reasonable rate for such service in disregard of the rate fixed by contract. But, as before stated, that principle does not control or govern where, as in this case, the municipality is carrying out an obligation under a private contract.

Without further enlarging on the subject matter of the issues as presented by the pleadings and testimony disclosed, the Commission concludes that it is without power or authority to sanction the meter rates to be charged by the city of Durango for the water carried by it to Animas City, as proposed in the schedule filed with the Commission and suspended pending a hearing and investigation; and it follows that such rate should be permanently suspended by the order of this Commission.

In the event the contract between the parties to this cause, dated August 16, 1910, is by agreement of the parties or by judgment and decree of a court having jurisdiction abrogated, and thereafter a proceeding shall be instituted before the Commission by either or both parties under the provisions of said Section 28 of the Act, the Commission will, of course, undertake to have a full and complete valuation of the respective water systems of Durango and Animas City made by its engineering and statistical forces, and reinforced by such other evidence as may be submitted, it will, if the facts so justify, order that such use be permitted, and prescribe reasonable compensation and reasonable terms and conditions for such joint use, in compliance with the express provisions of said Section 28.

ORDER.

It Is Therefore Ordered, That that portion of schedule Colo. P. U. C. No. 2 filed with the Public Utilities Commission of the state of Colorado by the city of Durango, November 29, 1919, marked to become effective January 1, 1920, and stating an advance in the rate for water service to the town of Animas City as follows: "Animas City will be charged, by meter, 50 per cent of the city rates," which said rate was suspended by order of this Commission dated December 22, 1919, until April 29, 1920, and further suspended and deferred to October 29, 1920, shall be, and hereby is, permanently suspended, and the said rate

shall be considered by virtue of this order stricken and expunged from said water rate schedule Colo. P. U. C. No. 2 of the city of Durango.

IT IS FURTHER ORDERED, That said respondent city of Durango shall file no schedule providing for an increased charge to Animas City for carrying the water of said Animas City in its pipe line, under the terms and conditions of said contract of August 16, 1910, until the further order of this Commission.

RE AMERICAN RAILWAY EXPRESS COMPANY.

[Application No. 94. Decision No. 372.]

Rates — Uniformity, interstate and intrastate — Transportation Act, 1920.

1. Uniformity of intrastate and interstate rates is desirable. Transportation Act of 1920 contemplates "that intrastate rates shall bear their just proportion of increases."

Rates—Express—Increase.

2. American Railway Express Co. authorized to increase intrastate rates 26 per cent, with exceptions.

[November 3, 1920.]

Appearance: A. B. Roehl, for the applicant.

STATEMENT.

By the **Commission**: This cause arises on the application filed on June 21, 1920, by the American Railway Express Company for an order of this Commission authorizing it to increase its express rates and charges on intrastate traffic within the state of Colorado, in conformity with such increases in the rates on interstate traffic as might be authorized by the Interstate Commerce Commission in proceedings then pending before it in I. C. C. Docket No. 11326.

On August 23, 1920, a supplemental application was filed reciting that on August 11, 1920, the Interstate Commerce Commission had issued its report and decision in the said proceedings and had authorized applicant to increase its rates and charges applicable to interstate traffic 12½ per cent, except that it had been authorized to make its rates on milk and cream the

same as the rates contemporaneously applied thereon by the railroad lines between the same points.

A hearing was held in the hearing room of the Commission, Capitol Building, Denver, Colorado, on August 30, 1920, due notice to all parties and the public being given. No protestants appeared at the hearing and no objections to the granting of the application had been filed. The applicant submitted at that time a copy of the petition made to the Interstate Commerce Commission, an abstract of the evidence relied upon and its brief before that commission, as well also as the exhibits introduced in evidence in that proceeding.

After the hearing of August 30, 1920, and before the case was decided, a second supplemental application for an additional and further increase in its rates was filed by applicant on October 4, 1920. This second supplemental application sets forth as a justification for an additional increase the following: That on August 30, 1920, at the hearing before this Commission in the above entitled application the applicant introduced in evidence the exhibits relied upon by it before the Interstate Commerce Commission in Docket No. 11326 in support of its application to increase its rates 12½ per cent, as well as also a copy of the report and decision of the Interstate Commerce Commission. In the said report and decision authorizing the applicant to increase its rates 12½ per cent the Interstate Commerce Commission did not take into consideration the increased expenses resulting from the wage awards made by the United States Railroad Labor Board in its decisions Nos. 2 and 3 of July 20, 1920, and August 10, 1920, as appears from the statement in the Interstate Commerce Commission's order as follows: "Further wage demands estimated to aggregate $73,835,679.00 now pending before the United States Railroad Labor Board are not taken into account in the proposed rate increase." Thereafter the Interstate Commerce Commission on September 21, 1920, issued its supplemental report and decision in Docket No. 11326 authorizing applicant to further increase its interstate rates throughout the United States 13½ per cent, excepting rates on milk and cream, which were allowed to be increased 20 per cent; that this

additional increase was allowed to enable applicant to secure sufficient additional revenue with which to meet the increased wages allowed to its employes by Decisions 2 and 3 of the said labor board; that applicant estimates that the additional expense on account of the said awards heretofore referred to will amount to $42,296,340.00 annually; that a statement showing in detail the effect of said awards based on applicant's pay roll was attached and marked "Exhibit G"; that for the six months ending June 30, 1920, applicant sustained an operating deficit of $21,097,132.27; that attached "Exhibit H" is a statement showing gross earnings, operating expenses and the ratio of expenses to earnings during the six months ending June 30, 1920, compared with the six months ending June 30, 1919; that a copy of the supplemental report and decision of the Interstate Commerce Commission in Docket No. 11326, of September 21, 1920, is attached and marked "Exhibit I"; that the decisions of the United States Labor Board herein referred to apply to employes of applicant engaged in handling intrastate as well as interstate business, and that the Interstate Commerce Commission in estimating the increases necessary to meet said increased wages took into consideration both state and interstate business; that it is therefore essential that increases be authorized in applicant's intrastate rates corresponding to the increases authorized in interstate rates. Applicant prays for a further hearing and that an order be made authorizing applicant to increase its express rates and charges on intrastate traffic within the state of Colorado in the aggregate of 26 per cent, except that the rates on milk and cream be not increased in excess of 20 per cent.

A further hearing on the second supplemental application was held in the hearing room of the Commission at Denver, Colorado, on October 4, 1920. From the record herein it appears that the Interstate Commerce Commission on August 11, 1920, in Docket No. 11326 granted the applicant an increase of 12½ per cent, but in that decision stated: "Further wage demands estimated to aggregate $73,835,679.00 now pending before the United States Railroad Labor Board are not taken into account in the proposed rate increase." At that time there was pending

before the said labor board an award to be made in Dockets Nos. 4, 5 and 6 on which was rendered Decision No. 3—Brotherhood of Railroad and Steamship Clerks, Freight Handlers, Express and Station Employes, Brotherhood of Teamsters, Chauffeurs, Stable Men and Handlers of American Railway Express, Drivers, Chauffeurs and Conductors, Local No. 20, Chicago, Illinois, Order of Railway Expressmen v. the American Railway Express Company, R. H. Barton, Chairman, and Horace Barker, et al.

The decision of the Interstate Commerce Commission in said Docket No. 11326 had already been drafted without taking into consideration the award of the labor board then pending. Thereafter, and after duly considering the award of said labor board, the Interstate Commerce Commission granted applicant an additional increase of 13½ per cent on interstate rates for the purpose of taking care of and providing further for the increase in wages due to the labor board award.

At the hearing on the supplemental application before this Commission applicant introduced its "Exhibit G" which was the results of the increases in the pay rolls of the company for one year based upon the month of March, 1920, as to decisions Nos. 3 and 2 applied to that pay roll and which shows that the aggregate effect of the increases in applicant's pay rolls to be $42,296,340.00 annually. Applicant also introduced its "Exhibit H," being a comparative statement of operating revenues, operating expenses and operating ratios for the six-month periods ending June 30, 1919, and 1920, six months of 1919 being contrasted with six months of 1920, as reported to the Interstate Commerce Commission. Applicant also introduced its "Exhibit I," being the report of the Interstate Commerce Commission on further hearing and dated September 21, 1920, in Docket No. 11326. "Exhibit J" was also introduced, which is a statement showing the actual revenue, expenses and income from domestic express transportation operations for the year ending December 31, 1919. There was also shown an estimate of the same for the year of 1920, including the 26 per cent increase,

made in accordance with the decision of the Interstate Commerce Commission in said Docket No. 11326 of September 21, 1920.

It appears from one of the exhibits, that the express transportation business of the United States sustained annual deficits in 1917, 1918 and 1919 of $5,473,694.78, $31,639,047.20 and $21,819,488.22, respectively. These large deficits, it appears, arose from several different causes, including large increases in wages paid to employes and changes in their working conditions which have increased the current pay roll of the company since July, 1918, approximately $40,000,000.00. It appears also that from 1911 to 1919, inclusive, wages were increased 209.06 per cent; that in addition the recent decision of the labor board has increased the wages of petitioner's employes $42,296,340.00. It further appears that another contributing cause to the increase in operating expenses is the increase in the cost of all articles of supplies and equipment essential to operation, and that the average increase in the price of said supplies and equipment since 1916 is approximately 75 per cent, and in some instances the increase has been as high as 443 per cent. It also appears that another cause contributing to the enormous increase in operating costs is the fact that in 1915 the average claim payment was approximately $5.14, whereas in 1919 the average claim payment was $14.20.

The testimony of the applicant before the Interstate Commerce Commission shows that the enormous increase in loss and damage payments resulted from increased cost of commodities, a more vigorous prosecution of claims, a large expansion of the volume of traffic, loss of experienced operatives and replacement by less efficient working forces, inadequate terminal facilities, necessary use of box car equipment with slower service and added difficulties in the matter of stowage and policing. The testimony also shows that in addition to the large deficits resulting from operation the applicant is confronted with the necessity of immediately securing additional facilties and equipment, and that before additional capital can be secured with which to acquire the same the express business must be placed on a paying basis and in a position to attract the necessary capital. In the proceed-

ings before the Interstate Commerce Commission applicant's president testified that approximately $31,000,000.00 was needed immediately for this purpose.

The testimony presented to this Commission included testimony presented to the Interstate Commerce Commission in the proceedings on applicant's petitions to increase its interstate express rates, and upon the record before it the Interstate Commerce Commission on August 11, 1920, authorized applicant to increase such rates 12½ per cent and on September 21, 1920, an additional 13½ per cent was allowed, or a total of 26 per cent on interstate rates, except that on milk and cream it was authorized to establish the same rates as those contemporaneously applied by the railroad lines between the same points.

The need and desirability of uniformity in transportation rates is obvious; indeed, the Transportation Act of 1920 seemed to contemplate that intrastate rates shall bear their just proportion of increases, and in view of the fact that the Interstate Commerce Commission, after due consideration of all matters herein referred to, authorized an increase in applicant's interstate rates of 26 per cent, except as specified, this Commission is of the opinion and finds that applicant has sustained large deficits in its operations by reason of increased operating expenses, and that unless the relief requested is granted the applicant will be seriously embarrassed in providing funds with which to operate its express service; that express rates and charges applicable to intrastate traffic within the state of Colorado are insufficient, and that the increases hereby authorized are fair, just and reasonable to meet the emergency and needs of the applicant.

The applicant requests that this proceeding be held open for the purpose of considering its application to make changes in its classification, if and after the Interstate Commerce Commission authorizes the changes in the proceedings seeking that relief, now pending before it.

ORDER.

IT IS THEREFORE ORDERED, That the American Railway Express Company be, and it is hereby, authorized to increase its express rates and charges applicable to intrastate traffic within

the state of Colorado 26 per cent on one day's notice to the Commission and to the public by filing and posting, in the manner prescribed in the Public Utilities Act of Colorado, schedules of rates containing the same, excepting on milk and cream, which increase is hereby denied.

IT IS FURTHER ORDERED, That this order and the increases herein allowed shall not apply to applicant's rates on the line of the Denver and Salt Lake Railroad, which rates are established in a separate order.

IT IS FURTHER ORDERED, That in order to simplify and expedite tariff publications applicant is hereby authorized to file the increased rates and charges herein authorized in blanket supplements, if it finds it expedient, to the same extent that it has been authorized so to do by the Interstate Commerce Commission in its decisions in Docket No. 11326.

IT IS FURTHER ORDERED, That in computing the increased rates and charges hereby authorized, applicant shall follow the rule prescribed for the disposition of fractions by the Interstate Commerce Commission in its decisions in Docket No. 11326.

IT IS FURTHER ORDERED, That this proceeding be held open for the purpose of considering applicant's petition to make certain changes in its classification upon the filing by applicant of a supplemental petition herein, if and after the Interstate Commerce Commission authorizes the said changes.

IT IS FURTHER ORDERED, That the foregoing increases are authorized on the express condition that this Commission may, either upon its own motion or upon complaint after due notice and hearing, change, alter or amend any or all rates increased in pursuance of this order. In the event that it hereafter finds that any or all of said rates are unjust, unreasonable or discriminatory, and in the event such inquiry is initiated by the Commission or arises on complaint, the applicant herein will be held to justify any rates under investigation.

RE CRESTED BUTTE LIGHT AND WATER COMPANY.

[Investigation and Suspension Docket No. 45. Decision No. 373.]

Rates—Value—Pre-war and present prices.

1. In determining value, inventory prices applied by Commission were nearer pre-war than their present prices.

Depreciation—Rate.

2. Average rate of depreciation of 3¾ per cent found proper for water system.

Operating expenses—Income taxes.

3. Income taxes excluded from operating expenses.

Rates—Large consumers—Rate of increase.

4. Large water user required to pay increase in water rates in proportion to the increase to other consumers.

[November 3, 1920.]

Appearances: C. L. Ross and W. H. Whalen for The Crested Butte Light and Water Company.

STATEMENT.

By the **Commission**: This case arises by the respondent, The Crested Butte Light and Water Company, filing with the Commission as provided by law a schedule of rates for water, which proposed rates represented a considerable advance over the schedule of rates then in force. The proposed rates were to go into effect in 30 days. The Commission, after considering the schedules, and realizing this was a considerable advance therein, suspended the same and set the case for hearing on September 1, 1920, at Crested Butte. In the meantime the Commission directed its hydraulic engineer to make an inventory and appraisement of the property of the respondent in use and useful in its water service. This was done and a report filed with the Commission containing such an inventory and appraisement, together with a statement showing estimated cost of operation and revenues, based on the new schedule. An examination of the books and accounts of respondent was made by the Commission's statistician and report of such examination filed and made a part of the record in this case.

The respondent company is engaged in operating both electric light and power and water utilities. Only that part of the prop-

erty in use and useful in the water system was inventoried, as the rates proposed were for water only.

At the public hearing held at Crested Butte on September 1, 1920, witnesses for respondent were examined and all other evidence in the way of exhibits on the part of the company were received and filed with the record in the case. The five members of the board of trustees of the town of Crested Butte were present at the hearing. No formal protests against an increase in rates were entered. The reports of the Commission's engineer and statistician, including the engineer's valuation of respondent's property, were introduced in evidence.

Respondent introduced its Exhibit 1, consisting of sheets A, B, F and G, being its inventory and appraisal of its property in use and useful in its water plant. The total value placed on the property by respondent and which it asks the Commission to fix as the value of the property now in use and useful in its water system, including engineering and superintendence, interest during construction, legal expenses and taxes, was $49,606.28. The total valuation as fixed by the Commission's engineer was $42,750. The valuation of the property as fixed by the Commission is based on an inventory of the physical property. It is believed to be reasonably accurate and fairly representative of the property now in use by the Company. The inventory is compiled and classified according to the uniform classification of accounts as prescribed for water utilities. The fixed capital accounts prescribed by the Commission, under which the property of this company would be classified, are as follows:

Account No.	Classification
105	Lands and Water Rights
107	Boiler Plant Equipment
115	Intake and Supply Mains
125	Mains
141	Miscellaneous Equipment

It is probable that Account No. 101, "Organization," should have been included, but as no organization expense could be located, it probably is insignificant, and it will not be necessary to consider it. The cost of the reproduction of the physical plant under accounts 107, 115, 125 and 127 has been reached by apply-

ing a reasonable unit price to the different units as shown in the inventory. The unit cost of the pipe line as applied includes all labor and material necessary to put the pipe in place ready for use. No direct use has been made of present prices except to establish a reasonable basis as between present and pre-war prices. The prices which have been applied to this inventory are nearer the pre-war than the present prices and it is an attempt on the part of the Commission to fix a price that will in the near future be a reasonable value. For instance, the price of sheet steel made into pipe on pre-war basis was about 6c per pound in this locality. The present price is about 12c per pound. This inventory was figured on a price of 8c per pound. Other prices were reached through somewhat similar processes, and the resulting valuation, while somewhat higher than pre-war prices, reflects a reasonable base for present rates.

The value of the plant of The Crested Butte Light and Water Company is fixed by the Commission for rate-making purposes at $40,000.

Annual Depreciation Requirement.

The average life and salvage value of the different units of the physical plant have been used in arriving at the amount necessary to meet annual depreciation. In the engineer's report the figure 3¾ per cent is used as the average depreciation. This has been computed by taking into account the cost of reproduction, salvage value, and the expected life of the different units. By applying 3¾ per cent to the value of $40,000 for rate-making purposes the annual depreciation requirement for this water system would be $1,500 per year.

Operating Expenses.

Inasmuch as the two plants have been operated together for some time past, it is difficult to do other than estimate a reasonable operating expense. In the Commission's judgment the following items are proper:

Superintendence and collection	$1,600
Maintenance, minor leaks, etc.	500
Total	$2,100

Taxes

From the statistician's report it appears that taxes should be allowed at $1,100 a year. This excludes income taxes from operating expenses.

On the basis of the above figures the following is the income necessary to meet the foregoing items of expense, annual depreciation requirement and return on the investment.

Operating expenses	$2,100
Annual depreciation requirement	1,500
Taxes	1,100
7½ % return on the rate-base of $40,000	3,000
Total income necessary	$7,700

Income Account.

In the schedule of rates filed by the company no charge is made to the electric part of the plant for water used by it. In the schedule of rates herein approved there has been inserted an item of power water for the light plant of $1,200 per year. This rate is based on an estimate of $8,000 as the increased cost of the plant made necessary to deliver power water over and above the estimated cost of the plant necessary to deliver water for domestic and commercial uses. Taxes, annual depreciation and return figure on this part of the plant, about 15 per cent. Operating expense is not materially affected. In other words this item is figured at 15 per cent of $8,000, which is $1,200.

In the schedule filed by respondent and now under suspension, no increase is made in the rate charged the Colorado Fuel and Iron Company for water. This company, although a large user, should pay an increase for the use of water in proportion to the increase to other users. The old rate of $90 per month was made about 1917, at which time the company was operating coke ovens at Crested Butte. These were discontinued about November, 1918. Since that time a new mine has been opened and water is used for boilers and other uses. From the data at hand it appears that there is considerable waste of water at the old mine known as the Crested Butte property. From meter readings taken in 1919 it appears that the actual use of the Colorado Fuel

and Iron Company is slightly in excess of 2,000,000 gallons per month. A reasonable rate for this use would be six cents per one thousand gallons. On this basis the rate of $125 per month has been fixed as shown in the schedule herein approved. This charge is a reasonable charge and will continue until the first day of July, 1921. Thereafter the rate should be based on a meter rate of six cents per thousand gallons. The company in the meantime will have had time for the installation of meters. This will also allow it ample time to make such provisions as will be necessary to insure the economical use of water. The schedule of rates herein set forth and approved will show a gross income, as found upon a survey of consumers made by the engineer, as follows:

Resident rates	$2,456
Commercial rates	1,264
C. F. & I. Co. rate	1,500
Electric plant (power water)	1,200
Hydrant rental, town Crested Butte	1,280
Gross income	$7,700

ORDER.

IT IS THEREFORE ORDERED, That the following schedule of rates as fixed by the Commission is fair, just and reasonable, and the same shall be adopted by The Crested Butte Light and Water Company.

IT IS FURTHER ORDERED, That the following schedule of rates, fixed and established by the Commission, shall be filed in the manner prescribed in the Public Utilities Act of Colorado, and that the respondent, The Crested Butte Light and Water Company, may and it is hereby permitted to file such schedule upon one day's notice to the Commission and the public:

ANNUAL RATES.

Bakeries, first oven	$ 10.00
each additional oven	5.00
Banks	12.00
Barber Shops, first chair	14.00
each additional chair	6.00
Billiard or pool rooms, per table	3.00
Billiard or pool rooms, minimum charge	24.00

Blacksmith shop, first forge	16.00
each additional forge	8.00
Boarding House, see Hotel rate	
Bottling Works	20.00
Brick Works, building purposes per 1,000 kiln count	.20
Butcher Shop	20.00
Cigar Store	24.00
Confectionery Store or Ice Cream Parlor	20.00
Concrete, per cubic yard	.20
Cow, per head	2.00
Drug Store (soda fountain extra)	20.00
Fountain, soda	20.00
Fountain, vegetable	30.00
Fountain, drinking, continuous flow	40.00
Fire Hydrants rental, as per franchise from town, for the first twelve hydrants	1,200.00
each additional hydrant	80.00
Garages, Public, equipped for washing, per car, based on total car capacity	3.00
public, without washing facilities, per car, based on total car capacity	2.00
private	2.00
Halls	12.00
Horse, per head	2.00
Hotels and boarding houses, 10 rooms or less	24.00
each additional room	2.00
dining room, per table chair	1.50
Laundry	40.00
Lawn sprinkling or garden irrigation, per lot 25′ x 125′, per season	3.00
Lodging houses, 10 rooms or less	24.00
each additional room	2.00
Livery Stable, stalls for 15 head or less	24.00
each additional stall	2.00
Offices, dentist	10.00
doctors or surgeon	7.50
not otherwise specified	5.00
Photograph gallery	24.00
Plastering, per square yard	.01
Printing office	20.00
Railroad use	420.00
Residence, rate for each family, one in four rooms	12.00
four to six rooms	13.00
each additional room over six	.50
per rented room	1.50
Restaurant, each table chair	1.50
each stool at counter	2.00
minimum charge	24.00
School, per student enrolled	.15
Soft drink parlors	24.00
Steam Boilers, per H. P.	1.00

Stores or Shops not otherwise specified, per front foot	.60
minimum charge	12.00
Stone Work, per perch, Mason measures	.05
Tailor and cleaning shop	20.00
Motor washing machine	6.00
In addition to the foregoing flat rates the following additional charges will be made for bath tubs, urinals and water closets:	
Bath tubs, private residence, each	6.00
hotels, boarding and rooming houses	12.00
barber shop and public use	18.00
Urinals, private, each	6.00
public	15.00
Water closets, private residences, each	6.00
business houses, private use	8.00
hotels, boarding and rooming houses and business blocks	12.00
soft drink parlors, billiard or pool rooms and cigar stores, each	18.00
Coal mining use by Colorado Fuel & Iron Co. and other consumers similarly situated	1,500.00
Electric Plant for power water	1,200.00

RE THE COLORADO POWER COMPANY.

[Investigation and Suspension Docket No. 40. Decision No. 375.]

Rates—Suspension.

1. With apparent consent of electric utility, schedules of increased rates permanently suspended without hearing thereon, and leave given to file amended schedules containing proposed increases.

Rates—Expiration lawful period of suspension—Effect.

2. Mere fact period for which Commission has power to suspend increased rates is about to expire without hearing no ground for dismissal of application for authority to make the proposed rates effective.

[November 9, 1920.]

Appearances: Barney L. Whatley for sundry protestants; Dubbs and Vidal for The Yak Mining, Milling and Tunnel Company and American Smelting and Refining Company; W. V. Hodges and D. Edgar Wilson for applicant, The Colorado Power Company.

STATEMENT.

By the **Commission**: On December 20, 1919, there was filed with the Commission by applicant, The Colorado Power Company, certain schedules and increases in power rates which are designated as follows:

First Revised Sheet No. 2 to Colorado Public Utilities Com. No. 11
First Revised Sheet No. 3 to Colorado Public Utilities Com. No. 11
First Revised Sheet No. 4 to Colorado Public Utilities Com. No. 11
First Revised Sheet No. 2 to Colorado Public Utilities Com. No. 12
First Revised Sheet No. 3 to Colorado Public Utilities Com. No. 12

Special Power Agreements, dated December 20, 1919, with:

The Carbondale Light & Power Company
The Denver City Tramway Company
The Tungsten Products Company
The Iron Mountain Alloy Company
The Ferro Alloy Company (electro-chemical plant)
The Ferro Alloy Company (electro-metallurgical plant)
The Gilpin County Light, Heat & Power Company
The Summit County Power Company
The Summit County Power Company and
The Tonopah Placers Company, jointly
The Yak Mining, Milling & Tunnel Company
The Down Town Mines Company
The American Smelting & Refining Company
U. S. Rare Minerals Company

Cancellations, dated December 20, 1919, of Special Power Agreements with:

French Gulch Dredging Company
Derry Ranch Gold Dredging Company

These schedules were suspended by the Commission on January 9, 1920, by its order of first suspension which expired May 17, 1920, and subsequently the schedules were further suspended by order of May 15, 1920, until November 17, 1920, the period designated under Section 48 of the Public Utilities Act, Session Laws, 1913.

Upon the filing of said schedules, notice thereof being given to power users of said company, numerous protests were filed against the said proposed increase of rates.

On January 21, 1920, the Commission issued its order directed to applicant, The Colorado Power Company, in and by which it was ordered that said, The Colorado Power Company, make for

the Commission under the direction and supervision of the Commission's electrical engineer, full and complete inventory and appraisal as of January 1, 1920, of the physical properties of the company located within the state of Colorado; and that said The Colorado Power Company place all of its books, records and accounts in any way material for a proper investigation of the case at the disposal of the Commission's statistician, to enable the Commission to arrive at a full and correct determination of all questions relating to an investigation of the finances of said company.

The applicant power company has been engaged for some time and, as it appears to the Commission, diligently so in the preparation of an inventory and appraisal of its property to be filed herein, in compliance with the order of the Commission aforesaid, but up to the present time such inventory and appraisal has not been filed. Under said Section 48 of the Public Utilities Act, the time for which schedules may be suspended by the Commission appears to be limited to a total period of ten months, and this ten months period will have expired November 17, 1920.

On October 6, 1920, applicant power company filed its petition, with schedules attached as exhibits thereto, covering the power rates heretofore mentioned in the nature of a supplemental application for a further increase of power rates to be considered at the time of hearing of its application for increase in rates, and prays that upon such hearing the rates set forth in said supplemental petition may be authorized and established as being the rate necessary to yield the applicant power company a fair return on the value of its useful property devoted to the service of the public.

On October 16, 1920, there was filed with the Commission by the attorney representing a large number of protestants against the proposed increase in rates, a motion to dismiss said application, in which said motion there was set up the fact of the filing of said schedules on December 20, 1919; the fact of protests having been filed on the part of different consumers represented by attorneys for the protestants; that on January 9, 1920, the Commission entered its order suspending the proposed rates until

May 17, 1920; the order of the Commission to the applicant power company to file its inventory and appraisal; that on May 15, 1920, the Commission entered a further order herein suspending the effective date of said proposed increases until November 17, 1920, to permit of such investigation and decision within the period of the suspension above stated; and it is further alleged in said motion that a question of law is involved as to whether or not said schedules can be further suspended beyond the date of the second suspension period expiring November 17, 1920, and that petitioners fear that on said date, November 17, 1920, the proposed rates will become effective automatically without the sanction or approval of this Commission; it is further alleged that it has been the purpose of the applicant power company to wilfully and intentionally delay the filing of its inventory and appraisal until a time so near to said November 17, 1920, that protestants and others interested in the proposed increase of rates will not have sufficient time or opportunity within which to examine and check said inventory, and that the Commission being without power to further suspend said rates, they will immediately go into effect on and after November 17, 1920; protestants pray that the application of said utility to increase its power rates as aforesaid, be dismissed and that all subsequent schedules, petitions, applications or amendments filed herein by said utility concerning said proposed increased rates be likewise dismissed and that an order be entered denying said application.

The motion of protestants to dismiss said application was heard by the Commission at its hearing room, Capitol Building, Denver, Colorado, on November 4, 1920, upon due notice being given to all parties. At said hearing the attorney for the protestants contended vigorously that the Commission's power and jurisdiction over suspending the proposed rates of applicant would cease under Section 48 of the Act at the date of the second suspension thereof, to-wit: November 17, 1920, in that the provisos in the section of the Act limited the power of the Commission to the periods therein specified to suspend the proposed rate. On the other hand the applicant company contended

that the section of the Act contemplated that a hearing should not be unnecessarily delayed by the Commission in the interest of the utility affected. The question involved is a matter of first impression, and so far as it has been made to appear, has not been the subject of controversy in this state, nor so far as the Commission has been advised, in any other state up to the present time. In the course of the argument at said hearing, the position was taken by the attorney representing applicant power company that it did not seek and would not seek to take any alleged technical advantage, even though the section of the act might have the effect contended for by the attorney for protestants; that it, the power company, was solely desirous of having its application heard at the earliest possible time and that it had been engaged in compiling its inventory and appraisal and the same would soon be filed with the Commission.

The Commission is of the opinion that the reason alleged by protestants that applicant power company has purposely delayed filing its inventory and appraisal is not well founded. The property of The Colorado Power Company is very large and its different plants and properties are so scattered over the state of Colorado and the amount of work involved in the preparation of its inventory and appraisal is so extensive that it necessarily has taken a long time to properly prepare such inventory and appraisal. It is the opinion of the Commission, however, that in view of the fact that the inventory and appraisal ordered by the Commission has not as yet been filed, and that the time of the second suspension order expires on November 17, 1920, that were it now filed the Commission, its engineers and statistician will not have time and opportunity to properly consider and examine the inventory and appraisal, nor would any of protestants that so desired have time to examine the same and to permit of the hearing on the merits of said application to be held prior to November 17, 1920.

In view of the fact that the purpose seemingly desired by all parties, and surely to be desired by the Commission, is to have a full and completed investigation of the properties of the applicant company, in order to pass upon the merits of its pro-

posed increase of rates and of the willingness of applicant company to refile its entire schedules in the nature of an amended application to the original and supplemental application filed herein, the motion to dismiss will be denied, and the point raised by the motion will not be decided at this time. Under these circumstances, however, the Commission will permanently suspend the schedules filed December 20, 1919, and those supplemental thereto filed October 6, 1920, and all other schedules, rates and applications herein involved, with leave to applicant power company to file its amended schedule of proposed increase of power rates forthwith, should it be so advised, under the same title and number as this cause bears, so that it will in effect be a continuation of the present case. (Investigation and Suspension Docket No. 40.)

ORDER.

IT IS THEREFORE ORDERED, That the said schedules,

First Revised Sheet No. 2 to Colorado Public Utilities Commission No. 11

First Revised Sheet No. 3 to Colorado Public Utilities Commission No. 11

First Revised Sheet No. 4 to Colorado Public Utilities Commission No. 11

First Revised Sheet No. 2 to Colorado Public Utilities Commission No. 12

First Revised Sheet No. 3 to Colorado Public Utilities Commission No. 12

Special Power Agreements, dated December 20, 1919, with:

The Carbondale Light & Power Company

The Denver City Tramway Company

The Tungsten Products Company

The Iron Mountain Alloy Company

The Ferro Alloy Company (electro-chemical plant)

The Ferro Alloy Company (electro-metallurgical plant)

The Gilpin County Light, Heat & Power Company

The Summit County Power Company

The Summit County Power Company and
The Tonopah Placers Company, jointly
The Yak Mining, Milling & Tunnel Company
The Down Town Mines Company
The American Smelting & Refining Company
U. S. Rare Minerals Company

Cancellations, dated December 20, 1919, of Special Power Agreements with:

French Gulch Dredging Company
Derry Ranch Gold Dredging Company

be, and the same are, hereby permanently suspended; that this permanent suspension be without prejudice to the right of applicant, The Colorado Power Company, to file schedules herein in the nature of amended schedules; that said The Colorado Power Company be, and it is, hereby permitted to file with the Commission such new or amended schedules as it shall be advised, in which it shall set forth the increased power rates asked for by applicant; that such new schedules, if filed, are hereby allowed to be filed herein under the same title and under Investigation and Suspension Docket No. 40; that the inventory and appraisal heretofore ordered to be filed by applicant power company may be filed herein and the same will be accepted by the Commission in this cause under Investigation and Suspension Docket No. 40; that nothing herein shall be deemed and held in any way as a reflection upon said applicant power company for its not having filed said inventory and appraisal before this date; and that this cause shall proceed and continue with all reasonable dispatch and without undue delay.

RE EXPRESS RATES ON LINE OF THE DENVER & SALT LAKE RAILROAD COMPANY

[Application No. 94. Decision No. 378.]
[Investigation and Suspension Docket No. 49.]

Rates—Relationship of freight and express.

1. Equality of express and first-class freight rates held unjustifiable.
2. Various increases in express rates on line of The Denver & Salt Lake authorized.

[November 16, 1920.]

Appearances: A. B. Roehl of San Francisco, for the American Railway Express Company; Elmer L. Brock of Denver, for the Denver and Salt Lake Railroad Company.

STATEMENT.

By the **Commission**: This cause is before the Commission as a result of an application filed on June 21, 1920, by the American Railway Express Company, for an order of this Commission authorizing it to increase its express rates and charges on intrastate traffic within the state of Colorado, and by virtue of a supplemental application filed by said the American Railway Express Company on July 30, 1920, which supplemental application specifically pertains to increase of express rates on the line of the Denver and Salt Lake Railroad within the State of Colorado.

The application of the Express Company for increased rates throughout the state generally, designated as Application No. 94, has been made the subject of investigation by this Commission, and an order entered therein, dated November 3, 1920, and for the purpose of hearing, was consolidated with the supplemental application pertaining to the Denver and Salt Lake Railroad, which was docketed under the title of Investigation and Suspension Docket No. 49. On August 21, 1920, the schedules of rates filed by the American Railway Express Company pertaining to the line of the Denver and Salt Lake Railroad, were suspended by order of this Commission, and embraced the following schedules:

Supplement No. 3 to Colorado Public Utilities Commission No. 6
Supplement No. 3 to Colorado Public Utilities Commission No. 7
Supplement No. 4 to Colorado Public Utilities Commission No. 8
Supplement No. 4 to Colorado Public Utilities Commission No. 15
Supplement No. 5 to Colorado Public Utilities Commission No. 16

The hearing on the matters embraced in I. & S. No. 49 was set for September 27, 1920, at the hearing room of the Commission, State Capitol Building, Denver, Colorado, and due notice thereof was given all parties in interest. Upon application of the attorney for the Express Company, said hearing was continued to October 4, 1920, and was held at the Commission's hearing room aforesaid, due notice of said continuance having been given to all parties, and to the patrons of the Express Company along the line of the Denver and Salt Lake Railroad.

No protests or objections to said application were filed, and at the hearing, by leave of the Commission, the Denver and Salt Lake Railroad filed its petition in intervention, in which petition it is alleged that the Express Company had theretofore filed its application, in Application No. 94, for authority to increase its express rates and charges applicable to intrastate traffic within Colorado to the same extent that the Interstate Commerce Commission authorized increases in the express rates and charges on interstate traffic within Colorado, in a proceeding then pending before said Interstate Commerce Commission, and designated as I. C. C. Docket No. 11326; that thereafter, and on or about July 27, 1920, said Express Company issued supplements to its express tariffs providing rates and charges applicable to traffic originating and destined to points on the line of the Denver and Salt Lake Railroad, which said supplements were filed on July 30, 1920, to become effective August 31, 1920; that the suspended tariffs and rates therein proposed were filed by the Express Company with this Commission at the instance and request of the Denver and Salt Lake Railroad for the purpose of restoring the relationship existing between express rates and the first-class freight rates, applicable to traffic moving to and from points on the line of said railroad.

The petition in intervention further alleges that after an analysis and study of said tariffs and rates, as so filed, inter-

venor became convinced that the rates and charges proposed in the said tariffs were insufficient and did not restore or establish the proper relationship between the express rates and freight rates on the line of said the Denver and Salt Lake Railroad.

Attached to said petition in intervention is a statement marked "Exhibit 1," which purports to show the trend of the relationship between the freight and express rates on the line of said railroad since the year 1913; and also attached thereto and marked "D. & S. L. Exhibits 2, 3 and 4," are statements purporting to show the present freight and express rates, the proposed increase in express rates as suspended by order of the Commission, and the express rates which intervenor proposes and requests to be established on the line of said the Denver and Salt Lake Railroad, in lieu of the present express rates applying between points upon said railroad, and also in lieu of any general increase in express rates on the line of said the Denver and Salt Lake Railroad which American Railway Express Company had theretofore applied for.

The petitioner further alleges that the first-class express rates in some instances, and the second-class rates in most instances, are now less than the freight rates applying on said road, with the result that many commodities usually moving by freight have been moving by express, which results not only in a loss of revenue to intervenor railroad to a considerable extent, but also results in delay of the passenger service in the handling of said express matter.

Intervenor further alleges upon information and belief, that the first-class express rate should be approximately 200 per cent of the first-class freight rate, and the second-class express rate should be not less than 150 per cent of the first-class freight rate, and that the rates proposed by intervenor are designed to establish such a relationship.

The intervenor prays that upon hearing in this matter an order be made authorizing American Railway Express Company to increase its express rates and charges applying between points on the line of the Denver and Salt Lake Railroad as proposed in its Exhibits 2, 3 and 4 hereinabove referred to, with the

exception that American Railway Express Company be authorized to increase its rates and charges applicable to the transportation of milk and cream to and from points on the line of said railroad 20 per cent in excess of the rates in effect thereon on August 31, 1920; and intervenor also prays that American Railway Express Company be authorized to increase interline express rates applying to and from points on the line of said Denver and Salt Lake Railroad to the same extent and by the same amounts as intervenor herein proposes that the local express rates applicable to express traffic on its said railroad be increased, in order that said rates be made to conform with the long and short haul clause of the Public Utilities Act of this state. What is meant, no doubt, is reference to the long and short haul clause provided in the Act of Congress to regulate interstate traffic, there being no such provision in the Public Utilities Act of the State of Colorado. The closing paragraph of the prayer sets forth that the specific increase proposed by intervenor is in lieu of any general increase which has been applied for by the American Railway Express Company, or as heretofore contemplated by the tariffs filed by said Railway Express Company and suspended by this Commission.

At the hearing, held as aforesaid, testimony was submitted verifying and explaining Exhibits 1, 2, 3 and 4 of the Denver and Salt Lake Railroad.

Exhibit 1 is a tabulated statement showing the trend of relationship between freight and express rates on the Denver and Salt Lake Railroad since the year 1913; it shows the ratio of percentage of the express rate in 1914, compared to the freight rate, to average more than 200 per cent, with a gradual diminishing of said ratio, until on September 1, 1920, the percentage ratio had decreased to an average percentage of about 100 per cent. This is accounted for, according to the testimony, from the fact that freight rates were increased by order of the Director General of Railroads, and subsequently as to interstate traffic by order of the Interstate Commerce Commission, and as to intrastate traffic by order of this Commission, without any corresponding increase in the express rates.

Exhibit 2 is a comparative statement showing freight and express rates in cents per hundred pounds, both actual and proposed, between Denver and stations on the line of the Denver and Salt Lake Railroad as of September 1, 1920. This is explained by the testimony to the effect that the ratio of percentage which the express rates bear to first-class freight rates on September 1, 1920, average about 100 per cent, while the ratio of percentage between said rates as proposed by the American Railway Express Company in its application for increase, averages about 150 per cent, and the ratio of percentage between said rates, if the same be increased to a scale nearest 200 per cent of first-class freight rates as proposed by intervenor railroad, averages 200 per cent as to first-class freight and express rates and average 150 per cent as to second class rates.

Exhibit 3 is a comparative statement of freight and express rates showing the rates both actual and proposed between points in different blocks on the Denver and Salt Lake Railroad, and Exhibit 4 is a comparative statement showing freight and express rates in cents per hundred pounds, both actual and proposed, between points on said railroad in the same block. According to the testimony explanatory of said Exhibits 3 and 4, the same ratio of increase as between first-class freight rates and express rates will result as is shown by Exhibit 2, in the event the increase herein applied for is allowed.

Testimony was introduced as to the unusual situation prevailing on the line of the Denver and Salt Lake Railroad as pertains to the relationship between first-class freight rates and express rates to the effect that it exists in no other section of the United States. At present, because of the similarity of such rates, many articles are moved by express over said railroad which are generally, if not entirely, moved by freight. As an illustration of this anomalous condition, witness Robbinson, the agent for the Denver and Salt Lake Railroad Company at Denver, testified that since about the 1st of July, 1918, freight shipments outbound from Denver on certain classes of commodities noticeably diminished, and the articles theretofore moving by freight were being moved by express; that a number

of articles are moved by express that are usually considered legitimate freight, such as fresh or salt meats, lard, vegetables, household goods, steel cables, cooking ranges, rocking chairs, tables, bath tubs, heavy castings, pipes and other similar articles. This witness also testified that prior to 1918, a refrigerator car was carried on the line of this railroad to accommodate freight shipments of fresh meats, vegetables, fruits and other similar perishable articles, but that under present conditions no refrigerator cars were in service, and that by virtue of the increased number of unusual articles moving by express an additional car is necessary to be attached to the passenger train, which results in an extra engine over the steeper grades on the line and great delay in passenger service in unloading such a large volume of express matter.

Testimony further shows that such conditions are unjustifiable, unnecessary and almost unheard of in the realm of express and freight business; and that no other community in this state has the privilege of so low an express rate as compared with freight rates as those communities along and upon the line of the Denver and Salt Lake Railroad.

In short, it appears by the testimony and to the Commission that the existing rates and charges of the American Railway Express Company on the line of the Denver and Salt Lake Railroad are unreasonable, and that the proper measure of relief to be afforded the intervenor railroad can not be gained by an allowance of the same rate of increase in express rates as applied for by said Express Company and as suspended by this Commission. It further appears, and the Commission finds from the entire showing in this case, that the rates and charges proposed by intervenor in its petition, and under all the facts and circumstances surrounding the operation of the Denver and Salt Lake Railroad, are just and reasonable and that such rates shall be allowed to go into effect upon one day's notice, providing the American Railway Express Company cancels upon one day's notice the schedule of rates heretofore filed by it increasing rates to and from points and between points on the line of the said railroad, on or before December 1, 1920.

ORDER.

IT IS THEREFORE ORDERED, That the American Railway Express Company be, and it is, hereby authorized to increase its express rates and charges applicable to intrastate traffic within the State of Colorado, except traffic to or from points, or between points on the Denver and Salt Lake Railroad, 26 per cent, as provided and ordered in Application No. 94, provided its rates and charges on the transportation of milk and cream within the state of Colorado shall not be increased in excess of 20 per cent.

IT IS FURTHER ORDERED, That said Express Company be, and it is, hereby authorized to increase its express rates and charges applicable to intrastate traffic between points on the Denver and Salt Lake Railroad within the state of Colorado, as proposed in the petition in intervention filed herein by W. R. Freeman and C. Boettcher, Receivers of the Denver and Salt Lake Railroad, and as set out in Appendix "A" attached to this order.

IT IS FURTHER ORDERED, That said Express Company be, and it is, hereby authorized to increase its express rates and charges applicable to intrastate traffic between points on the line of the Denver and Salt Lake Railroad and points on other lines within the state of Colorado to the same extent as it is hereby authorized to increase its rates applicable to intrastate traffic between points on the line of said Denver and Salt Lake Railroad.

IT IS FURTHER ORDERED, That said Express Company be, and it is, hereby authorized to increase its express rates and charges applicable to the transportation of milk and cream within the state of Colorado, between points on the Denver and Salt Lake Railroad and between points on the Denver and Salt Lake Railroad and points on other lines of railroads in Colorado, not to exceed 20 per cent in excess of the rates applicable to the transportation of such class of traffic on August 31, 1920.

IT IS FURTHER ORDERED, That said Express Company be, and it is, hereby authorized to make effective the increased rates and charges hereby authorized on one day's notice to the Commission and the public, by filing and posting tariffs containing the

same with the Commission, in the manner prescribed by Section 16 of the Act.

IT IS FURTHER ORDERED, That said Express Company be, and it is, hereby notified and required to cancel on one day's notice, on or before December 1, 1920, the schedules of rates heretofore filed by it increasing the rates to and from points, and between points on the Denver and Salt Lake Railroad, which rates were suspended by this Commission under its order dated August 21, 1920, in I. & S. No. 49, and particularly described as follows:

Supplement No. 3 to Colorado Public Utilities Commission No. 6
Supplement No. 3 to Colorado Public Utilities Commission No. 7
Supplement No. 4 to Colorado Public Utilities Commission No. 8
Supplement No. 4 to Colorado Public Utilities Commission No. 15
Supplement No. 5 to Colorado Public Utilities Commission No. 16

IT IS FURTHER ORDERED, That in order to simplify and expedite tariff publication, said Express Company is hereby authorized to file the rates and charges herein authorized in blanket supplements, if it desires so to do, to the same extent that it has been authorized to do so by the Interstate Commerce Commission in Docket No. 11326, dated August 11, 1920.

IT IS FURTHER ORDERED, That in computing the increased rates and charges herein authorized, applicant shall follow the rule prescribed for the disposition of fractions by the Interstate Commerce Commission in its said decision in Docket No. 11326.

IT IS FURTHER ORDERED, That this proceeding be held open for the purpose of considering applicant Express Company's petition to make certain changes in its classification upon the filing by applicant of a supplemental petition herein, if and after the Interstate Commerce Commission authorizes said changes.

APPENDIX "A"

Between	Denver		Rollinsville		Tolland		Arrow		Fraser		Tabernash		Granby		Sulphur Springs		Kremmling		McCoy		Yampa		Phippsburg		Oak Creek		Steamboat Springs		Mt. Harris		Hayden	
and	1st	2nd	1st	2nd	1st	2nd	1st	2nd	1st	2nd	1st	2nd	1st	2nd	1st	2nd	1st	2nd	1st	2nd	1st	2nd	1st	2nd	1st	2nd	1st	2nd	1st	2nd	1st	2nd
Rollinsville	137	103																														
Tolland	154	115	77	58																												
Arrow	253	190	165	124	165	124																										
Fraser	253	190	165	124	165	124	77	58																								
Tabernash	264	198	165	124	165	124	77	58	77	58																						
Granby	286	214	198	148	198	148	93	70	93	70	93	70																				
Sulphur Springs	319	240	236	178	236	178	121	91	121	91	121	91	93	70																		
Kremmling	379	285	280	211	280	211	176	132	176	132	176	132	121	91	93	70																
McCoy	407	306	357	268	357	268	258	195	258	195	258	195	214	162	187	141	137	103														
Yampa	511	384	467	351	467	351	335	252	335	252	335	252	297	223	275	207	225	169	132	99												
Phippsburg	511	384	467	351	467	351	335	252	335	252	335	252	297	223	275	207	225	169	132	99	77	58										
Oak Creek	522	393	495	372	495	372	390	294	390	294	390	294	341	256	313	235	275	207	187	141	110	82	110	82								
Steamboat Springs	539	405	495	372	495	372	390	294	390	294	390	294	341	256	313	235	275	207	187	141	110	82	110	82	93	70						
Mt. Harris	555	417	555	417	555	417	495	372	495	372	495	372	462	346	390	294	330	247	258	195	176	132	176	132	121	91	121	91				
Hayden	561	421	561	421	561	421	495	372	495	372	495	372	462	346	407	306	357	268	280	211	198	148	198	148	154	115	154	115	110	82		
Craig	572	429	561	421	561	421	495	372	495	372	495	372	462	346	462	346	407	306	308	231	253	190	253	190	198	148	198	148	110	82	93	70

RE THE COLORADO SPRINGS LIGHT, HEAT AND POWER COMPANY

[Investigation and Suspension Docket No. 26. Decision No. 386.]

Commission—Jurisdiction—Rates in home-rule cities.

1. Case dismissed for lack of jurisdiction over electric and gas rates in Colorado Springs.

[November 19, 1920.]

ORDER.

This matter is before the Commission by virtue of the filing of certain schedules of the above named company for an advance in the rates of electric and gas service at Colorado Springs, contained in certain tariffs to become effective December 1, 1918, which schedules were suspended by order of the Commission dated August 16, 1918. The question involved in above case has been since determined adversely to the jurisdiction of the Commission concerning utilities doing business in the home-rule cities, so-called, of the state, and for that reason the same will be dismissed for want of jurisdiction.

IT IS THEREFORE ORDERED, That the above cause be, and the same is, hereby dismissed for want of jurisdiction.

RE APPLICATION OF RECEIVER OF THE DENVER & INTERURBAN RAILROAD COMPANY

[Application No. 116. Decision No. 392.]

Operating expenses—Payment of damage claims—Property loss from collision.

1. Liability for damage claims and property loss resulting from a collision not properly chargeable to operating revenue. Patrons of a utility cannot be required to bear burden caused by negligent act of a utility.

Rates—Interurban railway—Increase—Conditions—Increase of wages.

2. Receiver of interurban railroad company authorized to increase passenger fares to 3.6 cents per mile upon conditions, including one that wages of employes be increased 21 per cent, and others as to methods of operating.

[November 29, 1920.]

Appearances: E. E. Whitted and J. Q. Dier, Esqs., for Receiver of The Denver and Interurban Railroad Company; W. F.

Hynes, Esq., for certain patrons of said railroad; J. B. Jenks, C. E. Seehorn and J. G. Edgworth for Motormen, Conductors, Flagmen and other employes; John H. Gabriel, Esq., for patrons of the road living at Westminster; T. A. McHarg, Esq., for the Boulder Commercial Association.

STATEMENT.

By the **Commission**: The above matter is before the Commission on an application filed October 30, 1920, by the Receiver of The Denver and Interurban Railroad Company to increase passenger fares upon said line of railroad.

The application sets forth that W. H. Edmunds was heretofore and on June 11, 1918, appointed receiver of said The Denver and Interurban Railroad Company, by order of the United States District Court for the District of Colorado, in the case of Guaranty Trust Company of New York, as Trustee, v. The Denver and Interurban Railroad Company, which was a mortgage foreclosure suit pending in said federal court; that said receiver qualified, and that since said date he has been, and now is, acting as such receiver and in possession of all property of said The Denver and Interurban Railroad Company, and has been, and now is, operating the lines of said railroad company, which consist of an interurban railroad between Denver and Boulder and Eldorado Springs, Colorado.

It is further alleged, that the revenues of said railroad are at the present time entirely inadequate to meet the cost of operation of the property and to pay the necessary increases in wages of employes, to meet additional maintenance charges, taxes and other expenses and provide proper and adequate service for the public; that the present fares on said railroad, one way and round trip, are based upon a charge of 3c per mile and that commutation fares in the form of 50 and 25 ride tickets, respectively, are based upon a rate of 1.9c and 2.2c per mile, which said fares when considered by themselves, as well as by way of comparison of fares prevailing on steam lines of railroad for similar service, are inadequate, unreasonable and insufficiently remunerative to the petitioner.

The third paragraph of the application alleges that present steam fares between Boulder and Denver and intermediate points are based upon a rate of 3.6c per mile; and that such rate of 3.6c per mile was put into effect on all steam lines of railroad by order of the Interstate Commerce Commission entered July 29, 1920, as to interstate fares, and by order of this Commission of August 25, 1920, as to intrastate fares; that applicant renders the same service in the carriage of passengers between Denver, Boulder and Eldorado Springs, and intermediate points, by means of The Denver and Interurban electric railroad service as do the steam railroads, and inasmuch as the same service is rendered by applicant in the transportation of passengers over said The Denver and Interurban Railroad, urges that he is entitled to the same compensation for the carriage of passengers as the steam lines of railroads.

In the fourth paragraph of the application it is alleged that on September 6, 1920, a collision of two trains occurred upon said The Denver and Interurban Railroad, which resulted in the death of a number of persons and in personal injuries to a large number of others, and that by reason of damage claims and damage to equipment caused thereby, applicant has incurred and will incur a large expense, which, it is alleged, is a property charge against operating revenue; that by reason of the low rate for carriage of passengers now and in the past in effect upon said line of railroad, in order that further operation of said railroad be continued and the expense of said accident and the increased cost of operation be met, it will be necessary for applicant to have granted additional revenue.

The fifth paragraph of the application shows to the Commission that the employes in the train and other service of the company have made requests upon applicant for increased wages, which amounts to the sum of approximately $20,000.00 per year. Applicant alleges that he is desirous of increasing the compensation of such employes in the above sum, but that in order to do so, it will be necessary for applicant to have additional revenue to meet these charges; and that he believes that if additional revenue can be secured through the increase of fares, it is

just and proper that the employes have such increases in their compensation, and urges that the requests of those employes be given consideration by the Commission in the granting of any increase in passenger fares.

In the sixth and closing paragraph of the application it is alleged that by careful operation applicant has so far been able to maintain and operate said railroad reasonably commensurate with the needs of the public within the limits of the present rates of fare which were authorized by this Commission by order of August 7, 1918; but that due to the above mentioned causes and the increased operating expenses and charges alleged, unless applicant is given some substantial relief in the way of increased fares, it will be necessary that he abandon the operation of said railroad. Attached to the application and marked "Exhibit A" is a schedule of such increased fares which applicant desires to put into effect, and which it is alleged applicant believes will afford the necessary relief and justify the continued operation of said railroad.

The prayer of the application is that upon hearing in view of the emergency alleged to exist, an order be made and entered by this Commission authorizing the receiver to put into effect the fares proposed in said Exhibit A on one day's notice.

Exhibit A is a schedule of the new passenger rates desired and asked for by applicant as follows:

1. Local one way fares, between all points, three and five-tenths cents per mile; minimum fare in any one case ten cents.
2. Round trip, between all points, 10 per cent less than double the local one way fare.
3. 25-ride commutation tickets, between all points, two and four-tenths cents per mile; minimum charge for any 25-ride book $2.00.
4. 50-ride commutation tickets, between all points, two and one-tenth cents per mile; minimum charge for any 50-ride book $4.00.
5. Special train rates, two and nine-tenths cents per mile; minimum guarantee $60.00, except as between Denver and Eldorado Springs and return, and between Boulder and Eldorado Springs and return, round trip fares are $1.25 and 50 cents respectively.
6. Round trip fares, good only on Sunday, between May 15 and October 31, Denver and Eldorado Springs, $1.55; Denver and Boulder, $1.55.

Special charge of five cents extra to the regular ticket fare in all cases where passenger has failed to purchase a ticket at such stations as have agents where tickets may be procured.

Upon the filing of the above application, the same was set for hearing before the Commission on Wednesday, November 10, 1920, at 9:30 o'clock A. M., at the hearing room of the Commission, 315 Capitol Building, Denver, Colorado, and notice thereof given by the usual method on November 1, 1920, to the Boulder Commercial Association, the Lafayette Commercial Association, the Louisville Commercial Association, and also by the posting of notices of such application in the depots of said Interurban Railroad at Boulder, Marshall, Superior, Louisville and Lafayette, and by publication of notice in the newspapers of Boulder, Denver, Louisville and Lafayette, it being the desire of the Commission to have all patrons of the road that might be interested to have due notice of this application for increased fares.

At the hearing no person or association whatever appeared in opposition to the increased rates asked for, and such appearances as were made, aside from that of the Receiver himself, appear to have been made for either assurance of a more efficient service being maintained, or that the employes of the company be assured of an increase in their wages as a result of any increased fares granted.

The Receiver, W. H. Edmunds, was the sole witness for applicant, and his testimony comprised most of the evidence submitted. He testified that The Denver and Interurban Railroad was never at any time taken over by the United States Railroad Administration, and had, therefore, never received any benefits of increased rates as allowed to steam carriers by the Railroad Administration, or as allowed to such of the electrically operated carriers of the country as were taken over by the Railroad Administration, of which only such electric roads as carried freight as well as passengers were made subject to the jurisdiction of the United States Railroad Administration. His testimony further disclosed that in April of 1918, an application for increased rates had been made to this Commission, but the same had been substantially denied, so that whatever increase had been allowed at the April, 1918, hearing made no appreciable difference in the operating revenues of the com-

pany. That proceeding was known as Investigation Docket No. 17. Subsequently a second application was made to this Commission docketed as Application No. 23, in July, 1918, which was allowed and became effective August 7, 1918, and which rates are the basis for the present rates now in effect upon said line of railroad. The witness further testified that much of the benefit that would otherwise have been derived from the increase of August, 1918, was rendered abortive until the spring of 1919, for the reason that the ravages of the Spanish influenza depressed traffic to such an extent that operations were at a loss during several months of the epidemic period. Thereafter, the operating costs for materials and supplies increased to such an extent as compared with prior costs that any benefits that would otherwise have been derived from such increased fares were practically overcome. To demonstrate the comparative cost of supplies and materials entering into the maintenance of the railroad property in 1920 compared with 1916, the witness identified as being correct a comparative statement of such costs. Such statement is somewhat voluminous, so that the record will not be encumbered with it in detail, but a number of items may be cited to show the general trend of increased cost, as testified to by the witness, as follows:

Material	Cost 1916	Cost 1920	Increased Per Cent.
Steel tires	$22.00	$45.70	128
Steel axles	19.00	61.59	208
Window glass	.47	1.27	167
Castings	25.00	74.91	200
Paints	1.42	2.85	100
Copper wire	.30	.59	97
Steel wire	.12	.33	172
Ties	.81	1.71	112

The above items are fairly indicative of a long list shown in Exhibit 4, and it may be safely stated therefrom that the general average of per cent in increased cost will approximate 125 per cent as the increase of cost of supplies and materials in 1920 over the cost of the same in 1916.

The Receiver further testified that the year 1919 was the banner year, so far as operating revenue is concerned, within the

history of the road, the total operating revenue for that calendar year being $276,344.59, all of which was derived from passenger fare revenue save $1,964.71, which was derived from excess baggage charges, station and train privileges, mail contracts and several other smaller items. The operating expense, as shown by said Exhibit 2 for the calendar year 1919, amounted to $177,-104.47, which comprised maintenance of way and structures, maintenance of equipment, transportation and traffic expense and transportation, traffic and general expense, of which sum the transportation expense amounted to $107,788.02. The total operating expense deducted from the operating revenue gives a net operating revenue of $99,240.12, from which is deducted railway tax accruals of $10,150.00, leaving a net operating income for the year 1919 for $89,090.12. To this net operating income is added $2,978.91 of non-operating income, which is interest from unfunded securities and accounts, which gives a grand total of net income for the calendar year 1919 of $92,-069.03; from this total net income there are chargeable, according to the testimony, the following items:

Interest on unfunded debt	$ 28,726.50
Interest on funded debt	64,740.00
Rent for leased roads	2,585.04
Miscellaneous rents	19,684.92
Total deduction	$115,736.40

This shows a deficit between net income for 1919 and the above items of deductions therefrom for the calendar year 1919, of $23,667.43.

The Receiver's testimony explains in detail the various items set forth in Exhibit 2, but as will be observed therefrom, the most serious charge against the operation of this road is the interest charge upon its funded and unfunded debt, which in 1919 amounted to $93,466.50. The debt of the company upon which interest is paid, according to the testimony, is $1,079,000.00, of which $480,000.00 is unsecured or unfunded, which represents the money borrowed by The Denver and Interurban Railroad Company to pay interest upon its bonded debt, all of which, according to the testimony, bears interest at 6%. No account has

been taken in the figures submitted for depreciation or return upon invested capital, so it is apparent that under conditions at the present time applicant company is entitled to an increase in its fares in approximately the same ratio as increases have been granted to steam carriers throughout the country by the Interstate Commerce Commission, and the various state commissions, if it shall longer continue to operate and give reasonably adequate service to the public and pay to its employes something near to a fair schedule of wages.

The witness testified without objection in support of the allegations contained in the fourth paragraph of the application, that is, as to the collision of September 6, 1920, and the liability thereby incurred by the Railroad Company, for damage claims and property loss. Such allegations, and the testimony in support thereof, have been entirely disregarded by the Commission as being matters not properly chargeable to operating revenue and thus to be paid by the traveling public. That patrons of a utility cannot legally be required to bear the burden caused by the negligent act of the utility and its agents, servants and employes, is, the Commission believes, self-evident, if not axiomatic.

The witness' testimony further disclosed that the operating revenue of the applicant company was greatly decreased during the months of August, September and October, 1920, by reason of the following facts:

As now and heretofore operated, the Interurban cars operate over the tracks of the Denver Tramway Company from Globeville into Denver, to the loop at Fourteenth and Arapahoe Streets and return to Globeville, for which service the Tramway Company collect a city fare of six cents from each passenger in either direction; such cars are operated over the tramway tracks by tramway employes, the regular employes of The Denver and Interurban operating same from Boulder to Globeville only. On August 1, 1920, a strike was declared by the employes of the Denver Tramway, which, as a matter of common knowledge, grew into a very serious menace to industrial conditions in the city of Denver. No cars were operated by the tramway for several weeks at all, and for a period of more than two months, very

irregularly. During this period of time The Denver and Interurban Railroad Company operated its cars into Denver by means of its own employes to what is termed the car barns at Twenty-third and Market Streets, this point being distant from the Interurban loop about nine blocks; the Interurban Company was unable to operate its cars into the Interurban loop at that time because of its having an agreement to use tramway tracks for its cars further into the city than the car barns, and for the additional reason of its working agreement with its employes to operate cars between Boulder and its car barns. For a period of three months, August, September and October, passengers into the city were carried only to Twenty-third and Market Streets, and passengers from the city were required to take the Interurban at Twenty-third and Market Streets, so that the revenues of the Interurban were thereby decreased in the month of August, 1920, as compared with August, 1919, $5,632.19; September, 1920, less than September, 1919, $3,919.86; revenues for October, 1920, were not stated, but estimated as being considerably less than October, 1919. On November 1, 1920, the Interurban cars were operated as before the strike, that is, by tramway crews from Globeville to the Interurban loop and return to Globeville, but by new and inexperienced men, which has caused more or less disruption of a punctual service.

The Receiver testified that in the event the increased fares are granted by this Commission, as asked for in his application, he will undertake to do three specific things: First, increase the wages of his train service and other employes to the level of increases granted by the Railroad Labor Board created by the Transportation Act of 1920, which granted an approximate increase of 21 per cent to practically all classes of railroad employes, effective in the summer of 1920. Second, that arrangements will immediately be made with the Denver Tramway Company whereby the cars of the Denver and Interurban Railroad will be brought into the Interurban loop at Fourteenth and Arapahoe Streets in the city of Denver by the train crews of said railroad company, and that the passenger ticket from Boulder and intermediate points will convey the passenger to said Inter-

urban loop in Denver without payment of the six cents street car fare as has heretofore been done. Third, that within a reasonable time, which the Receiver estimates will be within twelve months from this date, The Denver and Interurban Railroad Company will construct a link of road from Modern to Utah Junction, and thence use the tracks of the Chicago, Burlington & Quincy Railroad from Utah Junction to West Thirty-sixth Avenue, and thence construct its road about a block southerly to connect with the tracks of the Denver Tramway Company at a point just north of the Twenty-third Street viaduct and thence operate over the tracks of the Denver Tramway Company into the Interurban loop at Fourteenth and Arapahoe Streets; by this means to eliminate and abandon the existing Interurban tracks from Modern around through Globeville to the Twenty-third Street viaduct, which will save about three and one-third miles of distance through a circuitous and dangerous part of its track, and will result in the saving of about ten minutes time in landing its passengers at the Interurban loop in Denver.

With reference to the first proposition, it may be said that the Commission is in hearty accord. The testimony discloses, and we think it is conceded by all parties concerned, that the employes of The Denver & Interurban Railroad Company, and especially those in the train service, are of that type of railroad employes that usually are found upon American railroads, courteous, accommodating and faithful. An additional factor also is that the operation of the Interurban cars between Boulder and Denver for half the distance is over the leased lines of the Colorado and Southern Railway Company, so that The Denver and Interurban employes in the train service must possess and require the same degree of railroad technical skill and ability as is required of the employes of a steam rail carrier. The motormen and conductors now receive pay at the rate of 56 cents per hour and the flagmen or brakemen at the rate of 42 cents per hour, which approximates $144.00 a month for the former two classes of employes and $107.00 a month for the flagmen. The Receiver proposes to increase wages to a scale of 67 cents per

hour for motormen and conductors and 50 cents per hour for flagmen, which will approximate $180.00 per month for the two first named classes of employes and $135.00 per month for flagmen. These wages are none too great under existing conditions. The applicant asks for an increased fare which will yield approximately $20,000.00 per year to inure to its employes. The United States Labor Board granted increases of approximately 21 per cent, and the increase of applicant to its employes will be, as the Commission understands it, upon the same basis, that is, 21 per cent increase to its employes, which comprise trainmen, linemen, brakemen and all other of its employes. From the testimony in this case, and indeed from the common knowledge of present day conditions, the Commission is quite satisfied that no objection to an increased fare will be made by the traveling public in the event such increased fares accrue to the employes of the company.

As regards the second proposition of the Receiver, the Commission is equally satisfied that this will inure to the benefit of the traveling public, and the increased fares hereby allowed are made upon the understanding that this arrangement will be forthwith inaugurated. Not only is the collection of a city fare upon an Interurban car a nuisance to the public, but the operation of the Interurban cars by tramway crews is to a large extent responsible for many vexatious delays and misunderstandings. With the elimination of this factor, a passenger boarding an Interurban car, outbound or inbound, will be landed upon the same ticket and with the same train crew at his destination and without additional annoyance, bother or misunderstanding. This change ought to be, and we feel will be, appreciated by the patrons of The Denver and Interurban Railroad.

The third proposition of the Receiver to eliminate the roundabout and dangerous trackage through Globeville is equally meritorious in the interest of the patrons of this road, and in the interest of the road itself, in saving upwards of three miles in distance and of about ten minutes of running time, to say nothing of the dangerous curves that will be eliminated thereby and of the disagreeable sections of the city that will be avoided in

entering the city, which are matters well calculated to be of advantage to the traveling public and to the railroad itself, and when this condition shall have been brought about, The Denver and Interurban Railroad Company will have accomplished a betterment that will prove to be a material asset.

The increased fares hereby allowed upon the basis asked for by applicant in its petition must be understood to be upon the conditions named hereinabove, and upon the further condition that a reasonably adequate and efficient service shall be maintained by the company, for it is a notorious fact, though not being specifically testified to, that the service now furnished is far from being satisfactory or efficient, and particularly since the inauguration of the strike upon the Denver tramway of last August 1st, since which time the service to and from Denver in the morning and evening hours has been more frequently off of schedule time than on time.

As before stated, the increase in fares hereby allowed is made with the express understanding that unless conditions are improved as hereinabove indicated, and unless the propositions made by the Receiver in his testimony in this case are fulfilled as therein stated, this order may be made the subject of further consideration upon complaint of any patron affected or on the Commission's own motion.

ORDER.

It Is Therefore Ordered, That applicant, the Receiver of The Denver and Interurban Railroad Company be, and he hereby is, authorized to establish and to put into effect upon one day's notice to the public and the Commission in the manner prescribed by the Act, the fares, rates and charges as set forth and specified in Exhibit A, hereinabove referred to and attached to his said application.

It Is Further Ordered, That the above authority is hereby granted upon condition that the wages of his employes be increased approximately 21 per cent contemporaneously with the going into effect of such increased fares.

It Is Further Ordered, That the said applicant shall in-

augurate within a reasonable time a system of operating his cars into and out of the city of Denver by means of his own employes, and without any additional city fare being charged.

IT IS FURTHER ORDERED, That within a reasonable time, which is hereby designated as within twelve months from this date, said Receiver shall establish a line of track and operate the cars of The Denver and Interurban Railroad from Modern to Utah Junction, and thence over the line of the Burlington Railroad from Utah Junction to West Thirty-sixth Avenue, Denver, and thence southerly to the tracks of the Denver Tramway Company to a point near the north end of the Twenty-third Street viaduct and thence over said tramway tracks to the Interurban loop in the city of Denver.

IT IS FURTHER ORDERED, That all outstanding tickets, one-way, round-trip and commutation, be honored by said railroad for transportation within limit of sale, without additional charge.

IT IS FURTHER ORDERED, That the failure, neglect or refusal of the Receiver of said railroad company to comply with the terms of or amend the terms of this order as the Commission may then term to be just.

THE WESTERN LIGHT & POWER CO.

v.

THE CITY OF LOVELAND.

[Case No. 144. Decision No. 394.]

Eminent domain—Public Utilities Act—Effect.

1. Right of municipality to proceed by eminent domain to condemn system of electric utility is preserved by Public Utilities Act.

Eminent domain—Effect of Commission's order on right of.

2. Nothing contained in cease and desist order made to conserve labor and materials during war prevented municipality from proceeding in proper action before Commission or in court to acquire property of private electric utility.

[December 2, 1920.]

Appearances: Pershing, Nye, Fry and Tallmadge and Ab. H. Romans for the City of Loveland; Paul W. Lee and George A. Shaw, Attorneys for the Western Light and Power Company.

STATEMENT.

By the **Commission**: The petition in this case was filed with the Commission on August 11, 1920, and an answer was filed August 30, 1920. A hearing was held October 11, 1920. The question to be determined is whether an order entered in the above entitled case on the 31st day of December, 1917, prohibits the city of Loveland from acquiring by purchase by proceedings before this Commission or by eminent domain proceeding in any court having jurisdiction over said matter, the distribution system of the Western Light and Power Company in the city of Loveland.

The original action in this cause, on which the said order of December 31, 1917, was entered, was commenced by the Western Light and Power Company for determination by this Commission of the question whether under subdivision b, Section 35, Chapter 110, Session Laws, 1917, of Colorado, the defendant, the city of Loveland, had, before the effective date thereof, to-wit: July 16, 1917, begun actual construction work on its proposed electric light plant and had prosecuted such work in good faith, uninterruptedly and with reasonable diligence in proportion to the magnitude of the undertaking, under any franchise, permit, ordinance, vote or other authority heretofore granted, but not heretofore actually exercised, or whether a certificate of public convenience and necessity was required. After due consideration by the Commission the said order of December 31, 1917, was entered, which is as follows:

"It is therefore ordered, that the Public Utilities Commission of the State of Colorado finds that the municipality of Loveland had begun actual construction of its electric light plant prior to the enactment of the amendment to the Public Utilities law of the State of Colorado, known as Section 35, and at the date of this hearing was prosecuting the work in good faith, uninterruptedly and with reasonable diligence in proportion to the magnitude of the undertaking.

"It is further ordered, that the municipality shall not proceed further to build and complete the proposed municipal electric light plant and system until such time as the municipality

shall again appear before the Commission and show to the Commission that it is ready to proceed in the interest of the municipality, or until such time as the Commission, on its own motion, shall authorize the municipality to resume work under more normal conditions.

"It is further ordered, that no public utility, taxpayer or person may appear before the Commission for the purpose of showing that the municipality of Loveland is not prosecuting the work of constructing and completing its proposed municipal electric light plant and system in good faith, uninterruptedly and with reasonable diligence in proportion to the magnitude of the undertaking until the further order of this Commission."

In this decision and order the Commission first found that the municipality of Loveland had begun actual construction of its plant prior to the enactment of the amendment to the Public Utilities law, and was prosecuting the work in good faith, uninterruptedly and with reasonable diligence. In the second part thereof, which is the part of the order which seems to be under contention, the Commission ordered that the municipality should not proceed further to build and complete the proposed municipal electric light plant until such time as the municipality should again appear before the Commission and show to the Commission that it was ready to proceed in the interest of the municipality, or until such time as the Commission, on its own motion, authorized the municipality to resume work under more normal conditions. The reasons which prompted the Commission to include the second part in its order are set out in its statement of facts, as follows:

"Today the United States is in a state of war, and, as a consequence, there is insufficient labor and material to carry on economically the work and industries necessary to a satisfactory termination of the war. Largely on this account, there has been brought about a great scarcity of both labor and materials necessary to the successful termination of the same. The federal authorities at Washington are continually advocating the conservation in every way possible of man-power and materials, requesting that all unnecessary construction at this time be de-

ferred, and that sacrifices be generously made in order that all power and energy may be directed in a united effort to bring the war to a satisfactory and successful conclusion. It is the policy of this Commission to co-operate with the National Government in every way possible, and this also should be the policy of the state and municipalities. The Commission has sufficient knowledge of the scarcity of labor and material, and is also informed that many kinds of material can not be immediately obtained at any price; it is equally true that the cost of labor and material today exceeds by more than 100 per cent the cost of a year ago."

From the above it plainly appears why the Commission, after finding that the city of Loveland had begun actual construction and had prosecuted the work uninterruptedly and with reasonable diligence, included the second paragraph in its order; namely, for the purpose of conserving in every way possible manpower and material for the successful prosecution of the war, and to prevent the unnecessary dissipation of the funds of the municipality in being compelled to construct its system at a time of extraordinary high prices of material and labor.

It is evident from the order itself that the Commission did not intend to prevent the city of Loveland from purchasing the plant of the Western Light and Power Company by a proper proceeding before this Commission, as on Page 9 of the original order of December 31, 1917, the Commission says: "If the municipality desired to appear before the Commission and purchase the properties of the Western Light and Power Company serving the city of Loveland, in accordance with the terms of the Public Utilities Act, that would be its privilege."

As to the question of the city of Loveland proceeding by an action to condemn, there is nothing in the order to indicate that the Commission intended in its said order to thereby restrain the city of Loveland from proceeding by an action of eminent domain in a court of law of competent jurisdiction to condemn any part of the property of the Western Light and Power Company. The right to proceed by eminent domain is reserved to the city by the Public Utilities Act, and were it not so reserved, it is indeed a doubtful question whether this Commission would

have the jurisdiction to restrain the city from proceeding in court to enforce a remedy provided by law.

ORDER.

IT IS THEREFORE ORDERED, That it is the opinion of the Commission that nothing in the said order of December 31, 1917, in any way prevents the said city of Loveland from proceeding in a proper action before this Commission to acquire the property of the said Western Light and Power Company in the city of Loveland, and that the said order in no way prevents or restrains the said city of Loveland from proceeding in a court of competent jurisdiction to acquire said property by condemnation.

RE THE LIBERTY TRANSPORTATION AND EXPRESS COMPANY.

[Application No. 58. Decision No. 399½.]

Certificate of convenience and necessity—Failure to pay fee—Effect. Certificate of convenience and necessity cancelled for failure to pay fee therefor provided by law.

[December 13, 1920.]

STATEMENT.

By the **Commission**: On September 22, 1919, The Liberty Transportation and Express Company of Denver, Colorado, filed their petition for a certificate of public convenience and necessity for the operation of an automobile truck line between Denver and Greeley, Colorado.

The matter was heard at the hearing room of the Commission on September 26, 1919. Upon such hearing a certificate was granted. Applicant was notified that the certificate would issue upon payment of the fee therefor as provided in the Public Utilities Act. Notices have been sent to applicant to comply with the request of this Commission, which have been ignored. Under these circumstances the certificate issued will be cancelled and the application dismissed for failure of applicant to comply with the request of the Commission and of the provisions of the Act.

ORDER.

IT IS THEREFORE ORDERED, That the certificate heretofore, and on October 11, 1919, granted to applicant, The Liberty Transportation and Express Company be, and the same is hereby cancelled and for naught held, and the said application be and the same is hereby dismissed.

RE E. F. CHAMBERS.

[Application No. 110. Decision No. 402.]

Service—Abandonment.

The Commission has no power to compel a utility company to invest additional money in operation, which experience has proven to result in financial loss, and such a utility should be permitted to abandon service notwithstanding consumers have invested money in fixtures in reliance upon its continuation and will suffer loss by the abandonment.

[December 20, 1920.]

Appearances: Hughes and Dorsey and E. I. Thayer, for applicant; N. Walter Dixon and S. Harrison White, and Clyde T. Davis, city attorney of La Junta, and H. M. Minor, city attorney of Rocky Ford, for the cities of La Junta and Rocky Ford, protestants, and Fred A. Sabin for protestant, The Holly Sugar Company.

STATEMENT.

By the **Commission**: Applicant, E. F. Chambers, filed with the Commission on September 10, 1920, his application wherein he alleges that The Otero Gas Company, a corporation, organized under the laws of Colorado, prior to June 1, 1915, was the owner of a gas plant at La Junta, Colorado, and of franchises and privileges granted to it by the cities of La Junta and Rocky Ford in Otero County, to construct, maintain, own and operate gas equipment and appliances and to lay, maintain and operate gas mains and lines through the streets, alleys and roads of said municipalities and county for the manufacture and distribution of light, power and fuel gas to the public; that said Otero Gas Company continued to be such owner and was engaged in the

operation of such gas plant and pipe lines and in supplying gas to the public until the plant was sold, as hereinafter mentioned; that on June 1, 1915, said Otero Gas Company issued and sold its bonds in the sum of $60,000.00 with interest at the rate of 6 per cent per annum, and on said date executed and delivered its mortgage deed of trust conveying all of its property, equipment, appliances and privileges to the International Trust Company, a corporation, as Trustee, to secure the payment of such bonds and interest; that on December 1, 1919, said Otero Gas Company made default in the payment of interest then due upon said bonds and proposed to cease its operations, and declared that because of the impaired condition of its plant and property and its lack of funds it was unable to further continue the operation of its property; that in January, 1920, a foreclosure suit was filed in the District Court of the Tenth Judicial District of Colorado entitled "The International Trust Company, as Trustee, v. The Otero Gas Company," for the foreclosure of said mortgage deed of trust securing the payment of said bonds and the interest thereon, and for the appointment of a receiver to conserve and operate said business and property pending said foreclosure; that the court thereupon appointed H. K. Holloway the receiver of said Otero Gas Company and its property, and the receiver took over the charge and control and operations of said property until the foreclosure and receiver's sale of said property on July 8, 1920; that during the operation of said property by the receiver the operating expenses were largely in excess of the operating revenues, and that the loss, exclusive of taxes and depreciation, amounted to about $8,000.00; that since the acquisition of said gas property by the applicant July 8, 1920, the operating income has been insufficient to pay the operating expenses of said property.

Applicant further represents that upon examination into the physical condition of said gas plant and property made by the receiver and The Otero Gas Company and by applicant, it was made to appear that to rehabilitate the properties and render the plant efficient to properly manufacture and distribute its product, would require the immediate expenditure of not less

than $35,000.00 to $40,000.00; that efforts have been made to organize a new company and secure sufficient capital to finance the same, in order that it may be possible to further operate said gas plant and system, but without success; that because of the conditions set forth in the application, applicant was unable to sell bonds or borrow any money, which is imperatively necessary for the continued maintenance and operation of said gas plant and system, and that he is unable to obtain funds with which to even make the necessary repairs and rehabilitate said system as will render it efficient and in condition to be operated without constant and recurrent loss to the owner; that unless the depreciation in equipment is checked and old and defective machinery and appliances are immediately replaced with efficient equipment, the loss in operation will be greatly increased, and that, in fact, unless the above is speedily done, the gas plant will soon arrive at a stage where it will automatically cease to be operable or of any practical use.

The applicant further states that with the gas plant in its present physical condition he is unable to pay operating expenses under the rates now in force, or under any increase of rates that might be allowed by the Commission commensurate with the value of the service; that the property cannot be continued in operation unless additional capital is invested therein for necessary repairs, improvements and a general rehabilitation, and thus to procure increased operating revenues; that the said Otero Gas Company and the receiver and applicant have each, respectively, given a fair trial to the rates in effect as heretofore allowed by the Commission; that a purchaser cannot be found who is willing to buy the property as an entirety at a fair price and to operate it as a gas utility; that the respective owners of the gas plant have made a legitimate effort to increase and develop the business, but without success, and that the gas property has been capably and economically managed; that reasonable efforts have been made to increase the earning power of the plant, but that the revenues derived have heretofore been and now are insufficient to pay operating expenses and taxes, and that the earnings do not permit of any depreciation allowance whatever; that

the rates for gas cannot now be increased to an extent as will yield an adequate sum to provide for operating expenses, taxes, depreciation and a fair return on the value of the property; that it is necessary, therefore, that the operation of the plant be discontinued; that neither The Otero Gas Company nor the receiver nor the applicant has received a fair return upon the fair value of said plant, and that the applicant is without funds to further operate the plant and to pay for necessary repairs and replacements of the various parts thereof, and is unable to further maintain the plant in its present physical condition and to furnish a proper and adequate supply of gas to consumers.

The concluding paragraph of the application states that applicant should be permitted to abandon and discontinue and cease the operation of said property and dismantle the same, and to junk or sell the property and equipment in its entirety or in separate portions as he may deem advisable.

The prayer of the application is that an order be entered by the Commission authorizing and directing applicant to discontinue service, cease the operation of said gas plant, to dismantle it and to sell all or such part of the plant and equipment as petitioner may deem advisable.

Upon the filing of said application copies of the same were served upon the municipal authorities of La Junta, Rocky Ford and Swink, Colorado, by registered mail, and also notice of the filing of said application was sent to the press of said three municipalities with a request that the same be given publicity.

Thereafter, and on September 24, 1920, the cities of La Junta and Rocky Ford, by their attorneys, filed a motion to require applicant to set out and state who is the real owner of the utility mentioned in the application, averring that the application failed to so state, and that said cities proposed to resist the granting of the prayer of the application.

Upon applicant being served with copy of said motion, he filed, by his attorneys, on October 9, 1920, a satisfaction of said motion in which it was stated that the International Trust Company, a corporation, of Denver, is the real owner of said gas property which had been acquired by foreclosure and receiver's

sale, and that the International Trust Company is the owner of bonds, notes and certain other of the indebtedness of the former owner of said property, The Otero Gas Company, and that applicant, E. F. Chambers, holds the legal title thereto for the use and benefit of said The International Trust Company.

The cause was set for hearing in the city hall in the city of La Junta, Colorado, on October 13, 1920, at 10 o'clock A. M., due notice thereof being given to all parties in interest and by publication in the newspapers of La Junta, Rocky Ford and Swink. Upon the morning of said date the place of hearing was changed to the district court room of the county court house in La Junta, by consent of all parties and for greater convenience.

At the inception of the hearing a formal protest was filed by the cities of La Junta and Rocky Ford, which protest was subsequently adopted by the Holly Sugar Company as its basis of protest, which said protest sets forth the incorporate capacities of the protestants and that the same is filed in behalf of said cities and their inhabitants who now are and who desire to become patrons of the utility involved, and that the only means which protestants and the inhabitants of said communities have to procure gas for public and domestic purposes, is from the said gas utility.

Protestants further set forth that large numbers of the inhabitants of said cities have heretofore expended sums of money, amounting in the aggregate to thousands of dollars, piping their homes, procuring lighting fixtures and gas ranges and other appliances for using gas, all of which was done in reliance upon the continued operation of said gas utility, and that the discontinuance of said gas utility will cause the inhabitants who are users of said gas product not only great inconvenience, but in the aggregate serious financial loss.

Protestants further allege that said gas utility was constructed and has been and now is being operated under franchises obtained from said cities and from the Board of County Commissioners of Otero County, and that the owner of said utility cannot be excused from the performance of the conditions of said

franchises by the fact, if it be a fact, that the utility cannot, under present conditions, be operated at a profit or without loss.

On information and belief, protestants deny that the receipts from the operation of said gas utility will not meet operating expenses, and deny that the real owner of said utility has not or cannot obtain sufficient funds with which to operate said utility and make repairs and extensions thereof as may be necessary.

Protestants pray that the owner of the utility be required to furnish full proof of the allegations of the applicant, and that protestants have the right and opportunity to produce counter evidence and other evidence as may be pertinent to the issue involved.

It appears from the testimony and exhibits in the case that The Otero Gas Company was incorporated November 10, 1914, under the laws of this state for a term of twenty years, with a capital of $100,000.00, par value $1.00 per share, and that shortly subsequent to its incorporation it purchased a franchise of the Rocky Mountain Gas Company and land upon which was to be constructed a gas plant. On January 4, 1915, it began construction of an oil gas plant to cost $20,000.00, part of which was to be paid in cash and part in the stock of the company; that thereafter, and on March 8, 1915, The Otero Gas Company extended its operations from La Junta to the city of Rocky Ford, about eleven miles distant, and to the town of Swink, about eight miles distant. Franchises were procured from Rocky Ford and Swink and a right of way was procured from the County of Otero for laying transmission and distributing mains to said city and town, and about September 1, 1915, said company began to serve consumers in Rocky Ford and Swink. Meantime, and on June 15, 1915, The Otero Gas Company issued its bonds in the amount of $150,000.00, bearing interest at 6 per cent per annum, secured by a deed of trust on the property of the company to the International Trust Company of Denver, as Trustee; these bonds were dated June 1, 1915, and were due June 1, 1930, of which $60,000.00 of bonds par value were sold at 90 and accrued interest. The agreement with the Trust Company, trustee, provided that the balance of the bonds, $90,000.00 par, could

not be issued until the net earnings of the company, after deducting operating expenses, taxes and interest, should equal two and one-half times the interest charges on all bonds then outstanding within the twelve months period prior to issuance, and then only to be issued to the extent of 75 per cent of the cost of construction. Subsequently, and on November 21, 1916, The Otero Gas Company borrowed $8,000.00, secured by a second mortgage on the gas property, with interest at 6 per cent per annum, which second mortgage was dated December 1, 1916, and was due June 1, 1919. The Otero Gas Company defaulted in the interest payment on its bonds. On application of the trustee, a receiver for the company was appointed by the District Court of Otero County January 5, 1920, and the property of the company was taken over and the plant operated by the receiver from January 9, 1920, to July 9, 1920, when at receiver's sale the property was disposed of and thereafter operated by the applicant Chambers for The International Trust Company, the purchaser of the property at such sale.

In the franchise granted to The Otero Gas Company certain rates were therein specified as the price for which gas should be furnished to consumers in said municipalities. On August 16, 1917, the company filed a schedule with the Commission, amending the franchise rates, to become effective September 15, 1917. Protests were made to such amended schedule, and upon hearing the Commission established, under Decision No. 146, in Case No. 145, the monthly minimum guarantee as 75 cents gross or 70 cents net per month.

Thereafter, and in November, 1918, another schedule of rates was filed by The Otero Gas Company, and upon protests being filed was suspended by the Commission until a hearing was had thereon, and on June 30, 1919, in Decision No. 263, I. & S. No. 33, the Commission established the following schedule of rates for The Otero Gas Company:

First 5,000 cubic feet per month, $1.70 gross per 1,000 cubic feet.
Next 10,000 cubic feet per month, $1.40 gross per 1,000 cubic feet.
Next 15,000 cubic feet per month, $1.25 gross per 1,000 cubic feet.

For all consumption during the month in excess of 30,000 cubic feet $1.00 net per thousand cubic feet, with a proviso in the schedule

that a discount of 10 cents per thousand cubic feet be allowed on the first 5,000 cubic feet or fraction thereof on all bills paid within the discount period.

These rates, with a minimum monthly guarantee of $1.00 net per consumer or per meter, were effective as of June 30, 1919, and have been the schedule of rates under which the company, the receiver and the applicant have been operating said plant from that date up to the present time.

At the hearing a mass of testimony, both oral and documentary, was submitted to the Commission by applicant and by protestants. From all of such testimony it clearly appears that the gas property in question never succeeded in paying its operating expenses, charges and taxes, much less anything for depreciation allowance or any return upon the capital invested. The most of the equipment for this gas plant was what might be termed second hand or used machinery and appliances, purchased in California by The Otero Gas Company for installation at La Junta. The evidence discloses a constant loss in operation, as stated, so that it was constantly necessary to procure new capital to operate the plant, which finally culminated in the bond issue, as hereinabove stated, and a mortgage upon the plant which was foreclosed by the trustee upon default in the payment of the interest on the bonds issued.

Much testimony was introduced relative to the present physical condition of the plant, from which it appears that to warrant further operation and to have a reasonably adequate and efficient gas plant, extensive repairs, improvements and a general rehabilitation of the plant would be necessary. Such repairs and improvements, witness King, Superintendent of the plant, testified in detail is what, in his judgment, will be necessary, and that the cost thereof will be about $36,400.00, exclusive of freight and cost of installation. Also much testimony was submitted with reference to the operating expenses and revenue of the plant prior to the receivership, during the receivership and subsequent to the receivership. In order to clarify the situation in that regard, it was stipulated and agreed by all parties that the statistician of the Commission should make a report as to the operating revenues and expenses of The Otero Gas Company from

the period July 1, 1919, to January 9, 1920, and during the receivership from January 9 to July 9, 1920, and by the applicant Chambers from July 9 to October 1, 1920; that in so doing the statistician should go over the records and accounts covering these periods of operation as kept by these respective parties, and when completed it should be admitted in the evidence without objection as "Commission's Exhibit X."

The cause was argued orally at the hearing room of the Commission, Capitol Building, Denver, on November 24, 1920, pursuant to notice, at which time the report of the statistician was filed and considered in evidence. Applicant contended that the evidence, including the said report, established beyond question, that the gas plant could not further continue to be operated except at great loss, while protestants urged that under all the evidence it was obvious that before such discontinuance is permitted, an increase of rates should be granted, to demonstrate the ability of the utility to at least earn its operating expenses, charges and taxes. Were it not for the fact clearly appearing from the evidence, that in excess of $35,000.00 of new capital must be immediately put into the plant to render it fairly adequate to furnish its gas service, the argument of protestants is worthy of serious consideration; but without such capital being invested, any increase of rates would furnish no accurate or dependable data for its future operation, and would, in all probability, only result in further and continued loss in the operation of said plant.

From the report of the statistician, comparative statement of operating revenues and expenses during the three periods mentioned, is as follows:

OTERO GAS COMPANY	Revenues	Expenses	Deficit
July 1, 1919, to Jan. 9, 1920	$17,509.68	$19,483.44	$1,973.76
Average per month	2,797.94	3,113.33	315.39
RECEIVERSHIP			
Jan. 9 to July 9, 1920	$15,446.69	$27,400.26	$11,953.57
Average per month	2,574.45	4,566.71	1,992.26
E. F. CHAMBERS			
July 9 to Oct. 1, 1920	$10,422.21	$11,574.66	$1,152.45
Average per month	3,801.04	4,221.35	420.31

From the above report it will be observed that during the

periods mentioned the average monthly deficit of the Gas Company was $315.39, the average monthly deficit during the receivership $1,992.26, and during the period of applicant's operation up to October 1, 1920, $420.31. The comparatively large deficit during the receivership is accounted for, according to the testimony, by fees of receivership, attorney's fees in connection with the receivership and other expenses out of the ordinary, although the fees of receiver and attorney's fees have not as yet been paid.

The statistician's report further shows the amount of gas sold during the above three periods as follows:

OTERO GAS COMPANY

Cubic feet gas sold, July 1 to Dec. 31, 1919.....10,512,100
Average cost per thousand cubic feet of gas sold..... $1.85

RECEIVERSHIP

Cubic feet gas sold, Jan. 1 to June 30, 1920..... 9,918,400
Average cost per thousand cubic feet of gas sold..... $2.76

E. F. CHAMBERS

Cubic feet gas sold, July 1 to Sept. 30, 1920..... 6,331,100
Average cost per thousand cubic feet of gas sold..... $1.83

It will be observed therefrom that the average cost of production per thousand cubic feet of gas sold by the Gas Company was $1.85, by the receiver $2.76, and by applicant Chambers $1.83, so that it conclusively appears that the cost of manufacturing gas sold during each of the periods was in excess of the rates fixed by the Commission to be charged therefor.

That brings the situation squarely to a consideration of what seems to the Commission to be the chief contention in the case; viz, whether a further increase in gas rates to the consumers of the said gas plant should be allowed by the Commission before an order permitting discontinuance of said gas service is made by the Commission. In other words, following the general legal principle involved that has been often declared by the courts, including our own Supreme Court, that before a public utility may be permitted to discontinue its public function it should be required to operate at a higher rate charged for its service rendered, to determine by an actual test whether such increased

charge will save the utility to the public service. (In re Durango Ry. and Realty Co., 5 Colo. P. U. C. 906.)

The chief defense interposed by protestants was that an increased rate should be tried by the operating owner of the gas plant before its discontinuance of service should be allowed, and in support of this contention a number of witnesses testified that the consumers in La Junta and Rocky Ford would be willing to pay an increased rate rather than lose the enjoyment of the gas utility. Bearing in mind that in June, 1919, upon an application for an increase of rates, this Commission fixed as a basis of rates adequate for a fair return upon $116,094.00, the value of the plant as determined by the Commission, $1.60 net for the first 5,000 feet, $1.40 net for the next 10,000 feet, $1.25 net for the next 15,000 feet and $1.00 net for all monthly consumption in excess of 30,000 cubic feet. By a simple mathematical calculation it is determined that, had a greater rate been fixed at that time—as high, for instance, as $2.00 for the first step of the rate, with a corresponding deduction as to the other steps—upon the same amount of gas sold, additional revenues during the three periods named would have amounted to approximately $1,200.00 more in the first period, approximately $1,000.00 in the second period and about $700.00 in the third period, so that the deficit sustained in each of the three periods would not have been covered even had the last mentioned and higher rate been allowed by the Commission in June, 1919. The testimony is to the effect that, with the higher rate, a certain percentage of loss in consumers is encountered in summer, and also that the winter consumption of gas is lowered, and even under the present rate Witness King testified that the winter load is much less than the consumption during the summer months, so that the figures above given with reference to a result anticipated by the granting of a higher rate, appear to be conservative.

Some testimony was submitted by protestants to show anticipated loss and damage to consumers in the communities served by the gas utility if it is allowed to discontinue such service, by reason of the consumers' installation of gas fixtures, mains and the like in their property, such installation having been made

by the consumers in reliance upon the continued operation of the gas utility, and that such loss and damage in the aggregate would amount to several thousands of dollars. Undoubtedly this will be the effect should the utility be allowed to discontinue operation; but it resolves itself into an individual loss on the part of consumers in the respect mentioned as against the utility's loss, much more serious in the aggregate were the utility compelled to operate its plant for the reasons given. These matters are unavoidable. Where an operating utility sustains a loss, its customers must of necessity incur a loss also. This principle may be illustrated by a utility beginning business in a flourishing mining camp; everything is booming, the utility is making money and all of its customers are prosperous. Then a slump comes to the mining industry; people move away and the numbers of the customers of the utility are thereby greatly decreased and its revenues in proportion. Those of its customers who remain will be required to pay an increased charge for the service of the utility and they thus lose money, while the utility itself is failing to earn anything like a fair proportion of its just charges and operating expenses.

The witness King testified that in his opinion the value of the property of the gas plant and system as junk would approximate $22,000.00, and that, in his opinion, the value of the plant as an operating proposition as it now exists would be fairly worth to a purchaser about $35,000.00 to $40,000.00, by reason of its present run down condition. This witness also testified, as hereinabove stated, that in his judgment the cost of a general rehabilitation of the plant to render it reasonably adequate and efficient to supply the service required would be about $36,400.00.

This involves a question of the authority of the Commission to compel the owner to invest additional money in the equipment of a utility that has theretofore been a losing venture. It is asserted in the pleadings of the protestants that it is the duty of the owner of a utility so to do, and within the power of the Commission to compel its being done. But we have not been cited to any legal authority in support of such proposition, nor do we know of any such authority. Therefore, the Commission holds

that it is without power to order it to be done, and that it is not the legal duty of the owner to further invest his capital in the operation of a utility that experience has proven to result in financial loss.

The prayer of the application is to the effect that an order may be entered by the Commission authorizing and directing applicant to discontinue service, cease operations and dismantle said gas plant and to sell all or such part of the properties and equipment comprising the same as applicant may deem advisable. In the opinion of the Commission the evidence justifies the granting of the relief as prayed for by the applicant, and an order permitting discontinuance of service will be entered herein.

Without further resume of the testimony in this cause and unduly lengthening this statement of facts and order, the Commission finds that under all the testimony in this cause the operations of The Otero Gas Company plant and system have been conducted at a monetary loss, without any regard to any allowance for depreciation or a fair return upon the capital invested; that to further increase the rates for gas would not relieve such condition of affairs materially; that the present owner of the utility cannot lawfully be compelled to invest additional capital therein for the purpose of rehabilitating said gas plant; that approximately $36,400.00 additional new capital would be necessary to be expended in order to render said gas plant and system in such condition as to fairly and adequately serve its function; that in view of the fact that the abrupt termination of the service heretofore and now being rendered to the citizens of the communities affected would be attendant with extreme hardship and inconvenience if such service should be abruptly terminated, the discontinuance of service prayed for will not be allowed except upon the giving of fifteen days' notice to each of its consumers, as disclosed by its books and records, and to the Commission, prior to the discontinuance of service hereby permanently allowed.

ORDER.

IT IS THEREFORE ORDERED, That applicant, E. F. Chambers, owner and holder of the legal title, of the franchises, appliances,

privileges and properties of The Otero Gas Company for the International Trust Company of Denver, a corporation, be, and he hereby is, authorized, permitted and allowed to discontinue the service of such utility upon the giving of fifteen days' notice to each patron of said utility and to the Commission, prior to the date of such discontinuance.

IT IS FURTHER ORDERED, That until the expiration of such fifteen day period the said utility shall continue its operations and furnish gas to all of its consumers in the same manner as the same is now and heretofore has been done.

RE AMERICAN RY. EXPRESS CO.
RE PROPOSED INCREASE IN EXPRESS RATES ON LINE OF THE DENVER & SALT LAKE RAILROAD COMPANY.

[Investigation and Suspension Docket No. 49.]
[Application No. 94. Decision No. 403.]

Rates—Express—Block basis.

Express rates authorized in I. & S. Docket No. 49 authorized to be slightly modified in order to put them upon the block basis. Further order made with respect to rates on milk and cream.

[December 21, 1920.]

SUPPLEMENTAL ORDER.

Since the Commission issued its order in I. & S. Docket No. 49, American Railway Express Company has filed its schedule No. 5, Colo. P. U. C. No. 4, establishing rates authorized by the Commission in Application No. 94, upon the basis of the block system heretofore established in this state. The Express Company has now discovered that it is impossible to comply strictly with the original order herein and at the same time maintain the block system for the publication of said express rates.

It was not the intention of the Commission to establish any other or different method than the block system in the publication of rates, and it now appearing to the Commission from the showing made by the Express Company that rates can be established in accordance with the block system which will be in substantial conformity to the rates authorized by the original

order herein,—in certain instances on local business the rates will be two or three cents more and in other instances two or three cents less,—and will not result in a greater variation from the rates heretofore authorized; and it appearing to the Commission that the original order herein should be modified accordingly, the same is hereby amended to read as follows:

IT IS THEREFORE ORDERED, That American Railway Express Company be, and it is hereby authorized to increase its express rates and charges applicable to intrastate traffic within the State of Colorado, except traffic to or from points or between points on the Denver & Salt Lake Railroad, 26 per cent as provided and ordered in Application No. 94, provided its rates and charges for the transportation of milk and cream within the State of Colorado shall not be increased in excess of 20 per cent.

IT IS FURTHER ORDERED, That said Express Company be, and it is hereby authorized, to increase its express rates and charges applicable to intrastate traffic between points on the Denver & Salt Lake Railroad, within the State of Colorado, as proposed in the petition in intervention filed herein by W. R. Freeman and C. Boettcher, Receivers of the Denver & Salt Lake Railroad, as set out in Appendix A attached to this order; provided, however, that in order to conform to the block system of rates now in effect, American Railway Express Company in the publication of said rates may, and it is hereby authorized to, state the same in scale numbers representing the rate scales nearest approximating the rates set out in said Appendix A;

IT IS FURTHER ORDERED, That said Express Company be, and it is hereby authorized to cancel its express rates and charges applicable to intrastate traffic between points on the line of the Denver & Salt Lake Railroad and points on other lines within the State of Colorado, and thereafter to apply a combination of local rates to and from Denver on such interline traffic, provided, however, that such combinations be published in conformity with the block system of rates, and filed with this Commission;

IT IS FURTHER ORDERED, That said Express Company be, and it is hereby, authorized to increase its express rates and charges applicable to the transportation of milk and cream within the

State of Colorado between points on the Denver & Salt Lake Railroad and between points on the Denver & Salt Lake Railroad and points on other lines of railroad in Colorado not to exceed 20 per cent in excess of the rates applicable to the transportation of such class of traffic on August 31, 1920;

It Is Further Ordered, That said Express Company be, and it is hereby, authorized to make effective the increased rates and changes hereby authorized on one day's notice to the Commission and to the public, by filing and posting tariffs containing same with the Commission in the manner prescribed by Section 16 of the Act;

It Is Further Ordered, That said Express Company be, and it is hereby notified and required to cancel on one day's notice, on or before January 1, 1921, the schedules heretofore filed by it increasing the rates to and from points and between points on the Denver & Salt Lake Railroad, which rates were suspended by this Commission under its order dated August 21, 1920, in I. & S. No. 49, and particularly described as follows:

Supplement No. 3 to Colorado Public Utilities Commission No. 6
Supplement No. 3 to Colorado Public Utilities Commission No. 7
Supplement No. 4 to Colorado Public Utilities Commission No. 8
Supplement No. 4 to Colorado Public Utilities Commission No. 15
Supplement No. 5 to Colorado Public Utilities Commission No. 16

It Is Further Ordered, That in order to simplify and expedite tariff publication said Express Company is hereby authorized to file the rates and charges herein authorized in blanket supplements, if it desires so to do, to the same extent that it has been authorized to do so by the Interstate Commerce Commission in Docket No. 11326, dated August 11, 1920;

It Is Further Ordered, That in computing the increased rates and charges herein authorized, applicant shall follow the rule prescribed for the disposition of fractions by the Interstate Commerce Commission in its said decision in Docket No. 11326;

It Is Further Ordered, That this proceeding be held open for the purpose of considering applicant Express Company's petition to make certain changes in its classification upon the filing by applicant of a supplemental petition herein, if and after the Interstate Commerce Commission authorizes said changes.

RE THE COLORADO SPRINGS & INTERURBAN RAILWAY COMPANY.

[Application No. 111. Decision No. 405.]

Rates—Street railway—Increase.

Increase in street railway fares authorized because revenue insufficient to meet operating expenses and fixed charges, and provide adequate return on investment.

[January 4, 1921.]

Appearances: D. P. Strickler for Petitioners; W. K. Wing, Hon. David Elliot, C. S. Robbins, The Ivywild Improvement Society by Mrs. J. Moore, Pres.; Mrs. C. C. Kingsolver, The West Colorado Springs Commercial Club by George B. McDonald, Pres., and R. D. McNeill, Secy., representing 874 Protestants.

STATEMENT.

By the **Commission**: A hearing on the above application was held in the City Council Chamber at Colorado Springs on November 27, 1920.

The petitioners showed they were operating an electric street and interurban railway passenger line within Colorado Springs, county of El Paso, Colorado, and extending to the town of Manitou, Ivywild, Broadmoor, Cheyenne Canon and Roswell, and having a trackage approximating about forty miles.

This company's sworn statement shows it is capitalized for $1,500,000.00: $1,000,000.00 common stock and $500,000.00 in six per cent cumulative preferred stock. It also has an outstanding bonded indebtedness of $1,500,000.00; $975,000.00 of this amount bears interest at the rate of five per cent, and $525,000.00 bears an interest rate of six per cent per annum. No interest has ever been paid on the $1,000,000.00 common stock, and no interest has been paid on the $500,000.00 preferred stock since 1912. Illustrating the economical administration of its affairs. It was shown that only $2,400.00 per annum was paid out to its general officers.

Effective July 1, 1920, a wage increase of about $39,000.00 per annum was granted to the employes by this company, partly on this company's initiative and also on account of an increased

award made by the Colorado Industrial Commission. In addition to the increase of wages of $39,000.00, it was shown there was an annual increase in taxes of $8,648.10; an increase of $9,600.00 for coal, and a general increase of cost in maintenance of approximately $30,000.00, making a total increase of operating expense of $87,248.10. The passenger revenue for 1919 was $474,797.88 on a basis of six cent fares. Increasing the fares to seven cents would give a theortical increase in revenue of sixteen and two-thirds per cent, or about $79,732.98, or $7,515.12 less than the increased costs heretofore set forth. The increase from six to seven cents asked for will probably be sufficient to meet its operating expenses and pay interest on its bonded debt, but in all likelihood will not produce an amount sufficient to pay any interest on either its preferred or common stock.

At the conclusion of the presentation of the case for The Colorado Springs and Interurban Railway Company a large delegation of citizens of Ivywild presented a protest against any change in zone line affecting them, and put on several witnesses showing their reasons therefor. Another vigorous protest was presented by citizens of west Colorado Springs, formerly Colorado City, asking that their former overlapping zone be re-established between Seventeenth and Thirty-seventh streets. This protest has since been reinforced by a petition of 874 street car patrons residing between Seventeenth and Thirty-seventh streets in what was formerly known as Colorado City.

In connection with the petition presented by the street railway company, we wish to call attention to the fact that Colorado Springs is a home rule city, and as such its city council is given certain regulatory functions over public utilities such as are delegated to this Commission in all sections of Colorado outside of so-called home rule cities. Accordingly on September 29, 1920, the city of Colorado Springs duly passed an ordinance granting, among other things, a seven cent fare to the Colorado Springs and Interurban Railway Company within the confines of Colorado Springs. To make the transaction complete and afford the relief prayed for, it is necessary for the State Public Utilities Commission to supplement the action of the city of

Colorado Springs that the fares may become uniform, both within and without the city limits.

A careful review of all the evidence presented at the hearing shows conclusively that the present rates of fare charged by the Colorado Springs and Interurban Railway Company are insufficient to meet operating expenses, fixed charges and provide an adequate return on the capital invested. This Commission therefore finds that the increased rates asked for are fully justified by the testimony presented and should be allowed.

In view of the fact that The Colorado Springs and Interurban Railway Company is in urgent need of increased revenue, and from the fact that the mayor and city council of Colorado Springs are desirous of granting the relief asked for, and from the further fact that it has been mutually agreed by and between the mayor and city council of Colorado Springs and this Commission that the question of zone lines shall be held in abeyance and not be disturbed, but remain as they were in full force and effect as of date September 1, 1920, and it is thought advisable that the questions relating to zones shall be the subject of future consideration by this Commission.

ORDER.

IT IS THEREFORE ORDERED, That all rates, fares and charges heretofore existing and filed with the Colorado Public Utilities Commission by The Colorado Springs and Interurban Railway Company be, and the same are hereby abrogated and annulled, and the rates, fares and charges from and after January 6, 1921, shall be as follows within the zones as established and in effect September 1, 1920:

For each and every full fare, seven cents; children under 12 years of age and over 6 years of age, three and one-half cents, to be evidenced by half fare ticket, or four cents cash fare; children under 6 years of age when in charge of anyone paying a full fare shall be entitled to ride free. The said company shall sell not less than eight full fare tickets for fifty cents, and eight half fare tickets for twenty-five cents. Such tickets shall be for sale upon the passenger cars while in operation. The same regulations as to transfers on September 1, 1920, shall also obtain and no extra charge shall be made for same.

RE THE WESTERN UNION TELEGRAPH COMPANY.

[Case No. 207. Decision No. 409½.]

Service—Change without Commission authority.

The Commission being informed that the Western Union Telegraph Co. had substantially changed the character of its service afforded at Victor without authority of the Commission, the service formerly rendered was ordered to be resumed.

[January 17, 1921.]

Upon information and informal complaint made to the Commission to the effect that The Western Union Telegraph Company has heretofore and on January 15, 1921, substantially changed the character of telegraph service afforded the public at the city of Victor, Colorado, which will render the same inadequate and inefficient;

And it appearing that no application to the Commission has been made with reference to such change of telegraph facilities by said The Western Union Telegraph Company and that such change has been made wholly without warrant or authority of the law regulating public utilities in the State of Colorado, the Commission upon its own motion does, therefore, deem it to be advisable and proper to enter upon an investigation of the complaint made with reference to said matter and that in the meantime the kind and character of facilities and service maintained by said Telegraph Company at Victor on and prior to January 15, 1921, be forthwith reinstated by said Telegraph Company pending such hearing and investigation and until the further order of the Commission.

ORDER.

IT IS THEREFORE ORDERED BY THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO, That the facilities and service maintained at Victor, Colorado, by said The Western Union Telegraph Company on and prior to January 15, 1921, be immediately reinstated to the status and extent such facilities and service were maintained on and prior to January 15, 1921;

IT IS FURTHER ORDERED, That the Commission enter upon a hearing and investigation of the facilities and service necessary

to be rendered to the public at Victor, Colorado, the said hearing to be held on January 20, 1921, at 10:00 o'clock A. M. at the hearing room of the Commission, Capitol Building, Denver, Colorado;

IT IS FURTHER ORDERED, That no change in the character of service or the facilities afforded the public at Victor, Colorado, as the same existed on and prior to January 15, 1921, be made in any manner by said The Western Union Telegraph Company until the further order of the Commission.

RE COLORADO SPRINGS & INTERURBAN RAILWAY COMPANY.

[Application No. 111. Decision No. 413.]

Rates—Street railway—Overlapping zones.

The Commission ordered the restoration of overlapping zones on a street railway system, where it appeared that a sliding zone line had been in use for over thirty years and that the communities had built up their business with regard to such arrangement.

[January 31, 1921.]

Appearances: D. P. Strickler for Petitioners; W. K. Wing, Hon. David Elliot, C. S. Robbins, The Ivywild Improvement Society by Mrs. J. Moore, Pres.; Mrs. C. C. Kingsolver, The West Colorado Springs Commercial Club by George B. McDonald, Pres., and R. D. McNeill, Secy., representing 874 Protestants.

STATEMENT.

By the **Commission**: A hearing on the above application was held in the City Council Chamber, Colorado Springs, Colorado, November 27, 1920. The evidence presented clearly indicated that the applicant railway company was justly entitled to the one cent increase of fare asked for, and, indeed, there developed no opposition or protest to such increase of fare. Accordingly, on January 4, 1921, the Commission issued its order to that effect. The queston of establishing overlapping or sliding zones was the only matter in controversy at the hearing, and that

question was taken under advisement by the Commission for future determination.

The residents of Ivywild and West Colorado Springs filed petitions in the above case, asking that the overlapping or sliding zones formerly in effect be re-established.

In the presentation of its case the Ivywild Improvement Socity presented evidence to show that the attempted establishment of a zone line at the city limits on South Tejon Street was unfair, unreasonable and unjust to the residents of Ivywild.

If the term is permissible, it may be said that the hub of The Colorado Springs and Interurban Railway would be the City Loop. Radiating from this point in a northerly, southerly, easterly and westerly direction, the distances from the City Loop and the mileage on the following lines are: To Nob Hill, 2.302; to Institute, 2.059; Wahsatch, 2.390; to Rock Island bridge, 2.646; Spruce, 2.207; Adams Crossing, 3.874; Manitou to Adams Crossing, 2.053; Hillside, 2.328; Maple or Lorraine Street to Stratton Park, 2.042; Broadmoor Loop to Lorraine, 2.403; City Loop to Maple or Lorraine, 2.151. Thus it will be seen that out of the eleven branches named all but two are greater in mileage from the City Loop than is the distance from the loop to Lorraine or Maple Street. To further circumscribe this by making the zone line at the city limits near the Fountain River instead of at Lorraine Street would be manifestly unfair from the standpoint of length of haul, if for no other reason, as this would probably be one of the shortest hauls of any street car system in the United States operated under similar conditions.

Evidence was presented to show that Ivywild has a population of between 1,200 and 1,500, that it has a fine public school and that the school district is consolidated with that of Colorado Springs. The testimony also showed that over a considerable period of time the zone line on the south was at what is known as the Zoo and that the people of Ivywild had enjoyed the privilege of a one fare ride jointly and on the same basis as the citizens of Colorado Springs from the inception of operations by this traction company.

The people of Ivywild point with pride to the fact that they have a splendid citizenship and very many substantial homes, and that their improvements were made at great expense, in the firm belief that they would not be discriminated against in the use of street car facilities.

The West Colorado Springs Commercial Club occupies a somewhat analogous position to that of the people of Ivywild in that it, too, is asking for a return to the former status as regards street car service previous to the annexation of Colorado City to Colorado Springs. The Commercial Club presented to this Commission a petition signed by 874 people residing in what was formerly Colorado City, asking for the re-establishing of the old overlapping or sliding zone between 17th and 37th Streets. The testimony in support of the petition showed that Colorado City had enjoyed the benefits of this sliding or overlapping zone for about thirty years; that hundreds of thousands of dollars in improvements had been expended during this period, firmly in the belief that the conditions as to the zone lines would not be interfered with in any manner to the disadvantage of the residents of that locality.

These people also gave support to their objections by the most vigorous protestations that the change to a permanent zone line at 37th Street on the west was entirely inequitable and in violation of the understanding at the time of consolidation of Colorado City with Colorado Springs. These petitioners averred that had such change in the zone lines been contemplated or known at the time, the people of Colorado City would have been a unit against annexation and would thereby have defeated what they consider a wilful violation of rights they had enjoyed for more than a quarter of a century.

The petitioners in both the westerly and southern zones complain, and that with a great deal of justice, that when these lines were constructed and for 30 years thereafter, they were constantly improving their districts, investing vast sums of money, care and labor in making betterments without any thought of changes in street car zone lines that would double the cost of travel to the patrons in said districts. Under these

conditions it is no wonder that the contemplated change affecting the people of Ivywild, and the changing of the zone lines in West Colorado Springs has wrought up and made aggrieved and resentful the people of these two districts, who feel that the change, and attempted change, is a violation under the circumstances, of long standing and almost inherent rights. The omnipresence of this fact this Commission has to take cognizance of.

The only evidence introduced by the Colorado Springs and Interurban Railway Company derogatory to the sliding zone in West Colorado Springs did not go into the merits of the overlapping zone, but on the contrary attempted to show that the chief objection was the one of operation, which gave trouble in the collection of fares, since the displacement of cars having both a conductor and motorman were substituted by the so-called "one-man cars."

Judging from the fact that no one at this hearing disputed the fundamental rights of the petitioners as presented, and from the further knowledge that a monster petition has been generally signed by the citizens of Colorado Springs praying for the return of the old zone systems as they existed prior to June 5, 1919, convinces this Commission that there is little or no opposition by the good people of Colorado Springs to the zone systems as they previously existed, but, on the contrary, there seems to be a unanimity of feeling that a great injustice is being done their neighbors and they are anxious to see the zones re-established as they were previous to June 5, 1919.

It is the indubitable duty of the regulatory body, invested with the authority, to mitigate, modify or abolish such rules of a public utility as are found incompatible with the best interests of the public whom they serve. This is particularly the case in a community where there are a multiplicity of zones and restricted transfer privileges. The more ideal traction operation, of course, is where the service to all parts of the community served is rendered by the payment of a single fare. When, for lack of patronage, or reasons that make general service impossible from a revenue standpoint, and a zone system becomes

necessary, to make an adequate return on invested capital, it must be made elastic and comprehensive enough to meet the reasonable demands of the people. For women to be called upon to alight from a stret car in the darkness within one, two or three blocks of one's domicile and then have to tramp through the mud or dust, or be compelled to pay an extra fare, as has been the case under the present zone system, presents an awkward and almost intolerable condition. The adoption of an overlapping or sliding zone will not entirely remove or cure all the objections or ills inherent in operation of a street railway that has fixed zone lines, but it will reduce to somewhat of a minimum the expense and inconvenience that now attaches to a considerable number of the patrons of this street railway. To prevent and put a stop to the idiosyncrasies and palpable injustice of the present operation this Commission deems it expedient and wise to establish two widely separated overlapping or sliding zones in order to give the people the relief they are entitled to. One of these zones should be located in West Colorado Springs between 17th Street and 37th Street. The other should be on the South Tejon Street line between the bridge over the Fountain River and the Zoo on the Broadmoor line, and the terminus of this zone on the Canon or Stratton Park line should be at the junction of the Zoo line with the Canon line.

In view of the fact that said street railway company has, since the establishment of fixed zones in June, 1919, equipped most of its lines with the pay-as-you-enter one-man type of car, operating obstacles in the re-establishment of the overlapping or sliding zone, will present some difficulty; but the operating company will be required to provide such facilities as will best overcome such obstacles with the least annoyance to the public as is consistent with its own interests in preventing loss of revenue.

After a thorough investigation and hearing of this matter in Colorado Springs, this Commission finds that the service rendered by the Colorado Springs and Interurban Railway, under its present rules, is not sufficient or commensurate to meet the reasonable needs, requirements and demands of the traveling public.

In view of the foregoing, and taking into consideration all facts, it is the opinion of the Commission that the zone lines should be and will be established as the same existed prior to June, 1919, and more specifically set forth in the following order, effective on and after February 15, 1921.

ORDER.

IT IS THEREFORE ORDERED, That for the purposes of this order zone lines be established at the following points on the lines of the applicant, The Colorado Springs and Interurban Railway Company: Thirty-seventh Street, Seventeenth Street, the bridge over Fountain River on South Tejon Street, the intersction of the Canon or Stratton Park line with the line to Broadmoor, and the point described as the Zoo on the Broadmoor line.

IT IS FURTHER ORDERED, That the applicant, The Colorado Springs and Interurban Railway Company, on and after February 15, 1921, shall not charge or collect more than one fare for the transportation of each passenger from the terminus of applicant's line in Manitou to Seventeenth Street in Colorado Springs, from Thirty-seventh Street to the intersection of the Canon or Stratton Park line with the line to Broadmoor or from Thirty-seventh Street to the point described as the Zoo on the Broadmoor line, from the bridge over Fountain River on South Tejon Street to Stratton Park or to Broadmoor, from Stratton Park or from Broadmoor to the bridge over Fountain River on South Tejon Steet, from the point described as the Zoo on the Broadmoor line to Thirty-seventh Street, from the intersection of the Canon or Stratton Park line with the line to Broadmoor to Thirty-seventh Street, and from Seventeenth Street to the terminus of applicant's line in Manitou.

RE AMERICAN RAILWAY EXPRESS COMPANY.

[Case No. 209. Decision No. 422.]

Rates—Express "commodity"—Relationship to first class.

Order made upon stipulation of parties that American Ry. Express Co. put in effect on Denver & Salt Lake "express commodity rates," being 60 per cent of the first class express rates then in effect, applicable to berries, bread, rolls, cake and pies,

butter, eggs, fish, green fruit, meat, oysters, clams or scallops, poultry, rabbits, vegetables and other such commodities generally rated second class.

[February 16, 1921.]

Appearances: Charles H. Leckenby for Steamboat Springs Commercial Club; F. L. Tobin for Oak Creek Chamber of Commerce; George A. Pughe for Craig Commercial Club; David P. Howard for Hot Sulphur Springs and Grand County; Charles R. Brock and F. J. Toner for Receivers of Denver and Salt Lake Railroad Company, and N. K. Lockwood for American Railway Express Company.

STATEMENT.

By the **Commission**: Prior to January 22, 1921, a number of complaints were received by the Commission with reference to the rates of the American Railway Express Company on the line of the Denver and Salt Lake Railroad in that by virtue of the express rates allowed by this Commission in Application No. 94, Decision No. 372, in Application No. 94 and I. & S. No. 49, consolidated, Decision No. 378, and by supplemental order in Application No. 94 and I. & S. No. 49 aforesaid, Decision No. 403, such rates were unjust, unreasonable, inequitable and discriminatory as compared with express rates prevailing in other sections of the State of Colorado.

These representations were made to the Commission by the Steamboat Springs Commercial Club and the Oak Creek Chamber of Commerce in a lengthy telegram under date of January 5, 1921; in a letter of the Hayden Commercial Club of January 7, 1921, and in other communications from various civic organizations. These communications impelled the Commission to make an investigation as to the alleged injustice, unreasonableness and discrimination of said express rates and charges.

As a result thereof, the Commission, upon its own motion, on January 22, 1921, issued its order directed to the American Railway Express Company, the Receivers of the Denver and Salt Lake Railroad Company, the Steamboat Springs Commercial Club, the Oak Creek Chamber of Commerce, the Craig Commercial Club, the Hayden Commercial Club and various other

civic organizations in the cities and towns upon and along the line of said railroad company, that they and each of them should appear before the Commission at its hearing room, Capitol Building, Denver, Colorado, on February 10, 1921, at 10:00 o'clock A. M., when and where the Commission would investigate and hear matters affecting the express rates and the class freight rates now in effect on the line of said Denver and Salt Lake Railroad; and that upon such hearing and investigation it would fix and establish such just and equitable express rates and class freight rates upon said railroad as would then be determined by the testimony and showing submitted at such hearing.

The above order was served upon the American Railway Express Company and the Receivers of said railroad company on the date thereof, to-wit: January 22, 1921, and service was had upon the divers and sundry civic organizations mentioned by registered mail on the same date.

At the hearing upon said investigation testimony was adduced by the Commission by its rate expert to show the apparent inconsistency and discrimination that exists in express rates over the line of said railroad as compared with the rates, for example, between Cheyenne, Wyoming, and Steamboat Springs and between California and Atlantic seaboard points and Steamboat Springs. This was all the testimony submitted by the Commission, aside from exhibits showing such facts compiled by the Commission's rate expert, which were introduced in evidence.

The Denver and Salt Lake Ralroad submitted exhibits prepared by its auditor showing the need of said railroad for revenue, and that its deficit in the past four years had averaged more than $800,000.00, and that its estimated deficit for the year 1921 would approximate $750,000.00, based upon the deficit already incurred for the month of January, 1921.

During the progress of the hearing by stipulation and agreement entered into by all the parties in interest as represented at such proceeding, it was proposed that the American Railway Express Company put into effect, by and with the approval of the Commission upon one day's notice, commodity rates on food

articles, such commodity rates to be 60 per cent of the first class express rates as the same are now established between points on the Denver and Salt Lake Railroad.

In establishing express rates it is customary to figure the first class express rate to be approximately 200 per cent of the first class freight rate, and the second class express rate to be approximately 150 per cent of the first class freight rate.

The stipulation entered into, as disclosed by the record, is in substance as follows:

"That there be established between Denver and other points or stations on the line of the Denver and Salt Lake Railroad what shall be designated as 'express commodity rates,' and which rates shall be based upon 60 per cent of the first class express rates now in effect between said points; and it is further stipulated and agreed that the commodities to be shipped at the rates named shall include berries; bread, rolls, cake and pies; butter; eggs; fish, fresh or frozen; fruit, green; meat, fresh or cured; oysters, clams or scallops, fresh, in shell or in bulk; poultry, live or dressed; rabbits, dead; vegetables, green, and such other commodities as generally move under second class express rates and designated as 'second class' under the express classification."

Accordingly, and by virtue of said stipulation and agreement entered into by all parties attendant upon the hearing, the proposed commodity rates will be approved by the Commission and an order entered in harmony therewith for the establishment of such commodity rates upon said line of railroad upon one day's notice, as provided by Section 16 of the Act.

ORDER.

It Is Therefore Ordered, That the American Railway Express Company be, and it is, hereby notified and required to publish and file a schedule of rates applicable to the following commodities:

Berries; bread, rolls, cake and pies; butter; eggs; fish, fresh or frozen; fruit, green; meat, fresh or cured; oysters, clams or scallops, fresh, in shell or in bulk; poultry, live or dressed; rabbits, dead; vegetables, green.

IT IS FURTHER ORDERED, That the rates so published shall apply between all stations on the Denver and Salt Lake Railroad, and shall be on the basis of 60 per cent of the first class express rates in effect on said railroad on the date of this order, and shall be published on the pound rate basis.

IT IS FURTHER ORDERED, That the said express company be, and it is, hereby authorized to make effective such rates on one day's notice to the Commission and to the public by filing and posting tariffs containing the same in the manner prescribed by Section 16 of the Act.

IT IS FURTHER ORDERED, That in computing the rates and charges herein authorized, fractions of one-half cent or less shall be discarded, and fractions exceeding one-half cent shall be treated as a whole cent.

RE WRAY TELEPHONE COMPANY.

[Application No. 114. Decision No. 423.]

Rates—Inter-city—Tolls—Discrimination.

Telephone service rendered to subscribers of two towns without charge for inter-city calls held a discrimination against patrons in other parts of the state having to pay for such service.

[February 16, 1921.]

Appearances: LeRoy J. Williams, Elmer L. Brock, R. M. Morris of Denver, and A. H. Borland of Wray, for Applicants; Dan J. McQuaid, Town Manager, for the Town of Yuma, Colorado.

STATEMENT.

By the **Commission**: The applicant filed its application with the Commission October 14, 1920, wherein it is alleged that it is a corporation organized under Colorado law, and that it is now and has been conducting a general telephone business in and near Wray, Colorado, and that it is a public utility subject to the laws of this state; that its post office address is 509 Wyoming Building, Denver, Colorado.

The application sets forth in paragraph three a statement showing the rates, fares, tolls, rentals, charges, rules and regu-

lations which it desires to be put into effect, upon order of the Commission, upon the completion by it of certain improvements to its property serving its Wray and Yuma exchanges, as will be hereinafter referred to as disclosed by the evidence.

The application on Page 2 sets forth such rates and charges as are desired to be made effective from the Wray exchange as to city business and residence rates, rural business and residence rates and as to service station rates, both business and residence, and alleges that such rates will entitle subscribers to an unlimited number of messages to all stations comprising the Wray exchange, and that in all other respects the rates, regulations, service connection charges, rules and practices will remain the same as at present charged under its schedule and tariffs filed. Also on Page 2 the toll rates and classifications sought to be established by the Wray and Yuma exchanges are set forth as follows:

Station to station calls	25c
Person to person calls	30c
Appointment and messenger calls	35c
Report charge	10c

(Present rate for non-subscribers is 25c)

The above rates cover a conversation period of five minutes for station to station calls, three minutes for person to person, appointment and messenger calls, with overtime of one minute for all classes of calls, and the overtime rate would be five cents for station to station calls and ten cents for person to person, appointment and messenger calls. All of the above toll rates would apply to day, evening and night calls.

On Page 3 of the application is set forth the present rates which will be superseded by the proposed rates.

The application alleges as reasons and justification of the increase asked for that the telephone plant at the Wray exchange is a magneto grounded system and is inadequate and insufficient to supply the present needs of that community; that the present plant has practically reached the end of its serviceable life and does not meet the demand made upon it, and that to eliminate transmission difficulties and to remove inductive and conductive interference and provide additional plant to meet the public de-

mands, the plant should be entirely rebuilt and a common battery exchange installed, with the necessary amount of cable and other equipment under standard construction requirements; that Wray is a prosperous community and needs an up-to-date and efficient telephone service. Reference is also made to the fact that attached to the application is a petition signed by a large number of patrons of the company at Wray in August, 1919, wherein such patrons express themselves in favor of the Commission granting exchange rates as may be necessary for the needs of the applicant.

Applicant states that it had an estimate made of the approximate expense of rebuilding its Wray exchange but was unable to proceed with the installation of such plant at the time on account of the then prevailing financial and labor conditions, and has been prevented from so doing up to the present time on account of increased costs; that as a consequence it has been necessary for applicant to have a new estimate made as of September 1, 1920, which provides for an expenditure of $53,325.00 at the Wray exchange.

It is alleged that the work covered by such expenditure would comprise the building of the outside plant and provide a new common battery central office equipment with suitable exchange quarters, and with the necessary changes in instruments and wiring.

Applicant asserts that the book value of its property would be increased by the investment proposed by approximately $40,000.00, and that the total investment thereby would aggregate about $117,000.00; that applicant at present does not earn to exceed 5 per cent upon the book value of its property, and that if the proposed investment is made and the proposed rates allowed, applicant would not then earn its depreciation charges, operating expenses and the rate of return to which it is entitled; that the free district service now given between the Wray and Yuma exchanges would be eliminated under the proposed rates, and the above toll rates would be charged for such service. As a reason for the elimination of district service, it is stated that, from studies made, but 1.3 per cent of the total traffic, Wray to

Yuma, uses the district service and that but 4.1 per cent of the traffic originating in Yuma use such service; that 90.5 per cent of the subscribers in the Wray exchange and 83.7 per cent of the subscribers in the Yuma exchange do not use the district service; that as now maintained all subscribers of the two exchanges contribute toward the district service expense, whereas about 15 per cent of the subscribers make use of the same, and that thereby such service is discriminatory among the subscribers using the Wray and Yuma exchanges, and also is discriminatory as to other localities which have exchanges approximately the same distance apart but do not have district service; that finally the elimination of the district service will increase the quality and efficiency of the service between the Wray and Yuma exchanges.

The application sets forth that no prior action has been had by the Commission in any way relative to the existing rates, and that applicant has caused a petition to be circulated among its patrons of the Wray exchange, which was signed by about 175 patrons, to the effect that if applicant reconstructs its system as proposed, they would have no objection to an increase of rates corresponding to the rates in effect in similar towns for the same class of service; and finally in paragraph four it is alleged that the rates and charges set forth in the application are necessary, reasonable and proper, and that the rates should be made effective upon the completion of the improvements and rebuilding as set forth in the application.

Applicant prays, therefore, that the said proposed schedule of exchange and toll rates, as set forth in its application, be adopted, approved and made effective at such time as it shall have completed its system by the installation of the proposed improvements and rebuilding of the exchange at Wray; and that when the completion of said system and its rebuilding and reconstruction have been accomplished the applicant be given leave to file its schedules containing the rates set forth in subdivision (a) of paragraph three of its application.

Upon the filing of said application, notice thereof was given to the telephone users of the Wray and Yuma exchanges by

publication in the newspapers in each of said towns and by service upon the Mayor and City Council of Wray. Thereafter, and on November 17, 1920, the town of Wray, by L. E. Orford, its manager, filed with the Commission a statement that the application of the Wray Telephone Company was read before the mayor and board of trustees of said town on November 15, 1920, and that no objections were made to its provisions.

The cause was set for hearing by the Commission at its hearing room, Capitol Building, Denver, Colorado, for Wednesday, December 1, 1920, at 10:00 o'clock A. M.

On November 30, 1920, the Commission received from Dan J. McQuaid, town manager of the town of Yuma, a remonstrance, so called, in the nature of a protest on behalf of the town of Yuma and its citizens and users of said telephone service, wherein it is alleged that the increase in toll rates and classifications proposed to be established between the Wray and Yuma exchanges in paragraph three of the application are excessive and discriminative, and sets forth the following reasons therefor, to-wit: That said application does not show that the citizens and users of said telephone line within the town of Yuma and adjacent thereto will be benefited in any manner by any of the contemplated improvements; that the present line service between Yuma and Wray is wholly inadequate and inefficient for the reason that it is a through line to Denver and for the greater part of the time in business hours it is almost impossible for parties at Wray or Yuma to talk over said line because of its being used by the exchanges at Akron, Brush, Fort Morgan, Denver and Sterling; that alleged loss of revenue at present, if any such, is occasioned by the loss of time by operators in trying to get connection between Wray and Yuma and not by reason of a lack of business; that Wray is the county seat of Yuma County and Yuma has as large a population as Wray, and because Wray is the county seat there is a great deal of business moving from town to town; that the proposed changes and additional expense to be entailed, as proposed in the application, would wholly benefit the town of Wray and its citizens; that the present is an inopportune time to increase rates for the rea-

son that the territory affected is a dry farming section and a reduction in prices of farm produce and livestock has occurred and that it is fair to assume that there will be a corresponding reduction in operating expenses of the utility in the near future, so that with the rates now prevailing the Company should be able to pay a fair return upon the book value of its property; that the proposed increase in toll rates would make an additional tax and charge upon users of said telephone service and that the regular patrons of said telephone company now pay enough to justify the inadequate and inefficient service between the two towns of Wray and Yuma, and the remonstrants pray that the proposed increase in toll rates be not allowed, and that the application, therefore, be denied.

Accompanying the above remonstrance or protest was filed also a petition signed by 35 or more citizens of Yuma and vicinity who state they are subscribers to the service of said applicant, and, without stating any reason therefor, ask that the Commission refuse to grant the increase of toll rates and classifications for station to station calls between Wray and Yuma by regular subscribers to said telephone service.

The case was called for hearing on December 1, 1920, at 10:00 o'clock A. M., at the hearing room of the Commission, and the only appearance was that of the applicant company by its manager and attorney. It then appearing that through inadvertence sufficient notice had not been given to the citizens of Yuma, in that the only service apparently had upon the citizens of Yuma was by publication of notice in the newspaper at Yuma; therefore, in the opinion of the Commission, it was deemed advisable to continue the hearing for one week for the purpose of allowing patrons of the applicant at Yuma to appear and testify in support of the remonstrance and petition filed, should they desire so to do, and accordingly said hearing was continued to Wednesday, December 8, 1920, at 10:00 o'clock A. M., at the hearing room of the Commission, Capitol Building, Denver, Colorado, and notice of such continuance to said date immediately and on December 2, 1920, was sent to the town manager of Yuma, to the editor of the Yuma Pioneer, and to some ten or twelve others

of the citizens of Yuma whose names appeared upon the petition filed herein protesting against the increase of rates.

At the hearing on December 8 the applicant company appeared by its manager and attorney and the citizens of Yuma by the manager of said town. A. H. Borland, manager of the applicant company, was the principal witness in behalf of the Wray Telephone Company. From his testimony it appears that the present plant and system of the Wray Telephone Company consists of a magneto grounded iron circuit for service between Wray and Yuma, a distance of about twenty-eight miles; that the equipment is used for both long distance and local business, and is inadequate and insufficient to meet the demands made upon this service. Certain other of the appliances as the same now exist are proposed to be bettered and improved, and the applicant company proposes to construct a new metallic copper circuit between said towns which will increase the efficiency of the service in that locality, according to the testimony of the witness, by 100 per cent. From the witness' testimony and exhibits filed in the case it is made to appear that the free service or what is called district service now existing between Wray and Yuma is a discrimination against the patrons of telephone service in other localities in this state similarly situated. This practice grew up in the early days of the telephone business in Colorado and it is being eliminated from time to time in the respective localities where it has heretofore existed as application therefor is made to the Commission. When this class of service shall have been entirely eliminated in this state, operating revenues should be somewhat increased, with perhaps some decrease in operating expenses by reason thereof, with the result eventually that telephone rates may be reduced to the user by virtue of the elimination of the expense incurred in serving the district or free telephone service users.

The testimony of Witness Borland discloses that the elimination of the district service now existing, under the law of general averages, would yield the company a revenue of approximately $421.00 per annum, which has heretofore been a gratuity given to a certain class of its subscribers.

Clearly the existence of a free district service which is the privilege of one subscriber and not the privilege of another is a discrimination directly in conflict with the theory and practice of regulation and control provided by the Public Utilities Act.

The testimony shows, as disclosed by Table I of applicant's Exhibit 1, that the present investment of applicant in the Wray and Yuma exchanges approximates $53,962.62, and by an exhibit which is hereby designated as applicant's Exhibit 2, filed January 12, 1921, in compliance with agreement of counsel at the hearing, the proposed expenditures for the construction of the new copper circuit and plant lines with the appurtenances between Wray and Yuma, approximate $23,180.00, and as shown by Table J of applicant's Exhibit 1, the proposed investment in the Wray exchange of the new number 9 central office equipment or rebuild of outside plant, approximates the sum of $40,-282.00, which, when such investments are made for said improvement, will give a total plant investment in said exchange of approximately $117,424.62. Upon this basis of investment a return of 8 per cent would require a revenue return of approximately $9,400.00 per annum, which, including the estimate of expenses and deductions, not including depreciation, of $13,-655.00, would require approximately $24,000.00 annual revenue.

According to the testimony, the proposed increase of rates will produce an increase of revenue of $4,962.12, to which may be added the estimated increase of revenue derived by reason of the elimination of district or free toll service, estimated to approximate $421.00 per year. When it is taken into consideration that the estimates above mentioned were based upon an expenditure of but $10,000.00 for the new metallic circuit to be installed between Wray and Yuma instead of $23,180.00 as is now proposed under the estimates shown by Exhibit 2, and the further fact that in the computation no account is taken of a depreciation allowance, the proposed increase of rates will no more than yield a fair return upon the investment after the additional and better results have been made as proposed by the applicant.

If we understand the testimony of witness McQuaid, who

represented citizens and town of Yuma, the protestants at the hearing, the principal basis of objection to an increase of rates was that of inefficient and inadequate service; that if the applicant would so rehabilitate and improve the service now being furnished to the citizens of Wray and Yuma and by the addition of a metallic circuit for the use of toll and other means of communication to relieve the congestion now caused by all traffic being transmitted over the one line, and that any such a line as proposed would give the best results, very much, if not all of the grounds of protest will have been removed. To quote his testimony in this regard, witness McQuaid, in reply to a question as to what the attitude of the town and the Commercial Club would be as to the proposed rates if the construction proposed was made so as to give an efficient service, said: "I believe they would be willing to pay the amount that would justify a fair return on their investment, and new construction for that matter, if proven to the town and its inhabitants; if it is not proven, they would not withdraw our protest." And again in reply to a question that it is really a matter of efficiency involved, the witness replied: "Yes, sir, we want our whole pound of steak when we buy it." "And if you get the pound of steak, you are willing to pay for it?" "Yes, sir, until that time we will keep on protesting." And again the witness volunteered this testimony: "If I may be permitted, I will further say that all Yuma wants is value received and I think in justice we should get value received for our money and if we do not, Yuma will still protest."

From such testimony and other parts of the witness' testimony, it clearly appears then that if a reasonably adequate and efficient service is maintained by the applicant company for the use of its patrons in the Yuma and Wray exchanges, there will be no serious objection to the increase of rate applied for.

On the whole record before the Commission it is found therefrom that the increased rates specified in the application on file and in the testimony submitted will be fair and reasonable rates to be allowed applicant company at such time as it shall have made the additional investments to its plant and system

as has been testified would be made at an expenditure of approximately $63,000.00.

The application and the testimony asking for such increased rates are predicated upon such additional investment being made and the rendition of an adequate and efficient service which witness Borland testified would be practically 100 per cent efficient. It will be understood by applicant and by protestants, however, that such increase of rates will not be approved by this Commission until such time as applicant will exhibit to the Commission proof that the additional investment as proposed has been made, and that an efficient service is being rendered. When that proof has been submitted and a schedule of rates filed in harmony with the increase of rates proposed in the application, the Commission will approve the same, subject, of course, to the right of any patron of the company in the Wray and Yuma exchanges to protest and object to the same.

ORDER.

IT IS THEREFORE ORDERED, That applicant, The Wray Telephone Company, may file a schedule of rates in harmony with its application to embrace the rates embodied on Page 2 of its application when it shall have produced satisfactory proof to the Commission that the additional investment as proposed in its application and its testimony in support thereof has been made to its plant and system, and that reasonably adequate, satisfactory and efficient service is being rendered to the communities affected.

IT IS FURTHER ORDERED, That upon completion of its work of rehabilitation and additions to its plant and system, applicant shall furnish the Commission with a sworn statement of the actual investment incurred thereby, and that nothing herein shall be construed to imply that the lawful right of protest against such increase of rates shall be denied to any patron or user of the telephone service of said applicant.

RE LEADVILLE WATER COMPANY.

[Investigation and Suspension Docket No. 46. Decision No. 433.]

Depreciation—Sums in reserve.

1. It is proper that a sinking fund reserve account be cleared into the depreciation reserve account and not be allowed to drift into the surplus earnings of a utility where the sinking fund reserve has been created indirectly from the depreciation reserve, and the depreciation reserve has been used through the sinking fund accruals account for the purchase of the company's own securities, which securities have been canceled.

Valuation—Depreciation reserve—Accounting.

2. A depreciation reserve account was deducted from the reproduction value of a water utility.

Valuation overheads—Construction by regular officers and employees.

3. An alleged overhead cost of construction was reduced, on the ground that the work was done by regular officers and employees and the expense was charged as an operating expense, and that most of the payments for material were not made until the work was completed.

Return—Reasonableness—Value of service—Decreasing population.

4. A public utility finding itself unable to render service at fair and reasonable rates owing to a constantly decreasing population must accept the burden itself and cannot be permitted to pass its own misfortunes on to its customers by placing on them an undue burden.

Depreciation—Water company.

5. A water utility was allowed an annual depreciation of $4,800 when it was valued at approximately $400,000.

Return—Operating expenses—Federal taxes.

6. An item of Federal taxes was excluded from the operating expenses of a water utility in a rate proceeding.

Return—Operating expenses—Salaries and expenses of officers.

7. An item for salaries and expenses of general officers of a water utility, operating in a distant city, was disallowed, owing to the general condition of the company, the high cost of operation, and the decrease in the number of consumers.

Return—Water utility—Amount.

8. A water utility was allowed a return of 7 per cent per annum.

[April 15, 1921.]

Appearances: John A. Ewing, for Applicant; R. D. McLeod and John A. Rush, for the City of Leadville, Protestant.

STATEMENT.

By the **Commission**: On May 8, 1920, the Leadville Water Company filed its schedule of water rates, being P. U. C. No. 2 cancelling P. U. C. No. 1, which schedule contained very material increases in rates for water. The schedule was filed to become effective July 1, 1920.

On May 20, 1920, the Commission ordered that an investigation and hearing be held on said schedule of water rates of the Leadville Water Company, to be held at a later date to be designated, concerning the propriety of the proposed increases and the lawfulness of the said schedule. It was further ordered that as the rights and interests of the public appeared to be injuriously affected, the operation of the said schedules be suspended and the use of the said rates contained therein be deferred until the 29th day of October, 1920. It later appearing that on account of the amount of work involved in the preparation of the inventory and appraisal of the property of said company, and from the fact that such investigation and decision could not be concluded within the period of suspension above stated, the same was again suspended until April 29, 1921, unless otherwise ordered by the Commission.

Hearing hereon was held in the City of Leadville, Lake County, Colorado, on October 5th and 6th, 1920, at which hearing all the parties were present and the case was fully inquired into, testimony being taken both oral and written on the part of both applicant and protestant. The Commission also received and introduced into the record the testimony and report of its hydraulic engineer, which also included a complete inventory and appraisal of all the property of the Leadville Water Company in use and useful in the operation of the plant, as of September 30, 1920. The Commission also received and had introduced into the record the testimony and report of its statistician of his examination of the books and accounts of the said company, including a statement of the earnings and operating expenses thereof. There was also introduced at the time by the Leadville Water Company its report containing its inventory and appraisal of the property in use and useful by the applicant com-

pany as of December 31, 1919, as well as a statement of its earnings and expenses, which said report, containing its inventory and appraisal as well as a statement of all earnings and expenses, the testimony showed had been carefully checked by the Commission's engineer and statistician.

The record of the oral evidence introduced included 222 pages of typewritten matter besides written exhibits. The investigation by the Commission was quite exhaustive, and the informaton and facts obtained present some very interesting and difficult questions.

The City of Leadville is one of the oldest mining towns in Colorado. The population by the census of 1920 was 4,959. It is located in Lake County, approximately in the center of the state, almost at the top of the continental divide, on the head waters of the Arkansas River at an altitude of 10,200 feet; where there is comparatively little water used for irrigation; where water is reasonably plentiful but where the winters are very rigorous and long. The town is served by the Denver & Rio Grande and the Colorado & Southern Railroads. Being a mining town, Leadville has, as is frequently the case, seen its population gradually decrease from a population of approximately 16,500 in 1880 to a population of less than 5,000 in 1920. It appears from the evidence of the applicant company that while the population of Leadville has steadily decreased, the valuation of the Leadville plant, as presented by the inventory and appraisal prepared by its engineer, has gradually increased. In 1889 appraisers were appointed by the City of Leadville and the applicant company, and a valuation of $300,000.00 was fixed as the value at that time. A proposition was later submitted to the city for the purchase of the plant at that price, which was turned down by a vote of the people. Since that date the inventory of the Company shows many extensions and additions have been made, until the total valuation of the plant, as contended for by the applicant company at this time and as submitted to the Commission by the company as a valuation for rate making purposes as of December 31, 1919, is $573,320.78.

The company is asking for rates which will produce a reasonable return on this amount.

It is the contention of the City of Leadville and other protestants that the needs of the people of the City of Leadville for domestic, irrigation and commercial uses is not more than 750,000 gallons of water per day. The estimate of the Superintendent of the company, Warren G. West, is that the needs of the city are not less than 150 gallons per day per capita, based on a population of 5,000 people. The evidence was to the effect that there were not to exceed 5,000 people. This estimated amount of 750,000 gallons does not include other water furnished by the company for industrial purposes, such as smelters, mills, railroads, mines and other industrial concerns. From the evidence it appears that approximately 1,200,000 gallons per day additional is required for this purpose.

The Leadville Water Company receives its supply of water from three different sources designated as the Evans Gulch supply, the Blow Ditch supply, including Empire and Iowa Creeks, and the Arkansas River supply, including Birdseye and Indiana Creeks. All of these lines deliver water to the City of Leadville by gravity. However, the Evans Gulch supply is the only one that will supply all consumers by gravity. The Carbonite Hill reservoir, as supplied by the Blow Ditch, will reach practically all consumers in the city, although the pressure in the extreme east portion of the city would be light for fire protection. The Arkansas River supply will reach only a small portion of the city west of Pine Street and south of Chestnut Street by gravity. It is possible, however, by boosting the pressure by pumping at the Ninth Street station on the Arkansas line to supply consumers east of this territory.

From the above it will be seen that the Evans Gulch supply is the natural and most economical source for supplying the city, if sufficient water can be secured for this line. The carrying capacity of the supply mains for these different supplies are each of them independently sufficient to furnish the city with an adequate amount of water for its present population. There is not sufficient testimony to determine the natural flow

of these streams for the entire year. The Commission's engineer's report shows that during his inspection in September, 1920, there was sufficient water in any one of these supplies for the city's present population. The report also shows, however, that at an elevation of from 10,000 to 11,000 feet the flow is quite likely to diminish rapidly during the winter months. In addition to the stream flow of these different supplies, the Evans Gulch and Blow Ditch lines are augmented by storage reservoirs. In Evans Gulch there are located storage reservoirs with the following estimated capacities:

Reservoir No. 2—Evans Gulch	50,000,000 gallons
Reservoir No. 3—Evans Gulch	2,500,000 gallons
Reservoir No. 4—Evans Gulch	1,250,000 gallons
Mountain Lake Reservoir	40,000,000 gallons
Total Reservoir Capacity, Evans Gulch	93,750,000 gallons

The Empire Reservoir, tributary to the Blow Ditch supply, has an estimated capacity of 3,000,000 gallons; this gives a total estimated storage of 96,750,000 gallons. Owing to leakage, seepage and losses in transmission and the present condition of repair of these reservoirs, it is doubtful if more than 50,000,000 gallons can be figured on in augmenting the stream flow of water delivered to the city for these supplies when needed.

From the above it will be seen that the estimated storage capacity of the plant, exclusive of the Arkansas source or line, is 96,750,000 gallons, but owing to leakage, seepage and loss in transmission at the present time it appears that only about 50,000,000 gallons can be depended on in augmenting the stream flow.

The testimony shows that there are leaks in these reservoirs which should be repaired; that the same could be repaired, but no positive estimate was given of the expense that would necessarily be incurred for repairing the same. However, it did not appear that the expense would be extremely burdensome.

From the above figures it will be seen that if the reservoirs could be repaired so that they could be filled to capacity, this storage alone would supply the patrons of the plant in the City

of Leadville for approximately 45 days, if the requirements should demand an amount of 2,000,000 gallons per day.

It is the contention of the City of Leadville and other protestants that the Arkansas River supply is unnecessary for the City of Leadville, and that the Evans Gulch supply furnishes enough water for all consumers; or that in any event the combined supply of the Evans Gulch together with and including the Blow Ditch with Iowa and Empire Creeks, is ample to supply all the needs of the city for domestic, commercial and industrial purposes. The testimony is conclusive that the greater part of the water from the Arkansas River supply is used outside of the city and for industrial purposes, only a small number being supplied for domestic purposes inside of the city limits. The testimony also shows that during the last twenty years the supply from the Empire and Blow Ditch lines was amply sufficient for the consumers in the City of Leadville at all times, with the exception that on three or four occasions and for a few days each time during scarcity of water, water was supplied from the Arkansas line by pumping same into the city mains from the Ninth Street pump house. The inquiry then naturally arises whether if the different reservoirs were in repair to impound their full capacity this pumping would have been necessary at all.

Valuation.

The valuation of the company's plant, as made by Warren G. West, Superintendent of the company, of all the property in use and useful for all purposes, as of December 31, 1919, and as submitted in evidence to the Commission, was $573,320.78. This includes a value for overhead cost during construction of 17 per cent on all construction work, an item of $63,015.05.

Reproduction Cost.

The inventory and valuation or reproduction cost of the property of the Leadville Water Company made by the Commission's engineer for the assistance of the Commission, and including all property in use and useful in supplying all consumers in

the City of Leadville as well as for industrial uses, as of September 30, 1920, is as follows:

Acct. No.	Classification	Direct Cost	Construction Per Cent	Overheads Amount	Total Reproduction Cost
105	Land and Water Rights.	$ 52,570	10	$ 5,257	$ 57,827
106	Dams and Reservoirs...	74,405	16	11,905	86,310
107	Heating Plants	1,500	16	240	1,740
108	Steam Pumping Plants..	5,972	16	956	6,928
115	Collecting Aqueducts, etc.	136,968	16	21,915	158,883
116	Purification System	1,100	16	176	1,276
125	Mains	140,483	14	19,668	160,151
127	Hydrants	10,100	11	1,111	11,211
128	Meters	1,655	4	66	1,721
140	General Office Equip....	2,685	4	107	2,792
141	Miscellaneous Equipment	7,145	4	286	7,431
142	Utility Equipment	1,400	3	42	1,442
	Total	$435,983		$61,729	$497,712
	Working Capital.....	4,960	0	0	4,960
	Grand Total.....	$440,943		$61,729	$502,672

This report shows that there are three different sources of supply, and that the carrying capacity of the supply mains for each of the different supplies, or each of them independently, is sufficient to supply the city with an adequate amount of water for its present population, providing sufficient water can be secured at the source of the supply mains. This valuation of the Commission's engineer also contains an item of $61,729 for construction overheads, and together with the direct cost, as given by the engineer, of $435,983 plus $4,960 for working capital, totals $502,672. The following table gives the Commission's engineer's method of arriving at construction overheads:

Account	105	106	107	108	115	116	125	127	128	140	141	142
Contingencies and Omissions	1	2	2	2	2	2	2	1	2	3	3	2
Engineering and Supervision ...	1	6	6	6	6	6	4	4	1	1	1	1
Interest during Construction ..	6	6	6	6	6	6	6	6	0	0	0	0
Legal	1	1	1	1	1	1	1	1	1	0	0	0
Taxes and Insurance	1	1	1	1	1	1	1	1	0	0	0	0
Total per cent..	10	16	16	16	16	16	14	11	4	4	4	3

In the Commission's engineer's report, $502,672 is given as the reproduction cost of all of the property of the company as it was of September 30, 1920, then used and useful in the plant and as it was then constructed and existed at that time. It is, therefore, the cost of the reproduction of the identical plant without regard to its adaptability to either class of consumers or whether or not the plant at this time is built on the most economical plan or at the least possible cost for the purpose of serving the needs of the different classes of consumers. The evidence shows that under the present rates, as charged for the year 1919, the consumers of water for domestic, street sprinkling, hydrants and commercial uses paid to the company the following:

Commercial sales	$32,394.14
Municipal hydrants	5,100.00
Street sprinkling	250.00
Municipal departments	806.70
Total	$38,530.14

For the same period there was paid to the company by industrial users, including smelters, mills, railroads and mines, $12,993.08. The testimony also shows that for domestic and commercial uses the greatest use for 5,000 inhabitants at 150 gallons per capita per day, as estimated by the company's engineer, is 750,000 gallons per day. At the same time, the amount supplied for industrial uses, including mines, mills, smelters and railroads, according to the company's testimony, is approximately 1,200,000 gallons per day. The company did not furnish the actual amount of water consumed for industrial uses, but on cross examination the engineer for the company gave the amounts used by the different industrial users named, which amount is approximately 1,200,000 gallons per day.

The testimony, as before stated, reveals that practically all of the water from the Arkansas line is used for industrial purposes, the exceptons being a small number of domestic consumers and excepting the few times of scarcity of water in the other lines when water was pumped from the Ninth Street station.

The reproduction cost of each of the three different independent supplies was not segregated, but the evidence discloses that

approximately $138,000 of the entire plant is made up of values in the Arkansas line.

It appears from the evidence that out of a total of over 2,500 taps for users of water prior to 1917, there has been a steady decrease in the use of water by consumers, as evidenced by the following:

	Active Taps	Inactive Taps
1917	1935	640
1918	1793	785
1919	1592	994

The evidence shows that inactive taps are caused by vacancies of houses or turning off of water.

While the principal use of the Arkansas River supply seems to be for the supplying of water for industrial purposes, yet, under the evidence, it does not seem practicable to the Commission to segregate the values in the Arkansas line for the purpose of industrial uses altogether.

It is the position of the company, and the same seems to be borne out by the testimony, that this line is in use and useful in the plant as a whole; first, as it is used for supplying a small portion of the population for domestic purposes; second, that it is to an extent used as an emergency or standby plant for pumping purposes in times of great scarcity of water in the other lines. The Commission, however, is of the opinion that the total value of the plant, as it is constructed at the present time, is far greater than would be necessary to reconstruct a new plant devoted to supplying the present population of Leadville with water for commercial and domestic uses.

This conclusion is forced on the Commission, in part by the great decrease in the population and the number of taps that at the present time have become "inactive" which are now idle and not in use. At the same time, it seems to be difficult, if not impossible, for the Commission to segregate any particular part of the present plant and deduct that part from the valuation as not in any sense at this time being in use and useful. However, the Commission is of the opinion that a fair value for rate making purposes depends on all the facts and circumstances surrounding each case and under which the service is rendered. All of

these elements must be considered and each utility dealt with according to the conditions found to exist.

If the present plant was, by some calamity, completely destroyed and a new plant constructed by the company to render service to the City of Leadville as the conditions exist today, it is improbable that the identical plant would be built or that the amount of the investment would be equal to the valuation claimed by the applicant company.

Fair Value for Rate-Making Purposes

The valuation, as given by the Commission's engineer as a reproduction new valuation, of the present plant without depreciation and including overheads and working capital is $502,672.

Depreciation Reserve

The depreciation reserve account, as shown on the books of the company, reflects a credit at the close of the calendar year 1919 of $2,333.87. During the year 1920 and up to August of this year a credit has been passed to this account of $4,250.00, bringing the total depreciation reserve account to $6,583.87. In connection with this and on the books of the company is an account identified as depreciation reserve invested in sinking fund accruals. To this account has been credited direct the accruals for depreciation, and against these accruals have been charged the purchase of bonds. There has also been created an account designated as sinking fund reserve. To this account is passed a credit for the amount of the bonds retired, and a corresponding charge is made to the bond account, thereby creating a sinking fund reserve which is shown in the balance sheet of $53,500. Since the sinking fund reserve has been created indirectly from the depreciation reserve, and the depreciation reserve has been used through the sinking fund accruals account for the purchase of the company's own securities, which securities have been cancelled, it is perfectly proper that the sinking fund reserve account as it now stands be cleared into the depreciation reserve account, and that the same should not be allowed to drift into the surplus earnings of the company. As this fund is available for depreciation and as there is now in this fund $60,083.87, we

think that this amount should be deducted from the amount of $502,672, the reproduction value as given by the engineer. This is not really deducting accrued depreciation in that amount as the same should be on hand and available at this time.

Overheads.

In the reproduction cost, as given by the Commission's engineer as of September 30, 1920, there is also included an item of $61,729 as construction overheads. In the testimony of the company's engineer and Superintendent, Warren G. West, and in the company's Exhibit 5 it appears that from August, 1900, to September, 1920, there was added to the capital investment in the plant by way of additions and improvements the sum of $211,688.72, and in this sum is included the amount of $30,758.19 as construction overheads, being 17 per cent, added to the sum of $180,930.53, the sum given as the direct cost of these additions and extensions.

On page 48 and succeeding pages of the record it appears that the work of construction of these additions and betterments was practically all done from year to year with the same officers and employes, with the exception of engineers, as were usually employed in the operation of the plant; that the same was carried on with the regular employes and that costs were charged to expense of operation; that the cost of material and labor only was charged to capital account; that the cost of most of the extension mains themselves was not paid for until the construction was completed; that the construction each year was done in the two or three late summer and fall months; that freight was added to the actual cost of pipe.

After careful consideration of the testimony, the Commission is of the opinion that the most of this construction seems to have been carried on by the company at the same time that the regular work of the company was being done and by the same office force, and the expense of these regular officers and employes was charged as an operating expense; that most of the payments for material were not made until the work was completed; that said material and labor was charged to capital account; that the most of the main items were paid for after completion and that the

company is not entitled to a flat charge of 17 per cent for construction overheads. It is, therefore, of the opinion that all of the item of $61,000 for construction overheads contained in the Commission's engineer's report should not be allowed.

The Commission is of the opinion that no rate can be fair and reasonable unless it is fair and reasonable to the consumer. For example, suppose this plant actually cost $1,000,000 and a valuation by the Commission's engineer would support this cost as an actual valuation upon which this company is entitled to a return; suppose that the actual population has decreased from 16,000 to 5,000; that the actual users of water have decreased in number to only about 50 per cent of what there were three years ago, and that the rate necessary to be charged to obtain a fair return upon this sum as a fair value would be excessively high and practically prohibitive, should the present consumers be penalized with rates to maintain a plant far in excess of its present needs? How far should this principle of a fair return on the investment be carried? Suppose the City of Leadville's population should decrease to 500 people; should the remaining 500 be compelled to pay rates to maintain this plant as originally built and pay a return on the original investment? This must be answered by the statement that if the company finds it is unable to render service at fair and reasonable rates it must accept the burden itself and can not be permitted to pass its own misfortunes on to the customers by placing on them an undue burden.

Taking into consideration all of the facts regarding the company's plant and the evidence adduced in this case, and considering the population and character of the community served, the probable earnings and prospects and further growth or decrease in population, and after making deductions for the items heretofore referred to as disallowed, the Commission is of the opinion that the property in use and useful of the Leadville Water Company upon which a fair return should be computed is a fair value or worth of $400,000, and this sum will be used as a basis upon which to compute such return. On account of the present tendency toward a decrease in cost of material and

labor, and considering the plant of the company as a whole, the sum of $4,800 will be allowed as annual depreciation on the fair value of the property as fixed by the Commission.

Operating Revenues and Expenses.

The following is a statement of the operating revenues and the operating expenses as charged to the expense account by the company and as taken from the books of the company by the Commission's statistician for the years 1917, 1918 and 1919:

	OPERATING REVENUES	1919	1918	1917
501	Commercial Sales	$32,349.14	$36,560.72	$30,307.26
502	Industrial Sales	12,993.08	14,605.50	15,238.53
503	Municipal Hydrant Rentals	5,100.00	5,068.75	5,050.00
504	Sales for Street Sprinkling	250.00	200.00	210.00
505	Sales to Municipal Depts.	806.70	806.70	806.70
	Back Water Revenues (Previous Years)	.....	49.80	584.04
	Gross Water Sales	$51,498.92	$57,291.47	$60,196.53
	Less Rebates and Allowances.	303.90	333.70	939.75
	Net Water Sales	$51,195.02	$56,957.77	$59,256.78
507	Profits on Piping and Connections	116.17	421.82	20.25
	Total Operating Revs.	$51,311.19	$57,379.59	$59,277.03
	OPERATING EXPENSES			
680	Gravity Supply	$ 1,679.86	$ 2,219.91	$ 1,758.02
695	Water Purchased	1,400.00	1,400.00	1,400.00
700	Distribution	9,257.59	4,394.68	5,029.70
730	Utility Expense	243.84	368.57	330.07
740	Commercial Expense	3,741.23	4,093.66	3,586.69
760	General Expense	6,010.77	6,689.03	6,111.79
	Total Above Items	$22,333.29	$19,165.85	$18,216.27
775	Depreciation	2,500.00	8,500.00	9,500.00
779	Taxes	11,476.88	10,806.47	9,900.08
	Total Operating Expenses.	$36,310.17	$38,472.32	$37,616.35
	Net Operating Revenue.	$15,001.02	$18,907.27	$21,660.68
782-785	Non-operating Revenues.	5,616.67	6,790.24	5,707.95
	Gross Income	$20,617.69	$25,697.51	$27,368.63

	DEDUCTIONS FROM GROSS INCOME			
788	Interest on Funded Debt.....	$ 9,450.82	$10,375.23	$10,722.85
789	Interest on Unfunded Debt...	119.88	.....	6.25
	Total	$ 9,570.70	$10,375.23	$10,729.10
	Surplus	$11,046.99	$15,322.28	$16,639.53
795	Dividends Declared.....	$14,624.00	$14,624.00	$14,624.00
796	Miscellaneous Appropriations.	65.91	494.90	274.10
	Total	$14,689.91	$15,118.90	$14,898.10

The statement of revenues is for actual billing of water furnished the various classes of consumers and billed at the present rate, conforming to the schedule on file with the Commission and conforming to the rates as prescribed in Ordinance No. 424 of the City of Leadville. The said ordinance provides that the contract, its rates, terms and conditions shall be subject to change and revision at periods of 5 to 10 years, respectively, from July, 1915, upon the application of either of the contracting parties thereto. As the Commission understands this agreement, the rates may be changed by agreement between the parties themselves. However, the Commission understands that on a proper showing it may substitute different rates if justified in so doing.

In the above table of operating expenses for 1919 there is an item of $9,257.59 as a distribution expense which is in excess of this item for 1917 and 1918. This item for 1918 is $4,394.68 and for 1917 the amount is $5,029.70. The figures for 1917 are considerably more than for 1918, and would, no doubt, represent a more nearly equitable charge for this expense. The cause of this increase to $9,257.59 in 1919, as given, was due to the severe winter and freezing of pipes, necessitating an extra amount of uncovering and thawing of pipes which, from the evidence, is an unusual condition which only occurred once in a number of years. Using $5,029.70 as a reasonable average charge for this item seems to the Commission to be equitable and just.

Taxes.

The amount of taxes paid in 1919 by the company and charged to operating expense is $11,476.88. In this total is included an

item of $1,561.07 as federal tax. This item will not be allowed as a part of operating expenses.

General Expense.

In the above statement is an item of general expense, and in this is included an item of salaries and expenses of the general officers at Portland, Maine, of $1,940.85. The Commission is of the opinion that owing to the general condition of the company, the high cost of operation and the decrease in the number of consumers, that this item of expense is unnecessary and should not be allowed. The evidence shows that the Leadville office collected all revenue and attended to all the duties in the operation of the plant; that the Leadville office sent the surplus to Portland and the Portland office sent out the dividends and interest on the bonds. A utility asking relief should also show that it is exercising the utmost economy consistent with adequate service.

As to the different industrial utilities enumerated on sheet 8 of the schedule P. U. C. No. 2 filed by the company, the Commission has duly considered the amount of water used by the different industries and is of the opinion that the following rates are reasonable and should be charged and collected:

COMMERCIAL SALES FLAT RATES.

	Per Annum
American Smelting & Refining Company	$6,000
Denver & Rio Grande Railroad Company— Water used in Leadville depot, section boarding house, agent's residence, car repair shops, round house, ash pit and engine loaders in Leadville, Colorado	3,600
Colorado Power Company— For water used for cooling purposes in transformer house, which water to be returned to the box of the Leadville Water Company after passing through transformer, water for steam plant when in operation and water for two families	1,440

Colorado & Southern Railway Company—	
Water for two engines	432
Water for round house	216
Cramer & Company—	
Ladder shaft	96
Evening Star shaft	192
Down Town Mines Company—	
Penrose shaft	144
Joch Salo—	
Duncan shaft No. 3	108
Dold Mining Company—	
Fire purposes only	72
Aetna Mining Company—	
Aetna shaft	144
Geo. E. Curtis & Company—	
A. V. shaft	144

For the reason above set forth, the Commission is of the opinion that the contract rates, rules and regulations now in force and as agreed to by and between the water company and the City of Leadville should not be disturbed, and that the new schedule P. U. C. No. 2 now under suspension by the Commission should be permanently suspended as to Sheets 1, 2, 3, 4, 5, 6 and 7, inclusive.

As indicated above, the Commission is of the opinion, after considering all the facts, that the rates heretofore charged for industrial uses are discriminatory as against other users of water for domestic and commercial uses; that this class of users are not paying rates that are commensurate with their share of the expense of operating the plant, nor commensurate with the amount of the capital invested in the plant devoted to such use. In arriving at this conclusion the Commission has not overlooked the difference in the cost of distribution to the different classes of users.

The increases in the rates set out above will give the company an added income of about $2,000.00 per annum and a total annual revenue as follows:

Total operating revenue 1919	$51,311.19
Non-operating revenue 1919	5,616.67
Increase to industrial users as herein allowed	2,000.00
Total income	$58,927.86

The following is a reasonable estimate for annual operating expenses:

Gravity supply	$ 1,679.86
Water purchased	1,400.00
Distribution expense	5,029.70
Utility expense	243.84
Commercial expense	3,741.23
General expense	4,069.92
Depreciation	4,800.00
Taxes	9,915.81
Total operating expense	$30,880.36

This gives a total allowance for operating expenses, including taxes and depreciation, of $30,880.36 per annum, and deducting this amount from the total annual income of $58,927.86 leaves $28,047.50 as a return on the sum of $400,000.00 as fixed by the Commission as a fair value for rate making purposes. This is in excess of 7 per cent per annum on the valuation as fixed. These are abnormal times and no doubt the prices of labor and material will, in the near future, decrease until under these same rates the company will be able to earn a return in excess of 7 per cent, which excess, if earned, may be used as an unforseen contingent fund.

ORDER.

IT IS THEREFORE ORDERED, That sheets Nos. 1, 2, 3, 4, 5, 6 and 7 of the schedule of water rates now under suspension, being P. U. C. Colo. No. 2 cancelling P. U. C. No. 1, be, and the same are hereby permanently suspended.

IT IS FURTHER ORDERED, That sheet No. 8 of said schedule entitled "Special Rates and Contracts," be, and it is, hereby suspended and the above rates herein set out are substituted therefor; that the said rates are reasonable rates and shall be charged and collected.

IT IS FURTHER ORDERED, That the rates as ordered as to sheet 8 shall become effective May 1, 1921.

RE DONOVAN, *et al.*

[Application No. 125. Decision No. 441.]

Certificates of convenience and necessity—Materiality of evidence—Automobile service.

1. Objection that an auto bus line was a detriment to the highway, paid but little taxes, and would quite often be unable to operate during stormy weather, is not material in an application for a certificate of convenience and necessity.

Monopoly and competition—Occupied territory—Additional service.

2. A railroad operates its service according to its best judgment, but the regulatory authority may order additional service by other carriers to meet the reasonable requirements of the public, if the schedule of trains as operated fails so to do.

Certificates of convenience and necessity—Evidence required—Additional service.

3. It is not required that an applicant for a certificate of convenience and necessity show such a condition to exist as makes additional service indispensable to the necessity of the public, but merely that a reasonable necessity exists as will add to the convenience of the public.

[April 23, 1921.]

Appearances: H. A. Lindsley and George H. Swerer, for applicant; E. E. Whitted and J. L. Rice for The Colorado & Southern Railway Company and Chicago, Burlington & Quincy Railroad Company.

STATEMENT.

By the **Commission**: On February 16, 1921, application was filed by the above named applicants as co-partners under the firm name and style of The Paradox Land and Transport Company for a certificate of public convenience and necessity for the operation of an auto bus for the transportation of passengers between Denver and Fort Collins over the main traveled highway between said cities, passing through Broomfield, Lafayette, Longmont, Berthoud and Loveland into Fort Collins.

Applicants propose to operate an auto bus to accommodate 15 passengers, comfortably, and heated and lighted when necessary, twice each day between Denver and Fort Collins, of the latest approved type adapted to such service.

Notice of the filing of said application was given to the railway carriers operating in the territory affected, with the result

that the Union Pacific Railroad filed a motion, objection and answer on March 3, 1921, and The Colorado & Southern Railway and the Chicago, Burlington & Quincy Railroad filed objection and answer to said application on March 1, 1921. Thereafter, the Commission set the matter for hearing at its hearing room, Capitol Building, Denver, Colorado, for 10:00 o'clock A. M., Wednesday, March 23, 1921, at which hearing some testimony was taken and, upon request, the hearing was continued for one week and until March 30, 1921.

The issues involved are quite simple, it being alleged on the part of applicants that the public convenience and necessity require and will require the inauguration of an auto bus passenger line between said cities and towns, while the railway carriers object thereto upon several grounds, the principal one being that the public convenience and necessity does not require any additional facilities between said cities or towns than they now enjoy by means of passenger trains operated by the railway carriers.

On behalf of applicants, there was introduced in evidence its schedule of fares and that of the railway carriers between said cities and towns, whereby it appears that but little difference in fares is charged; in some instances it being a little less by railway and in others a little less by the proposed auto bus line. The applicant also submitted the proposed schedule of busses showing a service by auto bus northbound leaving Denver at 9:30 o'clock in the morning to arrive at Fort Collins 12:45 o'clock P. M., and leaving Denver at 4:00 o'clock in the afternoon to arrive at Fort Collins at 7:15 o'clock P. M.; southbound service proposed leaving Fort Collins at 9:30 o'clock A. M. to arrive at Denver at 12:45 P. M. and leaving Fort Collins at 4:30 P. M. to arrive at Denver at 7:45 P. M.

The railway carriers submitted evidence showing that the passenger service over The Colorado & Southern Railway between Denver and Fort Collins, as at present, leaves Denver at 8:00 o'clock A. M., 2:30 and 6:00 o'clock P. M. arriving at Fort Collins 11:00 A. M., 5:42 and 8:47 o'clock P. M.; over the Union Pacific Railroad leaving Denver at 8:00 o'clock A. M. and 4:30 P. M., arriving at Fort Collins 10:25 A. M. and 6:45 P. M.

Southbound The Colorado & Southern Railway trains leave Fort Collins at 7:10 and 8:40 A. M. and 3:20 P. M. and arrive at Denver 10:15 and 11:30 A. M. and 6:30 P. M.; Union Pacific leaves Fort Collins at 7:45 A. M. and 2:35 P. M., arriving at Denver at 10:00 A. M. and 5:00 P. M. The Burlington service affects none of the towns involved except Lafayette and Longmont, while Union Pacific service affects no town outside of Denver but Fort Collins of those proposed to be served by the auto bus line.

From this statement of existing train schedules and the proposed auto bus schedule, it will be seen that the auto bus line proposes to leave Denver northbound twice daily, at 9:30 o'clock in the morning, an hour and thirty minutes later than the Colorado & Southern Railway, and at 4:00 o'clock in the afternoon, an hour and thirty minutes later than the Colorado & Southern, to arrive at the cities and towns affected at such times as approximately to be midway between arrivals and departures of the Colorado & Southern trains; and the same is true of the auto bus schedule southbound.

Much of the matter injected into the hearing by the testimony had to do with matters entirely foreign to the issue, such as the objection of the carriers that the auto bus line was a detriment to the highway, paid but little if any taxes, and would quite often not be able to operate during stormy weather, all of which are not involved in applications of this character.

The sole issue as the Commission understands the law is, whether public convenience and necessity requires and will require the operation of the proposed auto bus passenger line. Whether or not the auto bus line can be operated at a profit is not involved, that being the risk undertaken by the applicant; whether or not the railway carriers will be affected is not involved except as to whether the public convenience and necessity is adequately served by the existing means of transportation.

At the conclusion of the hearing, time was given for the filing of briefs, with the result that the Colorado & Southern Railway and the Chicago, Burlington & Quincy Railroad filed an exhaustive brief in support of their position that no sufficient show-

ing was made by applicant to warrant the issuance of the certificate applied for. Applicant in its reply brief urgently insists that public convenience and necessity requires an additional means of transportation between the towns and cities affected and largely because of the fact that the service afforded by the present railway carriers to passengers to the cities and towns named is a morning and afternoon service in either direction, by the Colorado & Southern Railway, the principal rail carrier, one train in the forenoon out of Denver serving the communities named, while two trains in the afternoon at 2:30 and 6:00 P. M. are operated; southbound two trains leave Fort Collins in the morning and one in the afternoon. The result is the passenger who is not destined for Denver, and desires to travel from one town to another is not able to leave without a long period of waiting and it is contended by applicant that the bus line proposed will afford such traffic a convenient and necessary method of traveling without such long delay.

The carriers insist that if the rail service being operated does not suit the public convenience, then the trains may be "scattered" through the day. One train operated by the Colorado & Southern is an interstate train, so that its schedule is determined for other than local travel. A carrier operates its service according to its best judgment, but the regulatory authority may order additional service to meet the reasonable requirements of the public, if the schedule of trains as operated fails so to do.

The Public Utilities Act of this state is rather obscure concerning what condition is necessary to be shown to exist to entitle an applicant to a certificate of public convenience and necessity, and the instant case is the first time that the railway carriers have opposed the issuance of such certificate to an applicant for the transportation of either passengers or freight, and a number of such certificates have heretofore been granted by this Commission.

In Application No. 62, decided January 17, 1920, the Overland Motor Express Company applied for a certificate of public convenience and necessity for the transportation of freight by auto truck between Denver and Boulder. This application was re-

sisted by an existing auto freight truck carrier who had theretofore been granted a certificate, but no railway carrier made objection or appeared in opposition to such application. In the course of that decision, this Commisson undertook to construe the legslative meaning of the phrase "public convenience and necessity" as used in the Public Utilities Act, and based largely upon the interpretation of the New York Act by the New York Public Service Commission in re Troy Auto Car Company, Inc., 1917-A, P. U. R. 700-707, wherein it was held that the words "convenience and necessity" could not be split in two; that a thing necessary would always be convenient and that to show a strict necessity was not required. In other words "convenience" and "necessity" must be construed together to mean such a state of facts exists as show a reasonable necessity to meet a convenience of the public. As stated in the New York case, *supra*, "taking the phrase 'convenience and necessity' as an entity, it does not mean to require a physical necessity or an indispensable thing."

Re Overland Motor Express Co. 1920-B, P. U. R. 551.

So, in the instant case, it does not require that applicant shall show such a condition to exist as is indispensable to the necessity of the public, but merely that a reasonable necessity exists as will add to the convenience of the public; which can not be disputed under the evidence in this case. A traveler between Longmont and Loveland, for example, northbound may travel by existing passenger trains but once in the forenoon and twice in the late afternoon, while southbound he may travel twice in the early forenoon and but once in the late afternoon. With the establishment of the auto bus line, such traveler would be enabled to travel between Longmont and Loveland about noon northbound and in mid-forenoon southbound, while the afternoon service would give such traveler the privilege of traveling north and south-bound between said cities in the late afternoon.

The Commission concludes, therefore, that a sufficient showing has been made by applicant to justify the issuance of the certificate applied for, it having exhibited and filed with the Commission a showing by the respective towns and cities through

which it proposes to operate, that no license fees are required for the operation of such auto bus line.

ORDER.

IT IS THEREFORE ORDERED, That the public convenience and necessity require, and will require, the operation of an auto bus passenger line upon substantially the schedule filed herein by The Paradox Land and Transport Company, applicant above named, between the cities of Denver and Fort Collins, Colorado, over the main highway and passing through the towns and cities of Broomfield, Lafayette, Longmont, Berthoud and Loveland, and that this statement and order shall be held and deemed to be a certificate of public convenience and necessity therefor.

Commissioner Lannon dissenting:

This is a case wherein the applicants asked in their original petition for a certificate of public convenience and necessity for the operation of an auto bus line between Denver, Fort Collins and intermediate points, for the hauling of freight, passengers and express. At the hearing, however, they dropped the matter of freight and express and confined themselves exclusively to that of hauling passengers.

The time table first presented by applicants was so nearly identical with that of the Union Pacific and Colorado and Southern that the whole scheme of the applicants showed conclusively that the proposed operation of the auto bus line was being launched under a subterfuge and was an attempt to secure a certificate for doing a transportation business with an eye single to their own interests, and not in any sense to serve as either a public convenience or a necessity. This is perfectly obvious when one takes into consideration the fact that the section of country in which this auto bus line proposes to operate is served by the Denver and Interurban Railroad between Denver and Broomfield, and likewise Lafayette by means of Colorado and Southern connections and from Denver to Fort Collins by the Colorado and Southern and the Union Pacific Railroads, the latter being considered one of the leading and best railroads of the United States. In addition to this, the Burlington also serves Longmont and Lafayette wth a train each way daily.

With the Denver and Interurban reaching Broomfield with an hourly service, the Union Pacific running two trains daily, one in the morning and one in the afternoon, in each direction between Denver and Fort Collins, with the Colorado and Southern running three trains each way, leaving Denver at 8:00 A. M., 2:30 P. M. and 6:00 P. M. northbound, and departing from Fort Collins at 7:10 A. M., 8:40 A. M. and 3:20 P. M. southbound, for Denver, and also with the Burlington leaving Denver at 2:45 P. M. for Lafayette and Longmont and arriving at Denver from these places at 11:15 A. M., certainly with such a plethora of train service it would seem there could scarcely be an excuse, much less a need, for the proposed bus line.

Such service as the aforesaid is far more adequate than is furnished in many more populous sections of our country. If, perchance, the service furnished the section between Denver and Fort Collins is thought to be insufficient, the proper remedy is not to license another common carrier in the district and thereby deplete the vanishing revenues of the steam roads that are now operating at a loss. The legislature has very wisely provided for the production of efficient train service, so that this Commission, if there is any dereliction in this respect, has ample power to compel the railways to modify their schedules to meet the needs of the public, as provided in the laws of Colorado relating to Public Utilities in the following section:

Section 26. "Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any railroad corporation or street railroad corporation, or person operating any such railroad or street railroad does not run a sufficient number of trains or cars, or does not possess or operate sufficient motive power, reasonably to accommodate the traffic, passenger or freight transported by or offered for transportation to it, or does not run its trains or cars with sufficient frequency or at a reasonable or proper time having regard to safety, or does not stop the same at proper places or does not run any train or trains, car or cars, upon a reasonable time schedule for the run, the commission shall have the power to make an order directing any such railroad corporation or street railroad corporation to in-

crease the number of its trains or of its cars or its motive power or to change the time of starting its train or car or to change the time schedule for the run of any train or car, or to change the stopping place or places thereof, or to make any other change the commission may determine to be reasonably necessary to accommodate and transport the traffic, passenger or freight, transported or offered for transportation.''

It will be seen by Section 2 (e) of Chapter 134, revised laws of 1915, provides that certificates for automobile lines are only required where they come in competition with a railway line. To my mind, this means that the act contemplates the protection of the railways of Colorado against onslaughts on their business by either freight or passenger automobiles, in any case where the railway or railways are furnishing the public an adequate service and one that meets with the reasonable requirements for convenience and necessity of the people in the communities served.

The public utilities acts of the various states are the last word in the control of utilities, and were designed to prevent cut-throat competition. It also has a salutary eeffct, where enforced, in preventing large aggregations of capital from infringing upon or putting out of business weaker institutions that are giving effective public service. In fact, the law ignores the aphorisms that ''might makes right'' or ''that competition is the life of trade,'' and proceeds on the theory that capital wisely and judiciously invested in a public utility shall be protected by the public, by and for the uses of the public, not that it may be allowed rates so high as to work a hardship on the people, neither must they be so low as to not bring a fair return on the investment. To bring about such a state of affairs, our legislature enacted the public utilities act and wisely provided such safeguards as would have a tendency to invite capital to this much needed field, and while demanding reasonable rates for the public, at the same time threw a bulwark around the utility, thus preventing the wiping out of honest investments and injury to the public by undue competition, a thing that, in public service, leads only to chaos and destruction.

While the respondent railway companies have to pay large amounts for taxes upon their lines and equipment, which said taxes are used for general county and state purposes, including the upkeep of many country schools that could not exist without the said railway taxes, they are also compelled to keep up their own rail highways at their own expense and at the same time contribute very largely through taxes paid to the construction and maintenance of county and state highways in all counties in which their lines are located. Where the railroads are giving adequate service, as they are in this case, to grant a certificate of public convenience and necessity to an auto bus line using the public highways paralleling the railways to which the auto line has not contributed to either the building or upkeep, is manifestly unfair to the railways. To give an auto bus line a certificate under such circumstances is compelling the railways to contribute funds to help build up and maintain highways for the benefit of their rivals in the transportation business.

Owing to the vast investment of capital by the respondents herein, and the fact of their prior entry into this field, and the great benefits these railroads have bestowed in helping to build up the commerce, industries and educational institutions along their lines, should at least entitle them to fair play and a modicum of justice instead of subjecting them to a loss of business without in any sense giving recompense therefor to the people served. With the side tracks of the various railroads in this state lined with thousands of idle cars the applicants herein can not even plead shortage of equipment, and with this alarming state of affairs confronting these respondents, to grant the certificate asked for is but to invite financial disaster to the railroads.

If the railroads are allowed to be broken down by allowing auto bus lines to invade their territories and skim off the cream of their business during the summer months, then it will be possible to put the railways out of business. This would be a calamity, as none of our light paved roads, much less the dirt

roads, could withstand the haulage of even a small portion of one trainload of heavy freight. The operation of just a few trucks, hauling three or four tons each, after a rain or snow storm would convert our boasted fine highways into ploughed fields, making their further use worthless for not only freight traffic, but impossible for all other vehicles.

To my mind, communities like those between Denver and Fort Collins, served by two splendid systems of steam railways and, in part by two other systems, operating numerous trains each day in the year, be the weather good or bad, rendering excellent and adequate service, should not be jeopardized by the issuance of a certificate to a more or less temporary concern that can cease operations during storms, or permanently, at any time they may see fit to move their equipment to other fields.

If this Commission is to use wisdom in administering its regulatory powers, this is a case where it should be done, and to my mind if the intent of the law is to be carried out, the request for the certificate asked should be denied.

If certificates asked for operation of auto bus passenger lines are to be granted where there are two or more railways affording frequent and adequate train service, then and in that case we are giving away the substance for the shadow and there is absolutely no use for the law in this respect. The law becomes impotent to function in the realm in which it was intended to operate, namely, to effectuate adequate public service by the elimination of ruinous competition. I am unable to see in this record any proof adduced by the applicants of any inadequacy in the present steam road service. On the other hand, it appears beyond question, it seems to me, that such service is not only adequate, but indeed excellent. I doubt if its equal can be found in the state.

For the aforesaid reasons, I most respectfully dissent from the majority opinion as expressed in this case.

RE COLORADO & SOUTHERN RAILWAY COMPANY.

[Case No. 231. Decision No. 445.]

Service—Curtailment—Tax and interest charges—Materiality.

1. Tax and interest charges should not be taken into account in an application for reduction and curtailment of train service, for the reason that such tax and interest charges would not be affected by a curtailment of service.

Service—Curtailment—Showing revenue and expense—Period.

2. On application for authority to curtail service on branch line, showing of operating revenue and expense should cover a reasonable length of time and not merely a few weeks.

Service—Whole system—Part.

3. Law imposes upon a common carrier the duty of furnishing adequate facilities on its entire system, not a part.

In view of critical situation in mining industry, earnings credited to station agency in question, prospect of lower operating costs, etc., authority to close agency denied.

[April 28, 1921.]

Appearances: E. E. Whitted, J. Q. Dier, Attorneys, and J. E. Buckingham, Assistant General Freight Passenger Agent, for The Colorado & Southern Railway Company; John J. White, Attorney for Georgetown, Idaho Springs and Gilpin County; W. C. Matthews, Attorney for Central City; James M. Seright, Attorney for Black Hawk; H. A. Lindsley, for The Denver Publishing Company.

STATEMENT.

By the **Commission**: The Colorado & Southern Railway Company filed with the Commission on March 15, 1921, a notice of its intention to reduce passenger train service on the Clear Creek Division of its line of railway, by operating trains 52 and 53 only, to become effective March 27th, in compliance with General Order No. 7, of the Rules and Regulations of the Commission.

The notice sets forth that, at present, train 51 leaves Denver at 8:10 A. M. and arrives at Silver Plume at 11:50 A. M., and that train 54 leaves Silver Plume at 2:05 P. M. and arrives at Denver at 5:15 P. M. These two trains are proposed to be discontinued. At present, train 52 leaves Silver Plume at 6:40 A. M. and arrives at Denver at 9:50 A. M., while train 53

leaves Denver at 3:15 P. M. and arrives at Silver Plume at 6:50 P. M. The railway has a connecting mixed train at Forks Creek with each of said passenger trains which serves Black Hawk and Central City. The proposal is to change the time of trains 52 and 53 as follows: Train 52 to leave Silver Plume at 8:30 A. M. instead of 6:40 A. M., and arrive at Denver at 11:45 A. M. instead of 9:50 A. M.; and train 53 to leave Denver at 2:15 P. M. instead of 3:15 P. M., and to arrive at Silver Plume at 5:55 P. M. instead of 6:50 P. M.; and to operate trains 152 and 153, the connecting trains from Black Hawk and Central City to Forks Creek, to connect with trains 52 and 53 on the proposed schedule of those two trains.

The notice states that it is an emergency application, and that the freight and passenger business on the Clear Creek District has been falling off from year to year, that the operations on said district for the year ended December 31, 1920, show a deficit of $226,735.21, that, since the first of the present year, its business on said district has reached its lowest ebb.

Upon receipt of such notice, notice of such proposed discontinuance and curtailment of train service was given to the communities affected, with the result that the town of Silver Plume by its town trustees, filed assent to the railroad's proposal, while protests objecting to such proposal were duly filed by the Gilpin County Metal Miners Association, and by various citizens of Central City, Georgetown, Idaho Springs and Gilpin County.

The case was set for hearing at the hearing room of the Commission, Capitol Building, Denver, Colorado, for Monday, April 11, 1921, at 2:00 o'clock P. M., and was concluded during the forenoon of the following day, April 12, 1921; due notice of the time and place of such hearing having been given to all parties in interest.

The testimony submitted by the railway company as to financial conditions affecting its Clear Creek District branch for the calendar year 1920, was as follows:

Total operating revenue	$308,728.49
Total operating expense	440,483.96
Total net loss from operations	131,755.47

In addition to the above, taxes on said branch line amounted

to $42,487.14, and interest on its bonded debt, proportion chargeable to said branch, amounted to $52,492.60, which amounts, added to the total operation deficit, would make the total deficit from operations for said year $226,735.21.

So far as the taxes and interest charges are concerned, they should not be taken into account in an application for reduction and curtailment of existing train service, for the obvious reason that such tax and interest charges will not be affected by a curtailment of service, so that the operating deficit for the year 1920, so far as this branch line is concerned, is in the sum of the difference between its operating expenses and its operating revenues, or $131,755.47.

In addition to this, the testimony is to the effect that by discontinuing trains 51 and 54, and by rearranging the operating schedules of trains 52 and 53, and that of the connecting train from Forks Creek to Central City and Black Hawk so that said connecting train may run one day from Central City to Golden and return, and the next day from Central City to Silver Plume and return, both days connecting at Forks Creek with trains 52 and 53 on the proposed new operating schedule of those trains, that a total of approximately $7,500.00 a month will be saved the company in its operating expense. The testimony also discloses that on a train mile basis, it costs the company $2.89 a mile to operate trains on its Clear Creek branch, while its revenues per train mile amount to but 74c. This train mile basis, however, was confined to the month of February, 1921, and the deficit, testified to by officials of the railway company, was confined to the month of February, 1921, and was estimated as to the month of March, 1921, to be about the same as that in February, or $25,894.03. This was applied to the whole system and was submitted touching the operations of The Colorado & Southern Railway Company as an entire system. What deficit, if any, was incurred by the entire system for the year 1920 or for any other period except February, 1921, does not appear; and this deficit included taxes and interest charges on the funded debt.

The objection and protest to the arrangement proposed by

the railway company is because of the alleged inadequate and inconvenient service that would be afforded the public were the proposed schedules allowed to go into effect. By the change proposed, the people along the line of the Clear Creek branch, including two county seats, Central City and Georgetown, could only reach Denver at 11:45 in the morning, and to return the same day would be compelled to leave Denver at 2:15 in the afternoon, thus giving but two hours and thirty minutes in the Capitol city, most of which is at the noon hour. Conversely, visitors to the Clear Creek region from Denver or elsewhere in the state could only depart at 2:15 in the afternoon and would be compelled to remain overnight at destination; and if on a business errand, remain at least a portion of the next day or remain over the entire day and two nights before being able to return to Denver by train.

The application or notice filed made no mention of a temporary discontinuance and curtailment of this service, but at the hearing it was disclosed by the railway company that such curtailment of service was only desired until the tourist season commenced, which usually was late in May or about the first of June. The testimony was also to the effect that if a longer time in Denver was desired, train 52 would be run out of Silver Plume earlier in the morning, and train 53 out of Denver later in the afternoon. Just what schedule would be most convenient to the communities affected was not disclosed. Protestants strenuously objected to any change in service for so short a time, and expressed a willingness that such service should be curtailed during the fall of 1921, after the tourist season is over, in the event business conditions showed no material improvement over such as exist at the present.

Testimony of protestants is to the effect that many of the mines, having lain dormant for several years on account of war and other conditions, are preparing to resume operations and that some have actually begun development work; that now, at the beginning of the summer season, to publish to the world and put into effect a one-train schedule would result, to the communities affected, in great and irreparable injury, and that

under all the circumstances, bearing in mind the business the railway company has done in the years gone by upon the Clear Creek District branch, it would not be fair that such service should be changed at the present time. Protestants introduced into the record, and relied upon, a portion of the order in Application No. 91 of this Commission, dated August 25, 1920, wherein increases were granted to the railway carriers of this state on all traffic in a substantial per cent, such portion of said order appearing on page 8, reading as follows:

"Heretofore, the carriers have justified their failure to render adequate and efficient service through lack of revenue, and the rates and fares hereinafter permitted are authorized in the expectation that the carriers shall hereafter render adequate and efficient service within the State of Colorado."

It may be true that the increase of rates granted has not resulted in any material increase of revenue which seems to be the case throughout the country; it also may be true, as shown by the railway company, that the pay of its employes in its operating department is excessively high and in a large measure is the cause of its operating deficit. In that event, it would seem that it was the duty of the carrier to have made application to effect a saving much prior to the date when such application was filed. With the burdensome duties of the Commission, a fact that is well known to all persons having business before it, to obtain relief, where the public interest is involved, can not be done hurriedly, and generally involves a period of several weeks; so that, in the instant case, were the relief granted that is sought, the service changes would only be in effect for the month of May, when the railway proposes to reinstate such service.

Bearing in mind the duties and obligations that a common carrier bears to the public when it obtains a franchise and begins serving the public, it seems to the Commission that the cessation and curtailment of service for so short a time is not reasonable in justice to the public affected under all the circumstances disclosed by the testimony in this case.

Colo. & Sou. Ry. Co. v. R. R. Comm. et al,
54 Colo. 64-91-93.

The only testimony, as has been stated, submitted concerning the operating revenue and expense of the system as a whole pertained to the month of February, 1921, and that testimony was a statement of the General Auditor occurring on page 19 of the transcript of evidence. The Commission does not understand that this is a sufficient showing, as the showing must be over a reasonable length of time and not confined to any one or two months or few weeks. If such testimony had been submitted showing the system as a whole lost money during the calendar year 1920, a foundation would have been laid, but as the Commission understands the effect of the above decision, the "law imposes upon a common carrier the duty of furnishing adequate facilities to the public on its entire system, not a part; and it can not be excused from performing its full duty merely because by ceasing to operate a part of its system, the net returns would be increased."

Colo. & Sou. Ry. Co. v. R. R. Comm., supra, p. 93.

Much of the testimony submitted was immaterial and irrelevant, and the Commission feels that it ought to suggest to parties appearing before it, to be as brief and to the point as possible in the submission of testimony, that the work of the Commission may be, thereby, quite materially expedited.

For the reasons given, the Commission is of the opinion that the request of The Colorado & Southern Railway Company to discontinue trains 51 and 54 on its Clear Creek branch, until June 1, 1921, be denied, with leave to renew such request, or any other curtailment of its service upon said branch in the fall of 1921, should conditions then justify.

ORDER.

It Is Therefore Ordered, That the application of The Colorado & Southern Railway Company to discontinue its trains 51 and 54, and rearrange its schedule of trains 52 and 53, and 152 and 153, until June 1, 1921, be, and the same is, hereby denied.

IT IS FURTHER ORDERED, That leave is hereby given said railway company to renew such request during the fall of 1921, should the then existing conditions warrant it in so doing, at such time as it shall be advised.

RE E. STENGER, RECEIVER, THE DENVER TRAMWAY COMPANY.

[Application No. 129. Decision No. 458.]

Rates—Interurban railway—Increase—Return—Eight per cent.
Increases in rates authorized upon assumption of propriety of a return of eight per cent upon valuation of property.

[June 22, 1921.]

Appearances: Mr. H. S. Robertson, for Applicant. No other appearance entered.

STATEMENT.

By the **Commission**: On March 22, 1921, the above applicant filed its petition with the Commission, alleging that it is a common carrier, engaged in the transportation of passengers between Denver (Berkeley Station), Colorado, and Golden, Colorado, and Shaft 3 Leyden Mine, Colorado, setting forth its Post Office address as being 1100 14th Street, City of Denver.

The petition further alleges that the passenger fares as contained in the present Denver Tramway local passenger tariff No. 3, known as Colorado P. U. C. No. 3, issued July 5, 1918, effective August 6, 1918, and as said tariff was subsequently amended by current supplement thereto, as applying to the interurban lines operated by applicant between the points named in Paragraph 1, are inadequate and do not provide a sufficient revenue to pay the operating expenses of applicant chargeable to passenger operations, and to pay a reasonable return upon the properties of the company chargeable to passenger operations;

Wherefore, petitioner asks that the Commission make its order authorizing applicant to increase its passenger fares, as now published in its P. U. C. No. 3, above mentioned, as follows:

(A) Between Denver (Berkeley Station), Colorado, and Golden, Colorado, one-way full cash fare in cents per adult passenger, as shown in Section 6 of said tariff, be increased from twenty-eight cents to thirty-four cents, or an increase of twenty per cent; and between all intermediate points, Berkeley and Golden both inclusive, fares to be increased in the same ratio, with a minimum of ten cents.

(B) Between Denver (Berkeley Station) and Golden, round trip fares shown in Section 8 of said tariff, be increased from forty-eight cents to fifty-eight cents, or an increase of twenty per cent; and between all intermediate points, Berkeley and Golden both inclusive, fares to be increased in the same ratio; and that round trip fare be added to the list as it now reads, making the new round trip fares so added equal one hundred and seventy per cent of the one-way cash fares as increased in accordance with the provision outlined in paragraph A outlined above, with a minimum round trip rate of twenty-five cents.

(C) Between Denver (Berkeley Station) and Golden, Colorado, commuter's 50-ride books, as described in Section 10 of said tariff, be increased from $8.25 to $9.90, or an increase of twenty per cent; and between all intermediate points, Berkeley and Golden both inclusive, fares to be increased in the same ratio.

(D) Between Denver (Berkeley Station) and Shaft 3 Leyden Mine, one-way full cash fare in cents per adult passenger, shown in Section 7 of said tariff, be increased from thirty-two cents to thirty-eight cents, or an increase of twenty per cent; and between all intermediate points, Berkeley and Shaft 3 Leyden Mine both inclusive, fares to be increased in the same ratio, with a minimum of ten cents.

(E) Between Denver (Berkeley Station) and Shaft 3 Leyden Mine, round trip fares as shown in Section 9 of said tariff, be increased from fifty-four cents to sixty-five cents, or an increase of twenty per cent; and between all intermediate points, Berkeley and Shaft 3 Leyden Mine both inclusive, fares to be increased in the same ratio; also that round trip fares be added to the list as it now reads, making the new round trip fares

so added equal to one hundred and seventy per cent of the one-way cash fares as increased in accordance with the provisions outlined in paragraph D above, with a minimum round trip rate of twenty-five cents.

(F) Between Denver (Berkeley Station) and Shaft 3 Leyden Mine, commuter's 50-ride books, as shown in Section 10 of said tariff, be increased from $9.63 to $11.56, or an increase of twenty per cent; and between all intermediate points where fares are now shown, Berkeley and Shaft 3 Leyden Mine both inclusive, fares to be increased in the same ratio, provided that the fares shown in said section applying between Shaft 3 Leyden Mine and Arvada, now reading $7.98 in one part of the section, and reading $8.25 in another part of the same section, be increased from $8.25 to $9.90, on account of the amount $7.98 having been inserted therein through an error in compilation.

Upon the filing of said petition copy of same was served upon Charles McCall, the City Attorney of Golden, Colorado, and the said Application was consolidated with Case No. 198, The City Council and Citizens of Golden v. The Denver & Intermountain Railway Company for the purposes of hearing, and the two cases thus consolidated were set for hearing, and heard by the Commission, at its hearing room, Capitol Building, Denver, Colorado, at 10:00 o'clock A. M., Thursday, April 21, 1921, due notice thereof having been served upon the attorney for the City of Golden and the attorney representing the applicant, on March 23, 1921.

At the hearing held upon said day applicant produced testimony as to the total operating revenues, operating expenses and the net revenue of The Denver Tramway Company Interurban Lines and The Denver & Intermountain Railroad, for the years 1919, 1920, and the three months ending March 31st, 1921, showing the following:

NET REVENUE.

	D. & I. M.	Tramway Golden Line	Interurban Mountain Line
Year ending Dec. 31, 1919.....	$15,865.04	$11,555.69	$25,830.21
Year ending Dec. 31, 1920.....	4,861.08	5,688.50	41,731.70
3 months ending 3/31/21.....	8,865.16	2,210.90	13,518.02

Also the testimony of Applicant submitted shows that the net revenue, based upon an eight per cent return on the valuation of the Company's interurban property, of the Company's interurban lines, and the D. & I. M. R. R., as fixed by this Commission in that regard January 1st, 1918, shows the following deficits:

DEFICITS.

	D. & I. M. R. R.	Tram. Int. Golden Div.	Tram. Int. Leyden Div.
Year ending Dec. 31, 1919	$ 92,759	$38,267	$40,231
Year ending Dec. 31, 1920	103,763	44,136	24,329
3 months ending 3/31/21	18,291	10,244	2,997

The valuation of the interurban lines of The Denver Tramway Company as fixed by this Commission in the proceeding of January 1st, 1918, is as follows:

Tramway Interurban	$1,448,550
D. & I. M. R. R. Co.	1,357,800

The above valuation as fixed in said proceeding was divided between the Leyden and Golden Divisions on the mileage basis, with an allowance for freight equipment and Leyden yards special work of $150,000.00, deducted from the total values before pro-rating, and then added to the Leyden values, which give the following result:

Denver & Intermountain	$1,357,800
Tramway Interurban, Golden Division	622,785
Tramway Interurban, Leyden Division	825,765

The above is the basis of values upon which the deficits above set forth are arrived at, allowing a return upon such values at eight per cent. In addition, in Application No. 91, of August, 1920, increases were allowed upon the intrastate carriers in harmony with the increases allowed by the Interstate Commerce Commission, and in Application of The Denver & Interurban Railway Company a twenty per cent increase was allowed; all of which was introduced into the record in this hearing.

There being no opposition to the allowance of a twenty per cent increase, as asked for by petitioner, and there appearing to the Commission no substantial reason why such increase should not be allowed to the interurban lines of The Denver Tramway Company which now prevails upon The Denver & Intermountain

Railroad and upon The Denver & Interurban Railroad, the prayer of the petitioner will be granted, and an order entered to that effect.

ORDER.

IT IS THEREFORE ORDERED, That Applicant, The Denver Tramway Company, E. Stenger, Receiver, be, and it is hereby, given permission to increase its passenger fares on its Golden and Leyden interurban lines, effective July 1st, 1921, by filing with the Commission at least five days before the effective date aforesaid, and giving notice thereof, a supplement to its tariff, Colorado P. U. C. No. 3, or any such other published tariff as it may so desire, as follows:

(A) A twenty per cent increase of the fares between Denver (Berkeley Station), Colorado, and Golden, Colorado, and between all intermediate points, Berkeley and Golden both inclusive, as shown in Section 6 of said tariff, with a minimum of ten cents.

(B) Between Denver (Berkeley Station), Colorado, and Golden, Colorado, a twenty per cent increase of the round trip fares shown in Section 8 of said tariff, and between all intermediate points, Berkeley and Golden both inclusive, the same ratio of increase; and that round trip fare be added to said section as it now reads to make the new round trip fare so added equal one hundred and seventy per cent of the one-way cash fare as the same is increased by twenty per cent, with a minimum round trip fare of twenty-five cents.

(C) Between Denver (Berkeley Station), Colorado, and Golden, Colorado, commuter's 50-ride books, as shown in Section 10 of said tariff, and between all intermediate points, Berkeley and Golden both inclusive, fares to be increased twenty per cent.

(D) Between Denver (Berkeley Station), Colorado, and Shaft 3 Leyden Mine, Colorado, as shown in Section 7 of said tariff, and between all intermediate points, Berkeley and Shaft 3 Leyden Mine both inclusive, an increase of twenty per cent, with a minimum fare of ten cents.

(E) Between Denver (Berkeley Station), Colorado, and Shaft 3 Leyden Mine, round trip fare as shown in Section 9

of said tariff, and between all intermediate points, Berkeley and Shaft 3 Leyden Mine both inclusive, fares to be increased twenty per cent; and that round trip fares be added to said Section 9 as it now reads to make the new round trip fare so added equal to one hundred and seventy per cent of the one-way cash fares as hereby authorized to be increased, with a minimum round trip rate of twenty-five cents.

(F) Between Denver (Berkeley Station), Colorado, and Shaft 3 Leyden Mine, Colorado, commuter's 50-ride books, as shown in Section 10 of said tariff, and between all intermediate points between which fares are now shown, Berkeley and Shaft 3 Leyden Mine both inclusive, fares to be increased twenty per cent, provided that the fare shown in said Section 9, applying between Shaft 3 Leyden Mine and Arvada now reading $7.98 in one part, and reading $8.25 in another part of said section, be corrected to read $8.25 in both cases, so that the increase of twenty per cent shall be based upon said last named sum of $8.25, said $7.98 being included in said section through error in compilation.

CHAMBER OF COMMERCE OF COLORADO SPRINGS
v.
THE DENVER & RIO GRANDE RAILROAD COMPANY, *et al.*

[Case No. 199. Decision No. 460.]

Rates.

In reducing rate on coal from Pikeview to Colorado Springs from 67½ cents per ton to 50 cents, the Commission said: "Coal is one of the greatest necessities of life. To obtain it at a reasonable price depends not only on the prosperity and comfort of the household, but also on the manufacturing, mining and smelting industries of the state. The railroads, to a greater or less extent, are dependent upon these interests for their business. It is necessary, therefore, to the railroads themselves that freight rates on coal should be reasonable; coal has always been classed as a commodity that should take a low rate per ton per mile."

[June 22, 1921.]

Appearances: D. P. Strickler, for Plaintiff; J. G. McMurray, for Receiver, The Denver & Rio Grande R. R. Co.; Wm. V.

Hodges and D. Edgar Wilson, for The Chicago, Rock Island & Pacific Ry. Co.; Henry T. Rogers and Erl H. Ellis, for The Atchison, Topeka & Santa Fe Ry. Co.; J. H. Rothrock, for Pikes Peak Consolidated Fuel Co.

STATEMENT.

By the **Commission**: On November 15, 1920, a petition was filed with this Commission against the above named defendants for a readjustment of freight rates on coal from the Pikeview-Carlton Mine, Colorado, Roswell, Colorado, Pikeview-Keystone and City Coal Mine, Colorado, to Colorado Springs. The petition recites that the said petition is for the restoration of a 25c per ton (intrastate) freight rate on coal from the above mentioned mines to Colorado Springs.

It alleges that the present rate on coal from the above mentioned mines to Colorado Springs is 67½c per ton; that the distance is 5.8 miles for the longest haul; that said rate is an unreasonably high rate and is not necessary or justifiable; that prior to June 25, 1918, the rate from said points by the way of the Denver & Rio Grande Railroad and the Chicago, Rock Island & Pacific Railway and the Atchison, Topeka & Santa Fe Railway on lignite coal was 25c per ton of 2000 pounds; that after June 25, 1918, to November 8, 1918, the rate was 60c per ton; that on November 8, 1918, to August 31, 1920, the rate was 50c per ton; since August 31, 1920, the rate has been 67½c per ton.

A hearing was held at Colorado Springs on January 25 and 26, and on February 21, 1921, at Denver. A brief was filed by petitioner herein on March 28, 1921, to which brief reply brief was thereafter filed by the carriers.

On September 1, 1920, the carriers involved herein, pursuant to Interstate Commerce Commission's Order, ex parte No. 74, and followed by Colo. P. U. C. Order in Application No. 91, increased rates on the haul in question from 50c per ton to 67½c per ton. Prior to November 8, 1918, the rate per ton on the haul in question had been 60c per ton, but was voluntarily reduced by the carriers to 50c per ton.

The immediate order under which the last increase was made was Colo. P. U. C. No. 91, which was a general order increasing all freight rates within the State of Colorado. In that order this Commission said: "The applicant carriers submitted no evidence of a satisfactory nature as to the value of their properties in Colorado or as to the operating revenues and expenses in this state. The Interstate Commerce Commission, however, has had opportunity for a complete investigation of the affairs of the carriers in the different groups. In view of that fact and the further fact that in arriving at its conclusions the Interstate Commerce Commission contemplated that the revenues necessary to yield a 6 per cent return upon the aggregate value of the carriers' property would be derived from intrastate as well as interstate traffic, this Commission will authorize temporarily the same increases on intrastate traffic as has been authorized by the Interstate Commerce Commission on interstate traffic, * * *. Owing to the incompleteness of the record in this proceeding as to the percentage of revenues required by applicants properly assignable to intrastate traffic in Colorado, the finding as to increases hereinafter allowed must be understood to have been made upon authority and weight of the evidence presented to the Interstate Commerce Commission, as applied to the respective groups, and the applicants and the public will understand that such increases are authorized temporarily, and may be subject to readjustment or modification at any time application is made in that behalf, and that upon such application being made the carrier or carriers will be required to justify such increase, * * *." The Commission also uses the following language, which was uoqted from the Interstate Commerce Commission's Opinion in ex parte No. 74: "It is impracticable at this time to adjust all of the rates on individual commodities. The rates to be established on the basis hereinbefore approved must necessarily be subject to such readjustments as the facts may warrant. It is conceded by the carriers that readjustments will be necessary. It is expected that shippers will take these matters up in the first instance with the carriers, and the latter will be expected to deal promptly and effectively therewith, to

the end that necessary readjustments may be made in as many instance as practicable without appeal to us."

It will be seen by the latter part of the above quotation that it was contemplated and expected by this Commission that at the time of the entering of the order in Application No. 91 adjustments would have to be made; that injustice in individual instances would necessarily occur in entering a general order such as this was, increasing all rates for all classes of freight and commodities, and for all hauls within the State of Colorado, by a flat 35 per cent.

It will be noted that prior to November 5, 1918, the legal rate authorized for this haul was 60c per ton; that by the application of the 35 per cent increase authorized in that order to the legal rate of 60c, the rate would have been 81c per ton. However, the carriers themselves had previously reduced the rate from 60c to 50c per ton, and by the application of the 35 per cent increase, the rate now in question is 67½c per ton. The last general increase of 35 per cent was first adopted by the Interstate Commerce Commission, and permitted by this Commission as a quick and effective way of generally increasing the rates corresponding to the conceded necessity for more revenues to the carriers.

The obvious effect has been in some instances and on very short hauls (and in the opinion of the Commission in this case) to produce a rate which is unreasonably high for the services performed, and which, in the opinion of the Commission, is not to the best interests of the carriers themselves.

In defendant's brief they say, speaking of their voluntary reduction of the previous rate of 60c to 50c, "the question naturally arises as to why the rate could not be maintained on a respective basis. The answer seems to be that the mines in this district are located so near to Colorado Springs that it is perfectly practicable, during a certain part of the year at least, to haul the coal by wagons and trucks; in fact, there is a large percentage of the coal moved by wagons and trucks at all seasons, and this fact compelled the carriers, more directly affected by the wagon haul, to-wit: the carriers that serve directly the

northern portion of Colorado Springs, to reduce the rate or go out of business."

The evidence taken in this case was quite full and complete entering into the different phases of rate making. The briefs of the parties were also quite complete, and the Commission has read them all. The Commission realizes that the increase on the haul in question being a flat 35 per cent increase was no greater than was made in other instances, but the thing that impresses the Commission in this particular case is that on this particular haul, the last increase should not have been allowed. The present case is just such an instance of a condition which it believed might arise by the application of the general 35 per cent increase when it used the language above quoted that the carriers would be required to justify the increase.

If the Commission is to follow out its opinion in Case No. 91, it must commence somewhere to correct these inequalities, and the Commission can hardly conceive of a more justifiable point of beginning. If there are other instances of a similar nature, the same will be dealt with when the attention of the Commission is called to the same.

Coal is one of the greatest necessities of life. To obtain it at a reasonable price depends not only on the prosperity and comfort of the household, but also on the manufacturing, mining and smelting industries of the state. The railroads, to a greater or less extent, are dependent upon these interests for their business. It is necessary, therefore, to the railroads themselves that freight rates on coal should be reasonable; coal has always been classed as a commodity that should take a low rate per ton per mile. The base rate in question, before the recent high cost of operation and the numerous recent increases in labor and material for something like a five-mile haul, was 25c. By a succession of continued increases by the Federal Administration and the Interstate Commerce Commission, together with the last increase of 35 per cent on all freight rates allowed by this Commission, all rates have been tremendously increased, and in the opinion of the Commission in the present instance, has produced a rate

of 67½c, which is unreasonably high and is more than the services are worth.

In the opinion of the Commission, after considering all of the evidence in the case, the present rate of 67½c should be reduced. We believe that the last increase of 35 per cent was not justified on this particular haul, and we believe if the hearing was had upon this rate alone at the time of the entering of the order in Application No. 91, the Commission would not have allowed this last increase. Other rates may have to be adjusted by this Commission on coal within the State of Colorado, and the Commission at this time will establish a rate of 50c per ton for the hauls in question.

ORDER.

IT IS THEREFORE ORDERED, That the defendants, The Denver & Rio Grande Railroad Company (A. R. Baldwin, Receiver), The Chicago, Rock Island & Pacific Railway Company and The Atchison, Topeka & Santa Fe Railway Company, on or before fifteen days from this date, establish, publish, charge and collect a rate of 50c per ton on all classes of coal from the Pikeview-Carleton Mine, Pikeview-Keystone Mine and City Coal Mine, the different points on defendants' railroads named in the petition herein, to Colorado Springs.

RE THE TRINIDAD ELECTRIC TRANSMISSION RAILWAY & GAS COMPANY.

[Application No. 127. Decision No. 464.]

Return—Gas utility—Fraction over six per cent insufficient.

Return of a fraction over 6 per cent on value of property of a gas utility held insufficient.

[July 12, 1921.]

Appearances: E. E. Whitted, for Applicant; Frank H. Hall, for the City of Trinidad, Colorado; Henry Hunter, for Trinidad Chamber of Commerce.

STATEMENT.

By the **Commission**: The applicant company filed its application in this case February 19, 1921, the material allegations in which are as follows:

That the applicant is engaged, among other things, in the operation of an artificial gas system in the city of Trinidad, State of Colorado; that for a number of years past, the said system has been operated at a heavy loss; that during the year 1920, the same fell short of meeting operating expenses, excluding interest, depreciation or dividends by $7,870.36; that petitioner can no longer continue said operations at a loss, neither can it secure capital for extension or betterments in the face of said loss.

Applicant prays that the Commission make an order for an increase in gas rates aquivalent to not less than $2.50 per M. cu. ft., including a minimum charge of $2.00 per meter installed; that in lieu of this increase in rates, that the applicant be permitted to discontinue the furnishing of all gas service in the City of Trinidad and vicinity.

Attached to said application is a copy of a complete financial and statistical report of the gas department.

Due notice of the pendency of this application was given, and on March 9, 1921, answer was filed, the substance of which is as follows:

That the rates asked for are unjust, unreasonable and excessive; that The Trinidad Electric Transmission Railway & Gas Company is engaged in the manufacture and distribution of artificial gas under a franchise originally granted to the predecessors of said company on December 9, 1880, for the term of 25 years, which said franchise was on February 13, 1905, renewed and extended for the further term of 25 years; that said company and its predecessors accepted the terms and conditions of said franchise and have exercised their rights and privileges thereunder, the same now being in full force and effect; that said gas company and its predecessors have through negligence, carelessness and inefficiency allowed and permitted the plant, pipes and mains of said establishment to deteriorate and to remain in a condition of dilapidation; that the waste and loss exceeds the normal waste and loss incurred in the manu-

facture of gas, and if the same was conserved would equal or exceed any loss incurred; that petitioner has refused and neglected to extend its pipes and mains to accommodate additional consumers. That the inhabitants of the City of Trinidad have prepared their homes for the use of artificial gas, and have installed fixtures therefor, and if said company is allowed to abandon its plant its consumers will suffer great loss.

The answer asks that the applications of petitioner herein be denied.

After due notice to all parties, a hearing was held in Trinidad on Tuesday, May 3, 1921, at 10 o'clock A. M. Further or final hearing was held at the Commission's hearing room in Denver on May 12, 1921.

From the evidence it appears that a final summary of the plant investment of the applicant company, as compiled by the Commission's engineers, is as follows:

FINAL SUMMARY.

Acct.	Item	Herbert's Appraisal	Additions 1919 & 1920	Normal Present Reproduction Cost
101	Organization	$ 2,500	....	$ 2,500
105	Land	6,300	....	6,300
106	Buildings	6,564	....	6,564
108	Coal Gas Apparatus	46,868	$ 500	47,368
111	Boiler Equipment	314	....	314
121	Mains	38,591	395	38,986
122	Services	15,750	338	16,088
123	Meters	8,457	883	9,340
124	Customers' Inst.	1,878	....	1,878
140	Gen'l Of. Equip.	630	....	630
142	Utility Equip.	347	336	683
143	Miscel. Equip.	1,260	....	1,260
	Working Capital	6,500	1,196	5,304
		$135,959	$1,256	$137,215

The following table is taken from the reports of the Commission's auditing department, compiled and filed in this case:

GAS DEPARTMENT—Income Statement.

	OPERATING REVENUES	1920	1919
501	Commercial Earnings	$26,609.16	$24,113.27
501a	Prepaid Gas	2,397.18	2,062.71
509	Earnings from Residuals	3,259.70	2,424.59
510	Merchandise and Jobbing	302.19	189.71
515	Miscellaneous Earnings	26.00	54.15
		$32,594.23	$28,844.43
	Less Discounts and Allowances	1,411.17	1,591.02
	Total Operating Revenues	$31,183.06	$27,253.41
	OPERATING EXPENSES		
600	Production	$27,017.16	$20,145.56
700	Distribution	4,706.21	2,964.53
740	Commercial	1,058.58	1,029.54
745	New Business	.....	63.80
760	General Expense	3,891.47	3,471.71
	Total Above Items	$36,673.42	$27,675.14
775	Depreciation	.....	.....
779	Taxes	2,380.00	729.09
	Total Operating Expenses	$39,053.42	$28,404.23
	Net Operating Revenue	$ 7,870.36	$ 1,150.82

This statement shows an operating loss for the year 1920 of $7,870.36. In analyzing the details that go into the different items of expenses in this table, however, the Commission by comparing the different items therein for the years 1919 and 1920 has noted a very great increase for 1920 over 1919. For instance, in the above table, under the item of "Distribution" for 1920, the amount of $4,706.21, as compared with $2,964.53 for 1919 shows a difference of about $1,700.00. This is accounted for as an increase on account of extra cost of maintenance repairs to gas mains and gas meters. On account of the unusual amount of work done in this year, the extra $1,700.00, in the opinion of the Commission, should be amortized over a period of years. This materially reduces this item and brings it more in proportion to the expense for this item in 1919. Also in the

item of "Production," this item for 1920 being $27,017.16, as against $20,145.50 for 1919, a difference of nearly $7,000.00.

This is explained by the Company and accounted for by them in the detailed items of "Coal Carbonized" and "Retort House Labor." While the price of coal is still up, the price of labor is decreasing. The Commission believes, however, that the tendency in the future of the price of coal will soon be downward. The Commission is of the opinion that as an average, the amount of $29,500.00 is reasonable as an operating expense.

After considering the testimony carefully, the Commission has concluded that it is its duty to deny the application to abandon this plant. It believes that with the relief that will be granted in this order, together with the general tendency of decreasing price of material and labor, the applicant company will be enabled to continue the operation of its plant with some profit at the time of the granting of this order.

The Commission will, therefore, without fixing rates that will be prohibitive, and thereby decreasing the net income to the Company, allow a reasonable increase in the rates to be charged.

It appears from the evidence that as compared to population, the City of Trinidad has less consumers of gas than other towns in the State of Colorado. With an increase in rates, the Commission will expect the company to so improve its service and the quality of gas, as will enable it to induce a greater number of consumers to use its products.

The Commission has carefully considered the testimony in this case for the purpose of determining a reasonable value thereof for rate-making purposes. While it is practically admitted that the plant is not modern and is not of the latest and more efficient design, yet the testimony of the Commission's electrical engineer is that with a reasonable rehabilitation of which it is capable, the same can be placed in a condition to give efficient service.

The Commission has determined that the amount of $125,000.00 is a reasonable value for rate-making purposes, and for the purpose of this case, that sum will be used as a basis for determining the rates herein allowed.

The following earning requirements are required over and above a reasonable return on the capital invested:

Annual Depreciation Reserve Requirements	$ 2,500.00
Taxes (1920)	2,380.00
Operating Expenses allowed after considering the items of expense discussed above	29,500.00
Total	$34,380.00

The Commission has considered carefully the needs of additional revenue to the company. It has also fully considered the effect of allowing a rate of $2.50 per M. cu. ft. of gas, as asked for in the application. It has also compared this proposed rate with the highest rates in effect in any other portion of the State. It has carefully considered the question of the reasonable value of the service and the probable effect of establishing a $2.50 rate. It has studied what might be the effect of such an increase as tending to increase or decrease the net revenue to the company, and whether on account of such a high rate there would be a loss of business and thereby an attendant decrease in the revenues of the company.

All costs of material and labor at the present time are high, but there is a general tendency at the present time toward a reduction.

The Commission is of the opinion that any increase in rates over and above a rate of $2.00, with a $2.00 minimum, would not tend to increase the net income of the company.

The total earnings for 1920 of the company without discount, according to the above table taken from the Auditor's report, were $32,594.23. An increase in rates to $2.00 per M. cu. ft., without discount, would be approximately 25% increase on commercial and prepaid gas earnings.

The amount of these two items is $29,006.34; 25% of this would amount to $7,256.58. The increase to the company on account of the $2.00 minimum, using 2,703, as given by the electrical engineer, as the number of minimum consumers, would add approximately $2,000.00 additional or a total additional revenue of $9,256.58. This added to the income of 1920 would give an estimated total income of $41,850.81.

Deducting the total requirements as set out above from this sum would leave an amount as a return on the investment of $7,570.81, or a fraction over 6%. This is less than the company ought to be allowed to earn if conditions would permit, but the Commission feels that any increase over and above a rate of $2.00 per M. cu. ft., without discount, plus a $2.00 minimum rate, would not be effective in increasing the net return, and it also feels that the general tendency of lowering price and the attendant decrease in expenses will soon allow the company to earn a reasonable return on the rates as fixed.

ORDER.

IT IS THEREFORE ORDERED, That the application of The Trinidad Electric Transmission Railway & Gas Company, the applicant herein, to abandon the operation of its plant be, and the same, is hereby denied.

IT IS FURTHER ORDERED, That the following schedule of rates are reasonable, and the applicant, The Trinidad Electric Transmission Railway & Gas Company, shall before the 31st day of July, 1921, publish and file with this Commission, and charge and collect thereafter the following schedule of rates:

METER RATE.

For all consumption per month, per M. cu. ft. net	$2.00
Minimum guarantee per month, net	2.00

No prompt payment discount.

CHARLES W. TAYLOR, *et al.*

v.

CITY OF GLENWOOD SPRINGS, *et al.*

[Case No. 201. Decision No. 466.]

Commissions—Jurisdiction—Municipalities—Ultra vires act.

1. A defense by a municipality, in which it alleges that a contract entered into with a public utility is ultra vires and void, is purely one of law which the Commission may not consider or determine, as it is not invested with judicial power and is not a court.

Commissions—Jurisdiction—Damages—Water.

2. A commission has no jurisdiction over a claim for damages arising from a leakage from a water main.

Commissions—Jurisdiction—Condition of street—Water seepage.

3. The Commission has no jurisdiction with respect to the dangerous condition of a street occasioned by the leakage of water undermining said street and the holes excavated therein in the work of repairing the pipeline.

Parties—Complainant—Water main—Leakage—Jurisdiction.

4. A commission has no jurisdiction to order repairs or improvements in a water main except upon complaint of a patron of the utility that the leaks are responsible for an inadequate, insufficient, or impure supply of water.

Public utilities—What constitutes—Water company—Operation.

5. Discussion of the status of a water company as a public utility when its revenues are collected and expenses paid by an agent, but which files an annual report with the Commission.

[August 2, 1921.]

Appearances: J. W. Bell, Esq., of Glenwood Springs, for Petitioners; A. L. Beardsley, Esq., of Glenwood Springs, for City of Glenwood Springs; Hughes & Dorsey, Esqs., E. I. Thayer, Esq., and Walter M. Campbell, Esq., of Denver, for the Cardiff Light & Water Co., Respondents.

STATEMENT.

By the **Commission:** On November 15, 1920, the above named petitioners filed their petition with the Commission wherein it is alleged that they are and have been for several years prior to the filing of the petition, residents and property owners of and within the City of Glenwood Springs, Colorado; that said City of Glenwood Springs is a municipal corporation and as such, is the owner of and operates, a municipal water system and supplies water to itself and its inhabitants, and to the respondent, The Cardiff Light and Water Company, and is a public utility subject to the jurisdiction of this Commission; that The Cardiff Light and Water Company is the owner of a water system to supply water to the town of Cardiff in Garfield County, Colorado, and to others along the line of its conduit or pipe line and is a public utility subject to the jurisdiction of this Commission.

The third paragraph of the petition sets forth that in March, 1907, the town, now City, of Glenwood Springs, granted a franchise to C. W. Darrow, et al., which said franchise was assigned

by the grantees thereof to The Cardiff Light and Water Company, which authorized the franchise holder to lay and forever maintain, a six-inch water main in and through certain streets in said City of Glenwood Springs to the south line of said city; that thereafter and during said year of 1907, said Cardiff Company duly proceeded to install and lay in said streets a six-inch wooden pipe line, and upon completion, turned water therein from a connection with the mains of The Glenwood Light and Water Company, which last named company was then the owner of the water system furnishing water to the City of Glenwood Springs and its inhabitants. In the fourth paragraph, it is alleged that upon completion of said water system by said Cardiff Company, the control, management, supervision and work of repair was assumed by The Glenwood Light and Water Company, and so continued until about the month of July, 1914, when the City of Glenwood Springs purchased the water system then owned and operated by The Glenwood Light and Water Company, and the city thereby assumed whatever obligations said The Glenwood Light and Water Company had with the Cardiff Company; that in the summer of 1916, the wooden pipe line aforesaid, began to leak and discharge water upon the streets of said city, which said leaks became so numerous and frequent that the ground around and about said wooden pipe line became filled and saturated with water; that on account of the nature and character of the soil, the water percolated therethrough and to adjoining property, and caused the streets and adjoining property to settle and to greatly damage the same, as well as buildings constructed on property upon said streets; that since the summer of 1916, said wooden pipe line has continuously leaked and discharged water upon and under the streets of said city; and that on account of it becoming necessary to dig up the ground to stop said leaks, the said streets have become in a dangerous and unsafe condition; and that on account of said water seeping and percolating through and under the property of petitioners and the settling of the ground therefrom, the petitioners have suffered damages to their property rights in substantial amounts.

Petitioners further allege that they have, with other property owners in the City of Glenwood, upon several occasions petitioned the City Council of said city for relief from the damage being caused to the property aforesaid, but that said council has failed and neglected to take any measures to prevent the damage, and that the condition of said wooden pipe line is well known to the officers of The Cardiff Light and Water Company, and they have also neglected and failed to repair the said wooden pipe line or to replace the same with other pipe to prevent the leakage of water therefrom.

Petitioners further allege, upon information and belief, that the aforesaid wooden pipe line is wholly worthless, worn out and in such condition that to repair the same is impossible so that it can be used to carry water without leaking, and that its continued use and operation will result in irreparable injury to the property of petitioners; and that on account of the things alleged, this Commission has authority and is vested with power under Sections 24 and 25 of the Public Utilities Act, to assume jurisdiction and investigate the equipment, appliances, facilities and physical condition of the property of said Cardiff Company, and if the same be found to be unsafe, inadequate or insufficient, to order the proper repairs, or the installation of new equipment such as may be necessary to operate said water system without damaging the streets and property, or on failure to abide by the order of the Commission, to order the discontinuance of the operation of said system.

The prayer of petitioners is that a hearing may be ordered by the Commission upon the allegations of the petition, and that the Commission determine the necessary repairs, installation and new equipment to place the water system of the said The Cardiff Light and Water Company in a safe and proper condition, such repairs to be made in a time certain to be fixed in the order; and that on failure to comply with the rule and order to be entered by the Commission, then that the Commission enter an order discontinuing the operation of said water system within a time specified.

Upon the service of copies of said petition, respondent, the

City of Glenwood Springs, filed its separate answer on December 1, 1920, wherein the allegations of paragraphs one and two of the petition, are admitted. Said city also admits the grant or attempt to grant of the franchise to C. W. Darrow, *et al.*, by an alleged ordinance, a copy of which is attached to said separate answer, and also admits the assignment or attempted assignment of said alleged grant or franchise to The Cardiff Light and Water Company, but denies that said alleged ordinance granted or conferred upon said Darrow, or upon his assigns or successors, any rights, privileges or franchises whatever, for the reason that said alleged ordinance is and at all times was *ultra vires* and void, for the alleged reason that the grant was beyond the power of the Board of Trustees of said town to make, and was made without consideration and not for the use or benefit of the town of Glenwood Springs or its inhabitants and to be a grant in perpetuity.

The separate Answer of the respondent city admits the entering into by the Cardiff Company and the Glenwood Company of a written contract about the month of August, 1907, concerning the Cardiff wooden pipe line, and attaches a copy of said contract to said separate answer; and that the water system of the said Glenwood Company was purchased by the City of Glenwood Springs, and the Glenwood Company attempted to assign its right, title and interest in said contract to said city; and it is alleged that said assignment or attempted assignment was void for the reason that said city was without power to assume the obligations of the contract, and that the attempted assumption of the obligations of said contract by said city, is *ultra vires* and void.

In the fourth and fifth paragraphs of said separate answer of said city, the allegations in paragraphs five and six of the petition are denied, except the respondent city admits that leaks have occurred in the Cardiff pipe line, and avers all of said leaks have been promptly, or as soon as possible, repaired, and admits that numerous complaints have been made to the City Council concerning alleged damage to property by reason of said alleged leaks in said Cardiff pipe line, and alleges that all such com-

plaints have been reported by the city to the Cardiff Company, who, if anyone, alone is liable for said alleged damage; and the sixth and concluding paragraph of the separate answer of the city denies, upon information and belief, the allegations contained in paragraph eight of said petition; and respondent, City of Glenwood Springs, prays that it be dismissed from this proceeding as not being a necessary or proper party to it.

On December 4, 1920, respondent, The Cardiff Light and Water Company, a corporation, filed its separate answer to the petition of petitioners, wherein it protests and asserts that this Commission is without jurisdiction to entertain this controversy, and without prejudice it answers said petition, and states: that as to the allegations in paragraph one of said petition, same are denied upon information and belief; admits allegations in paragraph two of the petition, except that it denies that it is a public utility and denies it is subject to the jurisdiction of this Commission; admits the allegations contained in paragraph three of the petition, but denies that it excavated in the City of Glenwood Springs a six-inch wooden pipe line and turned the water therein, as alleged in said paragraph.

In the fourth paragraph of said separate answer there is set forth a copy of the agreement alleged to have been made and entered into by and between The Glenwood Light and Water Company, and respondent, The Cardiff Light and Water Company, on the 26th of August, 1907, and alleges that the obligations of The Glenwood Light and Water Company and The Cardiff Light and Water Company with reference to the water plant of respondent, The Cardiff Company, and the control, management, supervision and repair thereof, are contained in said agreement, and respondent, Cardiff Company, admits that about the month of July, 1914, the City of Glenwood Springs purchased the water system then owned and operated by The Glenwood Light and Water Company in the City of Glenwood Springs, and assigned its interests in and to said contract with respondent, Cardiff Company, to the City of Glenwood Springs.

The allegations contained in paragraphs five and six of said petition are expressly denied by respondent, Cardiff Company,

and paragraph seven of said separate answer is denied upon information and belief, except as to the condition of the pipe line being well known to the officers of the Cardiff Company, and it denies that the condition of said wooden pipe line is well known to its officers, and denies that it is under obligations to repair said wooden pipe line or to replace the same with other pipe to prevent water leaking therefrom; and denies each and all the allegations contained in paragraph eight and nine of said petition.

Paragraph eight of said separate answer of the Cardiff Company, is a further answer to the allegations of the petition wherein it is alleged that the injury and damage done to the property of petitioners, if any, is caused by the negligence of the petitioners and by their failure to exercise due and ordinary care and caution in one or both of the following particulars:

(a) "In negligently and carelessly using water under their control upon their property, causing said water to seep through the soil and cause the injury and damage complained of.

(b) "In negligently and carelessly failing to guard and protect their premises against the flow of water thereon, and the seepage of the water therein, causing the injury and damage to property complained of in the petition."

Then follows allegations concerning the alleged failure of petitioners to exercise due and ordinary care in the control of water used on the respective properties of petitioners and that if water did escape from the wooden pipe line to their premises, petitioners have had full knowledge of the fact for several years and had acquiesced and consented without objections thereto, and thereby granted to respondent, The Cardiff Light and Water Company, a legal license to cause the continuance of the seepage into the said premises and thereby waive all claim of right to cause said wooden pipe line to be repaired or replaced, and then follows a plea of *laches* upon the part of the petitioners in that they have slept on their rights, or alleged rights, and have been negligent concerning them for many years and are thereby estopped and precluded from maintaining their petition.

And said respondent, The Cardiff Light and Water Company, prays that the petition be dismissed as to it.

After due notice given to all parties, the matter was set for hearing and heard at Glenwood Springs on Tuesday, March 6, 1921.

At the beginning of the hearing and before any evidence was received therein, respondent Cardiff Company, by its counsel, moved to dismiss the above proceedings as to it, for a number of reasons, the principal ones of which are:

(a) "That the Commission has no jurisdiction to order a non-operating utility to repair or replace the same.

(b) "That the Commission has no jurisdiction to abate a nuisance such as complained of by the petitioners herein, this being a matter for the courts.

(c) "That the jurisdiction to order repairs and to abate nuisances such as complained of is lodged by statute in the City Council of the City of Glenwood Springs, and the Public Utilities Act does not confer concurrent jurisdiction upon the Commission so to do.

(d) "That the Cardiff Light and Water Company is not a public utility in the sense of the statute; therefore, the Commission has no jurisdiction to make orders concerning it.

(e) "That the pleadings disclose upon their face that the rights of the Cardiff Company and the City of Glenwood Springs, as assignee, are to be determined concerning the matters involved herein under a certain contract entered into as set forth in the pleadings and that the Commission has no jurisdiction or authority to construe or determine the rights of the parties under such contract."

The motion aforesaid was temporarily denied pending the taking of testimony, at the conclusion of which, time was given for the filing of briefs by the respective parties in support of their respective contentions.

The principal contention of petitioners is, that under Sections 24 and 25 of the Act, the Commission is vested with jurisdiction when, after hearing, it shall find "that the practices, equipment, appliances, facilities or service of any public utility or the method of distribution, transmission, storage or supply employed by it are unjust, unreasonable, unsafe, improper, inadequate or

insufficient,'' then the Commission shall determine the just, safe, proper, adequate or sufficient practices, equipment, appliances, facilities, service or methods to be observed, furnished, contracted, endorsed or implied and shall fix the same by its order or rule.

Section 24, Public Utilities Act, Laws 1913.

And the further contention that under Section 25 of said Act, when the Commission, after hearing, shall find that the extension, repairs or improvements to or change in the existing plant, equipment, apparatus, facilities or other physical property of any public utility ought reasonably to be made, or that any structure or structures should be erected ''to promote the security or the convenience of its employees or the public or in any other way to secure adequate facilities,'' the Commission may serve an order to direct that repairs, improvements or changes to be made or structures to be erected, in the manner and within the time specified in such order.

The evidence disclosed substantially the following facts: That in 1907, a franchise was granted through the streets of Glenwood Springs by the City Council of said city, then a town, to C. W. Darrow, *et al.*, for the purpose of laying a water pipe line therein to serve the inhabitants of the town of Cardiff, lying some six miles to the south of Glenwood Springs; that said franchise was assigned to The Cardiff Light and Water Company, one of the respondents herein, who installed such water system and by arrangement with the then, The Glenwood Light and Water Company, procured water from it for the Cardiff Company for the purpose of supplying the inhabitants of Cardiff and the territory contiguous thereto; that some years later The Glenwood Light and Water Company assigned and transferred to the City of Glenwood Springs its water facilities under a certain contract set forth in the pleading, under and by which the City of Glenwood Springs assumed to undertake to fulfill the obligations of the corporation insofar as it pertained to the respondent, Cardiff Company. The evidence further discoses that in the operation of such utility, The Glenwood Light and Water Company, and after its transfer of the water system to the City of Glenwood Springs, then the city undertook to supply water to said

Cardiff water pipe line and to collect all water rents and to pay expenses of said Cardiff Company from the revenue so collected and account to the Cardiff Company for the same, as provided in said contract.

The defense of the City of Glenwood Springs is to the effect that the aforesaid contract is *ultra vires* and void and was never of any force or effect or binding upon the city and, therefore, was and is unenforceable, as against the city. Such defense is purely one of law with which the Commission may not consider or determine, as it is not invested with judicial power and is not a court.

Defense of respondent, Cardiff Company, under its motion and proof was, that it is a non-operating utility and not amenable to the jurisdiction of the Commission under the Public Utility Act, and second, that under the proof it clearly appeared that the petitioners are not patrons of respondent, Cardiff Company, and were not residents of the town of Cardiff nor the territory contiguous thereto; that Sections 24 and 25 of the Act were not applicable to the facts of the case and the Commission was without jurisdiction for such reason.

The evidence discloses that the wooden pipe line of the Cardiff Company was laid in the street upon which the property of petitioners faced; that for several years past and up to the present time the said wooden pipe line leaked in numerous places along said street and to such an extent as to saturate the ground with water that percolated in and upon and through their property and resulted in damaging the residences of petitioners by settling of the ground caused by such percolating water from said pipe line; and that because of excavations made in the street for the purpose of repairing numerous leaks the streets have become unsafe for public travel and dangerous to those traveling over and upon said streets.

It will be observed that the petition largely sounds in damage to private property and seeks to hold the respondents liable therefor because of their failure to keep said wooden pipe line in repair and prevent the escaping of water therefrom. With the question of damages, the Commission, of course, has nothing

whatever to do, that being a matter for a court of competent jurisdiction to determine. With respect to the dangerous condition of the street, occasioned by the leakage of water undermining said street and the holes excavated therein in the work of repairing said pipe line, the Commission is of the opinion that that is a matter for the authorities of the City of Glenwood Springs to remedy, as the Commission would have no authority, as we construe Sections 24 and 25, to order repairs or improvements in the line except upon complaint of a patron of said water utility that the leaks in said pipe line were responsible for an inadequate, insufficient or impure supply of water. It is conceded that no one of the petitioners is dependent upon the Cardiff Company for his supply of water nor ever has been. It therefore raises the question whether one not dependent upon a public utility may complain of the apparatus, facilities and equipment of such utility. The Commission thinks not. Only those who are served and are dependent upon the public utility for service may enter complaint as to the improper, inadequate or insufficient appliances and apparatus in use to the injury of the patron or patrons of such utility.

Allen v. Railroad Comm., 175 Pac. 466; 8 A. L. R. 249.

Sub-section 7, of general Section 6524, G. S. 1908, defines the powers of incorporated towns or cities over streets therein. Among other things, the legislature has granted to towns and cities in this state, power with respect to streets, "to regulate the use of the same and to prevent and remove encroachments or obstructions upon the same." The above are some of the clearly defined powers granted to cities and towns by legislative enactment and is ample authority for the City Council of Glenwood Springs to remove any obstructions that may be within its streets and dangerous to the public use in traveling thereover. The Public Utilities Act in nowise confers power or jurisdiction upon and over the streets and alleys of a municipality. Suppose for instance that a bridge were constructed over a street and it became obstructed and unsafe for use by the public, clearly it would be the duty of the local authorities to remedy such condition. And it seems equally clear that the legislature did not

confer upon this Commission nor intend to confer upon this Commission, the general supervision of streets and alleys of municipalities in this state as to their obstructions or safety for public travel. The local authority is the forum to which such situation should be properly addressed, as the local authority, if for no other reason, is more familiar with the desires and needs of the people affected thereby, than would be any state regulatory body, and to hold otherwise, would be clearly to confer upon the Commission the power of regulation concerning matters affecting local self-government, which do not affect the public generally.

Petitioners strenuously urge that because the water from said pipe line leaks and causes the ground to become soft and saturated with water, with holes constantly excavated in the street in making repairs to said pipe line, the Commission has jurisdiction under the statute for the reason that the street is thereby rendered unsafe for public use and travel. And reliance is had upon Section 29, Ch. 109, Session Laws, 1917. The Act cited pertains entirely to railroad utilities, as is clearly indicated in the title and context, and therefore does not apply to the facts of this case. The mere statement that a street of a municipality is unsafe for public use and travel, suggests at once to the mind that resort should be had to the local authority to remedy such condition. And, as we have seen, the City Council of Glenwood Springs has full statutory power to remedy and correct such unsafe or dangerous condition in its streets. Indeed, it may be said that it becomes its legal duty so to do.

Without further discussion of the other questions raised, except only that the defense interposed by respondent, Cardiff Company, that it is not subject to jurisdiction of this Commission because of its being a non-operating utility, the Commission feels that it must dismiss the petition for lack of jurisdiction to grant the relief asked. The question as to whether or not respondent, Cardiff Company, is a non-operating utility is unimportant in reaching the above conclusion, yet there having been so much testimony adduced to seek to prove the alleged character of the Cardiff Company, and been strenuously urged pro and con as to that feature, the Commission may properly rule that

under the facts, as clearly established by the record in this case, The Cardiff Light and Water Company is an operating utility, and subject to the jurisdiction of this Commission. The mere fact that its revenues and expenses are collected and paid by an agent, does not give it the character of a non-operating utility; and a controlling fact which was not introduced into the record but of which the Commission must take judicial notice, is the fact that the Cardiff Company files its annual reports with this Commission, both for its operations as an electric utility and as a water utility. And from those reports required to be filed by the Public Utility Act, it clearly appears that it is an operating utility within the State of Colorado. And in a proper case, would be, in the opinion of the Commission, fully subject to its regulation.

ORDER.

IT IS THEREFORE ORDERED, That the petition of petitioners, Charles W. Taylor, D. C. Weyand and P. J. Kirwan be, and the same is, hereby, dismissed for want of jurisdiction of this Commission to entertain and grant the relief prayed for.

THE HYGIENIC ICE & COAL COMPANY
v.
THE COLORADO & SOUTHERN RAILWAY COMPANY, *et al.*

[Case No. 202. Decision No. 468.]

Rates—Failure to pass reduction to public—Materiality.

1. The fact that the public may not receive the benefit of a reduction in a freight rate is no reason why an unreasonable or burdensome rate should not be ordered reduced.

Rates—That other communities may be entitled to reduction—Materiality.

2. That other communities similarly situated would ask for a rate reduction is no reason why a rate found to be excessive should not be ordered reduced.

Rate—Basis of determination.

3. "A service such as this (transportation of coal) is worth to the community receiving it, its actual operation cost plus rea-

sonable expense of upkeep and betterment, plus a fair return on the capital invested in the enterprise. Anything less is confiscation on the part of the public; anything more is confiscation against the public."

Rate of 90 cents per ton prescribed on coal of all kinds moving from "the northern Colorado coal fields" to Boulder.

[August 5, 1921.]

Appearances: T. A. McHarg and Dudley I. Hutchinson, of Boulder, for complainant; Frank L. Moorehead, City Attorney, for City of Boulder; E. E. Whitted and J. Q. Dier, of Denver, for The Colorado and Southern Railway Company; C. C. Dorsey and Edward C. Knowles, of Denver, for Union Pacific Railroad Company.

STATEMENT.

By the **Commission**: Complaint was filed November 29, 1920, by the above named complainant against defendants, therein alleging the incorporate capacity of the complainant and of the defendant carriers, and that complainant was engaged in business at Boulder, Colorado, in the manufacturing of ice and thereby was a large consumer of coal; that complainant also was engaged in the retail coal business at the City of Boulder, and purchases coal in carload quantities from mines in what is called "The Northern Colorado Coal Fields," which comprise a group of mines to the east and south of Boulder, distant from six to twenty-six miles; that a large proportion of the coal purchased by complainant comes into Boulder in carloads over the lines of said defendants, and that the defendants are the only rail carriers entering the City of Boulder, and that all coal used in said city, except a small portion hauled in by motor or wagon vehicles, is carried into said city from said coal fields by said defendant carriers.

Complainant further alleges that, on and prior to June 25, 1918, the freight rate on coal from said coal fields into Boulder in carloads was 50c per ton; that by General Order No. 28 of the United States Railroad Administration, effective June 25, 1918, the above rate was increased thereby, to 90c per ton, and that by order of this Commission in Application No. 91, effective

September 1, 1920, the last named rate was increased 35 per cent, making the present rate on coal, from said coal fields into the City of Boulder in carloads, $1.21½ per ton; that said rate of $1.21½ is an increase of 143 per cent over the rate as it existed prior to June 25, 1918; that the increase, under said General Order No. 28, increased the rate 80 per cent, which is the only increase of rates the defendants are entitled to collect as being a fair and reasonable rate for the service performed; and, that the rate at present of $1.21½ per ton is an unjust and exorbitant charge, and should be reduced by order of this Commission to a proper and compensatory rate.

Complainant prays that upon hearing, a rate on coal in carloads, shipped into Boulder from the northern coal fields, be fixed by this Commission at not to exceed 90c per ton.

On December 8, 1920, each of the defendant carriers filed answer to complainant's complaint. That of the defendant, The Colorado and Southern Railway Company, admits the incorporate capacity of the complainant and of the defendants, and being engaged in business in the State of Colorado as common carriers as alleged in the complaint; and admits that said carriers are the only rail carriers of freight entering the City of Boulder; denies that it or the Union Pacific Railroad Company, separately or jointly, transport to said City of Boulder the bulk of coal for commercial or domestic purposes used in said city, and alleges that a far greater tonnage is brought into said city for said purposes by other means; and admits that the greater portion of coal transported by it to the City of Boulder originates in the territory known as the Northern Colorado Coal Fields, lying southerly and easterly of said city; admits that the freight rate was as alleged, prior to June 25, 1918, and that under General Order No. 28 aforesaid, said rate was increased to 90c per ton, effective June 25, 1918; and that, under order of this Commission in Application No. 91, effective September 1, 1920, the rate was increased to $1.21½ per ton.

In paragraph 6, it denies that the rate of 90c per ton, as fixed under General Order No. 28, is or would have been, in view of the defendants' circumstances, its needs, its right to earn a fair

return upon the aggregate properties and the emergency with which it has been confronted since the termination of Federal Control of Railroads on March 1, 1920, a fair or reasonable or just or sufficiently remunerative or adequate rate for the transportation of coal from said mines to said City of Boulder; and denies that the present rate on coal in carloads from said mines to said Boulder of $1.21½ per ton is an unjust or exorbitant charge or rate, and that it should be reduced or that it can be reduced to any extent and still afford the defendant a proper compensatory rate for the transportation of such coal.

In the 8th and closing paragraph, the defendant, The Colorado and Southern Railway Company, alleges that the expenses of operating its road largely increased since the increase of freight rates on June 25, 1918, was made under General Order No. 28 by reason of the increase in cost of materials and of supplies and of labor costs; that the increase in the rate, as authorized by this Commission under Application No. 91, as applied to the coal rates involved herein, is a fair, just and reasonable one in order to enable the defendant to meet the emergency with which it is, and since the termination of Federal Control, has been confronted and to enable it to earn a fair return on its property; and finally that a reduction of the existing rate on coal from $1.21½ will result in undue and unreasonable advantage to the complainant and other consignees of coal in the City of Boulder, and in undue and unreasonable prejudice to other localities and consignees of coal located in this State, and likewise in gross discrimination and undue and unreasonable prejudice as between persons or localities in intrastate commerce on the one hand and interstate commerce on the other.

Wherefore, the defendant, The Colorado and Southern Railway Company, prays that this proceeding may be dismissed.

The defendant, Union Pacific Railroad Company, in its answer admits the allegations of paragraphs 1 and 2 of the complaint, and denies the allegations of paragraph 3 upon information and belief; admits the above named defendant carriers are the only rail lines which transport coal into Boulder as alleged in para-

graph 4, and denies upon information and belief each and every other allegation contained in said paragraph.

In the 5th paragraph, the defendant admits the freight rate per ton on carloads of coal shipped from the Northern Colorado Coal Fields to the City of Boulder is as alleged in said complaint, and as is hereinbefore set forth; that is, 50c per ton prior to June 25, 1918, increased to 90c by General Order No. 28, effective June 25, 1918, and increased to $1.21½ by order of this Commission, effective September 1, 1920, under Application No. 91.

The defendant, Union Pacific Railroad Company, denies each and every allegation in paragraph 6 of the complaint; and denies that the present rate of $1.21½ is unjust, exorbitant or that the same should be reduced, and alleges the fact to be that said rate is just and fair. Then follows allegations dealing with affirmative defenses by said defendant, Union Pacific Railroad Company, to the effect that in the conduct of its business as a common carrier, it maintains a railroad from said Northern Coal Fields to Boulder with full equipment for the transportation of coal, and with terminal facilities at Boulder and at points in the Northern Coal Felds for the convenience of shippers; that the cost of operating trains for the transportation of coal, the expense of maintaining railroad track, equipment for the transportation of coal, including locomotives and cars, and terminal facilities, are the elements which made necessary the establishment of the present rate of $1.21½ per ton from said coal fields to Boulder, and the same necessity exists and requires that the rate established by order of the Commission in Application No. 91 to $1.21½ be and remain in force.

Defendant, Union Pacific Railroad Company, further alleges upon information and belief, that a larger percentage of the coal shipped into Boulder from the coal fields is transported by wagons, automobiles, and other means of conveyance than by railroad; that such other means of transporting coal from said fields to Boulder, in spite of the fact that there are no expenses for maintenance of road-bed or terminal facilities, is unable to transport coal between said points at a lower rate than that es-

tablished by this Commission in Application No. 91 aforesaid, and that said fact shows that it is impossible for defendant, Union Pacific Railroad Company, to transport coal between said points at a lower rate than the rate now in effect, because of its expense of maintenance of road-bed and terminal facilities, and the defendant prays that no order be entered herein reducing the freight rate between said Northern Colorado Coal Fields and Boulder, and that it be hence dismissed.

This matter was regularly set for hearing, upon due notice to all parties, on January 24, 1921, at the Court House in the City of Boulder, and afterward, by agreement of Counsel, continued from said date to February 4, 1921, at the same place where the hearing was held, at the conclusion of which, time was given for the filing of briefs by the respective parties, complainant waiving its opening brief, the defendant carriers each being given twenty days from the receipt of the record herein to file its brief, and complainant fifteen days thereafter within which to reply thereto. By reason of extensions of time granted, the brief of complainant was not filed herein until Monday, July 25, 1921.

The issue involved is, whether or not, the present rate of $1.21½ per ton for the transportation of coal in carloads from the Northern Colorado Coal Fields to the City of Boulder is excessive, unreasonable and unjust, as alleged by the complainant, or, in view of the circumstances and needs of the carriers, is such a rate fair, reasonable and just.

A voluminous record was made at the hearing, much of which, so it seems to the Commission, is entirely irrelevant and immaterial to a determination of the issue involved, as above stated.

Counsel for the carriers, in a joint brief, insistently and specifically urge that the increase of 35 per cent over the rate of 90c per ton, as fixed under General Order No. 28, is justified, and is necessary in order that the carriers may receive a fair and just compensation for the movement of such coal, in view of the property investment of the carriers necessary in the transporting of such coal, and especially with reference to the investment made necessary in so doing by terminals, switches, rolling

stock, including locomotives and car equipment generally, plus the increased cost of materials, supplies and increased wages or labor costs. On the other hand, complainant, in its reply brief, as insistently urges that the rate as fixed under General Order No. 28 of 90c per ton, which was an increase of 40c per ton over the rates existing prior to June 25, 1918, is a fair and reasonable rate, and such a rate as will permit of the carriers obtaining a just and compensatory remuneration for the service performed. As is expressed by complainant in its reply brief: "A service, such as this, is worth to the community receiving it, its actual operation cost, plus reasonable expense of upkeep and betterment, plus a fair return on the capital invested in the enterprise. Anything less is confiscation on the part of the public; anything more is confiscation as against the public."

From a careful hearing of the testimony and reading of the record in this matter, it would appear to be that anything like an exact cost to the carriers and the service in question, that is, transporting carloads of coal from the Northern Colorado Coal Fields to Boulder, is quite largely a matter of speculation or conjecture, and perhaps almost necessarily so, for the reason that the service performed by the carriers in the transporting of the coal in question is so minutely and intimately interrelated with the transporting of other classes of freight, not only between the same points but between other points on the systems of said carriers, as well as in the transportation of passengers and express, that it apparently is a difficult, if not an impossible, task to segregate the cost of the transportation of coal between the Northern Colorado Coal Fields and the City of Boulder with any particular degree of certainty. When it is borne in mind that prior to General Order No. 28 issued in May, 1918, and effective June 25, 1918, the freight rate upon this identical service was at the rate of 50c per ton (and without protest or objection upon the part of carriers), and then, by General Order No. 28, was increased to 90c per ton, an increase of 80 per cent, and then in August, 1920, following a decision of the Interstate Commerce Commission in *ex parte* 74, effective as to this movement, September 1, 1920, an increase of 35 per cent over the 90c

per ton rate was granted, which gives the present rate of $1.21½ per ton, or an increase of 143 per cent over the tonnage rate in effect prior to June 25, 1918, it would appear that the increase of rates, as particularly applied to coal, has been advanced to a point where the consumer of this necessity is burdened. It must be remembered that coal is the only fuel of the inhabitants of this part of the country for the sustenance of life; that it is an element as necessary to the maintenance of life itself as is water or sunlight, so that any undue burden that may be placed upon the consumption of coal by the people for their necessity is a condition that a regulatory body should be prone to prevent. While the furnishing of water is made the subject of regulation by the State, as yet the State has not seen fit to exercise its extraordinary power to regulate the price of coal to the consumer, and this fact is a complete answer to the contention of the defendant carriers, that were the freight rate reduced upon this coal movement, the consumer would not be benefitted thereby. Such contention may be a fact, and yet it is no valid reason why the agencies of the State should refuse to relieve as against a burdensome freight rate, if such it be. And though it is a matter *dehors* the record, at the time this statement and order is being prepared there appears in the daily press a statement to the effect that the price of coal from the Northern Colorado Coal Fields to the consumers thereof, has been increased by the coal producing companies 50 cents per ton, is peculiarly aggravating when an attack is made by such consumers upon an increase of freight rates of 31½c per ton. The above statement, however, is merely made in passing and is a matter, if it be unjust or unreasonable, for governmental action through legislative action.

It is conceded by all parties that the average length of the haul from the Northern Coal Fields into Boulder is 15.4 miles, some of the mines being 8 miles distant, others 20 miles and the farthest being about 26 miles from the City of Boulder. So far as the length of haul is concerned, it may be safely asserted that not a great deal of difference in cost is made in the transportation of such coal as disclosed by the testimony; but the contention of defendant carriers is, that because of terminal facilities

at point of loading and unloading of coal, up-keep of road-bed, rolling stock, locomotives, with increased costs of materials, supplies and wages, anything short of the present rate of $1.21½ would be such a rate as would not compensate the carriers for the service performed. And, too, the carriers contend that anything less than the $1.21½ rate in this case, would be an unjust discrimination as against other localities and consignees in the buying and use of coal from the Northern Colorado Coal Fields.

The 35 per cent increase on such coal rates was occasioned by the Interstate Commerce Commission in granting a flat 35 per cent increase in all of the Western group or territory in *ex parte* 74, wherein the Interstate Commerce Commission divided what had hitherto been the Western group into two groups. Defining the Western group as that part of the United States west of a line running southerly from Chicago to the gulf of Mexico, and on and east of a north and south line running as follows: "Following the boundary line between the State of North Dakota and the State of Montana, and the boundary line between the States of South Dakota and Wyoming, and Nebraska and Wyoming to the line of the Union Pacific Railroad extending east from Cheyenne, Wyoming, then following the line of the Union Pacific Railroad westward to Cheyenne, and from Cheyenne running southward through Denver, Colorado Springs, Pueblo and Trinidad, Colorado; then following the line of the Atchison, Topeka and Santa Fe Railway through Raton and Las Vegas, New Mexico, to Albuquerque, New Mexico; then south along the line of the Atchison, Topeka and Santa Fe Railway to El Paso, Texas," and all that part of the United States lying west of said line was denominated the Mountain-Pacific group; said order of the Interstate Commerce Commission granted a uniform increase of 35 per cent on freight rates in the Western group and 25 per cent in the Mountain-Pacific group. Then by interpretation, all Colorado common points are placed in the Western group which would include the City of Boulder, although it lies west of a line "running southward through Denver, Colorado Springs, Pueblo and Trinidad, Colorado." It

may be observed, in passing, that the line drawn in dividing the Western group into two groups and creating the Mountain-Pacific group, is fixed upon lines definite and certain save only through the State of Colorado, and that the line separating the two groups through the State of Colorado is indefinite and uncertain, and apparently was made through ignorance or carelessness of its drafter. No satisfactory explanation was given by witnesses for the carriers as to why the line through Colorado should have been so designated, nor has this Commission as yet been able through its research to understand the reason therefor, if any there be, but the fact remains that Boulder, in common with other Colorado common points, is located in the Western group regardless of its physical relation with reference to the above described line, and therefore remains subject to the 35 per cent increase granted by the Interstate Commerce Commission in *ex parte* 74.

This Commission in Application No. 91, followed the lead of the Interstate Commerce Commission in granting increased rates upon intrastate traffic, and for the express purpose of being in harmony with the desire of Congress, as expressed through its agent, the Interstate Commerce Commission, to yield the rate provided for in the Transportation Act, 1920, to the rail carriers upon the aggregate value of their property used and useful in the transportation service. But, as stated in the opinion in Application No. 91, there was submitted by the carriers "no evidence of a satisfactory nature as to the value of their properties in Colorado or as to operating revenues and expenses in this State," and this Commission followed the lead of the Interstate Commerce Commission upon a mass of testimony presented by the rail carriers of the United States to the Interstate Commerce Commission, as affecting rates of such carriers in the respective groups and without any regard to their investments in this State or their operating revenues or expenses therein. So that, further on in the opinion in Application No. 91, this Commission said: "Owing to the incompleteness of the record in this proceeding as to the percentage of revenues required by applicants properly assignable to intrastate traffic in Colorado, the finding

as to increases hereinafter allowed must be understood to have been made upon authority and weight of the evidence presented to the Interstate Commerce Commission, as applied to the respective groups; and the applicants and the public will understand that such increases are authorized temporarily and may be made subject to readjustment or modification at any time that application is made in that behalf, and that upon such application being made, the carrier or carriers would be required to justify such increases.'' Hence, it will be observed that the complainant is pursuing a procedure impliedly authorized by that part of the opinion of Application No. 91 above quoted; and further on, in the same opinion, there is set forth the thought and hope that the shippers and carriers will, in the first instance, take such matters up that are thought to require readjustment, and deal promptly and effectively therewith, to the end that such ajdustments may be made in as many instances as practicable without appeal to this Commission. If that method of procedure was attempted to be followed in this case, obviously it has been unsuccessful, else this application would not have been filed. It is clearly apparent that the order in Application No. 91 was made by this Commission upon insufficient evidence presented as to rail conditions in Colorado, and hence made as a temporary measure, and would be subject to readjustment upon any particular commodity or with reference to any particular freight rate that might thereafter be determined to be excessive, unjust or unreasonable. In view of the fact that the rail carriers transported coal prior to 1918 at 50c per ton from said coal fields into Boulder, and the rate has, in practically two years' time, been increased to $1.21½ per ton, *prima facie* is indicative of the latter rate being unjust and excessive and burdensome, and the only justifiication for such rate that the carriers have asserted, is increased price of materials, supplies and labor costs, plus the maintenance of terminal facilities, rolling stock and road-bed. At the hearing, testimony was submitted by the railway and hydraulic engineer for the Commission, of the tendency toward lower cost of materials and supplies, and since the hearing, the United States Labor Board has granted a reduction of 12 per

cent of railway employes' wages, and beyond all that, there is an undoubted and, we might say, undisputed tendency toward lower costs in all lines of human endeavor, so that the objection made by the carriers at the hearing loses much of its weight in view of the situation and circumstances that now exist.

With reference to the further contention of the carriers, that to grant a lower freight rate in this case than the existing rate of $1.21½ per ton would be an unjust discrimination as against other localities and consignees of coal, and that to do so in this case would encourage the consumers of coal in other localities to ask for some similar relief or readjustment of freight rates on coal, is a reason of no little importance to the carriers, and is probably well grounded in the practical sense; but if such rate be so high as to be excessive and burdensome upon one locality, that fact ought not to impel the Commission in denying relief merely because other localities would also be similarly inclined to ask relief. It is the hope of the Commission that, in view of the conclusions reached in this case and order of the Commission entered herein, the rail carriers of coal in this State will cooperate with the respective localities dependent upon them for the transportation of their necessary coal supply to the end that some equitable readjustment of such coal rates may be made without resort to the instrumentality of the state regulatory body. There is, indeed, another application lately filed before this Commission concerning the same subject matter by the civic authorities of the City of Greeley, against the above rail carriers and the Chicago, Burlington & Quincy Railroad, asking a readjustment of the freight rates on coal which, unless settled by the interested parties as above suggested, will be the occasion of another lengthy and laborious hearing and order upon this subject.

Attention is again directed to the opinion in Application No. 91 in the next to the last paragraph thereof, which reads, taking the record as a whole, the Commission finds that the expenses of the applicant carriers in this State have been increased by increased cost of materials and supplies and advances in wages, and "that charges for freight service, including switching and other special service now in force within this State, are insuffi-

cent and the increases hereby authorized are fair, just and reasonable *temporarily* to meet the emergency and needs of the carriers; that for the purposes of this order, the rates and fares hereinafter authorized are just and reasonable *temporary* rates and are fair to the public and to the applicants and intervenors, and they are therefore authorized to go into effect subject to such readjustment as actual experience may prove to be necessary." The above language again forcefully and clearly expresses the thought that the increases authorized under Application No. 91 were temporarily made, and were subject to readjustment "as actual experience may prove to be necessary."

The answers of the carriers set forth the alleged fact that a large proportion of the coal hauled from said coal fields into the City of Boulder is moved by motor trucks and other vehicular means at a greater per ton rate than is charged by the rail carriers, and the argument is made that, because of such alleged fact, the rate of $1.21½ per ton by rail is not unjust or unfair or unreasonable. But little evidence was submitted upon this question, but enough to demonstrate that but a very small percentage of the total tonnage of coal moved from said coal fields into Boulder was by means other than the rail carriers; so small a percentage, indeed, compared to the total tonnage conveyed to Boulder, as to be an almost negligible quantity.

At any rate, whether such coal may or may not be moved by motor and other vehicles at a greater or less cost than by rail, is not relevant to the issue herein involved, except, possibly, in a collateral sense. The principal movement of coal into Boulder by motor and other vehicles, as disclosed by the testimony, is from the Black Diamond coal mine, which is off the railroad and which in no sense could be justly classed as a competitive point with the rail carriers. Another feature also that makes the vehicular movement of coal not fairly comparable with the rail carriers is that the former movement receives the coal directly at the mine and unloads it directly into the bin of the consumer, neither of which service is performed, of course, by the rail carriers.

Taking all these circumstances and the conditions surround-

ing this matter as disclosed by the evidence into consideration, the Commission is of the opinion that the rail carriers have not justified the 35 per cent increase upon this particular coal movement authorized by the general rate increase allowed under Application No. 91 aforesaid.

ORDER.

IT IS THEREFORE ORDERED, That the defendant carriers herein, The Colorado and Southern Railway Company and Union Pacific Railroad Company, according as they participate in the transportation be, and they are hereby, notified and required to cease and desist, on or before September 1, 1921, and thereafter, to abstain from publishing, demanding or collecting their present rates for the transportation of coal of all kinds from the Northern Colorado Coal Fields to Boulder, Colorado.

IT IS FURTHER ORDERED, That said defendants, according as they participate in the transportation be, and they are hereby, notified and required to establish, on or before September 1, 1921, upon notice to this Commission and to the general public, by not less than one day's filing and posting in the manner prescribed in the Public Utilities Act, and thereafter to maintain and apply to the transportation of coal of all kinds from the Northern Colorado Coal Fields to Boulder, Colorado, rates which shall not exceed 90c per net ton.

AND IT IS FURTHER ORDERED, That this order shall continue in force until the further order of the Commission.

THE COLORADO POWER COMPANY

v.

JAMES PIRIE.

[Case No. 235. Decision No. 476.]

Monopoly and competition—Duplication of service—Adequacy of existing service.

Where service rendered by a utility in the field has been adequate and sufficient, another utility will not be allowed to duplicate the service even though it has secured a municipal franchise.

[September 21, 1921.]

Appearances: For Complainant and Protestant, Wm. V. Hodges and D. Edgar Wilson; for Defendant, E. M. Sabin and A. E. McGlashan.

STATEMENT.

By the **Commission**: This is an action brought before this Commission by The Colorado Power Company, March 31st, 1921, against James Pirie, whose Post Office address is Georgetown, Colorado, to prevent the said Pirie from exercising any rights or privileges under a franchise ordinance of the City of Idaho Springs, which said ordinance was adopted March 24th, 1921, and which grants to said James Pirie, his heirs, administrators and assigns, the right, privilege and authority to erect, construct, maintain and operate a substation or substations, an electric light and power plant and distribution system for distribution and sale of electricity within the corporate limits of the City of Idaho Springs, Clear Creek County, Colorado, and from constructing or extending the plant and system now owned by the said Pirie or any new plant or system into and contiguous to the said City of Idaho Springs, within territory as to which it is claimed the defendant has not heretofore carried on operations or furnished service, and within which territory the complainant has been operating and furnishing service as a public utility.

While there is more or less obscurity in regard to the ownership at divers times of what is now known as the "Pirie" plant, the testimony shows this electric utility was first put in operation in 1907 by "The Two American Sisters Company." "The Georgetown Power Company" then came into possession of the property. This company was succeeded by the "American Power Company," and the latter company's holdings were acquired by James Pirie, the defendant, not earlier than 1916 and apparently by sheriff's deed dated March 27, 1920. The defendant's acquisition of title to the property therefore was subsequent to the effective date of that part of the Public Utilities law of Colorado known as Section 35, which was added in the year 1917.

The Pirie plant is located about two miles below Georgetown. In 1912, the then owners constructed a transmission line to Law-

son, where it connected with the lines of the Gem Electric Company, which was the owner and operator of the line from Lawson to Idaho Springs, a distance of about seven miles.

Neither the defendant, nor any of his predecessors, over the entire period from the inception of their enterprise, and the generation of current in 1907, up to the year 1917, had ever attempted to extend their distribution lines to Idaho Springs and in fact have never entered this field up to the present time.

The evidence shows that The Colorado Power Company came into possession of the properties and rights of the United Hydro Electric Company in the year 1916, and to those of the Gem Electric Company in the year 1917, and in the acquisition of these properties took over the transmission line of the Gem Electric Company between Lawson and Idaho Springs and dismantled this line and thus became the sole and only public utility operating in the Idaho Springs field for furnishing electric lights, heat and power.

In the instant case, to grant the certificate of public convenience and necessity asked for by the defendant, would be violative of not only the letter but the spirit of the Colorado Public Utilities Act.

In times past, the slogan was "Competition is the life of trade." This sentiment carried out to a logical conclusion invariably resulted in rate cutting, the destruction and wiping out of weaker concerns by vast aggregations of wealth, until the country is now strewn with derelicts representing hundreds of millions of wasted wealth and untold human effort and endeavor. In very many instances cut-throat competition in the end resulted in a combination of the warring interests and an enormous increase in rates that were not justified and were detrimental to the welfare of the general public. This was the net result of unbridled competition.

To protect the public from such pernicious influences, the legislatures of all our states have resorted to remedial legislation and vested courts and commissions with regulatory powers to prevent the abuses spoken of. These laws are generally founded on the principle that both the public and the utility shall receive all

necessary protection. Speaking of Colorado enactments, they give the Commission power over rates, service, extensions, abandonments, etc., and are predicated upon the theory that rates must not be excessive, but that they be sufficient to give a fair return on capital judiciously and properly invested.

Both the plaintiff and defendant presented bids, last March or April, for the municipal lighting of Idaho Springs, and franchises have been granted to both parties by the City of Idaho Springs.

While Mr. Pirie claims he has always been more or less interested in what was formerly "The Two American Sisters" plant, he did not acquire title to same until after the transmission line of Senator Renshaw's Gem Electric Company had been purchased by The Colorado Power Company and had moreover been abandoned and completely dismantled.

No evidence of any substantial nature has been introduced by the defendant which would warrant the defendant's invasion of the complainant's territory. On the other hand, the complainant showed that there had not been any complaints from the citizens of Idaho Springs in regard to their service, and that its service had been sufficient and adequate to meet all the requirements and needs of the public. This being the case the defendant has in no manner, or at all, shown to this Commission that there is any necessity or convenience of the public of Idaho Springs and vicinity requiring the entry of another electrical utility in that field. On the law and the evidence, we are unable to find any good and sufficient reasons to justify the issuance of the certificate asked for.

From the testimony adduced at the hearing the Commission finds that the defendant, James Pirie, is not now, and at no time has been, serving the territory of Idaho Springs as an electrical public utility.

It further finds from the testimony, that while the evidence shows that defendant's plant, under former owners, did at one time furnish electricity at wholesale to the Gem Electric Company, which said Company was then serving Idaho Springs as a public utility, that such sales to the Gem Company, which was

distributing said electricity, wholly ceased when that company discontinued operations in the spring or fall of 1917, or about four years prior to the application of this defendant for a certificate of public convenience and necessity.

Under the testimony and facts, as presented at the hearing, and taking into consideration the provisions of the Public Utilities Act relating to certificates of public convenience and necessity, the defendant is not entitled to the certificate of public convenience, and necessity, which he seeks, nor is he entitled to operate his plant or extend his lines for supplying electric service in the City of Idaho Springs or vicinity on account of either he or his predecessors having built their plant before the enactment of the present provisions of the Public Utilities Act relating to the subject matter, as this defendant or his predecessors had never prior thereto entered the territory of Idaho Springs for the purpose of supplying electricity therein. In connection with this matter we call attention to Western L. & P. Co. v. City of Loveland, 5 Colo. P. U. C. 74; Re Palo Verde & Imperial Valley Transportation Co., Calif. P. U. R. 1920, C. 619; Re Ausable Forks Electric Co., N. Y. P. U. R. 1920, B 791.

ORDER.

It Is Therefore Ordered, That the complaint herein be sustained and that the application for a certificate of public convenience and necessity by the defendant, James Pirie, be and the same is, hereby denied.

It Is Hereby Further Ordered, That the defendant, James Pirie, is hereby prohibited from doing any acts or things or exercising any rights or privileges under the certain franchise ordinance granted to him by the City Council of the City of Idaho Springs, Clear Creek County, Colorado, and passed and adopted by said City Council and approved by the Mayor of said City on the 24th day of March, A. D. 1921, and from extending his lines from Lawson into the territory of Idaho Springs, within which territory the defendant has not heretofore carried on operations or furnished service, and within which territory the complainant is now and has been operating and furnishing adequate service as a public utility to the public in such territory.

RE CANON-RELIANCE COAL COMPANY.

[Application No. 136. Decision No. 485.]

Service—Extensions—Evidence of reasonableness—Contracts.

1. A contract entered into between a public utility and a consumer relating to service extensions is material evidence in determining whether added service should be ordered, although the Commission will not undertake to enforce specific performance of such a contract.

Service—Extensions—Electricity—Additions and betterments.

2. A demand by a power consumer for a transmission line of greater capacity than the one existing is to be treated as a demand for additions and betterments rather than a new extension in a new field.

Service—Duty to serve—Adequate facilities—Electricity.

3. As a general rule, when a utility has voluntarily entered a field and has undertaken to serve the customers therein, it must thereafter continue to serve them adequately, which naturally involves the furnishing of all reasonably adequate facilities and all necessary extensions and betterments, although the income may not at once produce a return on the added investment.

Service—Extensions—Deposits—Electricity.

4. A coal mining company demanding the construction by a power company of a transmission line of greater capacity was ordered to bear a portion of the burden of raising the additional capital necessary, the same to be refunded monthly out of the revenues received from the payment of power bills.

Service—Extensions—Electricity—Calculation of loss.

Discussion of the cost of constructing an adequate transmission line in place of one which carries an insufficient amount of current.

[November 22, 1921.]

Appearances: Hughes and Dorsey, E. I. Thayer and Berrien Hughes, Attorneys for Applicant; E. E. Whitted, Attorney for Respondent.

STATEMENT.

By the **Commission**: On June 3, 1921, The Canon-Reliance Coal Company, hereinafter referred to as the Coal Company, filed its application herein for an order from this Commission against The Trinidad Electric Transmission Railway and Gas Company, hereinafter referred to as the Power Company, authorizing and directing said Power Company to immediately

and forthwith install additional equipment necessary to supply and furnish said Coal Company at its property, the Reliance Mine, located at Ojo, Huerfano County, Colorado, 300 additional K. V. A. capacity. The Power Company is operating both in Las Animas and Huerfano County, with its main offices in Trinidad, Colorado.

Answer was filed by the Power Company on July 6, 1921. Thereafter, the cause was set for hearing and was heard before the Commission at its Hearing Room, Capitol Building, Denver, Colorado, on August 9, 1921. At the hearing thereon it was conceded by all parties hereto that no additional transformer capacity is required for the reason that at the time of the original installation in 1917, sufficient transformer capacity was then installed. It was also admitted that the original transmission line was installed as a Number 4 galvanized iron wire. It was also conceded that this transmission line is now insufficient to carry the additional load asked for. The real issue, therefore, is, is it the duty of the Power Company to reconstruct the 22.7 miles of transmission line with the copper wire, or other equally sufficient installation, for the purpose of supplying the 300 K. V. A. additional capacity to the Coal Company. The Power Company is now supplying 150 K. V. A. capacity. The Coal Company contends that it is the duty of the Power Company to furnish the funds and reconstruct said line, while the Power Company contends that before it should be compelled to reconstruct said line the Coal Company should be required to advance the sum necessary for said reconstruction.

In November, 1916, a contract was entered into between The Alliance Coal Company, the predecessor of the present company, and the Power Company, which contract was afterward assigned to the present Coal Company. Said contract was for a period of ten years, from the time power was first supplied by the Power Company, which was on June 14, 1917. According to the contract, The Alliance Company advanced $10,000.00 to the Power Company for building said line, which was to be paid back in monthly rebates on bills, together with 6% interest on the balance unpaid. About $6,300.00 of the $10,000.00 has been

thus paid, leaving a balance of approximately $3,700.00 due. The contract called for 150 K. V. A. installation, and in Paragraph 2 thereof contained the following provision:

"In the event that the consumer shall require greater capacity than that specified herein the company will, upon written application and within four (4) months of the receipt of such application, furnish and install the necessary additional transformer capacity; provided, however, that the company shall not be required to install additional transformer capacity or make any other additional capital expenditure during the last two years of this agreement."

At the time of the first installation a 450 K. V. A. transformer was installed by the Power Company. The Coal Company also at that time installed a 350 K. V. A. electric hoist. Said electric hoist has never been used on account of the lack of electric power, although said Coal Company has, according to the evidence, frequently tried to use the same. It seems that at the time of the first installation on account of high prices of copper a Number 4 iron wire was installed, as above stated, which it is now admitted by all will not carry the additional 300 K. V. A. demanded.

The above terms in the contract are referred to here that a better understanding may be had of the merits of this case. The Commission in no sense will undertake to enforce the specific performance of this contract, but it deemed that it was material evidence in determining the questions involved; and by the contract itself the Commission has determined that the Power Company itself has already voluntarily entered the field in question and is now operating therein. The Commission also finds that the 300 additional K. V. A. demanded by the Coal Company is in reality a demand for additions and betterments rather than a new extension in a new field. Also from the fact that at the time the field was entered the Power Company installed a 450 K. V. A. transformer and the Coal Company installed a 350 K. V. A. electric hoist when only 150 K. V. A. was at that time called for by the contract; and also from Paragraph 2 of said contract the Commission finds that it was the intention of the

parties at that time that additional power would be furnished by the Power Company on proper demand by the Coal Company. It is contended by the Power Company that it has, by its contract, limited its offer of service to the present amount furnished. This is not entirely clear to the Commission, for the reason that if we were to admit that the Power Company was at liberty to so limit the amount that it would furnish, the contract itself provides for additional service at any time prior to within two years of the termination of the contract, which has about six years yet to run, and as said heretofore the fact of the building of the hoist by the Coal Company and the 450 K. V. A. transformer by the Power Company does not bear out this contention.

From the facts adduced at the hearing, the Commission is bound to and will treat this application not as an application for extension into new territory but as an application for additions and betterments to equipment already furnished.

The Colorado Public Utilities Act of 1913 provides as follows:

"(b) Every public utility shall furnish, provide and maintain such service, instrumentalities, equipment and facilities as shall promote the safety, health, comfort and convenience of its patrons, employes and the public, and as shall in all respects be adequate, efficient, just and reasonable." L. 1913, p. 468, Sec. 13.

"Whenever the Commission, after hearing had upon its own motion or upon complaint, shall find that the rules, regulations, practices, equipment, appliances, facilities or service of any public utility, or the methods of manufacture, distribution, transmission, storage or supply employed by it, are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the Commission shall determine the just, reasonable, safe, proper, adequate or sufficient rules, regulations, practices, equipment, appliances, facilities, service or methods to be observed, furnished, constructed, enforced or employed and shall fix the same by its order, rule or regulation. The Commission shall prescribe rules and regulations for the performance of any service or the furnishing of any commodity of the character furnished or supplied by any public utility, and upon proper tender of rates such

public utility shall furnish such commodity or render such service within the time and upon the conditions provided in such rules." L. 1913, p. 475, Sec. 24.

Also "Whenever the Commission, after a hearing upon its own motion or upon complaint, shall find the additions, extensions, repairs or improvements to, or change in the existing plant, equipment, apparatus, facilities, or other physical property of any public utility, or of any two or more public utilities, ought reasonably to be made, or that a new structure or structures should be erected to promote the security or convenience of its employes or the public, or in any other way to secure adequate service or facilities, the Commission shall make and serve an order directing that such additions, extensions, repairs, improvements or changes be made or such structure or structures be erected in the manner and within the time specified in such order." L. 1913, p. 476, Sec. 25.

It will thus be seen that there is no question as to the jurisdiction of the Commission to make such an order as the one herein applied for, if in their judgment such an order is a reasonable one. In fact, the respondent, the Power Company, in their brief have conceded such jurisdiction, contending, however, that such an order by the Commission would be unreasonable.

The Coal Company contends that an adequate transmission line built of Number 3 aluminum wire could be constructed at an expense of $7,535.00. This, however, the engineers for the Power Company testified would not be suitable for this transmission line, and the engineers of the Power Company testified that they would not recommend the building of a line of this character. The testimony shows that the exact length of this transmission line is 22.7 miles. The Power Company's figures for the reconstruction of this line, using a Number 3 copper wire, is as follows:

Copper wire No. 3	$11,000.00
Labor in removing old wire	600.00
Labor in installing new copper wire	2,000.00
Contingencies 5% and engineering expense 10%, making the total amount of	$16,036.17

The two items for removing old iron wire and installing new

copper wire amount to $2,600.00 in the Power Company's figures. It seems to the Commission also that the item of engineering and contingencies which would amount to 15% is large, as estimated by the Power Company.

What is proposed is to purchase and restring a new copper wire and take down the old iron wire, which should not require extensive engineering. The right of way for the line is acquired and the poles thereon are already located. The cost of stringing a Number 3 copper wire, including labor and all construction overheads, for a similar distance, as determined in a hearing of another utility which was had before this Commission, is $12,175.00. By adding $600.00 for cost of removing old wire would give us a figure of $12,775.00. This item is a reasonable figure for this work. There is another item, however, which should be deducted from this amount. There are approximately 68 miles of old wire now in use on this line which, in the opinion of the Commission, is of the value of $1.53 per 1,000 feet. The salvage thereon would be $544.00. Deducting this amount would leave the sum of $12,221.00, which the Commission believes would be a reasonable amount for the reconstruction of this line.

According to the Power Company's answer, the original cost of the present line was $26,542.00. If we add thereto $18,000.00 for power house capacity dedicated to the demand of 450 additional K. V. A. as contended for by the Power Company, we would have $44,542.00 in the investment. This, together with the $12,221.00, a reasonable cost for reconstruction with the copper wire, would make an investment of $56,763.00. A reasonable estimate of the revenues that would be obtained with the transmission line re-enforced is as follows:

450 K. V. A. Sub-station per year, Service Charge (Schedule M)	$ 5,400.00
450,000 K. W. H. @ 1⅓ cents per K. W. H., Energy Charge (Schedule M)	6,000.00
The Town of La Veta paid to the company in 1920	2,200.00
Total Revenue	$13,600.00

(The testimony shows that the only revenue actually received from this line outside of that obtained from the Coal Company was $2,200.00 from the town of La Veta. It is also contended

by the Power Company that there is very little prospect of any additional revenue being obtained from this line in the future.)

OPERATING COSTS WITH RE-ENFORCED COPPER WIRE.

Estimated amount of power to supply the Reliance Mine and the Town of La Veta for one year, allowing 10% loss in transmission.....600,000 K. W. H.
Cost of 600,000 K. W. H. @ 1.4042 cents per K. W. H.....$8,425.20

(The cost of generating a K. W. H. of the company as a whole, as taken from the reports of the Power Company to the Public Utilities Commission for 1920, was 1.196 cents.)

The switchboard cost on this branch, as testified to by the Power Company, per K. W. H. was 1.4042 cents. This cost, it is contended, is exclusive of maintenance and overhead expenses as per the following table submitted by the Power Company.

The Power Company submitted figures upon the present cost of operation of the transmission line from Mutual to Ojo for an average month, which are as follows:

AVERAGE MONTH, 1920, TO OJO ONLY.
(Tr. 49 and Respondent's "Exhibit A.")

K. W. H. Consumption.....20,000 K. W. H.		
Switchboard Costs	$ 280.84	
Maintenance Cost (line and sub-station)	305.95	
Interest on Investment (8%)	176.95	
Taxes	253.26	
Totals Costs	$1,017.00	
Revenue	545.89	
Difference	$ 471.00	
Switchboard Costs per delivered K. W. H.		1.4042c

Also figures if the line was re-enforced and sufficient power was supplied to operate the large hoist, which are as follows:

AVERAGE MONTH, 1920, OJO ONLY.
(Tr. 58. Respondent's "Exhibit B.")

K. W. H. Consumption.....26,000 K. W. H.		
Switchboard Costs	$ 373.52	
Maintenance Cost (line and sub-station)	305.95	
Interest on Investment (8%)	283.61	
Taxes	268.67	
Total Costs	$1,231.75	
Revenue	899.53	
Difference	$ 232.22	
Switchboard Costs per delivered K. W. H.		1.4042c

These Exhibits "A" and "B" are far from satisfactory to the Commission in arriving at a conclusion as to actual money saved or lost to the Power Company by the re-enforcement of this line. However, from these two exhibits, which are as to Ojo only (the property of the Coal Company), it seems the re-enforcement of this line by the Power Company would reduce the loss per month from $471.11 to $232.22, or a saving of $238.89 per month, or $2,866.68 per year. If this saving can be accomplished by the further investment by the Power Company of $12,221.00 in this line, this would lift quite a burden from the other customers of the company as a whole, which it is contended by the Power Company they are now subjected to; and the Power Company would thus earn a better return on the total investment. The point is, it is admitted by the evidence that the actual loss to the Power Company would be less with the line re-enforced than it now is, even with the added investment. We have said that these Exhibits "A" and "B" offered to show losses sustained are unsatisfactory. The item of switchboard costs, $373.52 per month or 1.4042c per K. W. H., seems to be large. There is no testimony on the part of the Power Company concerning this item, which is offered for the purpose of informing the Commission as to just what general expenses are included in arriving at 1.4042c per K. W. H.

Maintenance Cost.

The maintenance cost of the line and substation as given in respondent's Exhibit "B" is $305.95. It seems to the Commission that the time selected for the beginning and ending of the term on which these maintenance costs were computed is quite abnormal. The testimony shows that this period selected by the company was a period of storms of great severity, no other storm of equal severity having occurred, according to the evidence, since the erection of this line. The storm, it seems, occurred in October of 1920, and in that month there was spent in reconstructing $2,111.79, and in November of the same year $765.33, and in December $753.02, or a total for the three months of $3,630.14, which seems to have been prorated on the line

from Mutual to Ojo. The average monthly maintenance of this line from Mutual to Ojo from August, 1919, to August, 1920, from the testimony introduced, would approximate $42.32 per month, while in the exhibit it will be noticed the estimate is $305.95 per month.

The item of interest is figured on the basis of 8% per annum. It will be noted that this item would have to be paid whether the line was re-enforced or not, with the exception of interest on the additional investment of $12,221.00 for re-enforcements.

Taxes.

Taxes, $253.26 per month. The valuation of the property in Huerfano County, in which this line is located, for taxes for 1920 was fixed by the Tax Commission at $289,870.00, on which the Power Company paid a total tax to Huerfano County of $9,-434.73 for all purposes. Approximately one-third of all the taxes paid by the Power Company in Huerfano County, or the sum of $3,039.12, is prorated by the Power Company to the transmission line from Mutual to Ojo.

From the tables herein given by the Commission on Page 7, designated estimate of revenues that would be obtained and operating costs with re-enforced copper wire, it will be noted that after operating costs are paid there still will remain a revenue of $5,174.80 per annum. These figures, of course, include only operating costs. It will be noted also that concededly, by the Power Company's own figures, the further investment of this $12,221.00 in betterments will reduce the loss to the company $238.89 per month or $2,866.68 per year, and it can not, therefore, be said that the ordering of this outlay for betterments on this branch would be adding an additional burden to the consumers of the whole system.

As a general rule, when a utility has voluntarily entered a field, as the Power Company seems to have done, and has undertaken to serve the customers therein, it must thereafter continue to adequately serve them, which naturally involves the furnishing of all reasonably adequate facilities. A utility is not justified in enforcing a rule that all extensions or betterments will

be refused where the income would not at once produce a return on the added investment, for the reason that such an invariable rule would retard the development of the industries of the state. In ordering any extension into new territory the Commission ought generally to be reasonably assured that the extension at the outset or within a reasonable time would produce a reasonable return on the investment. The improvement in question, however, as the Commission has already stated, can not be regarded as an extension into new territory but as addition and improvement of the facilities already extended into the territory. The Commission, therefore, has ample authority under the law and the rulings of the various commissions to order these improvements made at the expense of the Power Company. However, in this particular case there are other considerations which the Commission feels bound to consider. The evidence shows that this line of 22.7 miles in length extends westward in Huerfano County toward or near the western limits of the coal fields. The testimony shows that the Coal Company and the town of La Veta (which said town affords a revenue to the company from this line of approximately $2,200.00 per annum) are the only two customers of the company on this line; that there are only two other coal companies operating in this vicinity, which other companies generate their own power and are not customers of the Power Company. It is contended by the Power Company there is no probability that it will be able to add any other customers on this line. This seems to be an important matter to the Commission. While it is possible that there might be in the future other companies springing up along this line, the Commission has no way of determining this at this time.

The Commission realizes the difficulty which utilities have at present in selling their securities to raise additional capital. It is, therefore, of the opinion and will so hold that the Coal Company itself shall bear its proportion of the burden of raising the additional capital necessary in re-enforcing this line, the same to be refunded to the said Coal Company monthly out of the revenues received from the payment by the Coal Company

of its monthly power bills. Upon the payment, as aforesaid, to the Power Company of the sum herein specified, it is the opinion of the Commission and the Commission will so order that it is the duty of the Power Company to so improve and increase its facilities as to furnish to the Coal Company the 300 additional K. V. A. asked for in the petition herein, which said betterments and improvements shall include the re-enforcement of the line in question from Mutual to Ojo with a Number 3 copper transmission line.

ORDER.

IT IS HEREBY ORDERED, That the respondent, The Trinidad Electric Transmission Railway and Gas Company, on or before sixty days from the date of this order, supply and furnish the applicant, The Canon-Reliance Coal Company, on its property at its mine at Ojo, Huerfano County, Colorado, 300 additional K. V. A. capacity and to install, string, construct and maintain additional facilities, including the re-enforcement of its transmission line, for that purpose with a Number 3 copper wire from Mutual to Ojo in said county; that The Canon-Reliance Coal Company advance and deliver to said Trinidad Electric Transmission Railway and Gas Company the sum of $6,110.50 for the purpose of providing a portion of the capital for the reconstruction of said line, the same to be returned to it as hereinafter provided; that before the commencement of the reconstruction of said line the said Coal Company shall enter into a contract with the said Power Company for a term of ten years, providing for the furnishing of the said additional K. V. A. at the legal rates now in force and on file or that may hereafter be in force and on file with this Commission; that on the date of signing said contract the said Coal Company shall advance to the said Power Company the said sum of $6,110.50.

IT IS FURTHER ORDERED, That the said Trinidad Electric Transmission Railway and Gas Company and its assigns shall refund to said Canon-Reliance Coal Company and its assigns said sum of $6,110.50 so advanced by returning monthly to said Coal Company 20% of each monthly bill, together with 6% interest on balances due on said $6,110.50 for all power fur-

nished said Coal Company over and above the original 150 K. V. A. now being furnished under a contract entered into between the Power Company and the Coal Company on November 1, 1916, which said contract and the agreement for refund therein it is not the intention of the Commission by this order to disturb.

RE DENVER, BOULDER & WESTERN RAILROAD COMPANY.

[Application No. 12. Decision No. 490.]

Commissions—Jurisdiction—Judicial power—Circumstances occurring subsequent to court judgment.

1. A Commission has no power to exercise the powers of a **nisi prius** court to exonerate and excuse from compliance with a judgment of the Supreme Court owing to facts and circumstances occurring subsequent to the rendition of the judgment by that court.

Service—Abandonment—Commission powers—Effect of court order.

2. A commission has no power to authorize a railroad to discontinue service after the Commission has been ordered by the Supreme Court to reverse and vacate an order permitting abandonment, and the company has been ordered to resume operation, although the evidence shows that between the issuance of the original order and the order of the Supreme Court the company has sold and delivered its property, applied the proceeds upon the first mortgage bonds, and is without funds or ability to acquire or operate the road.

[ORDER ON SUPPLEMENTAL PETITION.]

[December 28, 1921.]

Appearances: E. E. Whitted and Bardwell, Hecox, McComb & Strong, all of Denver, for Applicant; John R. Wolff, of Boulder, for Protestants.

STATEMENT.

By the **Commission**: This matter is before the Commission on the supplemental petition of applicant, The Denver, Boulder & Western Railroad Company, filed March 24, 1921.

In order that the status of the case may be readily understood, as of said date, a brief resume of what has hitherto transpired may be stated as follows:

In November, 1917, applicant filed its petition and gave its notice of intention to cease operation of its railroad, dismantle the same, and withdraw from the public service on December 27, 1917, in compliance with General Order No. 16, of the Commission, then in effect.

Thereafter, and on December 12, 1917, upon due notice to all parties, a hearing was held with the result that on December 26, 1917, the Commission rendered its decision denying the application and ordering petitioner to continue operation of its railroad property.

On or about May 27, 1919, petitioner filed its application with the Commission, to reopen this case and for permission to abandon the operation of its railroad and withdraw from the public service.

In accordance with the practice of the Commission, due notice of petitioner's said application was given to all parties interested in the continued operation of applicant's railroad, with the result that protests were filed and objections made by a number of patrons of said railroad against the proposed abandonment and discontinuance of service; and, on June 6, 1919, petitioner's said application was made the subject of hearing before the Commission, after due and legal notice to all parties interested. As the result of said hearing, and on July 23, 1919, the Commission made and entered its order in said cause, in and by which applicant petitioner was given permission to withdraw from the public service, abandon its railroad operation, and cease to operate on September 15, 1919, at twelve o'clock midnight.

5 Colo. P. U. C. 742.

Subsequently, and on August 6, 1919, applicant filed its petition to modify and amend the order of July 23, 1919, so as to permit the cessation of operation and to withdraw from the public service as of August 6, 1919, instead of September 15, 1919, by reason of a disastrous flood or cloudburst occurring in Boulder Canon, which said railroad traversed, on the night of July 31, 1919. Upon due notice to all interested parties, said matter was heard; and, on August 19, 1919, the Commission

made and entered its order therein permitting said cessation of operation and withdrawal from the public service as of August 6, 1919, by reason of the damage caused by said cloudburst to the tracks, bridges and right-of-way of said Railroad Company.

5 Colo. P. U. C. 788.

Thereafter protestants filed a petition for a rehearing, and the same coming on regularly to be heard by the Commission, the Commission entered its order, September 9, 1919, denying a rehearing.

On October 7, 1919, protestants applied for a Writ of Review to the Honorable the Supreme Court of the State of Colorado, to review the decision of the Commission, which said Writ of Review was issued by our Honorable Supreme Court on said 7th day of October, 1919, and served upon the Commission October 8, 1919.

Thereafter such proceedings were had in our said Honorable Supreme Court, that on the 10th day of January, 1921, a decision was rendered in the said Supreme Court, which decision of our said Supreme Court vacated the orders of this Commission theretofore entered therein with directions; and, on March 9, 1921, a remittitur was issued out of and under the seal of our said Supreme Court directed to this Commission in said cause, whereby this Commission was ordered to vacate and set aside its orders theretofore issued therein; with directions to the Commission to enter an order requiring the road to be operated and make a fair test of its ability to earn the necessary income to justify its further operation.

Up-to-Date Mining Co. v. Pub. Util. Comm.,
69 Colo. 309-313.

On March 14, 1921, in compliance with the mandate of our said Honorable Supreme Court, the Commission did make and enter its order herein, wherein and whereby the orders of this Commission made and entered herein on July 23, 1919, and on August 19, 1919, were vacated and set aside; and, in further compliance with the order of our said Supreme Court, as evidenced by its said remittitur to this Commission, it was further

ordered that said applicant, The Denver, Boulder & Western Railroad Company, resume operation of its line of railroad and to continue the operation thereof until it should have made "a fair test of its ability to earn the necessary income to justify its further operation."

Up-to-Date Co. v. Pub. Util. Comm., *supra*.

Due and legal service was made of the order of the Commission, upon said applicant railroad and its attorneys, and upon the attorney for protestants and other parties interested in said cause, on said 14th day of March, 1921.

On March 24, 1921, applicant filed its supplemental petition in support of its application to abandon its railroad operation, dispose of its property, and withdraw from the public service, in which said supplemental petition the salient facts are alleged as hereinabove set forth.

In and by its said supplemental petition, applicant further alleges that after the making of said order of July 23, 1919, for a valuable consideration, and on August 14, 1919, all the property of every description of petitioner was sold to The Morse Brothers' Machinery & Supply Company, a corporation, and that said sale was made in good faith and upon reliance of the order of the Commission permitting the cessation of operation and withdrawal of petitioner's railroad from the public service; and that immediately thereafter said The Morse Brothers' Machinery & Supply Company proceeded under said agreement of sale to take possession of all the property of every character theretofore belonging to petitioner, and proceeded to dismantle the said property and sell and dispose of the same; that in pursuance thereof of said The Morse Brothers' Machinery & Supply Company had, upon the date of the filing of said supplemental petition, to-wit, March 24, 1921, taken up practically all of the tracks of the petitioner, removed practically all of the property of the petitioner, and that the same had been resold by said purchaser and shipped out of the state, large portions of the same going to purchasers in the Kingdom of Japan; and that but a small portion of the property theretofore belonging to petitioner is now in Boulder County, State of Colo-

rado; and that by reason thereof, in addition to the financial inability of said railroad company to comply with said order of said Supreme Court as conveyed by order of this Commission on March 14, 1921, it is now a physical and potential impossibility for petitioner to comply with the order of the Supreme Court and of this Commission directing petitioner to continue or to resume the operation of its said railroad property.

Said supplemental petition sets out somewhat at length other reasons why the mandate of the Supreme Court, as conveyed through the instrumental order of this Commission, should not be obeyed, and sets forth certain paragraphs of our Public Utility Act pertaining to rehearings and the filing or giving of a suspending or supersedeas bond, being Sections 52, 53-A and 53-C of the Public Utility Act; and then alleging that by reason of protestants not having complied with the sections of the Public Utility Act plead, in not giving a suspending or supersedeas bond to preserve the status quo of the property of petitioner pending a decision in the Supreme Court upon the Writ of Review theretofore sued out by protestants, and the alleged fact that the property of applicant had prior thereto been disposed of in good faith and, as it had a lawful right so to do, that under these circumstances any order of this Commission requiring petitioner to resume or attempt to resume the operation of its railroad property would deny to petitioner the protection of the law and would be in violation of the constitution of the State of Colorado and the constitution of the United States; and that the enforcement of such order would require the petitioner to devote its property to the public use without just compensation and without due process of law, contrary to the constitution of the United States and of the State of Colorado.

Other matters are plead in the supplemental petition such as the alleged fact that there was not and has not been since the application for the Writ of Review and since the Supreme Court has issued its decision thereon, any business tributary or available to said railroad to warrant its continued operation.

Petitioner, therefore, prays that this Commission, after due

notice to all parties interested and after a hearing thereon, make and enter its order:

First, Finding the fact to be that since such changed conditions were lawfully brought about, and lawfully prevent the enforcement of the order of this Commission of March 14, 1921, requiring the operation of said railway;

Second, That said order of March 14, 1921, on account of said changed conditions, be set aside and held of no effect;

Third, That the sale, disposal and dismantling of said property of petitioner and the cessation of operation of said railroad be found to be lawfully accomplished;

Fourth, That the Commission find and adjudge the said acts of petitioner, since said order of July 23, 1919, in the sale of its property to be lawful and proper;

Fifth, That petitioner be found and adjudged exonerated and excused, because of the alleged foregoing facts, from obedience to said order of the Commission of March 14, 1921, whereby applicant was required to resume the operation of its said line of railroad.

Upon the filing of said supplemental petition, service thereof was made upon protestants with the result that on June 3, 1921, protestants filed what is denominated an "Answer" to said supplemental petition. In said answer protestants admit the facts alleged in the first ten paragraphs of said supplemental petition; and, in answer to the eleventh and twelfth paragraphs thereof, deny each and every allegation in said supplemental petition contained, except that they admit the issuance of a Writ of Review out of the Supreme Court of this state to review the decision of this Commission in question, and aver that the dismantling of said railroad property by the purchaser thereof, The Morse Brothers' Machinery & Supply Company, was had and done in collusion with the owners of said The Denver, Boulder & Western Railroad Company for the purpose of defeating any judgment that might be obtained by protestants in the prosecution of said Writ of Review; and that no order or judgment permitting petitioner to abandon or cease operation, and to withdraw from the public service, had become final;

and that said purchasers of said property had actual notice of the pendency of the action in the Supreme Court, and that the purchasers of said property destroyed and tore up said railroad deliberately and in collusion with the officers of applicant railroad for the purpose of defeating any judgment that might be rendered therein by said Supreme Court.

Other matters are alleged in the answer to said Supplemental petition which are of the same tenor and effect, except that it is admitted by protestants that no suspending or supersedeas bond had been applied for or given in compliance with the Public Utility Act to preserve the status of the property in controversy pending the decision of the Supreme Court on the Writ of Review sued out by protestants; and further answering, protestants allege that all the matters and things contained and set forth in said supplemental petition were presented to the Supreme Court of Colorado by petitioner in its motion for rehearing; and, attached to and made a part of said answer is a copy of the motion for rehearing marked "Exhibit A," and that on the 10th day of January, 1921, said motion for rehearing was overruled and denied by our said Supreme Court and that by reason thereof, all matters and things contained and set forth in said supplemental petition became and is *res adjudicata.*

The prayer of the answer to the supplemental petition is that said petition be dismissed for want of power of this Commission to grant the relief therein prayed.

The matter was set for hearing upon the issues joined at the hearing room of the Commission, Capitol Building, Denver, Colorado, for Wednesday, June 8, 1921, at 10:00 o'clock A. M., at which time and place testimony was submitted in support of the contentions of the respective parties to this cause. At the conclusion of the hearing on June 8th, the matter was continued for the submission of briefs, and any further testimony that might be desired, to a later date to be fixed by the Commission. In pursuance thereof, the Commission, upon its own motion, set the matter for further hearing on November 8, 1921, and gave notice to all interested parties; but, by stipulation

filed, the hearing was continued from November 8th, 1921, to Tuesday, November 22, 1921, when the same was resumed, at the conclusion of which, time was given for the submission of briefs and oral argument, and the same, having now been filed and argued, is the subject of decision.

Applicant has filed an elaborate brief in the support of its contention that by reason of the facts and circumstances alleged to have occurred subsequent to the orders of the Commission in July and August, 1919, and prior to the rendition of the judgment of the Supreme Court upon review in January, 1921, applicant should be exonerated and excused from obedience to the mandate of the Supreme Court to the Commission and by the Commission transmitted to the parties to this cause. In its brief, applicant cites numerous cases and authorities in support of the proposition that a *nisi prius* court may exonerate and excuse from the effects of a judgment of the Supreme Court owing to facts and circumstances occurring subsequent to the rendition of a judgment of reversal by the Supreme Court. With this contention, the Commission is in full accord for the reason that it is convinced such is the law; but the fact that is lost sight of by applicant is that this Commission, under the power that created it, is in nowise vested with judicial power; the Commission, it is true, is a quasi judicial tribunal, but the act creating it does not confer upon it the powers, responsibilities and duties of a court. Hence, the contention of applicant that the Commission should exercise the prerogative of a judicial tribunal in this cause is not applicable.

It will be observed that the mandate of the Supreme Court uses this language in its concluding sentences:

"We are, therefore, of the opinion that the Commission did not legally pursue its authority in the making of said order. It is, therefore, vacated and set aside; with directions to the Commission to enter an order requiring the road to be operated, and to make a fair test of its ability to earn a necessary income to justify its further operation."

Up-to-Date Co. v. Pub. Util. Comm., 69 Colo. 313.

Taking that mandate upon its face, it tells the Commission

that it did not legally pursue its authority in the making of the order under consideration. It also tells the Commission to vacate and set aside said orders. It is true that the mandate goes further and directs the Commission to enter an order requiring the road to be operated and to make a fair test of its ability to earn the necessary income to justify its further operation. Applicant questions the regularity and legality of that portion of the Supreme Court mandate which directs the Commission to order resumption of the service and further operation of the railroad. Without presuming to determine, it may be said that this objection might well be urged as to that portion of the Supreme Court mandate. But that in nowise affects the power of the Supreme Court to say what it has said, that the Commission failed to regularly pursue its authority, and to order the Commission to vacate and set aside its orders in the premises. That, the Commission did by its order of March 14, 1921, so that after said date the *status quo* is as though no order whatever had ever been rendered by the Commission. When the order of July 23, 1919, and the modified order of August 19, 1919, was made and entered by this Commission, it gave the applicant permission and authority to do said things. Upon review regularly pursued, the Supreme Court of Colorado, the highest tribunal in this state, directed this Commission to vacate and set aside those orders. It did so. Hence, as stated before, at this point matters are exactly as though the orders of July 23, 1919, and August 19, 1919, had never been made and entered by this Commission.

Denver Co. v. C. B. & Q. R. R. Co., 67 Colo. 155-161.

In the above case this language appears:

"When the Court set aside the order of the Commission, that order was thereby annulled and held for naught, and was of no more effect than if it had never been entered. The case stood precisely as it did before any hearing had been held or order entered at all."

Denver Co. v. C. B. & Q. R. R. Co., *supra,* Page 161.

That being true, it leaves applicant with the duty to serve the public by the operation of its railroad as though the orders of

1919 had never been made and entered herein. Whether, however, the matters and things occurring subsequent to those orders and prior to the rendition by the Supreme Court of its order of reversal and vacation, applicant should be exonerated and excused from compliance therewith, this Commission determines it has no power so to decide under the act creating it. To hold otherwise would be to arrogate to the Commission substantially all powers of a *nisi prius* court; and we are convinced, upon a careful reading of the Public Utility Act, no such intention was ever in the mind of the Legislature in creating this Commission.

From the testimony submitted to the Commission at the hearings upon the issues raised by the supplemental petition and answer thereto, the Commission deems it not improper, however, to make the following findings of fact:

That the orders of this Commission entered herein July 23, 1919, and August 19, 1919, remained without supersedeas or suspending bond throughout the period until final decision of review thereof in the Supreme Court determined January 10, 1921;

That during said period practically all of the physical property of applicant, The Denver, Boulder & Western Railroad Company, was sold and disposed of and delivered into the possession of The Morse Brothers' Machinery & Supply Company, a corporation, in good faith and in reliance upon the orders of this Commission;

That said purchaser took said property in good faith and was a *bona fide* purchaser thereof;

That by reason of the purchase and sale of said property, conditions affecting the physical property of said railroad were such as that at the date of the motion for rehearing in said cause, to-wit, January, 1921, said Railroad Company had no physical railroad property to operate;

That said applicant Railroad Company was and is without funds or ability to acquire or operate what was hitherto its said railroad;

That the purchase price of said railroad property has been long prior hereto wholly applied upon the first mortgage bonds

of said Railroad Company, and that by reason thereof the lien of said first mortgage has been fully released by the trustees thereof and the physical property of said Railroad Company has heretofore wholly been conveyed and transferred from it to said purchaser, The Morse Brothers' Machinery & Supply Company.

Our Supreme Court has announced in unmistakable terms, the duty of an inferior tribunal, or quasi-tribunal, in such cases, as follows:

"The rule is that where the mandate of an appellate court directs a specific judgment to be entered, the tribunal to which such mandate is directed must yield obedience thereto. No modification of the judgment so directed by the appellate tribunal can be made by the trial court, nor can any provision be engrafted upon or taken from it. * * * When a particular judgment is directed by the appellate court, the lower court is not acting of its own motion, but in obedience to the order of its superior. What that superior says it shall do, it must do, and that alone. * * * We directed a particular judgment, and nothing is left for the trial court to do but enter it."

Galbreath v. Wallrich, 48 Colo. 127.

Denver Co. v. C. B. & Q. R. R. Co., 67 Colo. 158-159.

For the reasons given, the Commission concludes it has no jurisdiction to act in the premises, and said supplemental petition will be dismissed.

ORDER.

IT IS THEREFORE ORDERED, That the prayer of applicant's supplemental petition be, and the same is, hereby denied; and,

IT IS FURTHER ORDERED, That said supplemental petition be, and the same is, hereby dismissed.

RE TRINIDAD ELECTRIC TRANSMISSION RAILWAY & GAS COMPANY.

[Application No. 152. Decision No. 512.]

Service—Abandonment—Return—Reasonableness as a whole.

1. The return from each branch or class of a public utility company's business must be considered separately for the purpose of determining whether service should be discontinued, rather than the return from the business as a whole.

Service—Effect of contract—Power of state.

2. Franchise obligations requiring a street railway to continue service are made subject to the power of the state to regulate and are, therefore, entirely irrelevant and immaterial in a proceeding to determine whether abandonment of service should be permitted.

[February 8, 1922.]

Appearances: E. E. Whitted, of Denver, and James McKough, of Trinidad, for Applicant; Frank H. Hall for City of Trinidad and the Trinidad-Las Animas County Chamber of Commerce; Senator S. W. De Busk, of Trinidad, for himself and others similarly situated; H. L. Anderson, of Trinidad, for himself and other residents and property owners of West Main Street, Protestants.

STATEMENT.

By the **Commission:** This matter is before the Commission upon a petition of applicant, The Trinidad Electric Transmission Railway and Gas Company, filed November 17, 1921, whereby applicant seeks permission of the Commission to abandon certain portions of its existing street railway system in the City of Trinidad, Colorado.

The petition alleges, in addition to the incorporate capacity of applicant, that it has operated and is now operating a street railway system in the said City of Trinidad along San Juan Street from Pine Street to Baca Street; Baca Street from San Juan Street to Arizona Avenue; Arizona Avenue from Pine Street to Baca Street; Baca Street from Arizona Avenue to San Pedro Street; San Pedro Street from Baca Street to race track and fair grounds and city limits, and on Stonewall Avenue from San Juan Street to applicant's bridge across the

Las Animas River, thence over said bridge to intersection on Main and Water Streets; Main Street from Water Street to Beach Street; Animas Street from Main Street to Fourth Street, and on Grant Avenue from Fourth Street to Monroe Street.

Attached to the petition and made a part thereof is a map or plat of the City of Trinidad, upon which is shown the location of the lines of street railway and the location of those portions or part of said line which applicant desires to abandon, which are indicated by blue lines, and that part which is desired not to abandon is indicated by red lines on said map. It appears therefrom that those portions of said street railway line desired to be abandoned, under the allegations of the petition, embrace all the street railway lines within the City of Trinidad except the following: From the city limits at the southwesterly corner of said City of Trinidad where the interurban line of said applicant enters the City of Trinidad from Sopris and Starkville, paralleling the right-of-way of the Santa Fe and Colorado and Southern Railways to San Juan Street, thence on San Juan Street to Pine Street, thence on Pine Street to Commercial Street, thence on Commercial Street to Main Street, thence west on Main Street to Ash Street, and from the intersection of Commercial and Main Streets east on Main Street to Beach Street.

At the hearing, however, by agreement made a part of the record, it was agreed between applicant and protestants interested, including the city, that that portion of the line extending west on Main Street from the intersection of Commercial Street with Main Street to Ash Street would be abandoned, and in lieu thereof applicant would operate its cars from the intersection of Commercial Street with Main Street, east on Main Street to Water Street, so that the petition for abandonment will be considered as being modified to that extent.

The applicant company operates, as above indicated, an interurban electric street railway from the coal camps of Sopris and Starkville, some miles distant from Trinidad, and the operation desired to be continued is merely such operation as is af-

forded by said interurban service; so that if the abandonment of the strictly urban or city lines is permitted, the only street car service that will thereafter be maintained by applicant is such as is afforded by the interurban lines entering the city from the coal camps, and such method of operation would be that the cars entering the city from the city limits on the route above described would end at the intersection of Main and Water Streets, and to traverse in returning to the coal camps the same route as was traversed in entering the city to the point of termination at Main and Water Streets.

The applicant bases its request for permission to abandon upon the ground set forth in the fifth paragraph, as amended, of the petition, that it is impracticable for it to continue operating the portions of its lines indicated in blue on the map, and that the maintenance and operation of said portion of its lines or system is a useless expense and far exceeds the revenue derived therefrom and is an economic loss; and that there is no demand for the service now, nor will there be in the future such demand as will be sufficient to pay operating expenses or justify a continuance of the operation of said lines.

In the sixth and last paragraph of the petition applicant alleges that it is practicable for it to use the lines shown in red on the map, and hereinbefore outlined, to bring its interurban cars into the city over these lines, and that it may perhaps continue local or interurban service over these lines to serve the public.

Upon the filing of the petition, service thereof was made upon the City of Trinidad and upon its Chamber of Commerce, with the result that on December 5, 1921, The Trinidad-Las Animas County Chamber of Commerce filed its answer to the petition, wherein, in addition to the allegation of its capacity as an association of the citizens residing in the City of Trinidad organized to promote the welfare of the people of the city and of Las Animas County, admits the allegations of the first four paragraphs of the application, denies the allegation in paragraph five, admits the allegation in paragraph six, but denies that the city

will, in any way, be benefited by running interurban cars into the city over said lines.

For further and separate defense it is alleged that the applicant owns and operates a street railway line within the city, and in addition thereto and as a part of its street railway system it owns and operates interurban lines extending from said city to outlying towns and mining camps; that said street railway system in its entirety consists of two separate branches or lines, an urban line accommodating the citizens of the City of Trinidad, and an interurban line accommodating the residents of outlying towns and mining camps, and that each of said lines caters to a separate and distinct group of patrons.

It is further alleged that the interurban line serves the patrons along its route at hourly intervals, while the urban or city cars run on a twenty-minute schedule for the accommodation of its city patrons; and that the abandonment of said lines, as prayed for, would mean the abandonment of the entire urban or city lines within the City of Trinidad, and that the retention of the interurban line can in no way serve the patrons of the lines asked to be abandoned.

In the fourth and concluding paragraph of said separate defense it is alleged that said street railway system, and particularly that part thereof sought to be abandoned, has become a necessity to accommodate the people of the City of Trinidad, and the discontinuance of operation of any portion or branch thereof will cause great inconvenience and hardship upon the inhabitants of said city. Wherefore, respondent prays that the application of the petitioner be denied.

The City of Trinidad, though having been served with a copy of the petition, made no answer thereto.

Upon due notice given to all parties interested, including the City of Trinidad, the matter was set for hearing before the Commission on Monday, January 9, 1922, 9:30 o'clock A. M., at the City Hall in the City of Trinidad, Colorado, upon which date the same was duly heard.

At the conclusion of the hearing, time and ten days was given

applicant to file its brief from the completion of the transcript, and time and ten days given protestant, The Trinidad-Las Animas County Chamber of Commerce, to file its brief from the date of the reception of a copy of the brief of applicant.

Applicant duly filed its brief herein on January 30, 1922, and a copy of same was served upon protestant Chamber of Commerce, who, on February 1, 1922, by its letter of advice dated January 31, 1922, notified the Commission that neither the City of Trinidad nor the Las Animas County Chamber of Commerce would file a brief in the above matter, and were willing that the matter should be decided on the record as made.

In May, 1920, the above applicant applied to this Commission for authority to abandon a portion of its street railway service in the City of Trinidad on Pine Street from San Juan Street to Commercial Street, a distance of approximately five blocks.

Upon a hearing of that case and in September, 1920, the Commission rendered its decision denying the application on the principle that has frequently heretofore been announced by this and other commissions, that before a public utility may abandon its service it may be permitted to do so only when the carrier proves to the Commission that, after a fair trial under an increase in rates as permitted by the Commission commensurate with the value of the service, the same will not increase the revenue of the utility sufficiently to meet its legitimate operating expenses; and permission was therein given for an increase in fares to a seven-cent fare. Hence, it will be seen that the line has been operating under a seven-cent fare from September, 1920, until the date of the hearing in January, 1922, a period of about sixteen months.

Applicant submitted a statement of its gross operating revenues and operating expenses for the years 1914 to and including eleven months of the year 1921, marked applicant's "Exhibit 1," which did not include anything for interest or depreciation and shows the net operating revenue as follows:

Year	Gross Operating Revenue	Operating Expenses	Net Operating Revenue
1914	$38,402.59	$33,121.45	$ 5,281.14
1915	32,068.92	35,366.33	3,297.41*
1916	41,773.51	56,626.09	14,852.58*
1917	49,881.03	59,677.15	9,866.12*
1918	51,333.43	60,874.45	9,541.02*
1919	50,670.20	59,660.77	8,990.57*
1920	60,363.83	64,877.67	4,513.84*
1921 (11 months)	42,550.25	55,962.01	13,411.76*

Asterisk (*) denotes deficit.

From the above exhibit it will be observed that the entire system suffered a deficit in each of the above years save 1914, and that although an increased fare was allowed and charged from September, 1920, throughout the period subsequent to that time to include eleven months of 1921, the deficit was more apparent, and this, without any inclusion of interest on capital invested or any amount by way of depreciation. In other words, for the period 1915 to and including eleven months of 1921, there was a total loss of approximately $60,000 in operating expenses alone on the entire street railway system.

The system of applicant, for purposes of hearing, was designated in three parts or divisions; viz, the line running to the Country Club and Animas Street, the Baca Street line and the Interurban or Camp lines; and, as shown by applicant's "Exhibit 2," during the period 1919 and 1920 and eleven months of 1921, the Country Club and Animas Street line suffered a loss of $23,312.73, the Baca Street line suffered a loss during the same period of $17,422.67, while the Interurban or Camp lines during the same period show a net gain of $13,720.23. By the same exhibit it is shown that the net per cent of revenue derived and the number of passengers carried by the three divisions was as follows:

COUNTRY CLUB AND ANIMAS STREET LINE.

Year	Net Per Cent Revenue	Number of Passengers Carried
1919	10	101,988
1920	11	103,681
1921 (11 months)	11	74,579

BACA STREET LINE.

Year	Net Per Cent Revenue	Number of Passengers Carried
1919	16	134,594
1920	16	144,273
1921 (11 months)	14	94,415

INTERURBAN OR CAMP LINES.

Year	Net Per Cent Revenue	Number of Passengers Carried
1919	74	535,530
1920	73	582,658
1921 (11 months)	75	417,915

From applicant's "Exhibit 2," as above shown, it is observed that the strictly urban lines of the system contributed a small net per cent of revenue as compared with the net per cent of revenue derived from the operation of the Interurban or Camp lines; and that, comparatively, the patronage of the city lines was not sufficient during the period mentioned to overcome the cost of operating the same, while the only branch of the system that did pay its way during the period mentioned was the Interurban or Camp lines; and this, despite the fact that for almost half of the period of 1920 and eleven months of 1921 an increased fare was in effect.

By applicant's "Exhibit 3," it is shown that during the period 1914 to and including the first eleven months of 1921, the gross earnings, per capita, on the entire system never exceeded 4.25 per cent, which was for the eleven months of 1921, while the average for the period 1914 to 1919, inclusive, was approximately 2.5 per cent.

Other exhibits were introduced by applicant which uniformly show that during the periods mentioned therein from 1914 to and including the first eleven months of 1921, the operation of the street car system, as a whole, has been conducted at a loss, except when the exhibit shows the segregation of the urban and interurban lines, these interurban lines have been operated at a profit, but not at such profit as by any means would overcome the losses from operation of the strictly city or urban lines.

The protestants sought to defeat applicant's petition for the right to abandon the portions of its system hereinabove desig-

nated almost entirely upon two grounds. First, that the applicant being also engaged in the furnishing of electrical energy to the citizens and inhabitants of the City of Trinidad and its environs for commercial, domestic and power purposes, and also in the furnishing of gas to the citizens of Trinidad, that the operation of the entire business of the company should be taken into consideration in this proceeding. So that if the entire operation of the company in all its departments shows a gain, the street car system should not be permitted to be abandoned. Second, that by virtue of the original contracts and franchises granted to the predecessors of applicant and in turn assigned to and being used and enjoyed by applicant, there was a contractual duty or obligation resting upon applicant to continue to serve the City of Trinidad with street car service until the expiration of such franchise period.

With reference to the first contention, it has been decided by this Commission in several instances, the last of which was in September, 1920, where applicant sought to abandon its Pine Street line of railway only and was denied, that when a utility operates distinctive classes of service each branch or class of its business must be considered separately for purposes of rate-making or discontinuance of service. This is a general rule and has been pronounced by the courts and commissions throughout the country, including the United States Supreme Court.

In *re* Trinidad E. T. R. & G. Co., P. U. R. 1920 F 707.
In *re* D. B. & W. Ry. Co. v. Pub. Util. Comm.,
P. U. R. 1921 B 607.
In *re* D. B. & W. Ry. Co., 5 Colo. P. U. C. 54, 742.
Brooks-Scanlon v. Ry. Comm., 251 U. S. 396.

The reason of the rule is quite obvious. A gas user ought not to be required to maintain an electric light service nor an electric light service a street railway service. The users of each utility must support it whether it be owned by one entity or by three distinct entities. If, in Trinidad, three different utilities entirely distinct from each other were operating a street railway, a gas plant and an electrical utility, no one would even suggest that the street railway utility should contribute from

its earnings anything toward the operation of the gas or electrical utility, nor in such case would one suggest the contribution by the electrical or gas utility of any amount to the street railway utility. The mere fact that the three distinctive classes of service are owned and operated by one person or corporation in nowise changes the principle that each operation must stand or fall by its own patronage.

Under this rule, therefore, no testimony or evidence was received as to the gas or electric operations of the applicant company as being relevant and material to the subject matter of the inquiry under consideration.

With reference to the second contention. While it may be true that there was an understanding or agreement entered into by the promoters of the original street railway lines, now owned and being operated by applicant company, with the citizens and inhabitants of Trinidad that such operation should be continued for a term of years, and that on the faith of such agreement the franchises were granted and perhaps even contributions of money or property may have been made to the original construction company, this was done, if done at all, long prior to the period of regulation by the state through its agency, and it is uniformly held that a contract or franchise granted is entered into or given in contemplation and subject to the power of the state to regulate at such time as that agency shall have been called into existence.

Denver and South Platte Railway Co. v. Englewood,
62 Colo. 229; 161 Pac., 151 P. U. R. 1916 E 134.

The above case was carried to the Supreme Court of the United States by the City of Englewood, wherein the decision of the Supreme Court of Colorado was affirmed.

Under the rule of law thus announced, such an agreement or understanding as made and entered into would be entirely irrelevant and immaterial in this proceeding.

It is with a sense of reluctance that the Commission feels it necessary, under the showing made in this case, to grant the relief asked for by applicant, for it undoubtedly will entail a hardship and inconvenience upon many of the people of Trini-

dad to be deprived of a street car service that has been so long enjoyed by them; but in obedience to its duty, as it understands the law as applied to the facts in this cause, the Commission will allow the abandonment of the particular portions of said street car system as above and hereinafter set forth.

The Commission finds that the operating revenue of applicant derived from its city or urban lines is, and has been under an increased fare, grossly inadequate to meet the operating expenses thereof during the period embraced within the testimony submitted in this cause, 1914 to and including the first eleven months of 1921.

It further finds that, as a matter of law, the prayer of applicant's petition should be granted, save as the same was modified by agreement of parties in interest at the hearing as shown by the record.

ORDER.

IT IS THEREFORE ORDERED, That applicant, The Trinidad Electric Transmission Railway and Gas Company, be, and it is hereby authorized and permitted to abandon all service over its lines of track designated as follows, to-wit: On San Juan Street from Pine Street to Baca Street; on Baca Street from San Juan Street to Arizona Avenue; on Arizona Avenue from Baca Street to Pine Street; on Main Street from Commercial Street to Ash Street; on Animas Street from Main Street to the intersection with Animas street and Grant Avenue; and on Grant Avenue from said intersection to Monroe Street; on Water Street from Main Street to Stonewall Avenue; on Stonewall Avenue from the intersection of the Water Street line to San Juan Street; and on Baca Street from Arizona Avenue to San Pedro Street; and on San Pedro Street to the end of the line at or near the race track and fair grounds.

IT IS FURTHER ORDERED, That such permission to abandon said portions of its street railway lines may be exercised by said applicant upon the giving of thirty days notice to its patrons through the public press of the City of Trinidad of its intention so to do.

RE RALPH McGLOCHLIN.

[Application No. 134. Decision No. 518.]

Certificate of convenience and necessity—Automobiles—Competition—Damage to highways.

A certificate for the operation of an automobile passenger-freight line should be refused when it appears that existing railroad service adequately meets public need, especially so in view of the fact that motor busses or trucks cause damage to roads far in excess of the damage caused by private cars and do not contribute a due proportion to the cost of highway construction and maintenance.

[March 8, 1922.]

Appearances: For the Applicant, Leroy J. Williams; for The Denver and Rio Grande Western Railroad Company, Thomas R. Woodrow.

STATEMENT.

By the **Commission**: The application herein was filed with this Commission April 25, 1921, and was set down for hearing and was heard in the hearing room at the State Capitol, Denver, Colorado, Thursday, January 19, 1922.

Alexander R. Baldwin, receiver of the property of The Denver and Rio Grande Western Railroad Company, by his attorneys, E. N. Clark and Thomas R. Woodrow, filed May 10, 1921, protest on behalf of the railroad company against the granting of a certificate under this application. Since the filing of the protest, the Receiver has been discharged and the railroad has passed into the hands of The Denver and Rio Grande Western Railroad Company.

The applicant, Ralph McGlochlin, asks that the Commission grant him a certificate of convenience and necessity for the establishment and operation of an automobile passenger line between Glenwood Springs and State Bridge, via Wolcott, all of which points are within the confines of Garfield and Eagle counties, Colorado. The proposed line, starting at Glenwood Springs, would run over the state highway through Garfield County, to the county line in Eagle County, thence through Eagle County through the towns of Dotsero, Gypsum, Eagle and Wolcott, and

terminate at State Bridge, Colorado, on the Denver and Salt Lake Railroad.

More than $600,000.00 has been expended on about fifteen miles of state highway through the canon, along the Colorado River, east of Glenwood Springs. It forms an important link in the highways between eastern Colorado and Utah and California and for scenic beauty is unsurpassed in the western country.

It was brought out at this hearing that the petitioner intended to limit the operation of his auto busses to only four months in the year, namely, June, July, August and September, when he could operate at the minimum of expense and maximum of profit.

This service is claimed to be not only a convenience but a necessity as well. Obviously when roads are muddy in spring and fall and also when deep snows have to be contended with by the traveling public in winter, it is at these times, if ever, when passenger conveyances become not only a convenience but an absolute necessity as well. Right at this time is when this applicant proposes to cease to function as a common carrier, which leads this Commission to the conclusion that this certificate is sought not so much to meet the convenience and necessities of the traveling public as it is for private gain.

This hearing brought out the fact that this railroad company actually loses money on its through travel, while the profitable haul comes from its local passenger travel. Even at this, the fare by rail from Wolcott to Glenwood Springs is only $2.22, while the applicant proposes to charge $3.00, by auto bus, between the same points.

One of the important reasons alleged for a certificate, by this applicant, was the fact that No. 1, the "Scenic Limited" of the Denver and Rio Grande Western, did not stop at Wolcott, thus compelling passengers coming over from State Bridge and bound westward to remain over night at Wolcott and pay hotel bills. February 28, 1922, the railroad company issued an order, effective at once, that train No. 1 will stop on flag at Wolcott for passengers, so that this feature of the argument for a certificate has been eliminated.

The evidence introduced in this case shows that the railroads

in Colorado paid in 1921 *state road taxes* aggregating $159,875.42. Of this amount The Denver and Rio Grande Western Railroad contributed for roads for the 1921 period, $45,207.12. In 1921 this road paid in taxes in Eagle County $61,240.09, and of this amount The Denver and Rio Grande Western contributed to the county road tax of said Eagle County, $16,709.89.

The testimony also shows that The Denver and Rio Grande Western Railroad Company paid Garfield County in 1921 taxes to the amount of $92,656.85, and of this amount $21,314.05 was for the upkeep and construction of roads.

The vehicle registration report of Colorado, compiled by the Secretary of State, for 1921, shows that Eagle County had seven trucks and paid in revenue to the state the sum of $54.25. Also, that Garfield County had sixty-one trucks and paid into the state treasury $765.02, or a total for the two counties of only $819.27 for the use of the state and county highways that the trucks use, while the Denver and Rio Grande Western Railroad had to pay in the same two counties, for the same period, more than forty-six times as much, or $38.023.94 for roads they do not use at all.

As to the adequacy of service for the town of Wolcott, we find No. 16 eastbound Denver and Rio Grande Western train makes a regular stop at Wolcott at 6:06 P. M. No. 4, also eastbound, stops on flag at 11:59 P. M., while No. 2 eastbound at 7:55 A. M., stops on flag to discharge passengers from Glenwood Springs and points west. There is also a freight train, No. 94, eastbound daily, excepting Sunday, that picks up and discharges passengers at all stations between Glenwood Springs and Wolcott.

Westbound No. 15 stops on flag at Wolcott at 9:28 A. M. to pick up passengers for Eagle, Gypsum, Glenwood Springs and other intermediate points as far as Grand Junction. No. 3 westbound has a flag stop at Wolcott at 4:36 A. M., and has a regular stop at Eagle and a flag stop at Gypsum and a regular stop at Glenwood Springs and all other points of considerable importance as far as Grand Junction. No. 1, the Scenic Limited, also stops on flag at Wolcott at 8:45 P. M., thus taking care of passengers from State Bridge, whose destination is westward on

The Denver and Rio Grande Western. In addition to the aforesaid service, freight train No. 93 leaving Wolcott daily, excepting Sunday, at 1:38 P. M., picks up and discharges passengers at all stations westward and arrives in Glenwood Springs at 5:20 P. M.

Taking into consideration the size of the town of Wolcott and the fact that the traveling public have access to three trains in each direction on Sunday and that there are four available trains both east and west every other day in the year, it would seem that there is no need for additional passenger service between Glenwood Springs and Wolcott. In fact, we believe these people are far better off than those of many more populous communities in not only this but other states as well. A reflex of the conditions is found in the fact that the total ticket sales from Wolcott to all points west, including Glenwood Springs, for 1921, amounted to only $664.77.

The record in this case shows The Denver and Rio Grande Western, in 1921, paid in Garfield and Eagle counties taxes totaling $153,896.94, and that over $38,000.00 went into the road fund of these counties. Viewing this whole matter from the point of present adequacy of transportation facilities and in the light of a decent regard for the rights of others, it would seem unequitable and unjust that the vast sums wrung from the railroads, especially in the shape of road taxes, should be used to provide means to encompass their own destruction.

Looking at all the facts in this case, it would seem manifestly unfair for this Commission to grant a certificate to this applicant that he may skim off the cream of the passenger traffic during the summer months and then leave the railroad to battle with the elements during the balance of the year when railroad operations are a heavier financial burden and passenger travel is exceedingly light.

But leave the railroad entirely out of the case and view it only from the standpoint of the farmer and city home owner. They pay a very large proportion of taxes assessed for highway construction and maintenance. Some of them own and operate automobiles and some do not. If they do, the damage to roads

from the occasional operation of their light, pneumatic tired cars is practically negligible. They seldom use the roads under weather conditions such that their use is destructive, while at certain seasons the heavily loaded freight and passenger trucks plough back and forth making great furrows in the roads regardless both of conditions and consequences. Under weather conditions producing softened roadbeds, the passage of a single heavily loaded truck will do greater damage to a highway than would the passage of hundreds of ordinary cars. The farmer and the city home owner pays the bill and the 136,336 passenger car owners of the State are grievously wronged.

Public convenience and necessity, by which must be understood the convenience and necessity of the people at large as contra-distinguished from the convenience and necessity of a very small number of persons who seek to derive a profit from the farmers' and home owners' investment in roads, never contemplated that the truck driver should destroy that, to the cost of construction of which he contributed little or nothing, or that he should reap where he had not sown.

When the taxing laws of this State are so amended that the truck driver operating over state highways shall contribute his due proportion to the cost of construction and maintenance of our highways, then, and not until then, can this Commission regard his use, under proper conditions and restrictions, of a great and tremendously expensive public facility as of equal dignity and equal benefit to the people with the moderate use thereof by the ordinary taxpayer.

Viewing this case in all its aspects, this Commission finds there is no existing necessity for an auto bus passenger line between Glenwood Springs and Wolcott. It also finds that the service furnished by The Denver and Rio Grande Western Railroad Company between Glenwood Springs and Wolcott is fully adequate to meet the reasonable necessities of the traveling public during the entire year.

The Colorado Public Utilities Act limits the Commission's authority over the issuance of certificates of convenience and necessity to automobiles in competition with railroads. As there

is no such competition between Wolcott and State Bridge, the Commission holds it has no authority over this part of the route.

For the aforesaid reasons, this Commission will deny the prayer of the applicant for a certificate for that part of the proposed route between Wolcott and Glenwood Springs on the grounds that there is no necessity shown to exist for such automobile passenger line.

ORDER.

IT IS THEREFORE ORDERED, That the application of Ralph McGlochlin for a certificate of convenience and necessity for the operation of an automobile passenger line between Glenwood Springs and State Bridge, Colorado, be, and the same is, hereby denied over any and all that portion of the proposed route between Glenwood Springs and Wolcott, Colorado.

RE COLORADO POWER COMPANY.

[Investigation and Suspension Docket No. 40. Decision No. 527.]

Procedure—Demurrer—Unheard—Considered overruled.

1. A rate case may properly proceed without disposing of a demurrer interposed by one of the parties, since under the Colorado Code, a demurrer not being heard is thereby deemed to have been overruled.

Constitutional law—Impairment of contract—Commission powers—Rates.

2. A change in contract rates made by the state through a Commission in its regulatory capacity is not in violation of the Constitution of the State of Colorado or of the United States.

Rates—Powers of Commission—Home rule cities—Wholesale supply contract.

3. The Commission has jurisdiction over a rate contract for power supplied to a company distributing power in a home rule city when the energy is received in a substation outside of the city.

Valuation—Reproduction cost—Average prices.

4. A Commission appraisal of the property of a power company was based on normal cost of reproduction new, with consideration as to the periods of construction, and reflecting average costs over those periods, so that the cost used was neither the highest nor the lowest but included these in the average whenever available, so-called war prices being given consideration only as they entered into averages or influenced the general trend of labor and material cost.

Valuation—Reorganization or purchase price cost.

5. The fair value of a power company's property which has been constructed by different companies at different periods ought not to be determined at the reorganization or purchase price cost.

Rates—Electricity—Firm power—Dump power.

6. Power furnished continuously to large consumers causing the principal system peaks which were simultaneous with other peaks, and causing a wider variation of load than any other consumers, was held to be "firm power" although sold at "dump power" rates because of inability to dispose of the entire product of an overbuilt system at regular rates.

Valuation—Segregation of non-paying property—Electricity—Dump power service.

7. The property of a power company which, on account of over-development, is obliged to sell energy which is in fact "firm power" at "dump power" prices should be apportioned between the firm power users and the dump power users for the purpose of fixing of "firm power" rates, when the company is unable to dispose of the surplus energy at the regular rate.

Apportionment—Electric property—Firm power and dump power users.

8. A transmission line used jointly by "firm" and so-called "dump power" consumers was allocated on the basis of the relative traffic over the lines, and a percentage ratio as between firm power use and the total use of the line was thereby determined.

Return—Operating expenses—Income tax.

9. Income tax is not properly chargeable as an operating expense.

Valuation—Going concern value—Attachment of business.

10. A utility plant which has an established business attached is more valuable than one without business and should be allowed a reasonable amount for going concern value.

[April 19, 1922.]

Appearances: William V. Hodges and D. Edgar Wilson, of Denver, for Applicant, The Colorado Power Company; Lee & Shaw, of Fort Collins, for The Western Light and Power Company; Dubbs & Vidal, of Denver, for American Smelting and Refining Company and The Yak Mining, Milling and Tunnel Company; Warwick M. Downing, of Denver, for The Tonopah Placers Company and The Wellington Mines Company; Whitehead & Vogl, of Denver, for The Big Five Mining Company; Barney L. Whatley, of Denver, for The Down Town Mines Company, The Ibex Mining Company, The Western Zinc Concentrating Com-

pany, Cramer and Company, John Cortellini, The Garbut Leasing Company, Izard, Mikado and Burns Leases, Robert E. Lee Lease, Kanawah Gold Mining Company, Iron-Silver Mining Company, The Royal Tiger Mines Company, W. F. Page, W. E. Bowden, The Ferro-Alloy Company, Board of Mines and Commerce of Georgetown, Colorado, The Colorado Central Mines Company, the Leadville Chamber of Commerce and The Bureau of Mines and Commerce of Idaho Springs, Colorado; George E. Collins, of Denver, for the Colorado Metal Mining Association; H. O. Andrew, of Boulder, for The L. A. Ewing Company; John R. Wolf, of Boulder, for The Up-to-Date Mining Company; H. F. Lampshire, of Silver Plume, Colorado, for the Board of Mines and Trade, Silver Plume; E. S. Stewart for the Argo Tunnel, Idaho Springs, Colorado; F. L. Palmquist for the Wahsatch-Colorado Mining Company of Silver Plume; H. S. Noble for The Western Zinc Oxide Company of Leadville, Colorado; O. J. Duffield for The Gilpin County Metal Mining Association, Central City, Colorado; John W. Green for the Board of County Commissioners, Georgetown, Colorado; Robert F. Lafferty for The Derry Ranch Gold Dredging Company, Leadville, Colorado; G. C. Randall for The Griffin Mining Company, Leadville, Colorado; Ike L. Jones for the Jones Lease, Leadville, Colorado; J. C. Jensen for The Gilpin County Chapter of the Colorado Metal Miners' Association; E. Stenger for The Denver City Tramway Company; Charles H. Haines, of Denver, for himself and associates; The Carbondale Light and Power Company of Carbondale, Colorado; B. A. Holly, of Georgetown, Colorado, protestants; Bardwell, Hecox, McComb & Strong, of Denver, for protestant, Denver Gas and Electric Light Company, appearing specially.

STATEMENT.

By the **Commission**: On December 20, 1919, the above named applicant, The Colorado Power Company, filed with the Commission certain schedules and increases it proposed in power rates, which it designated as being First Revised Sheets Nos. 2, 3 and 4 to Colo. P. U. C. No. 11 and First Revised Sheet No. 2 to Colo. P. U. C. No. 12 and First Revised Sheet No. 3 to Colo.

P. U. C. No. 12; and special power agreements with The Carbondale Light and Power Company, The Denver City Tramway Company, Tungsten Products Company, The Iron Mountain Alloy Company, The Ferro-Alloy Company (electro-chemical and electro-metallurgical plants), The Gilpin County Light, Heat and Power Company, The Summit County Power Company, The Summit County Power Company and The Tonopah Placers Company jointly, The Yak Mining, Milling and Tunnel Company, The Down Town Mines Company, The American Smelting and Refining Company, U. S. Rare Minerals Company; and cancellation of special power agreements with The French Gulch Dredging Company and The Derry Ranch Gold Dredging Company.

The above filings were, by orders of the Commission, suspended until November 17, 1920, under the provisions of Section 48 of the Public Utilities Act.

Notice of such filings having been given to the power users of said Company, numerous protests were filed against the increase of rates proposed in said application.

On January 21, 1920, the Commission issued its order, directed to applicant, wherein it was ordered that said applicant Power Company make for the Commission, under the direction and supervision of the Commission's Electrical Engineer, a full and complete inventory and appraisal as of January 1, 1920, of the physical properties of the Company located within Colorado; and that applicant place its books, records and accounts at the disposal of the Commission's statistician, for the purpose of enabling the Commission to arrive at a full and correct determination of all questions relating to an investigation of the property and finances of applicant Company.

On October 6, 1920, the applicant Power Company filed its petition, with schedules attached thereto, covering the power rates above mentioned in the nature of a supplemental application for further increased power rates to be considered at the time of hearing its application for increase in rates, upon the ground that such further increases as were designated in said supplemental petition were necessary to yield applicant Power

Company a fair return on the value of its property in use and useful devoted to the service of the public. Up to this time the inventory and appraisal ordered to be filed had not yet been completed nor filed with the Commission by the applicant Company.

Upon notice being given to protestants of the filing of said supplemental petition, there was filed with the Commission on October 16, 1920, by the attorney representing a large number of protestants, a motion to dismiss said application on the ground that under Section 48 of the Public Utilities Act, the Commission had no power or jurisdiction to order a further suspension of such increase of rates beyond November 17, 1920, as designated in the order of suspension of May 15, 1920, for the reason that said Section 48 provided for no further orders of suspension than would be included in the total period of ten months, and that said ten months' period would expire on November 17, 1920, and that the effect of allowing said application to stand might be that the same would become effective automatically without the sanction or approval of this Commission.

The motion of protestants to dismiss said application was heard by the Commission at its Hearing Room on November 4, 1920, due notice being given to all parties, with the result that without deciding the point involved the Commission made and entered its order on November 9, 1920, permanently suspending the above schedules filed December 20, 1919, and those supplemental thereto filed October 6, 1920, and all schedules, rates and applications involved herein; but with leave to applicant Power Company to file its amended schedule of proposed increase of power rates forthwith under the same title and number as the original cause bears, Investigation and Suspension Docket No. 40.

Thereafter and on November 10, 1920, applicant Power Company filed new schedules, summaries of Special Power Agreements and cancellations of special rates in compliance with leave as given in the order of November 9, 1920, which said schedules of agreements and cancellations, which were to become effective under the statute on December 10, 1920, are as follows:

Schedules.

P. U. C. Colo. No. 11, Third Revised Sheet No. 2, cancelling Second Revised Sheet No. 2.

P. U. C. Colo. No. 11, Second Revised Sheet No. 3, cancelling First Revised Sheet No. 3.

P. U. C. Colo. No. 11, Second Revised Sheet No. 4, cancelling First Revised Sheet No. 4.

P. U. C. Colo. No. 12, Third Revised Sheet No. 2, cancelling Second Revised Sheet No. 2.

P. U. C. Colo. No. 12, Third Revised Sheet No. 3, cancelling Second Revised Sheet No. 3.

Special Power Agreements With:

The Summit County Power Company.
The Ferro-Alloy Company.
The Yak Mining, Milling and Tunnel Company.
The Tungsten Products Company.
The American Smelting and Refining Company.
The Denver City Tramway Company.
The Down Town Mines Company.

Cancellations With:

The Derry Ranch Gold Dredging Company.
The Carbondale Light and Power Company.
The Gilpin County Light, Heat and Power Company.
The French Gulch Dredging Company.

Such new schedules amount to an increase of approximately 40 per cent in each step of power schedules No. 11 and No. 12, and a 20 per cent increase, with minor exceptions, for the special power agreements. The effect of cancelling these special agreements is to serve such consumers under the regular schedules, which would increase the power rate for The Derry Ranch Gold Dredging Company 17.5 per cent, The Carbondale Light and Power Company 34.2 per cent, The Gilpin County Light, Heat and Power Company 79.6 per cent and The French Gulch Dredging Company 45 per cent over the rates they theretofore enjoyed under such special agreements, based on their 1919 consumption.

Upon notice to protestants of the filing of such new schedules, special power agreements and cancellations, protests from protestants appearing herein were filed; and on December 9, 1920, the Commission issued its order of suspension suspending the effective date of the schedules filed November 10, 1920, until April 9, 1921, and thereafter and on April 4, 1921, a further order of suspension was issued suspending such rates until October 9, 1921, and on the 5th day of October, 1921, a further order of suspension was issued suspending and deferring the effective date of such rates until January 9, 1922, and by mutual agreement of all parties in interest such last named suspension is continued until the final decision is rendered herein.

On November 17, 1920, applicant Power Company filed its inventory and appraisal as required by the order of this Commission of January 21, 1920.

On December 29, 1920, applicant Power Company filed its supplemental petition, in and by which it asked for the temporary increase of rates applied for under its schedules filed November 10, 1920, as a temporary or emergency measure until the final hearing had been had in this cause, to which supplemental petition protestants appearing duly made answer and objection.

On February 9, 1921, the matters involved herein were set for hearing on March 15, 1921, at 10:00 o'clock A. M., at the Hearing Room of the Commission, Capitol Building, Denver, Colorado, and notice thereof was duly given to all parties interested herein; and subsequent to said February 9, 1921, several other protests were filed by sundry protestants.

The taking of testimony and submission of evidence consumed a considerable part of the months of March, April and May, the hearing being concluded on May 26, 1921. Thereafter, time was given for the filing of briefs by applicant Power Company and briefs by such of the protestants as desired so to do, with the result that the final reply brief of the applicant Power Company was filed October 27, 1921.

At the hearing begun on March 15, 1921, the supplemental petition for temporary or emergency relief was denied, and the

matters embraced therein were to be determined in the final determination of the case. Owing to the vast amount of work before the Commission, much of it of such a nature as made imperative prompt action of the Commission, and to the further fact that the Commission was and is handicapped by insufficient funds appropriated to expeditiously if not properly carry forward the work that comes before it, the final decision of the above cause has been thus unavoidably delayed until this time.

History.

The Colorado Power Company, applicant herein, was incorporated March 26, 1913, under the laws of the State of Colorado. Prior to its incorporation The Central Colorado Power Company and The Leadville Light and Power Company were operating in the district hereinafter referred to as being embraced within the Central System, so-called, of applicant Power Company. The Central Colorado Power Company and The Leadville Light and Power Company were acquired by applicant Company in a plan of reorganization agreed upon, so that present applicant, The Colorado Power Company, became the successor to all the property and plant of said Central Colorado Power Company and The Leadville Light and Power Company upon applicant Company becoming incorporated in 1913.

Subsequently, applicant Power Company acquired the property of The United Hydro-Electric Company operating in the Idaho Springs District and also the property in Alamosa and Monte Vista in 1914 and 1915, and the property of The Salida Light, Power and Utility Company and The Sterling Consolidated Electric Company; so that, at the present time the property of applicant Power Company comprises the property of the old Central Colorado Power Company, The Leadville Light and Power Company and the subsequently acquired properties above mentioned.

For convenience of operation and accounting, applicant's property is divided into eleven districts, seven of which comprise its so-called Central System, which consists of generating stations at Shoshone, near Glenwood Springs, and at Orodell,

a few miles above Boulder, these two stations being connected by a transmission line serving sub-stations at Leadville, Dillon, Idaho Springs and Denver, or rather just outside of Denver's city limits in Jefferson County. The applicant also has a secondary distribution from Shoshone and Boulder, a standby steam plant at Leadville and a subsidiary hydro plant at Georgetown. The general office district pertains to and is in general use by the entire property.

The so-called Central System was, for convenience of operation and accounting, divided into the Shoshone District, which covers local distribution service to The Carbondale Light and Power Company; the Leadville District, which covers domestic and business service in the City of Leadville and distribution to the mining districts surrounding; the Dillon District, with distribution along the Blue River Valley north of Dillon and with lines running to Redcliff and Gilman for local, domestic and business service, and mining operations on Battle Mountain; the Idaho Springs District, which supplies domestic and business service to the towns of Idaho Springs, Georgetown, Silver Plume and Lawson, and power service in Clear Creek and Gilpin Counties; the Denver District, which comprises wholesale service only to The Denver Gas & Electric Light Company, The Denver Tramway Company and distribution and general power purposes to the section known as Utah Junction north of Denver, and service to the Fitzsimons General Hospital; and the Boulder District, which comprises power service to the Boulder mining district and wholesale service to The Western Light and Power Company and domestic and business service to the Town of Nederland. The above districts are all within the so-called Central System of applicant Power Company and are served through hydro-generating plants at Shoshone, above Glenwood Springs, and at what is known as the Boulder development, which includes the Barker Reservoir, together with an auxiliary steam plant at Leadville and a hydro plant at Georgetown.

The Salida District comprises two small generating stations near Maysville, about eighteen miles from Salida, and a transmission line between these stations and a standby steam plant in

the Town of Salida, which furnishes energy for local distribution for domestic and business use in Salida and power service in the mining districts adjacent thereto.

The Alamosa District consists of a steam generating station in Alamosa with a transmission line to Monte Vista, a sub-station in Monte Vista and local distribution for domestic and business purposes in both Alamosa and Monte Vista, energy being wholesaled from the Alamosa plant to the La Jara Electric Company.

The Sterling District consists of a steam generating plant at Sterling with transmission lines to Atwood, Iliff and Merino, with local distribution for domestic and business purposes in these towns and in Sterling.

The Alamosa, Salida and Sterling districts are entirely segregated from the seven districts included within the so-called Central System of applicant Power Company, the operation of said three districts being in nowise connected with the operation of the territory comprised within the Central System, consisting of the above mentioned seven districts.

In the Central System the applicant connects its various stations with a 100 kilovolt main transmission line which extends from Shoshone along the Frying Pan River over Hagerman Pass near Leadville, thence over Fremont Pass to Dillon, thence over Argentine Pass through Idaho Springs to Denver; from Denver it runs along the foothills to the Boulder plant. The entire main line of said transmission system is 181.06 miles in length from Shoshone via Denver to Boulder. The transmission line is of standard steel tower construction and, as indicated, is constructed over several mountain passes. Branching off from the main line below Waldorf on the eastern side of the range is an emergency line which traverses another route over the Continental Divide and again meets the main line on the western side of the divide at Argentine. The so-called Central System is so connected that it is maintained for exchange of power in emergencies with The Summit County Power Company, having a hydro plant in the Dillon District, and with The Western Light and Power Company at the Boulder plant, thus affording an interchange of electric energy with those two utilities in cases

of emergency. The line really does not come into Denver, but when spoken of as touching Denver means the energy delivered to consumers in the City and County of Denver is delivered and metered at the switchboard of the Denver sub-station, which is located just outside of the City and County of Denver in Jefferson County, Colorado.

The applicant Power Company was organized and incorporated April 1, 1913, with an authorized capital stock of $20,000,000 par, of which $5,000,000 was preferred, and $15,000,000 common stock. Five per cent bonds in the amount of $4,130,000 were authorized in 1913, and by subsequent issues in 1916, 1918 and 1920, the total bonds issued amounted to $4,846,500, of which $84,800 were retired in 1918, 1919 and 1920, leaving a total issue of outstanding bonds of applicant company in the amount of $4,761,700 at the date of the beginning of the hearing herein, to-wit: March 15, 1921.

The Company was organized to take over the property of the Colorado Central Power Company, as acquired under foreclosure sale, by a bondholders' committee of that company, and the bonds of the new or applicant company were exchanged for the bonds of the predecessor company held for that purpose by said bondholders' committee; also, the property of the Salida Light, Power and Utility Company was acquired by the exchange of bonds and $150,000 cash. The Alamosa and Sterling properties were acquired for cash considerations in 1914 and 1916, and during the same period the Monte Vista property and the United Hydro-Electric Company property, operating in Georgetown and Idaho Springs, were acquired by applicant Company through the exchange of securities.

In addition to the special power agreements heretofore enumerated, as having been filed with the schedules of the applicant Company on November 10, 1920, there are also special agreements or contracts with The Denver Gas and Electric Light Company and with The Western Light and Power Company, which said special agreements were docketed under Dockets Nos. 50 and 51, respectively, of this Commission. The agreement with The Denver Gas and Electric Light Company provides for

the service of electric energy of applicant Company to said Denver Company at the above mentioned sub-station near the city limits of the City of Denver, as will be more fully stated and referred to hereinafter; while that of The Western Light and Power Company provides for the service of electric energy by applicant to said Western Company from its Boulder plant upon terms as will be more definitely referred to hereinafter.

The applicant company, in its application for increase of rates, asks that the rates fixed by said respective contracts be increased approximately 20 per cent, and each of said companies filed protests and objections thereto, first challenging the jurisdiction of the Commission, and second that such rates fixed by contract are such matters as do not affect the public and are purely the subject of contract between two utilities and that the energy contracted for is not energy denominated as a firm commitment, but is entirely of that character of energy denominated as "dump power" and, therefore, is not subject to regulation by the Commission.

All three of said cases, to-wit: Dockets No. 40, No. 50 and No. 51, were originally set for hearing on March 15, 1921, at the Hearing Room of the Commission, Capitol Building, Denver, Colorado, at 10:00 o'clock A. M., and notice thereof given to applicant, to each protestant in Docket No. 40, to the said Denver Gas and Electric Light Company in Docket No. 50 and the said Western Light and Power Company in Docket No. 51. On March 15, 1921, when said docket numbers were called, no appearance on that day was made by said Denver Company or said Western Company in Dockets No. 50 and 51, respectively, so that the hearing and the taking of testimony proceeded in Docket No. 40 without appearance by said Denver Company or said Western Company in Dockets Nos. 50 and 51 and without any objection thereto.

Thereafter, and in June, 1921, the Commission, desiring to hear any testimony or objections that might be desired upon behalf of said Denver Company or said Western Company, made and entered its order under date of June 13, 1921, wherein, for the purposes of the hearing, it consolidated said Dockets Nos.

50 and 51 with Docket No. 40, the hearing of which had then about been completed; and in said order fixed Tuesday, June 21, 1921, at the Hearing Room of the Commission, Capitol Building, as the date for said Denver Company and said Western Company to appear before the Commission and submit such testimony or objections as may be desired. On said June 13, a copy of said order together with notice of such hearing thereon were served upon each of said companies, to-wit: The Denver Gas and Electric Light Company and The Western Light and Power Company, while in the record it was stipulated by applicant Company and protestants in Docket No. 40 that no formal notice thereof need be given to protestants and applicant Power Company. Thereafter, the Commission received a request from Mr. George H. Shaw, of Lee & Shaw, Attorneys for said Western Company and purporting to be speaking for said Denver Company, asking that said matter go over from said June 21, 1921, to June 24, 1921, which, according to the record, was done.

On June 21, said Denver Company filed its objection to said consolidation and on June 24 appeared specially and filed its demurrer and objection to the procedure and jurisdiction of the Commission in the premises and stated in the record. Such objections were more specifically and fully stated and concurred in by said Western Company on said June 24, as shown by the record at page 2149 *et seq.*

The objections of the Denver Company, which were, so far as applicable, adopted by the Western Company as appears of record, embrace seventeen specifically numbered grounds. The first four are, substantially, objections to the consolidation of Dockets Nos. 50 and 51 with Docket No. 40 for purposes of hearing. These objections may be disposed of by mere reference to the record. The Denver Company and the Western Company each were duly notified that Dockets 40, 50 and 51 would be heard March 15, 1921, at 10:00 o'clock A. M., at the Hearing Room of the Commission. Upon the said date no appearance was made by either the Denver or the Western Company, so that the hearing proceeded upon Docket No. 40. Afterward when the hearing had progressed almost to completion, and

in June, 1921, the Commission again consolidated Dockets 50 and 51 for purposes of hearing and fixed the date of June 21 as the date upon which said two dockets would be heard, notice thereof together with a copy of the order of consolidation being duly served upon both of said companies.

On June 17, 1921, Mr. George H. Shaw, of Lee & Shaw, Attorneys at Fort Collins, appeared before the Commission and, as disclosed by the record at page 1678 *et seq.*, on behalf of the Western Company and also the Denver Company requested that the hearing of said Dockets 50 and 51 be continued or go over from June 21 to June 24 for reasons appearing in the record. On June 24 both companies appeared specially for the purpose of stating such objections as were made and then withdrew, except that Mr. Lee, at the request of the Commission, did submit testimony and participate in the cross-examination of witnesses in an endeavor to enlighten the Commission with reference to the energy furnished by applicant Power Company to the Denver Company and the Western Company under the special agreements aforesaid.

The record is quite clear, therefore, that both the Denver Company and the Western Company had ample notice of the setting of their causes on March 15, 1921, for hearing; that both were given ample notice of the consolidation of said causes for purposes of hearing for June 21, subsequently continued to June 24, and that the objections made as to the right or power of the Commission to so proceed were properly denied.

An objection is made by the Denver Company further that a demurrer interposed by it had not been passed upon by the Commission, and hence the Commission could not properly proceed until such demurrer was disposed of. This objection is untenable for the reason that under the code a demurrer not being heard is thereby deemed to have been overruled; and it was at all times within the power of demurrant to have called up and insisted upon the hearing of its demurrer if it had so desired.

Further objection is made to the power or jurisdiction of the Commission to alter or change the contract rate of applicant Power Company with the Denver and Western Companies, on

the theory that it is in contravention of the constitution of the State of Colorado and of the United States. The principle has so often been announced by courts of last resort, including the Supreme Court of the United States, that every contract made with a public utility is made impliedly subject to the power of the state to call into being the dormant police power in the interest of the public in the regulation of rates; therefore, a change in contract rates made by the state in its regulatory capacity is not in violation of the constitutional provisions referred to.

Union Dry Goods Co. v. Georgia Pub. Serv. Corporation, 248 U. S. 372; P. U. R. 1919-C 60.

The remaining objection worthy of consideration is that the Commission has no jurisdiction over the business of the Denver Company for the reason that Denver is a home rule city, so-called, and under the decision of the Supreme Court of this State this Commission has no jurisdiction in such cities. Were the Commission attempting to regulate rates of the Denver Company in the City and County of Denver or the rates of the Western Company in the City of Boulder, another so-called home rule city, the objection would be well founded; but, as disclosed by the testimony which is conceded to be the fact, the applicant Company furnishes to the Denver Company electric energy under said contract at the sub-station of applicant Company in Jefferson County, Colorado. The energy received in said sub-station is distributed by the Denver Company in the City and County of Denver, and with the rates the Denver Company receives therefor from its consumers, the application in this proceeding makes no mention and, indeed, there is no thought or desire or purpose of the Commission to regulate in the remotest degree the rates of the Denver Company to its customers. The thing sought by applicant Power Company under its application with respect to the special agreements with the Denver and Western Companies, is that the charge for energy furnished by the applicant utility to the two utilities designated under their respective contracts be increased; and so it is merely a question of the power of the Commission to regulate the cost of electric energy sold by one utility to another when the selling utility is

engaged in and is a public utility and thereby the public interest being affected. We are clearly of the opinion, under the authorities, that the Commission has power in the instant case to regulate the price of energy furnished by applicant company to the respective Denver and Western Companies, under the facts in this case as disclosed by the testimony. The case of *re* City of Durango, P. U. R. 1921-A, 316, cited by objectors, is not in point as applied to the facts of this case, for the reason that in the Durango case the water carried by the City of Durango in its pipe line to Animas City was the water of Animas City which Durango merely contracted to carry for an agreed compensation. In the instant case the electricity generated by applicant company is carried by applicant over its own transmission line from Shoshone or Boulder, as the case may be, to its sub-station adjoining the City of Denver and there delivered to the Denver Company, or in the case of the Western Company delivered at the sub-station above Boulder to the latter company. From the instant of delivery at the respective sub-stations the energy delivered becomes and is the property of the Denver or Western Company, and in such case the applicant Company is a public utility engaged in the generation and sale of electrical energy for a contracted price; and it is obvious that the public is interested in such contract price to the extent that such contract price affects the general rates of applicant Company as applied to its customers generally.

The Supreme Court of the United States in passing upon a similar question where the reasonableness of contracts for joint action between railroads in the transportation of persons and property is concerned uses the following language:

"The argument for the railroad companies of this case assumes that while the state many interfere as between the railroads and their customers, the shippers of freight, it can not do so as between the railways themselves by fixing joint tariffs and apportioning such tariffs among the several railways interested in the transportation * * *. Granting that a state has no right to interfere with the internal economies of a railroad further than to secure the safety and comfort of passengers * * *

it has a clear right to pass on the reasonableness of contracts in which the public is interested, whether such contracts be made directly with the patrons of the road or for a joint action in the transportation of persons or property in which the public is indirectly concerned."

Minneapolis and St. Louis Railroad Company v. Minnesota, 186 U. S. 257-522.

The same doctrine is announced also by the following state commissions:

Oklahoma Natural Gas Co. v. Corporation Commission, P. U. R. 1918-D, 515.

City of Vincennes v. Central States Gas Co., P. U. R. 1920-F, 356.

Re Cumberland County P. & L. & Co. (Me.), P. U. R. 1918-F, 675.

Re Fontana Power Co. (Cal.), P. U. R. 1917-A, 633.

So that, objection of objectors, as to the jurisdiction of the Commission to regulate and inquire into the reasonableness of contract rates existing between applicant Company and objectors is overruled. If, however, the electric energy being furnished to objectors by applicant Company really is "dump" power, as is contended to be the case by objectors and protestants generally, then the Commission would not attempt to regulate the price thereof and such dump power is properly made the subject of private contract as to everything that affects it. As to whether or not such energy is dump power will be necessarily determined in this proceeding, and if it is held to be dump power no interference will be attempted by the Commission with the contract price agreed upon by the parties therefor. That subject will be considered and decided later on in this opinion or decision.

On December 29, 1920, applicant Power Company filed its supplemental petition herein asking for emergency relief in the way of allowing the increases asked for to become effective pending the final determination of the cause, and offering to file a bond to reimburse its power consumers for any excess collected over the schedules as finally fixed by the Commission. Service

of said supplemental petition was had upon all protestants and users of power of applicant Company, with the result that protests were quite generally filed thereto. On March 15, 1921, at the beginning of the hearing herein, the request for emergency relief was deferred pending the taking of testimony by the Commission upon the application filed for increased power rates under the schedule filed by applicant on November 10, 1920. On June 28, 1921, and after practically all the evidence had been taken and submitted in this proceeding, the motion for such temporary or emergency relief was renewed by applicant and arguments were had thereon; and on July 1, 1921, at the conclusion of the hearing herein, the Commission made and entered its order denying the temporary or emergency relief asked for by petitioner in its supplemental petition.

Written protests were filed herein before, at and subsequent to the beginning of the taking of testimony on March 15, 1921, by a large number of protestants; others of protestants contented themselves by making protest in the record. Many of the protestants made protest upon the common ground that an increase of power rates, as applied for, would result in discrimination as against protestants, and that the same was unnecessary, unreasonable and unjust and that the schedules of rates theretofore enjoyed by applicant Power Company were sufficiently high as to yield sufficient net revenues to enable applicant Power Company to earn a fair return upon its property investments. Some of the written protests, however, have additional reasons of protest and they will be briefly referred to.

Protest of Yak Mining, Milling and Tunnel Company.

The Yak Company protests against the schedule of rates and charges of applicant Company for an increase as filed November 10, 1920, and sets forth in its protest that it conveyed to The Leadville Light and Power Company about November 15, 1906, a certain power plant located at the Yak Tunnel near the City of Leadville, together with other property; that as part consideration for such conveyance there was executed by said Leadville Company and said Yak Company a contract for the furnishing of electric power by said Leadville Company to said

Yak Company at certain rates and charges; that in April, 1913, all the property and assets of said Leadville Company, including the above mentioned Yak power plant, were acquired by and became the property of applicant Power Company, and ever since have been and are now owned, held and used by said applicant Company; that said contract of November 15, 1906, continued to be recognized and obeyed by the parties thereto, and that in September, 1916, pursuant to one provision of the above contract, certain matters in dispute between said applicant Power Company and said Yak Company were referred to arbitration, and in November, 1916, an award was made, which award defined and determined the rates and charges for electric power to be paid by said Yak Company to said applicant Company under said contract; that said award was accepted and acquiesced in and that the rates and charges so provided for in said contract and as further defined and determined by said arbitration and award have been in full force and effect and are in full force and effect up to the present time; that on January 12, 1917, said applicant Company filed with this Commission its schedule designated "Special Power Agreement" with said Yak Company, stating the rates and charges for electric power to the Yak Company as provided for in the contract of November 15, 1906, and the arbitration and award of November, 1916, and that no objection or protest to said schedule of rates filed January 12, 1917, has ever been made.

Said Yak protest further alleges that the rates and charges now in effect are sufficiently adequate to give said applicant Company a fair, reasonable and just return, and that said applicant Company has received a fair, reasonable and just return under said rates and charges; that the real value of the properties of applicant Company in this State is not in excess of $6,000,000, and that said properties were returned for taxation by said applicant Company in the year 1920 in the value of $5,963,330, and that said properties are the same as the property described and valued in the inventory and appraisal filed herein by said applicant Company, and that the value of said properties in said inventory and appraisal is excessive and un-

reasonable and is based upon abnormal and extraordinary conditions in prices.

Protestant Yak Company further alleges that said applicant Company is selling about half of its total production of electric energy to consumers in the City and County of Denver, and particularly to The Denver Tramway Company and The Denver Gas and Electric Light Company; that the rates and charges to said consumers are much less than the rates and charges heretofore made to protestant Yak Company, and much less than those proposed to be enforced by said applicant Company if the proposed rates and charges are allowed, and that if so allowed and put into effect same will impose an unjust condition and unreasonable burden upon protestant Yak Company and will require protestant to pay a greater charge than said Denver consumers and, therefore, will result in discrimination and preference against it; that said applicant Company has increased its rates and charges for electricity used in lighting over the rates and charges in effect in December, 1919, and November, 1920, and that its proposed increase to protestant Yak Company will result in discrimination against it, and that finally protestant Yak Company denies that any increase in revenues is necessary for said applicant Company and it prays that the application of the Power Company for an increase of its rates and charges be denied.

Protest of American Smelting and Refining Company.

Protestant set forth substantially the same grounds as are stated by the Yak Company, except that its contract with the applicant Company was entered into June 1, 1913, upon and for mutual considerations for the furnishing of electric power to protestant American Company for its A. V. plant near Leadville; that in compliance with said contract protestant American Company, at large expense, made changes, alterations and additions in its plant, and that said contract ever since being entered into has been fully complied with by the parties thereto and the same is still in full force and effect; that the schedule of rates and charges provided for in said contract was duly filed with the Commission by said applicant Power Company and no

objection or protest thereto has ever been made until the application of the Power Company to change and increase said rates and charges by schedule filed herein November 10, 1920.

Protestant American Company further alleges that the income earnings of applicant Power Company have been sufficient, under the rates and charges heretofore in effect, to provide for the payment of operating expenses, interest charges and all reasonable charges and allowances for improvements, renewals, depreciation and a reasonable return upon its capital stock; that the rates and charges specified in the schedule filed November 10, 1920, are unreasonable, excessive, unjust and illegal and are not necessary to provide a reasonable return upon the just, fair and true value of the said applicant Power Company; that protestant American Company was, at the time of entering the contract with applicant Company June 1, 1913, and at all times since and still is, engaged in the smelting of gold, silver, lead and other ores near the City of Leadville; that the operation of said smelting plant is and has been beneficial to the City of Leadville and other mines in the Leadville District and elsewhere, and to said applicant Company; that the expense of protestant American Company's operations has greatly increased and that if the proposed increase of rates and charges, as provided in the schedule filed November 10, 1920, be allowed, it will require protestant American Company to pay a greater charge than by its contract provided or by public welfare is demanded, and greater than other consumers of power pay to said applicant Power Company and would be unjust, unreasonable and discriminatory. This protestant likewise prays a denial of said increase.

Protest of Tonopah Placers Company.

Above protestant alleges that it has a contract with applicant Power Company entered into March 25, 1915, for a ten-year period, a copy of which is on file with this Commission; that said contract was understandingly entered into by and between the parties thereto and that the same was based upon conditions made by protestant Tonopah Company, so that it would be highly inequitable and unjust that the contract rate be changed; that

the rate specified in said contract is not so unreasonable as to be detrimental to the public interest; that said contract is based upon conditions peculiar to the dredging industry, such as low and constant peak load and maximum use during the summer months and minimum use during the winter months, so that it is alleged to be just and reasonable that the schedule should be based upon such conditions rather than upon conditions generally applying; that the rate proposed by applicant Company is unjust, unreasonable, excessive, discriminatory and preferential; and finally that protestant Tonopah Company is entitled to the rate classification fixed in its said contract and that any increase in rates, whether directly or by change in classification, would be unjust, unreasonable, excessive, discriminatory and preferential.

Protest of Wellington Mines Company.

The above protestant alleges that the proposed increase in rates of applicant Power Company and of The Summit County Power Company, as proposed by their schedules filed herein, is and would be in violation of existing contracts between said Wellington Company and said applicant Power Company and said Summit County Power Company, and the proposed change or any increase would be and is in excess of a reasonable rate.

Protest of The Down Town Mines Company.

Above protestant objects to the increase of rates proposed by applicant Company because such increase would be an increase over and above the rates designated and specified in its contract with applicant Power Company dated July 16, 1914, and covering a period of ten years from said date; that protestant Down Town Company, in reliance upon the terms of said contract, has made large expenditures upon its property, and that not only would an increase of its contract rates be in violation of the contract but would be also in excess of a reasonable rate and would increase the burden upon protestant Down Town Company to such an extent as would prevent the continuation of its operations; that the mines of protestant Down Town Company are of great depth and require pumping of water for a distance of at least 900 feet below the surface; that its said mines were

unwatered by protestant of a large amount of water by virtue of the contract rates aforesaid and upon the faith and belief that said applicant Company would carry out its contract to furnish protestant power at the contract rate for the above period of ten years, and that in reliance thereon protestant Down Town Company has expended at least the sum of $500,000 in installation of machinery and pumps and in the purchase of electricity under said contract to unwater its said mines; that the machinery of said Mines Company was continuously operated by electricity under said contract rate for more than a year before any product was obtained from protestant's mine, and that such machinery has been operated continuously to the present time and that protestant has not earned an income sufficient to pay the cost of installation and unwatering of its mines, and that, at present costs, in prospecting and mining low grade ores its expenditures have been more than its receipts; and that finally if an increased power rate is allowed it will add to protestant's costs to such an extent that it will be impossible to carry on such work and will result in the permanent shutting down of the operation of protestant Mines Company, destroying its drifts, levels and shafts now used and being operated and will result further in the shutting down of all the mines in the Down Town Mine basin of the Leadville District, to the great detriment and hardship of all the people of said district.

DECISION.

While the issue presented by the applicant Company for determination by the Commission is broadly based on the increases applied for herein, as set out in the schedules filed, and the said increases only affect the power users on the Central System, there are also involved other questions, such as special contracts and whether particular customers are being served with surplus firm power at discriminatory prices or so-called "dump power." There is also involved the question of surplus or overbuilt plant. All of these questions so fully enter into the different features of applicant's business as to make a full and complete investigation necessary. This is the reason for requiring a complete valuation made by the applicant and the making of

a separate valuation by the Commission. These conditions explain also the reason for the long delay in the preparation of the inventory and appraisal by the applicant Company, the hearing from day to day and many postponements, the postponements being allowed by the Commission to meet the desires of the parties.

The testimony was very voluminous, consisting of about twenty-five hundred pages; also exhibits and data together with carefully prepared briefs filed by the applicant and each of the protestants. All the different parties to the case were allowed full time for argument; and it will, therefore, readily be seen why many months were consumed before the submission of the case to the Commission.

VALUATION.

During the hearing the applicant Company introduced in the evidence its valuation report compiled by the J. G. White Engineering Corporation known as the J. G. White Appraisal, which was marked as applicant's Exhibit C. This was thereafter supported by oral testimony and applicant's Exhibit B, known as the Walbridge Analysis. Applicant also filed its Exhibit G as a part of its appraisal. The protestants did not submit any separate valuation. However, they presented through their engineers, Durbin Van Law and George E. Collins, criticisms of the valuation and appraisal of the applicant Company; and by different exhibits and oral testimony as well as in their argument pointed out to the Commission to what extent, in their opinion, the values in the J. G. White Appraisal should be allowed. They also introduced evidence as to their contention that the Central System of applicant's plant was overbuilt, and what was claimed by them to be the amounts on which the applicant should be allowed to earn a fair return. The Commission's engineers also presented to the Commission a report in which the J. G. White Appraisal is checked and analyzed, and an effort made to authenticate or disprove the same. In considering the applicant's inventory together with the criticisms of protestants and the Commission's engineers, it was found that the parties hereto were many thousands of dollars apart in their figures and

findings. This violent difference of amounts resulted in part from the contention that the plants of the applicant were extravagantly built, without a proper regard to prospective or future business, and that being so overbuilt, when finally completed the Central System was and is much too large and has a generating capacity much in excess of that which is necessary to supply the firm power consumers which they have ever been able to secure or have secured. It is pointed out by the protestants that the Company, not being able to dispose of all its power at firm power prices, then disposed of its right to sell the same in certain districts, by contract with The Denver Gas and Electric Light Company of Denver, for a consideration of $500,000, which was paid to it by the latter company. They point to this contract, which is introduced in evidence, to substantiate this contention. The applicant Company contends that this contract provided only for the sale of so-called "dump power." The applicant Company has filed in its report and inventory two valuations, one denominated "Original Cost," the other denominated "Reproduction Cost at Present Prices" as of the date of January 1, 1920.

In regard to "Reproduction Cost New" as of January 1, 1920, the Commission has found that the figures presented for reproduction new as of January 1, 1920, are not susceptible of Commission study and determination in the form presented. The reproduction new cost as presented was made dependent upon the original cost in a gross manner by factors or multipliers which were the result of an engineering firm's experience and conclusion based on appraisals in various places which quite likely might not be comparable with the present case. Moreover, the Commission could not exercise its judgment in regard to a final decision as to rate base upon reproduction new cost as of January 1, 1920, as presented without first completing its detail study and determination of the Power Company's figures for original cost and then a similar detail consideration of the items that entered into the factors, or multipliers themselves, and in regard to the details of these multipliers too little information has been supplied in the record. Therefore, the Commission has concluded,

on account of the wide differences in the amounts contended for as a fair value, to make an independent investigation and study of its own to reach a proper conclusion as to a fair value for the purposes of this case. We, therefore, set our engineering force to work and have proceeded to make an examination and study to determine quantities, unit costs, percentages for engineering and superintendence, omissions and contingencies, organization, interest and taxes during construction, insurance, working capital and all other elements of value, in fact a complete digest of these details of valuation, item by item; we have gone carefully over the evidence and have made such examinations of the plant as were necessary, including examination and investigation into the physical capacity of the plant; also the demands of the consumers, together with simultaneous and peak demands. The Commission has considered these studies together with all evidence in the case and has given the same very long and careful study and consideration. The appraisal on behalf of the Commission is based on normal costs of reproduction new, with consideration as to the periods of construction and reflecting average costs over these periods, so that the costs used are neither the highest nor the lowest, but include these in the average whenever advisable, so-called war prices being given consideration only as they enter into averages or influence the general trend of labor and material costs. A summary of the Commission's appraisal is set out later herein.

The Company has in the Central System hydraulic generating stations at Shoshone, Boulder and Georgetown, and a steam generating plant at Leadville, with additional substations at Shoshone, Dillon and Denver. The Central System is not connected physically with Salida, Alamosa or the Sterling Districts. The application for increases herein is confined entirely to the Central System. Hence the necessity of fixing a valuation on the Central System separately. When a plant, such as the one under consideration, has been constructed by different companies, which construction has taken place at different periods, and when, as in the present case, the larger part of the plant or system has been purchased at a reorganization sale, it is a somewhat difficult problem

to say whether or not the original costs as presented were all wisely incurred. On the other hand, the Commission ought not to determine the fair value at the reorganization or purchased price costs. Actual costs, where available and shown to be reasonable, have been approved in determining reproduction cost or fair value. While we have carefully considered applicant's reproduction cost as of January 1, 1920, in finding a fair value for rate purposes in this case, we did not accept such prices created by war conditions as controlling; nor has the Commission allowed the evidence that the present Company purchased the larger part of the Central System from the Central Colorado Power Company at a reorganization sale for $2,500,000 and the Leadville property for $400,000 to influence it in arriving at the fair value as found herein.

Regarding the question of power sold by the applicant Company to The Denver Gas and Electric Light, The Denver Tramway and The Western Light and Power Companies, which are all served with power from the Central System: It is the contention of the Power Company that the power sold to these companies is secondary or dump power and, therefore, should not bear any portion of the constant costs or fixed capital costs. On the other hand, it is the contention of the protestants that the power sold to these companies is prime power and should bear its proportion of all the constant costs, including a return on the investment. Obviously, if it is secondary or so-called "dump power" it should not be charged with such costs, it not entering into any demand which determines the capacity of the plant and costs thereof. From a careful study of the evidence in this case and with the aid of its engineers, the Commission has been able to form its conclusions as to the conditions which obtain with the Power Company in distributing its service and operating its power plants of the Central System, as to the importance of load factor in relation to low stream flow, the effect of consumers' demands as a determining factor in determining the question of dump power and bearing on the importance of many statements in the record, as to demands of overbuilt plant and the effect on the lines of the load of The Denver Gas and Electric

Light Company, The Denver Tramway Company and The Western Light and Power Company.

After a careful consideration the Commission has come to the conclusion that during the years 1918 and 1920 and on the day of maximum output on the system, for the year, and the day of maximum output in the month of lowest stream flow or the days when the plants met their heaviest duties, that that part of the plant known as Shoshone is and has been operated at a very good load factor and continuously at a capacity very close to the capacity of the tunnel, which is approximately 12,000 kilowatts; that as the plants have been operated, excluding The Denver Gas and Electric Light Company's demands, Shoshone alone was able to carry the entire load without difficulty including The Denver Tramway Company and The Western Light and Power Company, and that it moreover had excess power most of the time for carrying a part of The Denver Gas and Electric Light Company's load; that the hydro-electric plant at Georgetown and the steam plant at Leadville are capable of generating 3225 kilowatts, which could, as standby plants, supply any deficiency in times of low water in serving all of the firm power customers excepting The Denver Gas and Electric Light Company, The Denver Tramway Company and The Western Light and Power Company; that the load of these three companies, particularly the load of The Denver Gas and Electric Light Company, is the cause of the principal system peaks which are simultaneous with other peaks causing a wider variation of load than any other consumers, being detrimental to high efficiency of operation and low costs; that the load factor is poorer with The Denver Gas and Electric Light Company than without it. It seems to the Commission that these conditions are exactly opposite to what should be expected from a dump power load. It also appears that the maximum peaks, exclusive of The Denver Gas and Electric Company, are only about 40 per cent of the total; that the addition of The Denver Gas and Electric Light Company's load reduces the load factor about 10 per cent, and that this company requires about 53 per cent of the total generation on these days. The Commission has also concluded that

the Boulder plant has been operated at a very poor load factor and at an average capacity greatly below the rated capacity of the plant. After a full investigation and due consideration the Commission is led to the conclusion that the Boulder plant is not necessary to take care of the peaks produced excepting when produced by the addition of The Denver Gas and Electric Light Company's load. It also seems that the maximum demand brought about by The Denver Gas and Electric Light Company is often in excess of the Boulder plant's rated generator capacity. It is, therefore, the inevitable conclusion of the Commission that considered from the way its operations are carried on, excluding The Denver Gas and Electric Light Company, The Denver Tramway Company and The Western Light and Power Company, the Central System is overbuilt to practically the extent of the entire Boulder development. In a recent case, *re* Boston and Idaho Gold Dredging Company, the Idaho Public Utilities Commission says:

"It is the duty of a public utility to find a market for the consumption of its commodity, and where a public utility provides capacity without proper regard to the present and the prospective future demands, value of the excess capacity should not be included in rate base. The electrical plant and transmission system of the applicant has a capacity much greater than a prudent regard for its present and prospective customers require when considered in the light of the developmental possibilities of the territory which it serves."

Re Boston and Idaho Gold Dredging Company, P. U. R. 1921-E, Page 843.

See also *re* Stockton Springs Water Co., P. U. R. 1920-E, 918-21-22.

The Commission has concluded and it, therefore, finds that the power furnished The Denver Gas and Electric Light Company, The Denver Tramway Company and The Western Light and Power Company is not "dump power," under the well understood meaning of that term, but is excess or surplus firm power on account of an overbuilt plant. The Power Company contends that it has been unable in the past and is unable now to dispose

of this power to any other customer or customers at any greater price than the price proposed in the schedules filed herein. The three companies in question agree that this is the case and that they can not pay a greater price, having generating plants of their own.

CONTRACT OF THE DENVER GAS AND ELECTRIC LIGHT COMPANY AND THE COLORADO POWER COMPANY.

Protestants' Exhibit 5 was introduced in the evidence and is a contract between The Colorado Power Company and The Denver Gas and Electric Light Company for the supplying by The Colorado Power Company to The Denver Gas and Electric Light Company of certain power at prices therein stated. The contract is dated the 19th day of July, 1920, and provides that the Denver Company agrees to pay to the Power Company 5 mills per kilowatt hour for the first million kilowatt hours delivered per month by the Power Company, and for each kilowatt hour delivered in excess of a million kilowatt hours per month during the months of April 1 to September 30, the Denver Company agrees to pay 3 mills per kilowatt hour. During the months October 1 to March 31 all energy delivered to be paid for at the rate of 5 mills per kilowatt hour. The original contract was entered into by the predecessor of the present Company, The Central Colorado Power Company, and The Denver Gas and Electric Light Company on March 1, 1911. This contract provides that: "The Central Company hereby designates and appoints the Denver Company its sole agent and vendee for the period of twenty years from the date hereof for all energy generated by it and sold within the counties of Denver, Arapahoe and Jefferson in the State of Colorado (other than for power for street railway and interurban traction service, including lighting of cars, stations and barns), and Central Company agrees not to sell, deliver or donate, nor permit such sale, delivery or donation by any of its customers other than as stated above save the Denver Company under the terms of this contract; and in case such sale, delivery or donation shall be made, Central

Company shall pay to Denver Company as liquidated damages the difference, if any, between the price for like amount of energy at base load rates thereunder and the maximum price Denver Company is permitted to charge for like amount of energy and like service under its franchise from the City and County of Denver of May, 1906." The other important features of this original contract are that the Denver Company agreed to pay, and according to the evidence did pay, to the Power Company the sum of $500,000 as a consideration for the contract.

The present contract, Exhibit 5, recites that the Power Company does not agree to furnish the Denver Company with any service whatsoever unless the Power Company has electrical energy available for delivery to the Denver Company over and above the requirements of the business of the Power Company, but the agreement of the Denver Company to take 1,000,000 kilowatt hours per month is a firm covenant and the Denver Company shall take and pay for the same as a minimum guaranteed payment, or so long as the Power Company desires and is able to deliver in accordance with the following conditions. The important features of this contract are that the Denver Company is to pay the Power Company a maximum of 5 mills per kilowatt hour for the first million kilowatt hours which, it is contended by the protestants, is less than the cost to produce the same and that the contract is entered into for a period of twenty years. This price per kilowatt hour is in addition to the said sum of $500,000 already paid. While there is a provision in this contract that the Power Company is not compelled to furnish electricity to the Denver Company unless it has electrical energy available for delivery to the Denver Company above the requirements of other business, the Commission is of the opinion that the insertion of this clause in the contract in no way changes the nature or class of the power delivered to the Denver Company by the applicant. The evidence before the Commission is that the power furnished to The Denver Company has been continuous. The power furnished, therefore, has been firm power, as the Commission must look to the actual character

of the power delivered rather than to the description of the same in any contract.

Mr. Walbridge, one of the main witnesses for the applicant, an engineer in charge of construction of the plants of the applicant, gave his testimony very frankly and this testimony has been very helpful in enlightening the Commission as to the present difficulties of the Company. Mr. Walbridge testified to the following facts:

The plant was built for a larger market than found; that the Central Colorado Power Company built a much larger plant than they were able to develop a market for; that they did not supply Denver partly because of this contract; that the Central Colorado Power Company's property was bought in 1913 for $2,500,000 and the Leadville plant for $400,000; that it is evident that the plant as a whole was not justified; that at the time of entering into the original contract The Denver Gas and Electric Light Company was taking about one-half of the output; that The Denver Gas and Electric Light Company has paid to The Colorado Power Company the $500,000; that if he were building new and were not to supply Denver he would not spend as much money as is now in Shoshone; that since the original contract the energy supplied to the Denver Company has been continuous with very slight interruptions, also that supplied to The Denver Tramway Company.

There is no testimony in the record that the Commission has discovered that the Power Company has ever been compelled to refuse to supply The Denver Gas and Electric Light Company with the energy demanded. Mr. Read testified that in 1918, the time of the greatest demands on the system, there was some consideration given to the question as to whether The Denver Gas and Electric Light Company's supply should be curtailed. There is nothing in the record to indicate that the power furnished The Denver Gas and Electric Light Company from day to day differs in character from that furnished the other large consumers.

From the above it is apparent to the Commission that the Central System is overbuilt, and that the Company built and constructed its plant far in excess of its firm power users that it

has ever been able to attach. It seems that having come to the gates of Denver with this excess plant and either being unable to attach firm power customers sufficient to dispose of its supply, or unwisely having entered into a contract for the term of twenty years for a very low rate and for a further consideration of $500,000 not to enter the Denver, Arapahoe and Jefferson Counties field, it now attempts to dispose of its surplus power as "dump power," and by so doing it thereby will fasten upon the other power users the burden of its constant cost. The Commission can not subscribe to this theory. Of course, the Power Company in words in its contract attempts to attribute to this power a "dump" characteristic, but the wording of the contract can not fix the character of this power; that must be determined by the facts of its actual characteristics. The Commission does not deny that in the summer months of high water flow the Company may have at its disposal dump power, but it does say that the power furnished continuously to The Denver Gas and Electric Light Company, The Denver Tramway Company and The Western Light and Power Company has all the characteristics and is really surplus, prime power resulting from an overbuilt plant.

In Ketterlinus v. Bar Harbor and Union River Power Company, P. U. R. 1920-B, Page 540, which is a recent case by the Maine Public Utilities Commission, the Commission said:

"It will not be denied that the Bar Harbor and Union River Power Company in order to supply the demands within the Bar Harbor and Ellsworth districts which might approximate at times 800 kilowatts, was authorized to install a plant of sufficient capacity to provide for the reasonable, expected growth in the two districts and a development up to 1000 kilowatts would not be an unreasonable overdevelopment. * * * If the Commission felt sure that it could determine with substantial accuracy the cost of creating at Ellsworth a power plant that would produce 1000 kilowatts of energy, we would then know upon what amount the customers within these two districts might reasonably be required to yield a fair return. * * * We are satisfied, however, that no such structure as the respondent has produced and no

such amount of flowage as it has created would be necessary to supply the Bar Harbor and Ellsworth districts. We are also convinced that if the respondent invested money in the creation of a plant capable of producing 2250 kilowatts of energy and now finds either that it cannot dispose of the excess of energy produced above the needs of the Bar Harbor and Ellsworth districts at a price which will yield a profit or because of its intimate relations with one of its other customers does not find it advisable or convenient to charge that customer a price which will yield a fair return upon the excess investment costs, it has no right to shift any part of the burden of its error in judgment or its inability or unwillingness to charge what might be regarded as a fair price for energy furnished to one of its customers. Under the peculiar circumstances disclosed in this case, if the Bar Harbor and Union River Power Company is unable to dispose of this excess energy at a price which would yield a fair return upon the excess cost in creating a plant to produce this energy, then the loss should be borne by the company and not by its customers. The Commission is not warranted in finding that this 1250 kilowatts of energy is secondary or "dump power" any more than it would be warranted in finding that the 3800 kilowatts now being provided for will be "dump power," the cost of developing and producing which should be borne by the customers within the Bar Harbor and Ellsworth Districts.

"Almost from the time the first court was called upon to pass upon the question of the reasonableness of the rates charged by public service companies this assertion of a fixed principle has been adhered to; viz, no rate is fair and reasonable unless it is fair and reasonable to the customer. Our own Supreme Court has been subscribed to this doctrine. This Commission is not only bound by these decisions, but absolutely believes in the fairness and justice of the principle stated. To illustrate: Suppose a plant actually cost a million dollars, and a valuation by experts would support this cost as a value upon which the company might be entitled to a return. Assume also that taking into account the number of customers the company could possibly obtain, the rate necessary to be charged in order to obtain a fair

return on this "fair value" would be manifestly too high and practically prohibitive. In other words, it is demonstrated that either the company should never have entered the territory at all or else it has built a plant far and away beyond the needs and the purse of the territory to be served. Under these circumstances should this Commission permit rates to be charged which, while they yield no more than a fair return on the fair value of the property, nevertheless will result in excessive charges to the customers. There can be but one answer, the rights of the customer cannot be ignored; and if this respondent or any other public service company finds itself unable to render service at fair rates it must accept the consequences that follow the facts and cannot be permitted against the protest of the customers, to place upon the latter any undue burden."

The Commission is of the opinion that with the construction of the Shoshone plant together with the Georgetown and the Leadville steam plant developments, the company was able to serve all of its customers on the Central System with adequate service excepting The Denver Gas and Electric Light, The Denver Tramway and The Western Light and Power Companies, and at times of greatest stream flow was able to supply energy to The Denver Gas and Electric Light Company, The Denver Tramway Company and The Western Light and Power Company, which could not be given a year around firm commitment and which, without the aid of the Boulder development, would have had to be disposed of as "dump power." By the construction and building of the Boulder development, the Power Company has been able to produce such an additional supply of power from that plant in times of low water flow at the Shoshone plant, which has given them a very large increase in production and thus has rendered the greater part of the "dump power" theretofore produced by the Shoshone plant firm power and capable of a firm power commitment. This it has been unable to dispose of at firm power rates, according to the testimony. It is, therefore, disposing of the same to the three companies above named at dump power prices. According to the testimony of the said three companies above named, they themselves are unable to

pay firm power prices for the power delivered to them, having plants of their own ready for use by which they could produce their own energy practically at the prices now being charged to them. It, therefore, must be apparent that the Power Company in expending this additional amount necessary in constructing its Boulder development, must have had in mind the obtaining of an additional supply of power for these companies or some other customers, as the engineers must have known this development, in connection with the Shoshone, would convert a large amount of the "dump power" at Shoshone during high stream flow into firm power available the year 'round. We are unable to determine from the evidence whether, as contended by protestants, it was the Power Company's original intention to enter the Denver, Arapahoe and Jefferson County fields or not. The result, nevertheless, is that after having so built and having this surplus power the Power Company did, by contract with The Denver Gas and Electric Light Company and for a consideration of $500,000, preclude themselves from entering this field and are now unable to dispose of this power to this company or any other customers at firm power rates. If this surplus power can not be sold at firm power prices it would be useless for the Commission to fix firm power rates for this excess power, when the result would be that they would be unable to sell it at all at the rates fixed and they would thereby be precluded from obtaining any revenue therefrom.

The Commission has attempted, first to segregate the property of the Central System from the rest of the system as a whole. It has then taken up the Central System for the purpose of ascertaining, if possible, the value of the properties in use and useful in serving all of the customers on the Central System outside of The Denver Gas and Electric Light Company, The Denver Tramway Company and The Western Light and Power Company, and to also ascertain the value of the properties of the Company in use and useful in serving these three companies alone. The final summaries following include all of the physical property in use and useful to all consumers on the Central System. Table "A" is a general summary of original cost claimed

by applicant compiled from exhibits of The Colorado Power Company for all districts. Tables "B" and "C" are final summaries of original cost claimed by applicant and the Commission's valuation allowed, "B" including power plants and 100,000 volt transmission line and "C" containing the substations and distribution systems. At the end of table "C" is a grand total of the final summaries of property contained in the Central System alone. It will be noted that the last column, P. U. C. totals, amounts to $6,909,206, which is the property in use and useful by the Company in serving all of its customers on the Central System. The column for the Walbridge Analysis is not entirely comparable with the other column because there have been additions to property since its completion, but the figures are introduced to illustrate how the Walbridge Analysis fits into the other figures presented. The totals by districts, as they appear in the following final summaries, were reached after a consideration of intermediate summaries by accounts, which in turn were dependent upon the digest prepared item by item by the Commission's engineers. The summaries by accounts are also set out herein:

General Summary of Original Cost Claimed by Applicant Company and Compiled from Exhibits of THE COLORADO POWER COMPANY

For All Districts
[As of January 1, 1920.]

	Items	(J. G. White Appraisal) Page 1 Ex. C.	Corrected for Clerical Errors	Data from Exhibit G	Adjusted Totals	General Office District, Allocated to Districts	Final Totals
(1)	General Office District	$ 80,208	$ 79,208				
	(Cost to be allocated)						
	Additions:						
	Ex. G, item e	.....	.....	$ 1,350*	$ 80,558	.....	.....
(2)	Central System:						
	Transmission District	$1,068,735	$1,068,375	.....	$ 1,068,375	.....	.....
	Shoshone District	2,755,858	2,755,948	.....	.....	.....	.....
	Additions:						
	Ex. G, item a	.....	.....	671,159	.....	.....	.....
	item d	.....	.....	18,948	.....	.....	.....
	Deductions:						
	Ex. G, item h	.....	.....	—1,110	3,444,945	.....	.....
	Boulder District	2,943,510	2,943,510	.....	.....	.....	.....
	Additions:						
	Ex. G, item c	.....	.....	47,508	.....	.....	.....
	item e	.....	.....	1,030*	.....	.....	.....
	Deductions:						

	Ex. G, item g	.....	.....	—5,700†	2,986,348	.....	.....
	Leadville District	554,480	553,551	.....	.....	.....	.....
	Additions:						
	Ex. G, item b	.....	.....	30,864	.....	.....	.....
	Deductions:						
	Ex. G, item f	.....	.....	—800‡	.....	.....	.....
	item g	.....	.....	—3,825†	579,790	.....	.....
	Dillon District	232,364	232,364	.....	.....	.....	.....
	Deductions:						
	Ex. G, item g	.....	.....	—3,767†	228,597	.....	.....
	Denver District	229,374	227,653	.....	227,653	.....	.....
	Idaho Springs District	654,324	652,195	.....	.....	.....	.....
	Deductions:						
	Ex. G, item g	.....	.....	—4,350†	.....	.....	.....
	item f	.....	.....	—14,845‡	633,000	.....	.....
	Total of (2)	.....	$8,433,596	$735,112	$9,168,708	$70,601	$9,239,309
(3)	Sterling District	407,485	405,311	.....	405,311	3,118	408,429
(4)	Salida District	680,593	680,065	.....	.....	.....	.....
	Deductions:						
	Ex. G, item g	.....	.....	—3,150†	676,915	5,212	682,127
(5)	Alamosa District	212,302	212,282	.....	.....	.....	.....
	Deductions:						
	Ex. G, item g	.....	.....	—1,350†	210,932	1,627	212,559
	Total of above	$9,819,233	$9,810,462	$731,962	$10,542,424	$80,558	$10,542,424

* These items total $ 2,380, item (e) of Exhibit G.
† These items total $22,142, item (g) of Exhibit G.
‡ These items total $15,645, item (f) of Exhibit G.

Final Summary of Original Cost Claimed by Applicant Company and Commission's Valuation Allowed for Power Plants and 100,000 Volt Transmission Line.

		Colo. P. Co. Totals Presented	Original Cost Portion in Walbridge Analysis	P. U. C. Totals
(1)	**Shoshone Hydro-electric Power Plant—**			
	Specific construction	$2,992,643	$2,238,985	$1,697,563
	General overheads	445,097	416,080	325,267
	Sub-total	$3,437,740	$2,655,065	$2,022,830
	General Office District	26,468	.....	20,884
	Total Shoshone Plant	$3,464,208	.....	$2,043,714
(2)	**Boulder Hydro-electric Power Plant—**			
	Specific construction	$2,985,979	$1,994,541	$1,926,133
	General overheads	706,217	675,877	499,548
	Sub-total	$2,792,196	$2,670,418	$2,425,681
	General Office District	21,498	.....	25,042
	Total Boulder Plant	$2,813,694	.....	$2,450,723
(3)	**Georgetown Hydro-electric Power Plant—**			
	Specific construction	$ 273,773	.....	$ 179,834
	General overheads	57,194	.....	37,567
	Sub-total	$ 330,967	.....	$ 217,401
	General Office District	2,549	.....	2,245
	Total Georgetown Plant.	$ 333,516	.....	$ 219,646
(4)	**Leadville Steam Power Plant—**			
	Specific construction	$ 228,250	.....	$ 152,475
	General overheads	31,591	.....	33,867
	Sub-total	$ 259,841	.....	$ 186,342
	General Office District	1,998	.....	1,920
	Total Leadville Plant	$ 261,839	.....	$ 188,262
(5)	**Transmission Line—**			
	Specific construction	$ 864,538	$ 794,271	$ 745,525
	General overheads	203,837	182,759	159,072
	Sub-total	$1,068,375	$ 977,030	$ 904,597
	General Office District	8,225	.....	9,341
	Total Transmission Line.	$1,076,600	.....	$ 913,938
	Total of Summary	$7,949,857	$6,302,513	$5,816,283

Final Summary of Original Cost Claimed by Applicant Company and Commission's Valuation Allowed for Substations and Distribution Systems.

		Colo. P. Co. Totals Presented	Original Cost Portion in Walbridge Analysis	P. U. C. Totals
(6)	**Glenwood-Carbondale** Line in Shoshone District—			
	Specific construction	$ 4,955	.....	$ 4,955
	General overheads	2,250	.....	1,140
	Total in Shoshone District	$ 7,205	.....	$ 6,095
(7)	**Boulder** Distribution, etc.—			
	Specific construction	$ 173,258	$ 13,892	$ 152,785
	General overheads	20,894	.....	28,815
	Total in Boulder District	$ 194,152	.....	$ 181,600
(8)	**Leadville** Distribution, etc.—			
	Specific construction	$ 273,956	.....	$ 248,190
	General overheads	45,993	.....	41,100
	Total in Leadville District	$ 319,949	.....	$ 289,290
(9)	**Dillon** Distribution, etc.—			
	Specific construction	$ 205,317	.....	$ 168,208
	General overheads	23,280	.....	18,728
	Total in Dillon District	$ 228,597	.....	$ 186,936
(10)	**Denver** Distribution, etc.—			
	Specific construction	$ 207,309	$ 90,719	$ 139,576
	General overheads	20,344	4,952	31,855
	Total in Denver District	$ 227,653	$ 95,671	$ 171,431
(11)	**Idaho Springs**, Distribution, etc.—			
	Specific construction	$ 254,341	.....	$ 207,496
	General overheads	47,692	.....	38,906
	Total in Idaho Springs District	$ 302,033	.....	$ 246,402
	Total Sub-stations and Distribution Systems—			
	Specific construction	$1,119,136	.....	$ 921,210
	General overheads	160,453	.....	160,544
	Sub-total	$1,279,589	.....	$1,081,754
	*General Office District	9,863	.....	11,169
	Total Sub-stations and Distribution Systems.	$1,289,452	$ 109,563	$1,092,923
	Grand total of the final summaries above	$9,239,309	$6,412,076	$6,909,206

*This item is allocated between Distribution Districts in the Summary by Accounts.

POWER PLANTS.

Summary by Accounts.

Acct. No.	Items	Shoshone Colo. P. Co.	Shoshone P. U. C.	Boulder Colo. P. Co.	Boulder P. U.C.	Leadville Colo. P. Co.	Leadville P. U. C.	Georgetown Colo. P. Co.	Georgetown P. U. C.
	Gen'l Office Dist.	$ 26,468	$ 20,884	$ 21,498	$ 25,042	$ 1,998	$ 1,920	$ 2,549	$ 2,245
101	Organization	671,159	33,286	.....	.....	47,500	6,000	72,670	10,200
105	Lands & Rights-of-way	18,838	1,000	191,587	142,532	1,130	1,130	52,492	42,557
106	Buildings	132,468	104,322	71,470	67,365	27,489	20,432	19,891	19,536
107	Steam P. Equip.	.....	.....	.....	.....	93,342	85,624	.....	.....
109	Hydro P. W. Equip.	1,612,593	1,359,658	1,615,734	1,515,345	.....	.....	78,351	59,038
110	Hydro P. P. Equip.	220,119	194,025	202,452	196,155	.....	.....	47,708	45,842
111	Boiler P. Equip.	.....	.....	.....	.....	58,244	38,744	.....	.....
113	Miscel. P. P. Equip.	.....	.....	.....	.....	545	545	2,661	2,661
120-B	Tel. & Tel.	2,257	2,257	2,756	2,756	.....	.....	.....	.....
162	Gen'l Office Equip.	188	188	225	225	.....	.....	.....	.....
168	Miscel. Equip.	2,042	2,042	725	725	.....	.....	.....	.....
169	Utility Equip.	785	785	1,030	1,030	.....	.....	.....	.....
	Undistributed specific construction	332,194	.....	.....	.....	.....	.....	.....	.....
	Total specific construction	$3,019,111	$1,718,447	$2,107,477	$1,951,175	$230,248	$154,395	$276,322	$182,079
180	General overheads during construction	445,097	325,267	706,217	499,548	31,591	33,867	57,194	37,567
	Totals for Power Plants	$3,464,208	$2,043,714	$2,813,694	$2,450,723	$261,839	$188,262	$333,516	$219,646

TRANSMISSION LINE.

Summary by Accounts.

Acct. No.	Item	Shoshone-Denver-Boulder Colo. P. Co.	P. U. C.
	General Office District	$ 8,225	$ 9,341
105	Lands and Right-of-way	38,163	5,927
106	Buildings	7,243	7,243
120	Transmission Line	742,403	647,397
120-A	Patrol Houses	5,025	4,030
120-B	Telephone Lines	65,356	57,515
168	Outfits for Patrolmen	4,677	4,677
	Undistributed specific construction	1,671	18,736
	Total specific construction	$ 872,763	$ 754,866
180	General Overheads during construction	203,837	159,072
	Total Transmission District	$1,076,600	$ 913,938

SUBSTATIONS AND DISTRIBUTION SYSTEMS.

Summary by Accounts.

Acct. No.	Item	Glenwood C. P. Co.	Glenwood P. U. C.	Boulder C. P. Co.	Boulder P. U. C.	Leadville C. P. Co.	Leadville P. U. C.	Dillon C. P. Co.	Dillon P. U. C.	Denver C. P. Co.	Denver P. U. C.	Idaho Springs C. P. Co.	Idaho Springs P. U. C.
	General Office District	$ 55	$ 63	$ 1,497	$ 1,875	$ 2,466	$ 2,987	$ 1,762	$ 1,930	$ 1,755	$ 1,770	$ 2,328	$ 2,544
105	Lands and R.-of-way	------	------	------	------	505	505	200	200	2,018	1,162	1,523	895
106	Buildings	------	------	------	------	28,782	24,656	22,347	20,895	21,193	20,148	22,232	19,566
120-B	Telephones	------	------	323	316	893	893	1,577	1,577	674	674	2,034	1,549
121	Sub-station Equip.	------	------	15,414	13,472	40,022	36,489	52,780	52,790	86,320	61,462	39,709	38,853
140	Distribution (City)	4,622	4,622	120,168	104,966	41,409	40,723	3,517	3,120	70,887	46,946	30,642	28,064
140	Distribution (Mines)	------	------	------	------	74,681	57,636	104,731	69,750	------	------	103,236	70,084
141	Transformer (City)	------	------	23,898	23,898	5,257	5,257	959	959	2,278	2,278	3,025	2,694
141	Transformer (Mines)	------	------	------	------	45,509	45,509	11,390	11,390	------	------	19,956	15,591
141-A	Lightning Arr.	------	------	1,273	1,273	791	791	1,596	1,504	247	247	382	382
142	Meters (City)	233	233	744	744	12,958	12,958	1,101	1,101	1,818	1,818	7,050	7,050
142	Meters (Mines)	------	------	3,993	3,993	5,967	5,967	1,562	1,562	------	------	7,088	5,654
160	Municipal Lights	------	------	215	215	9,846	9,470	847	809	------	------	8,826	8,476
162	Gen'l Office Equip.	------	------	------	------	3,004	3,004	306	306	------	------	2,733	2,733
166	Customers' Inst.	------	------	------	------	------	------	------	------	17,033	------	------	------
168	Miscellaneous Equip.	------	------	404	404	740	740	379	379	682	682	2,371	2,371
168-A	Trans. Houses	------	------	789	378	457	457	313	154	------	------	------	------
168-B	Meter Houses	100	100	215	215	------	------	649	649	------	------	459	459
169	Utility Equip.	------	------	5,822	2,911	3,135	3,135	1,063	1,063	4,159	4,159	3,075	3,075
	Total Specific Construction	$ 5,010	$ 5,018	$174,755	$154,660	$276,422	$251,177	$207,079	$170,138	$209,064	$141,346	$256,669	$210,040
180	General Overheads during construction	2,250	1,140	20,894	28,815	45,993	41,100	23,280	18,728	20,344	31,855	47,692	38,906
	Totals	$ 7,260	$ 6,158	$195,649	$183,475	$322.415	$292,277	$230,359	$188,866	$229,408	$173,201	$304,361	$248,946

As constructed, the four power plants are connected to each other by the transmission line and are a physical entity in use and useful by all customers on the Central System; and it can not be said that the power received by any customer or group of customers in any part of the system really comes from one plant over a portion of the transmission line or from some other plant over a different portion of the transmission line. The Denver Gas and Electric Light Company, The Denver Tramway Company and The Western Light and Power Company receive their power at a much lower rate than any other large power user. As above stated, the reason given by the applicant is that these companies are furnished with "dump power" at the lower rate because they have sources of supply of their own. On the other hand, the other customer known as "firm power" customers are required by their contract to purchase all of their electric power from the applicant Company, and in return the applicant commits itself to furnish any amount within the terms of the contract at any time. The applicant contends in order to meet this necessity to supply firm power users it was necessary to build the Boulder development as a reserve or standby plant in order that sufficient capacity be available in times of insufficient water at Shoshone.

The Commission finds from the records and exhibits presented that if all the electricity sold, including the three above named companies, be considered that the capacity of a plant equal to the present plant together with the Boulder plant is required, and as was stated in the evidence it believes when the stream flow is up to normal or is excessive that because of the installed reserve capacity electricity can be generated in off peak periods at a comparatively low cost. Electricity so generated and not capable of a firm commitment might be sold at near production cost to the benefit of all consumers because the average total cost of production per kilowatt hour generated is lowered. Such electricity, when available, is in electrical terminology known as "dump power." The Commission has found that insofar as it is disclosed by the evidence The Denver Gas and Electric Light Company, The Denver Tramway Company and The West-

ern Light and Power Company consumers, regardless of the terms of their contracts, did receive power at all times they elected to take the same, whether at times of peak load on the plant or not; and that the energy so furnished them is not dump power. This partly for the reason that evidence is lacking to show that the applicant was unable at any time to furnish power during peak hours because it did not have the same to furnish over and above the commitment to firm power users, and further for the reason that evidence is lacking to show that the cost to firm power consumers is materially less than it would have been if there had been so-called "dump power" consumers. The Commission was, therefore, led to believe that insofar as the applicant's ability to supply is concerned the major portion of the so-called "dump power" sold differs from the "firm power" only in name.

Allocation of Fair Value.

Allocation by the Commission of the fair value of the property of applicant in the Central System, between the firm power users of the Central System, and The Denver Gas and Electric Light, The Denver Tramway and The Western Light and Power Companies, for the purpose of determining the fair value of the property in use and useful in serving the firm power customers of the Central System, exclusive of The Denver Gas and Electric Light, The Denver Tramway and The Western Light and Power Companies, and for the purpose of determining the fair and reasonable rates for the firm power customers, was made in the following manner:

For total generation investment, the entire net investment in the Shoshone, Leadville and Georgetown power plants is taken as set out in the final summary table.

The transmission line has joint use by firm and so-called dump power consumers; therefore, an allocation has been made on the basis of the relative traffic over the line and a percentage ratio as between firm power use and the total use of the line determined. This percentage ratio, reflecting an average of five years of operation, was found to be 44.814% to be allocated to firm power use and results in a net transmission line investment for firm power users of $409,572. Similarly in the Denver District and in the Boulder District a portion of the sub-stations and distribution systems is of benefit to both firm and dump power users, and an allocation was necessary and has been made

in the manner similar to that used for the transmission line. For the Denver District, this allocation results in a percentage ratio of 12.743% to firm power use or a net Denver distribution investment to firm power use of $22,071. For the Boulder District, this allocation results in a percentage ratio of 64.016% or a net distribution investment to firm power use of $117,453. In regard to all other districts, the substation and distribution systems are used solely by firm power consumers.

Therefore, the net investment upon which the applicant is entitled to earn a fair return from firm power consumers is found to be:

GENERATION INVESTMENT.

Shoshone Power Plant	$2,043,714	
Leadville Power Plant	188,262	
Georgetown Power Plant	219,646	
Total Generation Investment		$2,451,622
Transmission Line		409,572
Denver Distribution		22,071
Boulder Distribution		117,453
Shoshone Distribution		6,158
Leadville Distribution		292,277
Dillon Distribution		188,866
Idaho Springs Distribution		248,946
Total net investment for firm power use		$3,736,965

The Commission has taken the figures for working capital as set forth by the Commission's statistician in his report for the year 1920. In order to determine working capital, it was necessary to give consideration to operating expenses, gross revenues and the investment; therefore, these factors were used as they occur in the several districts in order to allocate the total working capital found by the Commission's statistician, first between the Central System and the Alamosa, Sterling and Salida Districts, and second as between firm power and so-called "dump power" use in the Central System. The resulting figure for working capital necessary for firm power consumers is $184,495.

The total rate base for firm power consumers, excepting going concern value, is the sum of the net investment and the working capital or $3,921,460. As a portion of the total revenue from

firm power consumers should provide a depreciation reserve fund allowance, it was determined in the following manner: Use was made of tables for the average life of the various classes of depreciable property in the entire investment of The Colorado Power Company in the Central System, and from these tables it was found that an allowance of 1.905% of the entire investment would be sufficient to replace the depreciable property as necessary insofar as can be predetermined. The annual amount to be set aside for depreciation reserve fund is, therefore, $71,189 from the total revenues of firm power consumers.

The Commission has taken the figures found by the Commission's statistician as set out in his report, Exhibit 1-B, for the operating expenses. A five-year average has been used unless otherwise indicated. The manner of allocation to firm power is as follows: After the conclusions reached in regard to investment that the Shoshone, Georgetown and Leadville power plants with a portion of the transmission line are sufficient to supply the firm power commitment, operating expenses have been allocated in the same way with certain exceptions. Production costs were not allocated but taken as they were found for the three plants over a five-year period. The fact that Shoshone did generate electricity in excess of that needed by firm power users is offset by the fact that these firm power users were protected in a measure by the standby service of the Boulder plant. Transmission line expenses were allocated on the basis of traffic. Distribution, utilization, commercial, new business, and local management expenses as set up in the report are all chargeable to the firm power consumers. It may be noted that distribution expense necessary for the so-called dump power consumers is included in the report in the general expenses and not in the distribution expense. General expenses are allocated in the ratio determined from a comparison of all other operating expenses. Taxes for 1920 are taken on the theory that they are constantly increasing, and those of the current year are the best indication of what may be expected for the future. Income tax has been deducted as not a proper charge against the total revenues, since income tax is properly chargeable against the profits. Taxes

have been allocated as between the Central System and the other districts in agreement with figures of the Commission's statistician. Within the Central System, taxes are allocated as between firm and so-called dump power on the basis of the net P. U. C. valuation. A table of operating expenses chargeable to firm power users follows:

Production and maintenance expense	$ 33,350
Transmission line expense	23,800
Distribution expense	30,069
Utilization expense	5,813
Commercial expense	10,058
New business expense	7,276
Local management expense	6,789
General expenses	40,218
Taxes	68,575
Total operating expenses	$225,948

The gross operating revenues are also taken from figures of the Commission's statistician and based on a five-year average. The following conclusions summarize the firm power revenue in the Central System:

Gross operating revenue	$662,460
Gross operating expenses (including taxes)	225,948
Net operating revenue	436,512
Depreciation reserve fund allowance	71,189
Net available for return upon fixed capital account	365,323

Going Concern Value.

A utility plant which has an established business attached is more valuable than one without business, and following our precedent in such cases as this we will allow going concern value. In this case it seems to the Commission that $300,000 is a reasonable allowance. The fair value of the property in use and useful for serving the firm power customers in the Central System is found by the Commission to be $3,921,460. To this will be added $300,000 as going concern value, making a total amount as a fair value of $4,221,460. The Commission, therefore, finds that so much of applicant's property as is reasonably necessary for the service of all of the customers on the Central System (and excluding The Denver Gas and Electric Light, The Denver Tramway and The Western Light and Power Companies), is of the fair value for the purposes of this case of $4,221,460, and that

the balance of the property owned by the applicant in the Central System is the result of an overbuilt plant and is not in use or useful in serving the customers on the Central System, excluding the above named companies. With a net rate base of $4,221,460 we have a net revenue upon this fixed rate base of $365,323, which is more than 8 per cent return on the capital investment and, therefore, leads the Commission to the conclusion that the rates charged the customers on which this earning was obtained were amply sufficient and high enough to afford the Company a reasonable return on the capital invested. The Commission has found that the balance of the energy generated by the Power Company and sold to The Denver Gas and Electric Light, The Denver Tramway and The Western Light and Power Companies is not, under the evidence in this case, "dump power" or secondary power, but is surplus firm power not capable of being sold by the Company at this time at firm power prices. The Power Company should, therefore, make an effort to dispose of or sell such energy at the highest obtainable prices at this time. If the time should arrive that the Company is able to obtain other customers to which it can dispose of this energy at firm power prices it should file with the Commission a schedule of firm power rates therefor, or make application to the Commission to fix a rate or make a contract which will be just, reasonable and lawful for the disposal of the same.

There was some contention on the part of attorneys for the protestants that the rates charged by the Power Company as between the firm power customers of the Central System were discriminatory as between the firm power customers themselves. The Commission will not attempt at this time to make any findings on this contention. This was an application for an increase in rates by the Power Company applicable to all power customers in the Central System. The case has been made and the evidence built up on the question as to whether or not the Commission would allow these schedules and increases to become effective. The Commission has reached the conclusion that they should not be allowed to become effective. There is not sufficient evidence, however, on which the Commission could form a rea-

sonable conclusion as to whether or not any of the rates or contracts between the firm power customers themselves are discriminatory as between themselves.

In view of the decision herein, the same questions being raised in Docket Numbers 50 and 51, the Power Company's application to increase the power rates of The Denver Gas and Electric Light Company, and The Western Light and Power Company, respectively, this decision is controlling in those cases; hence the Commission will enter an order permanently suspending the schedule of rates filed October 6, 1920, and suspended pending an investigation of same in said Dockets Nos. 50 and 51, which will permit the applicant Power Company to dispose of its energy to the Denver and Western Companies in accordance with the views herein expressed.

ORDER.

IT IS THEREFORE ORDERED by the Commission that the schedules of rates of the Power Company filed with the Commission embodying increases in rates to the firm power customers on the Central System and which were suspended by the Commission be, and they are, hereby permanently suspended.

RE C. L. PRESTON.

[Application No. 96. Decision No. 533.]

Certificates of convenience and necessity—Reasons for refusal—Immaterial testimony.

1. Testimony relating to the amount of taxes paid by a railroad and damage to highways by motor freight trucks is immaterial upon an application for a certificate of convenience and necessity to operate a truck in competition with an existing railroad carrier.

Certificates of convenience and necessity—Motor trucks—Showing of convenience.

2. A motor truck service which takes merchandise from the door of a consignor and delivers it to the door of a consignee is a reasonable necessity and convenience to the public, when existing railroad service requires handling and cartage at each end of the route.

[May 1, 1922.]

Appearances: M. B. Waldron, of Denver, for Applicant; E. G. Knowles, of Denver, for Union Pacific Railroad Company.

STATEMENT.

By the **Commission**: On June 30, 1920, applicant, C. L. Preston, doing business under the name of The Northern Transfer Company, filed his petition with the Commission for a certificate of public convenience and necessity to engage in the transportation of freight by motor truck between Denver and Greeley, Colorado, and intermediate points. The petition sets forth by appropriate allegations the equipment which he proposes to use in his motor truck transportation, and proposes to operate each day of the week in either direction, and that the territory through which he operates is thickly populated and the necessity for further service in the transportation of freight, and that public convenience and necessity require the proposed operation. Attached to said petition are the rates proposed to be charged, which includes delivery charges for the service rendered.

Union Pacific Railroad Company was served with a copy of said petition, and on July 16, 1920, filed its motion and objection and answer thereto.

The motion to dismiss the application is based upon a number of reasons therein set forth, most of which are for the alleged failure of the applicant to comply with the rules of procedure of the Commission with regard to filing applications for a certificate of public convenience and necessity, except the second ground thereof, which is upon the alleged ground that this Commission is without power or jurisdiction to entertain said application or to grant any relief in respect thereto.

The objection and answer filed contemporaneously with said motion to dismiss by Union Pacific Railroad Company, enumerates a number of reasons why the certificate should not be granted and the application dismissed, the important ones of which are:

It is alleged in paragraphs three and four that the respondent railroad regularly operates trains over its line of railroad between Denver and Greeley and intermediate points, and that the people affected are, and will be, at all times properly, adequately, reasonably, sufficiently, promptly and conveniently served by respondent railroad in the transportation of freight at reasonable

rates and charges, and that public convenience or necessity does not require the proposed operation of said automobile truck line, for that the public is already served in a complete, satisfactory and efficient manner by the operation of its trains between the cities aforesaid.

The matter was set for hearing at the hearing room of the Commission, Capitol Building, Denver, Colorado, on Thursday, March 24, 1921, at 10:00 o'clock A. M. Upon said day, by agreement of counsel and the Commission, the matter was continued from March 24, 1921, to May 27, 1921, at the same place, and the applicant was given leave to file, not less than ten days prior to the date to which the hearing was continued, such additional data as was required to be filed under the rules and practice of the Commission, and to furnish to said Union Pacific Railroad copies thereof.

On the date to which the same was continued, to-wit: Friday, May 27, 1921, the matter was duly heard, at which applicant testified, in substance, that The Northern Transfer Company was merely the trade name under which the applicant had been doing, and proposed to continue to do, business as a motor truck line for the transportation of freight between Denver and Greeley; that he was then operating three trucks and would provide such further equipment as the business justified; that he had a license for the operation of his trucks in the City of Denver, but that no other or further licenses were required to operate such trucks through the towns between Denver and Greeley nor in Greeley; that he proposed to operate as nearly on schedule time as possible so as to deliver freight from Denver into Greeley at 6:00 o'clock in the morning, a good deal earlier than freight could be delivered by the rail carrier, and that the service comprised pick-up and delivery from consignor to consignee's door; that the business men of Greeley, of which there were about one hundred fifty, were his patrons and that it was a convenience and a necessity to them in the matter of prompt delivery of their goods at their doors, and particularly with reference to perishable commodities.

The testimony of the railroad was to the effect that a freight

train ran daily, except Sunday, between Denver and Greeley, and that departure from Denver was in the night time to arrive at Greeley the next morning, where freight was delivered from Denver to the consignee at Greeley about 8:00 o'clock in the morning; and that, therefore, the rates and charges being as low, if not a trifle lower, than those proposed by the motor truck line, there was no necessity or convenience of the public for the operation of said motor truck freight line.

The answer of the rail carrier and the testimony upon its behalf embraced a number of other matters, such as the amount of taxes paid by the rail carrier, the damage to the highway done by the motor freight tracks, and so on, all of which the Commission deems to be immaterial under the statute in this regard.

As this Commission stated in *re* Overland Motor Express Company, P. U. R. 1920-B, 551, the necessity and convenience of the public con not be deemed to be an absolute necessity, else the statute would be meaningless. In that case the question of construction of the phrase "convenience and necessity," as used in Section 35 of the Public Utilities Act, was carefully considered, and upon the authorities therein cited we concluded that the phrase "convenience and necessity" can not be split in two, for obviously anything that is a necessity would be a convenience, while, on the other hand, a convenience of the public is not necessarily a necessity; so that the conclusion was reached in the Overland case, cited above, that all that an applicant was required to show was a reasonable convenience and necessity of the public to be afforded through the establishment of the proposed service, as compared with the service already existing in the particular field.

The merchant at Greeley who orders merchandise from the Denver merchant, may have the same picked up by the motor truck company at the door of the Denver merchant and delivered to his door in Greeley at practically the same cost of service as the rail freight rate, or less, for if the same merchandise is transported by the rail carrier the same must bear the expense of the haulage from the Denver merchant's place of busi-

ness to the freight depot, there to be transferred to a freight car, conveyed to Greeley, there delivered to the freight depot, and there to be loaded into some vehicle for carriage to the Greeley merchant's place of business. The latter service is not the convenience, surely, to the Greeley merchant as the service proposed and which has been maintained by applicant in taking the merchandise from the door of the consignor and delivering it to the door of the consignee.

Before the motor truck means of transportation came in use no other necessity or convenience was known; and while the service proposed by applicant is not an absolute necessity, the Commission is of the opinion that it is a reasonable necessity and convenience to the public. It must be borne in mind that during the period of Federal control of rail carriers, covering a period of two or three years, the establishment of truck lines was encouraged on account of lack of equipment and necessity of the government for all available rail equipment for the use of the government in the transportation of the sinews of war; and during that period the carriers by rail made no protest or objection to the motor truck transportation lines, and only within the past year and a half have such objections been made.

Such matters as injury to the highways of the state by truck transportation lines and of the taxes paid by rail carriers, which proportionately are used for the construction and maintenance of highways, and all such kindred questions, are matters for legislative action, by the enactment of such statute laws as will invest the Commission with authority to, in the proper case, give such matters due consideration.

At the hearing on May 27, applicant introduced, over objection of respondent, a paper writing dated May 23, 1921, signed by some fifty of the mercantile and business firms of the City of Greeley, expressing their satisfaction at the service rendered by applicant and a desire that such service be continued.

Taking all the circumstances surrounding this proceeding into consideration, it is the opinion of the Commission that an appropriate order be entered granting the certificate to applicant sought in his application.

ORDER.

IT IS THEREFORE ORDERED, That the public convenience and necessity require and will require the operation of the motor truck freight transportation line of the applicant, C. L. Preston, doing business as The Northern Transfer Company, between the Cities of Denver and Greeley, Colorado, and intermediate points, and that this order shall be deemed and held to be a certificate of public convenience and necessity therefor.

THE CO-OPERATIVE FRUIT GROWERS AND DISTRIBUTING UNION COMPANY

v.

AMERICAN RAILWAY EXPRESS COMPANY.

[Case No. 259. Decision No. 559.]

Rules and regulations—Estimating weight—Peach shipments.

It is impractical to weigh shipments of peaches moving by express during the busy season, and the practice of allowing movement under an estimated weight is fair and equitable.

Rate of $1.25 per cwt. prescribed on fresh fruits and vegetables moving by express from all points "shown in 'Group No. 1' to all points in 'Group A' of Section 4, local tariff No. 105, P. U. C. 33."

[July 21, 1922.]

Appearances: For the Complainants, McMullin & Sternburg, of Grand Junction, Attorneys for Fruit Growers and Shippers; for the Mesa County Farm Bureau, Mr. A. T. Johnson; for The American Railway Express Company, Messrs. N. K. Lockwood and E. Stein, of San Francisco; for The Denver & Rio Grande Western Railroad Company, F. C. Hogue, Engineer.

STATEMENT.

By the **Commission**: This case was brought about by the filing with this Commission, June 18, 1922, of a formal application, from numerous shippers and growers in Western Slope territory, for a reduction of express rates on fruits and vegetables from all points in "Group No. 1" to all points in "Group A" of Section 4 of local tariff No. 105; and also that the said rate

to apply to intermediate points not shown in "Group A." The applicants also asked that the rate within the boundaries specified should be $1.20 per hundred weight, regardless of weight of shipment, and that this rate should apply until November 1, 1922.

Responsive to the aforesaid application, the Commission took this matter up promptly with the traffic officials of The American Railway Express Company and received a tender from Mr. N. K. Lockwood, Superintendent of western departments, at San Francisco, to the effect that his company would be willing to publish a rate of $1.50 per cwt., which would cancel the $1.85 less than carload and also cancel the $1.51 fifteen hundred pound lot rates, thus making a flat rate of $1.50 per hundred for all shipments. This information was given to the complainants and, being unsatisfactory to them, this case was set down for regular hearing and was heard by this Commission at the Court House in Grand Junction, Colorado, at 10:00 o'clock A. M., June 28, 1922.

At the beginning of the hearing counsel for the shippers made it plain that they were not asking for an emergency or provisional rate, but were asking for a rate based upon a permanent basis of $1.20 per hundred for shipments, regardless of weight.

The evidence presented in this case brought out the fact that when the fruit business of western Colorado was in its infancy, in the early nineties, a rate of $1.00 per hundred was made on shipments of fifteen hundred pounds or over, and a rate of $1.25 per hundred on consignments of lesser weight from all points in "Group 1" to all points in initial "A" territory of Section 4, of local tariff No. 105. This rate was maintained until 1918, during the war period, when rates were increased 10 per cent, making the rates $1.10 and $1.37½. In 1919 a raise of ten cents per hundred was made in each classification, bringing the rates up to $1.20 and $1.47½. In 1920 there were two successive raises, making an aggregate raise of 25 per cent and bringing the rates up to $1.51 and $1.85 respectively.

The increase in rates, under which the fruit and vegetable business was built up in western Colorado, does not reflect the entire

transportation increase, especially in the peach industry. For a period of about twenty or twenty-five years the old express company accepted this product on a basis of eighteen pounds per box, until May 18, 1915, when the present express company raised the weight to twenty-one and one-half pounds, although the size of the boxes and method of packing has remained the same up to the present time. Until some time during 1918, fifteen hundred pounds could be shipped from the Western Slope to Pueblo, Colorado Springs, Trinidad, Walsenburg, Denver and all intermediate points at a rate of $1.00 per hundred pounds, thus making a transportation charge of eighteen cents per box on the then allowance weight of eighteen pounds per box. Under the present tariff of twenty-one and one-half pounds per box at $1.51 per cwt. the shipping charge has been raised to 32½ cents per box, or an increase per box of 14½ cents, or 80 per cent. On the less than fifteen hundred pound shipments now, which take a rate of $1.85 per cwt., the cost per box is nearly 40 cents. The $1.51 and $1.85 rates referred to were put in effect November 1, 1920, and were in force until July 1, 1921, when The American Railway Express Company made an emergency rate of $1.20 per cwt. on all shipments, regardless of weight, and was continued in effect to October 1, 1921, when they were restored to previous figures of $1.85 and $1.51.

The evidence given by witnesses in this case establishes the fact that while shippers have had a large advance in their rates, they have suffered in other ways. It was shown that under the lower rates for many years it was customary for the express companies to make the "pick up" at their own expense in several of the towns, which is now done almost exclusively by the shippers, thus relieving the defendants of the trouble and expense of maintaining a pick up service. This is especially true of Palisade and Clifton, which supply a large volume of express shipments. In this connection with the movement of fruit by express from Grand Junction, it was brought out in the testimony of Mr. Jones, the Secretary-Treasurer of The Grand Junction Fruit Growers Association, that his company loaded each season about ten carloads at its own platform, trucking the packages into the

cars and there delivering them to an express employe, this relieving the express company from all expense of pick up and handling save only what it costs to stack boxes in car.

It was also brought out by witnesses for the plaintiffs that oftentimes solid carload shipments were switched direct to consignees' platforms and were there unloaded, obviating all the expense of both pick up and delivery by express company, thus reducing the cost of express service to what would be practically made in a corresponding movement in the freight service, with the exception that the car would move by passenger train. Mr. Jones testified that in 1921 his association shipped 799 cars of peaches, pears and apples. Most of this was interstate shipments. In fact, only about 10 per cent of the movement being intrastate, and about 10 carloads moving by express. This witness says that Colorado has the largest fruit crop in its history; that California ships peaches during the entire Colorado peach season in competition with local shippers and growers, and that the California price sets the market price for all Colorado; that it costs 40 cents to produce a box of peaches in this State; that they are being offered in California at 67½ cents per box; that if express rates are not reduced to a minimum it will prevent a large tonnage from being marketed, and result in very serious losses to growers.

Mr. Jones also testified that labor costs are now considerably less than in 1919 or 1920, and besides there is also quite an increase in the efficiency of labor. Mr. Jones also testified that already this season he had ordered growers not to deliver cherries, as he could not get even the express charges out of them, leaving the inference that this valuable food crop was, to a large extent, a loss to the growers, though the varieties grown are very fine in quality and and the best known for canning and preserving purposes. Dwelling on the express rates, and giving as a reason why the charges should be reduced, this witness said that his company was compelled to go to an expense of from $40.00 to $50.00 per day to take care of their express pick up that is ordinarily performed by express companies in other communities throughout the United States.

Mr. Younger, of the Palisade Fruit Express Company, in his testimony related that The American Railway Express Company's service is not as good as it was formerly, under competitive conditions, when Wells Fargo was operating. At that time he said the express people called for fruit and vegetables at shippers' platforms, and relieved the shippers of this expense, and in addition to this the express company then furnished iced refrigerator express cars, which the present express company refuses to furnish. Now the express company has no pick up at Palisade and several other points, and shippers haul all consignments to depot for smal shipments. Often solid carloads are sent out from Palisade and Grand Junction, and the only function performed by express company is that they furnish an employe who stacks the boxes in car in station order after they are delivered inside of car by shipper. In addition to minor shipments, Mr. Younger testified there are often as much as three carloads shipped from Palisade in one day. He says these are loaded during the day and are all ready and are picked up by the passenger train engine, and are pulled out of Grand Junction and Palisade between 7:05 and 7:28 P. M. daily during the rush season. Sometimes these cars are picked up by No. 16 at Grand Junction, Clifton and Palisade from 1:20 to 1:55 P. M. While this movement is generally for many local points, it often happens that solid carloads are consigned to Pueblo, Colorado Springs and Denver.

Mr. Younger, in his evidence, shows that it costs the grower 40 cents per box to grow, pick, pack, furnish box, nails, paper, labor, haulage to express car, etc. He also said that in the fifteen years he had been shipping fruit from the Western Slope, that in only four years of this period had peaches brought as much as 95 cents per box. In this connection, and speaking from memory, Mr. Younger said 1909 was a good year and Elberta peaches averaged 66½ cents per box; 1910 was a poor year, and the average was about 40 cents; 1911 was another good year and the average was about 70 cents; 1912 was a particularly bad year and the published reports of the various fruit associations showed that peaches only brought from 21 to 28 cents per

box; 1914 the price did not exceed 60 cents per box; 1915 the average was about 60 cents. From the latter date until 1919 there was a gradual price improvement, until the price reached 95 cents per box.

Frank R. Davis, Manager of the Mercantile Department of The Grand Junction Fruit Growers' Association, an organization that has been in business over thirty years, and who has been with this concern for twenty-five years, stated in his testimony that the present charge of twenty-one and one-half pounds per box on peaches up to September 1st is an overcharge and that they will not average over eighteen pounds for this period.

This Commission also finds that it is entirely impractical to weigh shipments of peaches moving by express during the busy season. It also finds that the custom extending over more than twenty-five years of allowing peaches to move under an estimated weight of eighteen pounds per box up to September 1st of each year, and thereafter at twenty-one and one-half pounds, is fair and equitable to both the express company and shippers as well.

The Commission, in considering the many phases presented in this case, is of the opinion that the present rates are too high and are not justified. The elimination of pick up service by the express company, the large number of solid carloads moved and unloaded at consignees' expense, the movement of 90 per cent of express shipments in lots of fifteen hundred pounds and over to one consignee, the easy matter of delivering large consignments to one address, the relatively small number of consignments per carload compared with ordinary express business, puts the movement of fruit from western Colorado to Pueblo, Walsenburg, Trinidad, Colorado Springs, Denver and intermediate points in a class outside the pale of ordinary express movement. All these elements considered, it is easy to understand it costs the express company far less to move these commodities under existing conditions, than is the case with ordinary express matter, and in consequence of which it must follow that rates should be made to correspond somewhat with the service rendered.

ORDER.

IT IS THEREFORE ORDERED, That the express rate of The American Railway Express Company on fresh fruits and vegetables from all points shown in "Group No. 1" to all points in "Group A" of Section 4, local tariff No. 105, P. U. C. 33, shall be $1.25 per cwt., effective August 1, 1922.

IT IS FURTHER ORDERED, That up to September 1st of each year, The American Railway Express Company shall accept boxed peaches at the estimated weight of eighteen pounds per box, and after said September 1st at an estimated weight of twenty-one and one-half pounds.

RE W. R. FREEMAN, *et al.*, RECEIVERS OF THE DENVER & SALT LAKE RAILROAD COMPANY.

[Case No. 261. Decision No. 566.]

Rates—Coal—Reduction.

Rates on coal from points on Denver & Salt Lake Railroad ordered reduced 10 per cent.

[September 6, 1922.]

STATEMENT.

By the **Commission**: After the findings of the Interstate Commerce Commission in Docket No. 13293, Reduced Rates—1922, 68 I. C. C. 676, W. R. Freeman and C. Boettcher, Receivers of the Denver and Salt Lake Railroad, applied to the Interstate Commerce Commission for exemption from said order upon the grounds that they were not in position financially to make the reduction contemplated by the findings of the Commission in that case.

Upon said application of the Receivers of the Denver and Salt Lake Railroad, a hearing was held before Division 3 of the Interstate Commerce Commission in Denver, Colorado, beginning July 31, 1922.

In connection with said hearing, the Interstate Commerce Commission invited this Commission to sit jointly with them so that this Commission might at the same time consider the matter

of intrastate rates also. This invitation was accepted and on July 22, 1922, a notice was issued by this Commission entitled as above and served upon the Receivers of the Denver and Salt Lake Railroad and other carriers in Colorado, particularly including all carriers participating with the Denver and Salt Lake in joint through rates to destinations in Colorado.

As a result of the hearing the Interstate Commerce Commission on August 3, 1922, made its findings and order denying the application of the Receivers of the Denver and Salt Lake Railroad for exemption from the findings insofar as the interstate rates on coal were concerned without, however, requiring any reduction on other commodities, and ordered the Receivers to cease and desist on or before September 17, 1922, and thereafter to abstain from publishing, demanding or collecting the present interstate joint rates on coal from points on the Denver and Salt Lake Railroad to points on participating lines in Wyoming, Kansas, Nebraska, Iowa, North Dakota, and South Dakota, and by said order the Interstate Commerce Commission further required the Receivers of the Denver and Salt Lake Railroad to establish on or before September 17, 1922, upon notice to the Commission and the general public of not less than five days, and thereafter to maintain and apply joint interstate rates on coal reduced as specified in the original findings of the Commission in said case, which amounts substantially to a reduction of ten per cent of the rates in effect at the time of the original findings of the Commission in said cause.

This Commission allowed increases in rates effective September 1, 1920, in conformity with the increases ordered by the Interstate Commerce Commission in Ex Parte 74, and from the evidence introduced in the joint hearing herein, and in view of the findings and order of the Interstate Commerce Commssion requiring a reduction in coal rates at this time in interstate commerce, this Commission finds that a corresponding reduction should be made in intrastate coal rates so as to preserve the same relationship between interstate and intrastate rates on coal as existed immediately prior to the reduction in interstate rates ordered by the Interstate Commerce Commission.

The Interstate Commerce Commission at the time of the hearing of this case in Denver also heard the argument of counsel in another case involving the divisions of the joint interstate rates on coal and rendered a decision also on August 3rd in that case. So far as the hearing before this Commission was concerned, however, the question of divisions was not involved and it is expected that the participating carriers will agree upon the divisions of joint intrastate coal rates, and in the absence of such agreement the matter may be presented to this Commission for further hearing.

The Commission therefore finds that the local and joint intrastate rates on coal now in effect, from mines on the Denver and Salt Lake Railroad, will be unjust and unreasonable on and after September 17, 1922.

ORDER.

IT IS THEREFORE ORDERED, That W. R. Freeman and C. Boettcher, as Receivers of the Denver and Salt Lake Railroad be, and they are, hereby required to file with this Commission and make effective on September 17, 1922, on not less than five days' notice to the Commission and to the general public, and in the manner prescribed by the Act, rates on intrastate shipments of coal which will be ten per cent less than the rates now in effect for such traffic.

IT IS FURTHER ORDERED, That carriers now participating with the Denver and Salt Lake Railroad in joint intrastate coal rates from mines located on the Denver and Salt Lake Railroad to intrastate destinations be, and they are, hereby required to participate with the Receivers of the Denver and Salt Lake Railroad in the establishment of the rates ordered hereby.

THE MERCANTILE SERVICE CORPORATION

v.

THE AMERICAN RAILWAY EXPRESS COMPANY.

[Case No. 256. Decision No. 577.]

Rates—Express—Bread—Relation to those in neighboring states.

1. To allow express rates on bread in Colorado to continue higher than in neighboring states constitutes a discrimination against Colorado citizenry which should not be permitted.

Rates—Freight and express—Absorption of wage reductions—Discrimination.

2. To permit reductions in railroad wages and expenses to be absorbed by reductions in freight rates alone would be manifestly unfair to express shippers.

Rates—Comparison with another non-competitive commodity—Materiality.

3. The fact that a rate on a commodity does not measure up or down to those on other articles with which it does not come in competition does not indicate it is too low or too high.

Express rates on bread found unreasonable, and required to be reduced to what they were before increase of 26 per cent allowed in Application No. 94, November 3, 1920, became effective.

[December 6, 1922.]

Appearances: R. L. Ellis, Traffic Manager of The Pueblo Commerce Club, for Complainant; for Defendant, J. H. Moores, 49 Broadway, New York; for Intervenor, The Denver & Rio Grande Western Railroad Company, Messrs. E. N. Clark and Thomas R. Woodrow, its Attorneys; for The Commerce Club of Pueblo, Colorado, Mr. R. J. Breckenridge, President, and Mr. E. E. Gray, Secretary; for The Colorado Springs Chamber of Commerce, Mr. Jackson; for Intervenor, The Colorado & Southern Railway Company, Mr. J. E. Buckingham; for The Denver Civic and Commercial Association, W. D. Wright, Jr.; Intervenor for The Macklem Baking Company of Denver, Roger E. Knight; Intervenor for The Campbell-Sell Baking Company, of Denver, Stephen J. Knight.

STATEMENT.

By the **Commission**: On March 23, 1922, the Commission received the complaint herein and set the case down for hearing for 2:00 o'clock P. M., May 25, A. D. 1922, at the City Hall, Pueblo, Colorado, at which time the matter was duly heard.

By agreement of all parties and insofar as testimony was in any way applicable, both cases, numbered 255 and 256, were consolidated for the purpose of hearing; case No. 255 being recognized as the ice cream hearing and the present Case No. 256 being the bread hearing; both cases, however, relating to and having to do with express rates in practically the same territory.

Complainant, a corporation, in behalf of its clients, The Sunville Baking Company and Purity Bread Company, located at Pueblo, Colorado; Denver Bread Company, located at Denver, Colorado; The Zimmerman Baking Company, the Columbia Bakery, The Star Baking Company and the Ideal Bakery, located at Colorado Springs, Colorado, alleges that the defendant herein charges rates for the shipment of bread within Colorado that are unjustly high and unreasonable, and seeks relief therefrom and we are asked to establish reasonable rates for the future.

A large number of witnesses were introduced by the complainants, representing all the larger bakeries in Denver, Colorado Springs and Pueblo. The testimony went minutely into the facts of the baking industry in Colorado. It showed very conclusively that reductions in prices had been made by the bread manufacturers since the date of the last increase in express rates in 1920. The evidence also showed that while the bakers had increased their sales considerably in their respective localities, they have suffered very heavy losses in their outside trade, running from 30 to 70 per cent. These losses in their shipping business, the complainants allege, are wholly attributable to the increased express rates put in effect in 1920.

Sufficient evidence bearing out these claims was submitted to warrant the conclusion that the free movement of bread over the lines of the defendant carrier in Colorado is being retarded on account of high rates, and this in the face of the fact that more strenuous efforts have been made since such date to increase outside trade than ever before.

The testimony shows that the cost of shipping bread in New York City for a little over one hundred miles is 87 cents per cwt., while the cost of shipping it from Pueblo to Walsenburg, a distance of fifty-three miles, is $1.04 per cwt.; from Colorado Springs to Ramah, a distance of forty-eight miles, 82 cents; from Pueblo to Monte Vista, a distance of one hundred forty-five miles, $1.99; and from Pueblo to Salida, a distance of ninety-six miles, $1.16.

From the foregoing it can be readily seen that the New York

shipper has approximately twice the shipping radius for the same amount of express charges.

The following is a comparison in the present rates from Denver, Colorado Springs and Pueblo to points west thereof, with the rates in the next lower zone as shown by complainant's Exhibit No. 5:

Miles	Points West of Pueblo, Colorado Springs and Denver.	Washington, Oregon, Kansas, Nebraska, Dakotas and Other Points in Zones 3 and 5.
100	$1.71	$1.04
200	2.03	1.56
300	2.81	1.97
400	3.06	2.44
500	3.33	2.81

A statement showing comparisons in rates on bread from Denver, Colorado Springs and Pueblo to points in Colorado west thereof, and other states located in the same zone which did not permit the last 26 per cent advance, is as follows:

Miles	Points in Colorado West from Denver, Colo. Springs and Pueblo	Rates in Idaho Utah, Arizona, Montana, Nevada	Per Cent of Colorado Rates to Other Rates	Per Cent of Increase Colorado Rates Over Other Rates
25	$ .73	$ .70	104.3	04.3
50	1.19	.96	124	24
100	1.71	1.15	149	49
150	2.03	1.36	149	49
200	2.03	1.62	125.3	25.3
250	2.29	1.81	126.5	26.5
300	2.81	2.02	139	39
350	2.81	2.23	126	26.4
400	3.06	2.44	125.4	25.4
450	3.33	2.64	126.1	26.1
500	3.33	2.80	119	19

It will be noted in the figures above, the rate for fifty miles is $1.19, while the rate to Salida from Pueblo, ninety-six miles, is but $1.16. The lower rate between Pueblo and Salida was occasioned by the Express Company granting a special commodity rate between these points after the 26 per cent raise became effective.

Defendant urges that the aforesaid rates are not a fair comparison, but certainly if we are to arrive at just and equitable

rates within the State of Colorado, we must take into consideration the rates paid by competitors in the states surrounding us. The last increase in express rates was made effective in November, 1920, and at this time the states of Idaho, Utah, Arizona, Montana and Nevada did not permit the 26 per cent advance, while Colorado did. Owing to the apparent exigency of the case, brought about by an increase of express employes' wages, the Interstate Commerce Commission ordered a general increase throughout the country, after an investigation of the matters involved. This Commission allowed the same rates in Colorado to conform with the interstate rates. While two years have elapsed, and in the meantime the Express Company has appealed to the Interstate Commerce Commission, no advance in the rates in the states of Idaho, Utah, Arizona, Montana and Nevada has as yet been made.

To allow these competing states to continue on their present basis of rates and Colorado to continue on its higher basis of rates would constitute a discrimination against our own citizenry, which this Commission does not feel justified in permitting.

The evidence shows that, under the uniform contract between the Express Company and the railroad companies, the railroads will stand the larger portion of any reduction in express rates. Under an order of the United States Railway Labor Board, effective August 1, 1921, the Express Company got a reduction in labor costs amounting to approximately $12,000,000.00 per annum. The railroad companies, under an order of the Labor Board, effective August 1, 1921, got a reduction in wages estimated at $400,000,000.00 per annum. The Express Company and the railroad companies have also been benefitted by reductions in other expenses.

Many reductions in freight rates have been made voluntarily by the railroad companies and others have been ordered by the Interstate Commerce Commission. In Reduced Rates, 1922, Vol. 68, of the Interstate Commerce Commission's reports, pages 676 to 747, the commission ordered a general reduction of 10 per cent in freight rates throughout the country, effective July 1, 1922. In discussing the situation in this decision, the Interstate

Commerce Commission, at page 732, said: "Shippers almost unanimously contend, and many representatives of the carriers agree, that 'freight rates are too high and must come down.' This indicates that transportation charges have mounted to a point where they are impeding the flow of commerce and thus tending to defeat the purpose for which the increased rates were established—that of producing revenues which would enable the carriers to provide the people of the United States with adequate transportation." In our own State the railroads voluntarily reduced freight rates on certain commodities to about the basis in effect prior to the last increase.

To permit the reduction in wages and expenses of the carriers to be entirely absorbed by reductions in freight rates would be manifestly unfair to shippers whose products move by express and who are unable to bear the burden of the existing high rates.

In rates on grain, grain products and hay, 64 I. C. C. Reports, Page 100, the Interstate Commerce Commission says: "So far as a tendency downward in their rates (meaning the rail carriers) can be induced, and so far as the reduction in wages and prices which have already been made effective can be converted into rate reductions, we are assured that the full return of prosperity will be hastened for both industry and labor."

Defendant's witnesses insist that bread now takes a cheaper rate than any other article of food, except those packed in ice.

A flat charge of 5 cents is made for the return of empty bread containers where pickup and delivery service is not accorded, and 10 cents if pickup and delivery service is provided. The Express Company insists that the charges assessed for the return of the empties is not remunerative.

One of defendant's witnesses also stated that "bread is a necessity of life, and bakers have always contended that their margin of profit is smaller than on other classes of shipments and would not stand an increase in express rates." This he gave as a reason for the present rates on bread being lower than some other classes of food products.

The evidence shows that both milk and cream move at a lower rate than the bread rate, and the empty cans are returned free

where no pickup or delivery service is performed. While no terminal service is performed on the milk and cream rates, even by adding terminal costs, the bread rate would be considerably above those charged for milk and cream.

If, then, we are to measure the bread rates solely by those articles of food which take a higher or a lower rate than bread, which item would be the controlling factor in establishing a proper rate? It would be just as reasonable to use one measure as the other. The fact that a rate does not measure up or down to other articles with which it is not in competition does not indicate that the rate is too high or too low.

Defendant's evidence shows that the Express Company's operating income on Colorado intrastate business, after deducting expenses, was $17,864.93 for the year 1921, and that its net income for the same year from all operations throughout the United States amounted to $2,309,220.82. It is noticeable, however, that the Express Company did not contend that it was not earning a sufficient return on its investment, but contented itself rather upon a showing of the intervenors, The Denver & Rio Grande Western Railroad Company and The Colorado & Southern Railway Company, which companies produced exhibits to show that there was a deficit in express operation on the lines of these carriers for the year 1917, and that the deficit was greater in 1921 than in 1917; but this showing included through interstate hauls and included figures for local hauls in other states, and were not segregated in such a manner as to be of value and are not persuasive in the absence of evidence showing the surrounding circumstances and conditions. On the other hand, it is shown in the testimony that for the first three months of 1922 (subsequent reports were not produced at the hearing) the express privileges paid to the carriers generally throughout the United States exceeded those for the same period in 1921 by over $3,000,000.00, or in excess of 15 per cent.

It is also significant to note that the Missouri Pacific Railroad Company, The Chicago, Rock Island & Pacific Railway Company, The Atchison, Topeka & Santa Fe Railway Company, The Chicago, Burlington & Quincy Railroad Company and the

Union Pacific Railroad Company, all large companies having extensive lines within the State of Colorado, entered no appearances and made no protest or showing.

An illuminating statement showing how the increased express rates have decreased shipments and depleted the revenues of the Express Company is shown by complainant's Exhibit No. 12. It shows that for the week ending October 9, 1920, the five leading bakeries of Denver, Colorado Springs and Pueblo shipped 86,936 pounds of bread at an 82 cent rate, which gave the Express Company a return of $712.88. The same baking companies, for the week ending May 6, 1922, only shipped 38,252 pounds of bread at a rate of $1.04, producing a revenue for the Express Company of but $397.82, or a loss to the Express Company of $315.06 in revenue attributable to the higher rates.

Upon consideration of the record as a whole, the Commission finds the facts to be that the express rates of this defendant on bread are unreasonably high and unjust between Denver, Colorado Springs and Pueblo, Colorado, and points within the State of Colorado, and for the future will be unreasonable and unjust to the extent that they exceed those in effect prior to the last 26 per cent advance in rates.

Although the issue is not before us, the Commission does not feel warranted in issuing an order affecting certain localities in the State without according all points within the State the same privilege; and while no order will be issued at this time covering the points not mentioned in the complainant's complaint, the Express Company will be expected to bring all rates on bread within the State of Colorado to conform with the order in this case.

ORDER.

IT IS THEREFORE ORDERED, That The American Railway Express Company be, and it is hereby, ordered to restore the bread rates in effect in Colorado immediately previous to the twenty-six per centum increase allowed under Colorado P. U. C. Application No. 94, of November 3, 1920, from Denver, Colorado Springs and Pueblo to all points in Colorado reached by said Express Company.

IT IS FURTHER ORDERED, That The American Railway Express Company file with this Commission an amendment to its bread rates, in accordance with this order, within eight days of the date hereof.

IT IS FURTHER ORDERED, That the reduced rates ordered herein become effective December 15, 1922.

THE PUEBLO ICE CREAM CO., *et al.*,

v.

AMERICAN RAILWAY EXPRESS COMPANY.

[Case No. 255. Decision No. 578.]

Rates—Ice cream.

Rates on ice cream in effect before 26 per cent increase allowed in Application No. 94, November 3, 1920, became effective, prescribed.

[December 6, 1922.]

Appearances: R. L. Ellis, Traffic Manager of the Pueblo Commerce Club, for Complainant; for Defendant, J. H. Moores, 49 Broadway, New York; for Intervenor, The Denver & Rio Grande Western Railroad Company, Thos. R. Woodrow, Esq.

STATEMENT.

By the **Commission**: On March 23, 1922, the Commission received the complaint herein and set the case down for hearing for 2:00 o'clock P. M., May 25, A. D. 1922, at the City Hall, Pueblo, Colorado. Cases Nos. 255 and 256 were consolidated for the purposes of the hearing and it was agreed by the interested parties that all evidence that might be applicable should be used in both cases. It was agreed by counsel and other interested parties that Case No. 256 should be heard first and at its conclusion on May 26th, Case No. 255 was duly heard.

Complainants, The Pueblo Ice Cream Company and the Polar Ice Cream & Supply Company, both located at Pueblo, Colorado, allege that the defendant charges rates on ice cream between Pueblo, Colorado, and all points within the State of Colorado, and for the return of ice cream empties from Colorado points to Pueblo that are unjustly high and unreasonable, and

seeks relief therefrom. It was also alleged by complainants that rates to certain points were discriminatory in favor of Denver, but this latter allegation was withdrawn at the hearing.

It is shown in the evidence that ice cream and bread move on the same rates per cwt., and what we said in regard to the main issues in our decision on the bread case applies with equal force to the ice cream case and we will deal only with the issues peculiar to the ice cream case now before us.

The testimony of complainants' witnesses was similar to that introduced by the witnesses in the bread case. It was shown that reductions in prices had been made from time to time by the ice cream manufacturers since the date of the last increase in express rates.

The evidence shows that it is impossible for the ice cream companies to reduce their prices further in order to get business. More active sales effort has been made in 1920, without results. Their inability to get outside trade is attributed entirely to the high express rates.

Defendant's evidence shows that ice cream and other food shipments packed in ice are allowed a reduction of 25% from the gross weight account of being packed in ice, and that no reduction is allowed in the weight of articles not packed in ice. For this reason, the Express Company urges that no reduction should be made in the ice cream rates; but, everything considered, cream and milk move at a lower rate than ice cream.

Complainants contend that by reason of the necessity of packing shipments in ice, the defendant is accorded a greater revenue in comparison with the net weight of the shipment than is accorded food products not packed in ice. The evidence shows that in the early days of the express business it was found that the express business would be very essential for perishable food products packed in ice, such as fish, meat, oysters, clams, dressed poultry, etc., but those commodities would not move freely by express if they were charged on the gross weight, including the weight of the ice; so the express companies years ago fixed a classified rate on perishable food products packed in ice of 25 per cent less than the gross weight.

The issues here presented are practically identical with those in the bread case, No. 256, and the findings in that case will apply likewise to the issues involved herein.

The evidence in this case shows that 50 per cent of the ice cream is hauled to the express office by the express company's wagons, and 50 per cent is delivered by complainants' trucks, the reason being that complainants do not wish to pack their shipments so far ahead of the departure of trains and prefer to deliver the ice cream to the station themselves for this reason.

The present charge for the return by express of empty ice cream containers is 16 cents, regardless of distance carried. Complainants ask the Commission to reduce this charge to 5 cents, which is the charge in Colorado on the returned bread empties when no terminal service is performed.

A similar demand was made in the case of the National Association of Ice Cream Manufacturers against the Adams Express Company, *et al.*, 33 I. C. C. 411, in which the Interstate Commerce Commission said: "As with respect to the charges on ice cream, the rates on ice cream packages returned empty are not fairly comparable with rates on empty bread carriers or other carriers which take lower rates." The evidence shows that not all the ice cream empties are delivered by the Express Company, but the exception is when the ice cream company is in a hurry for the empties and picks them up with its own truck.

The testimony shows that complainants' containers are three and five-gallon containers, and the cubic dimensions of these are less than other containers returned for ten and eleven cents. Bread empties are returned for five cents where the bread company's truck picks up the empty, and ten cents where the Express Company delivers it. The Express Company contends that the delivery cost is in excess of the amount received for this service. It seems that complainant should be accorded the alternative of permitting the Express Company to deliver the ice cream empties at the existing rates or to pick them up with their own trucks, and that a reduction of five cents per package would be a fair allowance for this service.

After consideration of the record as a whole, we find that the

rates on ice cream between Pueblo and points within the State of Colorado are, and for the future will be, unreasonable to the extent that they exceed those in effect prior to the last 26% increase, and that an alternative application should be established in the Express Company's tariff providing for return of ice cream empties when pickup and delivery service has not been accorded by the Express Company, five cents under the rate where pickup and delivery service is performed by the Express Company.

Although the issue is not before it, the Commission does not feel warranted in issuing an order affecting certain localities in the State without according all points within the State the same privilege; and while no order will be issued at this time, the Express Company will be expected to bring all rates on ice cream and ice cream empties within the State to conform with the order in this case.

ORDER.

IT IS THEREFORE ORDERED, That the American Railway Express Company be, and is hereby, ordered to restore the rates on ice cream to the basis in effect in Colorado immediately previous to the twenty-six per centum increase allowed under Colorado P. U. C. Application No. 94, of November 3, 1920, from Pueblo to all points in Colorado reached by said American Railway Express Company.

IT IS FURTHER ORDERED, That the American Railway Express Company's tariff shall provide a reduction of five cents under its regular tariff where the Express Company does not provide delivery service for empty ice cream containers.

IT IS FURTHER ORDERED, That the reduced rates ordered herein become effective December 15, A. D. 1922, and that the Express Company file its amended tariff with this Commission embodying said reductions within eight days of the date hereof.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *et al.*,

v.

INTER-CITY AUTOMOBILE LINES, INC.

[Case No. 262. Decision No. 582.]

Public utilities—Common carriers—Motor vehicles.

1. Motor bus lines held to be common carriers and public utilities, not mere quasi public utilities.

Public utilities.

2. Held, the language in Sec. 35 (a) of the Public Utilities Act, "No public utility shall henceforth begin the construction of a new facility, plant or system . . . without first having obtained a certificate," etc., applies to a motor bus operation.

[December 12, 1922.]

STATEMENT.

By the **Commission**: The above case was filed with this Commission August 5, 1922. In their complaint the above named corporations, hereinafter called the railroads, after other formal allegations allege that the Inter-City Automobile Lines is a corporation of the State of Colorado, having its chief place of business in Denver, Colorado; that the said auto line has, since the middle of June, 1922, been operating automobile passenger stages and affording a means of transportation by such vehicles similar to that ordinarily afforded by railroads, and in competition with the railroads as common carriers for hire and compensation by indiscriminately accepting and advertising and otherwise holding itself out to accept, and carrying, discharging and laying down passengers between the fixed points of Denver and Colorado Springs, and latterly Pueblo, and immediately paralleling the double track jointly used and operated by the railroads between said cities; that the auto line has recently, and immediately prior to the month of July, 1922, begun the construction and operation of said new facility, line and system without first having obtained, or attempting to have obtained, from this Commission a certificate that the present or future public convenience and necessity require or will require such construction or operation as required by law; that the said auto line, in so con-

structing and operating its said line, facility and system, has interfered and is interfering with and injuriously affecting the systems of said railroads. Complainants ask that the Commission, after hearing, make an order prohibiting the further operation of said auto line, and that it find that said auto line is not entitled to obtain from this Commission a certificate of public convenience and necessity, and shall forbid any operation along such route by said auto line without such certificate.

After service of the complaint upon the respondent, Inter-City Automobile Lines, Inc., and on September 2, 1922, there was filed by the said Inter-City Automobile Lines a demurrer to the complaint, which reads as follows:

"Comes now the above named defendant and demurs to the complaint filed herein, and for grounds of said demurrer alleges that the complaint does not constitute a cause of action against the defendant."

After some delay, occasioned by the request of the parties hereto, the Commission set the case down for hearing and the same was heard on the 4th day of October, 1922, at 10:00 o'clock A. M., at the Hearing Room of the Commission. The case was set for hearing upon the demurrer filed by the respondent herein. Full opportunity for argument was afforded to all parties in interest, and at the request of the Commission briefs were filed by the parties in interest.

Upon the argument of the demurrer by the respondent, the respondent denied the power of the State to prohibit use of highways by common carriers by automobile and raised the question as to whether, under the existing Public Utilities law and subsequent amendments thereto, the State of Colorado, through its legislature, has given the Public Utilities Commission the authority and duty of investigating the question from the point of view of public convenience and necessity in allowing the operation of motor bus lines in competition with railroads. The respondent took the position that the legislature, in Section 35, did not intend to include motor bus lines in competition with railroads and that, therefore, the Utilities Commission had no power or authority to withhold or grant a certificate of public convenience and

necessity. Particular stress was given by the respondent in its argument to its contention that motor bus lines were not public utilities, as included in Section 35, but that motor bus lines in competition with the railroads were only quasi public utilities, and although they were subject to regulation under the Utilities law as to rates and service they were not intended to be included in Section 35, requiring certificates of public convenience and necessity, and that no certificate of public convenience and necessity is required to be obtained by the respondent herein. Section 2 (e), as amended in 1915, reads as follows:

"The term 'common carrier,' when used in this act, includes every railroad corporation, street railroad corporation, express corporation, dispatch, sleeping car, dining car, drawing room car, freight line, refrigerator, oil, stock, fruit, car loaning, car renting, car loading; and every other corporation or person affording a means of transportation by automobile or other vehicle whatever, similar to that ordinarily afforded by railroads or street railways and in competition therewith, by indiscriminately accepting, discharging and laying down either passengers, freight or express between fixed points or over established routes; and every other car corporation or person, their lessees, trustees, receivers, or trustees appointed by any court whatsoever, operating for compensation within this State."

This amendment was approved April 9, 1915. Section 35 of the original Public Utilities Act of 1913 was submitted to the people and failed of adoption. In 1917 the legislature passed a new act, and designated the same as Section 35 (a), which provides as follows:

"No public utility shall henceforth begin the construction of a new facility, plant or system, or of any extension of its facility, plant or system, without having first obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such construction * * *."

It will be noticed that amended Section 2 (e) declares an automobile line to be a common carrier. Section 3 reads:

"The term 'public utility,' when used in this act, includes

every common carrier, pipe line corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, person or municipality operating for the purpose of supplying the public for domestic, mechanical or public uses, and every corporation or person now or hereafter declared by law to be affected with a public interest, and each thereof, is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the Commission and to the provisions of this act * * *."

How it can be contended by the respondent, after a careful reading of these sections, that motor bus lines are only quasi public utilities we do not understand. The amended Section 2 (e) defines a transportation company by automobile as a common carrier. Section 3 defines the term public utility as including every common carrier and every corporation or person now or hereafter declared by law to be affected with a public interest. In 1915 the legislature of the State, three days after the passing of the amendment to Section 2 (e) and on April 12, 1915, also passed another statute, which seems to have been independent of the Public Utilities Act, expressly declaring automobile lines affected with a public interest to be public utilities. This section reads as follows:

Section 1. "Any person, firm, association of persons, or corporation now or hereafter engaged in transporting passengers, freight or express for hire in this State in any automobile or other vehicle whatever, and operating for the purpose of affording a means of transportation similar to that afforded by railroads or street railways, and in competition therewith, by indiscriminately accepting, discharging and laying down either passengers, freight or express between fixed points or over established routes, is hereby declared to be affected with a public interest and to be a public utility and subject to the laws of this State now in force and effect, or that may hereafter be enacted, pertaining to public utilities."

It will, therefore, be seen that this act itself expressly declares automobile lines to be affected with a public interest and to be a public utility, not a quasi public utility.

From a careful reading of the law the Commission can find nothing wherein it would be justified in holding that carriers by automobile, in any sense, should be regarded in a different class than other public utilities as far as the granting or withholding of certificates of public convenience and necessity is concerned. The amendment of 1917, requiring certificates of public convenience and necessity, starts out by saying that, "No public utility shall henceforth begin the construction of a new facility, plant or system, or of any extension, without having first obtained a certificate, etc." The words "no public utility" are simple, plain and emphatic, and in the opinion of the Commission it is not justified in holding that a common carrier by automobile is in any sense a different class of utility than others contemplated in the law requiring the obtaining of certificates of public convenience and necessity. If there is any good reason why common carriers by automobile should not be required to obtain a certificate of public convenience and necessity the same as other public utilities, this is for the legislature to decide by proper legislation.

It is the opinion of the Commission that the respondent herein, if it is operating in competition with railroads and has the other legal characteristics as set forth and contained in amended Section 2 (e), should obtain a certificate of public convenience and necessity from this Commission.

The Commission, at a future date, will set this case down for hearing on its merits when, after hearing, the Commission will either grant or deny to the respondent a certificate of public convenience and necessity.

ORDER.

IT IS THEREFORE ORDERED, That the demurrer herein, filed by the respondent, Inter-City Automobile Lines, Inc., is hereby overruled, and the respondent will be permitted to file any answer to the complaint herein it may desire within fifteen days from this date.

RE THE COLORADO SPRINGS & CRIPPLE CREEK DISTRICT RAILWAY CO.

[Case No. 265. Decision No. 589.]

Abandonment and discontinuance—Purchaser at judicial sale—Rights.

1. One buying a public utility at any sale authorized by law takes it charged with the same duties and responsibilities to the public that the original owner had, and no right to cease operations results from such sale.

Abandonment and discontinuance—Jurisdiction of Commission.

2. Commission has exclusive jurisdiction to determine whether abandonment of operations should be allowed.

Abandonment and discontinuance—Jurisdiction of Commission—Federal court.

3. Merely because Federal district court authorized discontinuance of operations and refused petition of Commission to vacate its order granting the authority, and the Commission sought no review, does not affect the latter's jurisdiction.

[February 20, 1923.]

Appearances: E. B. Upton, of Cripple Creek, Colorado, for the Petitioners; H. G. Lunt and E. M. Kistler, of Colorado Springs, Colorado, for W. D. Corley; and Clarence C. Hamlin, of Colorado Springs, Colorado, *amicus curiae*.

STATEMENT.

By the **Commission**: This matter comes before the Commission on a petition in the form of a letter filed January 13, 1923, by The Cripple Creek Motor and Commercial Club, et al., alleging that certain acts were being done, or about to be done, by The Colorado Springs and Cripple Creek District Railway Company and the purchaser thereof, one W. D. Corley.

The petition states that on or about October 16, 1922, at Colorado Springs, Colorado, the railroad known as the "Short Line" and other property of The Colorado Springs and Cripple Creek District Railway Company was sold at a foreclosure sale by a special master appointed by the United States District Court for the District of Colorado, and, at such sale, one W. D. Corley was the purchaser.

The petition further alleges that neither W. D. Corley nor any of his predecessors have ever applied to this Commission for an

order to discontinue and cease operation of said railroad, or any part thereof, and have never requested and secured permission to dismantle, tear up and junk said railroad or any part thereof.

The petition further alleges "that the tearing up of the side tracks and switches in the Cripple Creek Mining District in Teller County, Colorado, of said Short Line, which have and do serve mining properties in said District, and which have been and are now connected also with the Midland Terminal Railway Company system, will cause an irreparable damage to the owners of mining properties and to the business interests of the Cripple Creek Mining District and to the inhabitants of said District; that it is is a public matter and will cause irreparable damage to the public in general;" and asks that this Commission take jurisdiction of this matter on its own motion and hold a hearing wherein all facts pertaining to this subject may be heard.

On the 16th day of January, 1923, the Commission issued an order directed to W. D. Corley and to the petitioners, stating that a hearing and investigation would be had upon the allegations of the petition, which hearing was set originally for January 26, 1923, at the Hearing Room of the Commission, State Office Building, Denver, Colorado, later continued to February 1, 1923, and finally continued to February 8, 1923, and held at the City Hall, Colorado Springs, Colorado, at 10:00 o'clock A. M., all parties in interest having been duly notified.

On February 3, 1923, a motion was filed by W. D. Corley, through his attorneys, asking that he be dismissed from the operation of the order for the reason that he is not a common carrier; is not a corporation or an individual operating a railroad; and is not a public utility or person operating for the purpose of supplying the public; and is not, therefore, under the jurisdiction of this Commission or subject to its orders.

The motion further states that The Midland Terminal Railway Company is the corporation operating in the Cripple Creek Mining District and alleges that this is the only corporation or person subject to the control of this Commission under the Public Utilities Act, and asks that the Commission

enter an order dismissing W. D. Corley and requiring that The Midland Terminal Railway Company be made a party to this proceeding. On the same date the Chairman of this Commission, in a letter addressed to Horace G. Lunt, Attorney for W. D. Corley, stated that there was some question as to the power and authority of this Commission to compel intervention of The Midland Terminal Railway Company, and further stated that his motion would be disposed of at the hearing. The Chairman also, by letter on February 5 addressed to J. J. Cogan, General Manager of The Midland Terminal Railway Company, called his attention to the matter of the hearing and suggested that, if interested, a petition in intervention would be entertained.

History of the Property

The Colorado Springs and Cripple Creek District Railway, generally known as the "Cripple Creek Short Line," was built about 1900. It was a standard gauge railroad consisting of about forty-seven miles of main line from Colorado Springs to Cripple Creek and seventeen miles of sidings. In addition to the main line and sidings, there was built about twenty-eight miles of spurs, branches and sidings in the Cripple Creek District to serve the mining industries.

On May 2, 1919, the District Court of the United States for the District of Colorado, under an action entitled "Guaranty Trust Company of New York, as Trustee, and Central Union Trust Company of New York, as Trustee, Complainants, vs. The Colorado Springs and Cripple Creek District Railway Company, Defendant," appointed George M. Taylor as Receiver for said Railway Company. On July 15, 1919, George M. Taylor commenced operation of the railway property. On May 7, 1920, the District Court of the United States for the District of Colorado entered an order authorizing its Receiver to discontinue operation of said railway, excepting a small portion thereof between Colorado Springs and Summit.

On May 22, 1920, the Public Utilities Commission of the State of Colorado filed its petition in intervention with the United States District Court and asked that its order of May

7, 1920, be vacated or modified. On May 26, 1920, the United States District Court heard the facts and conditions as presented by the Commission and denied its petition.

On or about the 16th day of October, 1922, at Colorado Springs, Colorado, The Colorado Springs and Cripple Creek District Railway Company was sold at foreclosure sale, by a special master appointed by the District Court for the District of Colorado, to one W. D. Corley. Soon thereafter W. D. Corley began to tear up, dismantle and junk said Colorado Springs and Cripple Creek District Railway.

At the opening of the hearing at Colorado Springs, Colorado, on February 8, 1923, W. D. Corley, through his attorneys, filed an answer to the petition of The Cripple Creek Motor and Commercial Club and the order of the Commission pertaining thereto of January 16, 1923, wherein he alleged, first, that this Commission is without jurisdiction in that W. D. Corley is not a public utility, is not a common carrier, and is not a person operating for the purpose of supplying the public with those things declared by law to be affected with the public interest; second, that this Commission, by its own action, did intervene on an order made in the United States District Court of the District of Colorado, and such intervention was denied; that thereafter no further action was taken by this Commission; and that said W. D. Corley, herein, was advised that this Commission had, therefore, assented and consented to the order of the said United States District Court; third, that the said W. D. Corley entered into possession of said Railway Company by deed from a special master appointed by the United States District Court and began to dismantle said railroad, as he was informed and believed he had a perfect right so to do; fourth, that the said W. D. Corley has not threatened to tear up the tracks, sidings and switches mentioned in said petition, but has tried to dispose of same to the parties in interest for a fair and reasonable price and is willing and ready so to do.

After submitting the answer, H. G. Lunt, attorney for W. D. Corley, was asked by the Commission to be heard upon his

motion, to which he replied, saying, "I will submit the motion as it stands there, simply alleging that Mr. Corley is not subject to the jurisdiction of the Commission in any way, and ask that he be dismissed as far as he is concerned." The Commission thereupon denied the motion and stated in substance that originally when the Colorado Springs and Cripple Creek District Railway, or Short Line Railroad, was in operation, it may be fairly assumed that it was subject to the jurisdiction of the Commission the same as any other operating carrier or utility in the State. When it was sold or prior to its sale, May 13, 1920, the Commission was advised by notice from J. W. Cummings, Superintendent of the said Short Line, that on May 16 it would cease operation over its electrical lines and, May 17, over its steam lines, and gave as his authority an order of the Federal Court in a certain suit pending for the cessation of such operations. Thereupon the Commission made request upon the then Attorney General to intervene in that proceeding in the Federal Court and to make such showing as was deemed to be necessary to determine the question of jurisdiction or the power of the Federal Court to authorize cessation of service without regard to the power, jurisdiction and authority of the Commission, which was done. The Federal Court permitted the intervention, but denied the questions there involved. Thereafter request was made by the Commission upon the then Attorney General to preserve such records as might be necessary and have the question reviewed in the Circuit Court of Appeals or such other tribunal as would be proper. That, however, does not seem to have been done. That was the status of the matter until The Cripple Creek Motor Club filed its petition in January. Assuming that the petition is true and the allegations of it so far as the sale of the road is concerned last October to Mr. Corley, the Commission views the matter, under these circumstances, in this light: That one buying a public utility property at any time at a legal sale, foreclosure sale, master's sale or any other sale authorized by law, buys such property charged with the same duties and responsibilities, so far as the public is concerned, that the

original owner had. In other words, the maxim "*caveat emptor*" applies; so that, when Mr. Corley bought the property, if he did buy it, he was charged with the knowledge and notice of its public character and of its public duty and obligation. The mere fact that that company, as the Commission contends, never had any legal right to cease operations and junk the property, of course, would not give the purchaser any legal right. In Public Utilities Commission vs. Colorado Title and Trust Company, et al., 65 Colo. 472, our Supreme Court in a very exhaustive opinion lays down the proposition that the Public Utilities Commission has exclusive jurisdiction over every rail carrier or utility line lying wholly within the State, and that its jurisdiction is complete and exclusive as to the question of abandonment of service and junking of railroads, and, in that case, cited some very respectable authorities along the same line; so that the position of the Commission is that that question in this state, and in other states having the same sort of commissions, is a question that has been decided, so that it leaves the purchaser of this property in the position that until he makes application to the lawful authority for permission to abandon, junk and tear up the public utility that theretofore had existed, he has no lawful right so to do and he cannot defeat, and no other person can defeat, the public interest by so doing.

The Commission further stated: "This Commission is far from convinced that merely because the question of jurisdiction was raised in the Federal Court and was not reviewed by the Attorney General in the Court of Review, which is assumed to be the Circuit Court of Appeals, that thereby the Commission abandons all question of its jurisdiction in this matter. The law defines its jurisdiction and no act of omission or commission by the Commission would affect its jurisdiction one way or the other.

Messrs. H. T. Coppage, Evan J. Williams, E. P. Arthur, Jr., and J. W. Pherson, witnesses for the petitioners, testified in substance that certain tracks sold to W. D. Corley by the special master and originally owned by The Colorado Springs and

Cripple Creek District Railway Company were essential and necessary to the operation of certain mining properties; that they were now and had been used for this purpose since their installation; and that to remove them would do an irreparable injury to the mining industry and to the public in general in the Cripple Creek mining district.

Charles D. Vail, Railway Engineer for the Commission, testified that he had investigated the subject under discussion of the tracks and switches owned originally by The Colorado Springs and Cripple Creek District Railway Company, and that, in his opinion, certain tracks hereinafter mentioned in the order are necessary to the operation of the mining properties in the Cripple Creek District and to the public generally. He further stated that these tracks and switches are now in most cases serving the mines and to the best of his knowledge have been serving them for a number of years past.

The price paid W. D. Corley for a piece of track about four hundred feet in length was testified to by J. W. Pherson, for the petitioners, and explained by W. D. Corley, witness in his own behalf.

At the conclusion of the hearing it was agreed by all parties in interest and consented to by E. P. Upton, attorney for the petitioners, that an order be entered authorizing the dismantling and junking of the property of The Colorado Springs and Cripple Creek Railway Company, purchased by W. D. Corley from the special master appointed by the District Court of the United States for the District of Colorado, save and excepting those tracks, sidings and switches herein described as follows: Beginning at the connection of the Midland Terminal Railway with said Colorado Springs and Cripple Creek District Railway near the Last Dollar Mine to the Dante head block, a distance of 4,169 feet; a spur to the Dante ore bin, 340 feet long; a spur to the Dexter mine, 325 feet in length; the Gold Sovereign spur track, 2,584 feet in length; the Gold Sovereign stub track, 208 feet in length; from Portland Junction on what is known as the "high line" to the end of Ajax track, 4,815 feet in length; Ajax stub track, 650 feet in length; the

Portland No. 2 ore track, 1,374 feet in length; the Portland No. 1 coal track, 532 feet in length; the Portland switchback track, 1,682 feet in length; the Portland No. 1 ore track, 1,332 feet in length; the Portland stub track, 435 feet in length; making a total of 18,446 feet of track.

ORDER.

IT IS THEREFORE ORDERED, That W. D. Corley, purchaser of The Colorado Springs and Cripple Creek District Railway Company, is hereby authorized to discontinue service, withdraw from the public service and cease to operate such line of railroad and remove, dismantle and dispose of its property save and excepting those tracks, sidings and switches described as follows: Beginning at the connection of the Midland Terminal Railway with said Colorado Springs and Cripple Creek District Railway near the Last Dollar mine to the Dante head block, a distance of 4,169 feet; a spur to the Dante ore bin, 340 feet in length; a spur to the Dexter mine, 325 feet in length; the Gold Sovereign spur track, 2,584 feet in length; the Gold Sovereign stub track, 208 feet in length; from Portland Junction on what is known as the "high line" to the end of Ajax track, 4,815 feet in length; Ajax stub track, 650 feet in length; the Portland No. 2 ore track, 1,374 feet in length; the Portland No. 1 coal track, 532 feet in length; the Portland switchback track, 1,682 feet in length; the Portland No. 1 ore track, 1,332 feet in length; the Portland stub track, 435 feet in length; making a total of 18,446 feet of track; and each and every part thereof not herein excepted.

RE THE COLORADO SPRINGS & INTERURBAN RAILWAY COMPANY.

[Application No. 241. Decision No. 596.]

Rates—Temporary experiment.

Street and interurban railway company authorized to put into effect for twelve weeks new schedule of fares, including weekly and combination passes.

[March 15, 1923.]

ORDER.

Now comes the Colorado Springs and Interurban Railway Company, a corporation, engaged in transporting passengers for hire within the corporate limits of the City of Colorado Springs, Colorado, and from thence to the Town of Manitou, Broadmoor, Cheyenne Canon and Roswell, adjacent to said city, and whose postoffice address is 117 East Pikes Peak Avenue, Colorado Springs, Colorado, and presents its application praying for an order authorizing it to sell to the public unlimited ride, transferable, weekly passes over that portion of said company's system over which this Commission has jurisdiction, and where it has been authorized by prior order of this Commission to sell its transportation for the price of seven cents cash for a single ride, and to sell tickets therefor on the basis of eight full fares for fifty cents, for the price of seventy-five cents, and to sell a combination pass permitting the pass holder to obtain the like riding over that portion of said applicant's system where it now charges two fares, for the price of $1.75.

IT IS THEREFORE ORDERED, That said applicant be, and it is hereby, authorized to install said system for the period of twelve weeks, beginning Monday, March 19, 1923; but shall not be required to sell its single pass for the price of seventy-five cents, or at all, until beginning Monday, March 26, 1923; that this order shall be in effect only for the period of twelve weeks beginning Monday, March 19, 1923.

RE THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY.

[Application No. 244. Decision No. 597.]

Rates—Representation by carrier that temporary rate would be continued—Effect.

Where carrier informed a prospective shipper that a rate on cattle, intended to be temporary in nature and expiring on a certain date, would be effective after that date, and in reliance

thereon cattle were shipped after said date instead of before, and rate collected was the temporary one which had expired, undercharge was authorized to be waived.

[April 5, 1923.]

STATEMENT.

By the **Commission**: The subject matter of the above application is made informally to the Commission by The Denver and Rio Grande Western Railroad System for an order of the Commission authorizing it to waive an undercharge of $520.70 on certain shipments of cattle made from Pueblo to De Beque and Wolcott, Colorado, on July 6, 1922.

The application is supported by a letter from Mr. George Williams, the General Freight Agent of said railroad system; and by the affidavit of Mr. A. G. Prey, President of The Prey Brothers' Live Stock Commission Company, and from the letter and affidavit aforesaid, it is made to appear that by Supplement No. 4 to Denver and Rio Grande Western tariff 5617-B, effective May 8, 1922, published to expire June 30, 1922, a rate of $40.30 per car, Pueblo to De Beque, and $33.80 per car, Pueblo to Wolcott, was in effect as what might be denominated "an emergency rate" for the encouragement of shipments of feeder cattle into the carrier's territory. This emergency rate had been in effect at different periods during 1921 and 1922, and, in Supplement No. 6 to said tariff 5617-B, issued June 23, 1922, effective July 1, 1922, the rate theretofore prior in effect was restored, to-wit, $56.50 per car, Pueblo to De Beque, and $47.50 per car, Pueblo to Wolcott.

Mr. Prey, in his affidavit, states that the cattle shipments aforesaid were to be made by him from certain points in Arizona via the Atchison, Topeka and Santa Fe to Pueblo, thence transferred to the Denver and Rio Grande Western to destinations; that the movements from Arizona could have been made and would have been made prior to July 1, 1922, in order to take advantage of the lower rate, but for the fact that he made inquiry of the general offices of The Denver and Rio Grande Western Railroad System in Denver as to whether or not the lower rates would be continued in force and effect

after July 1, 1922, and that he was informed by some person in the office that they would be. This statement is corroborated by the letter of Mr. Williams, who details at length the somewhat uncertain condition of such tariff at that particular time, so that, unless the employe from whom information upon the particular rates in question was sought had made a thorough investigation, he would have been impelled to advise Mr. Prey that the lower tariff would remain in effect after July 1, 1922, as was stated by Mr. Prey in his affidavit. The movement of cattle from Arizona to Pueblo, it is stated, was made upon the lower rate over the Santa Fe to Pueblo; and, from the letter and affidavit aforesaid, it seems quite clear that the undercharge now sought to be waived was the result of a natural mistake made by the rate department of the Rio Grande System with Mr. Prey, and, that being the case, there would seem to be no reason why such undercharge should not be waived by the carrier.

The Prey Brothers' Live Stock Commission Company prepaid the freight from Pueblo to De Beque and Wolcott upon the basis of the so-called emergency tariff that was in effect up to June 30, 1922; and, as appears by the affidavit aforesaid, if the information had not been given that the said tariff would be continued in effect after July 1, 1922, the movement from Arizona via Pueblo to De Beque and Wolcott would have been made a few days earlier, so that the charges would have been based upon the tariff rate as established by the aforesaid supplement effective May 8, 1922, to expire June 30, 1922.

The Commission is strongly of the opinion, however, that this method of procedure should not be accepted or deemed as a precedent for matters of this kind in the future, but that collections should be made and then authority sought for reparating any overcharge that is justly due. Of course, in the instant case there was no overcharge, as the higher rate became effective on July 1, 1922; but, in truth and in fact, as indicated by the statement and affidavit filed herein, there was an overcharge to the consignor, which is now denominated an undercharge and which, under all the facts and circumstances

surrounding the matter, the Commission is of the opinion should be waived.

ORDER.

IT IS THEREFORE ORDERED, That The Denver and Rio Grande Western Railroad System be, and it is hereby, authorized and directed to waive the undercharge of $520.70 on the shipments of cattle by The Prey Brothers' Live Stock Commission Company from Pueblo to De Beque and Wolcott, Colorado, consigned to Coke T. Roberts and The 7-7 Cattle Company—twenty-five cars billed to Coke T. Roberts and eleven cars to The 7-7 Cattle Company, moved July 6, 1922.

RE F. E. JAMES, *et al.*

[Application No. 218. Decision No. 598.]

Certificate of convenience and necessity—Consent of city—Discontinuance of operations by protestant—Materiality.

1. Testimony offered by motor vehicle company seeking authority to conduct intra-city operations that protestant street railway company had not been operating its cars, held not to have any bearing on question whether city had given lawful consent to proposed operation.

Public utility—Dray line or express wagon.

2. A dray line or an express wagon operating wholly within a city is not a public utility.

Commission—Jurisdiction—Certificate of convenience and necessity—Failure to procure consent of city—Effect.

3. Commission has no power to authorize an intra-city operation by a bus line in absence of such consent of municipality as is required by Sec. 35(c) of the Public Utilities Act.

Automobiles—Municipal "authority"—License for fee.

4. Issuance of a municipal license for a fee pursuant to a general ordinance pertaining to hacks, omnibuses, automobile passenger cars, etc., is not the granting of such "consent, franchise, permit, ordinance, vote or other authority" as is required by Sec. 35(c) of the Public Utilities Act.

Automobiles—Power of municipality to pass resolution granting consent to operation.

5. City has power to pass resolution giving its consent to the operation of an intra-city bus line.

[April 2, 1923.]

Appearances: For Applicant, E. H. Houtchens, of Greeley, Colorado; Karl W. Farr, of Greeley, for Protestant, The Gree-

ley and Denver Railroad Company; A. P. Anderson and Barney L. Whatley, of Denver, Counsel for Protestant on brief.

STATEMENT.

By the **Commission**: On August 19, 1922, an application was filed before the Commission by F. E. James and L. G. Bradfield seeing a certificate of public convenience and necessity for the operation of an automobile bus transportation system within the city of Greeley, Colorado; and subsequently, upon leave, an amended application was filed on October 30, 1922, by The Greeley Transportation Company, a domestic corporation, which became substitute and successor to the rights of petitioners.

In the amended application the substitute applicant shows that it is a duly organized corporation under the laws of the State of Colorado, and by proper averment sets forth that it proposes to engage in the operation and conduct of a motor bus transportation line or lines for the convenience of the public generally, *inter alia*, in, through, over and along the streets of the city of Greeley; that there are no suitable or adequate transportation facilities for the convenience of passengers upon and along the streets of said city except such as were rendered, and being rendered, by The Greeley and Denver Railroad Company through the operation of an electric street car line owned by it, which service was wholly inadequate for the public convenience and necessity of the inhabitants of said city; and that said protestant, The Greeley and Denver Railroad Company, was unable to maintain an adequate and efficient system for the transportation of passengers over and upon the streets of Greeley by means of its electric operation on account of financial inability, and otherwise.

The protest and answer to the amended application sets forth that the protestant owns and operates, and for more than ten years prior thereto has owned and operated, a street railway line in the city of Greeley, and that there is no necessity for the operation of an automobile bus line in said city, and that there are not sufficient passengers for hire to be carried

in said city to require two public utilities to be engaged in such business, and hence not sufficient revenue for two competing companies. The protest and answer puts in issue the necessity for the proposed automobile bus line as being detrimental to the protestant, which occupies such field, and that to grant a certificate to a competing line would greatly injure its business, and perhaps ultimately render it necessary for cessation of its operations.

After due notice to all parties in interest the matter was set down for hearing at the city of Greeley on December 19, 1922, and duly heard. At the hearing applicant introduced in evidence a certified copy of its articles of incorporation, in obedience to the requirements of sub-division (c) of Section 35 of the Public Utilities Act. Applicant also introduced in evidence Exhibits C, D, E and F, which are licenses issued August 26, 1922, to the original applicants, James and Bradfield, and duly assigned to the corporate applicant, as a license tax imposed for permission to follow the business or vocation of a passenger auto in the city of Greeley from August 26, 1922, to August 26, 1923, subject to the provisions of the ordinances of the city of Greeley pertaining to said vocation.

At the further hearing herein held at the Hearing Room of the Commission, State Office Building, Denver, March 31, 1923, at 10:00 o'clock A. M., pursuant to adjournment from December 19, 1922, applicant offered in evidence its exhibit "J," which is merely a certificate of the city clerk of Greeley to the effect that the licenses introduced in evidence at the hearing on December 19, 1922, to-wit: Exhibits C, D, E and F, was and is the only authority the city of Greeley was empowered to grant under the statute law of the state, concerning or showing the city's consent to applicant to operate the proposed auto bus transportation line or lines within the city. Whether or not such be the case involves a question of law determinable by a court of competent jurisdiction. Applicant also offered to introduce additional testimony to show that at the present time, and since the December, 1922, hearing, the protestant has utterly failed to operate its street cars, and has practically aban-

doned its service to the public by that method of transportation. The offer was denied, for, obviously, if the Commission has no power or jurisdiction to issue the certificate of convenience and necessity for lack of proof as to the city's assent and consent, to issue it would be a void act, and the offered proof would in no sense indicate the consent of the city to the operation of applicant's bus line or lines, or even bear upon that question. And, of course, if the Commission would issue the certificate to applicant it requests, and its so doing would be an invalid act, no right would be gained to applicant thereby, nor no right of protestant affected. It would be as though no order granting the certificate had ever been issued insofar as the legal rights of the parties to this proceeding are concerned.

A mass of testimony was taken and received as to the necessity for the establishment and maintenance, in the interest of the public, of the motor bus line, which the evidence disclosed was to be located and operated entirely within the city limits of the city of Greeley, and would be in competition with the operation of the electric street car line of the protestant.

At the conclusion of the hearing the question of the sufficiency of the consent of the municipality to the operation of said auto bus transportation line in its corporate limits, as evidenced by the aforesaid licenses, that being the only consent of said city tendered or received in evidence, became important to the Commission; as, obviously, if the evidence submitted would not satisfy the requirements of said sub-division (c) of Section 35 of the Act, the Commission was without power to grant the certificate applied for, or any certificate. In that state of the record, the Commission requested that briefs be filed by the respective parties upon that one point, and for such purpose applicant requested, and was given, forty days within which to file its brief, and protestant forty days thereafter to answer and the applicant ten days thereafter to reply should it so desire; and the case was continued for further hearing to the 29th day of March, 1923, at the Hearing Room of the Commission, State Office Building, Denver, Colorado, in the event further testimony was desired to be submitted by either party

to the record, provided the Commission was satisfied of its power and jurisdiction under the requirements of sub-section (c) of Section 35, as to the consent of the municipal authorities given to applicant, as evidenced by Exhibits C, D, E and F aforesaid, and said Exhibit "J."

Applicant's brief was filed January 29, 1923, and that of the protestant on March 10, 1923, and on March 19, 1923, applicant notified the Commission in writing that it did not desire to make further reply to the protestant's brief.

The Commission will not enter into a discussion of the evidence submitted at the hearing other than the evidence of consent required by sub-section (c) of Section 35, to determine whether or not such evidence is sufficient to vest the Commission with jurisdiction to grant the certificate desired by applicant. Said sub-section (c), insofar as it pertains to the matter under discussion herein, reads as follows:

"Before any certificate may issue under this section, a certified copy of its articles of incorporation or charter, if the applicant be a corporation, shall be filed in the office of the Commission. Every applicant for a certificate shall file in the office of the Commission such evidence as shall be required by the Commission to show that such applicant has received the required consent, franchise, permit, ordinance, vote or other authority of the proper county, city and county, municipal or other public authority."

It will be observed therefrom that two things are essential to be filed by an applicant desiring a certificate of convenience and necessity; (1) if it be an incorporation that it shall file with the Commission a certified copy of its articles of incorporation, and (2) every applicant, whether it be a corporation or person, shall file with the Commission such evidence as shall be required by the Commission to show that applicant has received the required "consent, franchise, permit, ordinance, vote or other authority" of the particular municipality or public authority involved. The first of these requirements was complied with by applicant. The second of the requirements was attempted to be complied with by the filing with the Com-

mission of the licenses marked Exhibits C, D, E and F, and said Exhibit J. A certified copy of the ordinance of Greeley which authorizes the issuance of such licenses by the city clerk was also introduced in evidence, and, in brief, such ordinance is one that is similar to every town and city within this state, which seeks to license, and does license, those who desire to enter the municipality to engage in running an express wagon, dray, transfer wagon, hack, omnibus or automobile used for express or rent. Said ordinance was passed February 17, 1914, is numbered 258 and marked Exhibit H, and section one thereof provides as follows:

Section 1. "Every person, association, partnership or corporation who shall hire out, keep or cause to be kept, or permit to be used for carrying any person for hire, or for transporting any express, baggage, freight, merchandise, household goods, fuel or passengers; any dray, express wagon, transfer wagon, carriage, hack, omnibus, freight wagon, automobile express or automobile passenger car, within the corporate limits of the city of Greeley without having a license therefor, shall, on conviction thereof, be fined in a sum not less than five dollars nor more than twenty-five dollars for each offense."

The next section, or section two, indicates the mode of procedure to be followed in obtaining any such license as may be desired. Section two reads as follows:

Section 2. "The mayor is authorized to issue proper license, duly attested by the city clerk, under the seal of the city, to any person or persons, association, partnership or corporation, to keep and use for hire for the purposes mentioned in Section 1 of this ordinance, any or either of the carriages, automobiles or other vehicles mentioned in said Section 1, upon the application of such person, association or corporation, and the payment of the license fee hereinafter set forth."

In following sections of the ordinance the license fee is fixed at $10.00 per year for any automobile passenger car, express or transfer car, and for any two horse drawn vehicle described in Section 1, and at $7.50 per year for any one horse drawn vehicle described in Section 1; and provides that no license

shall be taken out for a less period than one year, and other terms and conditions set forth in the ordinance pertaining to the conditions under which said license is issued.

It will be seen therefrom that any person who desires may apply to the city clerk for a license to engage in any of the vocations described in the ordinance, and upon payment of the required fee the city clerk is required to issue a license to such applicant for a term of not less than one year. This applies to the person who operates a dray in the city, a jitney bus, an express wagon, or any other kind or means of transportation within the corporate limits of said city. The license issued is a matter of right to every applicant who complies with the terms and conditions of Ordinance No. 258. The question, therefore, resolves itself into this: Did the legislature, in using the terms or words embodied in sub-section (c) of Section 35, have in mind anything more than the customary and usual license to be issued by a municipality as a condition precedent to the issuance by this Commission of a certificate of public convenience and necessity for the operation of public utility carriers within such city or town? Taking Section 35 in its entirety, it seems to be the plain indication of the legislative intent that before the state, through its regulatory body, will authorize the conduct of any such business as is involved in the case at bar, by the issuance of a certificate of public convenience and necessity therefor, the local authority, which is given exclusive jurisdiction and control over its streets, alleys, highways and other public places within its corporate limits, must give its assent thereto. And it will be noted that throughout Section 35, as well as in sub-section (c) thereof, the character of the business proposed to be engaged in by an applicant seeking a certificate of convenience and necessity is one that is denominated, under the Act, a "public utility." Nowhere in the Act has the legislature defined a public utility to include the various businesses mentioned in Section 1 of Ordinance 258 of the city of Greeley. A dray line, for example, is not a public utility; an express wagon operating within Greeley, or any other city, is not a public utility, so that it seems quite clear that the

legislature intended that before this Commission should grant a certificate to an applicant to operate a public utility in any city or town, the consent so to do in one of the methods indicated by sub-section (c) of Section 35, shall be secured from such local authority and filed in the office of the Commission. This is made more apparent by the use of the words of sub-section (c) "consent, franchise, permit, ordinance, vote or other authority," for the reason that in interpreting a statute it is entirely proper, in arriving at the proper interpretation of legislative intent, to apply the principle of *sui generis;* so under such rule of interpretation the required consent, vote, franchise, ordinance, permit, etc., are required to be of like kind. In other words, the consent or assent of the municipality must be obtained for the particular vocation to be carried on by the applicant within such city or town, before this Commission is vested with power to issue its certificate of convenience and necessity therefor.

This Commission has held to this view heretofore in Farmers Electric and Power Company v. Ault, where this same question was under consideration, and this language was used:

"The Commission, therefore, will hold that the required consent of the municipality has been given for the construction and installation of the municipal electric plant. A different situation would be presented were the applicant other than the municipality itself; but it seems to the Commission that the main purpose of the legislature in enacting sub-section (c) of Section 35 of the Public Utilities Act was to prevent a privately owned utility from entering a town without first having obtained express consent of the town so to do, the evidence thereof being shown to the Commission before any certificate of public convenience and necessity may issue."

Farmers Electric and Power Company v. Ault, P. U. R. 1920-D, page 226.

This same general principle was made the subject of consideration by this Commission in its decision in Taylor v. Glenwood Springs, August 2, 1921. There the petitioners sought to have the Commission remedy conditions that affected the streets within

the corporate limits of the city of Glenwood Springs with reference to a water pipe line. In disposing of that contention the Commission used this language:

"Sub-section (7) of General Section 6524 R. S., 1908, defines the powers of incorporate towns or cities over streets therein. Among other things the legislature has granted to towns and cities in this State power with respect to streets, 'to regulate the use of the same and to prevent and remove encroachments or obstructions upon the same.' * * * The Public Utilities Act in nowise confers power or jurisdiction upon and over the streets and alleys of a municipality. * * * The local authority is the forum to which such situation should be properly addressed, as the local authority, if for no other reason, is more familiar with the desires and needs of the people affected thereby than would be any state regulatory body, and to hold otherwise would be clearly to confer upon the Commission the power of regulation concerning matters affecting local self-government which do not affect the public generally."

Taylor v. Glenwood Springs. P. U. R. 1921-E, 526-535-536.

The same principle is recognized by the Supreme Court of this State in its decision in Chicago, Burlington and Quincy Railroad Company v. Public Utilities Commission, *et al.*, November 8, 1920, where it reversed a decision of the Commission with reference to the opening of a street crossing within the incorporate limits of the town of Peetz, Colorado, and the Supreme Court held that the Commission had no right to practically condemn the property of a railroad company for street purposes, and uses this language:

"There is no reason for giving to the Commission the right to condemn. Paragraph 59 of 6525, R. S. 1906, gives express power to town and city councils to extend streets across railroads. * * * If the citizens of Peetz want the street extended they can doubtless induce the town council to take appropriate action to that end. This local action better accords with the principles of popular government than does the committing of the matter to the determination of a state commission."

C. B. & Q. R. R. v. Public Utilities Commission, P. U. R. 1921-B, 734-738, 193 Pac. 726.

So in the instant case it better accords with the principles of local self-government for the city of Greeley to give its assent to the applicant herein to engage in the public utility business within its corporate limits in the way it proposes, than that a state regulatory body should so determine. The contention is made by applicant, however, that the statute does not authorize or empower the city of Greeley to grant any other or different consent than has been granted by the issuance of the licenses aforesaid, Exhibits C, D, E, F, and J. It may be suggested in reply to this contention that it would be entirely a matter of right and power of the city council of Greeley to pass a resolution giving the city's consent and permission to the applicant to operate the automobile bus transportation lines in, upon and over the streets and avenues of said city if the city council desired so to do. If they do not desire to give such permission or consent, certainly it would be an infringement upon the principles of local self-government for this Commission, or any regulatory body, to decree otherwise without the consent and permission of the local governing authority.

For the reasons given the Commission is of the opinion that not sufficient proof of the "consent, franchise, permit, ordinance, vote or other authority" of the city of Greeley has been shown in evidence to vest this Commission with jurisdiction to issue the certificate of convenience and necessity applied for, and for failure of such proof the Commission is without jurisdiction to act.

ORDER.

IT IS THEREFORE ORDERED, That the application of the applicant herein be, and the same is hereby, dismissed for want of jurisdiction under the proof submitted, without prejudice, however, to the right of applicant to re-apply should it be so advised.

RE W. R. FREEMAN, *et al.*, RECEIVERS OF THE DENVER & SALT LAKE RAILROAD COMPANY.

[Application No. 157. Decision No. 608.]

Commission—Jurisdiction—Closing of station agency.

Closing of station agency without authority of the Commission declared unlawful, and the same was ordered to be reopened.

[May 25, 1923.]

ORDER.

This matter is before the Commission on the petition of Leon D. Wurtz, Superintendent of The New Life Mining and Milling Corporation, and eighty-six other signers of said petition, dated April 10, 1923, stating that by the permission of the Commission the agency of The Denver and Salt Lake Railroad Company at the Rollinsville station was discontinued from, and after, January 1, 1922, to, and until, May 1, 1922; that said agent had not been installed after January 1, 1923, and seeking the establishment of an agent at that station on or before the first day of May, 1923.

WHEREAS, Upon receipt of the above petition, signed by Leon D. Wurtz and other petitioners, a copy of same was submitted to The Denver and Salt Lake Railroad Company and the Receivers thereof, under date of April 23, 1923, requesting Receiver W. R. Freeman to advise the Commission as to the position of The Denver and Salt Lake Railroad Company, relative to re-establishing this agency; and,

WHEREAS, No response has been received by the Commission in reply to its letter of April 23, 1923; and,

WHEREAS, The closing of the agency at Rollinsville, Colorado, January 1, 1923, and up to the present time, was unauthorized by this Commission, as no showing was made for the necessity for said closing; and,

WHEREAS, The Receivers of The Denver and Salt Lake Railroad Company have, and now are assuming an attitude of contempt for the laws of Colorado governing the regulation of pub-

lic utilities and are setting themselves up as a law unto themselves; and,

WHEREAS, The New Life Mining and Milling Corporation, by Leon D. Wurtz, its Superintendent, has secured the names of eighty-six bona fide residents who are adversely affected and inconvenienced by the unlawful and unwarranted closing of the Rollinsville station agency.

This Commission will issue its order correcting the aforesaid violation of the statutes made and provided, covering such cases.

ORDER.

IT IS THEREFORE ORDERED, That The Denver and Salt Lake Railroad Company, through its Receivers, W. R. Freeman and C. Boettcher, re-establish its agency at Rollinsville, Colorado, and place an agent therein, on or before June 1, 1923.

IT IS FURTHER ORDERED, That the aforementioned agency shall be maintained until otherwise ordered by this Commission.

THE CHAMBER OF COMMERCE OF GREELEY, *et al.*

v.

UNION PACIFIC RAILROAD COMPANY, *et al.*

[Cases Nos. 244 and 250. Decision No. 611.]

Commission—Res judicata and stare decisis—Applicability in Commission practice.

1. The rules as to res judicata and stare decisis have no application to a rate or other proceeding before a regulatory body.

Rates—Changing those fixed by Commission—Whether warranted question of fact.

2. Whether conditions and circumstances have so changed as to warrant the Commission in changing a rate theretofore established is a matter for its determination from all the facts and circumstances in evidence.

Rates—Intrastate and interstate—Discrimination.

3. Where but a few cents difference or no difference at all is made between a rate on coal to the last station in Colorado and the rate to a point 250 to 300 miles or more further, the consumers of Colorado are being unduly penalized.

Rates—Parties—Rehearing.

4. Corporation, not a party eo nomine to a rate case, but a member of an association that was a party, may, under Sec. 51 of the Public Utilities Act, properly file a petition for rehearing.

Coal rates from various producing districts prescribed.

[June 4, 1923.]

Appearances: White & Vogl, Colorado Building, Denver, Colorado, for Complainants; C. C. Dorsey and E. G. Knowles, Denver, Colorado, for Union Pacific Railroad Company; J. Q. Dier and K. F. Burgess, Railway Exchange Building, Denver, Colorado, for Chicago, Burlington & Quincy Railroad Company; J. Q. Dier and E. E. Whitted, Railway Exchange Building, Denver, Colorado, for The Colorado and Southern Railway Company; E. N. Clark, Equitable Building, Denver, Colorado, for The Denver and Rio Grande Western Railroad Company; Henry T. Rogers and Erl H. Ellis, of Denver, Colorado, for The Atchison, Topeka and Santa Fe Railway Company; Elmer L. Brock, of Denver, Colorado, for Receivers of The Denver and Salt Lake Railroad Company; Russell W. Fleming, of Fort Collins, Colorado, for The North Park Coal Company.

STATEMENT.

By the **Commission**: The above matter is before the Commission by virtue of the complaint of the above named complainants in Case No. 244, filed with the Commission July 26, 1921; and of the complaint of complainant in Case No. 250, filed with the Commission October 25, 1921.

These two proceedings bring in issue the reasonableness and propriety of rates on coal from the northern lignite fields, located in Boulder and Weld counties, and from the Southern Fields, located in Huerfano and Las Animas counties, to Greeley and Denver. Complainants in Case No. 244 allege that the rates from the Northern and Southern Fields to Greeley are unjust and unreasonable, and by comparison with the rates on coal from the same originating territory to other localities within the State of Colorado, subject the City of Greeley and the residents

and industries thereof to unjust discrimination. They ask for the establishment of the following rates:

To Greeley from	Lump	M. R.	Nut	Slack
Trinidad	$2.75	....	$2.25	$1.75
Walsenburg	2.45	....	1.95	1.50
Northern Fields	1.25	$1.00	....	.80

Complainants in Case No. 250 attack the rates on coal from these same fields to Denver, alleging that they are unjust and unreasonable and are unduly prejudicial to intrastate commerce and preferential of interstate commerce. The Commission is asked to establish just, reasonable, non-discriminatory and non-prejudicial rates for the future. The North Park Coal Company, located at Coalmont, Colorado, intervened in opposition to the complaint in Case No. 244. The Denver and Salt Lake Railroad Company, by its Receivers, intervened in Case No. 250 in opposition to the reductions sought in the rates to Denver.

Both of these cases were, upon notice to all parties interested, set for hearing before this Commission upon several different dates in the latter part of 1921 and early in 1922, but, by applications for continuances and by stipulation and otherwise, they were not heard until after the institution by the Interstate Commerce Commission in the spring of 1922 of an investigation upon its own motion *in re* "Western Coal Rates," Docket No. 13588. At the instance of the parties, request was made to the Interstate Commerce Commission for a joint hearing upon a common record at such time as that Commission should designate as the date of its hearing to be held in the City of Denver. Thereafter, in April, 1922, the Interstate Commerce Commission extended an invitation to this Commission to sit with it jointly at its hearing in the City of Denver on May 10, 1922, and, upon a common record, to determine the matters involved in the two cases herein then pending before us for determination.

The complainants and defendants joined in a request that the scope of the investigation be widened or extended so as to include and permit a full consideration of both the interstate rates to and from Colorado and intrastate rates within Colorado to destinations on and east of the Colorado common point line, and

thereby so to adjust the relationship between the interstate states and the intrastate rates on coal that they would harmonize and not cause conflict through the inharmonious decisions of the two commissions.

While the stipulation or request as filed and of record is signed only by the complainants and The Colorado and Southern, Burlington, Union Pacific, and The Denver and Rio Grande Western, it was acquiesced in at the hearing by all interested parties except intervener, The Denver and Salt Lake Railroad, which objected on the ground that it had had no notice thereof and was not to be considered as a party thereto.

As indicated, and in pursuance to notice duly given by the Interstate Commerce Commission as to carriers of interstate traffic, and by the Colorado Commission as to carriers interested in intrastate traffic, the matter was set down for hearing and heard at the hearing room of the Commission in the State Office Building, Denver, Colorado, beginning on May 10, 1922.

It will be observed that under the terms of the agreement or stipulation widening or extending the scope of the investigation, many of the objections raised by the different carriers in the two Colorado cases are thereby eliminated, as the final outcome of this proceeding will be to fix and adjust coal rates from producing districts in Colorado to the principal consuming points in Colorado, including points on and east of the Colorado common point line to the Colorado state line.

The rates on coal in Colorado have been considered by this Commission in several proceedings. In Case No. 53, Commercial Club of Greeley v. Colorado and Southern Railway Company, decided in 1914, we prescribed rates from the northern Colorado lignite district to Greeley. In Case No. 26, Greeley Gas & Fuel Company v. Colorado and Southern Railway Company, decided in 1915, we approved rates then in effect from the Trinidad district to Greeley. As the result of Consumers' League of Colorado v. Colorado and Southern Railway Company, Case No. 6, decided in 1914, and on further hearing in 1918, rates were prescribed on lignite coal from northern Colorado to Denver. In 1915, this Commission instituted an investigation into all rates on

coal from the various coal producing districts to points on and east of the Colorado common point line. In that proceeding, known as Case No. 10, we prescribed rates from the principal mining districts to destinations on the Santa Fe, Burlington, Chicago, Rock Island & Pacific, Missouri Pacific, and Union Pacific, observing generally the differentials as between the districts which had been voluntarily established by the carriers. The rates from the Walsenburg district, as a rule, constituted the base rates, and on traffic moving through Denver, the Canon City, Oak Hills, and South Canon districts were accorded the same rate basis, with the Trinidad and Palisade districts 25 cents per ton higher on lump coal.

The rates then prescribed or approved by this Commission remained in effect, with minor variations, until June 25, 1918, when the increases under General Order No. 28 of the Director General of Railroads became effective. Following these, on September 1, 1920, further increases were made with our authority which corresponded with the increases in interstate rates effected by *Ex Parte* 74. The rates in effect in Colorado at the time of the hearing, therefore, were, in general, rates approved or prescribed by us. Since then, the reductions required under Reduced Rates, 1922, have been applied to the intrastate rates as well as the interstate rates. We are now called upon to determine, upon a record dealing with both the intrastate rates in Colorado and the interstate rates to and from Colorado, what would be a reasonable and non-prejudicial adjustment within this state.

The defense interposed in these cases that because decisions and orders of this Commission rendered some years ago, prescribed rates from the Trinidad and Walsenburg Districts to Pueblo, Colorado Springs and Denver, and from the Northern Coal Fields to Denver, and such orders and decisions have been in force and effect for a number of years and having been, as it is alleged, acquiesced in by complainants and other shippers of coal from said districts, they are final and conclusive and constitute a permanent adjudication and determination of the basic rates above mentioned, the Commission thinks to be untenable.

The defense mentioned is in the nature of what might be denominated in a court proceeding *res adjudicata* or *stare decisis*. Those principles are not applicable to a rate proceeding or, for that matter, any other proceeding before a regulatory body, for the reason that a rate or classification or rule established by a regulatory body today may at this time next year be shown to be entirely unreasonable, unjust or discriminatory in its effect. It is true, defendant carriers allege that complainants have shown in their complaints no such change of conditions and circumstances from the time of the rendition of the prior orders and decisions as would warrant the Commission in changing, modifying or altering the decisions and orders heretofore rendered; but that is a statement of conclusion merely. Whether conditions and circumstances have so changed as to warrant the regulatory body in increasing or decreasing a rate theretofore established is a matter for the regulatory body to determine from all the facts and circumstances in evidence; and the Commission is clearly of the opinion that, except as to the rates to Pueblo and Denver from the Southern Fields, the evidence clearly indicates that intrastate rates to other points on and east of said common points to the Colorado state line are too high both in and of themselves and by comparison with interstate rates from the Trinidad and Walsenburg Districts to Kansas and Nebraska points and the Missouri River, and that said intrastate rates have hitherto borne an unfair and unjust proportion of the rates for the transportation of coal by the carriers involved for similar distances under similar conditions.

The present rate of $2.25 on lump coal from the Walsenburg District to Colorado Springs, one of the principal common points, as compared with the present rates of $1.76 and $2.34 from said district to Pueblo and Denver, respectively, is unreasonable and unjust in view of the length of hauls involved, as well as other factors that pertain to the Denver movement. A rate of $2.00 from Walsenburg to Colorado Springs is, therefore, found to be a reasonable and just rate for said movement for the future, with a 25 cent differential over Walsenburg from the Trinidad

District on lump and nut coal, and a 10 cent differential on pea and slack.

Insofar as the rates to the common points designated are concerned, to-wit: Pueblo and Denver, of $1.76 and $2.34, respectively, from the Walsenburg District, with a 25 cent differential from the Trinidad District on lump and nut coal and a 10 cent differential on pea and slack, we are of the opinion they are no more than is fair, just and reasonable considering the length of haul, density of traffic, grades and other conditions surrounding the service in transporting coal to the two above mentioned common points.

In the stipulation hereinbefore referred to, the scope of the hearing was extended so as to permit full consideration of both interstate rates to Colorado and the intrastate rates within Colorado "to destinations on and east of the Colorado common point line." So far as the two Colorado cases are concerned, the Commission, as disclosed by the intention of the parties to the written stipulation and as expressed by complainants in the record, meant thereby the destinations "on and east of the Colorado common point line" from the principal common points of Pueblo, Colorado Springs and Denver to the Colorado state line; and as so construed by the Commission that question will be first dealt with herein, after which the rates in Case No. 244, from the Northern Coal Fields to Greeley, and in Case No. 250, from the Northern Coal Fields to Denver, will be dealt with, to be followed by a consideration of the rates from the other producing points in Colorado to the three principal common points above named.

When the complaints in Cases Nos. 244 and 250 were filed in July and October, 1921, respectively, the rates from the Walsenburg field to Denver were, as set forth in the complaints, $2.90½ on all coal except pea and slack and $2.56½ on pea and slack. By tariffs issued July 22, 1922, effective July 24, 1922, these and other rates on coal were reduced in conformity with Reduced Rates, 1922, 68 I. C. C., 676, which required a reduction of 10 per cent in class and commodity rates. Prior to *Ex Parte* 74, the rates from the Canon City and Walsenburg districts to Denver

were the same. The increases granted by the Commission under Application No. 91, following *Ex Parte* 74, were greater from Walsenburg than from Canon City because of the inclusion of the former in the western group and of the latter in the Mountain-Pacific group. Under the 10 per cent reduction of July 24, 1922, the rate on lump from Canon City to Denver became $2.34 and to restore the former parity the carriers reduced the Walsenburg rate to the same amount, the reduction being nearer 20 per cent than 10 per cent. At the time of the hearing, therefore, rates from Canon City and Walsenburg were the same and were $2.34 on all coal except pea and slack, and on the fine coal $2.14. The usual differentials over Walsenburg of 25 cents and 10 cents, respectively, made the rates from Trinidad $2.59 and $2.24. These differentials have been maintained for a long period of years.

The operators and shippers of coal urgently contended at the hearing that rates for the transportation of coal should be adjusted upon a mileage scale in conformity with the distance scale of rates found to be reasonable by the Interstate Commerce Commission in the case of Holmes & Hallowell Company v. Great Northern Railway Company, *et al*, decided March 8, 1921, reported in 60 I. C. C., pages 687 to 714, as amended June 6, 1922, effective July 1, 1922, the same being commonly known and referred to as the "Holmes & Hallowell Scale." This contention was vigorously opposed by the carriers as being impracticable to be applied to the transportation of coal traffic and unfair to the carriers, owing to the many different conditions affecting the service rendered, occasioned by density of traffic, curvatures, grades, empty car movement, climatic conditions and many other factors that enter into the operation of railroads throughout the country; and that to apply such distance scale, or any distance scale, would be inequitable and unjust to the carriers as a whole, and that to attempt to apply a distance scale at all each line of railroad should be considered separately with the circumstances and conditions surrounding its difficulties of transportation.

The Commission is impressed with the argument of the carriers that the adoption of rates for transportation in compliance with the principles laid down in the Holmes & Hallowell case

applied indiscriminately would be unfair and unjust to the carriers as, for instance, any principle of mileage scale of rates adopted over a prairie line where the grades and other difficulties of transportation are comparatively negligible as compared with the service rendered by a carrier over and through a mountainous country where curvatures and grades are quite considerable and climatic conditions render the service much more expensive than in the prairie haul, and where the return of empty car movement is practically 100 per cent, would be unfair, unjust and entirely unreasonable. In determining, however, the rates for the transportation of bituminous coal, carloads, from the Colorado common points east, northeast and north to the state line on movements intrastate, the Holmes & Hallowell scale will be considered as a starting point or guide for the fixing of what is deemed to be reasonable and fair rates for such movements.

An examination of the tariffs of the carriers shows that the increases in rates proceeding eastward from the three principal common points, Denver, Colorado Springs and Pueblo, to the Colorado state line are far out of proportion with the increases east of the state line. In other words, the rates are so graded that most of the increase between the common points mentioned and the Missouri River is within the state of Colorado. For illustration, the rate from Walsenburg to Cheyenne Wells, a distance of 362 miles, is $4.86, while to Enterprise, Kansas, 304 miles farther, the rate is the same, and to Kansas City, 463 miles east of Cheyenne Wells, it is only 41 cents higher. The following table illustrates how the present grading of the rates throws the principal burden upon the consumers in Colorado:

Walsenburg to	Miles	Rate	Increase in Miles	Increase in Rate
Denver	185	$2.34	...	....
Cheyenne Wells, Colo.	362	4.86	177	$2.52
Enterprise, Kans.	666	4.86	304	....
Kansas City	825	5.27	463	.41
Julesburg, Colo.	382	5.04	197	2.70
Alda, Neb.	593	5.04	211	....
Council Bluffs, Iowa	747	5.27	365	.23
Laird, Colo.	358	4.91	173	2.57
Hastings, Neb.	571	5.04	213	.13

Walsenburg to	Miles	Rate	Increase in Miles	Increase in Rate
Omaha, Neb.	723	5.27	365	.36
Colorado Springs, Colo.	110	2.25	...	....
Peconic, Colo.	269	5.04	159	2.79
Selden, Kans.	558	5.27	289	.23
Missouri River	679	5.27	410	.23
Pueblo, Colo.	67	1.76	...	....
Towner, Colo.	218	3.29	151	1.53
Herrington, Kans.	513	4.86	295	1.57
Missouri River	689	5.27	471	1.98

The carriers justify the disparity shown to exist between coal rates from the Walsenburg-Canon City-Trinidad Districts to eastern Colorado points as compared with the rates to Kansas, Nebraska and river points, on the ground that the comparatively low rate for the long haul is made necessary in order that Colorado coal may compete in the Kansas, Nebraska and river territory with coal from Iowa, Illinois and other coal producing districts contiguous to the Missouri River. It may be conceded that on the long haul there should be a lower rate as compared with the rate for the shorter haul, else no Colorado coal would move into the long haul territory; but where but a few cents difference, and in some cases no difference at all, is made between the rate to the last station in Colorado and the rate two hundred and fifty to three hundred miles or more farther east, it would seem that the consumers of Colorado coal at the designated points in Colorado are being unduly penalized and the consumers of Colorado coal in the territory farther on unduly favored.

Upon consideration of all the evidence presented at the joint hearing before this Commission and the Interstate Commerce Commission concerning the adjustment of rates from mines in southern Colorado to points in Colorado on and east of the Colorado common point line, more detailed discussion of which we deem to be unnecessary, we are of the opinion and find that the present rates on coal, other than nut, slack or pea, are now, and for the future will be, unreasonable and unduly prejudicial to the extent that they exceed the following. The record is insufficient to warrant a finding as to the differentials that should be maintained on the smaller and finer grades of coal.

UNION PACIFIC RAILROAD

Destination	Walsenburg-Canon City Rate	Trinidad Rate
Kuner	$3.05	$3.30
Sublette	3.15	3.40
Ft. Morgan	3.20	3.45
Cooper	3.40	3.65
Balzac	3.50	3.75
Atwood	3.60	3.85
Sterling	3.65	3.90
Proctor	3.80	4.05
Red Lion	3.85	4.10
Ovid	4.00	4.25
Julesburg	4.10	4.35
Sable	2.65	2.90
Watkins	2.70	2.95
Bennett	2.80	3.05
Byers	2.90	3.15
Deer Trail	3.05	3.30
Limon	3.25	3.50
Hugo	3.35	3.60
Boyero	3.50	3.75
Aroya	3.60	3.85
Arena	3.80	4.05
Cheyenne Wells	3.90	4.15
Arapahoe	4.00	4.25
Brighton	2.50	2.75
Erie	2.75	3.00
Boulder	3.00	3.25
Greeley	3.00	3.25
Eaton	3.00	3.25
Ault	3.05	3.30
Pierce	3.10	3.35
Nunn	3.15	3.40
Carr	3.15	3.40

COLORADO AND SOUTHERN RAILWAY

Destination	Walsenburg-Canon City Rate	Trinidad Rate
University Park	$2.34	$2.59
Sullivan	2.34	2.59
Parkers	2.34	2.59
Elizabeth	2.34	2.59
Elbert	2.34	2.59
Eastonville	2.34	2.59
Boulder	3.00	3.25
Fort Collins	3.00	3.25
Windsor	3.00	3.25

CHICAGO, BURLINGTON & QUINCY RAILROAD

Destination	Walsenburg-Canon City Rate	Trinidad Rate
Derby	$2.65	$2.90
Barr	2.70	2.95
Hudson	2.80	3.05
Keenesburg	2.90	3.15
Roggen	3.00	3.25
Wiggins	3.10	3.35
Ft. Morgan	3.20	3.45
Brush	3.30	3.55
Akron	3.45	3.70
Otis	3.60	3.85
Yuma	3.65	3.90
Laird	3.80	4.05
Hillrose	3.30	3.55
Union	3.50	3.75
Sterling	3.65	3.90
Padroni	3.75	4.00
Winston	3.85	4.10
Peetz	3.85	4.10
Logan	3.75	4.00
Willard	3.80	4.05
Stoneham	3.90	4.15
Raymer	3.95	4.20
Buckingham	4.05	4.30
Keota	4.05	4.30
Grover	4.20	4.45
Hereford	4.25	4.50
Fleming	3.70	3.95
Haxtun	3.70	3.95
Paoli	3.85	4.15
Holyoke	4.00	4.25
Amherst	4.05	4.30
Eversman	2.70	2.95
Lafayette	2.70	2.95
Erie	2.75	3.00
Idaho Creek	2.80	3.05
Longmont	3.00	3.25
Hygiene	3.00	3.25
Lyons	3.00	3.25

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY

Destination	Walsenburg-Canon City Rate	Trinidad Rate
Falcon	$2.25	$2.50
Calhan	2.25	2.50
Simla	2.35	2.60
Mathison	2.35	2.60

Destination	Walsenburg-Canon City Rate	Trinidad Rate
Resolis	2.45	2.70
Limon	2.55	2.80
Bovina	2.70	2.95
Arriba	2.70	2.95
Flagler	2.90	3.15
Vona	3.00	3.25
Stratton	3.05	3.30
Burlington	3.20	3.45

MISSOURI PACIFIC RAILROAD

Destination	Walsenburg-Canon City Rate	Trinidad Rate
Nepesta	$1.76	$2.00
Sugar City	2.00	2.25
Arlington	2.20	2.45
Haswell	2.30	2.55
Eads	2.45	2.70
Brandon	2.65	2.90
Sheridan Lake	2.75	3.00
Stewart	2.80	3.05
Towner	2.80	3.05

ATCHISON, TOPEKA & SANTA FE RAILWAY

Destination	Walsenburg-Canon City Rate	Trinidad Rate
El Moro	$1.60	$1.10
Thatcher	1.85	1.35
Timpas	2.10	1.65
La Junta	2.10	1.85
Las Animas	2.25	2.00
Lamar	2.55	2.30
Amity	2.70	2.45
Holly	2.80	2.55

GREAT WESTERN RAILWAY

Carriers heretofore or hereafter publishing joint through rates from the Southern Fields to points on the Great Western Railway, shall publish joint through rates not exceeding the following:

Destination	Walsenburg-Canon City Rate	Trinidad Rate
Mead	$3.00	$3.25
Johnstown	3.00	3.25
Kelim	3.00	3.25
Wattenberg	3.00	3.25

Oak Hills District—Common Point Rate.

The Oak Hills District is located on the Denver and Salt Lake (Moffat) Railroad, 211 miles distant from Denver, the nearest common point to said district. The present rate from the Oak Hills District to Denver is $2.92 per ton, carloads, for all sizes of coal, the bituminous product being the only kind of coal produced in said district. The haul involved from the Oak Hills District to Denver is conceded to be a service fraught with more difficulties and expense than any similar transportation service on the continent. The gradient of the haul frequently reaches as much as 4½ per cent, while the curvatures are quite numerous and about as sharp as it is possible in the operation of a standard gauge railroad; and before the service of transportation from the Oak Hills District to Denver is completed, it involves a haul over the main Continental Divide at an altitude in excess of 10,000 feet. The testimony discloses that it requires two locomotives to handle no more than eleven to fourteen cars of coal over these grades and curves, both ascending and descending, and that climatic conditions, particularly during the season of the year when the coal movement is the greatest, are so terrific that snow blockades are not infrequent, and that for many months of the winter season it is with the greatest difficulty and attended with enormous expense that the line of railroad is kept in operation. The road has been in the hands of receivers for several years and its operating expenses have been in excess of its operating revenues, according to the testimony, as a general rule during the past few years, while no attempt is made to pay interest on its bonded debt, much less dividends on its stock. Any serious disturbance of its revenues would, therefore, endanger the continued operation of this railroad. It has received from time to time special consideration from this Commission, and at least once from the Interstate Commerce Commission, because of its lamentable financial condition and its comparatively limited revenue possibilities. Approximately 87 per cent, the testimony discloses, of the entire traffic over the Moffat Railroad is coal traffic.

Taking into consideration all the difficulties and expenses inci-

dent to the operation of the railroad, as well as other factors that enter into the equation, the Commission is of the opinion that the present rate of $2.92 per ton of two thousand pounds, carloads, for the transportation of coal from the Oak Hills District to Denver is not unreasonable, excessive or unjust. We reach the same conclusion with respect to the present rate from Leyden Junction to Denver.

The testimony discloses that in the calendar year 1921 The Denver and Salt Lake Railroad Company transported 713,925 tons of revenue coal, of which 275,164 tons moved in intrastate commerce, which includes 199,281 tons to Denver, making a tonnage of about 76,000 tons originating on the Denver and Salt Lake Railroad destined to points in Colorado other than the City of Denver.

For a considerable period of time prior to the latter part of 1917 rates from the Oak Hills District were the same as from Walsenburg, a condition brought about by the competition between the two fields. In 1917 a temporary increase was made effective from Oak Hills, whereby the rates became 25 cents higher than from Walsenburg. The former parity has never been restored. Oak Hills and southern Colorado coals meet at Denver when destined to points on the Union Pacific and Burlington. The average distance from the Oak Hills mines to Denver is 26 miles greater than from Walsenburg and substantially the same from Trinidad. The differences in the operating conditions are such, however, as to justify higher rates from Oak Hills than from Trinidad.

The present rates on lump coal from Oak Hills and Walsenburg to a few representative stations in eastern Colorado are given below:

	Oak Hills		Walsenburg		Difference	
	Miles	Rate	Miles	Rate	Miles	Rate
Denver	211	$2.92	185	$2.34	26	$0.58
Union Pacific						
Ft. Morgan	310	4.01	284	3.60	26	.41
Sterling	351	4.74	325	4.46	26	.28
Ovid	401	5.10	375	4.82	26	.28
Julesburg	408	5.28	382	5.04	26	.24
Bennett	246	3.65	216	3.33	26	.32
Limon	300	4.01	274	3.69	26	.32
Cheyenne Wells	388	5.22	362	4.86	26	.36

	Oak Hills		Walsenburg		Difference	
	Miles	Rate	Miles	Rate	Miles	Rate
C. B. & Q.						
Brush	299	$4.37	273	$4.05	26	$0.32
Akron	323	4.62	297	4.32	26	.30
Yuma	349	4.86	323	4.55	26	.31
Laird	384	5.22	358	4.91	26	.31
C. R. I. & P.						
Limon	300	4.01	189	3.69	111	.32
Arriba	322	4.37	211	4.05	111	.32
Vona	351	4.86	240	4.55	111	.31
Burlington	377	5.22	266	4.91	111	.31

It will be observed that under the present adjustment the difference between the Oak Hills and Walsenburg rates at Denver on lump coal is 58 cents, whereas at points east of Denver it ranges from 24 to 41 cents. Under the rates which we have prescribed from the Walsenburg District to these points in eastern Colorado the differences will be substantially greater than at Denver and will range from about 75 cents to $2.00. Some readjustment is, therefore, necessary in the Oak Hills rates to enable the operators on the Moffat Road to compete in these common markets with the operators in the Southern Fields.

We are of opinion, and find, that the rates from the Oak Hills District to points east and north of Denver on the Union Pacific, Colorado and Southern, and Chicago, Burlington & Quincy Railroads, will be unreasonable and prejudicial to the extent that they exceed by more than 50 cents per ton of two thousand pounds the rates contemporaneously in effect from the Walsenburg District to the same destinations. We further find that to points on the Chicago, Rock Island & Pacific Railroad east of Limon, rates on lump coal from the Oak Hills District should not exceed those from Walsenburg by more than $1.20 per ton.

Southern Fields to Greeley Rates.

The present rates on lump and nut coal from Trinidad and Walsenburg to Greeley are $3.40 and $3.15, respectively, and on pea and slack coal $3.03 and $2.93, respectively. The average distance from the mines in the Trinidad District to Greeley via the Union Pacific north of Denver is 265 miles and from the mines in the Walsenburg District 237 miles or 52 miles greater

than the distances to Denver. For this additional haul of 52 miles the increase in the lump coal rate is 81 cents. The distance from Denver to Greeley via the Colorado & Southern is 99 miles, or almost twice the distance by way of the Union Pacific. The Union Pacific haul from Denver to Greeley is over a level country without appreciable grades or curves and under ideal transportation conditions. The haul via the Colorado and Southern is not only circuitous but offers greater difficulties from a transportation standpoint. Under the circumstances, rates from the Southern Fields to Greeley should be based upon the distance over the shorter line of the Union Pacific.

We are of opinion that the present rates to Greeley are unreasonable and that reasonable rates for the future will be the following: from Walsenburg, $3.00 on lump and $2.70 on slack. and from Trinidad, $3.25 on lump and $2.80 on slack.

Northern Coal Fields-Greeley Rates.

In Case No. 244 complainants allege that rates for the transportation of coal from the northern coal fields, in Boulder and Weld Counties, to Greeley are unjust and unreasonable, subjecting the City of Greeley and its inhabitants to unjust discrimination, and are excessive by comparison with the rates to other localities within the State of Colorado for similar traffic under similar conditions. Attached to and made a part of the complaint is "Exhibit A" which shows that the rates from the Northern Fields to Greeley at the time the complaint was filed were $1.89 on lump, $1.48½ on mine run and $1.35 on slack per ton, carloads. The distances are stated as 40.2 miles by way of Union Pacific and 77.4 miles by way of Colorado and Southern. Since the complaint was filed the above rates have been reduced by the carriers 10 per cent. The present rates are $1.70 on lump, $1.34 on mine run and nut, and $1.22 on slack and pea.

While the haul from the Northern Fields to Greeley via the Union Pacific is over a level country and free of operating difficulties of importance, the evidence establishes the fact that approximately 90 per cent of the coal movement is over the Colorado and Southern owing to most of the important mines being

located on that railroad. This affords an example where rates over the longer haul should not be depressed because there is an available competing shorter route between the same points. We recognized this in Commercial Club of Greeley v. C. & S. Ry., 1 Colo. P. U. C., 117-120.

The rates under consideration from the Northern Fields to Greeley were advanced as a result of General Order No. 28, *Ex Parte* 74, Application No. 91, approximately 100 per cent, and were reduced 10 per cent as a result of Reduced Rates 1922, making the present rate 90 per cent higher than the rate in effect prior to General Order No. 28. Taking all the facts and circumstances in evidence, and considering the rate for a similar haul under similar transportation conditions, we find that a rate of $1.50 per ton on lump coal would be just and reasonable, and any rate in excess of $1.50 per ton is hereby found to be unjust, unreasonable, and discriminatory. We do not find the rates on mine run, nut, pea or slack to be unreasonable or discriminatory.

Northern Coal Fields-Denver Rate.

The rates on the above movement, as determined by this Commission in November, 1914, after an extended hearing and investigation, were fixed at 65 cents on lump, 60 cents on mine run and 55 cents on slack, which continued to be the rates until affected by the increases allowed under General Order No. 28 and *Ex Parte* 74, Application No. 91. These increases made the rates $1.35, $1.35 and $1.21½, which were the rates in effect at the time the complaint was filed in this proceeding. Since that time, however, the 10 per cent reduction made in July, 1922, has resulted in present rates of $1.22, $1.22 and $1.09, which are substantial increases over the rates established by this Commission in its hearing and investigation hereinabove referred to.

The average distance from the northern coal fields to Denver over the three lines of carriers affected; viz., the Colorado and Southern, the Burlington and the Union Pacific, is stated as being 27.2 miles and the movement over each of said lines is practically free from difficulties of operation and is what might be denominated a prairie haul. The density of traffic for this par-

ticular haul as it pertains to the coal movement is perhaps as large a percentage as exists in any other section of the State for a haul of a similar distance and under similar conditions. It is true that the return movement of equipment is practically 100 per cent empty and should be taken into consideration in determining what is a fair and reasonable rate for the service in question; but that return movement is not appreciably greater than exists in other territories in this State, and in proportion to tonnage hauled is no greater now than in November, 1914, when the prior hearing fixed the rates at 65, 60 and 55 cents, respectively. As stated, the volume of coal traffic is relatively of such magnitude as should be taken into consideration in fixing a just and reasonable rate. Taking the above and all of the facts and circumstances in evidence into consideration, the Commission is of the opinion that the present rates for the transportation of coal, carloads, from the Northern Fields to Denver are excessive and unreasonable.

We find that rates of $1.15 on lump, nut and mine run, and $1.00 on pea and slack will be reasonable for the transportation of coal from the Northern Fields to Denver over all the lines involved in said transportation and that any rates in excess thereof will be unreasonable and unjust.

Rates From Western Colorado Districts.

As heretofore stated, the Colorado cases as originally filed did not embrace any adjustment of rates from points other than the Walsenburg-Trinidad fields to Denver and Greeley and the Northern Fields to Denver and Greeley; but that at the beginning of the joint hearing on May 10, 1922, counsel for complainants asked that, in conformity with the stipulation theretofore entered into between the parties interested, the scope of the hearing should be widened and extended to include the rates from all producing points in Colorado to points on and east of the Colorado common point line. Considerable evidence was submitted at the hearing under such agreement and understanding that would not have been relevant were the scope of the hearing not so widened and extended.

There are three well defined districts on the western slope of the Continental Divide in Colorado where coal is mined. These districts are referred to on the record as the Cameo-Palisade, Bowie-Somerset and Crested Butte-Baldwin Districts. The Cameo-Palisade District lies about 316 miles west of Pueblo on the main line of the Denver and Rio Grande Western. The Bowie-Somerset District is on a standard gauge branch of the Rio Grande 41 miles from Delta and 426 miles west of Pueblo via the route over which the traffic moves, *i. e.*, via the standard gauge route through Grand Junction. The mines at Crested Butte and Baldwin are on narrow gauge branches of the Rio Grande 27 and 17 miles respectively, north of Gunnison. The average distances from these mines to Pueblo, via the narrow gauge line through Salida, are 197 and 187 miles. At some of the mines in the Crested Butte District anthracite coal is produced as well as bituminous.

The present rates from the three districts mentioned to Pueblo, Colorado Springs and Denver are as follows:

	Crested Butte Baldwin			Cameo Palisade		
	Miles	Anthracite	Lump	Slack	Miles	Lump	Slack
Pueblo	197	$4.39	$2.93	$2.25	316	$3.38	$2.70
Colorado Springs	291	4.39	3.55	3.27	360	3.55	3.27
Denver	316	4.73	3.55	3.27	435	3.55	3.27

	Bowie Somerset		
	Miles	Lump	Slack
Pueblo	426	$3.60	$2.93
Colorado Springs	470	3.83	3.55
Denver	545	3.83	3.55

Comparatively little evidence was offered with respect to the reasonableness of the rates on bituminous coal from these western Colorado fields to Colorado common points. Considering the difficulties encountered in the transportation over the main range of the Rocky Mountains, we do not find these rates to be unreasonable.

According to the evidence, anthracite coal from some of the mines in the Crested Butte District is hoisted to the surface

through the same shaft as the bituminous coal and is loaded over the same tipple. The minimum weights on the two classes of coal are the same and the actual loading on anthracite is said slightly to exceed that on bituminous. Anthracite is more expensive to produce and at the time of the hearing sold at the mine for $7.50 per ton as compared with $5.00 to $5.50 for bituminous. Notwithstanding the similarity in the conditions affecting transportation, the rates on anthracite exceed those on bituminous by $1.46 at Pueblo, 84 cents at Colorado Springs, and $1.18 at Denver. A slightly higher rate for the transportation of anthracite is justified not only through custom and precedent, but because of the greater value and resultant higher claims against the carrier in the event of loss, but the present differences are excessive. We find that the rates on anthracite are unreasonable to the extent that they exceed by more than 50 cents per ton the rates in effect on bituminous lump coal from the mines in the Crested Butte District to the same destinations.

Rates on bituminous coal from western Colorado mines to points east of Pueblo, Colorado Springs and Denver are usually made differentially over the rates from Walsenburg. These differentials are $1.00 from the Cameo-Palisade and Crested Butte-Baldwin Districts, and $1.25 from the Bowie-Somerset District. Through rates thus made we find to be reasonable and these differentials should be applied to the rates herein prescribed from Walsenburg. There are exceptions to the general method of making rates from western Colorado in that a different basis is used to points on the Rock Island between Roswell and Falcon, on the Missouri Pacific and on the Santa Fe. We are not advised of the reasons for the differences and are of opinion that for the future the same differentials should apply on traffic moving through Pueblo to points on the lines of the carriers named. Anthracite rates when published should not exceed the bituminous lump rates by more than 50 cents.

ORDER.

It Is Ordered, That defendant carriers engaged in the transportation of coal from the Walsenburg-Canon City District to Colorado Springs be, and they are hereby, required to file tar-

iffs establishing a rate of $2.00 per ton of two thousand pounds on lump coal from the Walsenburg-Canon City District to Colorado Springs, with a twenty-five cent differential over Walsenburg from the Trinidad District, and a ten cent differential on pea and slack coal.

It Is Further Ordered, That defendant carriers engaged in the transportation of bituminous coal to destinations in the State of Colorado on, east, northeast and north of the Colorado commn point line, save as to points on said line from Trinidad to Denver, both inclusive, from the Walsenburg-Canon City-Trinidad Districts be, and they are hereby, required to file tariffs covering such service as is herein in this decision set forth, with a differential of twenty-five cents from the Trinidad District over the Walsenburg-Canon City District as to lump and nut coal, and ten cents differential as to pea and slack coal where the defendant carriers now publish differentials on the lower grades from either of said districts, carloads, per ton of two thousand pounds.

It Is Further Ordered, That defendant carriers engaged in the transportation of bituminous coal from the Southern Fields to Greeley be, and they are hereby, required to file a tariff of rates for the transportation of lump, mine run and nut coal of $3.00 per ton of two thousand pounds, carloads, and of $2.70 per ton on pea and slack coal, carloads, with a differential of twenty-five cents and ten cents, respectively, from the Trinidad District over the above rate from the Walsenburg-Canon City District.

It Is Further Ordered, That defendant carriers engaged in the transportation of lignite coal from the Northern Fields to Greeley be, and they are hereby, required to file a tariff of rates for the transportation of coal from said Northern Fields to Greeley of $1.50 per ton of two thousand pounds, carloads, on lump coal. The present rates on mine run, nut, pea and slack are deemed to be not unreasonable or discriminatory.

It Is Further Ordered, That defendant carriers engaged in the transportation of lignite coal from the Northern Coal Fields to Denver be, and they are hereby, required to file a tariff of

rates for the transportation of coal from the Northern coal fields to Denver of $1.15 per ton of two thousand pounds on lump, mine run and nut, and of $1.00 per ton on pea and slack coal.

IT IS FURTHER ORDERED, That the receiver of defendant carrier, The Denver and Rio Grande Western Railroad Company, be, and he is hereby, required to file a tariff of rates for the transportation of anthracite coal from the Crested Butte-Baldwin District to the Colorado common points, Pueblo, Colorado Springs and Denver, that do not exceed by more than fifty cents per ton the rates in effect on bituminous lump coal from that district to the same destinations; and that the rates now in effect from the Crested Butte-Baldwin District, the Cameo-Palisade District and the Bowie-Somerset District on bituminous coal are not found to be unreasonable or unjust.

IT IS FURTHER ORDERED, That the receivers of The Denver and Salt Lake Railroad Company be, and they are hereby, required to file a tariff of rates for the transportation of coal from the Oak Hills District to points east and north of Denver on the Union Pacific, Colorado and Southern and Chicago, Burlington & Quincy Railroads that do not exceed by more than fifty cents per ton of two thousand pounds the rates contemporaneously in effect from the Walsenburg-Canon City District to the same destinations.

IT IS FURTHER ORDERED, and the Commission finds, that each of the rates designated in the above decision and order are hereby found to be just and reasonable rates in the transportation service involved.

IT IS FURTHER ORDERED, That each of the defendant carriers be, and they are hereby, required to file such tariffs in supplemental, or other form, as may be desired to become effective within fifteen days from the date of this order.

Mr. Commissioner Scott does not participate in the above decision and order.

On June 18, 1923, the Commission made the following supplemental order in the above two cases (Decision No. 616):

[June 18, 1923.]

SUPPLEMENTAL ORDER.

WHEREAS, By the decision and order in the above entitled causes, rendered herein June 4, 1923, it has been made to appear to the Commission that the relationship of certain rates therein found to be reasonable and non-prejudicial to destinations on the Missouri Pacific Railroad from the Walsenburg-Canon City and Trinidad Districts, as announced in said order and decision at the top of page 9 of the printed report thereof, are in error with respect to the proper relationships that had been in said order and decision announced as being reasonable and just to destinations for similar distances from the Walsenburg-Canon City-Trinidad Districts to destinations similarly situated on the lines of other carriers, in that the rate from the Walsenburg-Canon City District to Nepesta and destinations between Pueblo and Nepesta is given as $1.76 per ton and to same destinations from Trinidad $2.00 per ton; and,

WHEREAS, By reason of such error, the rates as so announced in said order and decision do not bear the proper relationship to rates for similar distances to similar destinations, as in said decision and order announced; and,

WHEREAS, Upon further consideration of the aforesaid decision and order it is apparent that unless the same be modified in certain particulars, as hereinafter set forth, the long and short haul provisions of the Colorado statute will necessarily be violated. The Commission does hereby, upon its own motion, issue this supplemental order in modification and correction of the original order herein in the particulars above designated.

IT IS THEREFORE HEREBY ORDERED, That the rates on coal other than nut, slack and pea from the Walsenburg-Canon City District to destinations on the Missouri Pacific Railroad between Pueblo to and including Sugar City, are hereby found to be just and reasonable and non-discriminatory that do not exceed $2.00 per ton of two thousand pounds; and that the rate on coal from the Trinidad District to the same destina-

tions is hereby fixed at 25 cents over the Walsenburg-Canon City rate, or $2.25 per ton of two thousand pounds.

IT IS FURTHER ORDERED, That the differential of $1.00 per ton fixed by the Commission in its order of June 4, 1923, from the Cameo-Palisade District and the Crested Butte-Baldwin District, and of $1.25 a ton from the Bowie-Somerset District higher than the rates from the Walsenburg District to destinations in Colorado on the lines of the Missouri Pacific Railroad and the Atchison, Topeka and Santa Fe Railway east of Pueblo, and on the line of the Chicago, Rock Island and Pacific Railway east of Colorado Springs, be, and the same is hereby modified so as to apply only when the rates on lump coal from the Walsenburg-Canon City District are $2.75 per ton or in excess thereof.

IT IS FURTHER ORDERED, That the differential of 50 cents per ton on anthracite over bituminous lump coal from the Crested Butte District be, and the same is hereby, modified as follows:

(a) The differential of 50 cents per ton on anthracite over the bituminous lump coal rate be, and the same is hereby, ordered to apply to destinations on the lines of the Missouri Pacific Railroad and the Atchison, Topeka and Santa Fe Railway East of Pueblo, Colorado, only where the rates from said Crested Butte District on bituminous lump coal are $3.00 per ton or in excess thereof.

(b) The differential of 50 cents per ton on anthracite over bituminous lump coal rate be, and the same is hereby, ordered to apply to destinations on the lines of the Chicago, Rock Island and Pacific Railway East of Colorado Springs, Colorado, only when the rate from the Crested Butte District on bituminous lump coal is $3.50 per ton or in excess thereof.

The Commission finds, and it is hereby further ordered, that the rates designated in the foregoing supplemental order are just and reasonable rates in the transportation service involved.

IT IS FURTHER ORDERED, That the defendants affected by the foregoing supplemental order be, and they are hereby, required to file supplemental tariffs in accordance herewith to become

effective on the date established by the original order herein as the effective date thereof, to-wit: June 19, 1923.

IT IS FURTHER ORDERED, That the decision and order issued herein on June 4, 1923, be, and the same is hereby, modified to the extent hereinabove in this supplemental order set forth.

On January 29, 1924, the Commission made the following decision and order (Decision No. 671):

[January 29, 1924.]

Appearances: Whitehead & Vogl and Yeaman, Gove & Huffman, all of Denver, for Petitioning Interveners, The Victor American Fuel Company, The Routt Pinnacle Coal Company, and The Bear River Coal Company; Smith & Brock, of Denver, for Receivers of The Denver and Salt Lake Railroad Company, Interveners.

STATEMENT.

By the **Commission**: On June 4, 1923, this Commission issued its order in the above entitled cases upon a common record made with the Interstate Commerce Commission in its investigation *in re* "Western Coal Rates, Docket No. 13588."

By order of this Commission dated June 4, 1923, made effective June 19, 1923, the rates for the transportation of coal intrastate were dealt with, and certain reductions made from the tariffs and schedules theretofore existing.

On June 15, 1923, a petition for leave to intervene and for a rehearing was filed by The Victor American Fuel Company; and, on June 21, 1923, similar petitions were filed by The Bear River Coal Company and The Routt Pinnacle Coal Company adopting the allegations of the petition of The Victor American Fuel Company, asking leave to intervene and become parties to the above entitled proceeding, and asking that a rehearing be granted as to that portion of the decision and order (of June 4, 1923) which relates to and provides for rates for the transportation of coal from mines in Routt County, Colorado, referred to in the order and decision in this case as the Oak Hills District.

The petitions in intervention and for rehearing complain of said June 4, 1923 order, and particularly that part of it which

established a differential of 50c per ton from the Oak Hills District over the Walsenburg District to destinations east and north of Denver on the Union Pacific, Colorado and Southern, and Chicago, Burlington and Quincy Railroads; and, also, permission given in the order to maintain rates from the Oak Hills District to points on the Chicago, Rock Island and Pacific Railroad east of Limon which exceed rates by $1.20 per ton contemporaneously maintained from Walsenburg to similar destinations.

The intervening petitioners allege that the effect of the establishment of the 50c a ton differential as above stated will be to create an undue and unreasonable discrimination and prejudice against the producers in the Oak Hills District and that same will result in materially curtailing the movement of coal from the Oak Hills District to said destinations; and they further allege that the rates permitted from the Oak Hills District to points on the Rock Island, as above stated, in excess of the rates contemporaneously maintained from the Walsenburg field of $1.20 per ton, will create undue prejudice and discrimination against the producers of coal in said Oak Hills District and will absolutely prevent the movement of any coal from the Oak Hills District to said Rock Island destinations.

By further allegations in the intervening petitions, it is alleged that the above rate of 50c a ton established and of $1.20 per ton permitted, creates a prejudice and disadvantage to the operators in the Oak Hills District not only with regard to the relationship of said rates from the Walsenburg District, but also in relation to coal from the Cameo-Palisade Districts that are provided for in said order of June 4, 1923; and that the effect of the order of June 4 will be to unduly prefer coal produced in the Walsenburg and the Cameo-Palisade Districts over the coal produced in the Oak Hills District.

The intervening petitioners pray that they be allowed to intervene; that a rehearing be granted, in so far as the petitioning interveners interested are affected; and that, after a hearing and after due notice to all parties interested, the Commission modify its order of June 4, 1923, and fix a rate of 25c per ton to desti-

nations north and east of Denver on the Union Pacific, Burlington, Colorado and Southern, and Rock Island Lines over the rates contemporaneously maintained from Walsenburg to the same destinations.

A copy of the petition for leave to intervene and for rehearing as filed by said The Victor American Fuel Company, was caused to be served by the Commission upon all parties to the above entitled cases Nos. 244 and 250.

No appearances were made other than the Receivers of The Denver and Salt Lake Railroad Company, who, on June 23, 1923, filed an answer to said petition for intervention and rehearing, which answer reserved to the answering intervener all the objections as to jurisdiction of the Commission in the premises and otherwise as stated in the record originally made in case No. 250.

The answer of the Receivers objects to the intervention of The Victor American Fuel Company for the reason that it was at the time of the hearing in the said Western Coal Rates Case, I. C. C. No. 13588, an active member of the Colorado-New Mexico Coal Operators Association, which said association was a party to the joint hearing before the Interstate Commerce Commission and this Commission as aforesaid; that, therefore, The Victor American Fuel Company should not be permitted to intervene because it had already been before the Commission in the above proceeding as an active member of said association.

The answer further alleges that the Victor Company is engaged in the production of coal in both the Walsenburg and Routt County fields and that it, as one of the active members of the Colorado-New Mexico Coal Operators Association, was instrumental in bringing about the reduction of rates from the Walsenburg field, as provided for in the order of June 4, 1923; and that, after having procured or assisted in procuring reductions from the rates in the Walsenburg field for the advantage of its mines located there, it now seeks to make a corresponding or even greater reduction in the rates of the Oak Hills District for the advantage of its property located there, and without

any regard to the consequences or effect upon the rates of The Denver and Salt Lake Railroad Company.

The answer of the Railroad Company also points out that it operated at a deficit of $259,813.50 for the calendar year 1922, and at a deficit of $194,831.30 for the first four months of 1923; that approximately 85% of the total tonnage moved by the Moffat Road is coal tonnage and that any further reduction in rates ordered by the Commission would simply increase the deficit of the Railroad Company and would amount to confiscation of its property contrary to the Constitution of this State and to the Fourteenth Amendment to the Constitution of the United States.

The Receivers further allege that the total coal tonnage shipped over the Moffat Railroad, as disclosed by the record in the case, was 713,925 tons of revenue coal for the calendar year 1921, of which 275,164 tons moved in interstate commerce, 199,281 tons moved to Denver, and that a tonnage of only about 76,000 tons moved to points in Colorado other than to the City of Denver; that, for this reason if for no other, a reduction in rates for the comparatively small tonnage moved to eastern Colorado destinations would necessarily affect and perhaps require substantial reductions in the Denver rate and would materially affect the existing rates to interstate points east of Colorado where the greater amount of tonnage moves. The railroad intervener denies that the differential provided in the order of June 4, 1923, in this case, will retard the movement of coal from the Oak Hills District to destinations in eastern Colorado; and denies that the differential provided therein will constitute any undue or unreasonable prejudice or disadvantage to the Oak Hills District coal operators; and it, therefore, prays that the petition of the petitioning interveners for a rehearing be denied.

Pursuant to notice to all parties interested, this matter came on for hearing before the Commission at its Hearing Room, State Office Building, Friday, July 6, 1923. Testimony was submitted on behalf of the petitioning interveners for a rehearing, and for the Receivers of The Denver and Salt Lake Railroad

Company,—they being all the parties who appeared and participated in this intervening proceeding.

At the outset of the proceeding on July 6, the Receivers renewed in the record what amounts to a motion to dismiss, on the ground that the Victor American intervener was not a party competent to institute such proceeding for rehearing for the reason that it was a member of the Colorado-New Mexico Coal Operators Association, complainant in the proceeding held by this Commission in conjunction with the Interstate Commerce Commission hereinabove referred to, and for the reason that its petition for leave to intervene and for rehearing was without merit. At the hearing this question was not ruled upon but was reserved for decision until the entire matter should be decided.

The Commission is quite of the opinion that, under the broad language of Section 51 of the Public Utilities Act, the motion or demurrer of The Denver and Salt Lake Railroad Company is not tenable and should be denied. Section 51 in its beginning reads as follows:

"After any order or decision has been made by the Commission, any party to the action or proceeding or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in said action or proceeding and specified in the application for rehearing, and the Commission may grant and hold such rehearing on said matters, if in its judgment sufficient reason therefor be made to appear."

It must always be borne in mind that a state regulatory body, or at least in Colorado under the Public Utilities Act, is not a court and is not invested with the jurisdiction and powers of a court. As a matter of fact, in various sections of the Act, it is specifically provided that the rules of evidence and proceedings as are applicable to courts of record shall not be followed and adhered to by the Commission; and it is for this reason that it is a common practice to admit hearsay and secondary evidence in hearings before the Commission that would be entirely objectionable and ruled out were it tendered before a court of record. It will be observed also that the excerpt from Section 51 above

quoted provides that "any party to the action or proceeding" may apply for rehearing in respect to anything determined in said action or proceeding. It is conceded that The Victor American Fuel Company as a member of the Colorado-New Mexico Coal Operators Association, was a "party to the action or proceeding" that came on for hearing before this Commission jointly with the Interstate Commerce Commission in the above entitled case in May, 1922, which resulted in the order of June 4, 1923. Merely because the Victor Company was not a party, *eo nomine*, to the prior proceeding, and it being conceded that it is a party interested and affected by the prior proceeding, would give it the right to petition for leave to intervene and for rehearing, as we interpret the Public Utilities Act, and particularly that part of Section 51 above quoted.

We come now to a consideration of the basis of the complaint as alleged by the petitioning interveners, viz., a differential established under the order of June 4, 1923 of 50c per ton from the Oak Hills District over Walsenburg to points on the Union Pacific, Colorado and Southern, and Burlington east and north of Denver, and of the permission of rates by the Rock Island not to exceed $1.20 per ton differential Oak Hills District over Walsenburg, east of Limon.

The differential of 50c per ton Oak Hills District over Walsenburg District, as established by this Commission, to points intrastate north and east of Denver on the three rail carriers above mentioned, was taken into consideration by the Interstate Commerce Commission in its Docket No. 13930, hereinabove referred to, in the establishment of rates from the two districts to points interstate in the movement of coal from the respective fields to the Missouri River and other destinations. The rates established by this Commission in its decision and order of June 4, 1923, wherein was established the differential of 50c, aforesaid, were the result of conferences between this Commission and the Interstate Commerce Commission in the establishment of rates for the movement of Colorado coal from the above mentioned districts to points intrastate and interstate with a

view to harmonizing the proper relationship, or parity, of such rates.

At the hearing in May, 1922, and at the hearing of the instant case in July, 1923, no objection by any party was made as to the differential of 58c per ton Oak Hills over Walsenburg to Denver; that differential was not even considered or discussed.

To modify the order of June 4, 1923, as prayed for by the petitioning interveners, for a differential to points on said carriers north and east of Denver, and thereby to establish a differential of 25c Oak Hills over Walsenburg to said destinations intrastate, would result in some instances in the establishment of a lower rate to certain destinations north and east of Denver from Oak Hills than from Oak Hills to Denver. As an example, and bearing in mind that the rate Oak Hills to Denver is $2.92 on lump coal and $2.34 Walsenburg to Denver, accounting for the differential of 58c per ton, the present rate Oak Hills to Derby on the Burlington is $3.15 per ton; to establish a 25c differential would make the Derby rate $2.90 per ton, or 2c less per ton than the Denver rate. The same condition would exist to Sable on the Union Pacific east of Denver. At Watkins on the Union Pacific, the present rate is $3.20 per ton, while a 25c differential would make the rate $2.95 per ton, or only 3c higher than the Oak Hills-Denver rate. It will thus be seen that in some instances, and others may be cited, that to establish the differential of 25c asked for by the petitioning interveners, would result in what is properly designated as a Fourth Section violation under the Interstate Commerce Act, and, while in Colorado we have no specific statute, it is a general principle that a carrier may not charge less for a longer than for a shorter haul.

With reference to the $1.20 differential Oak Hills over Walsenburg to points on the Rock Island intrastate east of Limon, such differential is made necessary to maintain a proper relationship of rates intrastate to destinations east of Limon on the Kansas branch of the Union Pacific, and east of similar points on the Burlington and the Omaha or main line of the Union Pacific. This is best illustrated by the following table to some of the destinations on the lines of carriers above named:

Miles from Limon	Station C. R. I. & P.	Present Rate	Miles from Limon	Station U. P.	Present Rate
21.9	Arriba	$3.90	15	Hugo	$3.85
33.3	Flagler	4.10	33	Boyero	4.00
44.3	Seibert	4.20	50	Wild Horse	4.30
51.3	Vona	4.20	63	Kit Carson	4.30
58.6	Stratton	4.25	87	Cheyenne Wells	4.40
76.9	Burlington	4.40	97	Arapahoe	4.50

The present rate from Oak Hills to Wray on the Burlington, comparable to Burlington on the Rock Island and Cheyenne Wells on the Union Pacific, is $4.30 per ton, and on the Omaha or main line of the Union Pacific to Julesburg, comparable to said three points, the Oak Hills rate is $4.60. Therefore, so far as the rates from the Oak Hills District to said destination, Cheyenne Wells on the Kansas branch of the Union Pacific, to Burlington on the Rock Island, to Wray on the Burlington, and to Julesburg on the main line of the Union Pacific, the distances are practically the same with the widest spread of 20c, that to Julesburg, as the same are at present established. The same conditions apply to other points on the four carriers named between the farthest eastern points in Colorado to Limon on the Kansas Pacific and Rock Island, and to similar points on the Burlington and main line Union Pacific, as is disclosed by a cross section survey of the rates in that territory.

In the movement of coal from the Oak Hills District to points east of Limon on the Rock Island, that carrier, by a trackage agreement with the Union Pacific, transports coal from Denver to Limon over Union Pacific rails exactly as Oak Hills coal is transported from Denver to points on the Union Pacific, Kansas branch, east of Limon. Obviously, to establish a much lower differential than $1.20 on Oak Hills coal to Rock Island points east of Limon, would result in a gross discrimination to operators of Oak Hills coal to similar destinations in the territory on the Union Pacific, Kansas branch, east of Limon and to destinations on the Burlington and the main line Union Pacific east and north of Denver.

It is in the record in this and the prior proceeding that the movement of coal from the Oak Hills District to Denver during

the calendar year 1921, the latest period for which figures were submitted, amounted to 199,281 tons; that during the same period approximately 76,000 tons moved from Oak Hills District to points in Colorado other than Denver, and that during the same period 438,761 tons moved in interstate commerce. The large tonnage moved to Denver with the 58c per ton differential over Walsenburg in said period, as compared with the tonnage moved to points in Colorado outside of Denver, would seem to indicate that a 50c differential to points outside of Denver in Colorado ought not to be a serious deterrent in the movement of Oak Hills coal to destinations in Colorado other than Denver. The petitioning interveners seek to account for this seeming anomaly by reason of the testimony submitted to establish the fact that two of the larger operators in the Oak Hills District, viz., The Moffat Coal Company and The Colorado-Utah Coal Company, maintain their own yards in Denver and were thus enabled to act as their own distributors and, by means of canvassers, are enabled to dispose of a large tonnage of Oak Hills coal in Denver despite the 58c per ton differential. This is a competitive condition, if true, with which the establishment of rates for transportation properly has no concern. It is not a factor to be considered in the fixing of rates. Were it worthy of consideration, let us say, the small merchant could complain of the merchandise rate and ask for a lower rate on the ground that large mercantile institutions in Denver are enabled to buy large quantities and, by storage capacity and other means, are thus enabled to sell for less than a small competitor.

While the record in this and the prior proceeding discloses the approximate movement of coal from the Oak Hills District to destinations in Colorado north and east of Denver, there has been no evidence submitted in this proceeding of the movement from the Walsenburg fields to such destinations. It is in evidence, however, that the cost of mine operations in the Oak Hills District is anywhere from 75c to $1.00 per ton less than the cost of operations in the Walsenburg District by reason of the fact that the Oak Hills coal is mined from a newer field where the veins are wider and thicker and very much nearer the surface

than in the Walsenburg field. By virtue of these and other operating conditions, the cost of mining coal in the Oak Hills region is testified to be cheaper by the above amounts than in the older and more expensive operations in the Walsenburg and Trinidad fields. As to the quality of coal from the respective fields, there is some difference of opinion; but, on the whole, it is safe to assert that the Oak Hills product is superior to that of the Walsenburg product, and the consumer, under ordinary conditions, would prefer the Oak Hills coal. Therefore, even though a differential does exist as against the Oak Hills operator, he ought to be, and evidently has been, capable of absorbing sufficient of this differential as to permit of a free competition in territory north and east of Denver in Colorado with the Walsenburg-Trinidad product. This is strongly indicated by the fact that in the calendar year above named, 199,281 tons of Oak Hills coal moved to Denver with a 58c per ton differential over the Walsenburg rate. Just what the movement of Walsenburg coal to Denver was during that period is not in evidence; but it is a fair assumption that if the Walsenburg coal was superior or even equal to the Oak Hills coal as a commercial product, it would practically eliminate the Denver market for Oak Hills coal when we bear in mind the 58c differential and a haul of 185 miles from Walsenburg to Denver over an old established and, but for the Palmer Lake hill, a prairie haul, as against 211 miles from Oak Hills District to Denver over one of the most difficult and expensively operated railroads in this western country.

Another factor that is taken into consideration by the Commission in denying the relief sought by the petitioning interveners for a modification of the rates to points east and north of Denver as established by the order of June 4, 1923, is that were it feasible to grant the relief sought, aside from all other objectionable considerations hereinabove referred to, it would necessarily and inevitably diminish the revenues of the Denver and Salt Lake Railroad. It is in the testimony of this proceeding, and is not denied, that that carrier is operating at an enormous deficit; that the cessation of operation by the Denver and

Salt Lake Railroad would be a catastrophe to the people in a great region of Colorado, equalling in area and possibility of development all of the New England states plus the State of New York. Now that the actual work of boring the Moffat Tunnel is in progress with every indication of its timely completion, it is most important that nothing should be done to endanger the continued operation of the Moffat Road, or, indeed, to seriously interfere with its giving such public service as its revenues reasonably will permit.

For the reasons hereinabove stated, and other considerations that might be dwelt upon, the Commission feels constrained to deny the prayer of the petitioning interveners and to allow the rates established and permitted under the order of June 4, 1923, to remain in effect until further order of this Commission.

ORDER.

IT IS THEREFORE ORDERED, That the petitions of The Victor American Fuel Company, The Bear River Coal Company and The Routt Pinnacle Coal Company for a modification of the order of this Commission in the above entitled cases, dated June 4, 1923, effective June 19, 1923, as on file herein, be, and the same is hereby, denied, and said petitions of intervention are hereby dismissed.

RE THE PARADOX LAND & TRANSPORT COMPANY.

[Application No. 237. Decision No. 613.]

Certificates of convenience and necessity—Proof of municipal authority—Payment of license fee.

1. More of a showing of consent of a municipality is required than that it issued a license fee as a matter of course.

Commissions—Municipalities—Jurisdiction over streets.

2. Municipalities, not the Commission, have jurisdiction over their streets and alleys.

Convenience and necessity—Public generally—Particular locality or community.

3. The "convenience and necessity" contemplated by the statute is the convenience and necessity of the public generally and not of any particular locality or community.

[June 14, 1923.]

Appearances: George H. Swerer and H. E. Luthe, of Denver, for Applicant; J. Q. Dier, of Denver, for The Denver & Interurban Railroad Company, The Colorado & Southern Railway Company and the Chicago, Burlington & Quincy Railroad Company; T. A. McHarg, of Boulder, for the Boulder Chamber of Commerce, and A. W. Fitzgerald, of Boulder, for The Glacier Route, Inc., Protestants.

STATEMENT.

By the **Commission**: The Paradox Land and Transport Company, a corporation, filed its application with the Commission February 5, 1923, for a certificate of public convenience and necessity for it to operate and maintain an automobile bus line for the transportation of passengers between Lafayette, Boulder, Nederland and Lyons, Colorado, and intermediate points, under the provision of Section 35 of the Public Utilities Act. Applicant filed a certified copy of its Articles of Incorporation, with its post office address, 800 Central Savings Bank Building, Denver, Colorado, and alleged in its application the lack of adequate or convenient passenger service between Lafayette, Boulder and Lyons, Colorado, and from Boulder to Nederland.

Subsequently and at the hearing, that portion of its application that related to the service between Boulder and Nederland was withdrawn, so that the application pertained only to that portion of the route originally specified as between Lafayette and Boulder and Boulder and Lyons.

Copies of the application were served upon the carriers affected, with the result that on February 28, 1923, the railroad carriers filed their objection and protest to the granting of the certificate applied for. The Chamber of Commerce of Boulder and The Glacier Route, Inc., also protested against the granting of the certificate to applicant. The grounds of protest, tersely stated, were that the public convenience and necessity does not require nor will not require any additional means of transportation between the points designated in the application.

The matter was set for hearing at the Hearing Room of the Commission, State Office Building, Denver, Colorado, originally

for May 10, 1923, and thereafter, by consent, continued to Monday, the 28th day of May, 1923, when the matter was duly heard.

The evidence on behalf of applicant in support of its application disclosed that heretofore, and in the month of April, 1921, a certificate of convenience and necessity was granted to The Paradox Land and Transport Company, then a co-partnership, which subsequently was merged into the present corporate applicant, to operate an automobile bus line between Denver and Fort Collins over the main traveled highway, passing through Broomfield, Lafayette, Longmont, Berthoud and Loveland to Fort Collins; that it was the desire of applicant to establish a connecting bus line from Lafayette to and through Boulder north to Lyons, so that passengers destined from either termini to Boulder might connect with the Denver-Fort Collins bus stages at Lafayette for Boulder and thence on to Lyons, and returning from Lyons in the same way connect at Lafayette for buses between the termini of Denver and Fort Collins.

For the travel between Denver and Boulder, the testimony of applicant and protestants discloses that The Denver & Interurban Railroad Company operates hourly service from early in the morning until late at night, daily, except for two periods of two hours between cars, and that The Colorado & Southern Railway Company operates steam trains between Denver and Boulder, daily, three in either direction, and that there is a steam passenger train leaving Lyons in the morning operating through Lafayette to Denver and returning from Denver in the late afternoon through Lafayette back to Lyons. From the north, Longmont to Boulder, there are three passenger trains each way, daily, operated by the Colorado & Southern. The testimony of applicant was largely directed to the showing of an alleged public convenience and necessity for the traveling public between Lafayette and Boulder, and Longmont and Boulder, by the establishment of the connecting bus line from Lafayette.

Obviously from the number of interurban and steam trains that are operated between Denver and Boulder, there would not be any convenience and necessity of the public served by the

establishment of the connecting bus line from Lafayette to Boulder in the statutory sense, and, for that matter, for the traffic Longmont to Boulder via Lafayette, the same would not be greatly convenienced over the service now being afforded by the steam railroad from Longmont to Boulder. Two witnesses were asked as to the probable amount of traffic that exists between Lafayette and Boulder, one of whom gave it as his opinion that it *might* be as high as ten or fifteen a day, and the other about six to eight a day. On the traffic between Boulder and Lyons the evidence on behalf of applicant was not at all definite, while that offered on behalf of protestants was to the effect that it was almost negligible.

In short, taking all the testimony that was offered it falls short of proving a reasonable public convenience and necessity for the establishment of the proposed auto bus line from Lafayette through Boulder to Lyons; for, as has heretofore been declared by this Commission and by many others throughout the country, the "convenience and necessity" contemplated by the statute is the reasonable convenience and necessity of the public generally and not for any particular locality or community; and especially is this true if the evidence tends to show that the traffic from the particular locality or community is quite limited in its extent.

One of the prerequisites of an applicant desiring a certificate of public convenience and necessity is that before the application may be granted, in a proper case, the applicant shall file in the office of the Commission such evidence as shall be required by the Commission to show that applicant has received the required consent, permit or other authority of the proper county, city and county, municipal or other public authority, as prescribed by sub-section (c) of Section 35 of the Public Utilities Act. Attempting to comply with this requirement, applicant filed with the Commission, attached to its application, a license issued to it on the 27th day of January, 1923, for a period of one year from that date, to operate within the city of Boulder the business or vocation of "taxi," and that it had paid the license fee of $10.00, as provided by the ordinance of that

municipality for one proposing to engage in the business or vocation of running a taxi within said municipality.

This Commission has repeatedly held that it will require more of a showing of consent of the municipality than the usual license that is issued as a matter of course to anyone applying under the ordinance of a municipality to engage in the ordinary vocations within that municipality as prescribed by its ordinances; this for the reason that when this Commission authorizes an applicant to engage in the transportation of either passengers or freight into or through a municipality, the applicant thereby becomes a public utility, and, as such, subject to the regulation of this Commission. The licensee under the license submitted in this case is not a public utility, but is simply licensed to engage in the particular vocation or business within the corporate limits of the municipality and subject to the rules, requirements and regulations of the municipality's ordinances governing such business or vocation.

This identical question has been before this Commission a number of times, the last time being April 2, 1923, in the matter of the application of The Greeley Transportation Company, Application No. 218—Decision No. 598, not yet published. In that decision it was said:

"Any person who desires may apply to the city clerk for a license to engage in any of the vocations described in the ordinance, and upon payment of the required fee the city clerk is required to issue a license to such applicant for a term of one year. This applies to the person who operates a dray, a jitney bus, an express wagon, or any other kind or means of transportation within the corporate limits of said city. The license issued is a matter of right to every applicant who complies with the terms and conditions of Ordinance No. 258. The question, therefore, resolves itself into this: Did the legislature, in using the terms or words embodied in sub-section (c) of Section 35, have in mind anything more than the customary and usual license to be issued by a municipality as a condition precedent to the issuance by this Commission of a certificate of public convenience and necessity for the operation of public utility car-

riers within such city or town? Taking Section 35 in its entirety, it seems to be the plain indication of the legislative intent that before the State, through its regulatory body, will authorize the conduct of any such business as is involved in the case at bar, by the issuance of a certificate of public convenience and necessity therefor, the local authority, which is given exclusive jurisdiction and control over its streets, alleys, highways and other public places within its corporate limits, must give its assent thereto; and it will be noted that throughout Section 35, as well as in sub-section (c) thereof, the character of the business proposed to be engaged in by an applicant seeking a certificate of convenience and necessity is one that is denominated under the Act a "public utility". Nowhere in the Act has the legislature defined a public utility to include the various businesses mentioned in Section 1 of Ordinance 258 of the City of Greeley. A dray line, for example, is not a public utility; an express wagon operating within Greeley or any other city is not a public utility, so that it seems quite clear that the legislature intended that before this Commission should grant a certificate to an applicant to operate a public utility in any city or town, the consent so to do, in one of the methods indicated by sub-section (c) of Section 35, shall be secured from such local authority and filed in the office of the Commission. * * * In other words, the consent or assent of the municipality must be obtained for the particular vocation to be carried on by the applicant within such city or town before this Commission is vested with power to issue its certificate of convenience and necessity therefor."

To the same effect are:

Farmers Electric and Power Company v. Ault, P. U. R. 1920-D, 226.

Taylor v. Glenwood Springs, P. U. R. 1921-E, 526-535-536.

C. B. & Q. R. R. v. Public Utilities Commission, P. U. R. 1921-B, 734-738; 193 Pac. 726.

Sub-section (7) of General Section 6524 R. S., 1908, defines the powers of incorporate towns or cities over streets therein. Among other things the legislature in this State has granted to

towns and cities power with respect to streets, "to regulate the use of the same and to prevent and remove encroachments or obstructions upon the same." The Public Utilities Act in no method or manner confers jurisdiction upon this Commission over the streets and alleys of a municipality; and an applicant for a certificate of public convenience and necessity who desires to use them for any purpose, in contemplation of the Public Utilities Act, must obtain the consent or permit of the particular municipality involved and file the same with this Commission as a prerequisite to the granting of such certificate.

This principle of local self-government in a recent case decided by the District Court of the United States for the eastern district of Louisiana, Baton Rouge Division, February 15, 1923, construes the statutes of Louisiana upon this subject where the state Public Service Commission had ordered a railroad to construct a viaduct across certain railroad property within the city of New Orleans, and uses this language:

"Before the railroad could be required to build a viaduct as ordered, Newton Street would have to be opened across the railroad property. * * * Furthermore, the order requires the use of Newton Street and the building of a structure, with consequent blocking of that street. This certainly is a regulation of the streets and the regulation of its grades.

"The general rule regarding municipal corporations is that they have control of their own streets, with the right to fix grades, provide for pavement, regulate their use by steam and street railroads, and determine what structures in the nature of railroad tracks and appurtenances, telegraph poles, etc., may be erected and maintained on said streets. This is one of the ordinary governmental functions of a municipal corporation, exercised by virtue of the police powers delegated to the city by the state. There is no doubt that the city of New Orleans possesses this power to the fullest extent."

Morgan's Louisiana & T. R. & S. S. Co. v. Louisiana Public Service Commission, 287 Fed. Rep., 390-393, Fed. Rep. Adv. sheets May 17, 1923.

For the reasons hereinabove stated, the Commission finds, first, that under all the facts and testimony herein there is not sufficient showing that the public convenience and necessity requires or will require the operation of the proposed motor bus line between Lafayette, Boulder and Lyons; and second, applicant has not filed with the Commission the required consent, permit, vote or authority of the municipality of Boulder to vest the Commission with jurisdiction to grant the certificate of convenience and necessity prayed for in its application. The same will, therefore, be denied.

ORDER.

IT IS THEREFORE ORDERED, That the application of The Paradox Land and Transport Company for a certificate of public convenience and necessity for the operation of a motor bus line between the towns and cities of Lafayette, through Boulder to Lyons, Colorado, be, and the same is hereby denied; without prejudice, however, to applicant to renew its application at such time as it may obtain the required consent of said municipality to operate its motor bus lines into and through said city, and as it may be further advised.

RE THE COLORADO MOTOR WAY, INC.

[Application No. 191. Decision No. 617.]

Certificate of convenience and necessity—Previous operation by applicant—Effect.

1. On application for a certificate of convenience and necessity, fact that one has been operating as a common carrier is not material or relevant.

Automobiles—Authority from municipality—Certificate that none need be procured—Effect.

2. The filing by an applicant for a motor vehicle certificate of convenience and necessity of a certificate from a municipality that it did not require applicant to procure a license or franchise "was all that the Commission could reasonably require and was in satisfaction of the requirements of" the statute.

Commission—Jurisdiction—Operation into and through home rule cities.

3. Whether operation of a motor bus line into and through a home rule city is a matter of local concern questioned.

Automobiles—Evidence of municipal authority—Certificate by clerk and statement by lawyer re municipal requirement.

4. Certificates filed by city clerks and statements by lawyers in respect of municipal requirements as to bus operations in and through cities are prima facie evidence of compliance with Sec. 35(c) of the statute.

Automobiles—Written proof of payment of municipal fee—Necessity.

5. Oral evidence of payment of fees to procure necessary license not sufficient. Applicant must file written evidence.

[June 19, 1923.]

Appearances: Halsted L. Ritter and P. M. Clark, of Denver, for Applicant; Thomas R. Woodrow, for The Denver and Rio Grande Western Railroad Company; E. G. Knowles, for the Union Pacific Railroad Company; J. Q. Dier, for The Colorado and Southern Railway Company; Erl H. Ellis, for the Atchison, Topeka & Santa Fe Railway Company, Protestants.

STATEMENT.

By the **Commission**: A hearing in the above application was duly held at the Hearing Room of the Commission, State Office Building, Denver, Colorado, on April 23 and 24, 1923, at the conclusion of which, time and twenty days were given applicant to file its brief in support of its application and a like time was given the protestants to file an answer brief.

Applicant filed its brief on May 14, 1923; and thereafter, on June 13, 1923, protestants filed a motion to dismiss the application upon the ground, as set forth in the motion, that applicant had not complied with the requirements of sub-division (a) of Section 35 and sub-division (c) of the same section.

Thereupon, by agreement between the interested parties and the Commission, the motion was set down for argument at the Hearing Room of the Commission for Monday, June 18, 1923, when counsel for applicant and protestants were duly heard.

Sub-division (a) of Section 35 of the Act provides, that no public utility shall commence operation before first having obtained a certificate of public convenience and necessity from this Commission. The motion sets forth that the applicant has, as shown by the files and evidence herein, been operating for a considerable time over certain of the routes described in the

petition, and that it is thereby violating the terms of the public utilities law. At the argument this branch of the motion was not alluded to, but the Commission desires to announce once and for all its conclusion with respect to one who begins the operation of a public utility without first having complied with said sub-division (a) of Section 35 of the Act. It has been announced several times heretofore, when this matter has been made the subject of consideration, that one who engages in the operation of a public utility in violation of sub-division (a) of said Section 35, does so at his peril; and that upon making application for the certificate, the mere fact that he has so engaged is not even relevant or material; and that if the Commission denies his application for the certificate, it is then that he is violating the law, and may be proceeded against for such violation.

The argument of counsel had entirely to do with the consideration of the terms of sub-division (c) of section 35 of the Act, which provides, *inter alia*, that

"Every applicant for a certificate shall file in the office of the Commission such evidence as shall be required by the Commission to show that such applicant has received the required consent, franchise, permit, ordinance, vote, or other authority of the proper county, city and county, municipal or other public authority."

The motion is grounded upon the alleged fact that applicant had made no showing of such required consent, permit or authority from any county or city or town and county through which it operates and proposes to operate.

Applicant, at the hearing and subsequent thereto, has filed in the office of the Commission what may be termed a certificate from the following towns and cities: Fort Lupton, Greeley, Brighton, La Salle, Evans, Gilcrest and Platteville, with respect to the towns to the north of Denver; and La Junta, Canon City, Monument, Palmer Lake, Castle Rock, Fountain, Florence, Fowler, Rocky Ford, Manzanola and Swink, of the towns to the south of Denver; all of which are under the hand and seal of the mayor or clerk of each of said towns or cities, and are to the effect that said city or town does not require a license or fran-

chise for the operation of passenger busses through the limits of said city or town and is privileged to load or unload passenger buses within its limits.

As to the City of Denver, applicant filed, on May 10, 1923, a certificate signed by James A. Marsh, Attorney for the City and County of Denver, to the effect that he had examined the method of applicant's transaction of its business in the City of Denver and that it was complying with the provisions of the charter and ordinances of said City and County of Denver with respect thereto.

Applicant filed on June 13, 1923, a certificate signed by Benjamin F. Koperlik, City Attorney, with the approval of John M. Jackson, President of the Council, of Pueblo, to the effect that said city had no ordinances applicable to busses being operated by applicant therein and therethrough and that it was privileged so to do for the purpose of taking on and discharging passengers from and to points outside of Pueblo.

As to Colorado Springs, the general manager of applicant company testified to the effect that applicant had been licensed to operate its busses in that city, and had paid license fees therefor until some time in July, 1923, upon five busses.

The above are the salient facts upon which the motion was founded and the argument of counsel predicated. Counsel for protestants, in the interpretation of the requirements of subdivision (c) of Section 35, took the position that every applicant for a certificate must file an affirmative consent or permit or some affirmative action of the municipal authorities through which bus lines are operated, and that the mere filing of a certificate from the municipal authority that no permit or consent or other authority was required by the existing ordinances was not sufficient to vest the Commission with jurisdiction to issue a certificate for the operation of bus lines through the limits of such municipalities. Counsel for the Santa Fe, however, took a somewhat different position in that he was inclined to the belief that such certificates were *prima facie* evidence of the nonexistence of any required consent of any such municipality; but that as to charter cities or so-called "Home Rule Cities" through

which applicant proposed to operate, the Commission had no jurisdiction in such cities in any event as, under the decision of our Supreme Court in the case of Denver v. Mountain States T. & T. Co., *et al.*, 67 Colo. 225, 184 Pac. 604, P. U. R. 1920-A 238, the Commission was divested of all jurisdiction for the regulation of public utilities operating in such "Home Rule Cities" because Article 20 of the Colorado Constitution as amended in 1912 vested such jurisdiction in the local authority.

Counsel for applicant argued that the provisions of sub-division (c) of Section 35 were plainly to the effect that it was a matter in the discretion of the Commission as to what the Commission should require to be shown by an applicant who proposed to operate bus lines to, in and through municipalities within this State; and that a certificate from a town or city official who is presumed to know the fact that a city or town had no ordinance or rule requiring any permission, consent, franchise, etc., from such city or town, was all that sub-division (c) required, and should satisfy the requirements of the law that vests such matter in the discretion of the Commission.

Without unduly prolonging this decision and order, the Commission has heretofore repeatedly held that the filing by an applicant for a certificate of public convenience and necessity of a certificate from a municipal authority that it did not require from such applicant any affirmative action in the way of consent, permit, or otherwise, was all that the Commission could reasonably require and was in satisfaction of the requirements of said sub-division (c) of Section 35.

To hold that the legislative intent of sub-division (c) was to require an affirmative showing that each town and city must affirmatively give its consent or permit to the operation of a motor bus line through its municipal limits, would be, in effect, to nullify the statute, as such a method of procedure would be almost impossible of procurement. It would enable any one town or city to block the operation of a transportation bus line even if the public convenience and necessity required such operation in the judgment of the Commission upon the facts in evidence. Such an interpretation is not a reasonable one, and the Commis-

sion feels that it ought not request an unreasonable requirement of an applicant for a certificate.

To go further, when an applicant files a certificate under the hand and seal of a proper official of a municipality that under its ordinances, rules or charter the affirmative consent of such municipality is not required to be obtained by an applicant, such showing will be all that the Commission will require to be shown by an applicant under the terms of said sub-division (c), Section 35, of the Act.

With respect to the charter of "Home Rule" cities, it will be observed that the decision in the Telephone case, *supra*, involved merely the establishment of rates in such home rule city and that that decision goes no further than to say that only such functions of a utility as are purely of local and municipal concern are without the jurisdiction of the Commission and are vested in the local authorities. Whether or not the operation of a motor bus line as a means of transportation into and through a home rule city carrying passengers from town to town is a matter of local concern, may well be doubted; at any rate, the court of last resort has not passed upon that phase of the question in the Telephone and Telegraph case, above cited.

With respect to the certificates filed and the statements of the respective city attorneys of Denver and Pueblo, the Commission finds and holds that they are *prima facie* evidence that applicant has fulfilled the requirements of sub-division (c) of Section 35 of the Act. With respect to the testimony of witness Huntington that applicant had paid license fees in Colorado Springs for the operation of five busses, the Commission finds and holds that oral testimony of the alleged fact is not sufficient to meet the requirements of the statute, and that applicant must file with the Commission some written evidence of that fact as it pertains to Colorado Springs, and some written evidence of any other town or city through which it operates aside from those already on file, in the event that the Commission ultimately finds that the evidence entitles the applicant to a certificate of public convenience and necessity, upon final consideration and determination of its application.

ORDER.

IT IS THEREFORE ORDERED, That the motion to dismiss the application filed by protestants June 13, 1923, be, and the same is hereby, denied.

RE THE TRINIDAD ELECTRIC TRANSMISSION RAILWAY & GAS COMPANY.

[Application No. 243. Decision No. 639.]

Commissions—Jurisdiction—Franchise obligations—Relief from.

1. The duties and contractual obligations created by the acceptance of a franchise are subject to the power of regulation by the State and may by it be extinguished.

Monopoly and competition—Electric and other transportation—Operation at loss—Trucks.

2. If transportation by automobile is the thing desired by the people they cannot reasonably expect that electric and other forms of transportation will continue at a loss.

[August 31, 1923.]

Appearances: James McKeough, of Trinidad, and E. E. Whitted, of Denver, for applicant; John N. Mabry for protestant, the City of Trinidad; William E. Inglis for protestant, The Trinidad-Las Animas County Chamber of Commerce.

STATEMENT.

By the **Commission**: On April 2, 1923, applicant, The Trinidad Electric Transmission Railway and Gas Company, filed its petition with the Commission wherein is set forth that it is a domestic corporation and owns, among other properties, a street railway line in the city of Trinidad, Colorado, and an interurban line extending between Trinidad and Cokedale and between Trinidad, Sopris and Starkville, three towns in the vicinity of Trinidad, and operating a line of street railway within the city of Trinidad proper and the interurban lines between the above named points.

The petition further sets forth that although petitioner has practiced the utmost economy in the operation of its said street railway and interurban lines during the past ten years, it has not

been possible to make its railway operations earn operating expenses; that for the year 1922 operating expenses exceeded operating revenues by more than $24,000.00, and that there is not now, nor any probability of there being in the future, sufficient traffic over its lines of street railway or interurban lines to pay its operating expenses. The petition further recites that on account of good roads having been built between Trinidad and the communities contiguous to it, automobile service is maintained by different persons that results in competition which the railway is unable to meet; and it prays that it be allowed to abandon its street railway line in the city of Trinidad as well as its interurban service and withdraw from the public service as a common carrier.

Upon the application being received, copies thereof were served on the municipality of Trinidad and the civic organization of Trinidad, with the result that on April 30 the Chamber of Commerce filed its answer to the application and on May 4 the city of Trinidad filed its answer. The answers are in substance identical, alleging the inconvenience and hardship to be suffered by the interurban communities and by the city of Trinidad and its inhabitants were the abandonment and cessation of service permitted; that the city of Trinidad will suffer great loss of business thereby in the deprivation of trade coming to Trinidad over the interurban lines of applicant, and that patronage of said service is sufficient under reasonable, proper and efficient management to show a profit to justify the continuance thereof.

In addition to the matters hereinabove alleged by way of answer by the city of Trinidad and the Chamber of Commerce, the city pleads an additional defense in the matter of it being the duty of the applicant to continue the operation of its urban and interurban service, by reason of the conditions of the franchise granted to it by the City Council of Trinidad for a term of fifty years for the exclusive right to maintain and operate within the city of Trinidad a street railway system, which period of time has not yet expired; and that the city of Trinidad is engaged in the preparation for paving certain streets in the city of Trinidad which includes streets along which the tracks of applicant

run, and that the conditions of the franchise before mentioned provide that applicant shall stand the expense of paving between the rails and two feet on each side thereof along said railway; that if petitioner is permitted to abandon its line the city will suffer an irreparable loss contrary to the terms of the original franchise granted to applicant. Other matters are plead by way of defense, but the above constitute the salient factors relied upon by protestants in opposition to the application for abandonment.

Upon notice to all parties in interest, the above cause was set for hearing at the City Hall, Trinidad, Colorado, on May 22, 1923, where the matter was duly heard, and upon application of protestant city of Trinidad, further hearing of said matter was continued to the same place at 9:30 A. M., July 3, 1923, where the hearing was concluded.

At the conclusion of the hearing on July 3, 1923, time was fixed within which the respective parties should file briefs, and on July 11 the brief of applicant was duly filed. Thereafter protestant city of Trinidad was notified of its time within which to file brief, which was extended to August 6, 1923. No brief having been filed by protestant city by that date, it was notified to file its brief within the week of August 6; but no brief has as yet been filed by the city of Trinidad nor, for that matter, has any statement of the delay been given, so that the Commission is proceeding to a determination of the matters involved herein on the theory that the city of Trinidad does not desire to file a brief in the matter.

Applicant has sought to abandon portions of its line heretofore, the first involving a short part of its track within the city of Trinidad, filed May 10, 1920, decided September 8, 1920, Decision No. 360, Application No. 85, reported in P. U. R. 1920-F, page 707. In that proceeding permission to abandon was denied, applicant being required to continue its operation at a higher rate of fare in an attempt to earn its operating expenses.

The result of that experiment was that the applicant again filed its petition on November 17, 1921, whereby it sought permission to abandon the major portion of its urban lines of street

railway, which was decided February 8, 1922, Decision No. 512, Application No. 152, reported in P. U. R. 1922-C, page 299, the outcome being that permission for the abandonment of the lines of the urban tracks as prayed for was granted.

In both of the prior applications, and particularly in the latter application, the same matters were alleged as reasons for the relief as is alleged in the present application; that is, that the operation of the railway system in Trinidad was being rendered at a substantial loss. In the two proceedings substantially the same defenses were alleged as the defenses that are set forth in the answers in this proceeding. Those defenses were disposed of in the decision last above cited in P. U. R. 1922-C, page 299, *et seq.*, so that they need not be reiterated here. This leaves, as a practical matter, the only question to be decided now whether or not the remaining part of the urban lines and the operation of the interurban lines are being operated at a substantial loss as is alleged by the petitioner herein, and to determine if there is reasonable cause for the hope and belief that conditions will so improve as that the applicant may reasonably expect its street railway and interurban service to be self-sustaining.

The Auditor and Statistician for the Commission was assigned to make an investigation and report of the financial condition of the railway department of applicant, which he proceeded to do and completed same on May 16, 1923. The Auditor's report is quite thorough and complete, and was introduced in evidence as the Commission's Exhibit A. In addition to the Auditor's report, the General Manager and other officials of the applicant testified as to the loss being incurred by the applicant in the operation of its railway, which substantiated the report of the Auditor. For the purpose of this decision, however, the report submitted by the Auditor of the Commission will be used as a basis for the financial results of this railway operation, inasmuch as it is made by an officer of the Commission in the line of duty and without bias or prejudice. That report shows on pages 14 and 15 a comparison of the revenues and expenses of the railway department of applicant covering a number of years. On page 14 the comparison is from 1912 to 1922, both inclusive. It shows

that, beginning with the year 1915 up to and including the year 1922, operations of applicant were being conducted at a loss from $3,000 minimum to $24,000 maximum per year, that of 1922 being the largest, $24,660.43, and for the ten-year period showing a net loss from railway operations of $68,103.60. The comparative statement on page 15 of the Commission's Exhibit A comprises the years 1919, 1920, 1921 and 1922, and the losses suffered in those four years as being $8,990.57, $4,513.84, $16,-978.40 and $24,660.43, respectively, and the showing is made that the operating loss for 1922 was increased by reason of larger operating expenses in that year than either of the three years, particularly with the items of maintenance of way and structures and equipment, while suffering a marked decrease in earnings. The passenger revenue earnings for 1922 were $27,851, as compared with $40,414 in 1921, $48,224 in 1920, and $44,674 in 1919, and the total operating revenues for 1922 being $36,374.98 as compared with $46,311.38 in 1921, $60,363.83 in 1920 and $50,670.20 in 1919.

Without further attempt to analyze the showing made in the Auditor's report to the Commission and further consideration of the testimony and exhibits offered and received in evidence from the applicant, it is readily apparent therefrom, and the Commission finds, that the railway department of the applicant has been operating at a loss for the period 1915 to 1922, both inclusive, and that the operating deficits from said railway operation have steadily increased until the maximum of practically $2,000 a month was reached in 1922, the somewhat larger deficit being occasioned by deferred maintenance that was corrected in the year 1922, and the decreased revenues received during the calendar year 1922 as hereinabove set forth.

So far as the separate defense plead by the city of Trinidad, that because the predecessor of applicant had received a franchise from the city wherein and in consideration thereof it agreed to maintain the street railway operation for the term of the franchise, that same defense was, as before stated, interposed in Application No. 152, decided February 8, 1922, above re-

ferred to, P. U. R. 1922-C, page 299. In that decision this language was used:

"While it may be true that there was an understanding or agreement entered into by the promoters of the original street railway lines, now owned and being operated by applicant company, with the citizens and inhabitants of Trinidad that such operation should be continued for a term of years, and that on the faith of such agreement the franchises were granted and perhaps even contributions of money or property may have been made to the original constructing company, this was done, if done at all, long prior to the period of regulation by the state through its agency, and it is uniformly held that a contract or franchise granted is entered into or given in contemplation and subject to the power of the state to regulate at such time as that agency shall have been called into existence." P. U. R. 1920-C, page 306-7. Denver & South Platte R. Co. v. Englewood, 62 Colo. 229, 161 Pac. 151, P. U. R. 1916-E, 134, 4 A. L. R. 956, 4 Colo. P. U. C. 197.

With reference to the issue of economical and efficient management, suffice it to say that the Auditor for the Commission testified that he had made a study of the cost of operation per car mile of applicant for the years 1920, 1921 and 1922, and that the operating expenses for the three years were .2832 for 1920, .2811 for 1921 and .45954 for 1922. He further testified that he had made a comparative statement of the average operating expense per car mile of other street railway systems in Colorado comparable to the street railway system of applicant, such companies being The Southern Colorado Power Company, Pueblo; The Colorado Springs and Interurban Railway Company, The Denver and Crown Hill Railway Company, The Denver and South Platte Railway Company, The Denver Tramway Company and The Western Light and Power Company of Boulder; that the average cost of operation per car mile for these six companies was for 1920 .3112, for 1921 .2849 and for 1922 .2821 per car mile; that the car mile expense for applicant's cars of .45954 was largely due to the reduction of car miles in the year 1922 of applicant's system, the car mileage of appli-

cant's lines in 1921 being 208,371 as against 126,849 car miles in 1922.

Abstract of record, pages 153-154-155.

From the above testimony and showing it would appear that the car mile expense of operation of applicant company compares not unfavorably with that of the average car mile expense of operation of other comparable street car systems in Colorado.

It should be noted here that at the hearing applicant asked leave to amend its application to include the abandonment of all its operated lines, both urban and interurban, as the same now exist and to withdraw as a common carrier from the public service, which amendment was duly allowed.

From the testimony submitted it is quite apparent to the Commission that one reason, and a serious one, that has interfered with the revenue possibilities of applicant's street railway system, and particularly its interurban system, is the prevalence of automobile competition to the coal camps from Trindad that are and have been served by the interurban lines of applicant. The evidence establishes that numbers of flivvers or jitneys are prevalent upon the streets of Trinidad at all hours of the day and up to late hours of the night that solicit and transact the business of carrying passengers from Trinidad to the coal camps involved and *vice versa* for a consideration, and at approximately the same rate of fare as is charged by the street railway. The jitney service affords an attractive method of conveyance to people who thereby may come and go as and when they please without any reference to a fixed schedule. These jitneys are licensed, presumably, for a nominal sum to operate within the city of Trinidad. They have no expense of roadway or right-of-way to maintain, and hence are enabled to successfully compete with the street railway system, which must maintain its right-of-way, road bed, track and equipment at its own expense. The era of the automobile is here and here to stay, but the public desiring the use of short haul transportation by steam or electric methods of transportation must awake to the fact that it cannot have both, particularly in regions of the country so sparsely settled, comparatively, as are the communities in Colorado; and

if the automobile method of transportation is the thing desired for the convenience and pleasure of the people, they cannot reasonably expect that the electric and other usual forms of transportation will be continued at a monetary loss.

Without further elaboration of the subject, it is quite apparent that the patronage offered to the street railway and interurban lines of applicant company is not, has not been for the past eight years, and in all human probability will not be in the future, sufficient to pay even the operating expenses of such street railway system, to say nothing of depreciation and other items that are properly chargeable to such an operation, and the Commission so finds and an order will, therefore, be entered in accordance with the prayer of applicant's petition as amended at the hearing.

ORDER.

IT IS THEREFORE ORDERED, That applicant, The Trinidad Electric Transmission Railway and Gas Company, be, and it is hereby, permitted and allowed to abandon and cease the operation of its street railway line in the city of Trinidad and its interurban lines from the city of Trinidad to the towns of Cokedale, Sopris and Starkville from and after September 15, 1923, upon the posting of notices to that effect in its cars and stations at least ten days prior to said September 15, 1923, and by publication of notice to such effect in newspapers of general circulation published in the city of Trinidad and in said towns of Cokedale, Sopris and Starkville, if any there be.

IT IS FURTHER ORDERED, That after the cessation of operation as is herein permitted and allowed, the said applicant be, and it is hereby, permitted to withdraw its schedule on file with this Commission pertaining to its activities as a common carrier, and thereafter to cease functioning as a common carrier of persons or property.

IT IS FURTHER ORDERED, That proof of the compliance with this order shall be made by applicant company with reference to the posting and publication of notices by or before the 15th day of September, 1923.

RE THE COLORADO MOTOR WAY, INC.

[Amended Application No. 191. Decision No. 640.]

Certificates of convenience and necessity—Local consent—Counties.

1. Neither the board of county commissioners nor any other county authority has the power to grant or refuse permission to any person to make legitimate use of the public highways.

Certificates of convenience and necessity—Proof of necessity—Reasonable doubt.

2. Applicant for a motor vehicle certificate of convenience and necessity is not required to establish its right thereto beyond a reasonable doubt.

Return—Guaranty.

3. The State does not guarantee a satisfactory return upon utility investments.

[September 15, 1923.]

Appearances: For Applicant, The Colorado Motor Way, Inc., Halsted L. Ritter and P. M. Clark; for protestants, Thomas R. Woodrow, for Joseph H. Young, Receiver of The Denver and Rio Grande Western Railroad System; C. C. Dorsey and E. G. Knowles, for Union Pacific Railroad Company; J. Q. Dier, for The Colorado and Southern Railway Company; Erl H. Ellis, for The Atchison, Topeka and Santa Fe Railway Company; W. V. Hodges and D. Edgar Wilson, for The Chicago, Rock Island & Pacific Railway Company; T. H. Devine, J. W. Preston and T. C. Storer, for Missouri Pacific Railroad Company.

STATEMENT.

By the **Commission**: This is an application for a certificate of convenience and necessity to operate lines of motor busses for carrying passengers for hire and also parcels and small packages between the following points in the State of Colorado, as the application was amended and heard, namely: (1) from Denver to Nunn, passing through Henderson, Brighton, Fort Lupton, Platteville, Greeley, Eaton, Ault, Pierce, and all other intermediate places it may be able to serve; (2) from Denver to Fort Collins, traversing the route above described to Greeley, thence by a route through Windsor, Timnath and all other intermediate places it may be able to serve; (3) from Denver to

Colorado Springs, passing through Littleton, Sedalia, Palmer Lake and all other intermediate places it may be able to serve; (4) from Colorado Springs to Pueblo, passing through Fountain, Buttes, Pinon and all other intermediate places it may be able to serve; (5) Colorado Springs to Canon City, passing through Florence and all other intermediate places it may be able to serve; (6) thence from Canon City to Pueblo, passing through Portland, Concrete and all other intermediate places it may be able to serve; (7) and thence from Pueblo to La Junta, passing through Avondale, Fowler, Manzanola, Rocky Ford and all other intermediate places it may be able to serve. Applicant desires such certificate to grant to said company the right to stop at any and all places along said routes where the business may develop, the company proposing to use the best motor passenger busses and to make as many round trips between said points as the business will warrant.

Protests were duly filed against the said application by the Union Pacific Railroad Company, The Colorado and Southern Railway Company, The Atchison, Topeka and Santa Fe Railway Company, The Denver and Rio Grande Western Railroad Company and its receiver, the Missouri Pacific Railroad Company and The Chicago, Rock Island and Pacific Railway Company.

The applicant set forth that it is a Colorado corporation of sufficient capital to properly carry on the business; that the operation of such passenger motor busses is for the public convenience and necessity because the territory traversed is a thickly populated country and a great deal of travel exists between the points named and the intervening country; that the routes are over improved highways, parts of which are concrete and all of which are being contemplated to be surfaced; that the service will be more expeditious and convenient for the people as well as more frequent than the railroads can furnish; that it will serve many people now traveling in their own automobiles; that the operation will tend to increase the population and the pleasure of living along its route, and will furnish a facility for the transaction of business and the visiting of the people one with another and the general social intercourse which does not

now exist and for which there is a demand; that the increased travel which would be developed by the company's motor bus passenger service would be very largely of its own creation and that which the railroads would not be able to secure or develop.

Maps were duly filed illustrating the proposed route and the lines of railway now being operated.

Each of the several railroad companies filed in substance the same protest, in which it is alleged that the application does not state facts sufficient to constitute grounds justifying or warranting the granting of the certificate of public convenience and necessity applied for; that the applicant has failed to comply with the statute and with the Rules of Procedure of this Commission, in that the applicant has failed and omitted to show that it has received the required consent, franchise, permit, ordinance, vote or other authority of the proper county, city and county, municipal or other public utility within and under whose jurisdiction the proposed motor bus line will be operated; and alleging the operation of railroad trains along their several lines as being more than adequate to supply and take care of the reasonable requirements and needs of the communities and territory located along said lines of railroad; that the communities are and have been sufficiently and adequately supplied and conveniently served by the protestants by means of their said lines throughout the entire year and at reasonable rates and charges; that the establishment and operation of the proposed motor bus line of the applicant will unjustly and unreasonably interfere with and injuriously affect the operation, traffic, revenues and business of the protestants.

A motion was filed during the hearing by the protestants to dismiss the application, for the reason that no evidence of consent or authority on the part of the counties through which the applicant proposes to operate was offered. This motion, after argument, was overruled. It was the view of the Commission that the counties have no inherent or legislative conferred power to grant any such authority. The motion of the protestants was based on the following provision, contained in Section 35 of the Public Utilities Act:

"Every applicant for a certificate shall file in the office of the Commission such evidence as shall be required by the Commission to show that such applicant has received the required consent, franchise, permit, ordinance, vote or other authority of the proper county, city and county, municipal or other public authority."

The following must be accepted as defining the powers and duties of counties in this respect:

"The county is organized for governmental purposes, and is in reality part of the state's organization, possessing such jurisdiction and such power as the legislature has seen fit to confer."

Nelson v. Board of County Commissioners of Garfield County, 6 C. A. 279, 40 Pac. 474.

Hockaday v. Board of County Commissioners of Chaffee County and Hollenbeck, 1 C. A. 362, 25 Pac. 287.

And again:

"Each organized county within the state shall be a body corporate and politic, and as such shall be empowered for the following purposes:

First, to sue and be sued.

Second, to purchase and hold real and personal estate for the use of the county and land sold for taxes as provided by law.

Third, to sell and convey any real or personal estate owned by the county and make such order respecting the same as may be deemed conducive to the interests of the inhabitants.

Fourth, to make all contracts and do all other acts in relation to the property and concerns necessary to the exercise of its corporate administrative power.

Fifth, to exercise such other and further powers as may be conferred by law." C. L. 1921, Sec. 8658.

There is nothing in this concerning the question here involved, and this Commission is without power to add thereto. By the laws of 1921, page 514, the state has exercised the exclusive power to license and collect the fee for the use of the public highway for automobiles. Therefore, the use of the public high-

way through the county for this purpose is within state regulation.

The applicant asks only for the use of the existing public highway, not for a franchise for its own exclusive use. The application is that the applicant may perform its service by the occupation of the public highways. Neither the board of county commissioners nor any other county authority has the power or authority to grant or refuse any person the right to the legitimate use of the public highways. This has been the law from time immemorial.

"Highways are public roads which every citizen has a right to use."

Angell on Highways §3.

"The general rule may be deduced from principles and decisions already considered in this work, if not indeed self-evident, that it is the right of all to the use of the public roads and streets for the purpose of travel by proper means and with due regard to the rights of others. So it is apparently well settled that an automobile is a legitimate means of conveyance or travel upon such highways, and has in general, subject to valid statutory regulations, if any, the same rights thereon as other vehicles. Thus in one of the leading cases upon the subject it is said: 'The law does not denounce motor carriages as such on the public highways. For so long as they are constructed and propelled in a manner consistent with the use of highways and are calculated to subserve the public as a beneficial means of transportation with reasonable safety to travelers by ordinary modes, they have an equal right with other vehicles in common to occupy the streets and roads.' "

Second Elliott on Roads and Streets, Section 1107.

"The power of the legislature to regulate, either through the direction of local authorities or otherwise, is a legitimate exercise of the police power, and may regulate the speed and adopt other reasonable rules and regulations as to their use."

Second Elliott on Roads and Streets, Section 1109.

"The general rules governing the movement of automobiles, except as modified by statute, are the same as those which, as

the result of long usage, have been formulated for simpler vehicles such as wagons.''

Mark vs. Firtsch, 195 N. Y. 282.

For these reasons the Commission holds that it is not proper and not within its power to require the consent suggested in the statute.

In view of the testimony, the Commission feels it necessary to divide the application into two different parts; that relating to the territory north of Denver and that relating to the territory south of Denver. We have determined to grant the application insofar as it applies to a certificate of convenience and necessity for the territory north of Denver and to deny the application insofar as it applies to the territory south of Denver.

In the absence of a statute to direct or control, the Commission is sorely perplexed in the determination of a case like the present. Some of the counsel for respondents contend in their briefs that the applicant must establish the right to a certificate of convenience and necessity beyond a reasonable doubt. This is absurd. No such rule has been laid down by any utility commission nor promulgated by any court. It would seem to be time for railroad companies to understand that the state does not guarantee a satisfactory return upon utility investments, and further that the automobile is here to stay and that it cannot be eliminated by any utility commission nor by any court or legislature; that it is a great industrial fact and must be met and treated as such. The law will not compel a person to ride on a railroad train or forbid him to ride in an automobile if he so desires. Such a policy is inconsistent with the American notion of human liberty.

It is not important to discuss the evidence. The territory north of Denver through which the application for a certificate is granted is an irrigated and rather thickly settled agricultural section. The railroads of protestants, chiefly the Union Pacific, have principally flag stations and do not seem to have made a reasonable effort to suit the convenience of the public in the matter of schedules in the operation of their railroads. This is evidenced by the failure of the railroads to put on an early train

from this northern territory to Denver as requested by the public, and which omission is now supplied by the applicant operating its lines as recited in the application for a certificate. There appears also to have been carried by the applicant a sufficient number of passengers on its northern route to establish that the operation of the line is a convenient necessity to the public. The railroad service to the south of Denver seems to be much more efficient and satisfactory. The country is sparsely settled and there does not seem to be any reasonably sufficient requirement by the public for the use of the auto line. An additional reason why the certificate should not be granted as to the southern route is that the applicant has failed to secure the consent of the city of Littleton, as is required by the statute.

ORDER.

IT IS ORDERED BY THE COMMISSION, That a certificate of convenience and necessity be issued to the applicant for the operation of its line and for the carrying of passengers, together with parcel and small package deliveries, between the following points in the State of Colorado; namely, from Denver to Nunn, passing through Henderson, Brighton, Fort Lupton, Platteville, Greeley, Eaton, Ault, Pierce and all other intermediate places it may be able to serve; from Denver to Fort Collins, traversing the route described to Greeley, thence by route through Windsor, Timnath and all other intermediate places it may be able to serve.

IT IS FURTHER ORDERED, That the application for a certificate of convenience and necessity be denied for the operation of its line from Denver to Colorado Springs, passing through Littleton, Sedalia, Palmer Lake and all other intermediate places; Colorado Springs to Pueblo, passing through Fountain, Buttes, Pinon and all other intermediate places it may be able to serve; from Colorado Springs to Canon City, passing through Florence and all other intermediate places it may be able to serve; thence from Canon City to Pueblo, passing through Portland, Concrete and other intermediate places; and thence from Pueblo to La Junta, passing through Avondale, Fowler, Manzanola, Rocky Ford and other intermediate places; that the denial of such ap-

plication is without prejudice to the applicant to renew the same at any time that it may appear that changed conditions may cause the same to be more reasonable and as more likely to receive favorable consideration.

[September 21, 1923.]

Halderman, Commissioner: I have signed the decision and order in the above entitled application for the reason that I concur in the conclusion reached therein. I am not free from doubt, however, as to the correctness of the interpretation of Section 35 of the Public Utilities Act as applied in said decision and order to the requirement that an applicant shall procure some sort of "consent, franchise, permit, ordinance, vote or other authority of the proper county" as a prerequisite to the issuance of a certificate of public convenience and necessity by the Commission. It will be noted that said Act has been complied with insofar as it pertains to municipal authorities, save and except as to the city of Littleton; and we seem to all be agreed that the consent of some sort or a showing that no consent is required is necessary to be procured from a town or city or other municipal authority.

As to whether or not such consent is required from a county has not heretofore been presented to the Commission, but it was sharply raised by the protestants in this case. The decision and order cites Section 8658, C. L. 1921, as containing all the powers conferred by the legislature upon counties. No reference is made, however, to Section 8682, C. L. 1921, which specifically confers various powers upon the board of county commissioners of each county, the eighth and ninth specific powers therein granted being as follows:

"Eighth. To lay out, alter or discontinue any road running into or through such county, and also perform such other duties respecting roads as may be required by law.

"Ninth. To grant such licenses and perform such other duties as are or may be prescribed by law."

Section 35 of the Public Utilities Act was enacted many years subsequent to the enactment of the above cited section of the

statutes, and it is somewhat perplexing to me as to whether or not the board of county commissioners, having the power to grant licenses and perform such other duties as are or may be prescribed by law, may not have the power to grant or refuse to grant the consent of the county to an applicant who desires to operate an automobile common carrier over a county's highways. The county is required by Section 1244, C. L. 1921, to keep in repair and maintain all public highways in the county, except such as are within the corporate limits of any city or town, and except those as are owned and operated by private corporations. Reading Sections 1244, 8682 and 8658 together, as they all pertain to the same general subject, it would appear that a reasonable interpretation of the legislative intent might be to clothe the board of county commissioners of each county with power as is specified in Section 35 of the Public Utilities Act.

I make these observations in the friendliest of spirit toward the decision and order in this application, and solely with the desire that if such decision and order shall be made the subject of review by the court of last resort, the attention of that court may be called to the different statutes thought to be applicable to the subject under discussion.

[September 15, 1923.]

Lannon, Commissioner: I hereby concur in that part of Decision No. 640 denying the application for a Certificate of Public Convenience and Necessity for the operation of motor busses for carrying passengers, packages and parcels in both directions between Denver and Pueblo, Pueblo and La Junta, Colorado Springs and Canon City, and between Canon City and Pueblo and all intervening places between points enumerated.

I am constrained to say I regret that I cannot accept that part of the decision of my confreres granting a certificate for the operation of the motor busses of this company between Denver and Nunn, passing through Henderson, Brighton, Fort Lupton, Platteville, Greeley, Eaton, Ault, Pierce and other intermediate

places, and also between Denver, Greeley and Fort Collins, passing through Windsor, Timnath and the other intermediate places.

The basis of my non-concurrence in granting a certificate in the territory north of Denver lies in the fact of the frequent daily train service furnished by the protestants, the Union Pacific Railroad Company and The Colorado & Southern Railway Company. The Union Pacific runs six trains daily north of Denver. Four of these trains are operated in each direction between Denver and Greeley and two in each direction between Denver and Fort Collins. No. 103 of the Union Pacific leaving Denver at 8:00 a. m., arrives at Greeley at 9:35 a. m.; No. 21, leaving Denver at 1:30 p. m., arrives at Greeley at 2:58 p. m.; No. 105, leaving Denver at 4:00 p. m., arrives at Greeley at 5:40 p. m.; No. 109, leaving Denver at 6:00 p. m., arrives at Greeley at 7:35 p. m. No. 105 stops at Nunn at 6:22 p. m.; No. 103 stops at Nunn at 10:31 a. m. No. 161 leaves Denver at 7:50 a. m., arrives at Fort Collins at 10:15 a. m.; No. 163 leaves Denver at 5:55 p. m., arrives at Fort Collins at 8:25 p. m.

Going south on the Union Pacific, No. 106 leaves Nunn at 7:47 a. m., arrives at Greeley at 8:28 a. m. and at Denver at 10:15 a. m.; No. 22, no stop at Nunn, arrives at Greeley 10:38 a. m. and at Denver at 12:15 p. m.; No. 110 leaves Nunn at 2:56 p. m., arrives at Greeley at 3:38 p. m. and at Denver at 5:45 p. m.; No. 104, no stop at Nunn, arrives at Greeley at 4:40 p. m. and at Denver at 6:20 p. m.; No. 160 leaves Fort Collins at 7:45 a. m., arrives at Denver 10:05 a. m.; No. 162 leaves Fort Collins at 3:45 p. m. and arrives at Denver at 6:10 p. m.

The Colorado & Southern operates daily three trains in each direction between Denver and Fort Collins. This road also operates two daily trains in each direction between Denver, Fort Collins and Greeley. No. 31 leaves Denver at 8:00 a. m., arrives at Fort Collins 11:05 a. m. and arrives at Greeley at 12:15 p. m.; No. 23 leaves Denver at 2:30 p. m., arrives at Fort Collins 5:27 p. m. and at Greeley at 6:40 p. m.; No. 29 leaves Denver at 6:00 p. m., arrives at Fort Collins 8:25 p. m. Going south, No. 30 leaves Fort Collins at 7:13 a. m. and arrives at Denver at 8:40 a. m.; No. 32 leaves Greeley 2:05 p. m. arrives Fort Collins 3:10

p. m., and arrives at Denver 4:55 p. m.; No. 22 leaves Greeley 7:10 a. m., arrives Fort Collins 8:12 a. m. and arrives in Denver at 9:56 a. m.

Considerable stress has been laid on the statement that the railroads' landing of passengers in Denver was not at a reasonable hour for the transaction of business in Denver by people living in either Greeley or Fort Collins. This contention is more or less unjustified. The aforesaid time tables show that passengers may arrive in Denver via the Colorado & Southern from Fort Collins at 8:40 a. m. and again from both Greeley and Fort Collins at 9:56 a. m. The Union Pacific also has a train leaving Fort Collins at 7:45 a. m. that arrives in Denver at 10:05 a. m., and another train that leaves Greeley at 8:28 a. m. and arrives at Denver at 10:15 a. m. Reflecting that one may, if so disposed, remain in the capital until 6:00 p. m., it will be seen that one in attendance at court even can have almost the entire time of Denver court sessions at his disposal. Within this period one can also attend to matters at the state house, or can have almost the entire day to attend to business or social matters and then return to Greeley at 7:35 p. m. and to Fort Collins at 8:52 p. m. of the same day.

In the opposite direction those having business to attend to in either Fort Collins or Greeley can leave Denver at an hour early enough to give them almost the entire day in either Fort Collins or Greeley and then return to Denver at an early or seasonable hour in the evening.

As for travelers visiting Nunn, they can leave Denver by train at 8:00 a. m. and arrive at Nunn at 10:31 a. m. and remain four hours and twenty-five minutes, or until 2:56 p. m., and then arrive in Denver at 5:45 p. m., or for a sufficient period to transact any ordinary business. On the other hand, the traveling public can leave Nunn at 7:47 a. m. and arrive at Denver at 10:15 a. m. and remain five hours and forty-five minutes, or until 4:00 p. m., and then get back to Nunn the same evening at 6:22 p. m.

To my mind, it appears that both the Union Pacific and the Colorado & Southern are not only furnishing an adequate but

commendable service, and that the railroad service between Denver, Greeley, Fort Collins, Nunn and intermediate points is sufficient to meet all the just and reasonable requirements for the transportation of passengers and for package delivery between the points named.

It would be ill advised to say that motor trucks have no place in this day and age. They already occupy a large and ever-increasing field and one might just as well attempt to sweep back the tides of the ocean with a broom as to prevent their operation within useful and proper lines. However, this does not mean that they may not, without proper control, become a menace to the very people they seek to serve. While the taking from the railways of both passengers and express business by auto lines is keenly felt by all the railroads, it is possible the larger and more prosperous roads of Colorado can withstand this invasion, but this subtraction from some of our weaker lines, already sorely financially depressed, may so seriously handicap them as to compel them to cease operation. The railroads are absolutely necessary to our civilization. If it were not for them the wheat, corn, potatoes, fruits, hay, lumber, coal, live stock, sugar beets, etc., could not be moved to and from the eastern or local markets. Colorado has had several of her railroad lines scrapped in the past few years for lack of business. Other of our roads are now in the hands of receivers, and on some of the lines the operating expense exceeds the operating revenues. The subject of licensing autos in competition with the rail carriers is fraught with consequences that may become far reaching as affecting the weal of our populace. It is of such vital importance it should bring forth remedial legislation from our next legislature.

In the first place, our railroads have some financial standing. In case of loss or damage to goods or of injury or loss of passengers' lives, the railroads can be made to respond in damages. Not so with the majority of truck operators. Oftentimes the latter are operating on a shoestring, as it were, not even having a clear title to the trucks they operate or any other property of value, thus being wholly and solely irresponsible and immune from all financial liability. Statutes should be drawn requiring

those operating for hire to give good and sufficient bond to cover the lives of passengers carried, and also sufficient bond to cover all loss of baggage or freight carried; otherwise the public will be unprotected. Already there has come to the notice of this Commission several derelictions of auto bus operators. Only recently an old established Denver house appealed to this Commission, reciting that they had sent a bill of goods C. O. D. and that the truck driver had absconded with the proceeds. As there is no protective law, the Commission was powerless to act. Again, a trucker came to Denver and loaded four or five tons of merchandise on his truck and demolished a steel bridge in Park County, Colorado. To show the fallacy and injustice of such operation to both the public and the Colorado & Southern Railroad, it is only necessary to state that the estimated cost of repairs on this bridge was $6,000. In Park County the Colorado & Southern road pays approximately one-third of the county taxes. Thus it will be seen that this railroad would be compelled to bear an expense of $2,000 as their part of rebuilding the bridge their competitor in the freight business had destroyed, while the trucker got off scot-free. In addition to this, the truck owner paid no taxes for the upkeep of the highway, while the Colorado & Southern had paid approximately one-third of all the expense of previous construction and upkeep of the road this trucker was allowed to use gratis. Such injustice to all the taxpayers of Park County should, of course, be prevented by proper legislation.

To emphasize the need of a broad, comprehensive law affecting common carriers by auto, only one more case of many will be mentioned. In this instance all three parties to the transaction were made to suffer, wherein, with proper safeguards, all could have been protected. A party operating out of the metropolis of southern Colorado purchased a truck from a dealer, paying down a few hundred dollars as the first payment. In the course of his duties this trucker loaded all the effects of a householder on his truck. They were to be delivered to a distant point. Through some cause the truck ran into a deep arroya, and the only thing to be thankful for was that the driver's life was

spared. In this wreck the party who purchased the truck lost all he had put into it. The party who sold the truck lost his machine, and the party who was having his household goods transported had them demolished. The trucker, making a mental survey of the situation, and knowing he could not make good, did about the only thing he could and left for parts unknown.

The granting of "Certificates of Public Convenience and Necessity" to truckers in competition with the railroads, where the latter furnish frequent and adequate train service, as is done in this case, is uneconomic and grossly inequitable from either a public or railroad standpoint. The railroads pay out hundreds of thousands of dollars annually in taxes for the building and upkeep of the public highways they do not use. To say it is just to allow trucking concerns or "fly-by-night" companies who pay no taxes in the counties through which they operate to use the state and county roads with their heavily loaded and destructive trucks, in competition with the railroads, especially in view of the fact that in many counties they have never contributed a single cent to either the building or upkeep of the roads they so largely destroy, is not only grotesque but ludicrous as well.

The application for authority from this Commission to operate as a common carrier by auto is largely chimerical. If there ever was a reason for such operation, in the people's interests, it was several years ago when the roads were poor. Applications of this character are never made until the highways have been improved by the expenditure of huge sums of money wrung from the railroads, the small home owner, the farmer, the business man and others. It is then that the itinerant trucker wishes to serve the dear people and uses the miserable subterfuge of asking for a certificate, under the euphonious caption of "Public Convenience and Necessity," when in reality he wishes most sordidly to use, to his own profit, the roads that others have constructed, thereby "reaping where he has not sown."

For the aforesaid reasons, I concur in the majority opinion in denying a certificate for all that territory between Denver, Colorado Springs and Pueblo, and between Pueblo and La Junta,

and also between Colorado Springs and Canon City, and between Canon City and Pueblo.

I hereby dissent to the majority order granting a certificate to the applicant between Denver, Greeley and Nunn, and between Denver, Greeley and Fort Collins on the grounds that the service furnished by the Union Pacific and Colorado & Southern Railroads is superior to that furnished to many more populous sections of our country, and is sufficient, ample and adequate to meet all the reasonable transportation demands of the people between the points named.

THE COLORADO SPRINGS & INTERURBAN RAILWAY COMPANY

v.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, *et al.*

[Case No. 267. Decision No. 645.]

Rates—Switching charge—Coal.

1. Switching charge of 25 cents per ton on coal turned over by another railroad held reasonable.

Rates—Short hauls—Mileage.

2. Mileage on short hauls is of no moment. It is the custom in constructing tariffs to base rates on same level up to ten miles in distance.

[October 5, 1923.]

Appearances: Chinn & Strickler, of Colorado Springs, for Complainant; J. A. Gallaher and George Williams for The Denver & Rio Grande Western Railroad Company and its Receiver; Erl H. Ellis, for The Atchison, Topeka & Santa Fe Railway Company.

STATEMENT.

By the **Commission**: The complaint herein was filed with this Commission May 24, 1923, and was set down for hearing and was heard by Commissioners Lannon and Scott at the City Hall, Colorado Springs, Colorado, August 29, 1923.

The cause of this complaint seems to have arisen from the

fact that The Colorado Springs & Interurban Railway Company, previous to May 17, 1923, paid to the Midland Terminal a flat charge of $3.60 per car for switching its coal from the tracks of The Atchison, Topeka & Santa Fe to its power house in the southern part of Colorado Springs. This switching was done by the Midland Terminal Railway Company partly over the tracks of The Colorado Springs & Cripple Creek District Railway Company. The latter road was sold and junked, in consequence of which the rails were removed and the Midland Terminal was no longer able to make a transfer of this coal. At this juncture, May 17, 1923, the Denver & Rio Grande Western and The Atchison, Topeka & Santa Fe built a connection between their lines, and it then devolved upon the Denver & Rio Grande Western to switch the coal to the power house of this complainant, for which The Denver & Rio Grande Western Railroad Company has been making a charge of twenty-five cents per ton.

In the Colorado Springs district there are three mines with railroad shipping connections; namely, the Pikes Peak Mine, six miles north on the line of The Denver & Rio Grande Western; the City Mines, about five miles north on the tracks of The Atchison, Topeka & Santa Fe, and the Keystone Mine, about four miles distant on the track of The Chicago, Rock Island & Pacific. From each of these mines the line rate to Colorado Springs is the same; namely, fifty cents per ton for the initial haul. In each case, also, where a transfer is made from the rails of one road to those of another a switching charge of twenty-five cents per ton is made by the road that sets the car to an industry located along its tracks, thus making the charge reciprocal between the three railroads. Where the industry happens to be located on the road that has control of the whole movement of the coal, then in that case the total charge from the mine to the user in Colorado Springs is but fifty cents per ton. Thus, if this complainant were to get his coal from the Pikes Peak Mine it would be set to his plant at a charge of but fifty cents per ton.

The general practice among the carriers of the United States is that switching charges are not absorbed except on shipments

where originating and delivery is made from and to competitive points, and then only where the road making the absorption has had more or less of a long haul on the shipment.

The reciprocal terminal switching charges under consideration can in no manner be claimed to be discriminatory, for the reason that exactly the same charge is made for such service at all terminals in the Colorado common point territory; namely, Fort Collins, Greeley, Windsor Longmont, Loveland, Colorado Springs, Pueblo, Walsenburg and Trinidad. In Denver, however, there are two zones. Within the inner zone the charge is eighteen cents per ton on all roads, while the charge in the outer zone is twenty-four cents on The Colorado & Southern and twenty-five cents on The Denver & Rio Grande Western. The evidence shows that in every instance where The Colorado & Southern charges twenty-four cents per ton for reciprocal switching, The Denver & Rio Grande Western charges for the same service twenty-five cents. This difference was brought about by the disposition of fractions under the general reduction of 10 per cent in freight rates, switching and terminal charges that became effective July 1, 1922, which would make the switching charge twenty-four and one-half cents, which The Denver & Rio Grande Western claims, under the rules, should be made twenty-five cents, while their competitors saw fit to waive the rule for the disposition of fractions and made the charge of twenty-four cents. These rates are on file with this Commission and are the legal charges for switching in force and collected in Colorado. The line haul from the mines in question to Colorado Springs of fifty cents per ton is the lowest rate, mileage considered, of any in Colorado; consequently, it would be unfair for the railway making the line haul to absorb any portion of the switching charge. The Commission's files show that similar charges have been made by the respondent, Denver & Rio Grande Western Railroad, since June 18, 1907, or for over sixteen years. Again, the switching charge is in no way connected with the length of haul. It is worth just as much to switch a car that has had only a line haul of five or six miles as it is for one that has been hauled across the continent.

So far as the mileage is concerned in shipping coal into Colorado Springs from the nearby mines, it is of no moment, as in so short a haul full consideration must be given to loss of time in loading and unloading equipment. Again, it is the universal custom in the construction of tariffs to base rates on the same level up to ten miles in distance. The switching rates are reciprocal, and if the conditions were reversed and The Rio Grande Western were to transport coal from the Pikes Peak Mine on their line to a customer located on The Atchison, Topeka & Santa Fe, then in that case the customer would have to pay the Santa Fe for the switching just as is now done by this complainant to The Denver & Rio Grande Western. The switching charges of all the roads involved in this hearing are the same to each and all of their respective customers. The line haul charge of fifty cents per ton from the mines is a very reasonable one, and the twenty-five cents per ton, or the $6.30 minimum car load switching charge, puts the twenty-five ton customer on an equality as to costs per ton with the party who receives a fifty or seventy-ton car load.

Inasmuch as the switching rate complained of herein seems to be fair and reasonable, and from the further fact that it would be unjust and discriminatory to change such rates in Colorado Springs without making a similar change in all other affected parts of Colorado, this Commission deems it wise to dismiss the complaint of this complainant and will disallow its prayer for a gross line haul and switching charge of forty-five cents per ton on coal delivered to its plant, as asked for in its complaint to this Commission.

ORDER.

It Is Therefore Ordered, By the Commission, that the rate asked for by The Colorado Springs & Interurban Railway Company in its Case No. 267, be, and the same is hereby, denied and the complaint is dismissed.

RE W. R. RHOADS.
RE HENRY C. DAVIS, *et al.*

[Applications Nos. 252 and 253. Decision No. 650.]

Certificates of convenience and necessity—Grounds for granting or refusing—Fraud between parties.

1. An allegation that the holder of a certificate of convenience and necessity had practiced fraud upon a later applicant for a similar certificate is irrelevant in a proceeding involving the later application.

Certificates of convenience and necessity—Grounds for granting—Former ignorance of law.

2. An allegation by an applicant for a certificate of convenience and necessity to operate motor vehicles over a route covered by a certificate granted to another operator, that he had no knowledge of the legal necessity for such a certificate prior to the proceeding by the other operator to obtain his certificate, is not a ground for granting him permission to operate, especially when it appears that he should have had such knowledge.

Monopoly and competition—Occupied territory—Adequacy of service—Common carriers.

3. Permission should not be granted to operate a motor carrier service in territory which existing carriers adequately serve or are able and willing to serve.

Monopoly and competition—Adequacy of service—Freedom from unlawful competition.

4. If after a reasonable time elapses following cessation of operations by unlawful operators the motor vehicle certificate holder does not or cannot furnish reasonably adequate service, then it will be time for applicants or others to seek a certificate.

[October 26, 1923.]

Appearances: For applicant, W. H. Rhoads, Messrs. Blake & Bryant, Montrose, Colorado; for applicant, Davis Bros., Millard Fairlamb, Esq., Delta, Colorado; for protestant, The Motor Transportation Company, Messrs. Burgess & Bothwell, Grand Junction, Colorado, and Messrs. Charlesworth & Gueno, Delta, Colorado.

STATEMENT.

By the **Commission**: The above matters are before the Commission by virtue of the filing of a petition in Application No. 252 on May 8, 1923, and in Application No. 253 on May 9, 1923. In each of the said applications, applicants sought a certificate

of public convenience and necessity for the operation of a motor truck freight line over the routes therein described.

The route described by applicant in Application No. 252 is between the cities of Montrose and Grand Junction, Colorado, over the main traveled highway and serving en route the town of Olathe. The route desired by applicant in Application No. 253 is between Grand Junction and Bowie, Colorado, and serving the intermediate points of Delta, Austin, Lazear, Hotchkiss and Paonia.

Upon the filing of each of said applications, copies thereof were served upon The Denver and Rio Grande Western Railroad and upon The Motor Transportation Company, an automobile freight and passenger line which heretofore had applied for and received a certificate of public convenience and necessity for operation over the routes embraced in both of the above applications.

In a general way, each of said applicants set forth the alleged necessity for the accommodation and convenience of the merchants and other shippers of freight in the territory described, as an added and supplemental means of transportation of freight in addition to that afforded by The Denver & Rio Grande Western Railroad and said The Motor Transportation Company; alleging that the service of the railroad and transportation companies was and is inadequate to afford reasonably efficient and proper service between the communities affected.

Protests and objections to the applications were filed by both the railroad and transportation companies; on May 16, 1923, by said railroad company, and on July 2, 1923, by said transportation company. The basis of the protest and objection of each of said protestants and objectors, tersely stated, is: That the existing method of transportation between the communities sought to be served by applicants is adequately and efficiently served by means of the railroad and of The Motor Transportation Company.

Both of said applications were, upon request of the parties to the proceedings, except as to the railroad company, continued from the date originally fixed for the hearing of said applica-

tions in the month of July, 1923, to Tuesday, August 7, 1923, at the court house in Delta, Colorado, where the same were duly heard by Commissioner Halderman.

At the hearing, by stipulation of the parties appearing, The Denver & Rio Grande Railroad not participating in the proceeding, it was agreed that the applications should be consolidated for purposes of the hearing and that any and all evidence submitted, insofar as the same was applicable, should be considered as it pertains to each of said applicants. At this hearing, which consumed all of two days and one night session, a very voluminous record was made, particularly the testimony or proof offered by applicants. The testimony became so voluminous and so extended and so much in detail that the sitting Commissioner admonished the attorneys engaged that, in the interest of economy of time and labor, very much of the testimony, in his judgment, was immaterial and irrelevant to the real issue being tried, to-wit: Does the public necessity and convenience require additional transportation facilities over the routes embraced in said applications other than the service being afforded by the railroad company and The Motor Transportation Company?

In the taking of testimony before the Commission in very many of the applications and cases heard by it, much of the testimony is really irrelevant to the question being tried; so that the Commission here desires to emphasize to the lawyers who appear before it, that they seek to avoid the presentation of unnecessary, irrelevant and immaterial matters in the hearing of proceedings before the Commission.

It developed at the hearing that applicants in both applications had been engaged in the motor truck transportation of freight over the routes described in the applications for at least two years prior to August, 1923. The files and records of the Commission disclose that protestant, The Motor Transportation Company, made application for a certificate of public convenience and necessity for passenger and express traffic over the routes herein involved, and was granted such certificate on May 2, 1922, being Application No. 151, Decision No. 534; that there-

after and on January 13, 1923, protestant, The Motor Transportation Company, filed its application for a certificate of convenience and necessity for the purpose of engaging in the motor truck freight business over the route between Grand Junction and Montrose; that said application was heard at Grand Junction on April 19, 1923, and the certificate applied for was granted to said protestant on June 15, 1923, being Application No. 236, Decision No. 615.

Applicants, by the proof submitted and as reasons why the Commission should grant the certificates of convenience and necessity applied for, sought to establish two main propositions; first, that the volume of freight traffic between Grand Junction, Delta, Montrose, Hotchkiss and Paonia necessitated the installation of the freight truck service of applicants in addition to the existing freight transportation afforded by The Denver & Rio Grande Western Railroad Company and The Motor Transportation Company; and, second, that applicants had no knowledge of the law requiring a person engaged as a common carrier by motor vehicle, or otherwise, to apply for and obtain a certificate of public convenience and necessity, until the hearing held in Grand Junction on April 19, 1923, upon the application of The Motor Transportation Company for its motor truck freight line; and, also, that Mr. DeMerschman, manager of the protestant transportation company, had practiced a fraud upon the applicants in the making of his application for such motor truck freight line.

So far as the question of fraud is concerned, there was not a particle of testimony introduced to show that any fraud was practiced upon the Commission. The testimony that was submitted tended to prove, if it proved anything, that applicants and Mr. DeMerschman had some conversation, prior to the April, 1923, hearing at Grand Junction, concerning protestant's application for such certificate. If there was any fraud practiced by Mr. DeMerschman upon applicants in these cases, that is a question that is irrelevant to this sort of a proceeding for the reason that the Commission is not vested with jurisdiction to investigate and determine fraudulent practices as between indi-

viduals. Had the Commission been imposed upon and been misled by protestant transportation company, a different question would be presented; but, as stated, there was no evidence offered, and, indeed, no pretense, that the Commission itself was imposed upon or misled by Mr. DeMerschman or any other officer or agent of the transportation company.

Upon the question of the ignorance of applicants in not knowing or understanding that the law required one engaged in hauling freight by automobile or otherwise over established routes or between fixed termini for compensation is concerned, a law maxim as old as the hills is to the effect that "Ignorance of the law excuses no one." But to scrutinize the evidence, it will be observed that Mr. Rhoads testified that he knew as long ago as the spring of 1922 that the protestant had made application for a certificate of convenience and necessity for the operation of a passenger and express motor bus between Grand Junction and Montrose, serving Delta and Olathe en route; and it is fairly inferable from the testimony of Mr. Davis that he also had knowledge of that fact early in the year 1922. There was no testimony that applicants, or either of them, were or are unable to read and write the English language or that, by reason of the lack of educational facilities, or for any other reason, they did not understand the law upon the regulation of motor vehicle common carriers to the extent, at least, that they were required to apply for and obtain a certificate from this Commission to lawfully engage in such business. On the contrary, both applicants testified that they were acquainted with Mr. DeMerschman; had knowledge of his operation of "The White Bus Line" for many months prior to April, 1923; and their testimony, appearance and conduct while upon the witness stand indicates beyond a doubt that they are endowed with a marked degree of intelligence and business capacity. In view of the fact that this Commission has held several hearings in Grand Junction during the years 1921 and 1922 and one, at least, in Montrose, and that the newspapers have commented upon such fact, it seems incredible that men of the character and capacity of applicants should not have had knowledge of such requirement of the stat-

ute, or, at least, such knowledge as would cause them to be put upon inquiry. No one may wilfully close his eyes and thus fail to see such things as would tend to give him knowledge or cause him to investigate. The maxim, "Equity aids the vigilant; not those who slumber on their rights," is applicable in answer to the contention of applicants in this respect.

With regard to the principal contention of applicants as a ground upon which they base their right for certificate of public convenience and necessity in this proceeding, that the volume of freight traffic is of such extent that the public convenience and necessity requires that they engage in the motor truck freight business in addition to the service being afforded by the railroad and transportation companies, the evidence establishes the fact, and indeed is practically admitted by applicants, that they continued to haul freight between Grand Junction, Olathe and Montrose, by the Rhoads Truck Line, and between Grand Junction, Delta, Hotchkiss and Paonia, by the Davis Brothers' Truck Line, after The Motor Transportation Company had received its certificate in June, 1923; that applicants continued such business in the same manner and to the same extent as they had been doing during the year 1922 and prior thereto. The testimony of protestant disclosed that it purchased additional equipment after the reception of its certificate in June, 1923, and prepared to engage in the hauling of freight over said route, but that because and by reason of the operation of applicants as they had theretofore been doing, its operations were conducted and were being conducted at a loss.

Much of the evidence submitted by applicants, as well as a resolution of the Board of County Commissioners of Delta County, was directed toward the proposition that there should be no monopoly in the use of the highways by a motor transportation common carrier; and, for that reason, applicants should be granted a certificate of public convenience and necessity. The whole theory of regulation of common carriers, or of any public utility, is essentially of a monopolistic character; the theory being that the utility serving the public, whether it be a common carrier, an electric light, water, gas, or other public utility,

shall be entitled to earn a fair return upon the capital invested, and is entitled to protection from competition so long as the utility gives reasonably adequate and efficient service to the public. The utility's rates, practices and rules are made the subject of regulation by the state through the agency of a board, commission or body created by legislative enactment in the interest of the public, to the end that the public shall not be required to pay more than the service is reasonably worth and that the utility is obliged to maintain adequate and efficient service. To illustrate: If The Denver & Rio Grande Railroad had been, in the prior proceeding before this Commission, proved to be serving the public in the territory involved in these proceedings adequately and efficiently, no certificate of public convenience and necessity would have been granted to The Motor Transportation Company; but the Commission found in the prior proceeding that the railroad company was not serving the public in the territory herein in such manner; hence, the transportation company was granted its certificate.

If the transportation company failed, neglected or refused to adequately serve the public, then, upon such showing made, the Commission would grant a certificate of public convenience and necessity to another auto truck common carrier. However, in this proceeding, the public is not complaining of the service being rendered by the transportation company; and, by reason of the large volume of freight hauled by these applicants, the transportation company is prevented from demonstrating its ability to meet the public convenience and necessity in the haulage of freight by its motor trucks. This competition has been for a period of at least two years, continues now, and has always been and is without authority of law. There was no evidence submitted by applicants tending to show or purporting to show that protestant had failed, neglected or refused to serve the public adequately and efficiently; but, on the contrary, that applicants had corraled the greater volume of the business and attempted to show that there was sufficient business for additional motor truck lines. Protestant, on the other hand, introduced testimony of the financial ability to augment its equip-

ment to handle by truck whatever freight is offered between Grand Junction and the territory involved. If, after a reasonable length of time, protestant did not or could not furnish such service, then it would be time for applicants, or any person else, to make application for a certificate of public convenience and necessity to enter this particular field. These principles are so well established that it would hardly seem necessary to cite authority; however, a few are herewith given.

Re Motor Transit Company, P. U. R. 1922-D, 495;
Re Highway Transport Company, P. U. R. 1921-C, 719;
Re Wilson & Company, P. U. R. 1920-C, 635;
Re San Joaquin Light & Power Co., 1921-A, 613, P. U. R.;
Re A. R. G. Bus Company, P. U. R. 1919-E, 232;
Re A. L. Richardson, P. U. R. 1925-D, 531 (Advance Sheet Aug. 30, 1923);
Re Frost & Frost Truck Co., P. U. R. 1923-D, 536 (Adv. Sheet Aug. 30, 1923);
Re Grover C. Gillingham, P. U. R. 1923-D, 540 (Adv. Sheet Aug. 30, 1923).

Applicants also introduced what purports to be a resolution of the County Commissioners' Association of the Second State Highway District of Colorado, held at Ouray, Colorado, July 31, 1923. That resolution charges this Commission with attempting to use its powers and exercise jurisdiction over the public highways of this state. Said resolution, as well as the resolution hereinabove mentioned of the commissioners of Delta County, indicates that a misunderstanding is prevalent, upon the Western Slope at any rate, of the scope, object and purpose of the Public Utilities law. They seemingly fail to distinguish or differentiate the use of the highways by a common carrier for hire as distinguished from the use of the highways by the public generally in its private and personal affairs. One using the highways as a common carrier for compensation is, in fact, being furnished a track or right-of-way comparable to the right-of-way and track of a railroad company for its purposes. Whether or not the state should attempt to regulate the use of the highways by common carriers is a matter that should be addressed to

the legislative branch of the state government; but to adopt the theory of the resolutions aforesaid would be, in effect, to repeal and nullify the Public Utilities Act insofar as it seeks to regulate common carriers in this state.

In a recent case decided by the Supreme Court of Illinois, the principle of regulation is clearly set forth, wherein is stated the following:

"It is not the policy of the Public Utilities Act to promote competition between common carriers as a means of providing service to the public. The policy established by that act is that, through regulation of an established carrier occupying a given field and protecting it from competition, it may be able to serve the public more efficiently and at a more reasonable rate than would be the case if other competing lines were authorized to serve the public in the same territory. Methods for the transportation of persons are established and operated by private capital as an investment, but as they are public utilities the state has the right to regulate them and their charges, so long as such regulation is reasonable. The policy of the Public Utilities Act is that existing utilities shall receive a fair measure of protection against ruinous competition. Rates of fare charged for service are subject to regulation by the Commerce Commission within reasonable limits, but the commission has no power to make a rule or order regulating a utility which would amount to a confiscation of its property or require operation under conditions which would not provide a reasonable return upon the investment. Where one company can serve the public conveniently and efficiently, it has been found from experience that to authorize a competing company to serve the same territory ultimately results in requiring the public to pay more for transportation, in order that both companies may receive a fair return on the money invested and the cost of operation. * * *

"Some individuals, perhaps a considerable number, would be convenienced by the operation of the bus lines; but it is clear from the record that to the great body of the public it would be neither a convenience nor necessity. It was not within the authority of the commission to authorize the operation of the bus

lines for the convenience of a small part of the public already served by other utilities at no very great inconvenience."

West Suburban Transportation Company v. Chicago & West Towns Railway Company, 140 N. E. 56, 58; P. U. R. 1923-E, 150.

The New York Public Service Commission in a recent case promulgates the same general principles in the following excerpts:

"This change in policy was not actuated by any desire on the part of New York state to show favoritism to such persons or corporations as happened to be already interested in public utility enterprises at the time of the passage of the law. The far-reaching regulatory powers of the new Commissions were expected to be effectively used in compelling existing utility enterprises to give the very best service possible that the circumstances of each case permitted. It was expected that the Commissions would insist upon it that the public should for the future receive a very much better quality of service than many of these utility companies had in the past been willing, without efficient regulation, to accord. The underlying thought was that, in almost every case, the ultimate sufferer from unrestrained competition between public utilities was, necessarily, the public itself. Experience has demonstrated that competing companies, operating in a single field, were never likely to achieve such secure financial standings as to enable them, collectively, to give as good service as a single well-regulated monopoly, which was kept up to the mark by efficient state regulation, would be in a position to supply. The safeguard, of course, in all such cases —the justification for this seeming approval of the monopolistic idea—lay in the fact that, along with the power to establish a virtual monopoly, the Commission was given the power to compel these monopolies to serve the public more faithfully than had generally been the practice before the passage of the law.

"Since the Public Service Commissions law has been on the statute books the Commissions have frequently exercised their new powers to protect existing utility companies against competition, which, if permitted, would have been ruinous to both com-

petitors. They have at the same time endeavored to exercise their regulatory powers to the fullest extent consistent with the other duty imposed upon them—the duty of permitting private capital invested in utility enterprises to earn a fair return upon the investment. On the whole it may be said that the results have justified the hopes which were entertained for this new attitude on the part of the state, toward competition between public utilities, and that the state has profited by its adoption."

Re T. S. Ashmead, *et al.*, P. U. R. 1916-D, 10.

Without further discussion and for the reasons hereinabove stated, the certificates of public convenience and necessity applied for herein in said Applications Nos. 252 and 253, will be denied.

ORDER.

IT IS, THEREFORE, HEREBY ORDERED, That the application of W. H. Rhoads, doing business as the Rhoads Truck Line, Application No. 252, and the application of Henry C. Davis and Harry D. Davis, doing business under the firm name of Davis Brothers, Application No. 253, for certificates of public convenience and necessity for the operation of a motor truck freight line between Grand Junction and Montrose, in Application No. 252, and between Grand Junction, Delta, Hotchkiss, Paonia and Bowie, in Application No. 253, be, and the same are, hereby denied.

THE PUEBLO COMMERCE CLUB

v.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, *et al.*

[Case No. 251. Decision No. 660.]

Rates—Competitive points—Equalization—Increasing distance—Effect.

1. The rates from competitive cities should equalize or come together at some substantial distance from either city, and, as the haul lengthens the difference in distance becomes of relatively less importance.

Rates—Distance—Traffic conditions—Competition.

2. Distance alone is not controlling in fixing rates. Traffic conditions, competitive conditions and distance have all received recognition.

Rates—Distance—Class traffic—Equalization.

3. Distance generally controls on class traffic for hauls of 350 miles or less, when conditions are substantially the same.

Rates—Competitive points—Equalization—Lack of reasonable spread.

4. Denver & Rio Grande Western justified in meeting the rates of the Colorado & Southern at Leadville, even though a reasonable spread does not exist between the Denver and Pueblo rates at that point.

Rates—Scale—State of Colorado—Diversity of conditions.

5. It is not practicable to have a single distance scale for the entire State of Colorado because of the diversity of conditions in the eastern and western portions of the State.

Rates—Relief—All parties entitled not before Commission—Effect.

6. A commission is not required to deny relief to one shipper or in one locality merely because others not before it are also entitled to relief.

Rates—Colorado common points—Clark scale.

7. Rates between Denver and Pueblo and other Colorado common points based on the Clark scale plus 15 per cent.

Class rates prescribed on "intrastate hauls between Denver and Pueblo and stations on the Denver & Rio Grande Western Railroad and the Colorado & Southern Railway; all intrastate hauls within the State of Colorado on the Atchison, Topeka & Santa Fe Railway between Denver and Pueblo and all intermediate points; between Denver, Pueblo and stations on the line from Pueblo to Canon City, inclusive; and between Denver and Pueblo and stations on the line from Timpas to Trinidad."

Rates to and from Colorado Springs directed to be revised in harmony with basic principles found applicable to rates to and from Pueblo.

[November 20, 1923.]

Appearances: Mr. Clifford Thorne for the Complainant, The Pueblo Commerce Club; Mr. E. N. Clark, Mr. J. H. Gallaher and Mr. George Williams for The Denver & Rio Grande Western Railroad Company, Defendant; Mr. J. Q. Dier and Mr. J. E. Buckingham for The Colorado & Southern Railway Company; Mr. Erl H. Ellis and Mr. R. G. Merrick for The Atchison, Topeka & Santa Fe Railway Company, Defendant; Mr. Harry Dickinson for the Intervener, The Transportation Bureau of The Denver Civic & Commercial Association; Mr. E. E. Jackson, Intervener for The Chamber of Commerce of Colorado Springs, Colorado.

STATEMENT.

By the **Commission**: This case involves the class rates from Denver and Pueblo to certain points in Colorado on three of the principal railroads in this State. It is the first case ever heard or determined by this Commission involving the subject of class rates on Colorado state traffic.

We shall have occasion to refer to the decisions of other commissions functioning under somewhat similar statutory provisions where similar issues have been considered.

The Pueblo Commerce Club is the complainant. This is an organization of several hundred manufacturers, jobbers and other business men of Pueblo.

The Chamber of Commerce of Colorado Springs intervened in the case sustaining the position taken by Pueblo. The Denver Transportation Bureau intervened in behalf of the Denver interests.

The railroads and the specific territory at issue covered by the complaint is as follows:

All intrastate hauls between points within the State of Colorado between Denver and Pueblo and stations on the Denver & Rio Grande Western Railroad and the Colorado & Southern Railway; all intrastate hauls within the State of Colorado on the Atchison, Topeka & Santa Fe Railway between Denver and Pueblo and all intermediate points; between Denver, Pueblo and stations on the line from Pueblo to Canon City, inclusive; and between Denver and Pueblo and stations on the line from Timpas to Trinidad, inclusive.

The record is very voluminous, but we do not deem it necessary to review many of the details in controversy. We shall state only the salient facts.

Denver and Pueblo are the first and second largest cities, respectively, in Colorado, and are approximately one hundred nineteen miles apart via the short line. The great bulk of the traffic from Pueblo to the north, northeast and northwest passes through Denver, and *vice versa* the great bulk of the traffic from Denver to the south, southeast and southwest passes through Pueblo.

On this traffic the transportation conditions affecting the traffic from Denver are substantially the same as from Pueblo to same points of destination, save for the additional one hundred nineteen mile haul in either direction. This presents the pivotal question in the case: What is a fair, reasonable allowance for the additional haul of one hundred nineteen miles? Notwithstanding the similarity in conditions, we find a remarkable variation in the rate structure. Where the hauls are one hundred nineteen miles longer from Pueblo the additional charge of Pueblo over Denver is generally fifty per cent or more in excess of what the Denver merchant pays in the reverse direction where the haul is one hundred nineteen miles longer from Denver. In some cases this excess charge paid by the jobbers and manufacturers of Pueblo over those of Denver amounts to several hundred per cent, although the service is the same. In a large portion of the State where the haul is one hundred nineteen miles longer from Denver than from Pueblo, the rates are the same from both cities, notwithstanding the very substantial difference in the service rendered.

The distance at which the rates from Denver and Pueblo equalize on traffic to the northwest, north, northeast, east, southeast and south via all the railroads serving these cities is from three to five times as far as the equalization to the southwest on the Denver & Rio Grande Western.

The rates from Denver to Colorado Springs are the same as those from Pueblo to Colorado Springs, although the distance from Denver is more than 60 per cent greater than from Pueblo and the grades are much heavier from Denver than Pueblo.

There is an amazing variation in the relationships between the classes on the traffic issue. There are no facts of record sufficient to justify these inconsistencies which we have stated.

That the present class rate structure in Colorado is unjust and unreasonable was frankly conceded by one of the leading witnesses for the defendants, the general freight agent for the Atchison, Topeka & Santa Fe Railway. The witness testified: "There is no sense in the adjustment that we have now." Speaking of the basis on which these Colorado rates have been con-

structed, he stated on the witness stand: "I told you I did not say that was reasonable. I would say today that is foolish, to use that as a basis for the rates, but we did that." Further he testified: "There is no defense or reasonableness to our present rates."

A representative for the Colorado & Southern candidly admitted he did not know of any differences in conditions warranting the differences in charges on his road, and offered to correct the situation, so far as his company was concerned, north of Denver in a manner that was acceptable to Pueblo.

The witness appearing for Denver interests agreed that substantial equality in the rate structure should be established for both Denver and Pueblo. He took the position that the rates from Denver and Pueblo should come together at substantially the same distance in all directions; that is, Denver's advantage in rates where she has the advantage in distance should extend no farther than Pueblo's advantage extends in the opposite direction; and, in brief, counsel for Denver conceded that the differentials of one city over the other should correspond for similar hauls. To this extent there was substantial accord between the competitive cities. The Denver & Rio Grande Western denied any injustice existed in the present rate structure, and stoutly resisted any modifications or changes except on a few matters of a very minor character.

We are of the opinion that the position taken by the City of Denver and by the Denver & Rio Grande Western, that the rates between competitive cities should equalize or come together at some substantial distance from either city, is correct. This proposition is not denied by the representatives of Pueblo. As the haul lengthens the distance between the cities becomes of relatively less importance. Denver asks that this equalization point shall be within approximately one hundred miles, but her representative at the hearing expressed entire willingness to leave the determination of that distance to the Commission.

Many of these Colorado rates have been constructed with but little regard to distance. In other states, and on interstate traffic, we find the situation quite different. Class rates have been

established on the distance basis in the states of Illinois, Iowa, Wisconsin, Nebraska, Kansas, Oklahoma, Texas, Arkansas and many other states. In the east the class rates between points in Central Freight Association territory have been placed on the distance basis, regardless of the protests from those who were profiting by group adjustments. The rates from interior Iowa points to the east were adjusted in a similar manner. The rates from interior Iowa to Nebraska points, the rates from the Missouri River to Nebraska points and the rates from Denver and Pueblo to Kansas and Nebraska points have been established on mileage scales. It has been customary to group certain competitive cities; for example, the Mississippi River crossings from Saint Louis to Dubuque, inclusive, are grouped together on long haul traffic to and from the east and to and from the west; but on short haul traffic between these same points and stations in Iowa and Missouri distance schedules prevail, and on traffic within five hundred miles to the east distance also controls. In the same manner the Missouri River crossings are equalized on long haul traffic to and from the west and to and from the east; but on short haul traffic within five hundred miles to the west and to and from points in Iowa and Missouri west of the Mississippi River (the average distance between the rivers being three hundred twenty-five miles) the rates are not equalized, but are on the distance basis.

Distance alone is not controlling. It will be noted that traffic conditions, competitive conditions and distance have all received recognition in the development of the rate structure from the Atlantic seaboard to the Colorado line, as outlined above. Cities have been equalized on long haul traffic (generally for distances of three hundred fifty or five hundred miles and more) and long lines, within certain limits, have met short line competition. In this way competitive conditions have been recognized. Second, the scales of rates in the different territories have varied to meet the just requirements of traffic conditions. The level of class rates, for example, between Colorado common points and stations in Kansas and Nebraska, is higher than between Missouri River crossings and stations in Nebraska; and the latter rates,

in turn, are higher than those in Central Freight Association territory. And, lastly, on class traffic for hauls of three hundred fifty miles or less, when conditions were substantially the same, distance has generally controlled.

The distances at which rates are equalized in this immediate locality are as follows:

First class rates on traffic originating at Denver and Pueblo when destined to points in the northwest equalize at five hundred one miles from Denver (six hundred twenty miles from Pueblo); when destined to the north, the rates equalize at six hundred twenty-seven miles from Denver (or seven hundred forty-six miles from Pueblo); when destined to the east on the Chicago, Burlington & Quincy Railroad in Nebraska, the rates equalize at approximately three hundred thirty-nine miles from Denver, and on the Union Pacific in Nebraska at three hundred forty-six miles; when destined to the east on the Missouri Pacific in Kansas, the rates equalize at three hundred fifty-two miles from Pueblo; when destined to the east in Kansas on the Atchison, Topeka & Santa Fe Railway the rates formerly equalized at a much shorter distance, but by order of the Interstate Commerce Commission the rates were made to equalize at approximately three hundred fifty miles from Pueblo; when destined to the south on the Atchison, Topeka & Santa Fe, the rates equalize at four hundred five miles from Pueblo. There is some slight variation in the equalization on the lower classes, but the foregoing may be accepted as fairly representative.

These facts as to the placing of short haul class rates on the distance basis from the Atlantic seaboard clear up to the Colorado line, and in all other directions around Denver and Pueblo, are in striking contrast to the situation on the Denver & Rio Grande Western in the southwestern portion of Colorado, where the rates equalize at approximately one hundred fourteen miles from Pueblo. It is our opinion that the Denver & Rio Grande Western fails to give proper recognition to the relative service accorded Denver and Pueblo on this traffic to the southwest.

The development of business on an unfair group adjustment has not prevented the correction of the situation by the action

of the Interstate Commerce Commission adopting a scale of rates based on distance, thereby fairly reflecting the relative service performed. For example, in the Central Freight Association Class Scale Case, 45 I. C. C., 254-256, the Commission said:

"Particularly pronounced are the objections to the proposed rates on the part of localities which now enjoy rates designed to relieve them of some of their disadvantages of location, and which are here called upon to pay rates made with a greater regard for distance and transportation conditions generally."

Nevertheless the distance scale was adopted. In the case involving milk and cream rates to New York City, 45 I. C. C., 412, the Interstate Commerce Commission said:

"The New York dealers are entitled to reasonable charges, which means that the charges must be no higher than reasonable from all points. A basis which imposes comparatively high rates for short distances and comparatively low rates for long distances can not be sustained on the ground that the business had developed thereunder and has become adjusted thereto." (Item page 429.)

The time has arrived for the recognition in Colorado of these principles, based upon equity and justice, which have been so generally recognized elsewhere. However, there is one basic factor distinguishing Colorado from many of the other states. The division of the state between the western mountainous section, with the very expensive construction and operation, and the eastern prairie section renders it impossible to adopt a single distance scale for the entire State.

The scale now in effect between Missouri River cities and points in Nebraska (to which we shall refer as the Clark Scale), plus 15 per cent, has been proposed in this proceeding as applicable between Colorado common points. The Interstate Commerce Commission and the railroads have this same scale from Colorado common points to points in western Kansas and Nebraska. Without this 15 per cent addition this scale was ordered by the Interstate Commerce Commission and accepted by the railroads on traffic from the Missouri River crossings to stations in Nebraska. The traffic density (tons hauled one mile, per mile of line) in

these states was found by the commission to be as follows: In Colorado, 671,515; in Nebraska, 617,584; and in Kansas, 756,577. The density in Colorado exceeds that in Nebraska and is within 15 per cent of that in Kansas. (Public Utilities Commission of Colorado v. R. R. Co., 52 I. C. C. 439-451.)

The Colorado & Southern has consented, on the record, to the application of the differentials in the Arkansas Valley as applicable to its line north of Denver. We shall give our approval to their adjustment.

The situation beyond Leadville presents an issue concerning which there is a marked conflict of claims by the parties to the proceeding. On the other hand, it is urged that Pueblo must meet the competition of the Colorado & Southern at Leadville, the latter being the shorter line; and that beyond Leadville the rate of progression should be no less on the Denver & Rio Grande Western on shipments from Pueblo than on the Denver & Rio Grande Western on shipments from Denver. On the other hand, it is urged that there is no genuine competition beyond Leadville from the Colorado & Southern, and that the rates should be advanced on shipments from Denver as rapidly as possible until the normal spread between the Pueblo and Denver rates is restored. The record shows that portion of the Colorado & Southern to be a narrow gauge, and that the cost of transfer from the Colorado & Southern to the Denver & Rio Grande Western on shipments from Denver through Leadville to points beyond is of such character as to render through shipments very expensive.

It has been suggested, as stated above, that it would create an unjust discrimination to have the rate of progression beyond Leadville increase more rapidly from one city than from the other. If that doctrine were sound, then the rates from two different points of origin could never be equalized and the rates from Denver would not become the same as from Pueblo at any point. The acceleration of the rate of progression from one point of origin compared to the other, suggested herein on the traffic beyond Leadville, is well illustrated on this record by the situation south of Trinidad, as shown in the testimony of both

Mr. Merrick, for the Atchison, Topeka & Santa Fe, and in the testimony of Mr. Ellis, for the City of Pueblo. The spread between Denver and Pueblo at Trinidad is 28 cents. This is because of competition at that point; but if you go beyond Trinidad to Raton and points south thereof, this competition being eliminated, the spread gets back to normal, or approximately 40 cents per hundred pounds. This restoration of the larger spread is accomplished by advancing Denver rates more rapidly than the Pueblo rates increase.

We find that there is a justification for the Denver & Rio Grande Western meeting the rates of the Colorado & Southern at Leadville, and the establishment of such a competitive rate is justified, even though a reasonable spread does not exist between the Denver and Pueblo rates at that point.

We further find that there is not a justification for the maintenance of this equalization on shipments beyond Leadville, but that the Denver rates should be advanced as rapidly as the combination of locals on Leadville, and the interstate rates beyond as maxima, will permit until the proper spread between the Denver and Pueblo rates is restored, as indicated by the scale herein, entitled the "Denver-Pueblo 1st class differentials," with the maintenance of the concurrent percentage relationships on the lower classes existing today in the rates to the same points of destination on shipments originating at Denver. This result will automatically follow from the application of the conclusions hereinafter stated.

As previously stated, it is not practicable to have a single distance scale for the entire state of Colorado because of the diversity of conditions in the eastern and western portions of the State. However, it is proper and right that there shall be a fair recognition of the relative service performed. To meet this rather unique situation in Colorado, the use of differentials representing the one hundred nineteen mile haul between Denver and Pueblo has been proposed. This method will accept the voluntary rates from Denver as the basic factor, and from them the Pueblo rates will be constructed, giving due regard to the difference in the service from the said cities. Business men should

pay the costs of service rendered. On the other hand, there are some who would adopt a single mileage scale of rates for all traffic in the United States, basing everything on distance regardless of conditions. We must give proper regard to the relative distance hauled and the other conditions surrounding the traffic at issue.

Defendants place great reliance upon the decision of the Interstate Commerce Commission in Pueblo Commerce Club v. Denver & Rio Grande R. R. Co., 31 I. C. C., 133, involving class rates from Denver and Pueblo to Durango, Colorado, hereinafter referred to as the Durango Case. The hauls to Durango pass out of the State and then back into Colorado. The Interstate Commerce Commission held that equalization at Durango did not create an unjust discrimination. The complainants point out the following fundamental facts distinguishing the Durango Case, *supra*, from the present proceeding:

The distance from Pueblo to Durango is three hundred thirty-three miles and, consequently, the case did not involve the differentials or the question of equalization for shorter hauls, whereas those issues are directly presented on this record. The Durango Case did not involve the issue of reasonableness *per se (ibid.* 134, 136) while that issue is raised in the present proceeding. Regardless of these basic distinguishing features, the Durango Case involved interstate commerce, was decided by the Interstate Commerce Commission, and where the issue of discrimination against interstate commerce is not involved a decision by the Interstate Commerce Commission is not controlling on this Commission. There are principles stated in the Durango Case which, if applied to the facts as we find them in this proceeding, would compel the adoption of the conclusions we have reached.

Defendants have urged that no relief should be granted any city until all the railroads and all the cities in Colorado have had a chance to be heard. If no court or commission could make an order granting relief to parties in a proceeding before it until all other persons having a like grievance were brought into court, the time necessarily consumed in handling such matters would be increased to an intolerable extent and many abuses might

never be corrected. A commission is not required to deny relief to one shipper or one locality because others are also entitled to relief.

Milburn Wagon Co. v. Lake Shore & Michigan Southern Ry. et al., 22 I. C. C., 93-100.

Indianapolis Freight Bureau v. C. C. C. & St. L., et al., 16 I. C. C., 56-71.

New Orleans Board of Trade v. L. & N. R., et al., 23 I. C. C., 429-431.

The development of an equitable rate structure in this country has been a gradual process, extending relief where needed as rapidly as the facts could be established in a reasonable and proper manner before the tribunal having jurisdiction.

CONCLUSIONS.

In view of all the evidence before us, we find and conclude as follows:

1. The class rates at issue from Denver and Pueblo should equalize at substantially the same distance from either city.

2. Where the traffic moves through both cities, the differences in the rates of Denver over Pueblo (where Pueblo has the shorter haul) and of Pueblo over Denver (where Denver has the shorter haul) should be substantially the same for similar hauls.

3. We find the Clark Scale, as herein defined, plus 15 per cent, to be a reasonable maximum scale of freight rates on class traffic via the defendant carriers between Denver, also Pueblo, and stations known as Colorado common points; namely, Denver, Colorado Springs, Pueblo, Walsenburg, Trinidad and points intermediate at issue in this case.

4. We find that a reasonable maximum scale of freight rates on first class traffic from Pueblo to points north of Denver on the Colorado & Southern Railway shall be the present rates from Denver on first class to the said points, plus the amounts by which the Denver rates exceed the Pueblo rates for similar lengths of haul to points in the Arkansas Valley located on the Atchison, Topeka & Santa Fe Railway. The rates on the lower classes from Pueblo to each of the said points on the Colorado &

Southern Railway shall be constructed by applying the same percentages to the said first class rates from Pueblo as represents the present relationship between the corresponding classes from Denver to the same points on the Colorado & Southern Railway.

5. We find that a reasonable maximum scale of first class freight rates on Colorado intrastate traffic, subject to the jurisdiction of this Commission, from Pueblo to points on the Denver & Rio Grande Western Railroad and on the Atchison, Topeka & Santa Fe Railway west and southwest of Pueblo, so far as the same has not been specifically covered above, shall be the concurrent first class rates from Denver less the Denver-Pueblo first class differentials, as stated in the following table, corresponding to the distances the said points are from Pueblo.

Spread between Denver and Pueblo rates on first class (described in this decision on the "Pueblo-Denver 1st class differentials"):

Distance from Pueblo (Distances are inclusive)	Differentials in cents per 100 lbs.	Distance from Pueblo (miles)	Differentials in cents per 100 lbs.	Distance from Pueblo (miles)	Differentials in cents per 100 lbs.
Less than 10 miles....	42	120 to 129	30	240 to 249	16
10 to 19 miles.....	41	130 to 139	29	250 to 259	14½
20 to 29 miles.....	40	140 to 149	28	260 to 269	13
30 to 39 miles.....	39	150 to 159	27	270 to 279	11½
40 to 49 miles.....	38	160 to 169	26	280 to 289	10
50 to 59 miles.....	37	170 to 179	25	290 to 299	8½
60 to 69 miles.....	36	180 to 189	24	300 to 309	7
70 to 79 miles.....	35	190 to 199	23	310 to 319	5½
80 to 89 miles.....	34	200 to 209	22	320 to 329	4
90 to 99 miles.....	33	210 to 219	20½	330 miles	0
100 to 109 miles.....	32	220 to 229	19		
110 to 119 miles.....	31	230 to 239	17½		

This scale adopts the spread, using the Clark Scale plus 15 per cent, for hauls up to ten miles; and the rates will equalize at three hundred thirty-three miles from Pueblo.

The rates in the lower classes from Pueblo to each of the said points west and southwest of Pueblo shall be constructed by applying the same percentages to the aforesaid first class rates from Pueblo, as represents the concurrent relationships between the corresponding class traffic from Denver to the same points.

In complying with the requirements of this section the carriers may reduce the rates from Pueblo sufficient to produce the required spread between the rates from Pueblo and Denver, or the carriers may advance the Denver rates in part and reduce the Pueblo rates sufficient to produce the requisite spread; on the condition, however, that there shall be no substantial increase in the revenues, in the aggregate, derived from the Denver and Pueblo traffic due to the said rate changes. This proviso clause is added so as to permit the carriers, if they so desire, to protect their existing revenues in the southwest, where the cost of construction and operation is heavy. Nothing herein shall be interpreted as passing upon the adequacy or inadequacy of railroad revenues as a whole in Colorado.

6. In the construction of the rates from Pueblo, as described in the preceding paragraphs, numbers 1 to 5 inclusive, in all cases the carriers shall observe the combinations of locals as maxima; the carriers shall also observe the interstate rates to more distant points on the same lines of railroad to the west and south as maxima for intermediate stations; and the carriers shall be permitted to meet short line competition at any point where two or more lines may meet; provided, however, that the full Pueblo-Denver differentials as herein prescribed shall be observed, except as the same may be modified by the said maxima or the meeting of short line competition as herein authorized. The rates herein prescribed from Denver and Pueblo shall also apply in the opposite direction, to Denver and Pueblo, respectively.

This case involves the rates to and from Pueblo and Denver only, but the record indicates that there are other injustices of like character affecting certain other cities. This has been shown especially as to Colorado Springs, the business men of which intervened in the case. We will expect the Colorado railway companies to revise their rates affecting Colorado Springs in harmony with the same basic principles which we have found applicable to the rates to and from the City of Pueblo. We shall not announce a final decision at this time affecting Colorado Springs but, in view of the fact that Colorado Springs has ap-

pealed to this Commission, unless the carriers voluntarily revise the said rates within a reasonable time, this Commission, on its own initiative, will set the matter down for hearing and appropriate order in the premises.

ORDER.

IT IS THEREFORE ORDERED By the Commission that the defendants are hereby ordered to revise their tariffs in conformity with the conclusions and findings herein within thirty days of the date hereof.

[December 5, 1923.]

Halderman, Chairman: The above case was heard at the City Hall in Pueblo in the month of July, 1922. After the same had been transcribed the parties to it filed briefs in support of their respective contentions. Thereafter, and in and about December, 1922, the case was assigned to Mr. Commissioner Lannon to prepare a tentative decision and order. In June, 1923, such tentative decision and order was handed to me by Commissioner Lannon, and after carefully and painstakingly reading and considering the same I was unable to concur, and so advised. At that time Mr. Commissioner Scott was ill and confined to his home, and upon the urgent request of Mr. Frank S. Hoag and Mr. R. L. Ellis, as representatives of the complainant, I was importuned to prepare a tentative decision and order along such lines as I deemed fair and just under the evidence submitted. I did so, and shortly after July 4, 1923, I caused to be delivered to Mr. Commissioner Scott a copy of the Lannon order and my order, with the understanding that Mr. Commissioner Scott, upon further consideration of the Commission, should sign whichever of the orders he so desired.

The occasion of haste seemed thereby to be dispelled, or at any rate I heard nothing further of it until the morning of November 21, 1923, when I was advised by the Denver morning papers that the Lannon decision and order, so called, had been issued and served on the afternoon of November 20, 1923.

As above indicated, I had no knowledge nor notice of the issuance of this decision and order, important as it is to the busi-

ness interests of this state and to the consuming public, until I read of it in the Denver morning papers of November 21; otherwise, and had I been accorded the usual courtesy, I would have appended a short dissent to the original order instead of being compelled to send this dissent by separate mail, and some days later.

I have no greater sympathy with the justness or correctness of the decision and order issued by the majority of this Commission, as above stated, now than I had in June, 1923. I deem it to be wrong in principle, unjust and discriminatory, and will not remedy the wrongs that have heretofore existed in the class rates from the principal cities involved in this proceeding.

Lack of time prevents a further discussion of the basis upon which I dissent from the majority decision if this dissent shall be promulgated within a reasonable time from the issuance and service of the majority order. At some future time it is my expectation to set forth more in detail and at length the reasons that have appealed to my intelligence as the ground of my inability to concur in the majority opinion, had I been given the opportunity so to do.

[December 19, 1923.]

Appearances: Mr. Clifford Thorne for the Complainant, The Pueblo Commerce Club; Mr. E. N. Clark, Mr. J. H. Gallaher and Mr. George Williams for The Denver & Rio Grande Western Railroad Company, Defendant; Mr. J. Q. Dier and Mr. J. E. Buckingham for The Colorado & Southern Railway Company; Mr. Erl H. Ellis and Mr. R. G. Merrick for The Atchison, Topeka & Santa Fe Railway Company, Defendant; Mr. Harry Dickinson for the Intervener, The Transportation Bureau of The Denver Civic & Commercial Association; Mr. E. E. Jackson, Intervener for The Chamber of Commerce of Colorado Springs, Colorado.

SUPPLEMENTAL TO DECISION NO. 660.

By the **Commission**: The Commission's order, upon application by one of the defendants, The Denver & Rio Grande West-

ern Railroad Company, and by consent of the complainant, The Pueblo Commerce Club, is hereby modified without rehearing as follows:

In paragraph five (5) of "Conclusions" of the original order the following sentence is hereby added to and made part thereof:

"The application of the differentials prescribed in this paragraph need not be maintained on the line of The Denver & Rio Grande Western Railroad Company at the stations of Olathe, Grand Junction and intermediate points, and at points on the North Fork Branch from Delta to Somerset, inclusive."

Paragraph six (6) of "Conclusions" in original order is hereby amended by the addition of the following sentence:

"Where the application of the prescribed differential results in lower rates to farther distant points on the same line the carriers may observe rates at the intermediate points as maxima to such farther distant points."

Defendants herein will be authorized and required to establish revised schedule in accordance with conclusions herein and to make said schedule effective contemporaneously with the effective date of the original order in this case.

Owing to showing made by defendants herein, it is hereby ordered that the effective date of the original order in this case is hereby extended to January 20, 1924.

By the **Commission**: The Commission's order, upon application by one of the defendants, The Colorado & Southern Railway Company, in order to avoid any long and short haul complications that might arise in carrying out the original order pertaining to rates to points on this line north of Denver, Colorado, is hereby modified without rehearing as follows:

In paragraph four (4) of "Conclusions" of original order, in lieu of first-class rates from Pueblo to points north of Denver on The Colorado & Southern Railway, as prescribed in this paragraph, first-class rates shall be as follows:

From Pueblo, Colorado, to	Rates in cents per 100 pounds
Utah Junction to Semper, inc.	85
Standley Lake Spur to Burns Jct., inc.	87
Coalton to Burke's Spur, inc.	89
Inland Oil Ref. Spur, Lakeside, Goodview	91
Superior and Monarch	89
Marshall	91
State University to Loomis, inc.	93
Niwot to Minion, inc.	95
Longmont and Boettcher's	96
Morey to Berthoud, inc.	98
Campion to Greeley, inc.	99
Glover	99
La Porte to Roberts Spur, inc.	101
Ingleside and Limrock	104
Plummers to Wellington, inc.	101
Waverly to Bulger, inc.	104
Claybank to Crouse, inc	107

Rates on lower classes from Pueblo to each of said points on The Colorado & Southern Railway shall be constructed as provided for in the original order.

Both the defendant and the complainant concur in this modification.

Defendants herein are hereby authorized and required to establish revised schedule in accordance with our conclusions herein and to make said schedule effective January 20, 1924, as heretofore provided.

[January 16, 1924]

Appearances: Mr. Clifford Thorne for the Complainant, The Pueblo Commerce Club; Mr. E. N. Clark, Mr. J. H. Gallaher and Mr. George Williams for The Denver & Rio Grande Western Railroad Company, Defendant; Mr. J. Q. Dier and Mr. J. E. Buckingham for The Colorado & Southern Railway Company; Mr. Erl H. Ellis and Mr. R. G. Merrick for The Atchison, Topeka & Santa Fe Railway Company, Defendant; Mr. Harry Dickinson for the Intervener, The Transportation Bureau of

The Denver Civic & Commercial Association; Mr. E. E. Jackson, Intervener for The Chamber of Commerce of Colorado Springs, Colorado.

SUPPLEMENTAL TO DECISION NO. 660.

By the **Commission**: The Commission's order of November 20, 1923, upon application by one of the defendants, namely, The Colorado & Southern Railway Company, and by consent of the complainant, The Pueblo Commerce Club, is hereby further supplemented and modified without rehearing. Owing to the competitive conditions and peculiar adjustment of rates north of Denver on the Colorado & Southern Railway, the Commission has found it expedient to name all the class rates from Pueblo to all points north of Denver on said line affected by our original order rather than a specific basis for arriving at the rates.

By agreement between the complainant and The Colorado & Southern Railway Company, class rates from Pueblo to points north of Denver on the Colorado & Southern Railway shall be as follows, to-wit:

FROM PUEBLO

TO	1	2	3	4	5	A	B	C	D	E
Utah Junction to Semper, inc.	81	68½	57½	48½	43	40½	28	24	20½	17
Standley Lake to Burns Jct., inc.	81	68½	57½	48½	43	40½	28	24	20½	17
Coalton to Lafayette, inc.	81	68½	57½	48½	44½	40½	29½	24½	21	18½
Burke's Spur, Inland Oil Ref. Spur, Lakeside and Goodview	81	68½	57½	48½	44½	40½	29½	24½	21	18½
Superior to Marshall, inc.	81	68½	57½	48½	44½	40½	29½	24½	21	18½
State University and Boulder	81	68½	57½	48½	44½	40½	30½	26	23	20½
Ara to Downer, inc.	85	70	57½	48½	45½	40½	33½	27½	23	20½
Minion to Highlands, inc.	88	71½	59½	48½	45½	40½	35	29½	24½	21
Fife to Thompson, inc.	93	76	62½	50½	47½	44½	38½	30½	26	22½
Loveland	94	78	64	52	50	48½	39½	30½	27½	22½
Rist and Wild's Spur, inc.	96	79	65½	53½	50	48½	39½	30½	27½	22½
Neville Spur to McClellands, inc.	97	81	67	53½	50	48½	39½	30½	27½	22½
Drakes and Fort Collins to Greeley, inc.	100½	85	73	55	53½	52	43	33½	30½	22½
Glover to Bellevue, inc.	100½	85	73	55	53½	52	43	33½	30½	22½
Grave's Spur to Roberts Spur, inc.	106	91½	79	58½	57½	55	43	33½	30½	22½
Ingleside and Limrock	106	91½	79	58½	57½	55	43	33½	30½	22½
Plummers to Woods, inc.	100½	85	73	55	53½	52	43	33½	30½	22½
Kluver to Wellington, inc.	100½	85	73	55	53½	52	43	33½	30½	22½
Waverly	109½	94	79	58½	57½	56½	44½	35	32½	22½
Dixon	106	91½	79	58½	57½	55	43	33½	30½	22½
Gravelton to Bulger	109½	94	79	58½	57½	61	44½	35	32½	22½
Claybank to Crouse	109½	94	79	65½	57½	61	44½	35	32½	22½

In conformity with our findings herein, paragraph four (4) of the "Conclusions" in our original order dated November 20, 1923, is hereby made void. The rates named above shall become effective in lieu thereof, and The Colorado & Southern Railway Company is hereby authorized and required to establish and put into effect said rates and to make such schedule effective January 20, 1924, as heretofore provided.

[December 19, 1923.]

SUPPLEMENTAL ORDER.

By the **Commission**: The Commission's order, upon application by one of the defendants, The Denver & Rio Grande Western Railroad Company, and by consent of the complainant, The Pueblo Commerce Club, is hereby modified without rehearing as follows:

In paragraph five (5) of "Conclusions" of the original order the following sentence is hereby added to and made part thereof:

"The application of the differentials prescribed in this paragraph need not be maintained on the line of The Denver & Rio Grande Western Railroad Company at the stations of Olathe, Grand Junction and intermediate points, and at points on the North Fork Branch from Delta to Somerset, inclusive."

Paragraph six (6) of "Conclusions" in original order is hereby amended by the addition of the following sentence:

"Where the application of the prescribed differential results in lower rates to farther distant points on the same line the carriers may observe rates at the intermediate points as maxima to such farther distant points."

Defendants herein will be authorized and required to establish revised schedule in accordance with conclusions herein and to make said schedule effective contemporaneously with the effective date of the original order in this case.

Owing to showing made by defendants herein, it is hereby ordered that the effective date of the original order in this case is hereby extended to January 20, 1924.

THE NUCKOLLS PACKING COMPANY

v.

THE ATCHISON, TOPEKA & SANTA FE, *et al.*

[Case No. 266. Decision No. 678.]

Rates—Interstate and intrastate classification of barrels—Identical rates on hauls varying 387 and 391 miles—Discrimination.

1. Unwarranted discrimination results from classifying barrels moving intrastate as 4th class, and interstate as Class D, and charging same rate to a Colorado point as to points 387 and 391 miles beyond.

Rates—Unfair classification—Consideration by railroad committee—Delay in correction by Commission.

2. That the Western Trunk Line Committee has recommended a cancellation of Class D rating and the substitution of fourth class rating is no ground for not removing discrimination now resulting from application of former to interstate and the latter to intrastate shipments.

[March 4, 1924.]

Appearances: R. L. Ellis, Esq., of Pueblo, Colorado, for Complainant and Intervener, the Pueblo Commerce Club; J. A. Gallaher and W. M. Carey for Defendants, The Denver & Rio Grande Western Railroad Company and The Denver & Rio Grande Railroad Company, Alexander R. Baldwin, Receiver; Erl H. Ellis for Defendant, The Atchison, Topeka & Santa Fe Railway Company.

STATEMENT.

By the **Commission**: Complainant, a corporation, by complaint filed March 10, 1923, alleges that the rate charged on wooden barrels in carload lots, applying between Denver, Colorado, and Pueblo, Colorado, on June 20, 1921, and subsequent to that date was and is unreasonable and unjustly discriminatory.

The Commission is asked to award reparation on one carload of barrels which moved from Denver to Pueblo, Colorado, in June, 1921, and to prescribe a just and reasonable rate for the future.

The shipment, which originated at Denver, Colorado, on June 20, 1921, weighed 27,100 pounds, and charges were collected at

the applicable fourth class rate of 50½ cents per one hundred pounds.

At the time of movement of shipment complained of the applicable rate on wooden barrels in carload lots in territory adjacent and to the east of Pueblo, Denver, Colorado Springs and Trinidad, and also eastward from these points as far as the Michigan and Indiana state line, was the class "D" rate, minimum 14,000 pounds. Class "D" rate also applied on the line of The Colorado & Southern Railway between all stations Denver and north, and on the line of The Colorado & Southern Railway in Wyoming. The following table taken from complainant's exhibit compares the rates charged with rates on the same commodity with distances approximately equal to that between Denver and Pueblo:

RATES ON WOODEN BARRELS IN CARLOAD LOTS

Rates in Cents Per Cwt.

FROM	TO	Route	Miles	Rate 6-20-21	Present Rate	Rate Claimed Reasonable 6-20-21	Rate Claimed Reasonable Present	Class Rates in Effect at Present 4th	Class Rates in Effect at Present D.
Denver, Colo.	Pueblo, Colo.	D&RGW ..	119	*50½	*45½	19	17	45½	17
Denver, Colo.	Pueblo, Colo.	C&S	117	*50½	*45½	19	17	45½	17
Denver, Colo.	Pueblo, Colo.	AT&SF ...	117	*50½	*45½	19	17	45½	17
Denver, Colo.	Cheyenne, Wyo.	C&S	120	†22½	†20½			45½	20½
Denver, Colo.	Flagler, Colo.	CRI&P ...	123	†25½	†23			39½	23
Denver, Colo.	Otis, Colo.	CB&Q	126	†27½	†24½			41½	24½
Denver, Colo.	Aroya, Colo.	Un. Pac...	122	†23½	†21			39½	21
Pueblo, Colo.	Morse, Colo.	AT&SF ...	122	†25½	†23			52	23
Pueblo, Colo.	Diston, Colo.	Mo. Pac...	118	†26½	†24			47½	24
Colorado Springs, Colo.	Seibert, Colo.	CRI&P ...	123	†27½	†24½			44½	24½
Trinidad, Colo.	Caddoa, Colo.	AT&SF ...	126	†25½	†23			55	23

*4th class rates, minimum 12,000 lbs.
†Class D rates, minimum 14,000 lbs.

Complainant also shows the following comparisons:

FROM	TO	Route	Miles	Rate in Effect 6-20-21	Ton Mile Earnings in Cents
Denver, Colo.	Pueblo, Colo.	D&RGW.	119	50½	8.48
Denver, Colo.	Pueblo, Colo.	D&RGW.	119	*19	3.2
Denver, Colo.	Hutchinson, Kans.	D&RGW. AT&SF	†506	50½	2.0
Denver, Colo.	Osage City, Kans.	D&RGW. Mo. Pac.	†510	50½	1.98

*Rate claimed reasonable.

†Shipments are hauled 119 miles to Pueblo on the D. & R. G. W. and turned over to A. T. & S. F. Ry. or Missouri Pacific R. R. and then hauled 387 to 391 miles farther at the same rate as charged to Pueblo.

The above comparison is significant for the reason that shipments to Osage City and Hutchinson, Kansas, which complainant shows are 391 and 387 miles, respectively, east from Pueblo on the lines of the Missouri Pacific and Atchison, Topeka & Santa Fe, pass directly through Pueblo, and yet the shippers at Pueblo are charged the same rates as those at the farther distant points.

While comparisons between local rates and earnings on proportions of through rates are not conclusive, yet they cannot be ignored when the disparity is so great as shown in this case.

On a shipment of barrels from Denver to Hutchinson, Kansas, the division of revenue between the carriers is on the following basis: Denver & Rio Grande Western Railroad, 22%; Atchison, Topeka & Santa Fe Railway, 78%. Thus on a shipment from Denver, Colorado, to Hutchinson, Kansas, of the same weight as that which complainant shipped, the total revenue would be $136.85. Of this amount the Denver & Rio Grande Western would receive only $30.11 and the Atchison, Topeka & Santa Fe $106.73, while of the revenue on the shipment moving from Denver to Pueblo only, the Denver & Rio Grande Western received $136.85. Putting it another way, the Denver & Rio Grande Western for the citizen of Kansas puts his shipment in the "D" classification and hauls it to Pueblo for $30.11, and for The Nuckolls Packing Company of Pueblo the shipment moving over

the same rails by the same company is put in as fourth class and the Denver & Rio Grande Western collects for the identical service more than four times as much as is charged the Kansan for the same haul between Denver and Pueblo. This, of course, is an unwarranted discrimination against a Colorado industry.

A glance at one of the foregoing tables will show quite clearly the discriminatory features of the haul over the Colorado & Southern south to Pueblo as against the haul north to Cheyenne. In both instances the mileage is almost the same. To Cheyenne this company had barrels in class "D" June 6, 1921, and the rate was 22.5 cents per cwt. This same company shipping the same article to Pueblo, 117 miles, put barrels in as fourth class and charged a rate of 50½ cents per cwt.

Complainant alleged in its complaint, and defendant has admitted in its reply, that the rates cited from Denver, Colorado, to Hutchinson, Kansas, are a typical comparison between rates on wooden barrels in carload lots applying eastward from Denver to points in Kansas, Nebraska and Wyoming.

The record shows that generally in the middle western territory east of the Rockies barrels move on the class "D" rate. For instance, from South Omaha to Sioux City the rate is the class "D" rate of 11 cents, and from Omaha to Albert Lea the class "D" rate of 28 cents is applicable, and it is not denied that class "D" rate is applicable generally in this territory.

Defendants, however, rely greatly upon the fact that the Western Trunk Line Committee has recommended the cancellation of the class "D" rate and special commodity rates and the substitution of the fourth class rate in lieu thereof in this territory; but before such cancellation can be made it is necessary to get permission from the Interstate Commerce Commission and the state commissions having authority over the rates in this territory. So far as the record discloses, no such application has yet been made. On the other hand, a similar application made to the Interstate Commerce Commission by the Atlantic Coast Line Railroad Company in cancellation of Interstate Classification Rating on empty wooden barrels, 85 I. C. C. 154, for permission to advance the rates from class "K" to the fourth class rating

on interstate shipments of empty wooden barrels from South Carolina points, was denied, and the class "K" rates were left in effect.

The defendant in the cited case relied upon much the same character of evidence as is relied upon by defendants in this case.

It is the contention of defendants that the class "D" rating is too low for application on wooden barrels. However, in view of the fact that the class "D" rate is so generally in effect in the territory adjacent to Pueblo and Denver, and in the middle western territory, we think the rate between Denver and Pueblo should not have been higher than the class "D" rate, minimum 14,000 pounds.

We find that under present conditions the rates on wooden barrels in carload lots between Denver and Pueblo should not exceed the class "D" rates, minimum 14,000 pounds; and we further find that complainant made shipment in June, 1921, as described, and paid and bore the fourth class charges thereon, and that charges on this shipment were excessive, unjust and discriminatory and should be adjusted on the basis of the class "D" rate in effect June 20, 1921.

ORDER.

IT IS THEREFORE ORDERED, That the defendants are hereby ordered to revise their tariffs in conformity with findings herein and place empty wooden barrels in their "D" classification of freight rates within fifteen days hereof.

IT IS FURTHER ORDERED, That the interested defendants make reparation from 50½ cents charged per cwt. down to 19 cents per cwt., as would have been the case had the shipment moved under the "D" classification, and this shall be done within thirty days of the date hereof.

HOMER DELL CROW

v.

THE ATCHISON, TOPEKA & SANTA FE RY. CO., *et al.*

[Case No. 269. Decision No. 681.]

Rates—Emigrant car—One calf in excess—Three thousand pounds basis.

Requirement that shipper pay on a basis of 3,000 pounds for one calf, weighing 250 pounds, in excess of the number of livestock allowed in an emigrant car, is not only inconsistent but extortionate as well.

[March 20, 1924.]

Appearances: For Complainant, R. L. Ellis, Pueblo, Colorado; for Defendant, The Atchison, Topeka & Santa Fe Railway Company, Erl H. Ellis; for Defendants, The Denver & Rio Grande Western Railroad Company and The San Luis Central Railroad Company, J. A. Gallaher.

STATEMENT.

By the **Commission**: Complainant's complaint herein was filed with this Commission June 9, 1923. This matter was set down for hearing and was heard at the Hearing Room of the Commission, 305 State Office Building, Denver, Colorado, on Tuesday, January 8, 1924, at 10:30 A. M.

Complainant alleges that the freight charges on one three days old calf shipped with a carload of emigrant movables were unreasonable, and we are asked to award reparation and establish reasonable rules in such matters for the future.

The shipment of emigrant movables weighed 26,170 pounds. For the three days old calf charges were assessed based on a minimum weight of 3,000 pounds. There being no through rate from Rocky Ford, Colorado, to Center, Colorado, the local carload rate on the emigrant movables from Rocky Ford to Pueblo of 21 cents per cwt., 42½ cents per cwt. from Pueblo to Monte Vista, and seven cents per cwt. from Monte Vista to Center was assessed. The rate assessed on the calf was the less than carload rate of 55 cents per cwt. from Rocky Ford to Pueblo, $1.48 per cwt. from Pueblo to Monte Vista, and 11 cents per cwt. from Monte Vista to Center.

By reason of the fact that the less than carload rate and a minimum of 3,000 pounds was assessed on the calf, the charges on the calf were equal to more than one-third of the charges on the carload rated as emigrant movables.

Under the carriers' tariffs the less than carload rate is applicable on the one calf for the reason that their tariffs provide that only ten head of live stock may be shipped in a carload of emigrant movables at the emigrant movable rate, and there were eleven head of live stock in the car.

In the complaint, complainant asks that the entire shipment of emigrant movables, including the one calf, be rated at the emigrant movable rate; and that in no event should the charges assessed have been higher than the charges on the carload of emigrant movables excluding the calf, plus the less than carload freight charges on the calf based on the actual or estimated weight of 250 pounds.

At the hearing complainant made no showing regarding his first contention, but contented himself upon a showing that the charges on the calf should have been based on the actual weight at the less than carload rate.

The record indicates that under the applicable tariff, charges on the calf should have been based on the actual or estimated weight from Rocky Ford to Pueblo, instead of on the minimum weight of 3,000 pounds. Thus the shipment was overcharged $15.12, as The Atchison, Topeka & Santa Fe tariffs permit the use of the actual or estimated weight on the calf as a basis for the freight charges. This provision also applies on emigrant movables when moving in the territory east of Pueblo and in Kansas up to the Missouri River, and also in the state of Nebraska.

Defendants contend that very liberal concessions have been granted intending settlers, and that the line of demarcation must be drawn somewhere as to the number of head of live stock that would be permitted to be shipped as emigrant movables. This limit was set at ten head, and had complainant picked out one cow as excess over the allowed ten head of live stock permitted to be shipped as emigrant movables, the charges on the

cow would have been based on a minimum of 3,000 pounds, the same as on the calf; and that considering the calf as part of the emigrant movables and the one cow as the excess, the application of 3,000 pounds would not be out of line. But, nevertheless, regarding this last contention, the fact remains that the cows and other live stock were permitted under the tariff to move at the carload rate, and that the calf was the only portion of the shipment not allowed to move at the carload rating, and it is, therefore, the charges on the one calf that we must consider.

It seems reasonable on the record before us that the carriers should limit the number of head of live stock to be shipped as emigrant movables and make reasonable provision for different charges for live stock shipped in excess of the number allowed. and complainant does not take exception to such a rule. Complainant, does, however, take exception to the use of a minimum weight of 3,000 pounds on the excess head instead of the actual weight.

Defendant's witness admitted that the shipping of a calf with a car of emigrant movables was different than when shipping it as a less than carload shipment over their platform. He stated that the reason less than carload charges on a calf are based on minimum weight of 3,000 pounds instead of the actual weight is because the railroad company has to look after the calf when shipped over the platform, but he also stated they do not have to look after it when shipped with a carload of emigrant movables.

While the calf was in excess of the number of head of live stock permitted to be shipped as part of a carload of emigrant movables, it was shipped in the same car and as a part of the same shipment, and it would appear that the charges on the calf were unreasonable compared to the charges on the other portion of the shipment. The practice of basing charges on excess live stock when shipped with a carload of emigrant movables at the actual weight, instead of a minimum weight, is recognized by other carriers in a large territory, and is more in conformity with what would be considered just and reasonable rates.

The carriers for years have very wisely and consistently urged

and advocated the loading of cars to capacity, as a means of economy and for conserving equipment.

For this shipment Denver & Rio Grande car No. 62,620 was used. This car has a capacity of 80,000 pounds. Including the calf at 250 pounds, the total load amounted to only 26,420 pounds, or less than one-third the capacity of the car. On the basis of 250 pounds, moving at the rate provided for emigrant movables, the calf shipment would have amounted to $5.36. Instead of the latter amount, however, the complainant was compelled to pay the first class less than carload rate on 3,000 pounds, which amounted to $64.20 for the calf. Here, of course, is a plain case of heavily penalizing a shipper, not for overloading, but because he has exceeded the ten head of live stock allowed by some of the railroads' rules which, of course, is not only inconsistent but extortionate as well.

Charges such as resulted in this case from the present rule in effect on The Denver & Rio Grande Western and The San Luis Central railroads restrict the heavier loading of cars of emigrant movables to the detriment of both the shipper and carrier, for while there is no evidence in the record to bear out the statement, it is apparent that the charges assessed on the calf are far in excess of its value.

We find that the charges assessed on the calf by The Denver & Rio Grande Western Railroad Company and The San Luis Central Railroad Company were unreasonable and in violation of Sections 13 and 18 of the Colorado Public Utilities Act, to the extent that they exceeded the less than carload rate at the actual or estimated weight of 250 pounds; that complainant paid and bore the charges thereon, and has been damaged thereby in the amount of the difference between the charges paid and those which would have accrued by the use of the actual or estimated weight of 250 pounds; and that the complainant is entitled to reparation with interest.

It appears that shipment was overcharged on the movement between Rocky Ford and Pueblo, and it is expected that the defendant, The Atchison, Topeka & Santa Fe Railway Company, will make prompt refund of the overcharge.

ORDER.

IT IS THEREFORE ORDERED by the Commission, that the defendants, according as they may be interested, are hereby ordered to make reparation to complainant in conformity with the conclusions and findings herein within thirty days of the date hereof.

IT IS FURTHER ORDERED, That the defendants herein, The Denver & Rio Grande Western and The San Luis Central railroads, shall make provision in their tariffs to the effect that charges on excess live stock in carload lots of emigrant movables shall be based on the actual weight instead of a minimum weight, and that shall be done on or before fifteen days of the date hereof.

THE DENVER GAS & ELECTRIC LIGHT COMPANY

v.

THE COLORADO & SOUTHERN RAILWAY COMPANY, *et al.*

[Cases 215 to 228, inclusive. Decision No. 697.]

Commissions—Jurisdiction—Constitutional questions.

1. Since the Commission has not been and cannot be vested with judicial power, it cannot pass on the constitutionality of a statute.

Statutes—Limitation—Claims arising after and before passage of Public Utilities Act.

2. The statutory limitation period fixed in Sec. 56 (b) of the Public Utilities Act, in which claims for reparation may be filed, applies both to claims arising after July 11, 1913, the effective date of the limitation provision, and those "that accrued prior to July 11, 1913."

Statutes—Limitation—Six-year—Claims for reparation.

3. The six-year statutory provision, Sec. 6392, C. L. 1921, is not applicable to claims for reparation.

Reparation — Commission — Jurisdiction — Charges collected in violation of Railroad Commission's order.

4. The Commission has no jurisdiction to award reparation of excessive charges collected in violation of orders of the Railroad Commission fixing rates to be charged.

[May 14, 1924.]

Appearances: Albert L. Vogl and D. L. Webb, of Denver, for complainants; E. E. Whitted and J. Q. Dier, of Denver, for

defendants, The Colorado and Southern Railway Company and Chicago, Burlington & Quincy Railroad Company; C. C. Dorsey and E. G. Knowles, of Denver, for defendant, Union Pacific Railroad Company.

STATEMENT.

By the **Commission**: The fourteen cases above numbered were filed in February, 1921, some of them on February 16, others on February 18, and the remainder on February 23 of that year. Each of said cases involves a claim for alleged reparation on account of shipments of coal by the various complainants from what is designated the "Northern Coal Fields" to Denver during the period from May 10, 1910, to November 26, 1914.

Upon the filing of each of said complaints, copies thereof were served on the three defendant carriers, with the result that in the following month, to-wit: March, 1921, each of said defendant carriers filed a motion to dismiss said complaints for alleged want of jurisdiction of the Commission to grant the relief asked; also, contemporaneously with the filing of said motions, the carriers filed answers, in which the material allegations of complainant's complaint were denied. Inasmuch, however, as the controversy is determined by the Commission upon the motions to dismiss, no further reference will be made to the allegations of defendants' answers.

Upon the state of the record as above mentioned, the entire matter was permitted to lie dormant until the month of August, 1923, when, at the request of counsel for complainants, the cases were set for hearing on the motions to dismiss for November 1, 1923, at the Hearing Room of the Commission, 305 State Office Building, Denver, Colorado, and due notice thereof given to all parties. Subsequently, by stipulation of all parties in interest, the hearing upon the motion to dismiss was continued from November 1 to Friday, November 9, 1923, at the same place, at which time oral arguments on the motion were heard by the Commission, and thereafter time was given for the filing of briefs by the respective parties in support of their respective contentions.

Briefs having long since been filed within the time specified,

the decision of the controversy has been delayed through adverse circumstances over which the Commission had no control; but, in view of the fact of the length of time that has elapsed since the accrual of the right of complainants to assert their alleged claims for reparation, and the length of time that elapsed subsequent to their filing until the motion was called for hearing, the Commission is tempted to observe that it has, under these circumstances, moved with an equal degree of rapidity as have the parties interested in the controversy.

In the discussion of the controversy involved in the above cases, the complaint and motion in Case No. 215 will be briefly stated that the gist of the matter may be understood, as it was agreed, and was so understood by all parties, that whatever ruling was made in one case should apply to all, as the facts and circumstances are substantially identical in all the above fourteen cases insofar as any liability of the carriers to the various complainants is concerned.

The complaints, after the allegation as to the corporate capacity of the various complainants and of the defendant carriers, and an allegation as to their being engaged in the business of common carriers by steam, and, as such, engaged in the transportation of lignite coal from mines located on their respective lines in what is generally known as the "Northern Coal Fields" of Colorado to Denver, and as such common carriers subject to the laws of Colorado, and particularly the provisions of Chapter 208, Session Laws of Colorado, 1907, Chapter 5, Session Laws of Colorado, 1910, and Chapter 127 of the Session Laws of Colorado, 1913, during such periods as the respective laws were in force and effect, said laws creating the old Railroad Commission and subsequently repealing parts of that act and creating the Public Utilities Commission under the Public Utilities Act, and conferring powers on the Public Utilities Commission theretofore had by the Railroad Commission, except such as were especially repealed by the latter act; then complainants allege that for a long time prior to December 6, 1909, defendants demanded, charged and collected for the transportation of lignite coal in carloads from said Northern Fields to Denver, 80 cents

per ton for lump, 70 cents per ton for mine run, and 60 cents per ton for slack coal; that on December 6, 1909, proceedings were commenced by the Consumers League of Colorado before the old State Railroad Commission attacking the aforesaid rates of 80 cents, 70 cents and 60 cents then being charged for such transportation, and in which said proceeding each of the defendant carriers herein were named as defendants; that said proceeding culminated in the finding by the State Railroad Commission that said rates of 80 cents, 70 cents and 60 cents were unjust, unreasonable, unlawful and excessive, and in said proceeding made its order requiring each of said defendant carriers to cease and desist from collecting in excess of 55 cents, 50 cents and 45 cents per ton, respectively, for the transportation of lump, mine run and slack coal from said coal fields to Denver.

It is further alleged, that on February 23, 1912, proceedings were commenced in the name of Omar E. Garwood before the State Railroad Commission similar to the aforesaid suit brought by the Consumers League of Colorado, in which latter proceeding defendants herein were made parties; and that in said latter proceeding the State Railroad Commission affirmed the decision above mentioned in the Consumers League case and again ordered and commanded the defendant carriers to cease and desist from charging or collecting in excess of 55 cents, 50 cents and 45 cents per ton for the transportation of such coal as aforesaid. Then it is alleged that the aforesaid orders of the State Railroad Commission were each sustained and affirmed by the District Court of the City and County of Denver, and that during the period covered by the order of the State Railroad Commission of Colorado, the General Assembly of this state enacted Chapter 127 of the Session Laws of Colorado of 1913 (Public Utilities Act), which provided that:

"All proceedings heretofore taken by the Railroad Commission are hereby ratified, approved, validified and confirmed." * * * "All orders, decisions, rules and regulations heretofore made or promulgated by the Railroad Commission shall continue in force and have the same effect as though they had been

lawfully made, issued or promulgated under the provisions of this (Public Utilities) Act."

Complainants further allege, in Case No. 215, substantially the same allegations as contained in the other petitions, except as to dates and amounts; that during all of the period covered by shipments of coal from May 10, 1910, to and including November 26, 1914, the period in which the orders of the Railroad Commission were in effect, establishing the reasonable rates as being 55 cents, 50 cents and 45 cents per ton from said fields to Denver, said defendant carriers refused to transport said lignite coal in carload lots from said fields to Denver for said rates, but demanded, charged and collected rates greatly in excess of the aforesaid rates, to-wit: 80 cents for lump, 65 and 70 cents for mine run and 60 cents for slack coal, whereby it is alleged that complainants were required to pay in excess of the alleged lawful rate established by the Railroad Commission of Colorado the difference between the rates hereinabove stated for such coal as was transported from said fields to Denver between May 10, 1910, and November 26, 1914; and complainants pray in each of said cases that the Commission enter its order whereby the defendants shall be required to refund to the complainants the difference, as may be determined by the freight bills, paid under the higher rate and what should have been collected under the alleged lawful rate, as being the amount of such overcharges collected by defendants, together with interest thereon at the rate of eight per cent per annum on each said overcharge from the date of payment thereof.

As above indicated, the defendant carriers each filed motions to dismiss in each of said causes, that is to say, the defendant Colorado and Southern Railway Company in Cases Nos. 215, 219, 222, 227 and 228; defendant Chicago, Burlington & Quincy Railroad Company in Cases Nos. 216, 218, 220, 224 and 226; and defendant Union Pacific Railroad Company in Cases Nos. 217, 221, 223 and 225, which said motions are substantially identical and are upon the following grounds:

(a) That the Commission is without jurisdiction to hear or determine any of said cases, for that the provisions of Section

56 of the Public Utilities Act concerning allowance and recovery of reparation are wholly invalid because in conflict with the provisions of Article 2, Sections 23 and 25, of the Constitution of Colorado, and Article 14, Section 1, of the amendments to the Constitution of the United States.

(b) Because the claims, demands and causes of action sought to be presented herein, and each thereof, are not claims, demands and causes of action for reparation, but each and all of them are, as appears upon the face of the complaints, claims, demands and causes of action for alleged overcharges and not for reparation as defined in Section 56 (a) of the Public Utilities Act; and that, therefore, they present justiciable questions and controversies of which the courts alone have jurisdiction, to be tried and determined therein in accordance with the course of the common law, and such jurisdiction is not and cannot be vested in this Commission.

The second ground of the motion is that for the reasons set forth in the first ground that the proceedings and complaints filed herein be dismissed as to each and every claim, cause of action and demand and item sought to be presented thereby, save and except those which arose and accrued between May 10, 1912, and April 23, 1913.

The third ground of the motion to dismiss is for the reason that in each and every claim and demand herein, as appears upon the face of the complaints, said action or proceeding was not commenced within six years next after said cause of action accrued and, therefore, all thereof are barred, pursuant to the provisions of Section 4061, R. S. 1908 (Sec. 6392, C. L. 1921).

The fourth ground of the motion to dismiss is based upon the theory that the complaints were not filed with the Commission within two years from the time when said causes of action or either or any thereof accrued, or within two years from and after the effective date of the Public Utilities Act; and, therefore, each and all of said causes of action, claims and demands are conclusively barred by the provisions of Section 56 (b) of the Public Utilities Act (Sec. 2965 (b) C. L. 1921).

As to the alleged claims and demands which accrued after

the effective date of the Public Utilities Act of 1913, to-wit: July 11, 1913, the fifth ground of the motion to dismiss is based upon the proposition that they are forever barred by the provisions of Section 56 (b) of the Public Utilities Act (Sec. 2965 (b) C. L. 1921), as not having been filed with the Commission within two years from the time when said causes of action or either or any of them accrued, or within two years from and after the effective date of the Public Utilities Act.

The first ground of the motion, to-wit, that the Commission is without jurisdiction for the reason that the provisions of Section 56 of the Public Utilities Act concerning allowance and recovery of reparation are invalid as being in conflict with the provisions of certain sections of the state and federal constitutions as hereinabove designated, will be briefly considered.

The Commission has invariably held that when matters of a judicial nature, such as questions involving the constitutionality of a statute are concerned, that it is without jurisdiction and that such questions are beyond its power to determine. It must be remembered that the Commission is purely an administrative body—an agent of the legislature. It has not been and can not be vested with judicial powers by the legislature as, under our constitution, the powers of government are divided into three distinct branches, to-wit, executive, legislative and judicial. Article V of the state constitution prescribes the functions of the legislative department of the state government, while Article VI prescribes the judicial power. Any attempt, therefore, of the legislature to confer judicial power upon its agent would be a direct contravention of the constitutional provisions aforesaid.

> Western Light & Power Co. v. City of Loveland, 5 Colo. P. U. C. 74-79; S. C., P. U. R. 1918-B, 644-650.

To the same effect are the decisions of numerous courts and commissions.

> Muller & Co. v. Pere Marquette Ry. Co., P. U. R. 1922-B, 422-429.
>
> *In re* Central Indiana Gas Co., P. U. R. 1922-C, 29-35.

The Public Service Commission of Nevada, in a very well reasoned and considered case before it, expresses this thought in the following language:

"This Commission is a body created to administer and enforce the laws and carry out the intent of the legislature. Regardless of the individual opinions of the Commissioners as to the advisability or justice of a law, the will of the people, as announced by their representatives, the legislature, must, so far as this Commission is concerned, be supreme. As we can not question the wisdom of the law which we are required to administer, so we can not question the power of the legislative department to direct our course of procedure.

"It is the province of the judicial department of the state to determine, *inter alia*, whether the legislature has overstepped its constitutional powers. That question appears to be beyond the power of an agency of the very legislature which passed the bill."

To the same effect are the decisions of the following commissions:

American Phosphorus Company v. York Haven W. & P. Co., P. U. R. 1922-C, 515-518. (Pa.)

Re City of Rochester, P. U. R. 1922-E, 704. (N. Y.)

Re Jerome Union Stage Line, P. U. R. 1922-E, 850-855. (Ariz.)

This Commission has heretofore given expression to its lack of power to pass upon constitutional questions that may be raised before it.

Farmers E. & P. Co. v. Ault, 5 Colo. P. U. C., 693-696; P. U. R. 1919-E, 371.

To the same effect and illustrating the limitation of the powers of the Commission when constitutional questions are before it, the Supreme Court of this state has given expression to the principles herein announced:

Denver & S. P. Ry. Co. v. Englewood, 62 Colo., 229; 161 Pac. 151; 4 Colo. P. U. C. 197; P. U. R. 1916-E, 134.

The third, fourth and fifth grounds of the motion to dismiss are based upon the proposition that, as shown on the face of the complaints, the recovery sought in the nature of reparation is for overcharges made by defendant carriers in the transportation of coal during the period from May, 1910, to November, 1914, and that consequently the right of procedure of complainants is barred by the six year limitation of the statute laws of this state, being Section 6392, C. L. 1921; also because not filed with the Commission within two years from the time said cause of action accrued, or within two years from the effective date of the Public Utilities Act, and is barred, therefore, by the provisions of Section 56 (b) of the Public Utilities Act, Section 2965 (b) C. L. 1921; and further that as to the alleged claims and demands which accrued after the effective date of the Public Utilities Act of 1913, on to-wit: July 11, 1913, as to such claims and demands they are forever barred by the provisions of said Section 56 (b) of the Public Utilities Act, Section 2965 (b) C. L. 1921.

It is conceded by complainants that the transportation service involved between May, 1910, and November, 1914, included movements of coal before July 11, 1913, and after that date, and the Commission finds that to be a fact with every complainant save as to complainants in Cases Nos. 223 and 227. In those two cases all claims accrued subsequent to July 11, 1913, the effective date of the Public Utilities Act. In the twelve other cases part of the claims accrued before and part after July 11, 1913.

In the discussion of these pleas in bar it should be borne in mind that the Act of 1913, by Section 69 thereof, expressly repealed six sections of the Railroad Commission Act, being Chapter 5, Laws of 1910, and in the adoption of the remainder of the Railroad Commission Act this language is used:

"And the remaining sections of said Chapter 5, Laws of 1910, where not in conflict with this Act are hereby expressly declared to be and remain in full force and effect as if this Act had not been passed."

Sections 56 (a) and (b) of the Act of 1913 are the sections

in said Act which provide for the ordering of reparation when complaint has been made to the Commission, and specifying the time when such complaints shall be filed with the Commission, which is within two years from the time the cause of action accrues. There is no corresponding section in the Railroad Commission Act, so that when the 1913 Act adopted the 1910 Act with the provision above quoted, the 1910 Act remained in full force and effect and all of its acts were ratified, approved and confirmed; but by necessary implication and intendment, the legislature applied the method of ascertainment and the time within which claims for reparation should be filed as being within two years from the time the cause of action accrues. It would be absurd to impute any other or different construction and intent, for one entitled to make claim for reparation under the Act of 1913 must file with the Commission his claim within two years, and that one who based his claim for reparation under the 1910 Act is not so limited, merely because the 1910 Act omitted such provisions. In other words, it would seem to be in harmony with sound principles of reasoning that when the legislature of 1913 adopted Sections 56 (a) and (b) it intended that all persons who had claims against a utility entitling them to reparation should file the same with the Commission within two years from the time the cause of action accrues. This is certainly true as to those claims for reparation accruing after the effective date of the 1913 Act, to-wit: July 11, 1913; and as to such claims the Commission finds that they are barred by the provisions of Section 56 (b) as not having been filed within two years from the time the cause of action accrued, as is shown and appears upon the face of the complaints. As to those portions of the claims that accrued prior to July 11, 1913, upon reason and principle, such claims should be barred if not filed within two years from the time of their accrual. In the instant case, the complaints were filed in February, 1921, which is a period of from seven to eleven years subsequent to the various dates of accrual of complainants' causes of action, to-wit: from May 10, 1910, to November 26, 1914; and it is not believed that such a holding would be in violation of the retrospective limita-

tions of our constitutional provisions inhibiting the enactment of laws retroactive in character. And this is said after a careful study and consideration of the Supreme Court ruling in the Bonfils case, including the dissenting opinion therein of Mr. Justice Denison, concurred in by Chief Justice Garrigues and Mr. Justice Burke.

Bonfils, *et al.*, v. Public Utilities Commission, 67 Colo. 563-577; P. U. R. 1920-D, 961.

With reference to the third ground of the motion, that the alleged causes of action are barred by the statute of limitation provided by the laws of this state, Section 6392, C. L. 1921, as not having been brought within six years from the time within which the cause of action accrued, the Commission holds that to be inapplicable to the cases under discussion under the terms of the majority opinion in the Bonfils case, *supra.*

As concerns the grounds of the motion as are set forth in subdivision (b) of the first ground of the motion, that the Commission is without jurisdiction to hear and determine the matters involved in each and all of the cases under discussion for the reason that there is no administrative or legislative question involved, and that each and all of such claims, demands and causes of action are not such claims, demands or causes of action as are properly made the subject of reparation but are such as appear upon the face of the complaints as recovery sought for overcharges, and present justiciable questions and controversies over which this Commission has no jurisdiction, the same to be tried and determined in a court of competent jurisdiction as being in the nature of claims for damages, the Commission is of the opinion that the point is well taken.

Stated tersely, the various complainants assert a claim against the various defendants for an overcharge arising in the transportation of coal in carloads from the Northern Coal Fields to Denver between May 10, 1910, and November 26, 1914, and alleging that during said period certain orders of the old Railroad Commission, as created by Chapter 5, Session Laws of 1910, effective February 16, 1911, in what are designated the Consumers League and Garwood cases, were in full force and effect,

and that the Railroad Commission had established, after hearing and investigation, rates of 55 cents, 50 cents and 45 cents respectively, for such service from said fields to Denver; but that in disobedience of that order the defendant carriers unlawfully exacted, demanded and collected rates of 80 cents, 70 cents and 60 cents, respectively, for such service. The carriers admit the exaction of such unlawful rates, but contend that as the action was unlawful and that it is admitted by them it was unlawful, the complainants' remedy is by a suit in court for the collection of such unlawful charges.

Section 15 of the Railroad Commission Act provides that it shall be the duty of the Commission whenever, *after full hearing upon a complaint made,* the Railroad Commission shall be of the opinion that any of the rates or charges complained of and demanded, charged or collected by any common carrier are unjust or unreasonalbe or are unjustly discriminatory or unduly preferential or prejudicial, then it shall determine in what respects such rates or charges are unjust, unreasonable, discriminatory, preferential or prejudicial and make an order that the common carrier shall cease and desist from such violations, and from thereafter publishing, demanding or collecting such rate or charge for transportation so determined to be unjust, and providing the just and reasonable rates for such service. The comparable statute in the Public Utilities Act is Section 56 (a), which reads:

"When complaint has been made to the Commission concerning a rate, fare, toll, rental or charge for any product or commodity furnished or service performed by any public utility, and the Commission has found, after investigation, that the public utility has charged an excessive or discriminatory amount for such product, commodity or service, the Commission may order that the public utility make due reparation to the complainant therefor, with interest from the date of collection, provided no discrimination will result from such reparation."

It will be observed from the analogous sections of the Railroad Act and the Public Utilities Act above cited, that this Commission nor the Railroad Commission had authority or jurisdiction

to grant any claim for reparation except where complaint had been made as to an excessive or unreasonable rate, and upon investigation found such rate to be of the character described in the statute and then, and then only, to prescribe a just and reasonable rate and order reparation. In the instant cases there is no complaint made that the charges made by the defendant carriers during the period May 10, 1910, to November 26, 1914, were of any nature other than that they were unlawful because the rates and charges demanded and collected by the carriers during such period were in excess of the lawful rate then in force, as had been determined and prescribed by the Railroad Commission after investigation and fixed for such service the reasonable and lawful rate. That being true, there would be nothing of an administrative nature for this Commission to do whatever; no investigation to make whatever; no testimony to be taken whatever; nothing to do but by mathematical calculation determine how much each complainant had unlawfully been compelled to pay during the period mentioned, in excess of the lawful rate as fixed by the Railroad Commission in the Consumers League and Garwood cases, and order defendants to refund such excess charges with interest. Such an order would be in the nature of a judgment for the payment of money, and this the Commission has no power to do.

As was said by our Supreme Court in People v. Colorado Company:

"The Public Utilities Commission is not a court; but an administrative Commission, having certain delegated powers, and charged with the performance of certain executive and administrative duties, and its powers are subject to the action of the courts in matters of which the courts have jurisdiction. The legislature did not give the Commission power to render judicial decisions or jurisdiction over remedial rights as exercised by the courts. Judicial powers relate to the authority exercised by courts through the instrumentality of judicial remedies. The legislature did not confer upon the Commission such judicial powers as courts are required to exercise in suits between litigants."

People v. Colorado T. &. T. Co., 65 Colo. 472-480-481. P. U. R. 1919-A, 542.

The proposition that a regulatory body, such as the Public Utilities Commission of Colorado, is merely a legislative agent and can not exercise judicial power of any character is so self-evident and has so often been declared to be the law that citation of authority other than our Supreme Court is deemed to be unnecessary; however, a few are given:

California Company v. Southern Pacific Company, 226 Fed. 349.

Pennsylvania Ry. Co. v. International Coal Company, 230 U. S., 184.

Rhodes v. Electric Co., P. U. R. 1916-B, 645. (Mo.)

Wheeling Co. v. Public Service Co., P. U. R. 1922-D., 67. (W. Va.)

Complainants' remedy is one clearly made cognizable by the courts by Section 8 of the Railroad Commission Act and by Section 58 (a) of the Public Utilities Act. Section 8 provides that if any common carrier shall do, cause to be done, or permit to be done any act, matter or thing prohibited or declared to be unlawful, or shall omit to do any act, matter or thing required to be done, such carrier shall be liable to the person or persons injured thereby for the full amount of damage sustained in consequence of any such violation of the provisions of this Act. While Section 58 (a) of the 1913 Act provides that in case any public utility shall do, cause to be done, or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful * * * either by the constitution, any law of this state or any order or decision of the Commission, such public utility shall be liable to the persons or corporations affected for all loss, damages or injury caused thereby or resulting therefrom; and provides further that if the court shall find that the act or omission was wilful, the court may, in addition to the actual damages, award exemplary damages by way of punishment.

From the provisions of the Railroad Commission Act and from the Public Utilities Act aforesaid, it is plain that when the defendant carriers exacted, demanded and collected rates in excess

of those theretofore lawfully fixed and established by the Railroad Commission for the transportation of coal from the Northern Coal Fields to Denver, they were committing an act in violation of the law and the persons injured thereby have a right of recovery in a court of competent jurisdiction for the injury and damage so suffered. The carriers admit the unlawful charge, but insist, as they have a legal right to do, that they shall be held answerable therefor in a court of competent jurisdiction, and that the Commission having no administrative or legislative duty or function to perform, is without jurisdiction to do anything in the cases at bar; and, therefore, whatever it did would be unlawful, void and entirely nugatory.

Without further discussion of the subject, the Commission is clearly of the opinion that it is without power and jurisdiction under the terms of the Act creating it, and under the terms of the Act creating the old Railroad Commission, to afford the relief demanded by complainants, for the reason that there is no administrative or legislative function to be invoked. That function was invoked before the Railroad Commission in the Consumers League case in 1909, which became effective May 10, 1910, and the Garwood case in 1912, which became effective April 24, 1913. Those orders of the Railroad Commission, fixing the reasonable and lawful rates for the transportation of coal from the Northern Fields to Denver of 55 cents, 50 cents and 45 cents, respectively, were taken into the courts by the rail carriers, with the result that the courts sustained the validity of the orders in each of said cases, and they thereby became binding and conclusive alike upon shippers, carriers, courts and Commission; and the administrative or legislative function of the Commission that had been fully performed when the old Railroad Commission, upon investigation, determined upon and promulgated the orders therein, had the legal effect as though the rates prescribed in said orders had been prescribed in a legislative enactment or by constitutional provision, or by any other final authority of the state. We can not escape the conclusion, therefore, that the Commission has no function to perform in a determination of the matters involved in the instant cases, and is without jurisdic-

tion to proceed therein, and for that reason each and all of said cases are hereby dismissed for want of jurisdiction, being Cases Nos. 215, 219, 222, 227 and 228, brought by various complainants against defendant, The Colorado and Southern Railway Company; Cases Nos. 216, 218, 220, 224 and 226, brought by various complainants against defendant Chicago, Burlington & Quincy Railroad Company; and Cases Nos. 217, 221, 223 and 225, brought by various complainants against defendants Union Pacific Railroad Company.

ORDER.

IT IS THEREFORE ORDERED, By the Public Utilities Commission of the State of Colorado, that the motions to dismiss the following cases filed by defendants herein be sustained, and that the said cases, to-wit: The Denver Gas and Electric Light Company, a corporation, Complainant, No. 215; The Pikes Peak Consolidated Fuel Company, a corporation, Complainant, No. 219; the McPhee and McGinnity Lumber Company, a corporation, Complainant, No. 222; The P. H. Zang Brewing Company, a corporation, Complainant, No. 227; The Coffin Packing and Provision Company, a corporation, Complainant, No. 228, versus The Colorado and Southern Railway Company, a corporation, Defendant; The Coffin Packing and Provision Company, a corporation, Complainant, No. 216; The McPhee and McGinnity Lumber Company, a corporation, Complainant, No. 218; The Pikes Peak Consolidated Fuel Company, a corporation, Complainant, No. 220; The Cambrian Coal Company, a corporation, Complainant, No. 224; The P. H. Zang Brewing Company, a corporation, Complainant, No. 226, versus Chicago, Burlington & Quincy Railroad Company, a corporation, Defendant; The Coffin Packing and Provision Company, a corporation, Complainant, No. 217; The Pikes Peak Consolidated Fuel Company, a corporation, Complainant, No. 221; The McPhee and McGinnity Lumber Company, a corporation, Complainant, No. 223; The Cambrian Coal Company, a corporation, Complainant, No. 225, versus Union Pacific Railroad Company, a corporation, Defendant, be, and each of the said cases is, hereby dismissed for want of jurisdiction.

DENVER GAS & ELECTRIC LIGHT CO., *et al.*,

v.

COLORADO & SOUTHERN RAILROAD COMPANY, *et al.*

[Cases Nos. 215-228. Decision No. 722.]

Commissions—Orders—Participation by all Commissioners.

1. A Commission order embodying conclusions reached by unanimous agreement of all three Commissioners, but signed by only two Commissioners on account of the death of the third Commissioner prior to the date of issuance, is not invalid on the ground that all the Commissioners did not participate in the order.

Commissions—Functions—Administrative relief.

2. The Commission can perform only those functions which are administrative in nature.

[July 1, 1924.]

FURTHER ORDER ON MOTION FOR REHEARING. STATEMENT.

By the **Commission**: On May 14, 1924, the Commission rendered its decision and order in the above entitled and numbered cases. On May 24, 1924, complainants, and each of them, in each of the cases as indicated in the caption herein, filed a motion for rehearing. Thereafter the motion was set down for hearing at the Hearing Room of the Commission, State Office Building, for Thursday, June 12, 1924, and subsequently, by agreement of the parties in interest, the hearing on the motion was continued to Tuesday, June 17, 1924, at the same place, where oral argument was heard by the Commission on the motion for rehearing aforesaid.

The grounds of the motion are seven in number, though the first and fifth grounds were particularly made the subject of argument by counsel.

The first ground of the motion is:

"That it appears upon the face of the purported decision and order that it is not the decision of the Commission as required by law, but that the same was participated in by two Commissioners only, and that under the statute creating this Commission three Commissioners must participate in all orders and deci-

sions of the Commission; therefore, the purported decision and order is void."

The fifth ground of the motion is:

"That the purported decision is erroneous in assuming and holding that the complaints require the Commission to enter an order which 'would be in the nature of a judgment for the payment of money;' and is erroneous in assuming and holding that the complaints seek any order which the Commission has not power to make."

A brief discussion of the two grounds as they are stated will be undertaken. The assumption contained in the first ground, that the decision and order was participated in by only two Commissioners, is predicated upon the fact that the same was signed by but two Commissioners, Halderman and Lannon; but it will be recalled, and the decision and order so states, that the hearing of the motions to dismiss filed by defendants was held on November 9, 1923, and that thereafter all complainants and defendants filed voluminous briefs in support of their respective contentions. All of this took place and transpired during the lifetime of Commissioner Scott, deceased; and while the decision and order does not so recite, the fact is that the late Commissioner Scott, some little time and at various times before the beginning of the illness in the latter part of April, 1924, which terminated in his death on May 4, 1924, discussed and considered the merits of the motions and briefs with the two Commissioners who signed the decision and order herein, and concurred and agreed with them in the conclusion reached in said decision and order. While the decision and order was in course of preparation, following the unanimous agreement of the three Commissioners, Judge Scott was taken ill and, as stated, died on May 4, and shortly thereafter, and on May 14, the decision and order was issued, so that if the first ground of the motion possesses merit, which is not conceded, it falls from the statement of facts as above narrated, which is within the knowledge of the two Commissioners who signed the order.

The principal argument of counsel for complainants was to the effect that because statutes creating the Board of Capitol

Managers, and various other boards incident to the state government, specifically declared in those cases that a majority of the board should constitute a quorum and be empowered to act, that there being no such language in the Public Utilities Act creating the Public Utilities Commission, it must have been the legislative intent that all three Commissioners must participate in the rendition of any order or decision that may be lawfully made. Counsel does not go to the extent, however, of assuming that all three Commissioners must agree, but merely that they must consider and participate in any decision or order that is made. With this contention we have no quarrel, as we are satisfied that the law is well settled that a decision or order of a regulatory body rendered by a majority of the members of such body is a valid order, if opportunity were given the entire membership of the body to participate, consider and either concur or dissent. Such was the situation in the instant case, and had the decision and order been prepared and ready to be issued prior to the last illness of the late Commissioner Scott, there is no question but that he would have concurred and signed the order. His failure to sign it was occasioned by his death, and it is hardly conceivable that under these circumstances the decision and order would be presumed to be invalid. To go a step further, the broad general principle seems to be, under the system of government under which we live, that a majority may rule, and in a commission of three members two, of course, is a majority; and where the third member has had opportunity to consider and participate but fails to do so, purposely, indifferently, or by reason of his death, the decision and order is not thereby invalidated. To hold otherwise would put it within the power of one Commissioner in a commission of three to purposely avoid participation and discussion, and thus block, clog and interfere with the proper administration of government; and this it is inconceivable that the legislature ever intended. Every presumption of the legislative intent as to the constitutionality and validity of its acts is to the end that good government and orderly conditions of society will be obtained, so that the argument advanced by counsel that merely because the legislature in the creation of some of the

various boards incident to the state government expressly has given the majority thereof power to act, is inapplicable and unsound as applied to the acts of a body vested with the powerful function of the state itself, designated the police power. If there is any presumption to be indulged at all upon this angle of the first ground of the motion, that presumption is that the legislative intent was that a majority of three would be competent, qualified and empowered to transact the business of the office, and that had the legislature intended it to be otherwise, appropriate language would have been used in the Act creating the Commission, or some act amendatory thereto since the date of its passage in 1913, which would expressly declare that no decision or order of the Commission would be valid unless participated in and considered by all members of the Commission. We think the first ground of the motion is without merit.

As to the fifth ground of the motion, little, if anything need be said further than was said in the decision and order of May 14, 1924. While it is true that decision did use the phrase that if the complaints were held valid, upon proof of their allegations the Commission would be required to enter an order which "would be in the nature of a judgment for the payment of money," that phrase in and of itself does not so state that it would be a judgment for the payment of money, but merely, in substance and effect, of that nature. The fifth ground of the motion relates to the question discussed already in the briefs and in the decision and order, that the complaints do not present any administrative questions. That matter has been gone into very thoroughly and earnestly considered and discussed, and the Commission is quite satisfied that with respect to this feature its position is sound. By the very nature of the powers vested in the Commission, it can only perform functions that involve the exercise of administrative functions. In the instant case the carriers admit that they exacted unlawful rates from complainants during the periods stated, which were unlawful by virtue of the decision and order of the old Railroad Commission fixing a lawful rate for the service involved. That being true, there would be no evidence to take, and no necessity of a

hearing. In the event of a hearing each complainant would present proof of the amount of freight paid during the periods mentioned, and then by mathematical calculation the Commission would arrive at how much he had been compelled to unlawfully pay for the service in excess of the rates fixed as reasonable by the Railroad Commission. The question of the reasonableness or unreasonableness of the carriers' charge is in no sense involved here, that mater having been determined by the old Railroad Commission.

For these and other reasons that it is not necessary to enumerate, the motion will be denied.

At the suggestion of counsel for complainants, which was tacitly assented to by defendants' counsel, this decision and order of denial will be rendered in Case No. 215 only, entitled The Denver Gas and Electric Light Company, a corporation, Complainant, v. The Colorado and Southern Railway Company, a Corporation, Defendant, with a view that in case a review of the Commission's decision and order is desired that one case will be made a test case and save counsel the labor and expense involved in taking up the record of all fourteen cases.

In the event a writ of review is not sued out of the Supreme Court in Case No. 215, as above styled, within the period allowed by statute for so doing, then and in that event the decision and order herein announced will be considered and held to apply to the remaining thirteen cases, as above indicated.

ORDER.

IT IS THEREFORE ORDERED, That the motion for rehearing filed herein on May 24, 1924, be, and the same is hereby, denied as to Case No. 215, entitled The Denver Gas and Electric Light Company, a corporation, Complainant, v. The Colorado and Southern Railway Company, a corporation, Defendant.

IT IS FURTHER ORDERED, That in the event a writ of review is sued out of the Supreme Court to review the decision and order herein as to Case No. 215, above styled, within the time provided by statute for so doing, then and in that event this order

will apply to the remaining thirteen cases above enumerated but held in abeyance.

IT IS FURTHER ORDERED, That in the event a writ of review is not sued out of the Supreme Court within the time provided by statute, then and in that event this order denying the motion filed in all of the above styled and numbered cases for rehearing will be held and deemed a denial of the motion for rehearing in all the fourteen cases above numbered and named in the order and decision herein rendered on May 14, 1924.

RE ROBERT A. ARNETT.

[Application No. 329. Decision No. 742.]

Service—One passenger train each way daily—Sufficiency.

1. One passenger train daily in either direction between Steamboat Springs and Craig held, on application for a motor vehicle certificate, to be inadequate means of communication.

Certificates of convenience and necessity—Motor vehicle—Competing rail operation at loss—Effect.

2. Operation of a rail line at a loss, while a reason for an increase of rates, is no ground for denying an application for authority to operate a motor vehicle line.

[August 26, 1924.]

Appearances: Gilbert A. Walker, of Steamboat Springs, Colorado, for Applicant; Elmer L. Brock, of Denver, for Protestant, The Denver and Salt Lake Railroad Company; F. O. Reed, of Denver, for Protestant, American Railway Express Company.

STATEMENT.

By the **Commission**: On April 23, 1924, Robert A. Arnett, the above named applicant, filed his petition seeking a certificate of public convenience and necessity to operate as a common carrier, an automobile stage between Steamboat Springs and Craig, Colorado, for the carrying of passengers, baggage, express and light freight.

He states in his application that he is engaged in the automobile business and ranching; that his post-office address is Steam-

boat Springs, Colorado; that he wishes authorization from this Commission to engage as a common carrier for the aforesaid purposes, between Steamboat Springs and Craig, Colorado. Applicant further alleges that he is well equipped to look after and conduct such business in a business-like way; that he conducted a stage line in the summer of 1923 between said points which proved highly satisfactory, convenient and accommodating to the people of said towns and the residents intermediate, and that the same supplied a much needed necessity; that he proposes to make one round trip each day, leaving Steamboat Springs at 8 o'clock in the morning and returning from Craig at 6 o'clock in the evening, serving the people intermediate as well as said towns.

Upon the filing of the application, copies of same were served upon The Denver and Salt Lake Railroad Company and upon the American Railway Express Company, which resulted in the answer and protest of W. R. Freeman and C. Boettcher, Receivers of said railroad company, being filed on April 30, 1924, and American Railway Express Company, May 5, 1924.

The answer and protest of receivers recite their appointment and qualifications as receivers and that they are operating said railroad for the transportation of passengers, freight and express, and all other traffic between Denver through Steamboat Springs to Craig, Colorado; that the proposed automobile line between Steamboat Springs and Craig, Colorado, would directly compete with their business between Steamboat Springs and Craig, and that the volume of such business is not sufficient to operate the said line in competition with the railroad; that the public convenience and necessity does not require, nor will not require, the operation of an automobile passenger, freight and express line between said points.

Protestants further allege that the railroad is operating throughout the entire year, and alleges that the proposed automobile line would not operate except during the summer months, and that the result of the granting of the application would simply be that applicant would participate in the passenger, express, freight and baggage business between said points during certain

seasons of the year, which would be to the detriment and damage of the receivers and the railroad operated by them; and that the inevitable result of the granting of the application would be the impairment of the railroad service to the detriment of the railroad company and its receivers and the public served by it between said two points.

Protestant railroad further alleges that it pays large sums in taxes to the counties through which it operates; that it was established and is maintained at enormous expense and that it should be protected from competition so long as the road continues to furnish reasonable transportation facilities for the communities served by it. They also allege that the railroad has been operated, and is operating, at a deficit to the extent that they have not been able even to pay operating expenses, and that if the certificate were granted to applicant, it would simply add to the difficulties of the receivers maintaining said railroad in operating condition.

And in the third and closing paragraph of the receivers' protest it is set forth that on June 1, 1924, there will be inaugurated a sleeping car service in connection with a night train known as Nos. 1 and 2; that said train west bound, No. 1, leaves Steamboat Springs at 7:15 A. M., arriving at Craig 9:30 the same morning; east bound, No. 2, leaves Craig daily at 6:00 P. M., arriving at Steamboat Springs at 7:55 the same day; and that this is an innovation to the traveling public between Denver, Steamboat Springs and Craig; and pending the effort of the receivers to improve the service to the public, no competition should be allowed between Steamboat Springs and Craig.

The protest of the American Railway Express Company alleges that neither the present nor the future public convenience and necessity requires, or will require, the operation of the proposed motor truck line, nor the transportation of express or freight between said two points, and that the Express Company now provides, and will continues to provide, sufficient service on passenger trains operated by the Denver and Salt Lake Railroad to accommodate the present and future public needs in said localities.

The matter was set down for hearing at the Court House, Steamboat Springs, Colorado, for June 23, 1924, upon due notice to all parties, at which time testimony in support of the application and in opposition thereto by protestants, was submitted.

At the hearing applicant testified that he proposed to carry baggage, parcels and light freight generally, with his equipment, although he also would transport passengers incidentally. He testified at some length as to the alleged necessity for the operation of the service proposed for the accommodation of the people of Steamboat Springs and Craig and the towns and communities intermediate.

Craig is the county seat of Moffat County while Steamboat Springs is the county seat of Routt County, and are distant approximately 50 miles. One passenger train daily in either direction serves this territory. Train No. 1 leaves Steamboat Springs at 7:15 in the morning, arrives Craig 9:30 same morning; train No. 2 leaves Craig at 6:00 P. M., arriving at Steamboat Springs at 7:55 the same evening. Freight train service, rather independable and irregular, is afforded between said towns daily which, according to the evidence submitted, the west bound train arrives at Steamboat Springs generally about noon and at Craig generally about 4 o'clock in the afternoon. The east bound freight service leaves Craig generally about 8:30 in the morning, arrives at Steamboat Springs generally about 1 o'clock in the afternoon. The above schedules of freight train service both east and west bound appear on Denver and Salt Lake Railroad Company's Exhibits 4 and 5, which show a wide spread of arrival and departure of freight trains, so that the statement is made hereinabove that the freight train service is irregular and independable.

Several witnesses testified for applicant, of the convenience and necessity afforded by the automobile line operated by him, particularly with respect to the carrying of vegetables, fruits, meats and other perishable commodities. It would seem to be quite apparent that between the two adjoining county seats, the public necessity and convenience requires, and will require, addi-

tional means of communication than that at present afforded by the rail carrier.

The principle, if not the real basis of protest offered, is that the railroad is being operated at a loss and that to permit the automobile competition would perhaps accentuate that loss, and in impairing the service being afforded by the railroad company. From all the evidence submitted it can hardly be conceived that its service between Steamboat Springs and Craig, and *vice versa,* is at all convenient to serve these two communities and intermediate points.

As to those grounds of protest that the rail carrier is operated at a deficit, not being able to earn even its operating expenses and taxes, those are matters that might properly be alleged as a reason for an increase of rates in a proceeding brought for that purpose, but not a proceeding seeking further and additional facilities for the transportation of baggage, light freight, express and passengers. This is best answered by the Supreme Court, through Mr. Justice Allen, in the case of C. Boettcher, *et al.,* v. Public Utilities Commission, *et al.,* 73 Colo. 46, wherein it is said:

"The only reason apparently advanced against the conclusion that the order is reasonable is that the railroad transports coal at a loss. This argument might be effective in a rate case, but the fact that a common carrier operates at a loss does not relieve it from performing the duties incident to transportation. The duties follow the status of common carrier in its financial condition. The duties are not obviated by the fact that they necessitate expense."

The above case was decided upon a review of an order of this Commission requiring The Denver and Salt Lake Railroad and its receivers to make a car door board allowance to shippers of coal, and its main defense was that the road was being operated at a loss. The principle announced by the court in the above case is, of course, binding upon this Commission, and the same principle being deemed applicable in the instant case, we cannot escape the conclusion that the certificate of public convenience and necessity applied for is required, and will be required, to

meet the reasonable public convenience and necessity of the communities affected.

In view of the testimony of applicant that he proposes to transport passengers merely as an incident to his auto bus operations, it is deemed advisable by the Commission to eliminate such service from this application; this, in view of the further fact that another application for the carriage of passengers only, between said cities, is pending, and was heard at the same time and place as this application.

ORDER.

IT IS THEREFORE ORDERED, That the public convenience and necessity requires, and will require, the operation of an automobile line for the transportation of baggage, freight and express between Steamboat Springs and Craig, Colorado, by Robert A. Arnett, applicant in the above entitled proceeding, and that this order shall be taken, deemed and held to be a certificate of public convenience and necessity therefor.

IT IS FURTHER ORDERED, That applicant shall file with the Commission within twenty days from the date hereof, a schedule of his rates and the time of leaving and departure from the various communities he serves.

IT IS FURTHER ORDERED, That applicant shall operate his said automobile transportation line daily, except Sunday, throughout the year, except when prevented by the act of God, the public enemy, or unusual and extreme weather conditions, and this order is made subject to compliance by applicant with the rules and regulations now in force or to be hereafter adopted by this Commission with reference to automobile common carriers, and also subject to any legislative action that may in future be taken with respect thereto.

RE GAILON LEWIS, DOING BUSINESS AS THE CONSOLIDATED TRUCK LINES.

[Applications Nos. 276, 277 and 278. Decision No. 746.]

Certificates of convenience and necessity—Motor vehicle—Proof of stability and permanency and feasibility of control.

1. The Commission in granting a certificate of convenience and necessity must have some assurance that the utility will prove reasonably stable and permanent and lend itself to control and regulation.

Common carriers—Operation under special contracts—Effect.

2. Insofar as transportation under any special contracts of the applicant is concerned, until he has otained a certificate of convenience and necessity he is not a common carrier and does not require a certificate of convenience and necessity for such transportation because he does not indiscriminately accept and carry freight or express.

Common carriers—Contracts—Disfavor—Control by Commission.

3. Contracts of a common carrier are not looked upon with favor, and are subject to the supervision and control of the Commission.

Common carriers—Motor vehicle—Brokerage business.

Under facts shown by the evidence the Commission expressed doubt as to whether the applicant is a common carrier or engaged in the brokerage business.

[September 26, 1924.]

Appearances: Arthur E. Aldrich, of Denver, Colorado, for Applicant; J. Q. Dier, of Denver, Colorado, for Protestants, The Colorado and Southern Railway Company and Chicago, Burlington & Quincy Railroad Company; E. G. Knowles, of Denver, Colorado, for Protestant, Union Pacific Railroad Company; J. W. Kelley, of Denver, Colorado, for Protestant C. L. Preston; J. Paul Hill, of Brighton, Colorado, for County Commissioners of Adams County; W. R. Kelly, of Greeley, Colorado, for County Commissioners of Boulder and Weld Counties; George H. Shaw and Paul W. Lee, of Fort Collins, Colorado, for County Commissioners of Larimer County.

STATEMENT.

By the **Commission**: On September 13, 1923, Gailon Lewis, doing business as The Consolidated Truck Lines, filed petitions,

designated as Applications Nos. 276, 277 and 278, seeking a certificate of public convenience and necessity to operate a motor truck line as a common carrier of freight and merchandise between Denver and Fort Collins, Colorado and intermediate points, between Denver and Ault, Colorado, and intermediate points, and between Denver and Pueblo, Colorado, and intermediate points. The allegations in all three petitions are practically the same with few minor exceptions.

The applicant states that he is engaged in the business of transporting and hauling freight and merchandise by means of auto trucks between the cities above mentioned; that the post office address of applicant is 1745 Blake Street, Denver, Colorado; that applicant has invested about $12,000 in establishing a receiving depot and equipping motor trucks for service on the aforesaid routes; that he is an honorably discharged soldier of the United States, having served in the recent World War, and that his service in that capacity was in the motor truck transport corps; that the applicant has been engaged in hauling and trucking on the Ault and Fort Collins routes since November, 1922, and on the Pueblo route since July, 1923, and has operated continuously and regularly from the respective dates to the present time; that the territory served from the Fort Collins and Ault routes is a well populated and prosperous farming district, and that public convenience and necessity require frequent and abundant service in the transportation of perishable farm products, merchandise and supplies by motor truck in addition to the present authorized service; that the service on the Pueblo route is through a number of small towns, and also through and to the cities of Colorado Springs and Pueblo, and that public convenience and necessity require frequent and abundant service in the transportation of perishable goods, merchandise and supplies by motor truck service, which service is best performed by motor truck in the manner aforesaid.

Applicant further alleges that on the Fort Collins and Pueblo routes there are at the present time no motor truck lines, within the knowledge of the applicant, operating thereover under the authority of a certificate of convenience and necessity issued by

this Commission; that there is at present one motor truck line operated by one C. L. Preston, doing business as The Northern Transfer Company, over the Ault route to Greeley, Colorado, under the authority of a certificate of convenience and necessity issued by this Commission in the month of May, 1922; that the schedule of rates and operating schedule of the applicant is attached to each of the petitions as an exhibit.

Upon the filing of the application copies of same were served on The Colorado and Southern Railway Company, Chicago, Burlington & Quincy Railroad Company, Union Pacific Railroad Company, American Railway Express Company, C. L. Preston, and The Atchison, Topeka and Santa Fe Railway Company, which resulted in the answer and protest filed by these parties. The Commissioners of Weld, Adams, Boulder and Pueblo counties also appeared as protestants but filed no written pleadings.

The answer and protest of The Colorado and Southern Railway Company is typical of all other answers and protests filed herein and we shall, therefore, confine ourselves to a recitation of the same. The answer alleges that the application filed does not state facts sufficient to constitute grounds justifying the issuing or granting of the certificate of public convenience and necessity applied for; that in applying for said certificate the applicant has failed to comply with the statute in such case made and provided, as well as the Rules of Procedure of this Commission, in that the applicant has failed and omitted to show that he has received the required consent, franchise, permit, ordinance, vote or other authority of the proper county, municipal, state or other public authorities within and under whose jurisdiction said proposed truck line will be operated; that the protestant operates and owns a line of railroad in competition with the route designated in the application herein and is now operating, and at all times in the past has operated, regular freight trains between said termini which are, and always have been, more than adequate to supply and take care of the reasonable requirements and needs of the communities and territory located along and tributary to said line of railroad; that the railroad of this protestant furnishes, and in the future will continue to furnish,

adequate facilities for the transportation of freight amply sufficient to accommodate the present and future needs for such transportation between said termini and the intermediate territory.

The matter was set down for hearing February 18, 1924, at 10:00 o'clock A. M., at the Hearing Room of the Commission, 305 State Office Building, Denver, Colorado, at which time testimony in support of the application and in opposition thereto by protestants was submitted, in connection with other applications for certificates of convenience and necessity for automobile transportation. The testimony on the applications for the routes north of Denver was taken up first, and the hearing of the testimony on the application for the southern route was taken up on February 20, 1924.

The applicant testified at the hearing that he is conducting a depot for freight and express at 1745 Blake Street, Denver, Colorado, formerly a vacant store, upon which he has a lease from month to month; that he is the owner of two auto trucks which are in use on the route between Denver and Fort Collins; that his entire investment consists of the lease on said depot and the necessary fixtures therein contained and the two automobiles above mentioned, the approximate amount of the investment being $3,500; that a great amount of his business has been of a private nature under special contract; that over the Denver and Fort Collins route there are in use four trucks; that over the route between Denver and Ault there is in use one truck; that over the route to Pueblo there are in use three trucks; that all of the trucks in use in the above routes for which the applicant requires a certificate of public convenience and necessity (except the two trucks belonging to the applicant) belong to other parties than the applicant; that the applicant has entered into an oral agreement with the owners of the other trucks by which they are to receive 85 per cent of all sums collected from freight and express, and the applicant is to receive the other 15 per cent; that this percentage basis, however, only applies to freight and express in and out of Denver; that the moneys received from any shipments originating between intermediate points are retained

by the respective owners of the trucks, and the applicant does not receive any amount therefrom; that the business which the applicant conducts at the depot in Denver may be termed a commission business in freight and express; that the insurance on all of the trucks is not carried by the applicant, but is carried by the respective owner of the truck in the sum of $1,500 to the load; that except as to the two trucks above mentioned, each truck driver owns his own truck, operates it, pays the license and is liable for any damages sustained. The applicant assumes no liability on any losses except on his two trucks, and assumes no responsibility after the trucks leave the receiving station. Any loss occurring thereafter is assumed by the driver; that the adjustment of any loss is not the applicant's concern, but is solely the concern of the owner of the truck; that the applicant does not carry insurance on any trucks except the two in which he has ownership; that the applicant desires that the certificate asked for shall cover all trucks, including those that do not belong to him; that the owners of the other trucks are working for themselves purely on a commission basis, and that they are in the business conducted by the applicant to the extent of 85 per cent. The applicant further testified that he never read any of the policies of insurance carried by the other truck owners and, therefore, was not familiar with the exact conditions and terms thereof; that the additional service offered by the applicant in his motor truck business consisted in the special contracts which he offered to certain shippers.

In the opinion of the Commission, it is very doubtful whether the applicant is engaged in the transportation business; in fact, the evidence tends to show that the applicant is engaged in a brokerage business for the shipment of freight and express over truck lines from which he receives 15 per cent of the total receipts. The Commission, however, prefers to base its opinion upon another ground.

It is apparent from the evidence that the applicant is not the owner of all of the equipment and trucks to be used under the certificate which he seeks. In fact, he admits that his personal service in connection with the transportation system sought may

be termed a commission business. In granting a certificate of convenience and necessity the Commission must have some assurance that the utility to be operated will prove reasonably stable and permanent and lend itself to control and regulation by the Commission. Furthermore, the public using the utility and any person who may suffer injury in any way by the operation thereof has a right to feel that the same is reasonably responsible for any loss or damage. The evidence is clear that the applicant, under his form of organization, is not responsible for any loss or damage in the operation of the trucks while in transit. This, in our opinion, is the main hazard experienced in such a utility. The applicant's arrangement with the truck owners who really operate the utility has not been reduced to writing and is rather uncertain. The most that can be said for applicant's form of organization is that it is a loosely jointed cooperative scheme without any definite legal liability or obligation. In the opinion of this Commission such organization and operation as is proposed by the applicant is difficult to control, unstable, with hardly any assurance of continuity, and generally unsatisfactory.

No authority has been submitted by the applicant in which the issuance of a certificate of convenience and necessity was granted where the scheme of organization and operation is similar to the one in the instant case. In fact, all the authorities called to our attention are opposed to the granting of a certificate of convenience and necessity under similar circumstances.

The California Railroad Commission, in an investigation of the practices and methods of automobile transportation companies, entered an order to the effect that the practice of automobile transportation companies of leasing equipment or employing drivers or operating cars on a percentage basis of compensation dependent on the gross receipts per trip is unreasonable; and that such companies must either own their equipment or lease it for a specified amount on a trip or term basis, the leasing not to include the services of a driver or operator, such services to be made on the basis of a contract by which the driver or operator becomes an employe of the transportation company.

In re Transportation Companies, P. U. R. 1918-E, 782, 792.

In re James W. Gray, P. U. R. 1923-A, 600.

In re Mark R. Monzie, et al., P. U. R. 1923-B, 209.

Other authorities to the same effect are:

In re Buffalo Jitney Owners Association, P. U. R. 1923-C, 645, 649.

In re Jacobson, P. U. R. 1923-E, 481, 483.

The evidence indicates that most of applicant's transportation business, especially over the Ault route, is conducted under special contract. A common carrier, within the meaning of the Public Utilities Act of Colorado, includes every corporation or person affording a means of transportation by automobile or other vehicle whatever similar to that ordinarily afforded by railroads or street railways and in competition therewith, by indiscriminately accepting, discharging and laying down freight or express between fixed points or over established routes. Insofar as transportation under any special contracts of the applicant is concerned, until he has obtained a certificate of convenience and necessity he is not a common carrier and does not require a certificate of convenience and necessity for such transportation because he does not indiscriminately accept and carry freight or express. All contracts, special or otherwise, of a common carrier by auto transportation as defined above, are subject to the supervision and control of this Commission. Such contracts of a common carrier give rise to a great deal of discrimination and favoritism, and are not looked upon with favor by the Commission.

Under all the evidence submitted in these applications, and for the reasons above stated, the Commission is of the opinion that the public interest requires that no certificate of convenience and necessity be issued to the applicant herein. Other questions have been raised in this matter which, owing to the conclusions reached, it is not deemed necessary to further discuss.

ORDER.

IT IS THEREFORE ORDERED, That the public interest requires that no certificates of convenience and necessity be issued to the applicant, Gailon Lewis, and that the applications for certificates of public convenience and necessity as prayed for in Applications Nos. 276, 277 and 278 be, and the same are hereby, denied.

RE W. M. FULLER.

[Application No. 239. Decision No. 747.]

Certificates of convenience and necessity—Evidence of necessity—Successful operation.

1. That a motor vehicle operation has been conducted successfully "carries some weight that a public convenience and necessity exists."

Certificates of convenience and necessity—Jurisdiction—Taxes, etc.

2. The Commission is powerless to consider the question of taxes and the use of the public highways by a common carrier, in an application for a certificate authorizing truck operation.

Certificates of convenience and necessity—Local consent—County officials.

3. Neither the board of county commissioners nor any other county officer has the power to authorize or deny the use of public highways for any legitimate use.

Place and part of motor vehicle carrier in modern transportation stated.

[September 26, 1924.]

Appearances: Grant LeVeque, of Brighton, Colorado, for Applicant; E. G. Knowles, of Denver, Colorado, for Protestant, Union Pacific Railroad Company; W. R. Kelly, of Greeley, Colorado, for Board of County Commissioners of Weld County.

STATEMENT.

By the **Commission**: On April 2, 1923, W. M. Fuller, the above named applicant, filed a petition seeking a certificate of public convenience and necessity to operate as a common carrier by motor truck between Fort Lupton, Weld County, Colorado, and Denver, Colorado, for the carrying of freight and express.

The applicant states in his application that he is engaged in the business of carrying freight and express by motor truck between Denver and Fort Lupton, Colorado; that his post office address is Brighton, Colorado; that since the first day of June, 1915, the applicant has conducted the business of carrying freight and express between Denver and Fort Lupton and any and all intermediate points along or adjacent to the main route of travel followed by the trucks of the applicant; that he operates over the streets and alleys of the City and County of Denver to the extent that it is necessary to collect or deliver freight and express and operate as a public carrier of freight and express; that he maintains a depot at 1940 Wazee Street, Denver, for receiving and setting down freight and express at Denver; that he uses the shortest route to reach the main thoroughfare between Denver and Fort Lupton, which is the Lincoln Highway, passing in a northeasterly direction through Adams County to the city of Brighton, thence northerly to Fort Lupton in Weld County, and for such operation he has obtained the necessary license or permit from the respective authorities interested for the use of the streets, alleys and public thoroughfares within the boundaries of the particular municipality interested; that the route followed by the applicant may be considered as parallel with the right-of-way of the Union Pacific Railroad Company between Denver, Colorado, and Cheyenne, Wyoming; that said railroad carrier is a carrier of freight and that the American Railway Express Company, a carrier of express, operates over the Union Pacific Railroad between the points above named; that in addition to the above named rail carrier, there are bus and truck carriers of persons, freight and express operating over the route used by the applicant as follows: Colorado Motor Way, Chase Motor Company and C. L. Preston, operating as the Northern Transfer Company; that all of the aforementioned carriers are competitors of the applicant over his route, so far as the applicant is able to determine.

The applicant then sets forth his schedule of operation and the tariff charged on freight and express hauled; that the rates charged, as per tariff schedule, cover transportation charge from

the consignor's sending point to the consignee's receiving point, no extra charge being made for picking up freight or express at points served by the applicant or to deliver to the consignee or as directed by the consignor; that during the time the applicant has been serving as a public carrier of freight and express for hire a convenience and necessity existed, and exists at this time, for the following reasons: Because direct delivery from consignor to consignee is provided; that it saves trouble to the consignor of taking shipments to carrier's depot or in going to carrier's depot to receive shipments, and saves expense connected with deliveries to and from the depot of the applicant and saves time for both the shippers and the consignee; afternoon delivery to all points out of Denver to Brighton permits consignee to have goods on the same day ordered with least possible delay in delivery after placing order; allows consignee of perishable freight and express to have same the same day it is ordered; applicant calls at farms along his route to receive farm products for delivery at Denver, such as milk and cream, and to deliver to the country patrons shipments destined to them, eliminating the trouble and time to such consignors and consignees of taking the shipments to the nearest rail depot and of calling at a rail depot to receive shipments that otherwise must come to such rail depot were this service of the applicant not available to the country patrons; that the applicant's patronage consists chiefly of business that originates in or is destined to points within easy access of the route covered by the applicant, without requiring the trucks of applicant to go much out of the way of the outlined route of regular travel; that the public convenience and necessity is further shown by continued and growing patronage of the service offered by the applicant, and that delivery is made during business hours when the consignor, or agent, and the consignee, or his agent, can personally attend to the details incident to shipping freight or express and of receiving it.

The applicant further alleges that he has an investment in his trucks of $5,000, using in the operation of his service three two-ton trucks; that maps have been filed showing the route used by the applicant, and that public convenience and necessity has in

the past required, and public convenience and necessity now requires, applicant to operate a motor truck freight and express service over the route now covered by him.

Upon the filing of the application copies of the same were served on the Union Pacific Railroad Company and the American Railway Express Company, which resulted in the answer and protest filed by these parties. The Commissioners of Weld County and Adams County also appeared as protestants, but filed no written pleadings.

The answer of the Union Pacific Railroad Company recites that said railroad is being operated between Denver and Fort Lupton; that the line of said railroad is paralleled by the state highway over which the applicant desires to operate his motor trucks; that it regularly operates railroad trains, both passenger and freight, over and along said line, and that the residents, citizens and people of the towns and territory adjacent and intermediate to said termini have been, and will be at all times, properly, adequately, reasonably, sufficiently, promptly and conveniently served with respect to passengers, parcels, small packages and freight at reasonable charges; that it pays annually to the State of Colorado a large sum of money as taxes; that this revenue is used in part to build and maintain roads and highways; that the state highways should not be unnecessarily burdened with heavy traffic, such as is contemplated in the application herein, because such traffic will add enormously to the wear and deterioration of the highways, and by reason thereof there will be imposed on the respective counties and the state an increased burden of expenses for road repairs and construction, and that as a result of such use of the highways there will be heavy and continuous assessments against the taxpayers for the benefit and assistance of a private enterprise conducted for gain and in direct competition with the respondent; that the use of the highway by the applicant will interfere with the use thereof by the public for personal business and pleasure and will add materially to the danger and hazard to the public in its own use of the highway; that said motor truck line, if established, will receive increased patronage and will thereby deprive the railroad company of a

substantial amount of its business and of the income derived therefrom, to which revenue it is alleged it is justly entitled and should be permitted to retain in view of its prior entry into the field, the great investment of its railroad property, the high cost of operation, taxes paid and the general benefit to the communities served as a result of the operation of said line of railroad.

It is further alleged that the applicant has admitted that, in defiance and disregard of the law and without waiting to obtain the authority of the Commission, he has been, and is now, operating a motor truck line for the carriage of freight for hire between Denver and Fort Lupton in competition with the respondent.

The answer of the American Railway Express Company alleges that neither the present nor future public convenience and necessity requires, or will require, the continued operation of a motor truck line for the transportation of express and freight; that the Express Company has service on trains of the Union Pacific Railroad Company, Denver to Fort Lupton, and setting out its schedule; that the present train service is adequate for the public convenience and necessity, and that this locality is better served by passenger trains than is true of any other part of the state except between Denver and Colorado Springs; that there are no public demands to require the continuance of a motor truck line paralleling the rail line, Denver to Fort Lupton. It also alleges, in practically the same language as the railroad company, the payment of taxes and the deterioration of the roads by reason of heavy traffic.

The matter was set down for hearing February 18, 1924, at the Hearing Room of the Commission, State Office Building, Denver, Colorado, upon due notice to all parties, at which time testimony in support of the application and in opposition thereto by protestants was submitted. At the hearing the applicant testified that he was engaged in operating a truck line between Denver and Fort Lupton, and has been operating this line for ten years. He testified at some length relative to the necessity and convenience of the service which he was giving to the farmers and business men between Denver and Fort Lupton. Other

witnesses were produced by him who testified as to the convenience and necessity of the service rendered. The protestants introduced some testimony as to the service rendered by them, introducing their schedule of train and freight service.

The evidence of the applicant and his witnesses as to the convenience and necessity of the truck line, briefly, was reliable, rapid and prompt service, especially where perishable goods were involved; that merchandise ordered under the service rendered by the applicant could be delivered from Denver to the consignee on the same date of ordering; that the service given by the railroad, while in the main satisfactory, was not sufficiently prompt to meet present day demands; that door-to-door delivery, a great convenience to the consignee as well as an economic saving, could not be furnished as adequately by the railroad or express company. The undisputed fact that the applicant has conducted his truck line successfully even prior to the enactment of Section 35 of the Public Utilities Act carries some weight that a public convenience and necessity exists.

It may be stated that the motor vehicle carrier, as an important element in our transportation system, is evidently here to stay, and its presence cannot and should not be ignored; that it is destined to find its place in the general transportation scheme as the short haul medium for the transportation of both persons and property in populated areas heretofore served by railroads is generally recognized. Store door collection and delivery of freight in less than carload lots has already passed the experimental stage in many communities. The Commission is of the opinion that the applicant has shown that a public convenience and necessity exists in the service which he has rendered and is rendering as a common carrier over the line alleged in his application.

The question of taxes and the use of a common carrier for hire of the public highways, raised by the protestants, is one which in our opinion is purely legislative, requiring the attention of the legislative branch of the government. The Commission has

heretofore expressed its sympathy with such legislation. It is powerless to consider this question under the present status of our laws.

The protestants also raised the much discussed and argued question of the necessary consent of the respective counties before a certificate of public convenience and necessity can be issued to the applicant. The point involved was decided by this Commission September 15, 1923, in the case of The Colorado Motor Way, Inc., Application No. 191, to the effect that neither the board of county commissioners nor any other county officer has the power under the state law to grant or refuse any person the right to the legitimate use of the public highways, and not having this authority it was not necessary to obtain any consent therefor. The Commission regrets that its decision in Application No. 191 was not pressed for judicial interpretation by the protestants. While this is a question not free from doubt, yet the Commission adheres to its former opinion in the Colorado Motor Way case.

ORDER.

IT IS THEREFORE ORDERED, That the public convenience and necessity requires, and will require, the operation of an automobile line for the transportation of freight and express between the City and County of Denver and Fort Lupton, Colorado, by W. M. Fuller, applicant in the above entitled proceeding, and this order shall be taken, deemed and held to be a certificate of public convenience and necessity therefor.

IT IS FURTHER ORDERED, That applicant shall file with the Commission within twenty days from the date hereof a schedule of his rates and the time of arriving and departure from the various communities he serves.

IT IS FURTHER ORDERED, That applicant shall operate said automobile transportation line as set forth in his schedule throughout the year, except when prevented by the Act of God, the public enemy, or unusual and extreme weather conditions,

and this order is made subject to compliance by applicant with the rules and regulations now in force or to be hereafter adopted by this Commission with reference to automobile common carriers, and also subject to any legislative action that may in future be taken with respect thereto.

RE DELMAR L. MILLER.

[Application No. 289. Decision No. 765.]

Monopoly and competition—Motor vehicle line—Competition with railroad.

1. If terminals are railroad points and route parallels railroad line most of its distance, motor carrier is operating in competition with a railroad.

Common carriers—Door-to-door delivery—Effect.

2. The fact that a motor vehicle carrier renders door-to-door delivery does not prevent his being a common carrier.

Certificates of convenience and necessity—Operation of motor vehicle line—"Construction" of system, etc.

3. Operation of a motor transportation line is the "construction" of a new facility, plant or system within the meaning of Sec. 35 of the act, Sec. 2946, C. L. 1921.

Certificates of convenience and necessity—Local consent—County.

4. It is not necessary for a motor vehicle carrier to procure consent from a county.

[October 23, 1924.]

Appearances: Chas. C. Sackman, of Denver, Colorado, for applicant; E. G. Knowles, of Denver, Colorado, for protestant, Union Pacific Railroad Company.

STATEMENT.

By the **Commission**: On October 17, 1923, Delmar L. Miller, the above named applicant, doing business as The Aurora Truck Line, filed an application seeking a certificate of public convenience and necessity to operate and transport by automobile freight between Deer Trail and Denver, Colorado, and all intermediate points.

The material allegations contained in the application are that the applicant is desirous of establishing, and engaging in, and

maintaining a freight transportation business by means of automobile trucks between the cities of Aurora and Denver, Colorado, and Deer Trail and Denver, Colorado, and all intermediate territory; that the postoffice address of said applicant is Aurora, Colorado, and 1940 Wazee St., Denver, Colorado; that the applicant is in the business of and is desirous of continuing the hauling of milk and other freight, as a common carrier, by means of automobile trucks in, and through, and immediately adjacent to the territory set forth, over a practically fixed route and time schedule as set forth in the application; that the applicant has for about seven years been maintaining a truck service from Denver to about two miles west of Watkins, Colorado, covering the territory about six miles north and two miles south of Colfax Avenue, as the same runs out of Denver due east; that the applicant has for about two years maintained an automobile truck service from Denver to Deer Trail, Colorado, and intermediate points, for the carrying of general merchandise, freight, and also for the delivery of milk to Denver, Colorado, such service being maintained every day in the week except Sundays; that the applicant is informed, and believes, and so states the fact to be that said territory is now served, as to its railroad freight transportation facilities, only at Watkins and Deer Trail, Colorado, by the Union Pacific Railroad Company, this being a steam railroad line, and that all territory covered by the applicant west of Watkins, Colorado, has no railroad service for the carrying of freight whatsoever; that the applicant is informed, and believes, that the territory between Denver and Deer Trail is sufficiently large, improved, developed and inhabited, and originates enough freight business that is not, and cannot be, provided for or taken care of by the railroad; and that the necessity and convenience of the farmers and merchants in said territory warrant and require the operation of motor truck transportation, to assist and supplement and provide additional service to that of the railroad now serving said territory, in order to furnish speedy and adequate facilities for the handling of the freight of said territory; that the applicant owns, or has in his possession, a sufficient number of trucks to satisfactorily take care of the automobile transpor-

tation to be furnished; that the applicant is a man of good moral character, and has been in the motor truck business about eight years.

Upon the filing of the application, copies of the same were served on the Union Pacific Railroad Company and the American Railway Express Company, which resulted in a protest being filed by the Union Pacific Railroad Company on December 21, 1923. In said answer, it is alleged that said railroad is being operated between Denver and Deer Trail, and the said line of railroad is paralleled by the state highway of the State of Colorado, over which the applicant desires to operate; that the protestant regularly operates trains, both passenger and freight, over and along its said lines of railroad, and all the residents, citizens and people of the towns and territory adjacent and intermediate to the termini of said line of railroad have been, are, and will be, at all times, properly, adequately and conveniently served by the protestant with respect to the transportation of parcels, small packages and all freight, including milk, at reasonable, lawful rates and charges; that said motor truck line, if established, will receive more or less patronage, and will thereby deprive said protestant of a substantial amount of its business and of the income derived therefrom, to which revenue said protestant is justly entitled, and it should be permitted to retain the same in view of its prior entry into the field, the great investment in its railroad property, the high cost of operation, and the general benefit to the communities served as a result of the existence and operation of said lines of railroad; that the applicant has failed to show or allege that he has received the required consent, franchise, permit, ordinance, or other authority of the proper county, etc., for the operation of a motor truck line for which a certificate of public convenience and necessity is sought.

The matter was set down for hearing on March 5, 1924, at the Hearing Room of the Commission, 305 State Office Building, Denver, Colorado, upon due notice to all parties, at which time testimony in support of, and in opposition to, the application was submitted.

At the hearing, the applicant testified that he has conducted a motor truck business from Denver to about two miles west of Watkins for the past eight years, and from Denver to Deer Trail, Colorado, for about the past two years; that his tonnage of shipment per annum has been about 700 tons; that his equipment is composed of five trucks, including a receiving depot at 1940 Wazee Street, Denver, Colorado; that his investment in this truck business amounts to about $14,000, and that he is personally financially responsible to the sum of $20,000; that there is no railroad competition over the route in question up to a point about two miles west of Watkins, Colorado. The applicant's testimony was supplemented by other witnesses to the effect that the service given by the applicant was a public convenience and necessity to the territory in question; that service by local freight from Denver was only three times a week; that merchandise ordered up to about 6:00 o'clock P. M. could be delivered the next morning at the door of the consignee; that the railroad company could give no such expeditious service; that related as to time, saving of drayage, as well as of spillage, motor truck transportation is more adaptable to the shipment of milk than railroad transportation, and that the shipment of milk by automobile transportation has been very much more satisfactory.

A witness for The Chicago, Rock Island and Pacific Railroad Company, at the same hearing, testified that it is hardly practical for a railroad to furnish the service given by motor truck transportation, and that the truck service is, in fact, a new industrial condition arising out of the advent of the automobile. It was further admitted by one of the witnesses of the same railroad that the service furnished by motor truck transportation, in many cases, was a convenience. There was some evidence to the effect that three or four years ago there was more service furnished by the railroad company than at the present time, but this evidence, however, was not very definite, nor was there any definite evidence presented showing any substantial loss of income by the railroad company since the operation of the truck line in question.

In his brief, the applicant seemingly contends that the auto transportation business, as conducted by him, is not that of a common carrier within the meaning of the Public Utilities Act; that part of Section 2 (e) of the Act applicable reads as follows:

"The term common carrier, when used in this Act, includes * * * and every other corporation or person affording a means of transportation by automobile or other vehicle whatever, similar to that ordinarily afforded by railroads or street railways and in competition therewith, by indiscriminately accepting, discharging and laying down either passengers, freight, or express between fixed points or over established routes; * * * etc."

The applicant in his business affords a means of transportation by automobile similarly performed by railroads in the transportation of freight at an established rate. He testified that he cares for everyone who desires the service. The fact that his service includes the additional accommodation of a door-to-door delivery does not exclude him as a common carrier. His main object of transporting freight indiscriminately is clear from his testimony. Furthermore, his testimony shows that he is transporting between fixed points (Deer Trail and Denver), and his application expressly alleges this. The fact that he leaves an established route to make a door delivery, in view of the other circumstances, is not controlling.

It appears from the evidence that the route of the applicant to a point about two miles west of Watkins does not adjoin the railroad, but that east from that point it does. The fact that for a greater distance his route does adjoin the railroad, together with the further fact that his terminals are railroad points, sufficiently establishes that he is in competition with the railroad. To hold otherwise would materially affect supervision and control by the Commission of the proposed transportation system. Unless the Commission assumes control over the entire system, there could not be proper and satisfactory public control and supervision.

Applicant also contends that his operation of a motor transportation system is not a "Construction" of a new facility,

plant or system within the meaning of Section 35 of the Act. Hence, applicant argues that said Section 35 never contemplated the granting or not granting of a certificate of public convenience and necessity for the use of the common public highways of Colorado, either as to automobile freight or passenger carriers. We cannot agree with this contention. The word "Construction," as contained in this Section, is synonymous with the words "Installation" or "Operation." The Act expressly declares an automobile line in competition with a railroad to be a common carrier, and that the term "Public Utility" includes every common carrier. Section 35 expressly includes every public utility. This particular question was raised in the case of The Atchison, Topeka and Santa Fe Railway Company vs. Inter-City Automobile Line, Inc., P. U. R. 1923-B, 323. While the Commission in that opinion did not make any special reference to the word "Construction" as contained in Section 35, nevertheless the same was argued in the briefs. We quote from that case the following language:

"From a careful reading of the law the Commission can find nothing wherein it would be justified in holding that carriers by automobile, in any sense, should be regarded in a different class than other public utilities as far as the granting or withholding of certificates of public convenience and necessity is concerned."

The protestant contends that applicant has not made a sufficient showing as to public convenience and necessity for his transportation system. In our opinion he has. As to the meaning of the phrase "public convenience and necessity," this was fully discussed by the Commission in the case of *re* Over-Land Motor Express Company, P. U. R. 1920-B, 551. The sufficiency of evidence as to convenience and necessity was ruled upon in the case of *re* C. L. Preston, P. U. R. 1922-C, 844. The facts in that case are very similar to the facts in the instant case. In the Preston case we found that the evidence introduced was sufficient to show a public convenience and necessity. Our attention has been called to the case of *re* Ralph McGlochlin, P. U. R. 1922-C, 215, decided by this Commission on March 6, 1922. The lan-

guage therein defining public convenience and necessity is entirely too indefinite and incomplete, and no attempt was made therein to define the same. The Commission, therefore, adheres to the definitions contained in the Over-Land Motor Express Company case, *supra,* and in *re* C. L. Preston, *supra.*

On the question of the necessity of consent from a county before issuance of a certificate of public convenience and necessity, the Commission adheres to its opinion in the case of Colorado Motor Way, Inc., P. U. R. 1924-A, 56.

The Commission finds, therefore, that the applicant is a common carrier requiring a certificate of public convenience and necessity under the Public Utilities Act, and that the facts are sufficient to show that a public convenience and necessity exists for the motor truck transportation system proposed by the applicant between Denver and Deer Trail, Colorado.

ORDER.

IT IS THEREFORE ORDERED, That the public convenience and necessity requires, and will require, the operation of an automobile line for the transportation of freight and express between the City and County of Denver and Deer Trail, Colorado, by Delmar L. Miller, doing business as The Aurora Truck Line, the applicant in the above entitled proceeding, and this order shall be taken, deemed and held to be a certificate of public convenience and necessity therefor.

RE W. S. GRAY, *et al.*, DOING BUSINESS AS GRAY TRUCK LINE.

[Application No. 300. Decision No. 784.]

Monopoly and competition—Established railroad—Motor carrier.

1. The destruction of an established railroad transportation system operated at a loss should not be permitted by granting a certificate to a motor transportation company which would tend further to undermine and limit the service rendered by the railroad company, although the motor truck service is in some instances more convenient to merchants.

Certificates of convenience and necessity—When required—Non-competitive carriers.

2. The Commission has no jurisdiction over the operation of a motor vehicle system on a route which is not in competition with a rail carrier.

[December 15, 1924.]

Appearances: Fred N. Bentall, Colorado Springs, Colorado, for Applicant; D. Edgar Wilson, Denver, Colorado, for The Chicago, Rock Island and Pacific Railway Company.

STATEMENT.

By the **Commission**: On November 14, 1923, W. S. Gray, one of the members of a co-partnership consisting of himself, H. W. Gray and E. M. Woodward, doing business under the name and style of the Gray Truck Line, filed an application seeking a certificate of public convenience and necessity to operate as a common carrier by motor truck in and about Colorado Springs, and to various points adjacent thereto, and more particularly to Manitou, Falcon, Peyton, Fondis, Calhan, Rush, White Station, Squirrel Creek, Fountain, Hanover, Lytle, Ramah, Simla, Keysor, Hall Station, Kendrick, Kutch, Matheson and other points in El Paso, Elbert and Lincoln Counties, Colorado.

It is alleged in the application of the Gray Truck Line that it is a co-partnership consisting of W. S. Gray, H. W. Gray and E. M. Woodward; that the company does not run its trucks on schedule time nor every day to any one of the points hereinabove mentioned; that the company picks up such work and takes such orders as it is able to find and procure, and makes delivery of goods to any point or place designated by its customers; that it does not run over any definite or specific route, but makes such runs to any of the above designated towns as may be required by its customers; that it carries no passengers for hire, or at all, but confines its business to baggage, parcels and such articles or products as may be conveniently hauled in a truck; that it makes delivery of such articles or products to the place of business or place of residence as designated by its customers; that delivery is made in any of the towns above designated without additional charge for such specific place of delivery; that it acts

as purchasing agent and sales agent for some of its customers; that many of the points made by said company are out in the country and distant from any railroad; and that the operation of this truck line will be required by public convenience and necessity.

On the fiilng of the application, copies were served on The Colorado and Southern Railway Company, The Denver and Rio Grande Western Railroad Company, The Atchison, Topeka and Santa Fe Railway Company, The Chicago, Rock Island and Pacific Railway Company and The Midland Terminal Railway Company.

Protests were filed by The Atchison, Topeka and Santa Fe Railway Company and The Chicago, Rock Island and Pacific Railway Company.

The protest of The Chicago, Rock Island and Pacific Railway Company alleges that it is a consolidated corporation duly organized and existing under and by virtue of the laws of Illinois and Iowa, having its principal place of business in Chicago, Illinois, and is now engaged in operating certain lines of railroad within the State of Colorado as a common carrier; that the application filed herein does not state facts sufficient to constitute grounds which justify or warrant the granting of a certificate of public convenience and necessity for the purposes set forth; that the application filed herein improperly joins applications for permits or orders to operate motor trucks over divers routes and between divers points within the State of Colorado, affecting separately and differently several other railroads and common carriers besides this protestant; that the said application appears to seek a certificate or certificates from the Commission authorizing applicant to engage in the business of general trucking in and about Colorado Springs, Colorado, and to various points adjacent thereto in the counties of El Paso, Elbert and Lincoln; that the applicant has failed to comply with the rules and regulations of the Commission, in that no definite route or routes over which applicant proposes to operate its motor trucks and engage in the business of general trucking are described, and applicant fails to describe what common carriers by rail or

otherwise said applicant is or will be in competition with; and this protestant, therefore, contends that it should not be joined or involved in any application or hearing herein until applicant has more definitely and particularly described said routes and operations; that the protestant owns and operates a line of railroad extending from Colorado Springs to Limon, Colorado, over which line of railroad protestant is now, and has for a long time past, been operating regular passenger and freight trains, which trains are, and always in the past have been, adequate to operate and take care of all reasonable requirements and needs of the communities and territory located along its said line of railroad; that all of the towns, communities and territory served by this protestant with its said line of railroad, and which are set out in the application herein, are now, in the past have been, and in the future will be, fully, adequately, reasonably, sufficiently and conveniently served by this protestant by means of its said line of railroad and the passenger and freight trains operated thereon at all times and at reasonable rates and charges.

The protestant denies that the operation of any truck line by applicant between the points or towns situate on said line of railroad of protestant or in the territory generally served by it has been, is, or will be required by public convenience and necessity, and denies that there is any public necessity existing for said truck operations and for the establishment and operation of any motor truck line of applicant in competition with the protestant, and that the establishment and operation of the motor truck lines as sought by applicant will injuriously and unreasonably interfere with and affect the operation of the line of railroad and the traffic, revenue and business of the protestant; that the railroad operated by protestant was first in the field, including the territory proposed to be served by the applicant, and was constructed and has been maintained and equipped with all necessary facilities and appurtenances at great expense; that protestant has very large sums of money invested in its said line of railroad; that it pays large sums of taxes; and that there is no genuine necessity, public or otherwise, for the establishment of the proposed truck line to serve the territory and communi-

ties adjacent to the line of railroad operated by this protestant; and that the public is now provided with adequate transportation facilities in the territory and communities in question far in excess of the immediate or probable future requirements.

The matter was set down for hearing February 13, 1924, at Colorado Springs, Colorado, upon due notice to all parties, at which time testimony in support of the application and in opposition thereto by protestants was submitted.

Before any testimony was taken the applicant withdrew its application as to the following towns: Manitou, Squirrel Creek, Hanover, Fountain and Lytle.

At the hearing the applicant testified that it uses three trucks in its transportation system; that it started one truck in April, 1922, and since that time its business has increased to such an extent that three trucks are required; that it has two lines, one on the Ocean to Ocean Highway from Colorado Springs as far as Matheson, and the other on the Farmers Highway, which runs about fifty-odd miles to Kendrick and further south, and that it has in contemplation a third branch from Calhan to Yoder, a distance of about nineteen miles south; that there is quite a demand for this transportation system by the merchants of the various communities served; that it has no printed tariffs and the rates are made on verbal understanding, keeping in view that all charges for transportation are made on the same basis; that applicant runs its trucks over the route when it has freight; that in addition to its transportation system, applicant buys quite a lot of fruit which it sells to the merchants along its route.

The applicant produced a number of witnesses, most of whom were merchants in the towns served by applicant, who testified to the convenience and necessity of the service rendered by applicant; that the service by the applicant's transportation system is more convenient because of door-to-door delivery, and permits more frequent shipment of perishable goods for the convenience of the public served by the merchants in business along the route. One of applicant's witnesses testified that prior to the Gray Truck transportation system, five truck lines had been operating in the same territory and failed to make any profit therefor and

went out of business for that reason. All of applicant's witnesses testified to the effect that while the Rock Island transportation system is a greater necessity than the motor truck service, yet they felt that there ought to be an opportunity for both transportation systems to function. Evidence produced by the applicant further showed that the railway express service was practically the same as the truck service, except that the express service was more expensive to the shipper.

The evidence of protestant, The Chicago, Rock Island and Pacific Railway Company, was to the effect that no complaints with reference to local freight service had ever been made by any of the communities along its route, nor was there any complaint made that the freight and express service rendered by the railroad was in any way inadequate. The evidence further developed that the revenue derived by the Rock Island Railway from its operations within the State has never been adequate to meet the expenses of such operation. As to the territory from Colorado Springs to Matheson, the evidence showed that the business of the railroad had never been sufficient to pay operating expenses even before the advent of the truck. The Chicago, Rock Island and Pacific Railway Company has tri-weekly local freight service to all the communities in question and two passenger trains in each direction daily furnishing express service.

It can perhaps be conceded that the service furnished by the motor truck transportation system to the communities along the Rock Island Railway is in some instances more convenient to the merchants. It must, however, be further conceded that the service by the railway company is considerably more convenient and necessary than that furnished by the motor truck service. The territory in question through which the Rock Island Railway Company, as well as the motor truck system of the applicant, operates is sparsely settled, and it is very doubtful if both transportation systems can continue to serve for very long unless there should be a great influx of settlers and a decided increase in the towns affected. The fact that five others have tried the motor truck transportation business in this territory and failed is some evidence that this service is not necessary; if it were, the

truck system should be on a paying basis. Perhaps the fact that the applicant has, in addition to his transportation system, also engaged in the business of huckster, has made it a paying business for him.

The evidence is undisputed that The Chicago, Rock Island and Pacific Railway Company has never derived revenues from its operations in this State equal to or adequate to meet the expenses thereof, and that over the particular route in question it has never received sufficient business to cover its operating expenses. Everyone, including counsel for applicant, concedes that if one were to select between the railroad and the motor truck service of the applicant, the applicant's service would have to be discarded and the railroad service would have to be maintained.

Having in mind the particular circumstances of the territory served by the applicant, as well as The Chicago, Rock Island and Pacific Railway Company, and the further fact that no complaint has ever been made of the service furnished by the railway company as to its adequacy, as well as to its sufficiency, the Commission is of the opinion, and so finds, that the public convenience and necessity does not require the motor truck transportation service rendered by the applicant between Colorado Springs and Matheson. It would be manifestly unfair to permit the destruction of an established transportation system, as now furnished by The Chicago, Rock Island and Pacific Railway Company, and operated at a loss, by granting a certificate to the applicant herein which would tend to only further undermine and limit the service now rendered by the railway company.

Relative to the transportation system of the applicant conducted on the Farmers Highway as far as Kendrick, there seems to be no evidence showing that this particular route is in competition with the railway company and, therefore, this Commission has no jurisdiction thereover; and this finding is solely limited to the route in competition with The Chicago, Rock Island and Pacific Railway Company between Colorado Springs and Matheson, Colorado.

ORDER.

IT IS THEREFORE ORDERED, That the application filed herein for a certificate of public convenience and necessity between Colorado Springs and Matheson, Colorado, be, and the same is hereby, denied.

RE H. P. KIDD, *et al.*, DOING BUSINESS AS WHITE MOTOR EXPRESS COMPANY.

[Application No. 293. Decision No. 785.]

Monopoly and competition—Railroads and motor carriers—Special service.

1. The requirements of those in the business of petroleum and petroleum products, automobile accessories, and tires were held to demand a quicker and more expeditious delivery than was furnished by a railroad, and to justify the granting of certificate authorizing motor truck transportation of such commodities between points served by the railroad.

Certificates of convenience and necessity—Powers of Commission—Limited certificate.

2. The Commission has authority to limit a certificate of convenience and necessity to motor truck transportation of petroleum and its products, automobile accessories and tires.

Common carriers—Motor truck service as common carriage.

3. A motor truck transportation system hauling certain kinds of freight in competition with railroads and accepting the commodities in question indiscriminately between two designated points was held to be a common carrier.

[December 18, 1924.]

Appearances: Barney L. Whatley, Denver, Colorado, for Applicant; J. Q. Dier, Denver, Colorado, for Protestant, The Colorado and Southern Railway Company; Erl H. Ellis, Denver, Colorado, for Protestant, The Atchison, Topeka and Santa Fe Railway Company; Thomas R. Woodrow, Denver, Colorado, for Protestant, The Denver and Rio Grande Western Railroad Company; F. O. Reed, Denver, Colorado, for Protestant, American Railway Express Company.

STATEMENT.

By the **Commission**: On October 24, 1923, H. P. Kidd, C. E. Martin, and F. E. Martin, doing business as a co-partnership under the firm name and style of the White Motor Express Company, filed a petition seeking a certificate of public convenience and necessity to operate as a common carrier by motor truck between the City and County of Denver and the City of Colorado Springs, Colorado, and intermediate points for the carrying of freight between said points.

The applicants state in their application that they are a co-partnership and have been engaged in the business of motor truck transportation since about May 5, 1922; that they are engaged in hauling certain kinds of freight by motor truck between different points in the State of Colorado by arrangement with the shipper or the consignee; that they have two motor trucks which are used in said service but the trucks do not run on schedule time; that they do not haul all kinds of freight, but do haul as and when tendered to them certain kinds of freight; that they do not operate over fixed routes; that they do not haul passengers, mail or express; that the principal business of the applicants is the hauling of oils, linseed, greases, gasoline in barrels or can lots, automobile tires, accessories and parts, together with such incidental freight or business as may be contracted for with individuals and corporations; that they do not haul hogs, stock, cattle or groceries; that up to the present time the principal business of the petitioners has been the hauling of such products between Denver and Colorado Springs, but that they have held themselves out as ready and willing to haul any article to any point desired; that the business which the petitioners are now, and have heretofore, engaged in is a public convenience and necessity, and renders a service to the public which the railroad companies have not heretofore, and are not now handling in a manner satisfactory to the public and the shippers and consignees of the several commodities mentioned.

Applicants further state that the several railroad companies operating between Denver and Colorado Springs have certain designated days on which they will accept and deliver oils, lin-

seed, gasoline, etc., that The Atchison, Topeka and Santa Fe Railway Company and The Colorado and Southern Railway Company accept such items only on Monday and Saturday of each week, and that The Denver and Rio Grande Western Railroad Company accepts said articles on Tuesday and Thursday of each week; that the service which the applicants render in the delivery of said articles is much quicker than that afforded by any of said railroad companies, and that it is in the interest of the public that such articles be delivered with greater dispatch than any of the railroad companies afford; that the service which the petitioners render in the delivery of automobile tires, accessories and equipment is a necessary one for the convenience and accommodation of the public, for the reason that the applicants make a more prompt delivery thereof than any of said railroad companies, and that the applicants deliver said articles on rush orders and at times and hours when there is no railroad service for the prompt delivery thereof; that by means of the service afforded by the applicants, persons desiring a prompt delivery of any of the articles which the applicants handle can wire or telephone rush orders for said articles and secure delivery of such orders by truck much earlier than it is possible for them to be delivered by railroad freight service; and in addition thereto, the service which the applicants afford contemplates the picking up of said articles and delivery thereof to the consignee without extra drayage charges; that the service which the applicants render is essential to the prompt, cheap and efficient transportation of such articles and is of great benefit to the business houses and others desiring quick service; that the applicants have at no time delivered any of said articles at a rate less than said railroad companies charge for the delivery thereof by freight, and that in most instances the charges received by the applicants are in excess of those charged by the railroad companies for freight delivery.

It is also stated in the application that the applicants are amply able to carry on and conduct the business which they are now, and have heretofore been, engaged in and are able to respond for any damage that may be done to the property delivered

to them for transportation which they may agree to transport; and in addition thereto, and for the protection of the shippers of said property, the applicants carry insurance covering all such property so delivered to them for transportation up to the amount of $5,000 per truck load; that there is some doubt in the minds of the applicants as to whether they come under the provisions of Chapters 133 and 134 of the Session Laws of Colorado for 1915, and as to whether they are a public utility within the meaning of the statutes and laws of the State of Colorado in such case made and provided.

Upon the filing of the application, copies of the same were served on The Atchison, Topeka and Santa Fe Railway Company, The Colorado and Southern Railway Company, American Railway Express Company and The Denver and Rio Grande Western Railroad Company who thereafter, and within the time required, filed answers and protests against the granting of the application.

The matter was heard February 20, 1924, at the Hearing Room of the Commission, 305 State Office Building, Denver, Colorado, upon due notice to all parties, at which time testimony in support of the application and in opposition thereto by protestants was submitted. At the hearing the applicants testified that they were engaged in operating a motor truck line between the points involved and had been operating this line since about May 6, 1922; that the approximate amount of their investment was about $8,000; that the equipment of their transportation line consisted of four trucks and one service car; that by far the major portion of the articles transferred by them consisted of petroleum and petroleum products, automobile tires and automobile accessories; that practically all of their business was confined to such commodities as were given on rush orders and required expeditious delivery; that such articles were accepted indiscriminately by them for shipment, and that most of the transporting done by them, except by special contract, was between Denver, Colorado Springs and intermediate points.

The evidence of the applicants was supplemented by the testimony of several shippers, who testified as to the public conven-

ience and necessity of the particular service rendered by the applicants; that most shipments made by them over the transportation system of applicants were rush orders and required expeditious delivery; that no freight could be shipped on any particular day from Denver after 4:00 P. M.; that any orders received by them after 4:00 P. M. could not be shipped and delivered until the following day; that the service of the applicants permitted the shipment of rush orders until about 9:00 or 10:00 o'clock in the evening of any particular day; that orders for petroleum, petroleum products, automobile tires and automobile accessories usually demand immediate delivery, and that there has grown up a custom among customers for such commodities to rely upon such expeditious and quick delivery to such an extent that the public now demands it.

The Commission is of the opinion that there is merit to the applicants' contention that the requirements of those in the business of petroleum and petroleum products, automobile accessories and tires demand a quicker and more expeditious delivery than is furnished by the railroads in the territory in question. The Commission, however, is also of the opinion that this demand does not apply to other commodities, and that any certificate of convenience and necessity granted herein should be limited to the transportation of petroleum and petroleum products and automobile accessories and tires between Denver and Colorado Springs, Colorado, and intermediate points. Its authority to so limit a certificate of convenience and necessity is found in Section 35 (c) of the Public Utilities Act in the following language:

"* * * The Commission shall have power, after hearing, to issue said certificate * * * for the partial exercise only of said right or privilege, and may attach to the exercise of the rights granted by said certificate such terms and conditions as, in its judgment, the public convenience and necessity may require. * * *"

The Commission, therefore, finds that the public convenience and necessity requires the transportation system of the applicants for the transportation as a common carrier of petroleum

and petroleum products, automobile accessories and tires only between Denver and Colorado Springs and intermediate points.

Some doubt is expressed by the applicants as to whether the transportation system as conducted by them is that of a common carrier. The Commission has no doubt in this matter. The evidence shows that the applicants are in competition with the railroads, and that they accept indiscriminately the commodities in question between Denver and Colorado Springs.

On the question of consent by the counties involved prior to the issuance of a certificate of public convenience and necessity, the Commission adheres to its opinion in the case of The Colorado Motor Way, Inc., Application No. 191, decided by this Commission September 15, 1923.

ORDER.

IT IS THEREFORE ORDERED, That the public convenience and necessity requires, and will require, the operation of an automobile line for the transportation of petroleum and petroleum products, automobile accessories and tires only as a common carrier between the City and County of Denver and Colorado Springs, Colorado, and intermediate points, by H. P. Kidd, C. E. Martin and F. E. Martin, doing business as a co-partnership under the firm name and style of the White Motor Express Company, applicants in the above entitled proceedings, and this order shall be taken, deemed and held to be a certificate of public convenience and necessity therefor.

IT IS FURTHER ORDERED, That the applicants shall file with the Commission within twenty days from the date hereof a schedule of their rates and the time of arrival and departure from the various communities they serve.

IT IS FURTHER ORDERED, That the applicants shall operate said automobile transportation line, as set forth in their schedule, throughout the year except when prevented by the Act of God, the public enemy, or unusual and extreme weather conditions; and this order is made subject to compliance by applicants with the rules and regulations now in force or to be hereafter adopted by the Commission with reference to automobile

common carriers, and also subject to any legislative action that may in future be taken with respect thereto.

Lannon, Commissioner: The Public Utilities Act gives this Commission authority to issue certificates of public convenience and necessity for the operation of auto bus lines for hire only where the proposed operations are in competition with railroads or street railways. Obviously the intent of the Act was that certificates should only be granted in isolated instances where the railway service was inadequate. If this is not the intent of the Act, then there was no reason or excuse for the enactment of the law. Between Denver, Colorado Springs and Pueblo twenty-two passenger trains—eleven each way—are run during the summer months, and ten trains each and every day are run during the winter months. Besides the passenger trains, a great many freight trains are operated daily. Between the points named, The Denver and Rio Grande Western Railroad, The Atchison, Topeka and Santa Fe Railway and The Colorado and Southern Railway operate more trains, and more frequent service is given by steam railway trains than is known elsewhere in Colorado. If there is any excuse for the granting of a certificate of public convenience and necessity between Denver and Colorado Springs, then I say there is absolutely no excuse for refusing such certificates anywhere in this State.

For the aforesaid reasons, I most respectfully dissent to the opinion rendered in the instant case.

THE PIKES PEAK CONSOLIDATED FUEL COMPANY

v.

THE DENVER & RIO GRANDE RAILROAD COMPANY.

[Case No. 272. Decision No. 788.]

Pleadings—Other grounds for relief than those stated in complaint—Surprise.

1. Other and different reasons for sustaining a complaint than those set forth therein may be urged unless defendant or interveners are injured by reason of surprise.

Rates—Value—Element but not controlling factor.

2. The value of a commodity transported is an element to be considered in fixing railroad rates, although it is not a controlling factor.

Rates—Reason for not making adjustment—Need of revision of other rates.

3. That other adjustments should be made in coal rates is no valid reason for not making a proper adjustment in the instant case.

[December 18, 1924.]

Appearances: C. C. Hamlin and F. C. Matthews, of Colorado Springs, and L. J. Williams, of Denver, for Complainant; J. A. Gallaher, of Denver, for Defendant; A. L. Vogl, of Denver, for Intervener, The Colorado and New Mexico Coal Operators Association; Erl H. Ellis, of Denver, for Intervener, The Atchison, Topeka and Santa Fe Railway Company.

STATEMENT.

By the **Commission**: Complainant, The Pikes Peak Consolidated Fuel Company, filed its complaint with the Commission on August 20, 1923, wherein it is alleged that complainant is a domestic corporation operating coal mines at Pikeview, Colorado, situated on The Denver and Rio Grande Western Railroad Company's main line 4.53 miles north of Colorado Springs, Colorado; that defendant is a common carrier by rail intrastate within the State of Colorado, and as such is subject to the terms and provisions of the Public Utilities Act of said State and all acts amendatory thereof or supplemental thereto.

Complainant further alleges that defendant railroad company exacts, makes and demands charges for the transportation of lignite coal, carloads, from Pikeview, Colorado, to Pueblo, Colorado, of $1.58 per ton on lump and mine run and 90 cents per ton on slack, which are carried in certain designated tariffs of said defendant railroad company; that the aforesaid rates are unjust and unreasonable and unjustly discriminate against complainant for the reason that the same rates, viz., $1.58 per ton on lump and mine run and 90 cents per ton on slack, are now in effect from the coal mines located at Canon City, called the Canon City Group, to Pueblo on bituminous coal, which are pub-

lished and carried in certain denominated tariffs of said defendant carrier; and further alleges that said bituminous coal produced in the Canon City Group is of a much higher grade than the lignite coal produced in the mines of complainant, and that the prices of the respective coals at the mines are approximately twice as much for the Canon City bituminous as for the Pikeview lignite.

Complainant, therefore, prays that, after hearing and investigation, the defendant carrier be required to establish and publish rates from Pikeview to Pueblo of 75 cents per ton on lignite lump and mine run, and 50 cents per ton on lignite slack coal from its said Pikeview mines to Pueblo.

The defendant carrier answered the complaint of plaintiff, filed August 27, 1923, wherein it admits the allegations of paragraph one of said complaint; alleges in a general way that it is a common carrier, as alleged in plaintiff's complaint, and that T. H. Beacom is the Receiver of the defendant carrier, and as such Receiver is subject to the provisions of the Public Utilities Act of the State of Colorado and all acts amendatory thereof or supplemental thereto.

Defendant further admits that the rates on lignite coal from Pikeview to Pueblo are as stated in paragraph three of the complaint, viz., 90 cents per ton on slack and $1.58 per ton on other classes of coal, and that defendant carrier publishes such rates in certain specified tariffs.

Defendant carrier denies the allegations of paragraph four in said complaint contained, and denies that the rates mentioned are unjust, unreasonable or discriminatory; and as to the allegations in paragraph five of said complaint, the defendant alleges that the rates prayed for by complainant of 75 cents per ton on lump and mine run and 50 cents per ton on slack from Pikeview to Pueblo are not reasonable or compensatory for the service involved, and that any change whatsoever should not be made in the present rates between said points, and asks that the complaint of plaintiff herein be dismissed.

Subsequently, on September 17, 1923, The Atchison, Topeka and Santa Fe Railway Company asked that it be permitted to

intervene in the above cause, and that it be considered as a party defendant. In its petition of intervention said intervener alleges its corporate capacity, and that it is authorized to do, and is doing, business as a common carrier of coal and other commodities within and through the State of Colorado; that among other intrastate movements the transportation of coal from mines immediately north of Colorado Springs to Pueblo is involved, as well as the movement from the Canon City Group of mines; that it is subject to the same extent and effect as the defendant herein to the provisions of the Public Utilities Act of this State, and particularly is affected by the rulings and decisions of this Commission affecting or changing intrastate coal rates in Colorado.

Intervener Santa Fe further alleges that it makes similar rates and charges to those set up in the complaint as being made by the principal defendant, both from mines on its rails in the vicinity of Pikeview to Pueblo and from the Canon City mines to Pueblo, and that any change in the rates mentioned in the complaint would necessarily affect the rates of intervener; denies that the present rates from the Pikeview mines to Pueblo are either unjust or unreasonable or that they operate to unjustly discriminate against any shipper from said Pikeview mines when shippers from the Canon City Group are considered, or otherwise; and alleges that the rates proposed and sought by complainant are not reasonable or compensatory.

In the sixth paragraph of intervener's petition it is alleged that a rate fixed on so-called lignite coal different from the rate on the regular bituminous coal, as sought by complainant, would be in contravention of the established method of making rates on coal in Colorado, which have always been made up without distinction between the various grades and values of soft coals from many of the fields and mines of the State; and that the granting of the prayer of the complaint would necessarily upset every intrastate coal rate in Colorado. Then follows a suggestion by intervener, in the interest of every carrier and shipper, of the necessity of a statewide inquiry into the subject, if any such distinction in rates is to be seriously considered, and suggests the impropriety of any order in the matter altering the present rates

or rate structure. Intervener closes its petition in intervention by alleging that there is no proper reason for establishing rates for the transportation of the so-called lignite coal different from or lower than the rates for the same or similar service in the movement of bituminous coal.

On January 26, 1924, The Colorado and New Mexico Coal Operators Association asked leave and filed its petition in intervention in the above entitled cause. Said intervener alleges that it is a domestic corporation organized not for profit, and has its principal office in the City and County of Denver; that its membership is composed of various individuals and corporations operating mines in Fremont, Huerfano and Las Animas Counties, Colorado, and also in other mining districts in the western and southwestern part of the State of Colorado, and that rates are published from the several mines operated by intervener's members in said localities to Pueblo, and that coal sold by intervener's members in Pueblo is sold in competition with the coal sold by complainant herein on the Pueblo market.

This intervener alleges that any changes made in the rates from complainant's Pikeview mines to Pueblo would materially affect the competitive conditions existing between complainant's mines and the mines of intervener's members, and that for this reason its members are directly interested in the subject matter of this procedure. It denies that the existing rates from the Pikeview mines to Pueblo unjustly discriminate against the complainant by reason of the same rates being in effect from the Canon City Group to Pueblo, as is alleged in paragraph four of complainant's complaint; and, therefore, asked and was given leave to intervene and become a party to and participate in the hearing of said cause.

Thereafter the Commission set the matter for hearing at its Hearing Room, 305 State Office Building, Denver, Colorado, for Tuesday, February 26, 1924, and by agreement between all parties in interest, the hearing was continued from time to time until the same was finally held at the same place on April 14, 1924, where the matter was heard before Commissioners Lannon and Scott.

After the hearing had been concluded, time was given for the filing of briefs by all parties appearing. Briefs were filed by complainant in May, 1924; by the interveners in June, 1924, and reply brief by complainant on June 17, 1924. Before any of the briefs had been filed, and on May 4, 1924, Mr. Commissioner Scott died and Mr. Commissioner Bock was appointed to and assumed the duties of said position on May 15, 1924. These circumstances, with other matters, have been the cause of the somewhat unusual delay in the preparation and issuance of the decision and order herein.

All briefs filed, the transcript of the record of the testimony adduced at the hearing, as well as all exhibits introduced, have been carefully read and considered. While it is true that so far as the allegations of complainant's complaint are concerned, the gist of its complaint is based on the alleged inferiority of the Pikeview lignite coal as compared with the bituminous coal produced at the Canon City Group, yet at the hearing there were several other grounds urged by complainant to substantiate its claim that the rates on Pikeview coal to Pueblo were unjust, discriminatory and unreasonable as compared with the same rates for the transportation of bituminous coal from the Canon City mines to Pueblo. Some question is raised by the defendant carrier in its brief as to the propriety of the Commission entertaining or considering any other factor or cause than the ones set forth in the complaint; but in view of the provisions of the Public Utilities Act, that unless otherwise specifically provided in the Act itself the hearings of the Commission should be conducted in conformity with the civil code of procedure of this State, it is deemed to be immaterial that other and different reasons were urged by complainant than those set forth in its complaint unless, of course, the defendant or interveners were thereby unjustly affected by reason of surprise. No such showing was made or, indeed, attempted to be made, and it seems improbable that in a rate case any party interested therein should be misled or surprised at any evidence introduced that bore at all upon the matter made the subject of investigation.

It is conceded that the rates from the Pikeview mines to Pueblo and from the Canon City Group to Pueblo are the same, to-wit: 90 cents for slack and $1.58 for other grades of coal. It is also admitted that there is about thirteen miles difference in the distance between Canon City and Pueblo and Pikeview and Pueblo, Pikeview being the longer haul.

If not conceded, there is ample evidence to justify the statement that, so far as the quality of the respective coals is concerned, that produced at Pikeview is of an inferior grade of lignite coal (such a grade of coal as does not, and perhaps would not, compete with any other grade of lignite produced in this State), while the coal produced at the Canon City Group is of the bituminous character and perhaps equals the bituminous product of any coal produced in the State of Colorado, and the market value at the mines of the respective coals is $1.50 to $2.00 per ton higher for the Canon City coal than for the Pikeview coal. The relative amount of the two coals marketed at Pueblo is fairly shown by defendant's Exhibit 3 for the calendar years 1922 and 1923 as follows:

Calendar Year	Bituminous (Canon City)		Lignite (Pikeview)	
	Cars	Tons	Cars	Tons
1922.....	2,182	112,385	66	2,264
1923.....	2,100	121,616	63	2,185

From the above statement it appears that the tonnage moving to Pueblo from Pikeview is somewhat negligible as compared with the tonnage moving from the Canon City Group to Pueblo.

The principal factors relied upon by complainant as reasons or grounds for a differential to be established, Pikeview to Pueblo as compared with Canon City to Pueblo, are:

(1) The inferior quality of the Pikeview coal.

(2) The relatively lower cost of the service in transporting coal from Pikeview to Pueblo than from Canon City to Pueblo owing to a down grade haul.

(3) No empty car return movement.

(4) No extra expense occasioned by the assembling of cars at the main line.

Taking up these contentions in their order, except the first, which has been discussed hereinbefore, it is fairly disclosed by the evidence submitted that the haul from the Pikeview mines to Pueblo, though some miles longer, is a continuous down grade movement, equalling in substantial effect the down grade movement from Canon City Group at the point of assembling at Canon City to Pueblo. The fact is further fairly established by the evidence that in the movement from Pikeview to Pueblo the empties are, or may be, set out at Pikeview from main line trains southbound, and after loading at the tipple of the Pikeview mine, which is but a short distance from the main line joint Denver and Rio Grande Western and Santa Fe tracks, the loaded cars are picked up and transported direct to Pueblo without any intermediate service or attention. It is also fairly inferable from the evidence that no empty return car movement is necessary to be made to Pikeview under normal conditions, owing to the fact that when coal is shipped from Walsenburg, Trinidad and Canon City fields to Denver, the return empties may be utilized, in proportion to which Pikeview is entitled, for the movement southbound from Pikeview to Pueblo without any appreciable additional expense.

On the other hand, the movement from the Canon City Group to Pueblo involves the distribution of the empty cars to the mines in the Canon City Group, within a radius of from two to five miles of the main line track, then the assembling thereof when loaded at the main line track to be made into trains destined for Pueblo. This additional service is such a service as involves an additional expense at Canon City for the train movement from Canon City Group to Pueblo. What that additional expense amounts to is not clear from the evidence, but it is clear that it is an additional expense incurred by the carrier in transporting coal from the Canon City Group to Pueblo over the expense entailed by transporting coal from Pikeview to Pueblo.

In support of the proposition that the value of a commodity is an element to be considered in fixing rates, this principle was recognized by this Commission as early as 1916 in the case of

Huerfano Coal Co. v. C. C. & C. S. R. R. Co., reported in 3 Colo. P. U. C. 116, 120, where it is said:

"The value of a commodity is always an element to be considered in fixing rates, and was one of the elements in the mind of the Commission when it used the following language in Case No. 10, *In re* Eastern Colorado Coal Rates, 1 Colo. P. U. C. 48-56: 'Wherever possible the coal mining districts of this state should be placed on an equality and given the fullest opportunity to compete with each other.'

"The Commission feels that this fact should receive careful and serious consideration."

The same principle as to the value of a commodity being a factor or element to be considered in fixing a rate was announced by this Commission in the case of Grand Junction M. & F. Co. v. D. & R. G. R. R. Co., 2 Colo. P. U. C. at 188, wherein it is said:

"The rates on bituminous coal may properly be somewhat higher than the rates on lignite, as lignite coal is an entirely different commodity from bituminous coal, and there are certain conditions surrounding its transportation which justify a difference in the rates."

And in Copeland Ore Sampling Co. v. Midland Terminal Railway, 4 Colo. P. U. C. at 195, the principle is again stated by this Commission as follows:

"The principle of grading rates in accordance with the value of the article is one well recognized in rate making and has been approved and utilized by the various regulatory commissions. The principle is based upon the underlying fact that the greater the value, the greater is the risk." Citing numerous authorities.

This same principle was recognized by this Commission in Cases Nos. 244 and 250, decided June 4, 1923, wherein a differential of 50 cents a ton higher for the transportation of anthracite coal over bituminous coal from the Crested Butte market was established, on the theory that the anthracite was of greater value and the consequent risk of damage in case of loss was thereby greater to the carrier.

Decision No. 611, June 4, 1923, *In re* Western Coal Rates.

The Interstate Commerce Commission has repeatedly and uniformly recognized this principle in its fixation of rates. In Union Tanning Company v. Southern Railway Company the principle is thus announced:

"The value of a commodity is one of the material considerations in the adjustment of rates, and it is just as unsound to say that rates on carloads of equal tonnage and equal cost of movement, one of a low grade cheap commodity, and the other of a high grade and valuable commodity, should be made the same, except for the difference that might be allowed for the single item of increased risk, as it is to say that every commodity should be charged all it can stand or bear. It is alike in the public interest and just to the carriers, having regard to their entire business and their right to an opportunity to earn a fair return upon the property in addition to the cost of service, that in the adjustment of rates due weight be given to differences in value of the respective commodities carried, and that such differences be not limited by the mere measure of difference in risk."

Union Tanning Co. v. Southern Ry. Co., 26 I. C. C. 159-163.

Again the Interstate Commerce Commission in Pure Oil Company v. Director General states:

"One of the essential factors to be considered in determining the difference in rates between refined oils and the low grade oils is the difference in value and the ability of the refined oils, because of their much higher value as a whole, to bear greater transportation charges than the low grade oils."

Pure Oil Co. v. Director General, *et al.*, 56 I. C. C. 218-222.

Authorities might be cited almost without number in support of the proposition that the value of the commodity is a factor to be given consideration in the fixing of rates—not a controlling factor, but merely an element to be given consideration along with other facts and circumstances in the particular case. The decisions of courts and commissions throughout the country are entirely in accord, and the books are full of iteration and reiteration of the principle hereinabove announced.

As hereinabove noted, it was suggested by intervener, The Atchison, Topeka and Santa Fe Railway Company, that if any relief should be granted complainant in the instant case it would thereby necessarily involve a statewide inquiry into coal rates with respect to the value of the various kinds of coal mined in the State of Colorado. The suggestion is not impressive in view of the provisions of sub-division (b) of Section 23 of the Public Utilities Act, which reads:

"The Commission shall have the power, upon a hearing had upon its own motion or upon complaint, to investigate a single rate, fare, toll, rental, charge, classification, rule, regulation, contract, or practice * * * and to establish new rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts or practices * * * in lieu thereof."

This same suggestion was made to the Commission, and somewhat seriously contended for by the carrier, in the case of Hygienic Ice & Coal Co. v. Colorado & S. R. Co., Decision No. 468 of August 5, 1921. That case involved the complaint of the Hygienic Company as to the rates then in effect for the transportation of coal from the northern fields into Boulder, and the contention and suggestion was made that if that rate were disturbed it would necessitate a general inquiry into all the rates from the northern coal fields to other localities and territory. The Commission in that case dismissed the contention by saying that "it should not deny relief from high rates for the transportation of coal merely because other localities would be similarly inclined to ask relief."

Hygienic Ice & Coal Co. v. Colorado & S. R. Co., P. U. R. 1921-E, 683, 813 (abs.).

Despite the contention made and the fact that the rate from the northern fields to Boulder was materially reduced, no other locality or community has as yet made application to the Commission for an adjustment of coal rates. For the sake of argument, however, it may not be gainsaid that the reasons suggested or the contention made has any real merit or force, for the reason that other adjustments made or which should be made in coal rates is no valid reason for saying that an adjustment should

not be made in the proceeding before the Commission in the instant case.

A mass of evidence, both oral and documentary, was submitted by the respective parties, but without unduly prolonging the length of this decision by further discussion thereof, the Commission is of the opinion that, taking all the facts and circumstances into consideration surrounding the movement of coal from Pikeview to Pueblo as compared to the movement from the Canon City Group to Pueblo, for the reasons hereinabove expressed, there should be some differential in the rate. What that differential should be is a matter of sound judgment; and it is the finding of the Commission that the existing rate of 90 cents for slack and $1.58 on other grades of coal from Pikeview to Pueblo is unjust, unreasonable and discriminatory to the extent that said rate exceeds 80 cents for slack and $1.25 for other grades of coal from Pikeview mines to Pueblo, and that for the future a reasonable and just rate for the transportation of coal from Pikeview to Pueblo will be $1.25 per ton of two thousand pounds for lump and mine run coal, and 80 cents per ton of two thousand pounds for slack coal.

ORDER.

It Is Therefore Ordered, That the carriers affected by said movement, The Denver and Rio Grande Western Railroad Company, T. H. Beacon, Receiver, The Atchison, Topeka and Santa Fe Railway Company, and any other carrier affected thereby, shall cause to be made and file with the Commission a tariff embodying the rates of 80 cents per ton of two thousand pounds on slack coal, and $1.25 per ton of two thousand pounds on other grades of coal from Pikeview mines to Pueblo, within twenty days from the date of the service of a copy of this order upon each of said carriers, respectively.

[December 18, 1924.]

Lannon, Commissioner, dissenting: The majority opinion states that this case was heard by Commissioner Scott, now deceased, and myself, and correctly sets forth the various conten-

tions of the respective parties and it is unnecessary for me to repeat those facts. I am, however, absolutely unable to agree with the majority in the conclusions which they reached for the reasons hereinafter given.

I shall take up in the order named the principal factors relied upon by complainant, shown on page seven of the opinion.

(1) The inferior quality of the Pikeview coal.

The inferiority of coal, in my opinion, should not be used as a basis to prescribe different rates for different grades or kinds of coal. The rates on coal in this State have not heretofore been made on basis of difference in grade or price, or between lignite and bituminous coals. On page eight of the majority opinion a citation is given from the case of Grand Junction M. & F. Co. v. D. & R. G. R. R. Co., 2 Colo. P. U. C. at page 188, and the language there used is based apparently upon the finding of the North Dakota Board of Railroad Commissioners as a result of its investigation of the reasonableness of the lignite rates in North Dakota. There was no lignite coal involved in Grand Junction M. & F. Co. v. D. & R. G. R. R. Co., et al., *supra,* and the order therein prescribed rates solely on bituminous coal. In the instant case the record shows that witness Bromfield clearly stated that the Dakota lignite was very different from the Colorado coal. There was also an entire absence of testimony in the record as to similarity of transportation and other conditions between the Dakota lignite coal fields and those here involved.

It is true that this Commission, in its Decision No. 611, Cases Nos. 244 and 250, Western Coal Rates, 80 I. C. C. 383, established a differential of fifty cents, anthracite over bituminous, from the mines in the Crested Butte district. What the Commission really did in that case was to prescribe a rate on bituminous coal and established a differential over that rate for the transportation of anthracite coal. The difference in mine prices between anthracite and bituminous was not the controlling reason for establishing such differential. In prescribing said differential, we said at page 478, "a slightly higher rate for the transportation of anthracite is *justified, not only through custom and precedent, but because of the greater value and result-*

ant higher claims against the carrier in the event of loss." There were no such facts developed in the instant case. While it may be readily admitted that the value of a commodity is always a factor to be considered in fixing rates and the decisions hold that to be the general rule, yet regulatory bodies have not heretofore reached the fine distinction of prescribing rates upon the *same commodity* where there is a difference in price, according to grades of the same commodity, of only one dollar to three dollars a ton. Exhibit No. 2, submitted by complainant, shows the price of Canon City lump coal at the mines prior to March 3, 1924, was Six Dollars ($6.00) per ton and Pikeview lump was Three Dollars and Twenty-five Cents ($3.25) per ton; that since March 3, 1924, Canon City lump coal has been reduced to four Dollars and Twenty-five Cents ($4.25) per ton, and the Pikeview lignite lump to Three Dollars ($3.00) per ton, so that over one month before the time of hearing, and at all times since and up to the present time, there has been a *difference of only One Dollar and Twenty-five Cents* ($1.25) per ton.

If a difference in price of from one dollar to three dollars in the grades of the same commodity is to be the controlling factor in determining differentials or differences in coal rates, can the Commission, with fairness, deny the establishment of rates based on prices of other commodities and necessities which fluctuate widely in wholesale prices? It is well known that apples range in price right now from One Dollar and Fifty Cents ($1.50) per box for Ben Davis to Five Dollars ($5.00) per box for the best grade Delicious. Here is a difference in value on a single box of apples of two and eight-tenths times the difference found in the coal prices per ton at the time of the hearing herein. An ordinary car of apples contains six hundred ten boxes. On the basis referred to, there would be a difference in value between the cheaper and the better variety of apples of $2,135.00, or more of a difference on the one car of apples than there would be on a whole trainload of coal where the spread in price only amounted to $1.25 per ton.

Again, grapefruit varies in price from three dollars a box to six dollars per box; oranges from twenty to sixty cents per

dozen; potatoes from one dollar and forty cents per cwt. to two dollars and fifty cents per cwt., and wheat prices vary widely according to grades. Upon the foregoing commodities and numerous other articles the rates are fixed on the articles as a whole and not upon the different prices received at point of production or consumption for the different grades of the particular articles.

In the light of such wide spreads in prices, and remembering that all these commodities move on the same rate basis irrespective of the prices or quality of the different grades of the particular article moved, doesn't it make one pause and wonder what kind of mental gymnastics one has to indulge in to come to a conclusion that lignite coal, with a difference in value only of from $1.25 to $3.00 per ton under that of bituminous coal, should be selected as a special favorite for a differential in rates in order that an inferior article should be foisted upon an unsuspecting public?

If we are to take the slight difference in price of coals as shown here of one dollar and a quarter and establish a difference in rates based upon said difference in price, then, logically, we should prescribe a different rate on coal from the Canon City district on account of the mine price of the coal from that district being reduced from $6.00 to $4.25 per ton. Also, to be consistent, we should order a state-wide investigation of present coal rates and rate structures asked for by the Santa Fe Railway and readjust rates on such coal prices as are found as a result of such inquiry. I am of the opinion that the majority erred in taking the difference in price of $1.25 between bituminous and lignite coal as a factor in determining a new basis of rates between Pikeview and Pueblo, and this opinion is supported by our recent general investigation of coal rates in Colorado and the rates prescribed in Decision No. 611. In that decision this Commission did not differentiate in rates, as far as prices were concerned, between lignite from the northern fields and bituminous coal from other fields, and I see no reason for doing so now.

(2) The relative lower cost of the service in transporting coal from Pikeview to Pueblo than from Canon City district to Pueblo, owing to a down-grade haul.

In reaching the conclusion that there is a lower cost of service in transporting coal from Pikeview to Pueblo than from Canon City district to Pueblo, the majority entirely overlooks the fact of the difference of about thirteen miles shorter in the haul, Canon district to Pueblo, and also ignored the additional service of sending switch engines from Colorado Springs to Pikeview a good portion of the year to bring coal into Colorado Springs from Pikeview.

It is true, as the record shows, that the mines in the Canon City district are all on short branches and that there are adverse grades on these branches, but these grades are favorable to the loaded movement and that fact, together with the shorter average mileage from the Canon district to Pueblo, is more favorable from a transportation standpoint than the about thirteen miles longer haul, Pikeview to Pueblo. There was no evidence whatsoever introduced by complainant as to such alleged lower transportation costs from Pikeview. In fact, Mr. Matthews, complainant's principal witness, testified that he had no actual knowledge as to actual costs of service. In the absence of some such substantial evidence, I am convinced that the majority erred in simply assuming that there was, in fact, a lower cost in transporting coal from Pikeview to Pueblo than from the Canon City fields to the same destination. I am further of the opinion that the record fully supports defendant's contention that the transportation of coal from both districts to Pueblo is under substantially similar conditions.

(3) No empty car return movement.

There was such slight reference in the record as to empty car movement that I cannot reconcile the statement in the majority opinion that: "It is also fairly inferable from the evidence that no empty return car movement is necessary to be made to Pikeview under normal conditions. * * *" I have again carefully examined the record and find only the mere statement of an operating witness employed by a carrier, not a party to this

proceeding, who said: "Cars are hauled empty from the north to Pueblo, coal cars." The only other reference in the record to empty movement passing Pikeview was a statement by Mr. George Williams, General Freight Agent of The Denver and Rio Grande Western Railroad Company, that there was such southbound empty movement in the distribution of coal car equipment to coal mines. I feel that the record is entirely insufficient to warrant any finding whatever as to empty car return movement.

(4) No extra expense occasioned by the assembling of cars at the main line.

What I have said with reference to the last preceding subdivision (3) applies with even greater force here, for it is apparent that the majority went entirely outside of the record herein in reaching a conclusion that there is "no extra expense occasioned by the assembling of cars at the main line." There is not the slightest evidence in the record as to assembling of cars at or on the main line, nor of the expense thereof, and the majority grievously erred in attempting to make such findings of fact upon matters not introduced at the hearing, or that were before the Commission in this case.

Exhibits introduced by defendant Denver and Rio Grande Western Railroad and on behalf of the interveners, convince me that for similar hauls on coal in comparable territory the rates herein assailed are entirely reasonable. These exhibits, together with our finding in Decision No. 611, Western Coal Rates, *supra*, wherein we prescribed rates of $1.15 on lump, nut and mine run, and $1.00 on pea and slack for an average distance of 27.2 miles, clearly support the reasonableness of a rate of $1.58 on lump and 90 cents on slack from Pikeview to Pueblo, a distance of 49.8 miles, or nearly twice the average distance from the northern fields to Denver.

It should be noted also that in the rates prescribed in Decision No. 611 the quality of the coal *was given no consideration whatever* and, therefore, the high grade lignite, as well as inferior lignite from the northern fields to Denver, all move under identical rates. Said finding was based upon density of traffic, trans-

portation and other conditions, and not in any sense upon the quality or the value of the lignite coals from the northern fields.

Courts, of course, must follow the evidence presented in cases and render decisions accordingly. We are not a judicial body but are clothed with wide powers, and such decisions as are promulgated are subject to review only by the State Supreme Court. Not being a court, consequently we are not tied to the wheel of court procedure. Every freight rate involved in Colorado is on file in the office of this Commission, and we have in addition a rate expert at our command. Through these agencies the most reliable data obtainable is at hand and should be used in reaching proper conclusions so as to prevent a miscarriage of justice and chaos in the traffic world. The following figures, taken from the files of the Commission, plainly show that coal rates are now lower from Pikeview to Pueblo than for similar distances in the northern Colorado fields. These figures show plainly that instead of a reduction, Pikeview to Pueblo, the rate should be raised or else the rates in the northern fields should be reduced.

Comparison of Lignite Coal Rates Between Pikeview and Pueblo with Rates from Northern Lignite Field of Equal Distance.

	Miles	Rates on Lump	Percentage Increase Over Pikeview Rates on Lump	Rates on Slack	Increase Percentage Over Pikeview Rates on Slack
Pikeview to Pueblo....	50	$1.58	....	$ .90	.....
Marshall to Ft. Collins.	50	1.90	20.25%	1.82	102.22%
Erie to Littleton.....	44	1.73	9.49	1.61	78.88
Erie to Ault.....	51	1.70	7.59	1.60	77.77
Firestone to Wellington	51	2.43	53.80	2.19	143
Erie to Lucerne.....	52	1.90	20.25	1.90	111.11
Louisville to Ft. Collins	54	1.90	20.25	1.82	102.22
Leyden to Castle Rock.	48	2.43	53.80	2.19	143.33
Erie to Watkins.....	55	1.80	13.92	1.80	100
Monarch to Ft. Collins.	51	1.90	20.25	1.82	102.22
Erie to Kuner.....	52	1.71	8.22	1.40	55.55
Erie to Klink.....	52	1.80	13.92	1.80	100
Firestone to Nunn.....	47	1.80	13.92	1.70	88.88

The aforesaid table shows that the average increase percentage of rates on lump coal from the northern field is 21.30% higher than it is from the Pikeview field to Pueblo.

The figures in relation to rates on slack coal from Pikeview are shown to be an average of 100.43% lower than rates for corresponding distances from the northern Colorado field.

Wherein, may I respectfully ask, is any wisdom or good business judgment exercised in declaring that because of an inferior grade of coal a railroad should be mulcted by compelling lower freight rates in order to increase the dividends of a mine producing an inferior coal? Every tub, so to speak, should stand upon its own bottom. On the average it costs so much per ton to haul freight. It is common knowledge that coal rates are among those carried at low figures. The Denver and Rio Grande Western Railroad Company has been a losing proposition for years. It had a large deficit last year. It is on the rocks of financial despond. To deprive this road of its *rightful* and *needed* revenue is unconscionable and unconstitutional in that it deprives it of its property without due process of law. In a word, it resolves itself into a proposition of "robbing Peter to pay Paul" and making this railroad the "goat" to stand sponsor for the deficiencies and delinquencies of every industry along its line.

The testimony in this case shows that the coal of this complainant has a content of about 25 per cent water. If the reasoning of the majority is reasonable, and because of the moisture contained, it should receive a lower rate, then I say, to be consistent, were the moisture to be increased to a certain extent in this coal it would be logical, according to the majority reasoning, to compel the carrier to furnish free transportation for the commodity. I freely confess I have no knowledge of, and I have never heard of a railroad ever being compelled or ordered by any regulatory body to haul even water for nothing. Since it is a down grade from Pikeview to Pueblo, I would suggest that if the moisture increases to any appreciable extent the product could be sent to market on the bosom of its own liquid content.

Finally, the majority opinion entirely disregards the principal relief sought by complainant; namely, the establishment of a differential according to the *value of the coal*. The chief witness for complainant, Mr. Matthews, testified: "We are asking the Commission to establish a differential according to the value of the coal in addition to the lower rate on the service." (Record, page 56.) The majority did not establish such differential.

They merely found an alleged reasonable rate of $1.25 for lump and 80 cents per ton for slack coal for future movements of coal from Pikeview to Pueblo.

The only explanation I can give for the majority opinion is that neither of the commissioners signing it heard the case.

For the foregoing reasons I most respectfully dissent to the majority opinion and order, and conclude that the complaint herein should be dismissed and that the rates prayed for should be denied.

[December 24, 1924.]

SUPPLEMENTAL STATEMENT.

By the **Commission**: In the interest of fair play, and that the public may be rightfully informed, the Commission deems it advisable to issue a supplementary statement in the above entitled cause. The necessity for this statement arises from certain unfortunate language used by Commissioner Lannon in his dissenting opinion herein.

In the closing paragraph of his dissent the following language is used: "The only explanation I can give for the majority opinion is that neither of the Commissioners signing it heard the case."

This language, in our opinion, is unfair, misleading and improper, because it conveys the impression that the majority members who entered the order had no knowledge whatever of the facts in the case. Every one familiar with the practice of the Public Utilities Commission understands fully that all cases are not heard by all Commissioners, nor is this necessary. The law expressly provides in Section 9 of the Public Utilities Act that "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 designated for the purpose by the Commission."

The language used by Commissioner Lannon gives the public a wrong impression of the manner in which it functions. A transcript of testimony is taken by the reporter of the Commission in each hearing, whether before one or two or three Com-

missioners. The Commissioner or Commissioners not sitting at the hearing have the opportunity to read and examine the entire transcript of testimony, as well as any exhibits that are introduced. In the instant case, the entire record was reported and transcribed, and was studied and read by the Commissioners who wrote the majority opinion. The only advantage that the Commissioner who heard the evidence had over the majority members of this Commission was that he personally heard the evidence from the mouth of the witnesses. As most of the important evidence in a rate hearing is documentary, a study of the record evidence is the more necessary in such a case than to hear the various witnesses testify. At any rate, such is the usual and customary *modus operandi.*

To illustrate the above practice by this Commission, the following cases are cited at random in which Commissioner Lannon was not present nor did he hear any of the testimony given, though he signed the decision and order prepared by the other members of the Commission:

Davis Brothers and Rhodes, Applications Nos. 252 and 253, for certificates of public convenience and necessity, heard at Delta, Colorado, by Chairman Halderman in August, 1923.

Colorado Springs & Interurban Railway Company, Application No. 314, for permission to abandon service on the Roswell line in Colorado Springs, heard at Colorado Springs before Chairman Halderman in March, 1924.

In re W. E. Carver, Application No. 328, for certificate of public convenience and necessity to operate passenger bus between Steamboat Springs and Craig, heard at Steamboat Springs in June, 1924, by Commissioners Halderman and Bock.

In re W. B. Arnold, Application No. 315, for certificate of public convenience and necessity for the operation of a motor freight line between Steamboat Springs and Craig, heard at Steamboat Springs, Colorado, in June, 1924, by Commissioners Halderman and Bock.

In re Charles Maxday, Inc., Application No. 319, for a certificate of public convenience and necessity to operate motor bus passenger line between Trinidad and Walsenburg, via Agui-

lar, heard at Trinidad, Colorado, in October, 1924, by Commissioners Halderman and Bock.

In re C., B. & Q. R. R. Co. and C. & S. Ry. Co., Application No. 371, to substitute passenger service between Lafayette, Louisville and Denver, heard at Lafayette, Colorado, September 12, 1924, before Commissioners Halderman and Bock.

In view of the fact that Commissioner Lannon has seen fit to criticize and question the motive of the majority of the Commission in rendering the decision and order in the instant case, for the reason that they were not present and did not hear the testimony, it would seem to be the height of inconsistency that Mr. Lannon should indulge in practices for which he now criticizes Commissioners Halderman and Bock.

The majority of the Commission has no quarrel with the views expressed by Commissioner Lannon in his dissent, except as those views reflect upon the good faith and integrity of the majority decision and order, and for the above reasons this supplemental statement in the case is made.

THE DENVER & INTERURBAN RAILROAD COMPANY, *et al.*, *v.* WILLIAM CLARK, *et al.*

[Case No. 279. Decision No. 789.]

Common carriers—What constitutes—Motor vehicle operation.

1. Persons operating automobiles in competition with a railroad carrier and advertising themselves as conducting an auto service between designated points were held to be common carriers within the meaning of the Public Utilities Act requiring a certificate of public convenience and necessity for such operation.

Commissions—Jurisdiction—Violation of Motor Carrier Law.

2. The Commission has power under Sec. 2954, C. L. Colo. 1921, to ascertain whether motor carriers are operating in violation of the Public Utilities Act and to enter an appropriate order.

Commissions—Jurisdiction—Restraining order.

3. The Commission has no power to enjoin the illegal operation of motor carriers.

Commissions—Jurisdiction—Constitutional questions

4. The Commission has no power to pass upon the constitutionality of an act passed by the legislature.

Certificates of convenience and necessity—Operation of motor vehicle line—"Construction" of system, etc.

5. The word "construction" used in Sec. 2946, C. L. 1921, applies to a motor vehicle system.

[December 18, 1924.]

Appearances: J. Q. Dier and E. C. Knowles, of Denver, for complainants; Frank F. Dolan, of Boulder, for defendants.

STATEMENT.

By the **Commission**: October 10, 1924, compainants filed their complaint against the above named defendants, alleging therein their corporate capacities and respective postoffice addresses; that upon information and belief defendants are residents of the city of Boulder, Colorado, and giving their business address as being 1831 14th Street in that city; that defendants are in business associated together as an association or partnership, and for a long time last past have been so associated together in the conduct and operation of a system or means of transportation of passengers by automobile between the cities of Boulder and Denver, Colorado, and intermediate points, and thereby are affording and providing transportation between said cities similar to that afforded by complainants' railroads, and in competition with them as common carriers for hire, by indiscriminately accepting, advertising and otherwise holding themselves out to accept, carry, discharge and lay down passengers between the said fixed points of Boulder and Denver, over established routes, viz., the public highways extending between said two points; that said defendants have and are operating said means of transportation without having obtained or attempting to obtain from this Commission a certificate or certificates of public convenience and necessity authorizing them so to do, as required by the laws of this State, and particularly as required by Section 2946, C. L. 1921, being Section 35 of the Public Utilities Act of the State of Colorado; that defendants in so doing have interfered and are interfering with and injuriously affecting the operations of

the lines of railroad of complainants, which have been for a long time constructed, maintained and operated between the said points, and threaten to continue so to do; that complainant carriers are furnishing, and have furnished at all times past, adequate passenger train service between Denver and Boulder and intermediate points, and that neither the present nor the future public convenience or necessity require, or will require, any new facility or system or means of transportation for the carrying of passengers between said points; and complainants ask this Commission to enter an order herein requiring defendants to apply for and obtain a certificate or certificates of public convenience and necessity as required by law for the operation of such means of conveyance, and that upon failure so to do this Commission take such steps as will require said defendants, and each of them, to cease and desist from the further operation of said means of transportation.

Upon the complaint aforesaid being filed, service thereof was made by registered mail upon each of the aforesaid named defendants, and thereafter, and on October 22, 1924, the defendants, William Clark, Fred Crain, O. H. Dunning, Arley Warner, J. Grant, F. P. Dunning and Seth Armstead, by their attorney, filed their joint motion that the complaint of said complainants be dismissed, reserving the right, however, to answer should the motion be overruled, upon the following grounds, viz.: That the Commission has no jurisdiction over the matters set forth in said complaint, and has not power, authority or jurisdiction to entertain said complaint, or to conduct a hearing thereon, or to grant any relief with respect thereto; that the complaint does not state facts sufficient to constitute grounds for complaint, nor to justify the granting of the relief asked, or any other relief; that on the face of the complaint the section of the statutes relied upon by complainants does not apply to the defendants, nor to the matters and things attempted to be set forth in their complaint; that said Section 2946, C. L. 1921, or any other statute attempted to be invoked by complainants is and are unconstitutional and void, and of no force and effect.

Thereafter, and upon notice to all parties, the motion of the named defendants was set for hearing at the Hearing Room of the Commission, 305 State Office Building, Denver, Colorado, for Friday, October 31, 1924, at ten o'clock, and by mutual agreement of all parties, the Commission continued the hearing to Friday, December 12, 1924, at the same hour and place, when argument upon said motion was duly heard.

At the argument defendants mainly relied upon two of the grounds set forth in the motion as reason for the dismissal of the complaint, to-wit, that the section of the statute relied upon by complainants is unconstitutional and void, and, second, that the section of the statute designated in the Public Utilities Act as Section 35, as amended in 1917, approved April 16, 1917, effective July 16, 1917, was not passed by the legislature in conformity with the provisions of the Constitution of Colorado, in that the subject matter thereof was not clearly expressed in the title, as required by Sections 21 and 24 of Article V.

With the first contention, to-wit, the unconstitutionality of the statute, this Commission had repeatedly held, and it once more holds, that whether or not a statute of the State is unconstitutional is a juridical question, to be determined by a court of competent jurisdiction; and that the Commission, being an administrative body, has no power, right, authority or jurisdiction to determine as to the constitutionality of any act passed by the legislature creating it.

As to the second ground of the motion, that Section 35 aforesaid was not passed by the legislature in conformity with the provisions of the Constitution of this State, that affords another question properly submissible to the courts; it involves a question of fact to be determined by submission of the journals of the House and Senate, and the records thereof, of the legislature of 1917, that purported to pass the act in question. Such matters are not properly determinable by an administrative body such as is this Commission.

Defendants also urged at the hearing upon the motion that they were not within the terms of Section 35 of the act, being Section 2946, C. L. 1921, which provides "no public utility shall

henceforth begin the construction of a new facility, plant or system * * * without first having obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such construction," etc., and urging that by the use of the word "*construction*" the legislature did not intend to include the operation of a motor vehicle means of transportation, over established routes, or between fixed points, as is provided by sub-section (e) of Section 2 of the Public Utilities Act as amended in 1915, being Section 2913 (e), C. L. 1921, the argument of the defendants being that in the use of the word "*construction*" the legislative intent was to be applied to public utilities such as railroads, telegraph and telephone lines, waterworks systems and other utilities *sui generis*. The argument is as ingenious as it is specious, but bearing in mind that the legislature of 1915, in the use of the words in sub-section (e) aforesaid, first brought into the statute laws of this State the use of the word "automobiles" as being common carriers, and by a subsequent section of the act all common carriers are public utilities, the Commission has heretofore held, and again holds, that the legislative intent must have been to include, by the use of the word "construction" all public utilities who begin the operation of a new facility, plant or system. To make this point plain, without necessity of further argument or consideration, until the court of review has spoken, the Commission interprets the legislative meaning of the words of the statute in question to include the purchase of the necessary equipment, coupled with the installation and operation by such means, of an automobile bus transportation line or lines for the carrying of passengers, freight and express between fixed points or over established routes.

For the reasons above set forth the motion of defendants will be overruled, and they will be given jointly time and twenty days from the date of this order, and its service upon them, within which to answer or otherwise plead, as they shall be advised.

ORDER.

IT IS THEREFORE ORDERED, that the motion of the named defendants filed herein on October 22, 1924, be, and the same is hereby, overruled.

IT IS FURTHER ORDERED, that the named defendants appearing by their attorney are given time and twenty days from the date of this order, and the service thereof upon their said attorney, within which to answer the complaint of complainants, or to otherwise plead thereto, as they shall be advised.

RE COLORADO SPRINGS & INTERURBAN RAILWAY COMPANY.

[Application No. 314. Decision No. 797.]

Abandonment—Street railway—Branch line—Loss on system as a whole.

1. The mere fact that a street railway system as a whole is not paying expenses is no ground for refusing authority to close a particular branch.

Abandonment—System as a whole unprofitable—Duty and privilege to dispense with least profitable operation.

2. A public utility whose operations as a whole are not on a paying basis has both the privilege and duty of curtailing expenses by dispensing with that part operated at the greatest loss in an endeavor to save the system.

[January 3, 1925.]

Appearances: D. P. Strickler, of Colorado Springs, for Petitioner; Henry E. Finch, of Roswell, Colorado Springs, for Protestants.

STATEMENT.

By the **Commission**: Petitioner filed with the Commission in February, 1924, its petition seeking permission for the discontinuance of service over what is called its Roswell line, being an extension of street car service from the north Tejon Street car line in the suburb called Roswell.

Protests were filed thereto, and in due course the matter was set down for hearing and heard in the City Hall, Colorado

Springs, Colorado, on March 31, 1924. Thereafter, and on May 20, 1924, the Commission issued its decision and order wherein it denied to petitioner the relief sought and provided that petitioner should serve the territory known as Roswell by reduced car service on a schedule of one car each hour from the northerly terminus of the north Tejon Street car line to and around the Roswell loop; but said order was issued without prejudice to the right of applicant to renew its request after the lapse of a reasonable length of time should deficits continue to be incurred under the plan proposed by the Commission.

On June 14, 1924, petitioner filed its application for rehearing, setting forth therein reasons why the matter should be reheard, among which was that the order of May 20, 1924, was based in part upon certain assurances the Commission had received from the Board of County Commissioners of the County of El Paso which the Commission understood to mean that El Paso County would undertake to repair and maintain a bridge over the Chicago, Rock Island and Pacific Railway at the north end of Tejon Street in a reasonably safe manner to permit the operation of petitioner's street cars thereover.

Thereafter the application for rehearing was granted and the matter set down for hearing at the City Hall, Colorado Springs, Colorado, for Friday, December 19, 1924, upon due notice being given to all parties in interest.

At the December hearing proofs were confined to such matters as had arisen subsequent to the hearing in March, 1924. On behalf of petitioner, the proof is to the effect that the earnings of the street car system of petitioner as a whole are insufficient to pay its operating expenses and taxes; that with reference to the receipts from the patrons of its service into and out of Roswell since the reduced car service was effective, the operating expenses had not been materially reduced and the operating revenue was not as great as it theretofore had been, with the result that instead of conditions improving over those in existence when the original petition was filed in February, 1924, the deficits suffered by petitioner in its Roswell operations were more than they had theretofore been.

A great deal of the testimony at the December hearing had to do with the question of who would repair and maintain the bridge over the Rock Island cut aforesaid. It was conceded by all that the bridge was in an unsafe condition for the operation of street cars thereover; that it had been closed to vehicular traffic by order of the Board of County Commissioners of El Paso County; that the only purpose the bridge had been used for since the discontinuance of the former street car service was for pedestrians; that to make the bridge reasonably safe for the conveyance of street car service thereover, either the heavy or light street cars, would require several thousand dollars, the testimony of petitioner being to the effect that the cost would approximate $15,000.

Each member of the Board of County Commissioners of El Paso County was called to the stand by protestants in an attempt to prove that El Paso County would repair and maintain the bridge suitable for the safe operation of street cars. The attempt, however, was unsuccessful, as no member of the Board of County Commissioners would state that the county would so do, and that El Paso County had no duty to perform with reference to repair and maintenance of said bridge for the operation of the street car company.

On June 6, 1924, the Commission addressed a letter to the chairman of the Board of County Commissioners of El Paso County asking the specific question whether or not El Paso County would undertake to repair and maintain the bridge in a reasonably safe condition for the use of Roswell street cars, and on June 11 a reply thereto was received by the Commission from the chairman of the Board of County Commissioners of El Paso County taking the position above set forth that: "The county has never caused the bridge to be inspected to determine whether it is safe for use by street cars, as it did not feel, and does not now feel, that it has jurisdiction to pass on this proposition." And that same expression was reiterated by the members of the Board of County Commissioners on the stand December 19.

But to lay aside all consideration as to the repair and maintenance of the aforesaid bridge, and for the sake of the argument concede that some one other than the street car company would put the bridge in a reasonably safe condition and maintain the same for the running of street cars thereover, yet the deficit of the street car company would not thereby be overcome on its Roswell lines nor in the operation of its system as a whole. Viewed in that light, the question of repair and maintenance of the bridge becomes immaterial.

The argument is made by protestants that other branches of the street car system are not paying expenses, and that it is unfair to permit the abandonment of the Roswell branch when the system as a whole is not paying expenses; that so long as the street car company is losing money it had just as well lose a few thousand dollars more per annum in the operation of its Roswell line. The argument is specious but it is not the law and is not sound. This Commission has repeatedly held, in conformity with the holdings of other commissions and courts, that a public utility whose operations as a whole are not on a paying basis not only has the right, but it is its legal duty to curtail its operating expenses by dispensing with that part of its service that is operated at the greatest loss in an endeavor to save the operation of the system as a whole. This principle is so well established that citation of authority is not necessary.

The Commission regrets exceedingly to permit the discontinuance of the Roswell line, as it will cause inconvenience and perhaps more or less hardship on those who reside in the Roswell district and who have enjoyed street car transportation facilities for so many years; but, as in the case of the petition of the street car system in Trinidad for permission to abandon and discontinue its service, authorized by the Commission, the prevalent use of the automobile and the growth of such use by people generally is responsible for most, if not all, of the ills of street car transportation.

Re Trinidad E. T. R. & G. Co., P. U. R. 1922-C, 299.

The petitioner, at the request of the Commission, filed a statement of its operations for the period January 1, 1924, to and in-

cluding December 15, 1924, which statement shows a total of operating expenses and taxes for the period of $410,731.24, while the total receipts for the same period were $408,758.84 on the system as a whole, leaving a deficit of $1,972.40 for the eleven and a half months' period.

Under the above conditions, the Commission feels it to be its legal duty to permit the discontinuance of the Roswell line as originally petitioned for by the street railway company, and that should it not permit the petitioning company to take such steps as are reasonably necessary to decrease its deficits, it would exceed its authority and its decision would be set aside by the court of last resort.

ORDER.

IT IS THEREFORE ORDERED, That petitioner, The Colorado Springs & Interurban Railway Company, be, and it is hereby, authorized and permitted to discontinue street car service over the Roswell loop, and to remove its rails, poles, wires and other property therefrom.

IT IS FURTHER ORDERED, That the permission and authority hereinabove given shall become effective at midnight January 15, 1925.

MAY FARNUM WOODWARD
v.
ESTES PARK WATER COMPANY.

[Case No. 274. Decision No. 803.]

Service—Duty to serve—Undertaking of utility.

1. The service agreed to be rendered by a water utility, and actually rendered for many years, is the measure of the utility's duty to continue service.

Service—Abandonment—Reasonableness of return.

2. A water utility must continue to render service which it has undertaken to render where the revenues are equal to and exceed the operating expense.

Service—Discontinuance—Inability to finance.

3. The inability of a water utility properly to finance the continuance of water service to a particular consumer where the

service has been established for a number of years was held not to be a sufficient excuse for discontinuing service.

Service—Water—Cost of thawing pipe.

4. A water utility which has rendered a year-around water service for domestic purposes for many years should pay the expense of thawing a frozen water pipe.

[January 12, 1925.]

Appearances: James A. Marsh, of Denver, Colorado, for complainant; A. H. Romans, of Loveland, Colorado, for respondent.

STATEMENT.

By the **Commission**: This is a complaint filed by the complainant, May Farnum Woodward, against the respondent, complaining of an abandonment of certain service by the public utility in furnishing water for domestic purposes. Complainant alleges that she is the owner of a cottage, together with necessary outbuildings, located within a distance of about one mile of the municipality of Estes Park, in Larimer County, Colorado, and that said cottage and outbuildings have been occupied as a residence by her and her family, tenants and employes for the entire period of twelve months during each year for the past several years; that The Estes Park Water Company is a corporation organized and existing under the laws of the State of Colorado, and is a public utility as defined under the laws of said State, and is now and has for many years last past been engaged in supplying water for domestic and other purposes to residents of the municipality of Estes Park and those living outside of Estes Park, which are reached by mains and pipes of said Water Company, including the complainant herein; that the cottages, outbuildings and premises of the complainant have been connected with the water mains and pipes of the respondent, and have been continuously supplied during every year for the entire year with water for domestic and other purposes since the year 1911, and that the complainant has during all of these years since 1911 paid all rentals and charges imposed by the respondent, and now stands ready and willing to continue paying any and all reasonable rentals and charges which may be lawfully

imposed by said respondent; that notwithstanding the respondent is such a public utility, as aforesaid, and has supplied the complainant continuously since 1911 with water for the purposes mentioned, the complainant is informed that some time during the month of September, 1923, the officers or board of directors of the respondent resolved and determined to discontinue the furnishing of water to the complainant for the purposes above mentioned on and after November 1, 1923, and that unless restrained by the order or direction of this Commission that respondent will carry out its resolution and determination and will discontinue furnishing water to the complainant on said date; that the cottage and premises are now occupied for residential purposes, and in addition thereto and in connection therewith certain livestock, such as cows, horses and chickens, are kept thereon, and that the continued water supply to be received from the Water Company, as has heretofore been supplied for several years last past, is indispensable for the use of the occupants of said premises and for the use of said livestock; that there is no other source of supply of water in order to supply said premises and to maintain life and make said premises inhabitable after November 1, 1923, unless the same is continued to be received from the respondent Water Company, and to have said water disconnected and water service discontinued, complainant would suffer great and irreparable injury and her legal rights would be invaded, and that the respondent would violate its duties and obligations as a public utility, and that it is the desire of said complainant to have said water and supply service as heretofore rendered continued indefinitely.

Copy of this complaint was served upon the respondent, and on November 9, 1923, an answer was filed by it, in which it admits that it is a corporation and is a public utility, and that it has been supplying water for domestic purposes to the residents of Estes Park and those living outside of Estes Park, but denies that it has furnished water for any other purpose than domestic; admits that the cottage and buildings of complainant have been connected with the water mains of the respondent since the year 1911, and that the complainant has paid the rentals imposed by

the respondent, but denies that the respondent has continuously supplied water through said main, and alleges the fact to be that the main leading to said cottage has frozen at some time during every year, and that the water through said main was never to be used for any purpose except domestic purposes; that the respondent never agreed to furnish water through said main in the winter months, but as a matter of accommodation left the water turned on until the same froze; admits that it notified complainant that the water would be turned off on November 1, 1923; admits that the cottage is occupied by caretakers of the complainant, and that there are certain livestock kept thereon. Respondent further states that complainant's cottage is one of eleven users on a two-inch line, which is about two miles in length from the main line of the Water Company, and which was built solely for the purpose of supplying water to summer residents attached thereto; that the line is laid very shallow on account of the fact it is laid in the mountains over a rocky surface, which makes it impossible to bury the line so that the same will not freeze during the winter months without an exorbitant cost; that that cost would amount to about $20,000; that the total revenue derived from the eleven users is $290.00 per annum; that in the winter of 1922-23 the respondent paid out for thawing and repairs on said line the sum of $316.23, and that the complainant did not have water through said line during the greater part of said winter on account of freezing; that none of the other ten users on said line occupy the premises during the winter months, and it is impracticable to maintain said line during the winter months for the use of the complainant alone; the only way in which complainant can be furnished with a supply of water during the winter months would be the taking up of the present main and putting in a new main to the depth of several feet through the rocky surface at a cost of $20,000, and if this is done the respondent cannot charge a rate sufficient to make a fair return for the money invested; that the other ten users would not take water at a rate to justify said expenditure; respondent has not and cannot obtain the funds with which to lay said main; that if the respondent is compelled to leave the

water turned on during the winter months the main will undoubtedly freeze, and the complainant will not get the service for which she is asking, and respondent will be greatly damaged by the freezing of the main, and the service will necessarily be cut off during the spring months, which otherwise could be turned on. Respondent further states that this water supply is not the only source which complainant has, but that complainant has a spring or springs from which she gets her supply and has in past winters obtained a supply of water at such times that the respondent line has been frozen; that the spring is piped to the outbuildings in the immediate vicinity of complainant's cottage, and the water from said spring is of good quality and sufficient for the winter use of the complainant's agents and employes, as well as domestic stock. The respondent denies all allegations in complainant's complaint except those which are expressly admitted.

On December 22, 1923, the complainant filed a replication to the answer of respondent, in which a denial is made of all new matter set up by the respondent's answer, and it is further alleged therein that the pipe line as now laid and constructed was not so laid and constructed solely for the purpose of supplying water to summer residents, and that formerly before the respondent began furnishing water to complainant, said pipe line was laid and operated on the surface of the ground and not under the ground as at present; that when the respondent began furnishing water to the complainant it undertook to furnish same for the entire year, which service respondent has rendered ever since the cottage of complainant was constructed, and the respondent has been rendering said service in compliance with its legal duty in that behalf and also in compliance with an understanding between complainant and respondent, the respondent placed said pipe line underground to enable it to serve the complainant and perhaps others with water for the entire year, and that while the pipe line may not be placed under ground by respondent as deep as desirable, this is neither the fault of the complainant nor any defense to the bounden duty of the respondent.

This case was originally set down for hearing on November 21, 1923, but for the purpose of meeting the convenience of the parties hereto, it has been continued from time to time, and was finally heard on August 1, 1924, at the City Hall at Estes Park, Colorado, before the entire Commission. Evidence was submitted in support as well as in opposition to the complaint.

After the hearing the parties hereto were given an opportunity to file briefs, the last one of which was filed on November 24, 1924, hence the delay in this decision.

The main issue of fact involved in this controversy is, what service did the respondent company, as a public utility, agree to and did render to the complainant from its inception to date. A determination of this fact, in our opinion, practically settles the issues in this case. The complainant contends that the respondent utility agreed to and did furnish annual services of water for domestic purposes. The respondent contends that no winter service was given or intended to be given and any service rendered during the winter months was only a matter of accommodation until frost of the pipes prevented. The respondent's services to the complainant commenced in 1911 and have continued to date. According to the testimony, from 1911 to 1923, there were about four times in which the line froze up during the winter months. The expense of thawing out at each freeze, except as to the last one, was borne by the respondent, which would clearly indicate that at least up to 1923 the respondent considered this its duty. The receipts given to the complainant by the respondent company for money received on service rendered are based on an annual service and nothing therein contained indicates any seasonal service. The schedules filed with the Commission under the Public Utilities Act do not indicate the rendering of any seasonal service. The evidence further shows that the respondent company has but one charge and one kind of receipt for all users, whether they take water one week or fifty-two weeks. Furthermore, at the time the complainant purchased the premises in question an investment was made by her in the sum of $1,000 in the respondent company, with the express understanding that the

respondent company would furnish to complainant year-round service, and for the purpose of enabling the respondent to place a portion of the pipe line underground which was formerly on the surface, in order to permit the Water Company to render all-year service. The evidence shows that the pipe formerly on the surface was thereafter placed underground. The Commission only gives weight to this agreement as an additional fact showing the intention of the respondent company at the inception to furnish year-round service.

The Commission is of the opinion, and so finds, that the facts and surrounding circumstances in this case show conclusively that the respondent company intended at all times, until November 1, 1923, to furnish a full year service to complainant.

The legal obligations resting upon a water company are fairly well settled.

"A water company is bound to render proper and satisfactory service * * * and for that purpose to maintain its plant in a state of efficiency."

40 Cyc. 778.

"A water company is bound to supply all persons along the line of its mains who apply for water and offer to pay the price, without discrimination and at uniform rates * * *."

40 Cyc. 791.

"A contract is also implied where the company furnishes water and the consumer uses it and pays for it, without written agreement, the one party being bound in such case to continue the service and the other to pay for it at the established rates."

40 Cyc. 793.

The respondent attempts to justify its curtailment of service from November 1, 1923, on the ground that to lay the pipe in question deep enough to prevent freezing would cost approximately $20,000, and that the respondent company has not this money now nor can it obtain the same. The cost of making the pipe line reasonably safe from frost was seriously disputed by testimony introduced by the complainant. Be that as it may, the showing made by the respondent does not justify the Commission to permit the discontinuance of this service.

Where the revenues are equal to and exceed the operating expenses, the public utility must continue to render the service in question. There is no evidence showing that the respondent company is not making its operating expenses.

The inability to properly finance the continuance of a service established for a number of years is not a sufficient excuse under the facts in this case.

> Residents of Laurel Springs, *et al.*, v. New Jersey Gas Co., P. U. R. 1921-A, 445.

Moreover, so long as a public utility continues to exercise its franchise it cannot refuse to render service to such patrons as it was organized to serve, because of the expense involved, and this is especially true where the status has once been created and maintained for a considerable period, as in the instant case.

> Colorado Telephone Co. v. Wilmore, *et al.*, 53 Colo. 585.
>
> C. & S. Ry. Co. v. State Railroad Commission, *et al.*, 54 Colo. 64.

The purpose of the complaint herein is to prevent a discontinuance of the service which has heretofore been rendered. The sole issue, therefore, before the Commission at this time is one of liability of the respondent to continue to render the same service which it has been rendering to the complainant for a period of thirteen years last past.

The Commission is of the opinion, and so finds, that the respondent company has for the past thirteen years rendered to complainant a year-round water service for domestic purposes, and the respondent is therefore not justified in attempting to discontinue this service under the issues in this case. It follows, therefrom, that the respondent should pay the expense of thawing out the line for the winter of 1923-1924.

The contention of the respondent company that complainant has, in addition to the service of the respondent company, a spring or springs from which she may obtain a sufficient water supply for winter service is not sustained by the evidence.

In the opinion of the Commission The Estes Park Water Company, respondent, is under an obligation to supply the complainant herein with adequate water service for domestic purposes the year round, and that it is not fulfilling its obligations as a public utility unless such service, as aforesaid, is rendered to the complainant.

ORDER.

IT IS THEREFORE ORDERED, That The Estes Park Water Company, respondent herein, furnish to the complainant at the premises in question adequate and proper water service for domestic purposes all the year round.

IT IS FURTHER ORDERED, That The Estes Park Water Company, a respondent herein, shall pay the expense of thawing out the line for the winter of 1923-1924.

THE GIBSON LUMBER & MERCANTILE COMPANY
v.
THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY.

[Case No. 280. Decision No. 848.]

Tariffs—Notice against demurrage—Weather conditions.

1. Shippers should make strict compliance with tariff provision "requiring notice within thirty days of claims against demurrage on account of weather conditions, etc."

Tariffs—Duty of carrier to explain.

2. Carrier owes legal duty to explain and make clear to shipper any tariff provision when requested by shipper.

[May 25, 1925.]

Appearances: W. M. Gibson, of Grand Junction, Colorado, for The Gibson Lumber and Mercantile Company; Bertha V. Perry, of Denver, Colorado, for The Denver and Rio Grande Western Railroad Company.

STATEMENT.

By the **Commission**: This matter is before the Commission by virtue of formal complaint of The Gibson Lumber and Mercan-

tile Company, Grand Junction, Colorado, regarding demurrage charges assessed on eight cars of cement shipped by The United States Portland Cement Company, Denver, Colorado, consigned to The Gibson Lumber and Mercantile Company, Grand Junction, Colorado, shipments moving during the month of October, 1922.

Pursuant to notice to all interested parties, the above entitled matter came on for hearing before Commissioner Frank P. Lannon, at the City Hall, Grand Junction, Colorado, Wednesday, February 11, 1925, at 11:00 A. M., when a full and complete hearing was granted interested parties and evidence introduced by both complainant and defendant upon which the Commission is asked to decide this case, such evidence being contained in record of the hearing, a copy of which record has been furnished all interested parties.

The eight cars of cement involved in this complaint, viz.: W. P. 17168, W. P. 18283, W. P. 17551, W. P. 17396, CCD 1135, D&RG 62970, C&S 12522 and D&RG 63929, moved during a period of extremely unsettled transportation conditions occasioned by the railway shopmen's strike, and during the period in which these cars were detained at Grand Junction and demurrage assessed, it is claimed by The Gibson Lumber and Mercantile Company and admitted by carrier's agent at Grand Junction, Mr. E. C. Craig, that an abnormal condition of congestion of the carrier's yards prevailed at Grand Junction, Colorado. Record shows The Gibson Lumber and Mercantile Company accept shipments in carload on a spur track, capacity of said track being two cars. The Gibson Lumber and Mercantile Company's portion of track being that part of a spur track located between enclosure of The Independent Lumber Company yard and the switch connection with the Denver and Rio Grande Western Railroad's main line (this spur track serving both The Gibson Lumber and Mercantile Company and The Independent Lumber Company) and occasionally unload cars placed for them on The Independent Lumber Company's track when placed where accessible to teams.

At this time, the Commission calls attention to conflicting evidence introduced at the hearing, which statements have a material bearing on the decision of the Commission. While it is a fact that The Gibson Lumber and Mercantile Company's portion of the spur track will hold but two cars, evidence by Mr. F. Wagner, Yard Clerk for The Denver and Rio Grande Western Railroad Company at Grand Junction, quoted from the railroad company's records, shows four cars, viz.: 17396, 1135, 12522 and 62970, as being actually placed on this track for ununloading, and held on this track while demurrage accrued, at one and the same time, between October 24 and November 7, 1922—a physical impossibility—indicating faulty records of The Denver and Rio Grande Western Railroad Company. Record also indicates that from one to two days elapsed after arrival of these cars before consignee was notified of arrival, which indicates to the Commission that if conditions were such at this time to cause delay in giving notice of arrival, it naturally follows that conditions would not permit of the prompt placement of cars. On cars (3) arriving October 21 (October 22, Sunday) —time of arrival not stated—notice of arrival was not given consignee until October 23. Cars arriving October 24 (time of arrival not stated), notice was given October 25.

Mr. W. B. Lawrence, Demurrage Clerk for The Denver and Rio Grande Western Railroad Company, states from his record that no carload shipments were received for The Gibson Lumber and Mercantile Company between dates October 24 and November 15, 1922, dates upon which demurrage was accruing on cars received prior to October 24. The fact that no claim is made that consignee was negligent in unloading cars between these dates but does show cars unloaded promptly when placed on spot accessible, further indicates to the Commission slow switching service on the part of the carrier. Mr. Gibson states shipper was ordered to ship two cars per day. Record introduced by Mr. Gibson shows that on October 14, 16 and 17, three cars per day were shipped, indicating to the Commission that shipments were being forwarded by this particular shipper in excess of usual ability of The Gibson Lumber and Mercantile Company to

handle promptly, it not being shown that these particular shipments were all shipments moving on these dates for The Gibson Lumber and Mercantile Company.

Exhibit No. 2 by The Denver and Rio Grande Western Railroad Company, an agreement by Mr. R. J. Hagan on behalf of The Gibson Lumber and Mercantile Company to accept notice of arrival of cars by phone, dated January 1, 1921 (this form of notice provided for by Section A, Rule 4, A. R. A. Tariff 4-B, Colo. P. U. C. No. 3, D&RGW Exhibit No. 1), is repudiated by Mr. Gibson account "Mr. Hagan not in our employ during year 1922." This repudiation cannot be considered, as agreement was made January 1, 1921, at which time Mr. Hagan was in the employ of The Gibson Lumber and Mercantile Company, and the Commission does not consider Mr. Hagan's leaving employ of The Gibson Lumber and Mercantile Company would have any effect on the manner in which The Gibson Lumber and Mercantile Company desired notice of arrival of shipments sent them, unless it had previously cancelled this agreement. Mr. Gibson's statement that "record showing dates cars released is proof positive that cars had not previously been placed where they could be unloaded" cannot be considered controlling, as the Commission does not recognize that the date of release of a car could possibly indicate the previous location of car. Neither can the contention of Mr. Gibson, that his company was not notified of change in Demurrage Tariff or that he "cannot figure out the tariff" be considered because of the fact that nothing in the record indicates there had been any change in carrier's tariff, and if there had been, the filing of the tariff with the Commission and posting of tariff at station is, by law, considered sufficient notice to the public, and it appears all requirements in this respect had been complied with. The law further imposes on the carrier the obligation of explaining and making clear to a shipper any tariff provision not entirely clear to shipper, when requested so to do by a shipper. Shippers generally are not inclined to consider favorably demurrage charges. The Commission recognizes that a carrier should be reimbursed for use of

its equipment and facilities, whether used for transportation or for storage purposes.

The Commission has thoroughly reviewed the record in this case in an endeavor to arrive at a just and reasonable solution of what the demurrage charges, if any, should be on the eight cars here in question. It is not the opinion of the Commission that the cause of delay on these cars is entirely with the carrier, even though strike conditions did prevail at this time, or entirely with The Gibson Lumber and Mercantile Company, first, because it is shown that carrier was performing switching service at all times during the period concerned herein, and, second, because it is clearly evident that shipments were being forwarded to The Gibson Lumber and Mercantile Company daily in amounts in excess of ability of the lumber company to handle, hence the Commission feels that it would be but fair for concessions to be made here to both The Gibson Lumber and Mercantile Company and The Denver and Rio Grande Western Railroad Company; and further, in view of the fact that at this late date actual and reliable records cannot be produced as a basis for a settlement on actual fact, the Commission takes this opportunity of calling attention of shipper to the carrier's tariff in requiring notice within thirty days of claims against demurrage on account of weather conditions, etc., there being ordinarily no good reason why such claims should not be made within the thirty days specified, and strict compliance with this rule will avoid the necessity of settling disputed claims at later dates when all facts are not so easily obtainable.

D&RGW Exhibit No. 3, notice of constructive placement covering four cars, is not considered by the Commission, as this notice covers cars arriving at destination on different dates on which carrier should have rendered constructive placement notices on different dates had carrier been performing usually prompt service. Also it is significant that carrier claims to have observed the requirements relative to constructive notice on these four cars only, the four cars on which the larger amounts of demurrage accrued.

Examination of record will show that according to Denver and Rio Grande Western Railroad station records, there were actually more cars on The Gibson Lumber and Mercantile Company and The Independent Lumber Company's tracks at one time than tracks will accommodate.

The Commission is of the opinion that the demurrage charges assessed of $133.00 on the eight cars here in question are excessive, unjust and unreasonable in that they exceed a charge of $18.00 on W. P. car 17168, $4.00 on W. P. car 18283, $13.00 on D&RG car 63929, $18.00 on CCD car 1135, and $8.00 on C&S car 12522, a total of $61.00, and that demurrage charges on cars D&RG 62970, W. P. 17396 and W. P. 17551 should be eliminated, and an order will be so made.

ORDER.

IT IS THEREFORE ORDERED, That The Gibson Lumber and Mercantile Company be, and is hereby, directed to only pay to The Denver and Rio Grande Western Railroad Company the sum of $61.00 demurrage charges on five cars of cement detained at Grand Junction for unloading during months of October and November, 1922.

RE THE GREELEY TRANSPORTATION COMPANY.

[Application No. 436. Decision No. 853.]

Monopoly and competition—Protection against unjust and ruinous competition.

1. It is a fairly well settled principle of utility regulation that a utility rendering a reasonably adequate service is entitled to protection against unjust and ruinous competition.

Monopoly and competition—Not all competition unjust and unnecessary—Question of fact.

2. All competition in the public utility field is not unjust and unnecessary. Each case should stand on its special facts and circumstances.

[June 6, 1925.]

Appearances: Harry S. Class, of Brighton, Colorado, and E. H. Houtchens, of Greeley, Colorado, for the applicant; C. Werthan, of Denver, Colorado, for the Colorado Motor Way, Inc.;

E. G. Knowles, of Denver, Colorado, for the Union Pacific Railroad Company; J. Q. Dier, of Denver, Colorado, for The Colorado and Southern Railway Company; F. J. Gould, of Denver, Colorado, for the American Railway Express Company.

STATEMENT.

By the **Commission**: This is an application for a certificate of public convenience and necessity to operate a line of motor busses for carrying passengers for hire and for carrying parcels and small packages between Greeley and Denver, Colorado, without intermediate stops.

Protests against this application were filed by W. M. Fuller, of Brighton, Colorado, the American Railway Express Company, Union Pacific Railroad Company, The Colorado and Southern Railway Company and the Colorado Motor Way, Inc.

The application was set down for hearing on June 1, 1925, at 10:00 o'clock A. M., at the Hearing Room of the Commission, State Office Building, Denver, Colorado, on due notice to all parties, at which time testimony in support of the application and in opposition thereto by protestants was submitted.

The territory in question has been served for about two years and a half in the way of motor transportation of passengers and carrying of light express by the Colorado Motor Way, Inc. A certificate of public convenience and necessity for this service and transportation system was issued to the Colorado Motor Way, Inc., on the 15th day of September, 1923. The applicant herein bases its ground of public convenience and necessity for its transportation system mainly on a passenger express service between Greeley and Denver which it intends to operate and the use of more modern and convenient busses than now used by the Colorado Motor Way, Inc. The witnesses produced by the applicant mainly testified as to their own personal convenience in the proposed passenger express service, as well as the convenience of the busses as contrasted between the busses of the Colorado Motor Way, Inc. The record discloses very little, if any, testimony as to the public convenience and necessity for the applicant's transportation system. No evidence whatever was in-

troduced by the applicant showing any public convenience and necessity for the transportation of parcels and small packages, nor was there any evidence introduced by the applicant to show any compliance with Section 35, sub-section (c) of the Public Utilities Act, that the applicant had received the required consent or other authority of any city or municipality through which it operates and terminates.

Evidence was introduced by the Colorado Motor Way, Inc., to the effect that it now is operating nine passenger busses on schedule time each way per day between Greeley and Denver and intermediate points, and that the bus leaving Greeley at 7:15 A. M. has passenger express through service between Greeley and Denver. It was further testified by witnesses of the Colorado Motor Way, Inc., protestant, that there was no public convenience and necessity for the transportation system proposed by the applicant, and that the transportation service offered by the Colorado Motor Way, Inc., was sufficient to meet all reasonable demands made by the public in the communities affected. The General Manager of the Colorado Motor Way, Inc., further testified that if there was any reasonable necessity for any additional service, such as proposed by the applicant, that the Colorado Motor Way, Inc., stands ready to install such service whenever the Commission so orders.

Considerable testimony was introduced to show the operating expense per mile of motor transportation between the points in question, it being contended by the Colorado Motor Way Inc., protestant, that two transportation systems could not successfully operate from a financial standpoint between the points in question. The testimony of the applicant was mainly based on an operation of its service commencing about May 7, 1925, from which it contended that the operation expense was about 17 cents per mile. The evidence introduced by the Colorado Motor Way, Inc., based on an operation over the particular territory for a period of about two and one-half years, shows an operating expense of about 26 cents per mile. The evidence further shows a reduction or falling off in revenues received by the Colorado Motor Way Inc., in the last week of May, 1925, in this service in

the sum of about $400.00, most of which is attributed to business taken away by the applicant from the Colorado Motor Way, Inc. The evidence also shows that about 22 per cent of the passengers hauled by the Colorado Motor Way, Inc., in the last year was through business between Greeley and Denver, and that this through business amounted to about 42 per cent of the revenues received. It would seem from these figures and others introduced by the protestants that if the applicant would be permitted to operate its proposed system considerable loss would result to the Colorado Motor Way, Inc., so much so that no profits of any kind could be realized and the deficit would perhaps be so large as to seriously affect its continued operation.

The general principle of public utility regulation protecting the utility which is rendering to the public a service reasonably adequate and practically sufficient against unjust and ruinous competition is fairly well settled. The purpose and application of this general principle is intended in the interest of the public welfare. This general principle does not mean that all competition is unjust and unnecessary, but that each case should stand on the special facts and circumstances. *Re* City of Lamar, P. U. R. 1919-C, 309. The Supreme Court of Colorado in the case of Pirie v. Public Utilities Commission, 72 Colo. 65, upheld the general principle referred to.

The Commission, however, prefers to decide this case mainly on the proposition that the applicant has failed to show that there is any public convenience and necessity requiring its transportation system. If the communities involved feel that the service now offered by the Colorado Motor Way, Inc., is not sufficient to meet the reasonable demands of the public, such matter can be remedied by the filing of a complaint under Section 31 (a) of the Public Utilities Act of Colorado, and can then receive proper investigation and determination.

After a full and careful consideration of all the evidence introduced in this case, the Commission is of the opinion, and so finds, that the public convenience and necessity does not require the motor transportation system proposed by the applicant herein.

ORDER.

IT IS THEREFORE ORDERED, That the application of The Greeley Transportation Company, applicant herein, be, and the same is hereby, denied.

RE FINACE SALTERS

[Application No. 437. Decision No. 880.]

Monopoly and competition—Adequacy of existing service—Motor carriers—No complaints.

The sole fact that an existing transportation service is not adequate and sufficient is not ground upon which the Commission should issue a certificate authorizing an additional service when there has been no complaint to the Commission against the existing service, a hearing had thereon, an order entered directing the utility in question to furnish adequate service, which order has not been obeyed.

[July 21, 1925.]

Appearances: Carl Cline, Esq., Denver, Colorado, for applicant; E. G. Knowles, Esq., Denver, Colorado, for Union Pacific Railroad Company, protestant; James E. Garrigues, Esq., Denver, Colorado, for the Aurora Truck Line, operated by Delmar L. Miller, protestant; J. C. North, Esq., Denver, Colorado, for American Railway Express Company, protestant.

STATEMENT.

By the **Commission**: This application was filed on April 29, 1925, for a certificate of public convenience and necessity to operate a truck and automobile line for the transportation of freight and merchandise between the City of Denver and the Town of Deertrail, Colorado, and intermediate points. It is alleged, among other matters, in the application that the public convenience and necessity requires a certificate to be issued permitting applicant to carry, haul and transport freight and merchandise, because at the present time there is but one other person, to-wit: Delmar L. Miller, who has a certificate of authority to do business in a similar line of work, but that the said Miller does not run a regular schedule; that particularly in the han-

dling of perishable goods the public necessity and convenience require the services of transportation by truck, and that the same can be delivered from Denver to Deertrail and intermediate towns with quicker dispatch and promptness than when sent or delivered by rail; that in the vicinity between Deertrail and Denver there are numerous towns and villages that require the services of this applicant, and the same is more advantageous than by shipping merchandise and freight by rail; that Delmar L. Miller does not operate his truck with regularity and promptness, and for that reason many of his patrons have turned their business over to this applicant. Applicant alleges that he intends to operate over the proposed route a truck or automobile known as the Reo truck, 1924 model, in good condition, and that he will make daily trips and keep to a standard schedule, or will meet such requirements as may be demanded.

A protest was filed by the American Railway Express Company, alleging that neither the present nor the future public convenience and necessity require or will require the operation of a motor truck line for the transportation of freight and merchandise between the said cities and towns, and that the Express Company provides and will continue to provide ample and sufficient service on passenger trains operated by the Union Pacific Railroad Company to accommodate the present and future public needs of said localities.

A protest was also filed by the Union Pacific Railroad Company, in which it is alleged, among other matters, that it is in the business of a common carrier, and has been so engaged for a long number of years, and in the course of its business has maintained and operated, and now maintains and operates trains for the carriage of passengers, freight and express between Denver, Colorado, and Deertrail, Colorado; that by means of the train service maintained and operated by it the traveling and shipping public is served completely, amply, sufficiently, constantly, efficiently, promptly, safely, economically and at reasonable and lawful rates as to the carriage of passengers, freight and express in the territory involved. It is further alleged that in addition to the service offered by the Union Pacific Railroad Com-

pany the Commission has granted a certificate of public convenience and necessity to one Delmar Miller, for the operation of a motor truck line between Denver, Colorado, and Deertrail, Colorado, and said Miller operates and maintains a service for the carriage of freight and express, and thereby the territory above described is completely and adequately served at the present time; that the applicant proposes to operate a transportation line which will duplicate the service and facilities now operated by the railroad company and by said Delmar L. Miller; that if the Commission should grant this application the railroad company would be deprived of revenue which because of its prior entry into the field it is entitled to earn and retain; that the inevitable result of indiscriminate competition will be loss of revenue to the respondent, and in order to continue the operation of its railroad economically, the service now offered by said respondent in the territory above referred to will have to be curtailed; that because of these facts it is averred that the public convenience and necessity does not require that a certificate be issued to the applicant.

A protest was also filed by Delmar L. Miller, who is the holder of a certificate of public convenience and necessity for the operation of an auto transportation system between Deertrail and Denver.

This matter was set down for hearing on May 22, 1925, at 2:00 P. M., at the Hearing Room of the Commission, 305 State Office Building, Denver, Colorado.

Evidence was produced by the applicant, through a number of witnesses from Deertrail, for the purpose of showing a public convenience and necessity for the proposed line of the applicant; it appears that the applicant commenced to operate this line about three months prior to the hearing, without obtaining a certificate of public convenience and necessity. This, of itself, was contrary to the Public Utilities Act. No testimony of public convenience and necessity as to the intermediate points was introduced, except what was testified to by the applicant. This Commission, on or about the 23rd day of October, 1924, granted to one Delmar L. Miller a certificate of public convenience and

necessity to operate a motor transportation freight system over the route in question. It was alleged and testified to by witnesses produced by the applicant that the service rendered by Delmar L. Miller was not sufficient and adequate to serve Deertrail. No complaint has ever been made to this Commission prior to this hearing relative to the service given by Miller, and in this connection it is significant that no complaint whatever was made against the service furnished by Delmar L. Miller from any other point on the route. The testimony introduced against the service rendered by Delmar L. Miller becomes material only when complaint has been made to this Commission that the service rendered by him is inadequate and insufficient, a hearing has been had thereon, an order is entered by this Commission finding the service inadequate and insufficient, and directing the utility in question to furnish adequate and sufficient service, and which order is not obeyed. In other words, the sole fact that Delmar L. Miller's service is not adequate and sufficient is not ground upon which this Commission should issue a certificate of public convenience and necessity to the applicant. Delmar L. Miller, protestant, and holder of certificate over this route, testified that his service was sufficient and adequate to Deertrail; that there had never been any complaints against his service; that he had operated regularly, as per schedule, and at a loss since this applicant commenced to operate, and that he stood ready and willing to furnish such adequate and sufficient service as in the opinion of the Commission the community at Deertrail reasonably required.

We may say, in this connection, that if the public interested at Deertrail does not obtain adequate and sufficient motor service, and a proper complaint is filed showing the same, the Commission in the performance of its duty will set the same down for a hearing, and if the hearing so justifies will enter an order giving to Deertrail sufficient and adequate motor freight service.

Mr. D. H. Moore, Mayor of Deertrail, testified that in his opinion the service rendered by Mr. Miller was sufficient and adequate.

Evidence was also introduced by the American Railway Express Company and the Union Pacific Railroad Company, showing their service rendered to Deertrail in the way of express and freight.

In re Greeley Transportation Company, Application No. 436, this Commission held that the general principle of public utility regulation protecting the utility which is rendering to the public a service reasonable, adequate and practically sufficient against unjust and ruinous competition was generally well settled. The Commission is of the opinion that in this case the evidence is insufficient to warrant the Commission in finding that additional motor truck service is required over the line proposed by the applicant. If the service now rendered by Delmar L. Miller is not reasonably adequate, the Commission has pointed out a way in which steps may be taken to make it so.

After a full and careful consideration of all the evidence introduced in this case, the Commission is of the opinion, and so finds, that the public convenience and necessity does not require the motor transportation system proposed by the applicant herein.

ORDER.

IT IS THEREFORE ORDERED, That the application of Finace Salters, applicant herein, be, and the same is hereby, denied.

JAMES PEARSON

v.

TONIE GIACOMELLI, *et al.*

[Case No. 281. Decision No. 881.]

Common carriers—Miscellaneous service—Motor vehicles—Jurisdiction.

A miscellaneous motor vehicle passenger operation conducted on call and demand with frequent trips made between two points served by a railroad held not to be under the jurisdiction of the Commission.

[July 22, 1925.]

Appearances: Frank L. Ross, Esq., Denver, Colorado, for complainant; William A. Way, Esq., Silverton, Colorado, for defendants Tonie and Frank Giacomelli.

STATEMENT.

By the **Commission**: On May 18, 1925, James Pearson, holder of a certificate of public convenience and necessity to conduct an automobile stage line between Silverton and Eureka, Colorado, filed with the Commission a complaint against the above named defendants, charging them with operating a passenger bus line in violation of the Public Utilities Act of the State of Colorado. It is alleged in the complaint that during the winter season of 1924-1925, while operation was difficult, the complainant maintained his stage line and transported passengers and freight for the public; that the operations during the winter months were without profit, as it was difficult and expensive to maintain public service; that during April of 1925 the complainant expended considerable money in assisting the County Commissioners and others interested in opening the road between Silverton and Eureka so that same could be used for transportation purposes by automobiles; that the said road was opened April 20th, 1925, and has remained open, and that the complainant under his said certificate operated and conducted his automobile stage line for the carriage of passengers and freight; that the complainant has the mail contract and is under bond to transport said mail, as well as operate under the certificate heretofore issued by the Public Utilities Commission to maintain and operate an automobile transportation line for the benefit of the public; that upon the reopening of said road for automobile use the said defendants Tonie Giacomelli, Frank Giacomelli, Angelo Dalla and Louis Dalla commenced operating a competing automobile and bus line for the transportation of passengers and freight; that complainant is advised that said Doud Brothers are preparing and will operate such a competing stage line; that the amount of profit does not justify such additional transportation facilities for passengers and freight; that the complainant necessarily must run according to schedule estab-

lished and advertised; that said competing lines by leaving Silverton and Eureka a few minutes prior to the stage operated by this applicant, have been and are able to secure a great deal of business, both passenger and freight; that said wrongful competition should be stopped; that complainant operated during the season of 1924 with but very little profit and that during the winter season he operated at a loss; that said complainant, on account of said wrongful competition, is now and will necessarily operate at a loss if such competing automobile stage lines are allowed to continue to operate, which are now being carried on, and which were carried on during the season of 1924.

No evidence was introduced against defendants Doud Brothers, it being stated at the hearing that they were not now operating, as was alleged in the complaint.

William A. Way, Esq., attorney for defendants Tonie Giacomelli and Frank Giacomelli, dictated into the record an answer substantially as follows: That the respondents Tonie Giacomelli and Frank Giacomelli are not at this time engaged in the operation of any competing line between the said towns of Silverton and Eureka, and aver that they are operating a taxi line or auto livery only, and that their operations are not confined to the road between Silverton and Eureka but wherever their passengers and patrons ask them to go; that they have applied to the Federal government for permission to conduct a taxi line and service, and have had issued to them proper license for so doing; that the question of the carriage of mail is entirely apart from any rights accruing under the certificate of public convenience and necessity mentioned in petitioner's complaint, and that all averments relative to that matter are irrelevant and immaterial; that in the winter time no automobile stage line is or can be operated between the towns of Silverton and Eureka, and all averments relative to that matter are also irrelevant, incompetent and immaterial to the matters herein in issue; and that defendants are not common carriers within the meaning of the Public Utilities Act of the State of Colorado, and that their operations are not within the purview of that act.

This case was set down for hearing on June 9, 1925, at 2:00 P. M. at the Court House, Silverton, Colorado, at which time evidence was introduced by the complainant and by the defendants.

The sole issue upon which this Commission is asked to pass is whether or not the defendants are operating as common carriers in conducting a motor transportation system for passengers between Eureka and Silverton, Colorado, within the meaning of the Public Utilities Act. The term common carrier as defined by Section 2 (e) of the Public Utilities Act (C. L. 1921, Sec. 2912) is as follows: "The term common carrier when used in this act includes * * * every * * * corporation or person affording a means of transportation by automobile or other vehicle whatever similar to that ordinarily afforded by railroads or street railways, and in competition therewith, by indiscriminately accepting, discharging and laying down * * * passengers between fixed points or over established routes * * * ."

No evidence of any kind was introduced showing that the defendants transported any freight. The evidence of the complainant was, briefly, that the defendants were hauling passengers between Eureka and Silverton; that they were making trips to and from Eureka at or about the time called for by the schedule of the complainant; that at certain times during the day the miners from the Sunnyside mine would come down on the mine tram to Eureka, and that usually the automobiles of the defendants would be waiting to take passengers to Silverton. Only one witness was produced by the complainant who testified that he rode as a passenger in the automobiles of the defendants from Eureka to Silverton, and that the contractual relation of carriage originated with him rather than with the defendants. The testimony of the defendants was to the effect that they were in the general taxi business in Silverton, and, as shown by Exhibit "A" introduced by them, they advertised to make trips to all points, day or night, under the name of the Silverton Taxi Line; that they advertised in no other manner, and did not advertise to run between fixed points or over established routes, or have

a regular time schedule, and that they were solely conducting a taxicab business.

Under the issues in this case the burden is upon the complainant to prove the allegations of his complaint. The Commission is of the opinion that the complainant in this case has failed to show by a preponderance of the evidence such a state of facts as would justify this Commission, under the law, to assume jurisdiction over the defendants, and that the complainant has failed to furnish such a case as would warrant this Commission in directing its legal representatives to proceed against the defendants on the ground that they are conducting a public utility without a certificate of public convenience and necessity. The character of the business, so far as appears from the proof in this case, is not such as would make the defendants common carriers within the meaning of our Act, there being no operation between fixed points or over established routes and is no such operation as to require the defendants to first obtain a certificate of convenience and necessity from this Commission before engaging in such business.

ORDER.

IT IS THEREFORE ORDERED, That the complaint herein be, and the same is hereby, dismissed, for want of jurisdiction.

RE THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

[Application No. 456. Decision No. 890.]

Service—Railroad station agency—Profitableness—Convenience and necessity of public.

1. Whether a railroad station is a paying proposition is not always controlling. The convenience and necessity of the public must be considered.

Service—Remote railroad station agency—Closing—Resort to other methods of economy first.

2. Other methods of effecting economies should be tried before resorting to closing a remote station agency used by the public.

[July 31, 1925.]

Appearances: D. Edgar Wilson, Esq., of Denver, Colorado, for applicant, The Chicago, Rock Island & Pacific Railway Company; Roy A. Davidson, Postmaster, Peyton, Colorado, protestant; J. A. Carruthers, Esq., County Attorney, Colorado Springs, Colorado, for El Paso County Commissioners, protestants; William I. Howbert, Esq., President of the Chamber of Commerce of Colorado Springs, E. J. Jackson, General Secretary, and J. R. Young, Chairman of the Transportation Committee of the Chamber of Commerce of Colorado Springs, protestants.

STATEMENT.

By the **Commission**: The application herein was filed with the Commission May 29, 1925, under Rule 34 of the Commission, effective May 1, 1921, giving notice that The Chicago, Rock Island & Pacific Railway Company would close its agency station at Peyton, El Paso County, July 1, 1925.

June 16, 1925, the Commission ordered that, pending a full hearing on the closing of this agency, notice of abandonment of said agency be suspended until August 1, 1925. After due consideration the Commission set this matter down for hearing and heard the same at the school building, Peyton, Colorado, Monday, July 27, 1925.

In petitioner's application for closure it recites that there is maintained a station known as Peyton, El Paso County, Colorado, distant approximately 27.7 miles from Colorado Springs and 51 miles from Limon; that applicant now maintains said station at Peyton as an agency station; that the portion of El Paso County served by said Colorado Springs-Limon Branch is a sparsely populated agricultural district and community; that the business at the said station consists mostly of carload shipments and could be handled as a prepay station at either Calhan or Falcon, distant respectively 11.2 and 9.4 miles; that the station agency is not justified by the revenues received from the business handled through said station, and that the applicant has heretofore and now operates at an annual deficit in the State of Colorado, and that present conditions necessitate in the inter-

est of economy every possible reduction by applicant in its operating expenses, and that a custodian can be obtained to look after the business of the station at much less expense than the continued employment of an agent at said station.

The evidence presented at the hearing showed that the applicant proposed to eliminate the station agent, who is a telegrapher and who receives a yearly salary of $1,536.94, and to substitute therefor a custodian at a salary of $25.00 per month, or a yearly salary of $300.00, thus making a substantial saving for the company.

The Commission finds Peyton is located in quite an extensive farming and dairying district 28 miles east of Colorado Springs on the line of applicant's railway, and has a population of about one hundred, with a considerable rural population adjacent thereto. The first station on the east is Calhan, distant about eleven miles, and the first station to the west is Falcon, distant ten miles, making the distances such that it would be a great inconvenience and source of annoyance and delay in ordering cars and getting them placed for loading from stations so far removed.

Whether a station is a paying proposition is not always controlling. The convenience and necessity of the public must be seriously considered. Railroads are built and maintained primarily for profit, but after commencing operations, as was the case with this line, farmers and others made large investments in land and built homes and improved farms on the natural assumption that the railroad facilities offered since the railroad's construction would be maintained, and in this they feel they have vested rights that should not be destroyed. In a similar case before the Board of Railroad Commissioners of North Dakota, Case No. 1885, 3rd Annual Report of the North Dakota Board, page 203, which was an application by the Northern Pacific Railway Company for permission to close its station at Sims, in which the total earnings were only $4,354.00 and the total expenses $2,325.00, the commission denied the application to close the station agency. In this case the North Dakota Commission cites with approval the case of State *ex rel.* Railroad and

Warehouse Commission v. Northern Pacific Railroad Company, 96 N. W. 81, in which it is held that the decisive question in such case should not be the convenience and benefit of railroad companies alone, and that the question of whether a railroad station is profitable is not the sole controlling issue.

In Boettcher v. Utilities Commission, 73 Colorado, No. 10,500, Boettcher, *et al.*, v. The Public Utilities Commission, *et al.*, decided by the Supreme Court of Colorado February 5, 1923, the Court said:

"The only reason apparently advanced against the conclusion that the order is reasonable is that the railroad transports coal at a loss. This argument might be effective in a rate case, but the fact that a common carrier operates at a loss does not relieve it from performing the duties incident to transportation. The duties follow the status of a common carrier, not its financial condition. The duties are not obviated by the fact that they necessitate expense."

and, therefore, affirmed the order of the Commission.

Of course, the Commission can readily understand that situations may arise where the abandonment of station agencies may be justified, but the Commission feels that almost every other method of working out economy should be tried before resorting to the extreme of taking from its patrons the public conveniences and necessities afforded the public by the station agencies, and especially so where the agencies are as far apart as they are in the locality of Peyton.

Evidence introduced at this hearing showed that 70 per cent of the short haul freight of the Rock Island Railway between Colorado Springs and Limon had been taken away from it by auto trucks. The County Commissioners of El Paso County, as well as the Chamber of Commerce of Colorado Springs, expressed themselves as being decidedly opposed to the operation of trucks for hire in competition with the Rock Island Railway in El Paso County, Colorado, and also showed that the Gray Truck Line, although having been refused a certificate of public convenience and necessity to operate by this Commission, was and is now operating along said line in violation of law.

After hearing all the evidence in this case and taking into consideration the serious consequences of depriving the inhabitants of Peyton and surrounding country in taking away from them their railway station facilities and substituting therefor a custodian, the Commission is firmly of the belief that on account of the small expenditure necessary to maintain its said agency, the Rock Island Railway Company is not justified in abolishing said agency, and the Commission will issue its order accordingly.

ORDER.

IT IS THEREFORE ORDERED, That the application of The Chicago, Rock Island & Pacific Railway Company to close its agency at Peyton, Colorado, be, and the same is hereby, denied, without prejudice.

RE THE COAL CREEK WATER & LIGHT COMPANY.

[I. & S. Docket No. 74. Decision No. 942.]

Commissions—Jurisdiction—Rate by contract with municipality—Caution.

Authority in the Commission, as declared by the Supreme Court, to change a rate fixed by contract with municipality, should be exercised with the greatest caution.

[February 18, 1926.]

Appearances: J. R. Roberts, of Florence, Colorado, for The Coal Creek Water and Light Company; J. H. Maupin, Esq., of Canon City, Colorado, for the Town Board of Coal Creek.

STATEMENT.

By the **Commission**: On November 25, 1925, The Coal Creek Water and Light Company filed with this Commission a revised schedule of water rates for the territory of Coal Creek, Fremont County, Colorado, showing a reclassification with advances in rates, as more fully set out in said revised schedule, to become effective January 1, 1926. On December 11, 1925, this Commission issued an order suspending said revised schedule until February 1, 1926. On January 14, 1926, this Commission issued

another order suspending the operation of said revised schedule for a further period until May 1, 1926. December 10, 1925, there was filed with the Commission a protest from the town board of Coal Creek, through its Attorney, Joseph H. Maupin, Esq., objecting to the proposed advance in rates.

This matter was set down for hearing on February 4, 1926, at 10:00 o'clock A. M., at the City Hall, Florence, Colorado, at which time evidence was heard by the Commission in this matter. Mr. J. R. Roberts, Secretary, Treasurer, and Manager of The Coal Creek Water and Light Company, was the only witness presented by the Water Company.

From the annual reports filed by The Coal Creek Water and Light Company, the cost of the plant was given as $10,000 for the past several years. No allowance whatever was made for depreciation. For the past five years, the average income, as based upon the annual reports filed with this Commission, was 10.76% per year. No evidence was introduced by The Coal Creek Water and Light Company upon which to base a valuation; in fact, the testimony shows that the Company was not prepared to show any actual valuation of the plant as of the present time. The evidence introduced at this hearing is entirely insufficient to warrant any findings upon which to base an increase in rates, or the reasonableness of the present rates.

The protestants introduced a contract on rates entered into by the town of Coal Creek with the Company, dated February 16, 1921, and to run for a period of twenty years from January 1, 1921. Evidence was introduced by the protestants to the effect that, at the time the contract was entered into, prices generally were on a high level, but that since that time, prices were on a somewhat lower level; that Coal Creek, being a mining town, the miners were now receiving wages about 30 per cent less than they were in 1921.

The Company requested at the hearing that an answer be given as to whether the Commission had jurisdiction to change the terms of this contract. This matter has been determined by the Supreme Court of this State in the case of The Ohio and Colorado Smelting & Refining Company v. Colorado Public Util-

ities Commission, 68 Colo. 137, in which it was held that this Commission has authority to change a rate fixed by a prior contract when done for the promotion of the common weal or necessary for the general good of the public. However, this authority should be exercised with the greatest caution. Our Supreme Court on this matter in the above cited case, on page 148, says: "This is the exercise of a very grave and dangerous power and should be asserted with the greatest caution, and by means of every instrumentality at the command of the commission, to determine with reasonable certainty that the rate fixed in the contract injuriously affects the public welfare. It is not as if the commission were to establish a rate in the first instance, as based upon its own judgment as to reasonableness, but it must first determine that a contract in this respect, between persons engaged in the particular business and presumably well advised as to its probable effect, not only at the time, but in the light of future conditions, is so unreasonable as to be detrimental to the public interest."

No evidence was introduced at this hearing showing that the rates set forth in this contract are so unreasonable as to be detrimental to the public interest, and this Commission so finds.

ORDER.

IT IS THEREFORE ORDERED, That said schedule filed herein by The Coal Creek Water and Light Company, on November 25, 1925, be, and the same is hereby, cancelled.

IT IS FURTHER ORDERED, That this proceeding be discontinued.

FRAVERT

v.

TOWN OF RIFLE.

[Case No. 290. Decision No. 948.]

Service—Jurisdiction of Commission—Municipal plant serving outside the city.

1. The Commission has jurisdiction over a municipal utility in its relations with patrons outside the municipality.

Municipal plants—Power to dispose of surplus to outside consumers.

2. While a municipality may not be construed a utility for the purpose of supplying the public outside its limits, it may, as an incident of its operations, dispose of its surplus product to consumers outside.

Service—Municipal plant—Water—Service beyond city limits.

3. Where evidence fails to show, inter alia, that a municipal utility has any surplus water to serve to persons residing outside the municipality, the municipality will not be required to give service to such a person.

[March 3, 1926.]

Appearances: I. A. McLearn, Rifle, Colorado, for complainant; N. A. Hutchinson, Denver, Colorado, for defendant.

STATEMENT.

By the **Commission**: On September 23, 1925, the complainant filed with this Commission a statement in which he alleges that he built a duplex house on some lots of which he is the owner in West Rifle, adjacent to a two-inch water line connecting with a water main in the town of Rifle; that the two-inch line was built by the Rifle Irrigation and Power Company about twelve years ago to serve West Rifle; that about four months ago complainant applied to the officials of Rifle for permission to tap his line, but that he was denied this privilege, first with the excuse that he had not designated his lot numbers, and at the next meeting of the town council he was refused water on the grounds that there was a shortage. It is also alleged that the real reason for the refusal of water is that the complainant has crossed some of the Mayor's friends in other matters. On September 13, 1925, the complainant obtained a plumber and tapped his line. He was arrested, brought before the police court of Rifle and was fined $5.00 for committing this act. He asks the Commission to make an investigation of this matter in order that he may obtain water for himself and family.

An attempt was made to adjust this matter in an informal way, but was not successful. Hence, the matter is now before us on formal complaint.

The Complaint was set down for hearing on January 5, 1926, at the Town Hall of Rifle, Colorado, at which time evidence

was introduced by the parties hereto. The first question raised by the defendant was the question of jurisdiction. The case of Smith v. Holyoke, 75 Colo. 286, is relied upon as divesting this Commission of any jurisdiction in this matter. That case is not in point. In the Holyoke case the question involved was a rate applicable solely to the town of Holyoke and not to any territory outside of the limits of the town of Holyoke, as in the instant case. This Commission, in the case of Star Investment Company v. City and County of Denver, P. U. R. 1920-B, 684, held that the jurisdiction of the Commission extended over a municipally owned utility in its relation to patrons outside of the limits of such municipality. After a study of all of the opinions of the Supreme Court of this State relating to this matter, we are of the opinion that there is no judicial determination in this State of this question, and until there is, we must adhere to the opinion laid down in the Star Investment case.

The question of the duty of the town of Rifle, operating a municipal water plant, toward patrons who are not residents of the town but reside outside of its limits, is a more serious question, especially where no contractual relations whatever exist. The town of Rifle has treated such patrons as licensees, with right of revocation. Where there are no contractual relations in existence between the parties, the authorities seem to hold that, while a city may not primarily construct and operate a public utility for the purpose of supplying the public outside of its limits, yet it may, as an incident to such operation, dispose of its surplus product in this manner.

Farwell v. Seattle, 86 Pac. 217.
Chandler v. Seattle, 141 Pac. 331.
Joslin Manufacturing Co. v. City of Providence, 262 U. S. 668.

In the last named case we find the following language:

"The provision in respect to furnishing water to water companies within the area defined is not compulsory but permissive, and leaves the city free to fix terms and conditions."

Complainant cites the case of Colorado Springs v. Colorado City, 42 Colo. 76, as being in point to sustain his position. This

case is based purely on contractual relations and, therefore, is not in point.

The record in this case does not disclose any evidence that the town of Rifle has any surplus water to serve patrons not within the city limits; in fact, the record does not disclose sufficient evidence upon which this Commission, even though the city stood in the same relation as a private utility company, could properly determine that the town was required and did have a public duty to serve all patrons without the town limits similarly situated. No evidence was introduced to show that the complainant was denied water service because of any personal difficulties with the Mayor or his friends. Under all of these circumstances, nothing remains but to dismiss this complaint.

ORDER.

IT IS THEREFORE ORDERED, That the complaint herein be, and the same is hereby, dismissed, without prejudice.

RE JESS MILLER, DOING BUSINESS AS THE MILLER TRANSFER CO.

[Application No. 51-A. Decision No. 988.]

Certificates of convenience and necessity—Transfer—Holder ask for authority.

Authority to transfer a certificate of convenience and necessity denied because the person to whom it was granted did not seek the authority.

[May 13, 1926.]

Appearances: Rinn & Connell, Esq., Boulder, Colorado, for applicant; Barney L. Whatley, Esq., Denver, Colorado, for protestant, The Over-Land Motor Express Company.

STATEMENT.

By the **Commission**: On August 4, 1925, the applicant filed his petition asking that this Commission approve the assignment to him of a certificate of public convenience and necessity,

issued to The Green Transfer Company on August 28, 1919, to operate a motor freight line between Denver and Boulder.

Protest against this assignment was filed on August 8, 1925, by The Over-Land Motor Express Company, who holds a certificate of public convenience and necessity from this Commission to operate a motor freight transportation business between Boulder and Denver.

This case was set down for public hearing and heard by this Commission on April 24, 1926, and on April 26, 1926, at the Hearing Room of the Commission, 305 State Office Building, Denver, Colorado, at which time evidence was introduced in support of, and in opposition to, the asisgnment.

On August 28, 1919, this Commission issued to Bert Green, Elizabeth Green, J. Earl Green and Helen Green, a copartnership, operating under the name of The Green Transfer Company, a certificate of public convenience and necessity to operate an automobile truck line between Denver and Boulder.

The application herein for the assignment is by Jess Miller, whose testimony shows that on, or about, July 1, 1922, he purchased from Bert Green and J. Earl Green certain office equipment located at Boulder and Denver, Colorado, and the good will, list of customers and patrons in the automobile trucking business operated by Bert Green. What, if anything, happened to the rights of Elizabeth Green and Helen Green under the certificate issued to them on August 28, 1919, the record fails to disclose.

In our opinion the proper person or persons who should make application for a transfer or assignment of a certificate of public convenience and necessity are such to whom the certificate sought to be transferred was originally issued. The certificate of itself is not subject to bargain and sale, but is the expression of a finding by the Commission based upon the police power of the State. The responsibility and dependableness of the individuals to whom a certificate is issued is one of the facts considered by the Commission. The purchaser of a transportation business, therefore, is not the proper person to make application for transfer of a certificate issued to some other persons or

corporation. The better practice would be to file a joint petition of seller and purchaser of the system. The only way that the Commission can protect the recipients of a certificate of public convenience and necessity is to have them affirmatively make application asking for transfer. For example, in the instant case, two of the persons to whom this certificate was granted do not appear to have sold anything to the applicant. So far as this Commission knows, they may still claim some rights under this certificate. The documentary evidence introduced by the applicant in his Exhibits Nos. 1, 2 and 3 does not specify or give the names of Elizabeth Green and Helen Green as selling anything whatsoever to the applicant.

The Commission is of the opinion that the applicant herein is not the proper person to file an application for transfer and assignment of a certificate, and the applicant's testimony does not show a purchase from all the persons to whom the certificate sought to be transferred was issued to in the first instance.

ORDER.

IT IS THEREFORE ORDERED, That the application of Jess Miller, doing business as The Miller Transfer Company, to have assigned to him the certificate of public convenience and necessity issued to The Green Transfer Company on August 28, 1919, be, and the same is hereby, denied.

RE THE ROCKY MOUNTAIN PARKS TRANSPORTATION COMPANY, *et al.*

[Application No. 542. Decision No. 1001.]

Commissions—Jurisdiction—Motor vehicle operations in Rocky Mountain National Park.

The Commission held to have no jurisdiction over motor vehicle operations in Rocky Mountain National Park.

[June 18, 1926.]

Appearances: D. Edgar Wilson, Esq., and George H. Swerer, Esq., Denver, Colorado, for applicants; T. A. McHarg, Esq., Boulder, Colorado, for applicant in Application No. 255, The

Glacier Route; A. J. Gould, Esq., Denver, Colorado, for Charles L. Davis; Sam Feldman, Esq., Denver, Colorado, for The Champa 3 Auto Livery Company; A. P. Anderson, Esq., Denver, Colorado, representing several applicants for certificates of public convenience and necessity.

STATEMENT.

By the **Commission**: On April 19, 1926, The Rocky Mountain Parks Transportation Company, a corporation organized under the laws of the State of Colorado, filed with this Commission its petition to operate certain lines of automobile transportation of passengers, freight, express, mail and other commodities between certain points designated in the application.

The petition alleges, among other facts, the number of routes for which the applicants pray a certificate of public convenience and necessity as follows:

Route No.

1. Denver to Estes Park via Longmont, Berthoud, Loveland, and Big Thompson Canon, and return.
2. Denver to Estes Park via Longmont, Lyons and North St. Vrain, and return.
3. Denver to Estes Park via Longmont, Lyons, South St. Vrain, Allens Park, Copeland Lake and Longs Peak, and return.
4. Denver to Estes Park via Boulder and Lyons and return, either North or South St. Vrain, and between intermediate points.
5. Longmont to Estes Park via Lyons and North St. Vrain and return.
6. Longmont to Estes Park via Lyons, South St. Vrain, Allens Park, Copeland Lake and Longs Peak, and return, also intermediate points between Lyons and Estes Park.
7. Loveland to Estes Park and intermediate points, and return.

8. Fort Collins to Estes Park and intermediate points, and return.
9. Grand Lake to Denver via Berthoud Pass and intermediate points, and return.
10. Estes Park to Longs Peak and intermediate points, and return.
11. Denver to Estes Park via Greeley and return; also intermediate points between Greeley and Estes Park but no local business to or from Greeley and Denver or points intermediate.
12. Greeley to Estes Park via Loveland and intermediate points, and return.
13. Boulder to Estes Park via Lyons and North or South St. Vrain, and return.
14. Estes Park to Drake via North Big Thompson, and return.
15. Estes Park to Grand Lake, and return.
16. Estes Park to Horseshoe Park to Moraine Park to Glacier Basin to Bear Lake to Y. M. C. A. Conference Camp to Estes Park in either direction.
17. Grand Lake to Granby and return.

The petition also alleges that the applicants will also operate in and throughout the Rocky Mountain National Park in connection with the above routes and termini, under and by virtue of permits and contracts entered into with the Department of the Interior of the United States Government granting them the right and privilege so to do; and insofar as the jurisdiction of this Commission may extend, and without waiving or prejudicing any of the rights secured to them by said permits and contracts, the applicants include herein all routes and operation which they now control and conduct in said Rocky Mountain National Park; that the applicants propose to operate and maintain the best model and up-to-date passenger busses and freight trucks and make regular trips between destinations and over the routes in question to the extent and as frequently as the

public may require; that the operation of said transportation facilities as applicant proposes to operate over the routes in question is required by the public convenience and necessity, and will greatly tend to promote, increase and develop the tourist travel into and through the Mountain Parks and resorts of the State of Colorado, and will be a great convenience and accommodation to the public and afford the traveling public the opportunity to visit such Mountain Parks and resorts economically and comfortably through the facilities which applicants propose to make available for such purposes, and will not diminish or interfere with the operation and transportation of passengers and freight by railroad carriers, but on the contrary will develop and increase such travel over railroad carriers through the furnishing of better facilities to tourists for sightseeing trips through the Mountain Parks and resorts; that the routes proposed are shown on a map attached to the application and marked "Exhibit A."

No protests were filed against this application and the same was set down for hearing at the Hearing Room of the Commission, Denver, Colorado, on June 9, 1926, at which time evidence in support of said application was introduced.

Prior to the introduction of any testimony, the applicant filed a motion to make The Rocky Mountain Motor Company a party to this proceeding, as a joint applicant with The Rocky Mountain Parks Transportation Company, which motion was allowed. Immediately thereafter an amendment to the application was filed which, among other facts, alleges that the applicant, The Rocky Mountain Motor Company, at all times hereinafter mentioned and since the 6th day of April, 1916, has been, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, and is qualified to do business and is transacting business in the State of Colorado by virtue of compliance with the laws of the State of Colorado relating to foreign corporations.

The evidence introduced at this hearing is undisputed. A number of witnesses from Estes Park, Lyons, Longmont, Fort Collins, Loveland and Boulder testified to the public convenience

and necessity of the transportation system of the applicants. All of the evidence by these witnesses was to the effect that the transportation system of the applicants was a very great factor in building up the summer tourist business in the Rocky Mountain National Park, and the transportation service rendered has been satisfactory in every respect. The Rocky Mountain Motor Company is the parent and holding company of The Rocky Mountain Parks Transportation Company. The latter is the operating company. The business of the applicants was started in the spring of 1916. In this connection, it may be well to call attention to Section 2946 of Compiled Laws of Colorado of 1921, in which it is provided that "no public utility shall henceforth begin the construction of a new * * * system without first having obtained from the Commission a certificate that the present or future public convenience and necessity require, or will require, such construction." This section was approved April 16, 1917, and became effective July 16, 1917. Therefore, the applicants having commenced the operation of their system prior to July 16, 1917, are perhaps entitled to a certificate of public convenience and necessity on that ground alone, especially as to such service and over such routes as they were operating on July 16, 1917.

The operation of practically all of the service of the applicants is non-competitive so far as railroads are concerned. Prior to the case of the Greeley Transportation Company v. People, 245 Pac. 720, decided on April 19, 1926, this Commission consistently held that it had no jurisdiction over motor transportation by common carriers unless in competition with railroads. The Supreme Court in the Greeley Transportation Case, *supra*, decided otherwise and held that this Commission has jurisdiction over all common carrier transportation. An attempt was made to bring the applicant herein within the jurisdiction of this Commission in 1920, and this Commission in the case of Enos A. Mills v. The Rocky Mountain Parks Transportation Company, P. U. R. 1920-B, 557, held that we had no jurisdiction over the applicant herein because not operating in competition with railroads. It should be said, therefore, that this Commis-

sion did not assume any jurisdiction over motor operations such as the applicants propose herein until after the decision in the Greeley Case, *supra.*

Mr. Roe Emery, president and general manager of the applicants, testified as to his connection with the motor transportation business in Estes Park since its inception, going into considerable detail as to the development of the popularity of Estes Park as a summer resort and the service and efforts necessary to develop Estes Park and the Rocky Mountain National Park as one of the great summer resorts of the country, so that now over 250,000 people come to the territory proposed to be served by these applicants annually. Furthermore, all the railroads in the East sell excursion tickets carrying coupon transportation and have joint tariff arrangements over the lines of the applicants. The railroad tariffs on file with the Interstate Commerce Commission and this Commission provide for the service of the applicants in connection with the railroad service to the gateways to the Rocky Mountain National Park.

As stated before, the Rocky Mountain Motor Company is the holding company of The Rocky Mountain Parks Transportation Company, and a financial statement introduced in the evidence in this case shows a net worth of over $1,000,000. This evidence indicates to us that the applicants are financially able to provide such transportation service in the territory in question as the traveling public shall require. The investment in this operation is about $600,000. The operation over practically all of the routes designated herein provides for regular scheduled service, some for daily all year around service, and some during the tourist season only. In addition to such service on regular schedule, the applicants also operate and furnish sightseeing service aside from the regular scheduled service. An indication of their operations is shown by applicants' Exhibit No. 26, showing 104 motor vehicles now in use by the applicants, in addition to large machine shops and repairing facilities.

The Commission has carefully considered all of the testimony in this case and is of the opinion, and so finds, that the motor transportation service by the applicants herein of the trans-

portation of passengers, freight, express, mail and other commodities between the points and over the routes in the State of Colorado designated in the application herein is a public convenience and necessity.

Some cross-examination was indulged in by certain parties at the hearing as to the operation of the applicants within the Rocky Mountain National Park and the jurisdiction of the Commission therein. As we understand the position of the applicants, it is that this Commission has no jurisdiction over motor transportation operations within the Rocky Mountain National Park. This position is sustained in the case of Robbins v. U. S., 284 Fed. 39, in which the Circuit Court of Appeals of the 8th Circuit held that the United States Government was entitled to an injunction restraining a person from transporting passengers for hire in the Rocky Mountain National Park in violation of the regulations of the Department of the Interior. In view of this decision we concur with the view of the applicants that this Commission has no jurisdiction over motor operation within the National Park. Should we, however, be in error in this respect, we deem it only fair to say that the evidence in this case conclusively shows, and the Commission finds, a public convenience and necessity for the transportation system of the applicants as operated within the Rocky Mountain National Park.

ORDER.

IT IS THEREFORE ORDERED, That the present and future public convenience and necessity requires, and will require, the operation of an automobile or motor transportation system for the transportation of passengers, freight, express, mail and other commodities, and tourist sightseeing operations on and over the seventeen routes designated herein by The Rocky Mountain Parks Transportation Company and The Rocky Mountain Motor Company, applicants herein, and this order shall be taken, deemed and held to be a certificate of public convenience and necessity therefor.

IT IS FURTHER ORDERED, That the applicants shall operate such automobile or motor transportation system as set forth, at

such times and under such schedule as now on file with this Commisison, except when prevented by the Act of God, the public enemy or unusual or extreme weather conditions, and this order is made subject to compliance by the applicants with the rules and regulations now in force or to be hereafter adopted by the Commission with reference to automobile common carriers, and also subject to any legislative action that may in the future be taken with respect thereto.

RE THE DENVER CAB COMPANY, *et al.*

[Application No. 543. Decision No. 1002.]

Certificate of convenience and necessity issued authorizing motor vehicle transportation of passengers between Denver and various points named, and express between Denver and Silver Plume.

[June 18, 1926.]

Appearances: D. Edgar Wilson, Esq., and George H. Swerer, Esq., Denver, Colorado, for the applicant; J. L. Rice, Esq., and J. Q. Dier, Esq., Denver, Colorado, and E. L. Reginnitter, Esq., Idaho Springs, Colorado, for protestant The Colorado and Southern Railway Company; T. A. McHarg, Esq., Boulder, Colorado, for applicant in Application No. 255, The Glacier Route; Sam Feldman, Esq., Denver, Colorado, for The Champa 3 Auto Livery Company; A. P. Anderson, Esq., Denver, Colorado, representing several applicants for certificates of public convenience and necessity.

STATEMENT.

By the **Commission**: On April 19, 1926, The Denver Cab Company filed with this Commission its petition for a certificate of public convenience and necessity to operate lines of motor cars, motor busses and vehicles for the transportation of passengers between the points and over the routes in the State of Colorado following, to-wit:

Route No.

1. Denver to Golden to Lookout to Bergen Park to Evergreen to Morrison to Denver, or vice versa.

2. Denver to Lookout Mountain and return via Golden, or return via Mt. Vernon Canon.
3. Denver to Golden to Lookout to Bergen Park to Echo Lake to top Mt. Evans and return via Deer Creek Canon and Turkey Creek Canon to Denver.
4. Denver to Echo Lake and return via Squaw Pass and Bergen Park.
5. Denver to Echo Lake via Bergen Park and Squaw Pass, return via Chicago Creek to Idaho Springs to Bergen Park to Evergreen and Morrison.
6. Denver to Georgetown and Silver Plume and return via Bear Creek.

In addition to these six routes the applicants at the time of the hearing amended their application by creating another route, designated as "Route No. 7," which is as follows:

7. Denver to Silver Plume by way of either Mt. Vernon Canon or Lookout Mountain, through Idaho Springs and Georgetown, for the carriage and transportation of passengers and light parcels and express, such as passenger trains carry to each of these points.

The application further alleges that the applicants propose to render a service in the transportation and carriage of passengers between the points and destinations indicated which will be non-competitive in character with any railroad, and will be primarily a service incident to the transportation of passengers between the terminals indicated and the mountain resorts and parks of the State of Colorado, and covering the tourist and sightseeing features of said parks and resorts, all as more particularly set forth and indicated in the map attached to the application, marked "Exhibit A."

That the applicants propose to operate and maintain the best of model and up-to-date passenger busses, and make regular trips between the destinations and over the routes indicated to the extent and as frequently as the business may require; that this operation is required by the public convenience and neces-

sity, and will greatly tend to promote, increase and develop the tourist travel into and through the mountain parks and resorts of the State of Colorado, and will be a great convenience and accommodation to the public, and afford the traveling public the opportunity to visit such mountain parks and resorts economically and comfortably through the facilities which applicants propose to make available for such purposes.

This application was set down for hearing at the Hearing Room of the Commission, State Office Building, Denver, Colorado, on June 9, 1926, at which time evidence in support of and in opposition to was introduced.

At the commencement of the hearing The Denver Cab Company presented a motion asking that The Rocky Mountain Motor Company, a corporation organized and existing under and by virtue of the laws of the State of Ohio, be made a co-applicant in this case; that The Rocky Mountain Motor Company is financially interested in the operation conducted and proposed to be conducted as set forth in the original application filed, and is also interested in the equipment to be employed therein, and is therefore a proper and necessary party to this proceding as a joint applicant. This motion was allowed.

Thereupon an amendment was filed to the application, setting forth the interest of The Rocky Mountain Motor Company as co-applicant herein, and certain other allegations not necessary to set forth in full. This amendment was also allowed.

Prior to the taking of any testimony The Colorado and Southern Railway Company filed an answer and protest herein, directed to the operation of the applicants between Denver and Idaho Springs, Georgetown and Silver Plume, Colorado, in which it is alleged that neither the present or future public convenience and necessity requires the operation of the applicants' bus line; that The Colorado and Southern Railway Company furnishes, and will continue to furnish, by means of its railroad adequate facilities for the transportation of passengers, and that the establishment and operation of the bus line prayed for will unjustly and unreasonably interfere with and injuriously affect

the operation, traffic revenues and business of The Colorado and Southern Railway Company.

The operations proposed herein by the applicants are practically all in a territory known as the Denver Mountain Parks System.

The evidence shows that The Rocky Mountain Motor Company is the parent and holding company of The Denver Cab Company; the Cab Company is the operating agency, while the Rocky Mountain Motor Company furnishes the finances for operation.

It appears from the evidence that the financial responsibility of these companies show a net worth of over a million dollars. The investment in this operation is about $400,000.

Mr. Roe Emery, who is the president and general manager of both companies, testified as to his experience in the operation of motor transportation, and his pioneering in such operations in the territory in question here. It can be safely said from the evidence that his experience in motor transportation is such as to fully qualify him in every branch of such operations. In the territory in question the applicants have operated for the past five and one-half years; originally, The Denver Omnibus and Cab Company operated in this territory; The Denver Cab Company a number of years ago purchased the interest of The Denver Omnibus and Cab Company.

It is proposed on some of these routes to operate on an all year round schedule, in others only during the tourist season. An estimate of the number of persons carried by the applicants in this territory amounts to about 60,000 people per annum.

The operations of the applicants, as outlined in the testimony, are for the purpose of further developing the summer tourist business in this territory, the possibilities of which are very great, and to establish a regular dependable motor transportation system operating on schedule time.

Between Silver Plume, Georgetown, Idaho Springs and Denver The Colorado and Southern Railway Company is operating two passenger trains daily in the summer and one in the winter. The testimony shows that over 75 per cent of the passenger busi-

ness now goes to motor transportation, mainly because the general public desires that mode of conveyance rather than the rail facilities offered.

Witness Emery, because of his motor transportation operations for over five years in the territory in question, testified that the public convenience and necessity is very greatly served by the service offered. Other witnesses also testified to the public convenience and necessity of the operations in question.

Some testimony was introduced by The Colorado and Southern Railway Company as to its service between Denver and Silver Plume and intermediate points. Suffice it to say that this evidence indicates that the motor transportation now serves most of the passenger business therein.

It should also be stated that in addition to the seven routes in question here, the applicants furnish a tourist sightseeing service. The evidence further shows that the equipment used by the applicants in this operation amounts to 131 busses, touring cars and auto trucks, in addition to machine and repair shops. A large number of persons are employed in this operation.

The Commission has carefully considered all of the testimony in this case, and is of the opinion, and so finds, that the motor transportation system by the applicants herein for the transportation of passengers between the points and over the seven routes designated in the application, and the parcel and express service in Route No. 7, is a public convenience and necessity.

ORDER.

It Is Therefore Ordered, That the present and future public convenience and necessity requires, and will require, the operation of an automobile or motor transportation system for the transportation of passengers and tourist sightseeing operations on and over the seven routes designated herein, and an express and parcel service over Route No. 7 designated herein, by The Denver Cab Company and The Rocky Mountain Motor Company, applicants herein, and this order shall be taken,

deemed and held to be a certificate of public convenience and necessity therefor.

IT IS FURTHER ORDERED, That the applicants shall operate such automobile or motor transportation system as set forth, at such times and under such schedules as now on file with this Commission, except when prevented by the Act of God, the public enemy, or unusual or extreme weather conditions, and this order is made subject to compliance by the applicants with the rules and regulations now in force or to be hereafter adopted by the Commission with reference to automobile common carriers, and also subject to any legislative action that may in the future be taken with respect thereto.

CLAUDE W. SMITH, GENERAL MANAGER, ETC.

v.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY.

[Case No. 302. Decision No. 1012.]

Abandonment—Railroad branch line—Commission authority—Restoration of service.

Requirement made that repair work on railroad track between Quartz and Pitkin, which never had been abandoned legally, be begun within ten days and that upon completion freight service be resumed.

[June 29, 1926.]

Appearances: Gilbert A. Stone, Esq., Gunnison, Colorado, for complainant; J. A. Gallaher, Esq., and E. N. Clark, Esq., for The Denver and Rio Grande Western Railroad Company; J. Q. Dier, Esq., Denver, Colorado, for The Colorado and Southern Railway Company.

STATEMENT.

By the **Commission**: On March 9, 1926, the complainant wrote a letter to this Commission relative to the freight service on the Denver and Rio Grande Western Railroad between Quartz and Pitkin, Colorado, a distance of 2.8 miles, for the purpose of hauling ore. A copy of this letter was submitted to the de-

fendant, and on March 17, 1926, the railroad replied that the track over the points in question had not been utilized for a long time, and that it would require considerable repairs, estimated at a cost of about $4,000, and that further investigation was being made to ascertain if the expense involved would be warranted from a revenue standpoint.

At this time the matter was handled as an informal complaint, No. 1487. On March 29, 1926, the complainant made a written demand upon the freight agent of The Denver and Rio Grande Western Railroad Company at Pitkin, Colorado, asking that a car be spotted on the switch at Quartz for ore on or about April 5, 1926. (See Complainant's Exhibit A.)

Thereafter the Commission caused an investigation to be made by its Railway Engineer, who rendered a report on April 16, 1926, on the cost of repairing the track in question. On May 27, 1926, the complainant again addressed a letter to this Commission, in which it is stated that the present delay is causing an enormous expense, and requested this Commission to consider this matter. Thereupon, the Commission gave this matter a formal docket number, and the same was set down for hearing.

On June 4, 1924, the railroad company stated its position in a letter addressed to the Commission. The substance, in brief, was to the effect that this particular track in question was the property of The Colorado and Southern Railway Company, and therefore the defendant was not responsible for the operation thereon, and that the revenues of the freight traffic did not warrant the repair of the track.

This matter was set down for hearing at the LaVeta Hotel, Gunnison, Colorado, on June 25, 1926, at 11:00 A. M., at which time the evidence in support of and in opposition thereto was introduced. At the hearing it was stipulated that there never had been any legal abandonment authorized by this Commission of the particular track in question. Furthermore, evidence was introduced showing that The Denver and Rio Grande Western Railroad Company was carrying Quartz in its tariffs, and as late as June 1, 1926, had filed an amendment, No. 60, Colorado P. U. C. No. 48, Railroad Tariff No. 5617 C, putting in a reduction

on one day's notice in the rate on sheep from Cimarron to Quartz, Colorado. On June 8, 1926, the defendant issued local and joint freight tariff, D. & R. G. W. G. F. D. No. 6294 B, effective July 17, 1926, and in Item No. 5 of which Quartz is designated as an originating point for lumber, shingles, poles and other forest products.

Evidence was introduced by the complainant to the effect that his ore traffic would amount to about 52 cars per year, or an average of one car per week.

The Graphite Syndicate introduced evidence to the effect that they would be able to provide about two cars a week of ore traffic at Quartz.

A witness for the Trinchera Timber Company testified that they had in prospect about 2,000 cars of lumber and timber that would move from Quartz within the next five years.

Mr. Arthur L. Pearson, of Pitkin, Colorado, also testified to a large quantity of timber which he could move from Quartz.

It would seem from this evidence that there still is considerable traffic to be obtained from the neighborhood of Quartz. The evidence shows that it will cost from $1500.00 to $2000.00 to repair the track. However, the Commission is mainly impressed with the testimony that this particular track in question has never been legally abandoned, and that the defendant railroad company has been holding itself out in its tariffs filed with this Commission as operating to and from Quartz, Colorado. No evidence as to ownership of the track in question was introduced.

The Commission, therefore, is of the opinion that The Denver and Rio Grande Western Railroad Company, defendant herein, is required to furnish freight service between Quartz and Pitkin, Colorado, and that the shipping public is entitled to this service.

ORDER.

It Is Therefore Ordered, That the defendant, The Denver and Rio Grande Western Railroad Company, be and it is hereby, required to commence the repair of this track between Quartz and Pitkin within ten days from the date of this order, and upon the completion of the repair work to reinstate its freight service between Quartz and Pitkin, Colorado.

THE DENVER & SOUTH PLATTE TRANSPORTATION COMPANY

v.

OTTO WILLINGHAM.

[Case No. 303. Decision No. 1015.]

Common carriers—Motor vehicle operations—Taxi—Indiscriminate solicitation.

One conducting a miscellaneous taxi business in Englewood and indiscriminately soliciting passengers from Englewood to Littleton held to be a common carrier, and ordered to cease and desist.

[July 2, 1926.]

Appearances: H. A. Davis, Esq., Foster Bldg., Denver, Colorado, for complainant.

STATEMENT.

By the **Commission**: On June 7, 1926, The Denver and South Platte Transportation Company filed a complaint with this Commission against Otto Willingham, in which it is alleged that the complainant is a corporation duly organized and existing under the laws of the State of Colorado; that the full name of the defendant is Otto Willingham, whose occupation is auto service under the business name "Willingham's Taxi Service," and whose post office address is 3524 South Broadway, Englewood, Colorado. That upon application duly made to this Commission by the complainant, and after full hearing thereon, a certificate of convenience and necessity was granted and issued to the complainant on the 7th day of May, 1926, to operate a motor bus passenger, express and parcel transportation line between Englewood and Littleton, both in Arapahoe County, State of Colorado, said application having been No. 509, and Decision No. 976. That on May 8, 1926, the complainant began operating said motor bus passenger transportation line over the route designated in its application, and has been rendering service to the public continuously and regularly as authorized by the Commission. That the defendant has been engaged in the transportation of passengers for hire at a through fare of fifteen cents for each adult passenger, and in competition with this complainant by

indiscriminately accepting, discharging and laying down passengers between Englewood and Littleton, in both directions, over the said route, and has been directly and actively soliciting patronage or business offered during the said period beginning about May 9th, 1926, in violation of the Public Utilities Act.

A copy of the complaint was served upon the defendant on June 7, 1926, ordering the defendant to satisfy the matters therein complained of, or to answer the complaint in writing within ten days. No answer was filed by the defendant.

This matter was set down for hearing at the Hearing Room of the Commission, 305 State Office Building, Denver, Colorado, on July 2, 1926, at 10:00 A. M., at which time evidence was introduced in support of this complaint. There was no appearance by the defendant, nor was he present at the hearing. The evidence introduced was to the effect that since the granting of the certificate of public convenience and necessity by this Commission to the complainant, about May 7, 1926, the defendant, who for some time past has operated a taxicab business at Englewood, Colorado, has been offering to carry passengers from Englewood to Littleton, and from Littleton to Englewood, at the same rate charged by the complainant. It also appears from the evidence that the defendant has been in the taxicab business at Englewood for a number of years, and that his regular charge prior to the issuance of the certificate in question to haul passengers from Englewood to Littleton was one dollar per passenger; that he still does a taxicab or call and demand business in addition to his operations between Englewood and Littleton. The evidence is undisputed that he has been soliciting passengers at Englewood, at or near the depot of the complainant, at the same rates charged by the complainant, and has carried a number of passengers in that manner. This solicitation was indiscriminate, resulting in a loss of considerable business to the complainant. No certificate of public convenience and necessity has ever been authorized by this Commission to the defendant, nor has application therefor been made. The operations of the de-

fendant, so far as they relate to Englewood and Littleton and intermediate points, is unquestionably a public service operation within the Public Utility Act of this State. He is operating an unlawful common carrier passenger transportation service between Englewood and Littleton.

Austin Bros. Transfer Co. v. Henry Bloom, 147 N. E. 387.

West Ridge Transportation Co. v. Charles Krona, P. U. R. 1925-E, 304.

The Commission has carefully considered all the testimony introduced in this case, and is of the opinion, and so finds, that the defendant is operating as a common carrier of passengers between Englewood and Littleton without having obtained a certificate of public convenience and necessity as required by Section 2946 of the Compiled Laws of Colorado, 1921, and that an order to cease and desist from such common carrier operation will issue.

ORDER.

IT IS THEREFORE ORDERED, That the said defendant be, and he is hereby prohibited from further operation of his transportation system between Englewood and Littleton, both in Arapahoe County, Colorado, and that the said defendant be, and is hereby required to cease and desist from the further operation of said transportation system between Englewood and Littleton, Colorado.

IT IS FURTHER ORDERED, That if within five days from the date of this order the defendant is still conducting said transportation system as disclosed by the evidence herein, an order shall issue requesting the Attorney General of the State of Colorado to bring appropriate action by injunction, as provided by Section 2969 of the Compiled Laws of Colorado of 1921.

THE NUCKOLLS PACKING COMPANY
v.
THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY.

[Case No. 270. Decision No. 1037.]

Rates—Reasonableness—Consideration of weight and carload minimum.

1. The reasonableness of charges on carload shipments depends upon the rate and the minimum weight applicable.

Rates—Freight—From Pueblo to Leadville—Pueblo to Montrose.

2. Charges on freight from Pueblo to Leadville should be materially lower than from Pueblo to Montrose and Ouray.

3. Increase in minimum carload weight applicable to fresh meats and packing house products moving from Pueblo to Leadville without reducing rate held excessive and unreasonable.

[September 24, 1926.]

Appearances: For Complainant, Albert L. Vogl and R. L. Ellis; for Defendant, J. A. Gallaher, George Williams and B. W. Robbins.

STATEMENT.

By the **Commission:** On June 11, 1923, the complainant, a Colorado corporation located at Pueblo, Colorado, which is engaged in operating a meat packing plant at Pueblo, filed its complaint herein.

The complainant alleges that between March 1, 1920, and March 18, 1922, the complainant shipped a number of carloads of fresh meat and packing house products from Pueblo to Leadville, Colorado, in mixed carloads and was charged at the actual weight of each article at the carload rate applicable thereto, subject, however, to a minimum charge on the entire carload of 12,000 pounds at the fresh meat rate. The complaint further charges that, effective May 22, 1919, to March 17, 1922, this minimum was increased from 12,000 pounds to 21,000 pounds, and on March 17, 1922, the minimum carload charge was reduced to the charge applicable on 12,000 pounds of fresh meat. The complaint further charges that during the entire period that the 21,000 pound minimum applied from Pueblo to Leadville, a 12,000 pound minimum applied from Denver to Leadville via

The Colorado & Southern Railway Company's lines. The complaint alleges that there is not sufficient business in Leadville to permit the loading of cars to 21,000 pounds weight, and that the advance in the minimum carload charges, resulting from the increase from 12,000 pounds to 21,000 pounds, resulted in what complainant terms the payment of penalty charges ranging from $38.48 to $77.85 per car. The advance in the minimum charge per car is alleged in the complaint to have been made without just cause and to have resulted "in unjust and unreasonable charges to the extent that they exceed the minimum charge," which would have applied under the previous 12,000 pound minimum carload charge. The complaint further alleges that during the period covered by the shipments upon which reparation is sought herein, complainant was in competition with fresh meat and packing house products shipped from Denver via The Colorado & Southern Railway Company, the charges upon which were based upon a 12,000 pound minimum, and that by reason thereof complainant had been subjected to unjust, unreasonable and discriminatory charges.

Attached to the complaint is a list of twenty-eight shipments upon which complainant prays reparation in the sum of Nineteen Hundred Thirty-six and 95/100 ($1936.95) Dollars, being the difference between the charges actually paid and what complainant would have paid if a 12,000 pound minimum had remained in effect. These shipments all moved between June 29, 1921, and December 31, 1921, being after the termination of federal control and within two years prior to the filing of the complaint.

The answer of the defendant denied that the complainant had been subjected to the payment of unjust, unreasonable or discriminatory charges.

A hearing was had upon the complaint and answer March 20, 1924, and on August 17, 1925, this Commission filed its opinion and decision, being Decision No. 894, finding the issues in favor of the complainant, and entered an award of reparation in the amount claimed.

Defendant filed a petition for rehearing, which petition was thereafter granted, and the case assigned for further hearing February 9, 1926. After the close of the hearing, briefs and reply briefs were filed by complainant and defendant and the matter is now before this Commission for decision upon the record.

The following table taken from defendant's witness, B. W. Robbins, Exhibit 5-B, and the testimony of that witness show the history of the adjustment of rates on fresh meat from Denver to Leadville via the Colorado & Southern Railway, and from Denver and Pueblo to Leadville via the defendant's line. It will be noticed from this table that the Colorado & Southern, during federal control, reduced its minimum from 21,000 pounds to 10,000 pounds, and then increased it to 21,000 pounds, and then reduced it to 20,000 pounds.

	From Denver via C. & S.			From Denver and Pueblo via D. & R. G. W.		
Date	Rate per 100 Lbs.	Min. Wgt.	Min. Chg. Per Car	Rate per 100 Lbs.	Min. Wgt.	Min. Chg. Per Car
1-18-13 to 6-25-18	55c	12,000	$ 66.00	Same as via C. & S.		
to 7-29-19	69c	12,000	82.00	Same as via C. & S.		
to 8-20-19	69c	21,000	144.90	Same as via C. & S.		
to 9-30-19	69c	10,000	69.00	69c	21,000	$144.90
to 1-29-20	69c	21,000	144.90	69c	21,000	144.90
to 8-26-20	69c	20,000	138.00	69c	21,000	144.90
to 6-25-21	86½c	20,000	173.00	86½c	21,000	181.65
to 2-8-22	86½c	12,000	103.00	86½c	21,000	181.65
to 7-1-22	86½c	12,000	103.00	Same as via C. & S.		
7-1-22	78c	12,000	93.60	Same as via C. & S.		

The evidence shows that pursuant to order issued under the authority of the Director General of Railroads during federal

control on June 2, 1919, the minimum on fresh meats was advanced to 21,000 pounds, which had the effect of increasing the minimum on the lines of the defendant, and also of the Colorado & Southern, from 12,000 pounds to 21,000 pounds. The evidence also shows that in the western district various minimums had been applied on fresh meat by various railroads. The testimony shows also that the Director General had under his control approximately 232,000 miles, of which only approximately 1,600 miles were narrow gauge lines, 1,200 miles of which were narrow gauge lines in the State of Colorado.

Complainant's testimony and exhibits show that the 78c fresh meat rate applicable on a 12,000 pound minimum weight from Pueblo to Leadville July 1, 1922, is 78.4% of the third class rate, and that at other points in Colorado where the 12,000 pound minimum applies, the fresh meat rate is from 61% to 74% of the third class rate, and that the packing house product rates on this minimum are 100% of the fifth class rates being used for comparison because they are the rates applicable to fresh meats and packing house products in carload lots where no commodity rate is published.

Complainant also shows that to points where 21,000 pound minimum applies in the State of Colorado, the fresh meat rates are from 34% to 63% of the third class rate, and the packing house products rates are from 45% to 65% of the fifth class rates. Similar comparisons are made with inter-state rates from various points to destinations in New Mexico, the purpose being to show that the rates established on the 12,000 pound minimum are relatively higher than those made on a 21,000 pound minimum and made to compensate the carrier for the lower minimum.

Exhibits were filed by complainant also to show several instances where carriers have published two rates applicable on one commodity between the same points, the rates being based upon the different minimums. Typical of these illustrations is the following:

From Kansas Producing Points to Pueblo, Colorado, Prior to May 23, 1925.

	Minimum Weight	Rate in Cts. Cwt.	Charges
Salt in Packages	37,500 lbs.	38½c	$143.58
Salt in Bulk	60,000 lbs.	25c	150.00
On and After May 23, 1925.			
Salt in Packages	45,000 lbs.	32½c	$146.25
Salt in Bulk	45,000 lbs.	32½c	146.25

Complainant also filed an exhibit showing that if the identical shipments upon which reparation is claimed in this case had moved from Pueblo to either Montrose or Ouray, the charges on such shipments would have been $1,248.22 less than were the charges upon these particular shipments.

The record shows that the distance from Pueblo to Leadville is 157 miles, and to Montrose via standard gauge lines the distance from Pueblo is 403 miles. To Ouray the distance via standard gauge lines to Montrose is 439 miles. Via the narrow gauge lines the distance from Pueblo to Montrose is 233 miles, and to Ouray 268 miles, but this would involve a transfer from standard gauge to narrow gauge cars. Defendant's witness Robbins testified that some of the Montrose traffic would move via the standard gauge lines by Grand Junction, but that the Ouray and Telluride business would be transferred from standard to narrow gauge cars at Salida.

Considerable testimony was introduced showing the difficulties encountered in operation of the defendant's line at points between Malta and Montrose, and on the narrow gauge lines beyond Salida going to Ouray.

The defendant's evidence showed that in June, 1919, a general order was issued from the office of the Director General of Railroads, under the authority of the Chairman of the Western Freight Traffic Committee, approving the publication of 21,000 pounds as the minimum on fresh meat in the western district.

Several exhibits were introduced by defendant showing minimums applicable on various commodities ranging from 24,000 pounds to 60,000 pounds, such commodities consisting of canned goods, cotton seed meal, butter and eggs, fresh meats, sugar,

rice and different kinds of similar commodities. Exhibits were also introduced by defendant showing that Denver packing houses shipped mixed carloads of fresh meats and packing house products and partially unloaded them at Leadville under provision of tariffs permitting that to be done, and in that way the actual charges on the meat and packing house products delivered from Denver to Leadville are less than those paid by the complainant in this case, providing an explanation, if nothing else, as to why Denver shippers of meat to Leadville made no complaint account of excessive charges.

The defendant's testimony showed that the same privilege was available to complainant, but complainant complains that on account of commercial conditions it is not able to avail itself of this privilege. Furthermore, complainant is entitled to reasonable and just charges upon its shipments as offered for shipment.

Defendant also introduced an exhibit showing that 21,000 pound and 30,000 pound minimum weights on fresh meat and packing house products, respectively, are in effect from Denver and Pueblo to a number of points in eastern Colorado, Kansas and Nebraska. The purpose of defendant's exhibits and evidence was to show:

First: That it at all times had charged the same rates from Denver to Leadville as it charged from Pueblo to Leadville during the time covered by complainant's complaint.

Second: That the advance in the minimum was the result of the order issued under the authority of the Director General.

Third: That the equipment furnished to complainant would accommodate the minimum provided for in the tariffs.

Fourth: That it was not responsible for the 12,000 pound minimum maintained to Leadville by the Colorado & Southern during the time the shipments involved in this complaint moved.

FINDINGS AND CONCLUSIONS.

It is strenuously contended by defendant that this case involves simply a complaint of discrimination and that such complaint is based solely upon the fact that Denver shippers could ship via the Colorado & Southern on a 12,000 pound minimum

whilst complainant was charged on a basis of 21,000 pound minimum. This contention is not sustained.

The complaint distinctly alleges that the minimum charges were advanced without just cause, and resulted in unjust and unreasonable charges to the extent that they exceed the minimum charge at the 12,000 pound fresh meat rate. The complaint also distinctly alleges discrimination on account of the charges and minimum maintained by the Colorado & Southern, so the complaint presents a question both of unreasonable charges and discrimination.

We are convinced from the evidence in this case that the rates when they were originally established by the defendant line from Pueblo to Leadville were made sufficiently high to take care of the minimum of 12,000 pounds. The evidence shows that these rates bear a higher relationship generally to the class rates than do the rates on packing house products and fresh meats between points where a 21,000 pound minimum is established.

The rule is well settled that in considering the reasonableness of charges on carload shipments, consideration must be given not only to the rate itself but to the minimum upon which that rate is applicable. This principle has been repeatedly recognized by the Interstate Commerce Commission. The following cases are in point on this question:

Swift & Co. v. T. & P. Railway Co. (88 I. C. C. 610).

This case involved the question of fresh meats and packing house products. The rates in question had been based upon what is known as the Texas Scale, which applied upon a lower minimum than generally prevailed in the surrounding territory. Pursuant to the order of the Director General referred to in the testimony in this case, the carriers involved in that case advanced the minimum to 21,000 pounds, and the Commission held that when the carriers advanced the minimum weight they should have reduced the rate correspondingly.

In Montague & Co. v. A. T. & S. F. Railway (17 I. C. C. 72), the Commission, discussing furniture rates, said: "If the minimum is reduced the rate may properly be advanced, and if the

minimum is increased, the rate should be reduced * * *. It is not possible, however, to fairly adjust the rate without a proper adjustment of the minimum."

The same principle is recognized in Kansas City Hay Dealers Assoc. v. M. P. Railway Co. (14 I. C. C. 603).

In Timmons v. B. C. & A. Railway Co. (55 I. C. C. 495), the Interstate Commerce Commission says: "The minimum carload weight is a factor in the carload rate, and in connection with the rate determines the carload earnings."

The same principle is also recognized in Acme Cement Plaster Co. v. C. G. W. Railway Co. (18 I. C. C. 19).

It follows from what we have said that when the defendant advanced the minimum from 12,000 pounds to 21,000 pounds and made no corresponding reduction in the rate to be charged, it very materially increased the carload earnings, for which increase in carload earnings no justification is shown in the record, and we find that complainant's contention that such increase in minimum carload earnings was excessive and unreasonable is sustained.

This conclusion is borne out by the fact that when the defendant eventually reduced its minimum to 12,000 pounds, it made no change in the rates applicable on that minimum, thereby indicating that it recognized that the rates were reasonable when applied to a 12,000 pound minimum.

It is true, as claimed by defendant, that the advance in the minimum weight was made pursuant to authority issued by the Director General of Railroads. This complaint, however, involves only shipments moving after the railroads were returned to private control and operation. It is also shown that this order of the Director General made no reference to the rates, so that the order did not prevent the defendant adjusting the rates in view of the increased minimum weight. It is also shown that notwithstanding this order, the minimum of 12,000 pounds was continued in effect over portions of the lines now operated by this defendant during the entire period of federal control, so that this explanation that the advance was compelled by order of the

Director General cannot be held to excuse excessive charges being made on the shipments herein involved.

Defendants contended that the minimum of 21,000 pounds is a reasonable minimum. It was admitted by defendant's witness Robbins that in fixing minimum weights, consideration must be given to the size and consuming ability of the communities involved, and this same witness admitted that 21,000 pounds was not a commercially practicable minimum for Leadville.

The Interstate Commerce Commission in a very recent decision, Wilson & Co. v. C. & O. Railway (104 I. C. C. 641), had under consideration the question of minimums on fresh meats and packing house products in the territory therein involved, and we quote the following from that decision:

"In 1916 the carriers proposed changes in the minimum charges in C. F. A. Territory by increasing the weight factor from 20,000 to 21,000 pounds. We found these changes not justified in Peddler Car Minimum, 43 I. C. C. 139. In Cleveland Provision Co. v. B. & O. R. R. Co., 50 I. C. C. 612, we found the C. F. A. basis from Cleveland, Ohio, to points in C. F. A. and eastern trunk-line territories unreasonable and unduly prejudicial to the extent that it exceeded a minimum charge equivalent to the revenue on 12,000 pounds of freight at the third class rate from point of origin to final destination of the car.

"The peddler car rules of the Louisville & Nashville provide for a minimum weight of 10,000 pounds, and if the aggregate weight of the articles is less than 10,000 pounds, the deficit is charged for at the Class B rating or in the absence of such rating, at the fourth class rate from the point of delivery to the Louisville & Nashville to the point where the car first breaks bulk. The Southern maintains a similar rule.

"The rules in western trunk-line territory provide that articles in peddler cars are subject to a minimum weight of 10,000 pounds, that deficits in weights are to be charged for at fourth class rates to the break bulk point, and that the minimum charge must not be less than the revenue accruing on 10,000 pounds of freight at the fourth class rate from the point of origin to the final destination of the car. In Rules Governing Shipments of

Freight in Peddler Cars, 32 I. C. C. 428, we found not justified certain schedules increasing the minimum weight in western trunk-line territory to 12,000 pounds.

"In Investigation of Alleged Unreasonable Rates on Meat, 23 I. C. C. 656, we prescribed commodity rates materially lower than the class rates on fresh meats and packing house products in peddler cars, subject to a minimum equivalent to the earnings on 10,000 pounds of fresh meat to the most distant point.

"The loading of peddler cars is dependent upon the consuming ability of the destination territory. The territory served by the C. & O., especially the branch lines, is thinly settled and the limited refrigeration facilities render storage of perishable articles for extended periods impossible. The average loading from East St. Louis is not in excess of 13,000 pounds."

The fact that the charges on the shipments herein involved were in excess of what they would have been if the shipments had gone to Montrose and Ouray is too significant to be overlooked in this case.

The evidence concerning operating conditions is convincing that the charges from Pueblo to Leadville should be materially lower than the charges from Pueblo to either Montrose or Ouray instead of higher, as was actually charged in the case of the shipments herein involved.

It is not disputed that the complainant made the shipments involved and paid the charges thereon, and we find that the charges so paid were unreasonable and excessive to the extent that they exceeded charges which would have been collected if based upon a minimum weight of 12,000 pounds, and that the complainant has been damaged in the amount of such excess which is shown in the table below, and is entitled, therefore, to reparation in the sum of Nineteen Hundred Thirty-six and 95/100 ($1936.95) Dollars, together with interest thereon from the date of the payment at the rate of 6 per cent per annum until the reparation is paid.

Date Shipped	Car	Collected	Charges Should Be	Reparation Due
June 29, 1921	ART-12447	$181.65	$103.80	$ 77.85
July 6, 1921	ART-12825	181.65	103.80	77.85
July 9, 1921	ART-12447	181.65	133.79	47.86
July 16, 1921	MRRX- 2406	181.65	105.10	76.55
July 23, 1921	ART-11791	182.43	104.58	77.85
July 30, 1921	ART-10471	181.65	106.83	74.82
Aug. 6, 1921	ART-11821	181.65	109.85	71.80
Aug. 12, 1921	ART-10764	181.65	108.66	72.99
Aug. 20, 1921	ART-13178	181.65	105.67	75.98
Aug. 27, 1921	ART-13376	181.65	127.95	53.70
Sept. 3, 1921	ART-14070	183.22	133.69	49.53
Sept. 10, 1921	ART-10445	181.65	113.60	68.05
Sept. 17, 1921	ART- 8816	181.65	103.80	77.85
Sept. 24, 1921	ART-13329	183.88	114.46	69.42
Oct. 1, 1921	ART-13686	185.64	109.56	76.08
Oct. 8, 1921	ART- 8813	183.13	115.99	67.19
Oct. 15, 1921	ART-10205	182.65	108.77	73.88
Oct. 22, 1921	ART-13606	184.19	106.34	77.85
Oct. 29, 1921	ART-11839	183.83	126.23	57.60
Nov. 5, 1921	ART-10274	184.54	111.38	73.16
Nov. 12, 1921	ART-13632	181.65	116.58	65.07
Nov. 19, 1921	ART-13392	182.31	109.72	72.59
Nov. 26, 1921	ART-12473	184.22	106.37	77.85
Dec. 3, 1921	ART-14095	182.44	104.59	77.85
Dec. 10, 1921	MRRX- 2404	182.82	118.65	64.17
Dec. 17, 1921	ART-13807	185.40	146.92	38.48
Dec. 24, 1921	ART-12573	181.65	116.42	65.23
Dec. 31, 1921	ART-13082	182.47	104.62	77.85
			Total.....	$1,936.95

ORDER.

IT IS THEREFORE ORDERED, That The Denver & Rio Grande Western Railroad Company, Joseph H. Young, Receiver, be, and is hereby, ordered and directed to pay unto The Nuckolls Packing Company of Pueblo, Colorado, the sum of Nineteen Hundred Thirty-six and 95/100 ($1936.95) Dollars, with interest at the rate of 6 per cent per annum from date of payment of charges on each shipment to date of payment of the reparation herein ordered, as reparation for damages sustained by said Nuckolls Packing Company by reason of discriminatory, unreasonable and excessive charges maintained and collected by The Denver & Rio Grande Western Railroad Company, Joseph H. Young, Receiver, on shipments of packing house products and fresh

meat, mixed carloads, from Pueblo, Colorado, to Leadville, Colorado, moving between the dates June 29, 1921, and December 31, 1921, inclusive, said reparation to be paid on or before thirty days from the date of service of this order upon the defendants.

Commissioner Bock dissenting:

I regret that I am impelled to dissent from the opinion of my colleagues in this case. On August 17, 1925, the Commission issued its decision and order awarding complainant reparation in the sum of $1,936.95 with interest. The majority of the Commission at that time based their decision on discrimination. The defendant filed a petition for rehearing, which was granted, and on February 9, 1926, was reheard. It was stipulated at that time that all testimony and exhibits introduced at the previous hearing shall be considered as a part of the record on rehearing.

Prior to June 29, 1919, the minimum weight carloads on packing house products and fresh meat was 12,000 pounds. As the result of a blanket order issued by the Director General of Railroads, under date of June 2, 1919, in Rate Advice No. 3129, this minimum was raised to 21,000 pounds. Complainant asked for an order of reparation as to certain shipments specified in the complaint, which shipments moved between June 29, 1921, and December 31, 1921.

The only question involved in this case is whether the 21,000 pound minimum established by the Director General, under federal control, was unreasonable as to the dates mentioned in the complaint. No question of discrimination is shown under the facts adduced at the hearing.

On June 25, 1921, The Colorado and Southern Railroad Company, a competitor with the defendant between Denver and Leadville, voluntarily reduced the 21,000 pound minimum. The defendant, The Denver and Rio Grande Western Railroad, on February 7, 1922, reduced the minimum of 21,000 pounds to 12,000 pounds, reinstating it to the pre-war basis. It is clear, therefore, that both carriers voluntarily reduced to the 12,000 pound minimum now in effect.

The act granting the 21,000 minimum was not the voluntary act of the railroads but the act of the Director General of Railroads. No complaint whatever was made by the shipper of the unreasonableness of the minimum of 21,000 pounds, until June 9, 1923, over one year after the defendant had voluntarily reduced this minimum. There is no evidence in the record that the shipper at any time, prior to the filing of this complaint, made application to the defendant railroad for a reduction of the minimum or a claim that it was unreasonable. As stated above, the minimum was reduced voluntarily by the defendant railroad a year prior to the filing of this complaint.

Section 208 (a) of the Transportation Act of February 28, 1920, provides:

"All * * * classifications, regulations and practices in anywise changing, affecting or determining, any part or the aggregate of rates * * * which on February 29, 1920, are in effect * * * shall continue in force and effect until thereafter changed by State or federal authority, respectively, or pursuant to authority of law."

Congress in the above Section 208 provided that all rates, classifications and regulations in anywise affecting any part of any rates which on February 29, 1920, are in effect shall continue in force and effect until thereafter changed by State or federal authority. While in my opinion this is not a limitation upon the power of this Commission to authorize reparation on intrastate shipments moving at the times alleged in the complaint, nevertheless this minimum was in effect on February 29, 1920, and except for very good, substantial reasons, no reparation should be allowed. Considering all the facts and circumstances surrounding this minimum, I do not find sufficient evidence in the record to conclude that the 21,000 pound minimum was not reasonable at the times in question.

Foster Lumber Company v. A. T. & S. F. Ry., *et al.*,
15 I. C. C. 56.

Another reason why there should be no reparation granted in this case is that such action would be contrary to General Order

No. 18 of The Public Utilities Commission of the State of Colorado. That part of General Order No. 18 which, in my opinion, is a full answer in support of a denial of any reparation in this case is as follows:

"Reparation will not be awarded on the formal or special docket in any case where the utility has reduced a rate simply in order to meet the lower rate of a competitor. Any other course of action not only deprives the competitor of the natural benefit of its lower rate, but tends to destroy the inducements for making a lower rate. Moreover, any other course of action is demoralizing, in that it enables the utility, before its own lower rate has become effective, to assure shippers or consumers that they may take advantage of the service rendered by that utility notwithstanding its higher rate and afterwards secure reparation on the basis of the lower rate of its competitor. Where there is a difference of rates between two utilities the shippers and consumers must understand that they may get the benefit of the lower rate only by obtaining the service from the utility publishing the lower rate."

The record is absolutely clear in this case that the reduction of the minimum of 12,000 pounds by defendant railroad was voluntarily, without solicitation on the part of the complainant, and that the defendant railroad reduced the minimum in order to meet the lower rate of their competitor, The Colorado and Southern Railway Company.

It is my opinion, therefore, no reparation should be awarded and the complaint should be denied.

PUEBLO ICE CREAM COMPANY, *et al.*,

v.

AMERICAN RAILWAY EXPRESS COMPANY.

[I. & S. Docket No. 84. Decision No. 1063.]

Rates—Ice cream, bread, fruit, empties.

Proposed increases in express rates on ice cream, bread and fruit found justified; the proposed increase of returned ice cream

empties found not justified, and schedule containing same ordered canceled.

[November 16, 1926.]

STATEMENT.

By the **Commission**: By schedules filed to become effective November 15, 1926, the American Railway Express Company, respondent, proposes to increase its rates for intrastate transportation on ice cream, bread, returned ice cream empties and fruit. Upon protest of the Pueblo Ice Cream Company, Polar Ice Cream and Supply Company and Standard Bakeries Corporation, by R. L. Ellis, Traffic Representative of Protestants, located at Pueblo, Colorado, the schedules were suspended until the 13th day of March, 1927.

Respondent's primary object in proposing the increases is to remedy the present chaotic condition of commodity rates intrastate in Colorado growing out of the several class rate adjustments since 1914. While the present commodity tariff has been in need of some revision for several years past, the matter did not become complicated until the sharp reduction of class rates effective March 1, 1925, following the orders and findings of the Interstate Commerce Commission in Docket No. 13930, which was cooperated in by several State Commissions. In authorizing the Docket No. 13930, class rates for intrastate application in Colorado, this Commission provided that existing exceptions to classification number twenty-nine and existing State commodity rates lower than second class rates be continued without change until conference could be had to consider necessary changes to conform to the new tariffs.

In order to continue the then existing commodity rates without change, it was necessary temporarily to retain the old class rate tariffs (which the new tariffs of March 1, 1925, superseded) for the sole purpose of determining rates on bread and ice cream under Section 8 of Local Tariff No. 105 Colo. P. U. C. No. 33, at the same time providing that if the second class rates in the new block tariffs produced a lower rate than the Section 8 rate under the old block tariffs, such lower rate would apply. This,

of course, resulted in a quite complicated tariff and rate condition until a new tariff could be prepared.

In order to determine which commodity rates in Colo. P. U. C. No. 33 were higher than the new second class rates, and which rates were being actively used, Colorado representatives of the express company made an exhaustive check of the traffic between points named in the tariff, as well as a comparison of the old and new rates, and conferences were had with this Commission after the results of this check were studied for the purpose of discussing a remedy for this chaotic commodity rate situation.

It was found that upon the bread and ice cream rates in Section 8, in most instances the second class rates, effective March 1, 1925, were lower than the rates in that section, and that the lower second class rates had been enjoyed by bread and ice cream shipments since March 1, 1925, and that where the new second class rates were a few cents higher than the scale in Section 8, that shipments of bread could move under the minimum charge of 27 cents at the new second class rate as well as at the Section 8 rate, and that in very few instances did Section 8 provide a lower actual charge than would result if the new second class rates were to apply to all shipments.

In order to bring ice cream shipments in Colorado to the same rate basis as applies interstate and intrastate in all other Mountain-Pacific States, it was necessary to cancel the estimated weights on ice cream shipments and be handled in accordance to classification. The regular classification weight basis for ice cream shipments has recently been found to be proper after testing weights throughout the country (107 I. C. C. 267) and ice cream shippers generally agree that the billing weight for both interstate and intrastate traffic should be the same. The sharp reductions in class rates in Colorado, effective March 1, 1925, as well as the adjustments referred to in the preceding paragraph, largely effect the increases resulting from the cancellation of these preferential weights. For example, the Pueblo to Lamar situation is as follows:

Present Rate (Section 8)	Present Billing Weight (Colo. P. U. C. 89)	Present Charge	Nov. 15, 1926 Rate	Nov. 15, 1926 Weight	Nov. 15, 1926 Charge
$1.24	100 lbs.	$1.24	$1.16	115 lbs.	$1.33

As an example of the March 1, 1925, rate reduction and the restoration of the classification weight basis, the Pueblo-Salida situation is typical and is as follows:

Section 8 Rate	Colo. P. U. C. 89 Billing Weight	Charge Prior to 3-1-25	3-1-25 Rate	Classification Billing Weight	11-15-26 Charge
$1.36	100 lbs.	$1.36	$1.16	115 lbs.	$1.33

The increase in fruit rates for the intrastate haul from points in Group 2, Section 3, to points in Group A, also represents a sharp reduction for the interstate haul from the same points and inasmuch as the interstate rate is the logical route for perishable traffic from the Durango district (Group 2) to Group A points, the actual result is a reduction rather than an increase. For example, the present intrastate rate on fruits from Durango to Denver via Dolores, Ridgway and Montrose under the present tariff is $1.25, while the present interstate rate via Alamosa is $2.32. Under the proposed new tariff which is also being filed with the Interstate Commerce Commission the rate via either route will be $1.50. The interstate route is 24 hours faster than the intrastate route and, as heretofore stated, is the only logical route. The interstate rate situation from the Durango and Farmington districts has also been held in abeyance awaiting this realignment of the Colorado intrastate rates, and it is now hoped to have that situation properly adjusted before the next shipping season.

We find that the suspended schedules, with the exception of returned ice cream empties, have been justified. An order will be entered vacating our order of suspension and discontinuing this proceeding.

ORDER.

It Appearing, That, by an order dated November 5, 1926, the Commission entered upon a hearing concerning the lawfulness of the rates, charges, regulations and practices stated in the sched-

ules enumerated and described in said order, and suspended the operation of said schedules until March 13, 1927;

IT FURTHER APPEARING, That a full investigation of the matters and things involved has been had, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof, and has found that respondents have justified the schedules under suspension, except upon returned ice cream empties;

IT IS ORDERED, That the order heretofore entered in this proceeding, suspending the operation of said schedules, be, and it is hereby, vacated and set aside as of November 16, 1926; and,

IT IS FURTHER ORDERED, That the respondents herein be, and they are hereby, notified and required to cancel said schedule upon returned ice cream empties upon notice to this Commission and to the general public by not less than one day's filing and posting in the manner prescribed in Section 15 of the Public Utilities Act of the State of Colorado, and that this proceeding be discontinued.

RE THE COLORADO MOTOR WAY, INC.

[Application No. 531. Decision No. 1064.]

Certificates of convenience and necessity—Transfer—Issue—Public convenience and necessity of operation.

In an application to transfer a certificate of public convenience and necessity, the question of public convenience is not in issue, and an objection to the transfer based on the lack thereof is a collateral attack.

[November 23, 1926.]

Appearances: Hodges, Wilson & Rogers, Denver, Colorado, for the Applicant; Herbert M. Baker, Esq., Greeley, Colorado, for Interstate Bus Lines, Inc.; Edward Knowles, Esq., Denver, Colorado, for Union Pacific Railroad Company; F. O. Reed, Esq., Denver, Colorado, for the American Railway Express Company.

STATEMENT.

By the **Commission**: On March 23, 1926, the Colorado Motor Way, Inc., applicant herein, filed its application for authorization to assign, transfer and convey all that portion of its certificate of public convenience and necessity which authorizes it to operate busses between the city of Greeley and the town of Nunn, in Weld County, Colorado, to the Interstate Bus Lines, Inc.

On April 7, 1926, the Union Pacific Railroad Company filed an answer in which it is alleged, among other things, that the applicant, Colorado Motor Way, Inc., has found that the public convenience and necessity in the territory between Greeley, Colorado, and the State line north does not require the operation of passenger motor busses, and that such operation is unprofitable; that the passenger and small package traffic in the territory between Greeley, Colorado, and Nunn, Colorado, is being adequately, fully, conveniently, reasonably and efficiently served by the Union Pacific Railroad Company, and that, therefore, there is no need for bus service and the certificate of public convenience and necessity issued to the Colorado Motor Way, Inc., should be terminated and surrendered, and its sale, transfer and conveyance should not be approved.

On April 10, 1926, applicant filed a demurrer to the answer of the Union Pacific Railroad Company, in which it is alleged that the said answer sets forth no facts showing, or tending to show, that the applicant's application should be denied. This demurrer was set down for hearing and argument on April 19, 1926, at 2:00 o'clock P. M. at the Hearing Room of the Commission, 305 State Office Building, Denver, Colorado, at which time counsel for all parties were given an opportunity to present arguments thereon.

The answer of the Union Pacific Railroad Company places in issue the question of public convenience and necessity for motor bus operation between Greeley and Nunn, Colorado. In other words, in an application for authority to transfer a certificate of public convenience and necessity, the Union Pacific Railroad Company opposes such a transfer on the ground that the public

convenience and necessity does not require bus operation between the city and town in question. To this the applicant demurs, and the reason which it advances is that the public convenience and necessity of a motor operation theretofore authorized by the Commission is not an issue in an application asking for the transfer of such a certificate but is, in fact, an attempt to cancel and revoke the certificate itself.

In addition to the oral argument had on this matter, briefs were presented by the parties herein, setting forth the various contentions. No authority is cited which is directly in point.

The original certificate to the Colorado Motor Way, Inc., a part of which the Commission is now asked to transfer, was issued after full hearing on September 15, 1923. The Commission gave considerable time and attention to this case, and reached the opinion that the public convenience and necessity did require motor bus operation between Greeley and Nunn, Colorado. The matter now before the Commission is an application by the Colorado Motor Way, Inc., seeking to assign to the Interstate Bus Lines, Inc., that portion of its certificate. The answer of the Union Pacific Railroad Company, in our opinion, constitutes a collateral attack upon a certificate already issued. We, therefore, conclude that the question of public convenience and necessity, as it relates to the service offered to the public authorized in the original certificate, is not a proper issue in an application to transfer a certificate of public convenience and necessity. There are other methods suggested in the Public Utilities Act in which the public convenience and necessity, as related to the service to the public, may be directly attacked. An application to revoke the certificate on the ground that the public convenience and necessity does not further require a particular service would seem to be the most direct way to raise the issue which the Union Pacific Railroad Company is attempting to raise in this application. For this reason, the Commission is of the opinion that the demurrer herein to the answer filed by the Union Pacific Railroad Company should be sustained.

Some contention was made by the Union Pacific Railroad Company that the original judgment or finding of the Commission

upon which the certificate now attempted to be transferred is based was not supported by evidence and that, therefore, this Commission should not allow a transfer of the certificate. No such question of fact is raised in the answer by the Union Pacific Railroad Company; hence there is no necessity of passing on the same at this time.

ORDER.

IT IS THEREFORE ORDERED, That the demurrer of the Colorado Motor Way, Inc., to the answer of the Union Pacific Railroad Company be, and the same is hereby, sustained.

IT IS FURTHER ORDERED, That the Union Pacific Railroad Company shall have ten days from the date of this order to file an amended answer if it so desires.

RE MISSOURI PACIFIC RAILROAD COMPANY.

[I. & S. Docket No. 81. Decision No. 1081.]

Rates—Milk—Baggage car service.

Proposed rates for baggage car with service held too high, and others prescribed.

[January 6, 1927.]

Appearances: T. H. Devine and Ted C. Storer, of Pueblo, Colorado, and W. H. Bissland, of St. Louis, Missouri, for the Missouri Pacific Railroad Company; T. S. Wood, of Denver, Colorado, for the Public Utilities Commission of the State of Colorado.

STATEMENT.

By the **Commission**: This cause is before the Commission as a result of a schedule filed September 3, 1926, to become effective October 7, 1926, by the Missouri Pacific Railroad Company, wherein it proposes to handle the milk and cream traffic on its line between points in Colorado in baggage car service at the now existing basis of express rates, representing an increase over the present baggage car rates now on file with the Commission.

This schedule was suspended by the Commission, by an order dated October 1, 1926, upon its own motion until December 30, 1926, and the case set down for hearing December 29, 1926, at the Hearing Room of the Commission, 305 State Office Building, Denver, Colorado, at 10:00 o'clock A. M. The effective date of the schedules was voluntarily postponed by respondent until January 29, 1927, unless otherwise ordered by this Commission. The evidence submitted by the defendant shows the traffic involved at the present time to be on an average of less than three cans per day. The proposed rates are the same rates as the shippers have been paying the express company for an identical service, and no hardship will be extended on account of the Missouri Pacific handling this traffic rather than the express company. The proposed schedule is broader in scope than that enjoyed by the shippers under the present schedule on file with the Commission, and at the same rates which they have been accustomed to paying. Originally the rates in express and baggage service were practically identical; some changes, however, were made in express rates that were not equalized in the schedules covering service in baggage cars. The respondent contends that the Missouri Pacific Railroad should enjoy the same basis of rates as those applying via the Denver and Salt Lake Railroad, comparing only the distance of miles operated by the Missouri Pacific as against that of the Denver and Salt Lake Railroad.

The Commission, through its rate expert, submitted an exhibit, known as Exhibit No. 1, showing the milk and cream rates in effect at the present time in baggage car service via Chicago, Burlington & Quincy Railroad, Chicago, Rock Island and Pacific Railway, Colorado and Southern Railway and Union Pacific Railroad which were all on a parity, and the Denver and Rio Grande Western Railroad, which was about on the same basis; also another exhibit, known as Exhibit No. 2, showing the present schedule of rates in effect and the proposed schedule, which for a distance of 100 miles represents a 41.9 per cent increase

and 14.5 per cent increase over the Chicago, Burlington & Quincy, Chicago, Rock Island and Pacific, Colorado and Southern and Union Pacific baggage car rates.

The record does not disclose, other than the mileage, any definite comparison as to operating conditions between the Missouri Pacific Railroad and Denver and Salt Lake Railroad, which the Commission, of its own knowledge, does not consider a fair comparison. The Denver and Salt Lake Railroad traverses a very mountainous country, with heavy grades and some of the most adverse conditions to combat of any railroad in the country, while the Missouri Pacific traverses a comparatively level country with no heavy grades or mountains to contend with. Respondent states that the rates in express and baggage service were practically identical. Some changes, however, were made in express rates that were not equalized in the schedules covering service in baggage cars. The carriers' tariffs do not bear this out, the Chicago, Burlington & Quincy tariff becoming effective October 1, 1922; Chicago, Rock Island and Pacific February 1, 1926; Colorado and Southern December 1, 1925, and Union Pacific January 1, 1925. From the range of the effective dates of these various tariffs it would indicate that the carriers recognize the fact that milk and cream rates in baggage service should be on a somewhat lower basis than when carried in express service. It is a well-known fact that revenues derived from express shipments are divided upon an agreed percentage or division between the express company and the carrier over whose line the service is performed. While the gross revenue derived by the lower baggage car rates is less, in reality it means a greater return to the carrier, as there is no division to be taken care of.

Upon the record, we find that the proposed schedule of the Missouri Pacific Railroad is unreasonably high and the present schedule is unreasonably low as compared with other lines operating in the State of Colorado, and that a reasonable schedule for the future will be as follows:

Distance in Miles—From	Per 5-Gal. Can Cents	Per 8-Gal. Can Cents	Per 10-Gal. Can Cents	Distance in Miles—From	Per 5-Gal. Can Cents	Per 8-Gal. Can Cents	Per 10-Gal. Can Cents
1 to 25	17½	22½	25	131 to 145	29	37½	41½
26 to 30	19	24	26½	146 to 160	30	39	42½
31 to 35	19	25	27½	161 to 175	30	39	44
36 to 40	20	26½	29	176 to 190	31½	40	45
41 to 45	21½	27½	30	191 to 205	32½	41½	46½
46 to 50	21½	27½	31½	206 to 220	34	42½	47½
51 to 60	22½	29	32½	221 to 235	34	44	49
61 to 70	24	30	34	236 to 250	35	45	50
71 to 80	25	31½	35	251 to 265	36½	46½	51½
81 to 90	25	32½	36½	266 to 280	36½	47½	52½
91 to 100	26½	34	37½	281 to 295	37½	49	54
101 to 115	27½	35	39	296 to 310	39	50	55
116 to 130	27½	36½	40				

ORDER.

IT IS THEREFORE ORDERED, That the Missouri Pacific Railroad Company be, and it is hereby, notified and required to cancel said schedule on or before January 15, 1927, upon notice to this Commission and to the general public by not less than one day's filing and posting in the manner prescribed in Section 16 of the Public Utilties Act.

IT IS FURTHER ORDERED, That said Missouri Pacific Railroad Company be, and it is hereby, notified and required to establish on or before January 15, 1927, upon notice to this Commission and to the general public by not less than one day's filing and posting in the manner prescribed in Section 16 of the Public Utilities Act, and thereafter to maintain and apply to the transportation of milk, cream, buttermilk, skim milk, condensed milk and butter fat in ordinary milk cans between points on its line in the State of Colorado, rates which shall not exceed the distance scale of reasonable rates set forth in the aforesaid statement.

IT IS FURTHER ORDERED, That this proceeding be discontinued.

RE BERT GREEN, *et al.*

[Application No. 681. Case No. 286. Decision No. 1088.]

Certificates of convenience and necessity—Transfer without Commission authority.

Transferee of motor vehicle certificate was criticized for taking over the operation before authority was granted by the Commission and conducting the same without a tariff.

[January 13, 1927.]

Appearances: A. P. Anderson, Esq., Denver, Colorado, for The Over-Land Motor Express Company; Charles D. Bromley, Esq., Boulder, Colorado, for the applicants and The Miller Transfer Company.

STATEMENT.

By the **Commission**: On May 29, 1926, Bert Green, Elizabeth Green, J. Earl Green and Helen Green, a co-partnership, known as The Green Transfer Company, and Jesse Miller, operating under the name of The Miller Transfer Company, filed their application with this Commission to transfer a certificate of public convenience and necessity to operate a motor truck line between Boulder and Denver, granted to the Greens on August 28, 1919, to Jesse Miller.

On June 15, 1926, The Colorado and Southern Railway Company filed an answer and protest against the proposed transfer. On September 9, 1926, The Over-Land Motor Express Company, holding a certificate of public convenience and necessity from this Commission to operate a motor truck line between Boulder and Denver, filed an answer and protest to the application.

On July 21, 1925, The Over-Land Motor Express Company filed a complaint against The Green Transfer Company, designated as Case No. 286, in which it sought the revocation of the certificate issued to the Greens. An answer was filed to this complaint by Jesse Miller on August 4, 1925. Subsequently a supplemental complaint was filed by The Over-Land Motor Express Company.

Application No. 681 and Case No. 286 were set for hearing September 21, 1926, at the Hearing Room of the Commission,

State Office Building, Denver, Colorado. Testimony was received in support of and in opposition to Application No. 681, and it was stipulated by the parties that the record made in Application No. 681 should be considered as the record in Case No. 286.

It appears from the evidence that this Commission granted a certificate of public convenience and necessity to operate a motor vehicle carrier truck line to The Green Transfer Company on August 28, 1919. This operation by The Green Transfer Company continued until about July 1, 1922, when The Green Transfer Company made an assignment and conveyance of its truck operation to Jesse Miller. Thereupon Jesse Miller, doing business under the name of The Miller Transfer Company, continued to operate this truck line, and has so continued to date. The evidence further shows that Miller paid the Greens $1,000 for the purchase of this truck line; that Miller relied upon his attorney to properly transfer this business to him; that Miller did not know that it was necessary to have this Commission authorize the transfer of the certificate until he was contested on or about July 1, 1925; that after learning it was necessary to obtain the authorization of this Commission he filed an application on August 4, 1925, authorizing its transfer. A hearing was had on this application, and on May 13, 1926, this Commission denied the same on the ground that the purchaser of a motor freight line is not the proper person to file an application for an assignment of the certificate, and that the better practice is that a joint petition of seller and purchaser be filed. (*In re* Jesse Miller, P. U. R. 1926-D, 501.) Evidence was also introduced showing that Miller has sufficient equipment and that his service is of sufficient dependability, and that he is personally qualified to properly conduct the operation sought to be transferred to him in this proceeding.

The Over-Land Motor Express Company introduced testimony to the effect that a proper transfer was not obtained from The Green Transfer Company; that Miller knew it was unlawful to operate without a certificate of public convenience and necessity but did not apply to this Commission; that he is not personally fit to operate the system originally granted to The Green

Transfer Company, mainly claiming that he was cutting rates below his tariff on file with this Commission. Miller testified that he did not have a tariff on file until his attention was called to it some time about July 1, 1925, and had no knowledge that he was required to file such a tariff and to operate as a common carrier under such tariff.

The Commission is inclined to the view that Miller, in July, 1922, when he purchased the motor operation, was not familiar with the requirements of the Public Utilities Act; that he remained in ignorance of the same until this contest was started. The Commission, therefore, feels that under all the facts and circumstances, the transfer from the Greens to Miller should be authorized. In doing so the Commission wants it understood that it is not entirely satisfied with Miller's conduct in not following his tariffs and in regard to cutting his rates. While we feel that notwithstanding this situation the transfer of the certificate to him should be allowed, yet we want it expressly understood that if in the future he should indulge in any rate cutting in violation of his tariffs and the rules and regulations of this Commission, the record in these proceedings now before us will be taken into consideration, with any additional testimony, in ascertaining whether or not he is guilty of such violations.

The Commission, after a careful consideration of all the facts and circumstances, finds that the public convenience and necessity requires the transfer of the certificate of public convenience and necessity granted to The Green Transfer Company on August 28, 1919, to Jesse Miller, doing business as The Miller Transfer Company.

From the foregoing it follows that an order will be entered dismissing the complaint of The Over-Land Motor Express Company in Case No. 286.

ORDER.

It Is Therefore Ordered, That the public convenience and necessity requires the transfer of the certificate of public convenience and necessity granted to The Green Transfer Company on August 28, 1919, to Jesse Miller, doing business as The Miller

Transfer Company, and this order shall be taken, deemed and held to be an authorization for such transfer.

IT IS FURTHER ORDERED, That the complaint in Case No. 286 be, and the same is hereby, dismissed.

RE C. A. FOSTER.

[Application No. 674. Decision No. 1090.]

Certificates of convenience and necessity—Great care in granting.

1. Great care should always be exercised in granting certificates of public convenience and necessity.

Certificates of convenience and necessity—Interests of public—certificate holder and applicant.

2. In determining the question of public convenience and necessity the interests of the public are of paramount importance and those of the certificate holder and the applicant are secondary and subordinate.

Certificates of convenience and necessity—Needed service alone not profitable—Effect—Authorizing other service.

3. Where public convenience and necessity requires a motor vehicle service for transportation of milk from farms, and such business alone would not be profitable, authority was granted to haul general freight also.

[January 24, 1927.]

Appearances: Edward T. Fiske, Esq., Denver, Colorado, for applicant; Quaintance & Quaintance, Denver, Colorado, for M. F. Thomas.

STATEMENT.

By the **Commission**: On May 27, 1926, C. A. Foster, doing business under the name of The Foster Truck Lines, filed his application with this Commission for a certificate of public convenience and necessity to operate auto trucks for the transportation of freight in both directions between Denver, Morrison and Indian Hills and intermediate points. This case was set down for hearing and was heard by the Commission at its Hearing Room, 305 State Office Building, Denver, Colorado, Monday, August 30, 1926, at 10:00 o'clock A. M.

No protests to this application were filed with the Commis-

sion, but M. F. Thomas, who has a certificate for the operation of motor vehicles, appeared by counsel, and introduced some evidence in opposition to the granting of the certificate asked for by the applicant herein.

The equipment of this applicant consists of a 2½ ton G. M. C. truck and a 1½ ton Graham Bros. truck, which together with tools, etc., is of a value of $5,000.00 Including garage and depot the applicant estimates he is worth about $7,500.00. He also showed that the value of his loads are not over $400.00 and that in case of a loss of an entire load he could easily liquidate the liability. In addition to his own responsibility, he also agreed to take out insurance if required by the Commission.

The evidence in this case clearly shows that there is not only a public convenience, but a necessity, as well, for the continued operation of The Foster Truck Line. This not only applies to the rendition of service performed for the farmers, located off the paved highway, by picking up and delivering in Denver the milk from twelve different farms south of Morrison, but also to the 365 days service each and every year that this applicant has been giving to the business houses of Morrision for the past seven or eight years.

While the evidence is not quite clear as to who was the real pioneer owner and operator of a trucking business between Denver and Morrison, it was shown that this applicant was employed as a driver of a freight truck over this route before the inauguration of the Thomas line. It is but fair to state, however, that both Foster and Thomas have operated over that part of the line between Denver and Morrison continuously since about 1918 or 1919, harmoniously and without any rate cutting or other untoward incident occurring.

In his operations, the Foster trucks leave Morrison at 7:30 A. M. and leave Denver at 2:00 P. M. every week day, and on Sundays his leaving time at both Denver and Morrison is at 10:00 A. M. The testimony shows that this applicant hauls at least three-fourths of all the freight that is hauled for the merchants of Morrison, and that he hauls for all the stores except one. This is brought about probably by the fact that he is a

resident of Morrison and that he has given the personal service so much appreciated by the business interests. Morrison is primarily a tourist town and a rendezvous for thousands of people of Denver. On account of this and in addition to groceries, etc., considerable quantities of ice, ice cream, fresh meats and vegetables are required to meet the demands of the merchants and others in Morrison at all times, and especially on Sundays. This demand has been met by this applicant since about the year 1919, and he was the sole and only operator that has ever attempted to give this Sunday service until about 1925, when Mr. Thomas also started a Sunday operation.

Until Mr. Foster started in 1919, up to the present, there has been no regular truck operation for the people of Indian Hills, a small town about five miles distant from Morrison, except that furnished by this applicant. To this place he makes about four trips weekly. He has no regular schedule, but goes whenever there is any freight to be hauled into or out of the village. In 1918 Mr. Foster was engaged in driving a freight truck between Denver and Morrision for a Mr. Gates. In July, 1919, Mr. Foster started in the trucking business for himself between Denver, Morrison and Indian Hills and has been engaged in this pursuit up to the present time.

Probably the most important trucking operation performed by any trucking concern in the Morrison district is that rendered by this applicant in the hauling of milk. This service is very necessary and important from the fact that it furnishes a reliable transportation facility for the farmers' milk and at the same time makes available about two tons daily of fresh milk for the people of Denver that would not be possible except for the service performed by this applicant. This milk is gathered from Morrison south about three miles and contiguous only to a very poor dirt highway, that is almost impassable in inclement weather. He serves twelve farmers and in this operation does not reach the paved highway until he is six miles distant from Morrison. While the Commission believes this operation easily transcends in importance other operations under consideration,

still, in view of this fact, the protestant, Mr. Thomas, says, on page 36 of the record:

"Question: You heard Mr. Foster testify that the cream route itself would not pay the expense of taking care of the route? Answer: Yes, sir.

"Q. Would ou be willing, Mr. Thomas, in the event Mr. Foster is not allowed the regular freight route (meaning freight hauls to and from Morrison) and is only allowed the cream route, and he finds it impossible to continue, would you take care of the cream route? A. If compelled to I would.

"Q. In case the Commission would not order you to, you would not take care of it then? A. No.

"Q. Do you think Mr. Foster's cream route through there is a public convenience and necessity? A. I do."

A resume of the testimony taken in this case shows that besides the applicant, three business men of Morrison, namely, Chas. E. Pienz, engaged in general merchandising; Jack Snyder, pharmacist, and Paul T. Kingsbury, a grocer, all testified that the operation of the applicant was a public convenience and necessity to the Morrison merchants. Snyder testified it was necessary to have two truck lines into Morrison, and that Thomas refused to haul him ice except during the 1926 season, that for all the previous years his only source of supply for ice or ice cream was by and through the Foster truck line.

From the testimony adduced in this case it is perfectly clear that applicant Foster has been serving the people of Denver, Morrison, Indian Hills and the farmers along this route for several years with the utmost satisfaction to his patrons and with profit to himself during both the winter and summer months, and the Commission finds it would be inimical to the public interest to deny or limit the said Foster the certificate he seeks.

The testimony further shows that the hauling of milk alone would not be profitable, and also that in order to haul the milk and make his operation profitable, the applicant must have a back haul, Denver to Morrison; that if he were not allowed to haul freight into and from Morrison he would be unable to take care of the milk route. The testimony also showed that the haul-

age of milk to Denver and a back haul from Denver to Indian Hills, without the Morrison haul, would also be a losing proposition.

Great care should always be exercised in granting certificates of public convenience and necessity, remembering that the interests of the public served are of paramount importance, and that of the interest of either a party having a certificate, or one seeking such is, and must be, secondary and subordinate to the interests and well-being of the people to be served.

Agriculture and its allied branches are the foundations upon which the superstructure of our civilization is largely erected, and furnish the dynamics around which the business, industries, activities and weal of civilized society revolve.

The twelve farmers served by this applicant in picking up their milk and delivering same to Denver, and then returning the empty containers, is performing a highly meritorious and necessary public service. In view of the evidence that this applicant could not operate at a profit if denied the privilege of serving Morrison, it follows that the twelve dairymen would naturally have to haul their own product to market or go out of the dairy business. That such a condition should be brought about, it would seem that a goodly portion of the public whom the applicant serves would be denied the haulage they are so justly entitled, in order that a single individual, having a certificate, might increase his profits. There is no evidence in the record that shows that M. F. Thomas, the holder of the certificate, is operating at a loss, and consequently there is no justification for a denial of the certificate asked for, and to do so would in effect be throwing away the substance for the shadow.

After a thorough examination and study of the record in this case the Commission finds from the evidence adduced that the future public convenience and necessity requires, and will require in the future, the operation of The Foster Truck Lines for the transportation of freight by means of auto trucks, in both directions, between the City and County of Denver, the town of Morrison, the town of Indian Hills, all in Colorado, and to and

from the dairy district south and contiguous to the town of Morrison and all intermediate points.

ORDER.

It Is Therefore Ordered: That the future public convenience and necessity requires and will require the motor vehicle operation for the transportation of general freight and dairy products by C. A. Foster, doing business under the name of The Foster Truck Lines, between the City and County of Denver and the towns of Morrison and Indian Hills and from and to the dairying district south and contiguous or adjacent to the town of Morrison and to all intermediate points, and this shall be deemed and held to be a certificate of public convenience and necessity, therefore subject to the following conditions:

That applicant shall file his written acceptance of the certificate herein granted within a period of fifteen days hereof, and shall file tariffs of rates, rules and regulations and time schedules as required by the rules and regulations of this Commission governing motor vehicle carriers within a period not to exceed twenty days from the date hereof.

It Is Further Ordered, That the applicant shall operate such motor vehicle carrier system according to the schedules filed with this Commission except when prevented from so doing by the act of God, the public enemy, or unusual and extreme weather conditions; and this order is made subject to compliance by the applicant with the rules and regulations now in force or to be hereafter adopted by the Commission with respect to motor vehicle carriers, and also subject to any future legislative action that may be taken with respect thereto.

Commissioner Bock dissenting:

I am unable to concur in the conclusions of my colleagues as to their finding of a public convenience and necessity for the transportation of merchandise and freight by the proposed operation of the applicant between Morrison and Denver. Insofar as the public convenience and necessity for the transportation of milk, cream and dairy products only from and around the vicinity of Morrison to Denver and the general transporta-

tion of merchandise and freight from Denver and Indian Hills but not between any intermediate points, I concur with the majority finding.

On May 1, 1920, this Commission granted a certificate to M. F. Thomas, protestant herein, to operate a motor vehicle system for the transportation of freight between Denver and Morrison, Colorado. This operation has continued ever since and no complaint has ever been made to this Commission of the service or the rates. In fact, the undisputed evidence shows that the service has been generally satisfactory. Under such circumstances before the applicant should receive a certificate for the transportation of merchandise and freight over the same route granted to Thomas, it is incumbent upon him to show affirmatively that the public convenience and necessity requires two operations. No such showing is made in the record. In fact, the undisputed testimony is that one operation can take care of all the business between Morrison and Denver. The applicant himself testified that one truck could handle all of the business. The evidence is further undisputed that Mr. Thomas has sufficient equipment to take care of all this business. Mr. Thomas states that if the Commission so orders he will also take care of the milk and cream business from the vicinity of Morrison.

The mere conclusions of the applicant based upon no statement whatever of his earnings or operations, that he cannot profitably take care of the milk and cream business unless he receives a certificate for merchandise and freight from Denver to Morrison, is not controlling. If, after Mr. Thomas had been ordered to take care of the milk and cream business from the vicinity of Morrison and refused to do so, or had not taken care of it properly, then such a situation may become material if based upon facts and not mere conclusions.

For these reasons I am of the opinion that a certificate of public convenience and necessity to transport merchandise and freight between Morrison and Denver to the applicant should be denied.

RE CHAMPA 3 AUTO LIVERY COMPANY.

[Application No. 545. Decision No. 1106.]

Certificates of convenience and necessity—Question for decision in passing upon application.

1. Question to be determined in passing upon application for certificate of convenience and necessity stated.

Certificates of convenience and necessity—Finding of convenience and necessity.

2. A finding of public convenience and necessity must be made before a certificate of convenience and necessity may be issued.

Monopoly and competition—Retention of competition—Requirements of public—Experience.

3. Competition situation already existing will have to be retained, in a measure, until Commission can obtain more knowledge of requirements of public, and develop a policy.

Certificates of convenience and necessity—Scope—Limited equipment—Competition.

4. Where sightseeing motor vehicle applicant has only two or three automobiles, his certificate should limit his operations "to such routes as can stand considerable competitive business."

Certificates of convenience and necessity—Requirements of public.

5. In passing upon an application for a certificate of convenience and necessity, the requirements of the public must be taken into consideration.

Certificates of convenience and necessity—Conservation of dependable schedule service.

6. In granting certificates of convenience and necessity, the general policy, "as expressed by legislative enactment, must, of necessity, be directed to conserve existing, satisfactory, dependable scheduled transportation facilities to such an extent that their future will not be financially impaired."

In issuing certificates to various motor vehicle sightseeing operators, the equipment to be used was required not to exceed that then in use.

[February 28, 1927.]

Appearances: Philip Hornbein, Esq., Denver, Colorado, for applicant; D. Edgar Wilson, Esq., Denver, Colorado, for The Rocky Mountain Parks Transportation Company, The Rocky Mountain Motor Company and the Denver Cab Company; J. Q. Dier, Esq., Denver, Colorado, for The Colorado and Southern Railway Company; Montgomery Dorsey, Esq., Denver, Colorado, for The Denver and Intermountain Railroad Company; Thos. R.

Woodrow, Esq., Denver, Colorado, for The Denver and Rio Grande Western Railroad Company and The Denver-Colorado Springs-Pueblo Motor Way, Inc.

STATEMENT.

By the **Commission**: On April 21, 1926, The Champa 3 Auto Livery Company, a corporation organized under the laws of the State of Colorado, filed with the Commission its application for a certificate of public convenience and necessity to operate a motor transportation system for the transportation of passengers over six routes and between certain designated points fully set forth in the application.

It is alleged, among other facts, in said application that the principal part of applicant's business consists in the transportation of tourists and sightseers by means of automobiles or motor cars, in and to the mountain parks and other places of attraction in the State of Colorado; that applicant has been engaged in such business for a period of approximately twelve years, and that, in making this application, it does not intend to waive any rights that it may have to operate and carry on its said business without procuring a certificate of public convenience and necessity; that the applicant believes that under the statute in such case made and provided it is not required to obtain said certificate for the reason that the system or business operated by the applicant was operated and carried on by it long prior to the time when the statute requiring certificates was enacted; that, without prejudice to applicant's rights in the premises, said applicant nevertheless applies to this Honorable Commission for this certificate, believing that it is in all respects entitled thereto.

This application was set down for hearing at the Hearing Room of the Commission, Denver, Colorado, on June 21, 1926, at which time evidence in support of, and in opposition thereto was introduced. Prior to the commencement of the hearing, The Rocky Mountain Motor Company, The Rocky Mountain Parks Transportation Company and The Denver Cab Company filed a protest to the granting of the certificate to the applicant, mainly on the ground that the protestants have for a long time past, and

are now operating automobile busses and trucks for the carriage of passengers, freight, parcels and express matter, and have adequate facilities and are rendering sufficient and satisfactory service over, and along, the routes covered by and proposed to be operated by applicant, except the route from Denver to Pikes Peak. Oral protest was also made by The Colorado and Southern Railway Company against the granting of a certificate in the so-called Georgetown Loop, Clear Creek District, on the ground that said railroad is now serving the territory in the Clear Creek region adequately and sufficiently to meet all convenience and necessity. Oral protest was also made by The Denver and Intermountain Railroad Company, which operates a suburban electric line between Denver and Golden. A statement by the applicant, to the effect that no pick-up or local passenger service between Denver and Golden, or any intermediate points, is contemplated, practically eliminates this protest.

Because of the conclusions reached by the Commission in the instant application, it is not necessary to discuss and determine the time of the beginning or the continuation of the applicant's business subsequent to July 16, 1917. By way of explanation it should be stated that, until the case of The Greeley Transportation Company v. the People, 245 Pac. 720, decided April 19, 1926, this Commission consistently held that it had no jurisdiction over motor transportation by common carriers except such as was in competition with railroads or street car companies. Since the Greeley Case, *supra*, a great number of applications have been filed such as the instant one where practically all of the operation is not in competition with a railroad.

The automobile sightseeing business from Denver, as involved in a number of applications including the instant one, may be described as a convenient service to a large number of tourists who come to Denver, and the Rocky Mountain region mainly, during the summer months to enable them to see the rugged mountains, deep gorges, wondrous valleys, and many other natural attractions such as only may conveniently be seen by the more flexible service offered by automobile transportation, commencing and terminating at Denver on the same day.

The testimony shows that the applicant is operating a motor transportation system for the purpose of serving the tourists and sightseers who visit the State of Colorado annually; that it has, in this operation, fifteen high grade and substantially built and well equipped automobiles; that the capital invested in said motor transportation system is approximately $40,000; that it has given satisfactory service to said tourists and sightseers; that most of the tourists who secure the service of the applicant prefer to travel by automobile for the reason that there is greater opportunity for sightseeing; that most of the persons who patronize the applicant would not use the railroads because the opportunity for sightseeing is not as great, and many of the spots of great scenic beauty are not served by any railroad; that the applicant is financially responsible and has carried out all of its business contracts. The testimony further shows that all of the operations of the applicant, over the routes designated, are one-day round-trip operations, originating and terminating at Denver on the same day. This does not, however, apply to the operations to Estes Park. None of the operations involve an intermediate business. From June 1 until September 15 annually, the applicant offers to the public a regular scheduled service from Denver to Estes Park and return, twice daily. Return tickets are sold to the public under these operations good for the season.

The principal question for the Commission to determine in this, as well as all other applications for certificates, is what does the public convenience and necessity require; what transportation facilities will be required to conveniently and reasonably serve the public in the territory involved. The Commission has heard about thirty-five applications, all involving primarily sightseeing operations from Denver to various points of interest as are involved in this application. A finding of public convenience and necessity must be made before a certificate based thereon can properly issue. The sightseeing operations from Denver have always heretofore been intensely competitive, and it would seem, therefore, having in mind the service performed and the tourist business served, that for the present and until the Commission can more fully develop a policy and obtain more knowledge of

the requirements of the public, the competitive element will have to be, in a measure, retained. The collective testimony given in these applications for sightseeing operations does not definitely indicate just how much equipment and service is necessary. It was testified by some that from four to six financially dependable operations would meet all public convenience and necessity; others testified from seven to twelve, while others estimated as high as fifteen operations would be necessary to properly take care of the traveling public during the tourist season. Some operations only have in service two or three automobiles, while others ranged from ten to fifteen. The question as to whether the size of the equipment of each particular operation should determine the extent of the certificate granted to it has given the Commission great concern. It would seem that, where an applicant only has two or three automobiles, his operating territory should be limited to such routes as can stand considerable competitive business. Furthermore, the bulk of this particular business occurs about four months of the year; the balance of the eight months the investment stands idle. Those operations that have considerable equipment and facilities tied up during that eight months' period of necessity bear a greater loss during the slack season than those operations that only have a small equipment.

Under the certificate of public convenience and necessity theory, which has been the law of this state since 1917, the requirements of the public being served by the operations, as well as the present established service and its dependability, must, of necessity, be taken into consideration. Every established, reliable, dependable transportation service operated on schedule should not be subjected to ruinous competition which may break down its dependability and make the service inefficient. Just how the Commission can do this, future development of this branch of the transportation system will determine; but the general policy as expressed by legislative enactment, must, of necessity, be directed to conserve existing, satisfactory, dependable, scheduled transportation facilities to such an extent that their future will not be financially impaired. The testimony intro-

duced in this hearing, as well as applications of a similar nature, does not definitely indicate just how much equipment will be necessary to take care of the sightseeing and tourist business; and, having in mind the protection that the established, regular, scheduled service requires and to not endanger the same but to ascertain more fully the requirements, the Commission believes that the equipment now used by every operation, such as the applicant's, should not be increased but should be limited to its present facilities. In this connection, the Commission desires to quote and adopt the language recently used by the Supreme Court of the State of Kansas in the case of Kansas Gas and Electric Company v. Public Service Commission of Kansas, 251 Pac. 1097-1099, in which they discuss the competitive theory as distinguished from the regulatory theory, as applied to certificates of public convenience and necessity, and the elements necessary to a determination of the question of public convenience and necessity. We quote as follows:

"In years agone, when competition was the rule, 'with the race to the swift and the devil take the hindermost,' a public service corporation established its plant, invested its capital, and investors put their savings in its stocks and bonds with their eyes open, knowing the possibility of their investments being rendered unprofitable by the intrusion of competitors in the same field. But they also had the allurement of possible large profits to stimulate their enterprise and to justify their speculative investments. Nowadays, public service companies and their stock and bond holders proceed on a different theory, which has for its basis their confidence in a fair and just administration of the Public Utilities Act. This act, while greatly restricting freedom of corporate action, is designed, among other purposes, to give a measure of security against ruinous competition to prudent investments of public service corporations which give the public reasonably efficient and sufficient service. The very enactment of the statute (R. S. 66-131), forbidding a public utility corporation to transact business without a certificate that the public convenience would be promoted thereby, was manifestly intended to put reasonable limitations to the evils attend-

ant on unnecessary duplication of public utilities. Janicke v. Telephone Co., 96 Kan. 309, 150 P. 633. Its text fairly indicates that unnecessary duplication and ruinous competition are to be avoided, and the power of granting or withholding certificates of convenience is to be exercised with sagacious discretion, not with indifference to legitimate interests likely to be affected by the determination of the official body to whom this important power has been intrusted. Jackman v. Public Service Commission, *supra*. In determining whether such certificate of convenience should be granted, the public convenience ought to be the commission's primary concern, the interest of public utility companies already serving the territory secondary, and the desires and solicitations of the applicant a relatively minor consideration."

The applicant herein has operated a regular scheduled service to Estes Park from June 1 to September 15, inclusive. This does not apply to any other application now pending. It would seem to the Commission that only such as operate a regular scheduled service should be permitted to sell one-way tickets. Every operation that does not conduct a scheduled service should not have the privilege of seriously interfering with the operation of a regular, established, scheduled passenger service. One reason for this is that the regular traveling public is greatly interested in an all year round, dependable passenger service. If the Commission should grant certificates that would permit ruinous competition, with regular scheduled service during the only time of the year when the operation is profitable, the public may lose its regular dependable service during the winter months, when it is not profitable and when, nevertheless, a transportation agency may badly be needed.

Mr. Sam Feldman, manager of the applicant company in the instant case, testified that competition, if it arises through a seasonable operation, is not fair to any transportation company that maintains a dependable, regular, all the year round service. Such service is maintained by The Rocky Mountain Parks Transportation Company between Denver and Estes Park, and by The Denver Cab Company between Denver and Idaho Springs. Such

service the applicant, in the instant case, promises to give to the traveling public between Denver and Estes Park during the tourist season.

The Commission has discussed these problems as applied to the transportation of tourists and sightseers more fully in the instant application, having in mind the disposition of a number of similar applications without again discussing in each decision the reasons which actuated it in reaching its conclusions.

After a careful consideration of all the evidence introduced in this application, the Commission is of the opinion, and so finds, that the present and future public convenience and necessity requires the motor transportation system of passengers operated by The Champa 3 Auto Livery Company to transport passengers over Routes A, B, C, D, E and F as more fully set out in the application herein, which by reference is made a part hereof; that, so far as the points in Routes A and B are concerned, the public convenience and necessity requires a regular scheduled service from June 1 to September 15, inclusive, operated twice daily during that period; that all other operations over the routes designated are limited solely to round-trip service on the same day, and no intermediate business of any kind shall be done on any of the routes designated in the application.

ORDER.

IT IS THEREFORE ORDERED, That the present and future public convenience and necessity requires the motor vehicle operation for the transportation of passengers by The Champa 3 Auto Livery Company, applicant herein, over the following routes:

A. Denver to Estes Park via the North St. Vrain Canon.
B. Denver to Estes Park via the South St. Vrain Canon.
C. Denver to Pikes Peak.
D. Denver to Georgetown Loop.
E. Denver to Echo Lake and Mt. Evans.
F. Denver to Mountain Parks.

Said routes being more fully set forth in the application filed herein, which by reference thereto are hereby made a part hereof,

and this order shall be taken, deemed and held to be a certificate of public convenience and necessity therefor, subject to the following terms and conditions, which, in the opinion of the Commission, the public convenience and necessity requires:

(a) That the applicant shall operate a twice daily scheduled passenger service between Denver and Estes Park from June 1 to September 15, inclusive.

(b) That no transportation of passengers to any intermediate point on the routes designated shall be permitted.

(c) That all operations by the applicant herein, except those mentioned in condition (a) above, shall be limited to sightseeing, round trip, one day operations.

(d) That the quantity of equipment to be used in this operation shall be limited to such as appears in the testimony offered at the hearing herein.

(e) That the applicant shall file a written acceptance of the certificate herein granted within a period of fifteen days from the date hereof, and shall file tariffs of rates, rules and regulations and time schedules, as required by the Rules and Regulations of the Commission governing motor vehicle carriers within a period not to exceed twenty days from the date hereof.

IT IS FURTHER ORDERED, That the applicant shall operate such motor vehicle carrier system, according to the schedules filed with this Commission, except when prevented from so doing by the Act of God, the public enemy, or unusual and extreme weather conditions; and this order is made subject to compliance by the applicant with the rules and regulations now in force or to be hereafter adopted by the Commission with respect to motor vehicle carriers, and also subject to any future legislative action that may be taken with respect thereto.

RE THE DENVER AND INTERURBAN MOTOR COMPANY.

[Application No. 790. Decision No. 1110.]

Corporations—Disregarding corporate fiction.

Courts look through mere names to learn the real relationships between corporations, and if there is practical identity, will disregard the mere formal legal entities.

In issuing certificate of convenience and necessity to a motor vehicle company, all of whose stock was owned by a railroad company, Commission imposed conditions:

(a) That the equipment of the company should not be encumbered; (b) That the capital stock should not be transferred during period of ten years without authority of Commission; (c) That the railroad company extend to the motor vehicle company a credit of $250,000, the amount of the latter's capital stock.

[March 7, 1927.]

Appearances: J. G. Dier, Esq., Denver, Colorado, for applicant; Edward Affolter, Esq., Louisville, Colorado, for the Town of Louisville; John H. Gabriel, Esq., Denver, Colorado, for the Town of Westminster; George H. Swerer, Esq., Denver, Colorado, for The Paradox Land and Transport Company; Frank Church, Esq., for neighborhood of Mandalay Gardens and Wadsworth Avenue.

STATEMENT.

By the **Commission**: On September 28, 1926, The Denver and Interurban Motor Company, applicant herein, filed an application for a certificate of public convenience and necessity authorizing motor bus transportation between Denver and Boulder, via Louisville, Superior, Marshall and other intermediate points. It is alleged in the application, among other facts, that since December 1, 1925, the applicant has been engaged in the operation of motor bus transportation between Denver and Boulder, Colorado, and intermediate points, pursuant to certificate of public convenience and necessity of this Commission issued under date of August 4, 1925, in application No. 454. That the applicant has been operating parlor coach busses between Denver and Boulder pursuant to such certificate, as is shown by a map attached to the application, indicated by a heavy solid black line;

that there is, and in the future will be, an increasing demand for motor bus transportation between Denver and Boulder via Louisville, Superior and Marshall sufficient to warrant and justify the operation of motor busses via such route, providing such operations are in cooperation with and supplementary to the existing railroad service, and not in competition therewith; that similarly, there is a present need and demand, which applicant believes will increase in the future, for cooperative and auxiliary or supplemental motor bus service at and in the vicinity of the village or community of Westminster, and that during the summer tourist or excursion season there is a need or demand for motor bus transportation for tourists or excursionists enroute to or from the resort known as Eldorado Springs; that the extended motor transportation operations of the applicant will not be in competition with any established common carrier, but will, as heretofore stated, be conducted as a supplementary or auxiliary service in connection with the transportation by railroad now furnished between Denver and Boulder.

On October 15, 1926, a statement was filed by the city clerk of Superior, Colorado, in which it is stated that the present transportation service given by the Denver and Interurban Electric line is all that is necessary; that the proposed bus service will be in competition with the electric cars; furthermore, that the hearing in instant application be postponed until the fate of the Denver and Interurban electric line be decided in suits that are now pending in the federal courts.

On October 16, 1926, the board of trustees of the town of Westminster filed a statement consenting to the granting of the certificate of public convenience and necessity as requested.

On October 18, 1926, the town of Louisville filed its protest, in which it is alleged that there is now pending in the District Court of the United States in Denver a proceeding of foreclosure against the property of the Denver and Interurban electric line, because of defaulted payments of principal and interest of certain alleged bonds, the same being entitled Guaranty Trust Company of New York v. The Denver and Interurban Railroad Company, and being No. 8244 in said court; that a receiver has

been appointed for the defendant company; that said receiver has applied to said court for authority to discontinue the electric interurban service heretofore afforded by said defendant company as to its entire system; that the town of Louisville is entirely dependent on said electric line for rail transportation; that said town has intervened in said above described suit insofar as the authority of said court is involved by said receiver to discontinue said service, and has also filed an answer to the petition of said receiver seeking the order for discontinuance, and has therein challenged the jurisdiction of said court to make such orders; that such issues so raised, except only the question of jurisdiction, remain entirely undetermined up to the present time, and that no hearing has been had upon the merits as between the receiver's petition and the said answer of this protestant. That if, as a final result of the action of the said United States District Court the service of said electric line should be discontinued, then the application of the Denver and Interurban Motor Company to provide bus service to the town of Louisville can be considered by this Commission without any question of interference or competition with said Denver and Interurban Railroad Company. That it is the belief of the protestant that if the application of said motor company is granted and service begun thereunder, that it will be in direct and ruinous competition with the said electric service; that it is the belief that the competition heretofore caused by said motor company has substantially influenced, if not directly caused, the alleged present financial condition of the said Denver and Interurban Railroad Company, and brought about its present alleged plight; that it is the belief of the protestant that this application has been presented to this Commission in order to influence the determination of the question of the total abandonment of said electric service as was involved in the proceeding in the United States court; that said protestant now has reasonable and satisfactory service by said electric system, that the same is dependable when most required in the wintertime and time of heavy snows, which cannot be said of the proposed service by bus, and that the protestant requests and suggests that the hearing on the applica-

tion herein be suspended or continued until a determination has been had in the suit before the United States District Court as to the abandonment of said electric railroad system and service.

On January 17, 1927, the town of Westminster filed with this Commission a statement setting forth a time schedule and rates, and suggests to this Commission that the certificate herein be granted to the applicant to run its bus lines to and through the town of Westminster only upon the schedule suggested and for the rates of fares designated.

On January 18, 1927, the Paradox Land and Transport Company filed with the Commission a protest, in which it is alleged it has filed an application for a certificate of public convenience and necessity over the same route in question, and that any decision in the instant application be reserved until hearing is had upon protestant's application herein, and that the application of the applicant herein be denied.

This case was set down for public hearing at the Hearing Room of the Commission, 305 State Office Building, Denver, Colorado, on January 18, 1927, at which time evidence in support of and in opposition to said application was introduced.

At the hearing the applicant asked to amend its application by including as a part of the route for which it is asking a certificate, the public highway designated in Exhibit No. 3 in green, the purpose of which was to serve the public in and around Semper and Church's, also called Mandalay District, when and as soon as the highway in question had been properly graveled and made sufficiently suitable for bus operation. This amendment was allowed.

The testimony shows that the Denver and Interurban Motor Company is a subsidiary of the Colorado and Southern Railway Company. A certificate was granted to the applicant herein on August 4, 1925, to conduct motor operations between Denver and Boulder, via Lafayette. The capitalization of the company is $250,000.00. The financial responsibility of the Colorado and Southern Railway Company is submitted to the Commission as being substantially the financial responsibility of the Denver and Interurban Motor Company, the applicant herein. At pres-

ent the investment in busses and shop equipment is approximately $87,000.00. If new equipment is needed there are two ways possible, one by the sale of stock, the other of advancement by the Colorado and Southern Railway Company. All of the capital stock of the company, except the qualifying shares issued to the directors, are held in ownership by the Colorado and Southern Railway Company. The equipment itself is unencumbered.

The Denver and Interurban Railroad Company, a subsidiary of the Colorado and Southern Railway Company, practically served most of the territory involved herein by electric line service until it was recently abandoned through an order of the United States District Court for the District of Colorado in a foreclosure proceeding. This abandonment was never authorized by this Commission. The Colorado and Southern has a steam rail transportation line that also, to a certain extent, serves the territory in question.

Very little, if any, testimony was introduced in opposition to the question of public convenience and necessity for the operation involved. While it was urged by the Paradox Land and Transport Company to defer the decision in this case until its application could be heard, no testimony in opposition to the proposed application by the transport company was introduced.

The evidence shows the United States District Court of Colorado has authorized abandonment of the electric line service, and that the territory now, in addition to the steam railroad service, is being served solely by the motor service offered by the applicant.

The greatest concern expressed in the record by the public involved the dependability and future continued operation of the motor line of the applicant. The fact that the service of the Denver and Interurban Railroad Company was abandoned in a foreclosure proceeding in court has disturbed the confidence of the public involved as to the future continuance of the proposed service.

The applicant herein, as well as the abandoned Denver and Interurban Railroad Company, which operated an electric line,

are both subsidiaries of the Colorado and Southern Railway Company. In the instant hearing the financial responsibility of the Colorado and Southern Railway Company is offered as evidence upon which a certificate should be obtained. Just how the public may be assured of this financial responsibility has given the Commission serious concern. In situations where one corporation is subsidiary to and owned and controlled by another, courts look through mere names to learn the real relationships between the corporations, and if there is practical identity will disregard the mere formal separation into legal entities. Bishop v. United States, 16 (Fed.) (2d), 410, 415, and numerous cases cited.

The Commission feels, under the circumstances, that since all of the stock ownership is in the Colorado and Southern Railway Company, that in some direct manner it should be held responsible for the financial dependability of the applicant herein; that the public convenience and necessity requires that a certificate issued to the applicant should contain such conditions as will reasonably insure to the public a continued dependable service. The Commission is of the opinion that the equipment of the applicant herein should not be encumbered in any way; furthermore, that the capital stock of the applicant herein, now held by the Colorado and Southern Railway Company, should not be transferable without an order of this Commission for a period of at least ten years; furthermore, that the Colorado and Southern Railway Company extend its credit to the applicant herein to the extent of its capital stock, in the sum of $250,000.

After a careful consideration of all the evidence submitted, the Commission is of the opinion, and so finds, that the present and future public convenience and necessity requires the motor bus system of the Denver and Interurban Motor Company, applicant herein, between Denver and Boulder, via Louisville, Superior, Marshall and Semper, and to Eldorado Springs for the summer season only, for the transportation of passengers, packages, express, mail and newspapers, subject to the conditions suggested above.

ORDER.

IT IS, THEREFORE, ORDERED, That the present and future public convenience and necessity requires the motor bus system for the transportation of passengers, packages, express, mail and newspapers between Denver and Boulder, via Louisville, Superior, Marshall and Semper, daily, and to Eldorado Springs during the summer season, on the route fully described in Exhibit 3, by reference hereto made a part hereof, by the Denver and Interurban Motor Company, applicant herein, and this order shall be taken, deemed and held to be a certificate of public convenience and necessity therefor, subject to the following terms and conditions which, in the opinion of the Commission, the public convenience and necessity requires:

(a) That the applicant herein shall not in any way encumber its equipment necessary and used in its operation.

(b) That all of the capital stock of the applicant now held by the Colorado and Southern Railway Company be not sold, assigned or transferred for a period of ten years from the date hereof, except by order of this Commission.

(c) That the Colorado and Southern Railway Company will extend credit to the applicant herein in the sum of $250,000.00 to properly and efficiently operate the service of the applicant, and to purchase any additional equipment necessary to serve the public.

(d) That the applicant, as well as the Colorado and Southern Railway Company, shall file written acceptance of the certificate herein granted, under the conditions above enumerated, within a period of fifteen days from the date hereof, and shall file tariffs of rates, rules and regulations and time schedules as required by the rules and regulations of the Commission governing motor vehicle carriers within a period not exceeding twenty days from the date hereof.

IT IS FURTHER ORDERED, That the applicant shall operate such motor bus system according to the schedules filed with this Commission, except when prevented from so doing by the Act of God, the public enemy, or unusual and extreme weather condi-

tions; and this order is made subject to compliance by the applicant with the rules and regulations in force and to be hereafter adopted by the Commission with respect to motor vehicle carriers, and also subject to any future legislative action that may be taken with respect thereto.

RE FRANK BARCROFT, *et al.*, DOING BUSINESS AS THE BROWN AND WHITE CAB COMPANY.

[Application No. 544. Decision No. 1114.]

Certificate of convenience and necessity issued authorizing certain motor vehicle sightseeing operations out of Denver, and imposing conditions stated.

[March 7, 1927.]

Appearances: J. W. Kelley, Esq., Denver, Colorado, for applicant; D. Edgar Wilson, Esq., Denver, Colorado, for the Rocky Mountain Motor Company, the Rocky Mountain Parks Transportation Company and the Denver Cab Company; J. Q. Dier, Esq., and J. E. Buckingham, Esq., Denver, Colorado, for The Colorado and Southern Railway Company; W. A. Alexander and Montgomery Dorsey, Esq., Denver, Colorado, for the Denver and Intermountain Railroad Company; Thos. R. Woodrow, Esq., Denver, Colorado, for the Denver-Colorado Springs-Pueblo Motor Way, Inc., and the Denver and Rio Grande Western Railroad Company; Erl H. Ellis, Esq., Denver, Colorado, for the Atchison, Topeka and Santa Fe Railway Company.

STATEMENT.

By the **Commission**: On April 20, 1926, Frank Barcroft and Edith Barcroft, applicants herein, doing business as a co-partnership under the name of the Brown and White Cab Company, filed their application with this Commission for a certificate of public convenience and necessity to operate a motor transportation system for the transportation of passengers over six routes and to certain designated points fully set forth in the application. On May 15, the applicants filed an amended petition sub-

stantially for the same routes. Protests were filed against this application by the Rocky Mountain Parks Transportation Company and the Denver Cab Company. Protests were also entered orally by the Colorado and Southern Railway Company and the Denver and Intermountain Railroad Company.

This application was set down for public hearing on June 21, 1926, at the Hearing Room of the Commission, State Office Building, Denver, Colorado, at which time evidence in support of and in opposition thereto was received.

The applicants herein seek a motor operation to serve the tourist and sightseeing public from Denver. They do not operate on a regular schedule. The equipment of the applicant consists of five Cadillac automobiles. They have been in business for five years. Their capital investment amounts to approximately $25,000.

The Commission has fully discussed the principles, circumstances and conditions applicable to the tourist and sightseeing business from Denver by motor operation in the application of Champa 3 Auto Livery Company, No. 545, Decision 1106, to which reference is hereby made, and, therefore, deems it unnecessary in the instant application to again make a detailed report. After a careful consideration of all the evidence introduced in this application, the Commission is of the opinion, and so finds, that the present and future public convenience and necessity requires the motor transportation system of passengers operated by Frank Barcroft and Edith Barcroft, a co-partnership doing business as the Brown and White Cab Company, to transport passengers over the six routes designated, as more fully set out in the application herein, which by reference is made a part hereof; that all operations over the routes designated are limited solely to round trip service on the same day, and no intermediate business of any kind shall be done on any of said routes.

ORDER.

IT IS THEREFORE ORDERED, That the present and future public convenience and necessity requires the motor vehicle operation for the transportation of passengers by Frank Barcroft and

Edith Barcroft, a co-partnership doing business as the Brown and White Cab Company, applicants herein, over the following routes:

A. Denver to Pikes Peak.
B. Denver to Mountain Parks.
C. Denver to Georgetown Loop.
D. Denver to Echo Lake and Mt. Evans.
E. Denver to Estes Park, north trip.
F. Denver to Estes Park, south trip.

Said routes being more fully set forth in the application filed herein, which by reference thereto are made a part hereof; and this order shall be taken, deemed and held to be a certificate of public convenience and necessity therefor, subject to the following terms and conditions, which, in the opinion of the Commission, the public convenience and necessity requires:

(a) That no transportation of passengers to any intermediate points on the routes designated shall be permitted.

(b) That all operations by the applicants herein shall be limited to sightseeing, round trip, one day operations.

(c) That the quantity of equipment to be used in this operation shall be limited to such as appears in the testimony offered at the hearing herein.

(d) That the applicants shall file their written acceptance of the certificate herein granted within a period of fifteen days from the date hereof, and shall file tariffs of rates, rules and regulations and time schedules as required by the rules and regulations of the Commission governing motor vehicle carriers within a period of not to exceed twenty days from the date hereof.

IT IS FURTHER ORDERED, That this certificate is issued subject to compliance by the applicant with the rules and regulations now in force or to be hereafter adopted by the Commission with respect to motor vehicle carriers, and also subject to any future legislative action that may be taken with respect thereto.

Certificates of convenience and necessity substantially the same as the one issued in the Barcroft application, Decision No. 1114, were issued in the following applications:

The Colorado Cab Company, Application No. 549, Decision No. 1115.

J. L. Brooks, et al., doing business as The Oxford Auto Company, Application No. 556, Decision No. 1118.

Michael P. Masterson, doing business as The Masterson Auto Service Co., Application No. 557, Decision No. 1120.

The Burke Taxicab Line, Inc., Application No. 562, Decision No. 1121.

C. W. Whitney, et al., doing business as Whitney & Perry Sight Seeing Co., Application No. 563, Decision No. 1122.

Charles W. Davis, doing business as Davis Sightseeing Service, Application No. 577, Decision No. 1123.

Nick Ranker, et al., doing business as Ranker and Semler, Application No. 568, Decision No. 1124.

Charles P. Fallico, et al., doing business as Fallico Auto Livery, Application No. 552, Decision No. 1134.

James Ryan, et al., doing business as The Shamrock Taxicab Co., Application No. 574, Decision No. 1144.

Roy L. Schram, doing business as The Schram Scenic Auto Tours, Application No. 677, Decision No. 1145.

W. M. Renard, Application No. 1131, Decision No. 2242.

RE STEPHEN S. PERRY, DOING BUSINESS AS CHAMPA 10 TAXI AND SIGHT-SEEING SERVICE.

[Application No. 555. Decision No. 1117.]

Certificate of convenience and necessity issued authorizing certain motor vehicle sightseeing operations out of Denver, and imposing conditions stated.

[March 7, 1927.]

Appearances: H. Berman, Esq., Denver, Colorado, for applicant; D. Edgar Wilson, Esq., Denver, Colorado, for the Rocky Mountain Motor Company, the Rocky Mountain Parks Transportation Company and the Denver Cab Company; Thomas R. Woodrow, Esq., Denver, Colorado, for the Denver and Rio Grande Western Railroad Company and the Denver-Colorado Springs-Pueblo Motor Way, Inc.; J. Q. Dier, Esq., Denver, Colorado, for the Colorado and Southern Railway Company; W. A. Alexander and M. Dorsey, Denver, Colorado, for the Denver and Intermountain Railroad Company.

STATEMENT.

By the **Commission**: On April 23, 1926, Stephen S. Perry, doing business under the name of Champa 10 Taxi and Sightseeing Service, filed his application with this Commission for a

certificate of public convenience and necessity to operate a motor transportation system for the transportation of passengers over seven routes and to certain designated points set forth in the application. Protests were filed against this application by the Rocky Mountain Parks Transportation Company and the Denver Cab Company. Protests were also entered orally by the Colorado and Southern Railway Company and the Denver and Intermountain Railroad Company.

This application was set down for public hearing on June 23, 1926, at the Hearing Room of the Commission, State Office Building, Denver, Colorado, at which time evidence in support of, and in opposition thereto, was received. At the hearing, the applicant asked to have his application amended by striking out route G, from Denver to Grand Lake, Colorado, which was allowed.

The applicant herein seeks a motor operation to serve the tourists and sightseeing public from Denver. He does not operate on a regular schedule; his equipment consists of one Dodge and one Cadillac automobile. The capital investment amounts to approximately $1500. He has been in business for about three years.

The Commission has fully discussed the principles, circumstances and conditions applicable to the tourist and sightseeing business from Denver by motor operation in the application of Champa 3 Auto Livery Company, No. 545, Decision 1106, to which reference is hereby made, and, therefore, deems it unnecessary in the instant application to again make a detailed report, but contents itself by making this reference thereto. After a careful consideration of all the evidence introduced in this application, the Commission is of the opinion, and so finds, that the present and future public convenience and necessity requires the motor transportation system of passengers, operated by Stephen S. Perry, under the name of Champa 10 Taxi and Sightseeing Service, to transport passengers over routes C, D, E and F, as more fully set out in the application herein, which by reference is made a part hereof; that all operations over the said

routes are limited solely to round trip service on the same day, and no intermediate business of any kind shall be done on any of said routes.

ORDER.

IT IS, THEREFORE, ORDERED, That the present and future public convenience and necessity requires the motor vehicle operation for the transportation of passengers by Stephen S. Perry, doing business under the name of Champa 10 Taxi and Sightseeing Service, applicant herein, over the following routes:

A. Denver to Pikes Peak and Colorado Springs region.
B. Denver to Georgetown Loop.
C. Denver to Echo Lake and Mt. Evans.
D. Denver to Denver Mountain Parks.

Said routes being set forth in the application filed herein, which by reference thereto are made a part hereof; and this order shall be taken, deemed and held to be a certificate of public convenience and necessity therefor, subject to the following terms and conditions, which, in the opinion of the Commission, the public convenience and necessity requires:

(a) That no transportation of passengers to any intermediate points on the routes designated shall be permitted.

(b) That all operations by the applicant herein shall be limited to sightseeing, round trip, one day operations.

(c) That the quantity of equipment to be used in this operation shall be limited to such as appears in the testimony offered at the hearing herein.

(d) That the applicant shall file his written acceptance of the certificate herein granted within a period of fifteen days from the date hereof, and shall file tariffs of rates, rules and regulations and time schedules as required by the Rules and Regulations of the Commission governing motor vehicle carriers within a period of not to exceed twenty days from the date hereof.

IT IS FURTHER ORDERED, That this certificate is issued subject to compliance by the applicant with the rules and regulations now in force or to be hereafter adopted by the Commission with

respect to motor vehicle carriers, and also subject to any future legislative action that may be taken with respect thereto.

Certificates of convenience and necessity substanially the same as the one issued in the application of Stephen S. Perry application, Decision No. 1117, were issued in the following applications:

W. B. Fink, et al., doing business as the Wynne Sightseeing Co., Application No. 561, Decision No. 1119.

Arthur Bawden, doing business as The Arthur Taxi Service Co., Application No. 567, Decision No. 1125.

Harry Large, et al., doing business as Large & Peterson, Application No. 582, Decision No. 1135.

R. Harolson, doing business as The Montview Sightseeing Co., Application No. 586, Decision No. 1136.

Charles R. Quigley, et al., doing business as Broadway Sightseeing Co., Application No. 585, Decision No. 1138.

C. H. Malone, doing business as Globe Sightseeing Co., Application No. 579, Decision No. 1139.

Robert H. Logan, doing business as The Logan Auto Tours, Application No. 606, Decision No. 1140.

Ray E. Ott, doing business as The Square Deal Auto Service Co., Application No. 593, Decision No. 1141.

Robert Wirth, doing business as The Hotel De Soto Sightseeing Co., Application No. 688, Decision No. 1142.

Fred E. Weidman, et al., doing business as Western Scenic Auto Co., Application No. 645, Decision No. 1143.

John R. Beard, doing business as Beard Taxi Service, Application No. 622, Decision No. 1309.

David R. Mannison, Application No. 885, Decision No. 1310.

W. F. Marlar, Application No. 720, Decision No. 1334.

Paul Schwank, Application No. 937, Decision No. 1387. (Operation limited to Argonaut Hotel only.)

RE JACK D. GEIST, DOING BUSINES AS JACK'S AUTO SIGHTSEEING COMPANY.

[Application No. 578. Decision No. 1137.]

Certificate of convenience and necessity issued authorizing motor vehicle transportation of passengers in sightseeing operations between Denver and Pikes Peak, Denver Mountain Parks, and Echo Lake and Mt. Evans, under conditions prescribed.

RE ARTHUR N. BUNNELL.

[Application No. 620. Decision No. 1146.]

Certificate of convenience and necessity issued authorizing motor vehicle transportation of passengers in sightseeing operations between Denver and Denver Mountain Parks, Silver Plume and Pikes Peak, under conditions prescribed.

RE JOSEPH FREILINGER.

[Application No. 583. Decision No. 1295.]

Certificate of convenience and necessity issued authorizing motor vehicle transportation of passengers on sightseeing trips between Denver and Pikes Peak, and Georgetown and Silver Plume, upon conditions imposed in other sightseeing certificates issued to Denver operators.

RE ED BURROWS.

[Application No. 644. Decision No. 1308.]

Certificate of convenience and necessity issued authorizing motor vehicle transportation of passengers on sightseeing trips between Denver and Pikes Peak, Georgetown and Silver Plume via Idaho Springs, and return via Bear Creek Canon, Echo Lake via Bear Creek Canon, and Denver Mountain Parks, subject to conditions imposed in certificates issued to other Denver sightseeing operators.

RE F. B. WAGNER, DOING BUSINESS AS THE ROCKY MOUNTAIN PARKS SIGHTSEEING COMPANY.

[Application No. 550. Decision No. 1116.]

Failure of motor vehicle sightseeing operator to make customary settlement at end of season with other operators on account of exchange of passengers affects reliability and dependability of applicant.

[March 7, 1927.]

Appearances: C. A. Prentiss, Esq., Denver, Colorado, for applicant; D. Edgar Wilson, Esq., Denver, Colorado, for the Rocky Mountain Motor Company, the Rocky Mountain Parks Transportation Company and the Denver Cab Company; J. Q. Dier, Esq., Denver, Colorado, for the Colorado and Southern Railway Company; Thos. R. Woodrow, Esq., Denver, Colorado, for the Denver and Rio Grande Western Railroad Company and the Denver-Colorado Springs-Pueblo Motor Way, Inc.; M. Dorsey, Esq., Denver, Colorado, for the Denver and Intermountain Railroad Company.

STATEMENT.

By the **Commission**: On April 22, 1926, F. B. Wagner, doing business under the name of the Rocky Mountain Parks Sightseeing Company, filed his application with this Commission for a certificate of public convenience and necessity to operate a motor transportation system for the transportation of passengers over six routes and to certain designated points fully set forth in the application. Protests were filed against this application by the Rocky Mountain Parks Transportation Company and the Denver Cab Company; protests were also entered orally by the Colorado and Southern Railway Company and the Denver and Intermountain Railroad Company.

This application was set down for public hearing on June 21, 1926, at the Hearing Room of the Commission, State Office Building, Denver, Colorado, at which time evidence in support of, and in opposition thereto, was received. At the hearing, Mr. Wagner claimed that he was in partnership with his wife; that he has been in the sightseeing business about seven or eight years; that his equipment consists of two automobiles.

The application filed does not allege any partnership, furthermore the evidence is very unsatisfactory as to the terms of the partnership. The testimony further shows that in his relations with other sightseeing operations from Denver he has not complied with his obligations toward them. It seems that, during the busy season, sightseeing operators exchange passengers where they do not have a sufficient load or where more patrons offer themselves than their equipment permits. Under such circumstances, a settlement is made around about October 1 after the close of the tourist season. The testimony shows that Mr. Wagner has not made such settlements. This, in our opinion, affects his reliability and dependability.

After a careful consideration of all the evidence introduced in this application, the Commission is of the opinion, and so finds, that in the public interest the applicant herein is not sufficiently dependable and reliable to receive a certificate of public convenience and necessity to operate as a motor vehicle carrier, as requested under his application.

ORDER.

IT IS THEREFORE ORDERED, That the application of F. B. Wagner, doing business under the name of the Rocky Mountain Parks Sightseeing Company, be, and the same is hereby, denied.

RE JAMES W. CAREY, DOING BUSINESS AS THE JIM CAREY AUTO SERVICE.

[Application No. 636. Decision No. 1157.]

Certificate of convenience and necessity issued authorizing certain motor vehicle sightseeing operations for one year out of Colorado Springs, and imposing certain conditions.

[March 29, 1927.]

Appearance: James W. Carey, Esq., Colorado Springs, Colorado, *per se*.

STATEMENT.

By the **Commission**: The above application, in addition to a large number of applications heard by this Commission, proposes a motor transportation system for the transportation of passengers to all the scenic attractions in the so-called Pikes Peak Region. The proposed operation is solely for the purpose of serving the tourist and sightseeing public from Colorado Springs, Colorado; there is no proposal to operate on a regular schedule, nor is there any suggestion that the proposed operation would be in competition with any established transportation service for passengers operated on schedule. All operations over the routes designated are limited solely to round trip service and no one-way operations are in contemplation.

A number of the larger sightseeing motor operations in Colorado Springs have suggested to the Commission that a certificate be issued at this time for the period of one year, in order that the Commission, as well as the operators, may have the benefit of a regulated service of this kind of an operation over that period to better determine what the public convenience and necessity requires.

The Commission is frank to admit that there are several problems in connection with these operations that it is not now in a position to answer, and which may be more satisfactorily adjusted and determined after the experience under regulated service of one year's operation. Some of the applicants in this sightseeing and tourist business also operate a taxi service, as well as renting cars by the hour and the day to wherever a patron may desire to go. The Commission, on the record made, has been unable to determine now just how to regulate such service and, therefore, defers any opinion as relating to such service until the final determination of this application.

The Commission is of the opinion that the public convenience and necessity requires that the applicant herein receive a certificate of public convenience and necessity to operate a motor transportation system for the transportation of passengers in the sightseeing and tourist business for one year from the date of this order, subject to such conditions as the Commission deems the public convenience and necessity requires. The Commission, however, will retain jurisdiction over this application for final determination some time within the next year, unless such time is further extended, and the record made in this application shall be taken into consideration in addition to such further record as may be deemed necessary before such application is finally determined.

ORDER.

IT IS THEREFORE ORDERED, That the public convenience and necessity requires that a certificate of public convenience and necessity be issued to the applicant herein for the term of one year, to operate a motor transportation system for the transportation of passengers from Colorado Springs, Colorado, to the various scenic attractions in the Pikes Peak Region, and this order shall be taken, deemed and held to be a certificate of public convenience and necessity for one year from the date hereof, subject to the following terms and conditions which, in the opinion of the Commission, the public convenience and necessity requires:

(a) That all sightseeing and tourist operations by the applicant herein shall be limited to round trip operations originating and terminating at the point of origin of the service.

(b) That no one-way transportation of passengers is permitted to any of the points in said Pikes Peak Region.

(c) That the quantity of equipment to be used in this operation shall be limited to such as appears in the testimony offered at the hearing herein.

(d) That the certificate of public convenience and necessity hereby issued shall be good for one year only from the date hereof, and that the Commission retains jurisdiction over the application herein for further hearing and determination, and for such disposition as the Commission deems the public convenience and necessity shall require.

IT IS FURTHER ORDERED, That the applicant herein shall file tariffs of rates, rules and regulations as required by the Rules and Regulations of the Commission governing motor vehicle carriers within a period of not to exceed twenty days from the date hereof; and that this certificate is issued subject to compliance by the applicant with the Rules and Regulations now in force or to be hereafter adopted by the Commission with respect to motor vehicle carriers, and also subject to any future legislative action that may be taken with respect thereto.

Certificates of convenience and necessity identical with the one issued in the Carey application, Decision No. 1157, were issued in the following applications:

W. F. Conway, et al., doing business as Conway Brothers, Application No. 621, Decision No. 1158.

Almeron Davis, Application No. 620, Decision No. 1159.

The Acacia Auto Co., Application No. 618, Decision No. 1160.

F. B. Bryant, doing business as The Bryant Auto Livery, Application No. 615, Decision No. 1161.

C. F. Garriott, doing business as The C. F. Garriott Sightseeing Business, Application No. 613, Decision No. 1162.

J. R. Snyder, doing business as The Snyder Scenic Auto Co., Application No. 609, Decision No. 1164.

The Yellow Cab Co. of Colorado Springs, Application No. 635, Decision No. 1165.

The Hammond Scenic Auto Co., Application No. 581, Decision No. 1169 (authorizing operations out of both Colorado Springs and Manitou).

L. E. Dicks, Application No. 599, Decision No. 1170 (authorizing operations out of both Colorado Springs and Manitou).

Thomas L. Reasoner, doing business as The Scenic Auto Co., Application No. 594, Decision No. 1171.

The Pikes Peak Automobile Co., Application No. 573, Decision No. 1172.

J. M. Buster, et al., doing business as The Buster & Williams Touring Co., Application No. 572, Decision No. 1173.

John O'Byrne, Application No. 592, Decision No. 1174.

William Irvine, Application No. 637, Decision No. 1175.

George H. Miller, Application No. 643, Decision No. 1177.

Luther C. Johnson, Application No. 647, Decision No. 1178.

F. M. Thompson, et al., doing business as The Colorado Springs Sightseeing Co., Application No. 652, Decision No. 1179.

L. L. Schwartz, Application No. 653, Decision No. 1180.

Otto Quillen, doing business as Otto's Scenic Co., Application No. 668, Decision No. 1181 (authorizing operations from Prospect Lake Auto Camp only).

Elk Hotel Co., Application No. 659, Decision No. 1182.

James T. Freeman, Application No. 661, Decision No. 1183.

Mrs. D. F. Gaines, Application No. 666, Decision No. 1184.

M. H. Grams, Application No. 825, Decision No. 1185.

C. W. Knight, et al., doing business as Knight and Tarman Sightseeing Company, Application No. 694, Decision No. 1186.

Florenz Ordelheide, Application No. 718, Decision No. 1188.

T. H. Smith, Application No. 753, Decision No. 1189 (authorizing operations from Rodeo Camp Grounds only).

P. B. Turner, Application No. 713, Decision No. 1191.

P. B. McCrary, et al., doing business as The Colorado Touring Co., Application No. 715, Decision No. 1193.

O. M. Early, et al., doing business as The Cadillac Touring Co., Application No. 733, Decision No. 1194.

Antlers Livery & Taxicab Co., Application No. 737, Decision No. 1195.

J. G. Shabouh, Application No. 736, Decision No. 1196 (authorizing operations out of both Colorado Springs and Manitou).

Arthur S. Hilles, doing business as The Colorado Springs Scenic Co., Application No. 670, Decision No. 1199.

Cragmore Sanatorium, Application No. 689, Decision No. 1203.

William Nuttall, Application No. 776, Decision No. 1248.

B. E. Beals, Application No. 847, Decision No. 1249.

I. C. Collins, et al., doing business as The Mountain Circle Auto Co., Application No. 849, Decision No. 1250.

The Seven Falls Co., Application No. 750, Decision No. 1251 (authorizing operations out of Seven Falls, Stratton Park only).

C. J. Lepel, Application No. 855, Decision No. 1252.

Charles Meter, Application No. 856, Decision No. 1253.

Katkan W. Parker, Application No. 862, Decision No. 1254.

George W. Clark, Application No. 877, Decision No. 1257.

Wallace Gribble, Application No. 656, Decision No. 1318.

E. W. Cook, Application No. 872, Decision No. 1319.

Edward Madison, Application No. 874, Decision No. 1320.

M. N. Fain, Application No. 910, Decision No. 1322 (authorizing operations out of Prospect Lake and Hopkins camps only).

W. H. Crowl, Application No. 906, Decision No. 1393.

In the following applications the certificates issued are identical with the ones issued in the preceding applications, except that the operations authorized are out of Manitou:

George J. Wetherald, et al., doing business as The G. & W. Garage and Tours Co., Application No. 612, Decision No. 1163.

T. E. Anderson, Application No. 614, Decision No. 1166.

Edward E. Nichols, Applications Nos. 601 and 602.

Harry L. Anderson, doing business as The Anderson and Harry Seeing Colorado Co., Application No. 595, Decision No. 1168.

Russell Foster, Application No. 640, Decision No. 1176.

William Olson, Application No. 837, Decision No. 1187.

F. J. Burghart, Application No. 780, Decision No. 1190.

Oscar Baughman, Application No. 714, Decision No. 1192.

Clyde W. Carmer, Application No. 748, Decision No. 1197.

Geo. E. Bateman, Application No. 749, Decision No. 1198.

Henry Muscati, Application No. 651, Decision No. 1246.

Frank W. Hoepner, Application No. 664, Decision No. 1247.

Beryl Spradling, Application No. 864, Decision No. 1255.

W. W. Walker, Application No. 865, Decision No. 1256.

T. A. Hailey, doing business as The Rocky Mountain Sightseeing Co., Application No. 639, Decision No. 1317.

Jesse Taylor, Application No. 846, Decision No. 1321.

Roy Padgett, Application No. 920, Decision No. 1360.

Harry Fraser, Application No. 915, Decision No. 1362.

Arthur S. Hillis, Application No. 939, Decision No. 1384 (authorizing operation out of El Colorado Lodge only).

RE FLORENCE C. MOLLOY, *et al.*, DOING BUSINESS AS MOLLOY TOURS.

[Application No. 706. Decision No. 1212.]

Certificate of convenience and necessity issued authorizing motor vehicle transportation of passengers on sightseeing trips between Boulder and points named, subject to conditions stated.

[April 4, 1927.]

Appearances: Frank L. Moorhead, Esq., Boulder, Colorado, for the applicant; J. Q. Dier, Esq., Denver, Colorado, for the Colorado and Southern Railway Company.

STATEMENT.

By the **Commission**: On June 10, 1926, Florence C. Molloy and Mabel N. Macleay, co-partners, doing business under the firm name of Molloy and Macleay, filed their application with

this Commission for a certificate of public convenience and necessity to conduct a motor transportation system for the transportation of the sightseeing public from the city of Boulder to various scenic attractions. No written protest was filed against this application. The same was set down for hearing at the Hearing Room of the Commission, Denver, Colorado, on February 10, 1927, at which time evidence in support of said application was received. Oral protest was entered by the Colorado and Southern Railway Company at the time of the hearing. The applicants asked that their petition be amended so as to show that the name under which this business is to be conducted be designated as the Molloy Tours, which was allowed.

Points to which this service from Boulder, Colorado, is to be operated are as follows: Estes Park, Idaho Springs, Mount Evans, Corona, Stapp's Lake, Arapahoe Glacier Region, Apex and Georgetown Loop, Colorado Springs, Cripple Creek, Grand Lake and Gold Hill. The operations are not conducted on regular schedule. It consists of sightseeing business from Boulder, mainly during the summer months, to enable the traveling public to see the various scenic attractions by the more flexible service offered by automobile transportation commencing and terminating at Boulder. No one-way tickets are sold to any point and there is no intention on the part of the applicants to serve the public as a passenger operation as distinguished from a sightseeing operation.

The equipment of the applicants consists of five seven-passenger automobiles. The investment is approximately $15,000.

After a careful consideration of all the evidence introduced at the hearing in this application, the Commission is of the opinion and so finds that the present and future public convenience and necessity requires the motor transportation system of passengers operated by Florence C. Molloy and Mabel N. Macleay, co-partners, doing business under the name of the Molloy Tours, to transport sightseeing passengers from Boulder to Estes Park, Idaho Springs, Mount Evans, Corona, Stapp's Lake, Arapahoe Glacier Region, Apex and Georgetown Loop, Colorado Springs,

Cripple Creek, Grand Lake and Gold Hill and return, subject to certain conditions contained in the order.

ORDER.

IT IS THEREFORE ORDERED, That the present and future public convenience and necessity requires the motor vehicle system for the transportation of passengers by Florence C. Molloy and Mabel N. Macleay, co-partners, doing business under the name of Molloy Tours, applicants herein:

A. Boulder to Estes Park.
B. Boulder to Idaho Springs.
C. Boulder to Mount Evans.
D. Boulder to Corona.
E. Boulder to Stapp's Lake.
F. Boulder to Arapahoe Glacier Region.
G. Boulder to Apex and Georgetown Loop.
H. Boulder to Colorado Springs.
I. Boulder to Cripple Creek.
J. Boulder to Grand Lake and Gold Hill.

And this order shall be taken, deemed and held to be a certificate of public convenience and necessity therefor, subject to the following terms and conditions, which, in the opinion of the Commission, the public convenience and necessity requires:

(a) That no transportation of passengers to any intermediate point shall be permitted.

(b) That all operations by the applicants herein shall be limited to sightseeing round trip operations originating and terminating at Boulder, Colorado.

(c) That the quantity of equipment to be used in this operation shall be limited to such as appears in the testimony offered at the hearing herein.

(d) That the applicants shall file a written acceptance of the certificate herein granted within a period of fifteen days from the date hereof and shall file tariffs of rates, rules and regulations as required by the Rules and Regulations of the Commission governing motor vehicle carriers within a period not to exceed twenty days from the date hereof.

IT IS FURTHER ORDERED, That this certificate is granted subject to the compliance by the applicants with the Rules and Regulations now in force or to be hereafter adopted by the Commission with respect to motor vehicle carriers and also subject to any future legislative action that may be taken with respect thereto.

RE APPLES, CULL OR WINDFALL, REFUSE AND WASTE.

[Investigation and Suspension Docket No. 80. Decision No. 1214.]

Rates—Improper mixing classes of freight—No ground for increasing rates—Apples.

1. That shippers in violation of the tariff may mix first class apples with culls has no bearing on the reasonableness of the cull apples rate. The policing of shipments is a matter for the carrier.

2. Proposed increase from 34 cents to 63½ cents per 100 pounds on apples, cull or windfall, refuse and waste in box cars from Mack, Paonia and Montrose to Denver and other points named held not justified by the carrier.

[April 4, 1927.]

Appearances: J. A. Gallaher and B. W. Robbins, Denver, Colorado, for the Denver and Rio Grande Western Railroad Company; Geo. A. Crowder and Henry Sobal, Denver, Colorado, for Puritan Products Company.

STATEMENT.

By the **Commission**: This cause is before the Commission as a result of State amendment No. 16 to freight tariff D. & R. G. W., G. F. D. No. 5922-B, Colo. P. U. C. No. 61, filed July 21, 1926, to become effective August 24, 1926, by the Denver and Rio Grande Western Railroad Company, wherein it proposes to cancel the 34 cents per 100 pounds rate on Apples, Cull, Windfall, Refuse and Waste (in box cars) from Mack, Paonia and Montrose, Colorado, to Denver, Colorado Springs, Colorado City, Jansen, Minnequa, Pueblo, Trinidad and Walsenburg, Colorado, and in lieu thereof to apply the 63½ cent rate as provided in

item No. 365 of above mentioned tariff, description of which is as follows: "Apples, carloads, minimum weight 30,000 pounds."

This amendment was suspended by the Commission, by an order dated August 23, 1926, upon complaint, until November 14, 1926, and resuspended by an order dated November 5, 1926, until May 23, 1927, and the case set down for hearing January 17, 1927, at the Hearing Room of the Commission, 305 State Office Building, Denver, Colorado, 10:00 o'clock A. M.

The complainant, a packer and manufacturer of high grade fruit products, vinegar and cider, with its place of business at Denver, Colorado, contends that if the 63½ cent rate is allowed to go into effect it will have the effect of forcing them to discontinue the manufacture of cider and vinegar, as the margin of profit is about 3 cents per gallon at the present time. The evidence is clear that the traffic in question will not bear any increase.

The present 34 cent rate is the outcome of a 30 cent rate established by an order of this Commission in Case No. 18, Grand Valley Fruit Rate Association v. D. & R. G. W. R. R. Co., *et al.*, 1 Colo. P. U. C. 111. This 30 cent rate was increased 25 per cent by order of the Director General of Railroads in General Order No. 28, making it 37½ cents, and at the request of the Denver Chamber of Commerce was not increased under the general advance of 1920, it being agreed to continue the 37½ cent rate for the balance of that season; however, the carrier failed to cancel the said 37½ cent rate, with the result that same was reduced 10 per cent under the 1922 general reduction.

Considerable stress was laid by the defendant to the abuse which was being practiced by certain shippers who ship first class apples in mixed carloads with cull or windfalls and secure the cull apple rate and then re-sort the apples in their warehouses and pack those that are in good shape and dispose of them at the first class apple price; however, there is nothing in the record establishing as a fact that these conditions actually exist and defendants' witness was unable to offer anything in evidence to substantiate their contention, although they were satisfied in their own minds that this was being done. In further testimony

defendants testified they had no objections to continue a provision for a cull apple rate, providing the same spread was applied as was prescribed by this Commission in Case No. 18, *supra.*

This Commission is of the opinion that the policing of shipments is a matter entirely up to the carrier; if their tariff provides a cull apple rate such rate must apply on that commodity and the question of what use it is to be put to has nothing whatsoever to do with the rate, and if shippers are inclined to misrepresent their shipment by false billing to secure the lower rate at the time of shipment, the carrier would be up against the same abuse on any other rate established, which was any less than the first class apple rate.

The issue before the Commission in this case is the reasonableness or unreasonableness of the proposed 63½ cent rate on cull apples and not the policing of the carrier's shipments. If shippers misrepresent their shipments in order to defeat the legal rate applicable to same they are laying themselves liable to criminal action and, furthermore, the carrier has recourse through the civil courts.

After a careful consideration of the entire record the Commission finds that the proposed increase has not been justified. An order will be entered requiring the cancellation of the suspended schedule.

ORDER.

IT IS THEREFORE ORDERED, That the respondent herein be, and they are hereby, notified and required to cancel item 220-B, State Amendment No. 16, to Freight Tariff D. & R. G. W., G. F. D. No. 5922B, Colo. P. U. C. No. 61, on or before May 23, 1927, upon notice to this Commission and to the public by filing and posting in the manner prescribed in Section 16 of the Public Utilities Act of the State of Colorado.

IT IS FURTHER ORDERED, That the respondent herein be, and it is hereby, notified and required to establish, on or before May 23, 1927, upon notice to this Commission and to the public by filing and posting in the manner prescribed in Section 16 of the Public Utilities Act, and thereafter maintain and apply to the

transportation of apples, cull, windfall refuse and waste (in box cars) from Mack, Paonia and Montrose, Colorado, to Denver, Colorado Springs, Colorado City, Jansen, Minnequa, Pueblo, Trinidad and Walsenburg, Colorado, a rate which shall not exceed 34 cents per 100 pounds, and that this proceeding be discontinued.

RE H. S. HARP, *et al.*, DOING BUSINESS AS HARP BROTHERS.

[Application No. 632. Decision No. 1216.]

Certificate of convenience and necessity issued authorizing motor vehicle transportation in combination with horse drawn sleds of freight, passengers and express between Rifle and Meeker "and intermediate and adjacent territory."

Raymond E. James was issued a certificate identical with the foregoing one issued to Harp Brothers, except that James' certificate does not authorize transportation of passengers. Application No. 701. Decision No. 1218.

[April 14, 1927.]

Appearances: Frank Delaney, Esq., Glenwood Springs, Colorado, for applicant; John R. Clark, Esq., Meeker, Colorado, for Rio Blanco County; J. N. Neal, Esq., Meeker, Colorado, for himself.

STATEMENT.

By the **Commission**: On May 10, 1926, petition was filed with this Commission by H. S. Harp and Thad S. Harp, co-partners, doing business under the firm name and style of Harp Brothers, for a certificate of public convenience and necessity to operate a bus and truck line for the transportation of passengers, express and freight, between the town of Rifle in Garfield County, Colorado, and the town of Meeker in Rio Blanco County, Colorado.

The applicants set forth in their application that they had operated over this route for a number of years, last past, that they were obliged to use horses and mules with sleds during the winter months, for about twelve miles of the route, on account of heavy snows falling at the higher altitudes, thus causing them

to transfer all loads from automobiles and trucks to sleds drawn by teams and then transfer back again to automobiles and trucks at the end of the snow area, thus calling for a different schedule during the winter period; that there was no other means of transportation between the towns set forth in this application, as Meeker was located about 43½ miles from any railroad and Rifle was the nearest and most accessible railroad point from which to operate such needed transportation line.

This application was set down for hearing at the City Hall, Rifle, Colorado, for December 8, 1926, at 9:00 o'clock A. M. and the Commission duly proceeded to receive such testimony and evidence as was submitted by parties in interest.

The applicants appeared by Attorney Frank Delaney and in person. Rio Blanco County was represented by Attorney John R. Clark and J. N. Neal appeared for himself.

The testimony introduced substantiated the facts set forth in the application herein, showing that the public convenience and necessity absolutely required the operation of such a transportation line as herein applied for. That the applicants had operated a similar line over the route herein prayed for during the last 30 years; that the snow conditions required an equipment such as they possessed, that they had shown themselves as capable and efficient in every way to render the service required and that they were at all times in a position to serve the public in the territory along this route.

The testimony shows that their equipment consists of two ten passenger busses; two five-passenger Studebaker cars; two 1½-ton freight trucks; one 1-ton truck; eight mules, eight horses, together with harness and sleds; barns along the route, and offices and garages equipped for the complete handling of these operations, all valued at $21,300.

The evidence shows that the operation of this system was giving a net income of about $300 per month over and above a mail contract which the applicants held from the Government amounting to $4,000 annually, covering the instant route applied for in this application.

All other parties appearing in this case disclaimed any objection to the granting of a certificate to the applicants herein, and after a careful consideration of all the testimony and facts adduced from the hearing of this application the Commission is of the opinion and so finds that the public convenience and necessity requires and will in the future require the transportation system of the applicants herein over the proposed route as set forth in their application for the transportation of passengers, express and freight.

ORDER.

IT IS THEREFORE ORDERED, That the present and future public convenience and necessity requires and will require the operation of a transportation system for the transportation of passengers, express and freight between the town of Rifle in Garfield County, Colorado, and the town of Meeker, Rio Blanco County, Colorado, and intermediate and adjacent territory thereto, by the firm of Harp Brothers, applicants herein, by such an operation as is by them provided, viz.: automobiles, busses and trucks during the summer months and during the winter months, or snow period, by a combination of said conveyances with horse-drawn sleds across such snow area as may exist during that period, and this order shall be taken, deemed and held to be, a certificate of public convenience and necessity therefor.

IT IS FURTHER ORDERED, That the applicants shall operate such transportation line as herein set forth, throughout the year, except when prevented by the Act of God, the public enemy, or unusual or extreme weather conditions, and this order is subject to compliance by applicants with the rules and regulations now in force or to be hereafter adopted by this Commission with reference to motor vehicle carriers, and also subject to any legislative action that may in the future be taken with respect thereto.

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