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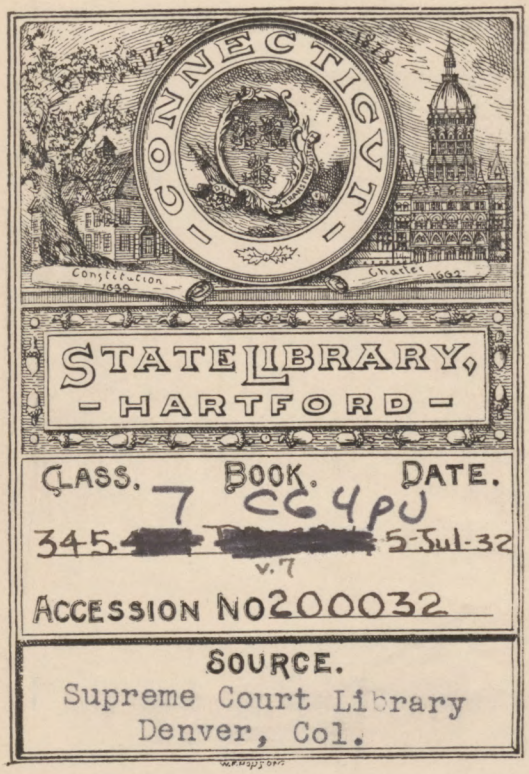

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REPORTS OF DECISIONS

OF

THE PUBLIC UTILITIES COMMISSION

OF THE

STATE OF COLORADO

FROM JANUARY 1, 1920, TO DECEMBER 31, 1930

VOLUME 7

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

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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.

PUBLIC UTILITIES REPORTS

RE THE RIO GRANDE MOTOR WAY, INC.

[Application No. 873. Decision No. 1228.]

Certificate of convenience and necessity issued authorizing motor vehicle transportation of passengers, hand baggage and mail between Alamosa and Monte Vista and intermediate points, subject to conditions stated.

[May 16, 1927.]

Appearance: Thos. R. Woodrow, Esq., Denver, Colorado, for applicant.

STATEMENT.

By the **Commission**: On April 22, 1927, The Rio Grande Motor Way, Inc., filed with this Commission an application for a certificate of public convenience and necessity for the operation of motor vehicles for the transportation of passengers, hand baggage and mail between Alamosa and Monte Vista. On April 30, answer was filed by the Monte Vista Commercial Club, in which it is alleged in substance that there is no objection to the granting of the application, provided the granting of the certificate will not lead to the curtailment of the present railroad passenger service between Alamosa and Creede, via Monte Vista.

This application was set down for hearing at the Hearing Room of the Commission, State Office Building, Denver, Colorado, on May 2, 1927, at which time evidence in support of said application was introduced. No testimony in opposition to the same was received.

The Rio Grande Motor Way, Inc., is a corporation organized under the laws of the State of Colorado, and the majority of the stock is held by The Denver and Rio Grande Western Railroad Company. In Application No. 841, this Commission authorized the transfer and assignment of Certificates of Public Convenience and Necessity, heretofore issued, covering the operation between Monte Vista and Salida, via Center and Saguache. In

Application No. 840, the applicant was authorized by this Commission to operate motor busses between Salida and Alamosa, via Mosca and Hooper. The testimony shows that, in order to give Center and Saguache expedited, first class mail service from Alamosa in the morning, it is necessary to commence this operation at Alamosa rather than wait until the train from Alamosa in the morning reaches Monte Vista, about 8:20 A. M. Furthermore, in the event the applicant waited at Monte Vista for the rail train and there received the mail destined to Saguache and Center, it could not make its schedule time to connect with the passenger train east at Salida; in other words, unless the applicant is permitted to commence the transportation of mail from Alamosa, via Monte Vista, at 6:45 A. M., it would disturb its entire passenger schedule. The proposed schedule upon which the applicant expects to operate daily is as follows, to-wit:

Westbound		Eastbound	
Leave Alamosa	6:45 A. M.	Leave Monte Vista	7:45 P. M.
Arrive Monte Vista	7:20 A.M.	Arrive Alamosa	8:20 P. M.

This schedule will afford the passengers from Monte Vista the opportunity to leave there at 7:45 P. M. to make connections with the passenger train leaving Alamosa at 8:30 P. M. for Pueblo and Denver. Westbound the passenger train arrives at Alamosa at 6:00 A. M., but the passengers in the sleepers are not required to leave the train until 7:30 A. M. However, such as do desire to expedite their trip to Monte Vista can do so by motor bus leaving Alamosa at 6:45 A. M. and arriving at Monte Vista at 7:20 A. M.

The Commission was assured that no curtailment of the present passenger rail service between Alamosa and Creede, via Monte Vista, was intended. Some testimony was introduced to the effect that it is the desire of The Denver and Rio Grande Western Railroad Company to put in a passenger train schedule leaving Creede, going east, about 2:30 P. M., reaching Monte Vista about 5:00 P. M., which train makes connection with the eastbound train at Alamosa. At the suggestion of the Commission, the Railroad Company expressed a willingness to make the rail tickets and motor bus tickets interchangeable, so that a ticket

for Denver could be purchased at Monte Vista, and the passenger could leave on the bus at 7:45 P. M., arriving at Alamosa at 8:20 P. M., and leaving on the rail train from Alamosa at 8:30 P. M., rather than requiring the passenger to take the passenger train at Monte Vista at 5:00 P. M. for Alamosa. The Railroad further expressed a willingness to take any trunks the passenger from Monte Vista may have on its passenger train, and permit the passenger to ride on the bus, thereby giving him an opportunity to eat supper before leaving Monte Vista and to take the motor bus direct to the rail station at Alamosa, where he would be transferred to the passenger train. It was testified that such a change would result in economies to the railroad amounting to about $130 per month. The Commission, of course, desires to encourage any economies that the Railroad Company may make consistent with proper and reasonable passenger service to the general public.

After a careful consideration of all the evidence introduced at the hearing herein, the Commission is of the opinion, and so finds, that the public convenience and necessity requires the operation of motor vehicles for the transportation of passengers, hand baggage and mail by the applicant between Alamosa and Monte Vista, subject to the conditions in Application No. 840.

ORDER.

IT IS THEREFORE ORDERED, That the future public convenience and necessity requires, and will require, the motor vehicle operation for the transportation of passengers, hand baggage and mail between Alamosa and Monte Vista, Colorado, and intermediate points, by The Rio Grande Motor Way, Inc., and this order shall be taken, deemed and held to be a Certificate of Public Convenience and Necessity therefore, subject to the following conditions:

(a) Conditions in Application No. 840.

(b) That the applicant 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, which tariff shall provide an interchange of passenger tickets with The Denver and Rio Grande Western Railroad Company, to and from any point on its system.

(c) That trunks belonging to passengers traveling between Alamosa and Monte Vista shall be carried by The Denver and Rio Grande Western Railroad Company without any additional charge except as provided by its tariffs.

IT IS FURTHER ORDERED, That the applicant shall operate such motor vehicle carrier system according to the schedule filed with this Commission except when prevented from so doing by the Act of God, the public enemy, or unusual or 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 this Commission with respect to motor vehicle carriers, and also subject to any future legislative action that may be taken with respect thereto.

RE ARVEL A. HENRICKSON.

[Application No. 447. Decision No. 1229.]

In application of an individual for a certificate of convenience for the operation of a motor vehicle freight line between Denver and Loveland, The Colorado & Southern Ry. Co. given leave before disposition of application to file its application for such a certificate.

[May 16, 1927.]

Appearances: A. T. Monson, Esq., Denver, Colorado, and Henry S. Sherman, Esq., Fort Collins, Colorado, for applicant; J. Q. Dier, Esq., Denver, Colorado, for The Colorado and Southern Railway Company; D. Edgar Wilson, Esq., Denver, Colorado, for The Colorado Motor Way, Inc.; J. S. Habenicht, Esq., Denver, Colorado, for the American Railway Express Company; George Swerer, Esq., Denver, Colorado, for The McKie Transfer Company.

STATEMENT.

By the **Commission**: On May 14, 1925, Arvel Henrickson, doing business as the Denver and Loveland Transportation, filed with this Commission an application for certificate of public con-

venience and necessity for the operation of motor vehicles for the transportation of freight and merchandise between Denver, Colorado, and Loveland, Colorado, and Denver, Colorado, and Berthoud, Colorado. On May 26, 1925, The Colorado and Southern Railway Company filed its answer and protest. On May 28, 1925, American Railway Express Company filed its answer and protest.

Thereafter a hearing was had on February 24, 1926, at which time evidence was introduced in support of, and in opposition to, the application. Thereafter on May 5, 1926, the Commission entered an order denying the application.

On May 14, 1926, the applicant filed a petition for rehearing. The rehearing was granted and the matter was heard a second time on February 16, 1927. The Colorado and Southern Railway Company at the hearing requested that it be given an opportunity to determine whether or not it wants to engage in such service as is sought to be rendered by the applicant before any permit is issued to the applicant or any other person.

The Commission believes and finds that the public interest requires that before a final decision is rendered on the application herein, The Colorado and Southern Railway Company should be permitted, if it so desires, to file its application for a certificate authorizing it to perform the same kind of service. If such application be filed, the Commission will then hold a hearing thereon before the final disposition of the instant application.

ORDER.

IT IS THEREFORE ORDERED, That The Colorado and Southern Railway Company be, and the same is hereby, given twenty (20) days in which to file, if it so desires, an application for a certificate of public convenience and necessity authorizing it to perform in the territory in question such service as the applicant herein desires to perform.

IT IS FURTHER ORDERED, That in the event no such application is filed, a final order on the application herein will be made as if the request of The Colorado and Southern Railway Company had not been made.

RE WESTERN SLOPE MOTOR WAY, INC.

[Application No. 684. Decision No. 1231.]

Certificate of convenience and necessity issued authorizing motor vehicle transportation of passengers, baggage and express between Paonia and Somerset and intermediate points, and for the transportation of freight between Bowie and Somerset.

[May 17, 1927.]

Appearances: Thos. R. Woodrow, for The Denver and Rio Grande Western Railroad Company, and the Western Slope Motor Way, Inc.; Milliard Fairlamb, Esq., Delta, Colorado, and Arthur A. Clemments, Esq., Paonia, Colorado, for the Chambers of Commerce of the city of Delta, the town of Paonia, and the town of Hotchkiss; Milton R. Welch, Esq., Delta, Colorado, for the Board of County Commissioners of Delta County, Colorado.

STATEMENT.

By the **Commission**: Western Slope Motor Way, Inc., a corporation, now has a certificate of public convenience and necessity, authorizing it to operate a passenger bus line between Delta and Paonia, and a freight truck line between Delta and Bowie, Colorado. It has applied for a certificate of public convenience and necessity for the operation of a passenger bus line between Paonia and Somerset and a freight truck line between Bowie and Somerset, Colorado. In other words, it seeks to extend its present passenger operations from Paonia to Somerset, and its present freight operations from Bowie to Somerset. The distance from Paonia to Somerset is some 12 or 13 miles. Bowie is an intermediate point.

By separate order, bearing even date herewith, entered in the matter of Application No. 667, The Denver and Rio Grande Western Railroad Company, which is at the present time furnishing the only passenger, baggage and express service between Paonia and Somerset, is authorized to discontinue said service, under certain conditions, for a portion of the year. Unless motor vehicle service is rendered, there will be no public passenger service rendered between Paonia and Somerset. After public

hearing had hereon we find that the public convenience and necessity does require the furnishing by Western Slope Motor Way, Inc., of daily bus, passenger, baggage and express service between these points when no such service is offered by rail transportation.

We further find that the public convenience and necessity requires the extension of the motor vehicle freight service by Western Slope Motor Way, Inc., from Bowie to Somerset, Colorado.

ORDER.

IT IS THEREFORE ORDERED, That the public convenience and necessity does now and will in the future require motor vehicle operation for the transportation of passengers, baggage and express between Paonia and Somerset and intermediate points, and for the transportation of freight by said company between Bowie and Somerset, Colorado, by the applicant herein, and this shall be taken, deemed and held to be a certificate of public convenience and necessity therefor.

IT IS FURTHER ORDERED, That the applicant shall operate such motor vehicle carrier system according to schedule which it shall file with the Commission within fifteen days from the date hereof except when prevented from so doing by the Act of God, the public enemy, or unusual or 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 this Commission with respect to motor vehicle carriers, and also subject to any future legislative action that may be taken with respect thereto.

RE WESTERN SLOPE MOTOR WAY, INC., *et al.*

[Application No. 667. Decision No. 1232.]

Whether the effect upon the highway of operating motor vehicles thereon is material in an application for a certificate of convenience and necessity is doubtful, but if material it is merely an item of evidence which alone is not conclusive.

Certificates of convenience and necessity—Meaning of "public convenience and necessity."

1. The phrase "public convenience and necessity" means a reasonable necessity to meet a convenience of the public.

Certificates of convenience and necessity—Adequate service—Question of fact.

2. What is reasonably adequate service is a question of fact depending upon all the circumstances surrounding the case.

Service—Curtailment—Issues—Profitableness of service.

3. In an application for authority to discontinue rail service during a portion of the year, neither the fact that the freight service on the branch in question is earning a substantial profit nor the fact that the passenger service is rendered at a loss is conclusive.

[May 18, 1927.]

Appearances: Thos. R. Woodrow, Esq., for The Denver and Rio Grande Western Railroad Company, and Western Slope Motor Way, Inc.; Milliard Fairlamb, Esq., Delta, Colorado, and Arthur A. Clemments, Esq., Paonia, Colorado, for the Chambers of Commerce of the city of Delta, the town of Paonia, and the town of Hotchkiss; Milton R. Welch, Esq., Delta, Colorado, for the Board of County Commissioners of Delta County, Colorado.

STATEMENT.

By the **Commission**: The question involved herein is whether The Denver and Rio Grande Western Railroad Company, hereinafter referred to as the Railroad Company, which operates a branch line from Delta to Somerset, both in the State of Colorado, known as the North Fork Branch, should be permitted to discontinue passenger train service thereon except from July 1 to October 15 of each year. The Railroad Company offers to furnish express service three times a week during the last half of June and the last half of October in connection with its freight train. The citizens of the communities served, by and through the Chambers of Commerce of Delta, Paonia and Hotchkiss, and the Board of County Commissioners of Delta County, have seriously protested against said discontinuance.

The hearing herein was had in the town of Hotchkiss, beginning on April 26, 1927, concluding on the 28th following.

The passenger service rendered by the Railroad Company between said points has been as follows: From November 16, 1914, to April 2, 1921, daily mixed train from Delta to Somerset and return; from April 3, 1921, to March 15, 1924, daily passenger

train between Delta and Somerset and return; from March 16, 1924, to June 5, 1926, daily passenger train from Grand Junction through Delta to Somerset and return; from June 6, 1926, to January 29, 1927, daily mixed train between Delta and Somerset and return; from January 30, 1927, to date, daily passenger train between Grand Junction and Somerset and return.

On June 15, 1923, this Commission granted to The Motor Transportation Company, a corporation, a certificate of public convenience and necessity authorizing the operation of motor vehicles for transporting passengers, express and baggage between Grand Junction, Delta, Montrose, Paonia, and intervening points. On May 19, 1926, Western Slope Motor Way, Inc., a Colorado corporation, hereinafter referred to as the Western Slope company, agreed to purchase from said The Motor Transportation Company, and the latter agreed to sell to the Western Slope company, the motor vehicles used and operated by said The Motor Transportation Company pursuant to said certificate of public convenience and necessity. The said agreement for purchase and sale included also the certificate of public convenience and necessity held by The Motor Transportation Company, and also the good will and common carrier business which theretofore had been conducted between the points mentioned in said certificate.

The transfer and assignment provided for in said agreement was approved and authorized by the order of this Commission dated May 26, 1926, which order constituted a certificate of public convenience and necessity to the Western Slope company.

Daily passenger, express and baggage service between Paonia and Delta has been rendered by said The Motor Transportation Company and its said successor, first by the former, later by the latter, from the year 1923 to February 1, 1927, without interruption or cessation for a single day, except that occasionally, on account of road conditions, one round trip instead of two was made daily.

As the result of a conference by and between officers of the Railroad Company, the officers of the Western Slope company and some of the citizens served by the North Fork Branch, per-

mission of this Commission was asked by the Western Slope company for temporary abandonment of said service rendered by the latter company. An order granting said permission was entered January 28, 1927, upon the agreed condition that the Railroad Company furnish daily service during the temporary period, originally fixed as the months of February and March.

The Western Slope company on June 1, 1926, filed an application for a certificate of public convenience and necessity for the operation of a motor transportation line for the carriage of passengers, baggage and express between Paonia and Somerset and intervening points. If granted such certificate, the Western Slope company would then be authorized to operate from one end of the North Fork Branch to the other. This application is granted in a separate order of even date herewith.

The Western Slope company is a subsidiary of the Railroad Company. It has a capitalization of one hundred thousand dollars ($100,000), the majority of which is owned by the Railroad Company. It has much adequate equipment, and on March 1, 1927, had a cash balance of sixteen thousand dollars ($16,000). None of its equipment is encumbered. That it has a strong financial condition is not questioned. Its service has consisted of one round trip daily from Paonia to Delta, and in the future will consist of said trip and an additional round trip daily from Somerset to Delta.

If the application of the Railroad Company for said discontinuance is granted, the Western Slope company and the Railroad Company agree to use the railroad stations as bus stations, to sell through interchangeable tickets good on both the motor bus and the Railroad Company lines, to receive baggage and express with the same through privileges as are customarily given express and baggage originating on the railroad alone. Moreover, the Railroad Company offers to run a passenger train from Somerset to Delta and return on all days, if any, when the highway is in such a condition that busses cannot be operated, provided it has notice of such condition by 11:59 o'clock P. M. of the day preceding.

The certificate of public convenience and necessity was granted

said The Motor Transportation Company, as aforesaid, against the vigorous protest of the Railroad Company. The organization of the Western Slope company and the purchase by it of the assets of its predecessor was prompted by a desire of the Railroad Company to protect itself, and its revenues.

The rail passenger, baggage and express service on the North Fork Branch is furnished at a heavy loss. During February and March of this year, when the passenger motor busses were not operating and the Railroad Company had a monopoly, the loss was at the rate of more than ten thousand dollars ($10,000) per year.

The citizens of the communities served make two principal contentions.

1. They say the fruit, for which the district is noted, is seriously injured by the jars and dust incident to shipment by motor bus express. The evidence shows there is no substantial amount of fruit moving from the district prior to June 15. After November 1 the only fruit moved by express is an occasional small shipment of apples. As the Railroad Company will operate an express car on its passenger train from July 1 to October 15, and on its freight train on Tuesdays, Thursdays and Saturdays from June 15 to July 1, and from October 15 to November 1, as it offered at the hearing, practically all the fruit shipped by express will move by train.

2. It is contended the highway over which the busses operate is seriously injured by them, and that the county cannot afford to stand the expense of the resulting repairs and maintenance required. Much evidence to this point was admitted. The Superintendent of Maintenance, District No. 2, of the State Highway Department, in whose district the road is located, testified that the average annual per mile maintenance cost during the past four years, in which period the passenger busses have been operating, on the road from Delta to Hotchkiss is one hundred twenty-five to one hundred thirty dollars, and from Hotchkiss through Paonia to Somerset fifty to sixty dollars. The same witness testified that two passenger busses making the round trip daily increase the annual maintenance cost some thirty dollars

per mile from Hotchkiss to Somerset, and very little from Delta to Hotchkiss. We take this testimony as stating the facts, because the witness is both qualified to speak with accuracy and more disinterested than other witnesses.

Whether the question of the effect upon the road of the operation of motor busses thereon is material is not free from doubt. If it be material it is a circumstance, an item of evidence which is not conclusive. But assuming that it is material, we are confronted, on the one hand, with a serious loss in rail passenger, baggage and express service tending to impair the general service rendered by the Railroad Company in the State, and, on the other, with the fact that the Railroad Company is paying sixty-two thousand five hundred dollars a year general taxes to Delta County, ten thousand four hundred of which is for road purposes, and the further fact that the Western Slope company will be paying to the State and county quite substantial revenue in the form of per passenger mile taxes, license fees, and personal property taxes on its equipment. If the damage to the road is material it is more than counterbalanced by the facts stated.

It is further urged that the highway between Paonia and Somerset is highly dangerous because of certain railroad crossings and a narrow road between Bowie and Somerset which runs between an irrigation ditch and the North Fork Branch of the Gunnison river. This, of course, is material. In places this road is only some 13 or 14 feet in width. It is a State highway on which the public in general travel. While it is dangerous if reckless driving is done thereon, we believe experience shows that bus drivers as a rule are much more careful than drivers of privately owned and operated cars, and that fewer accidents occur on what is considered a dangerous road than on roads considered safe, on which the driving is usually more reckless. The evidence shows, in this case, that the drivers of the busses operated by the Western Slope company are very careful and that for the period they have operated between Paonia and Delta no accidents of any consequence, if at all, have occurred. It is possible, although at considerable expense, to place the irrigation ditch further from the road, as has been done once in recent

years, and thus make the road wider. The highway apparently is deemed by the State Highway Department and the County Commissioners safe enough at the present time for the general public to be allowed to travel over it, and we see no reasonable probability of any accident on the part of the busses so long as they are operated, as we assume they will be, in a reasonably careful manner.

Of course, if the rail passenger service were, under all the facts, "a necessary service" such as we find described in Colorado and Southern Ry. Co. v. State Railroad Commission, *et al.*, 54 Colo. 64, 94, it would obviously be improper to allow the discontinuance, but the facts in that case, on which the necessity was based, are so dissimilar that they need no comparison. As was held in Donovan P. U. R. 1921-D, 488 at 493, the phrase "public convenience and necessity" means a reasonable necessity to meet a convenience of the public. What is reasonably adequate service is a question of fact depending upon all the circumstances surrounding the case. Wayne v. Pere Marquette Ry. Co., 1924 D, 317 at 319.

While the fact that the Railroad Company is earning a substantial profit on its freight service on the North Fork Branch, as is the fact, is not conclusive, neither is the fact that the passenger service is being rendered at a loss conclusive. It was contended at the hearing that if the passenger service rendered on a branch line is not profitable, that service, as distinguished from the entire operations on the branch, could be discontinued, irrespective of the profits made on the branch or the road as a whole in that or other lines of service, citing Gardiner Train Service, P. U. R. 1925 B, 367. There the Montana Commission held that, in view of all the facts, "the carrier will be discharging its primal obligation to serve by furnishing the mixed passenger train service four days a week" on that particular branch. That there is no absolute right to discontinue passenger service on a branch line merely because that class of service thereon is not profitable is held by the New York Public Service Commission in Long Island Railroad Company, P. U. R. 1919 E, 275, in which the Commission said, 278-279:

"The passenger traffic on this branch taken by itself does appear to be unprofitable, but that fact alone does not justify the company in discontinuing it. The total business of the branch is not unprofitable. Most of the passengers on this are commuters who originate at points on the Montauk division, where they reside; and there is no claim that this division or the railroad as a whole is not prosperous, or that the passenger service as a whole is not profitable. The company is under certain obligations to serve the passengers who patronize this branch, and it is not excused from performance merely because the branch taken by itself does not pay. It cannot, to repeat the common expression, pick and choose, but must take the lean with the fat."

With this statement we fully agree.

But after giving serious and careful thought and consideration to all the facts and circumstances, we are of the opinion, and so find, subject to the exceptions and conditions herein stated, that the public convenience and necessity does not and will not in the future, require operation by the Railroad Company, except from July 1 to October 15 each year, of its passenger train.

We believe and find that the public convenience and necessity requires the Railroad Company to furnish a round trip passenger train service daily, not only when the highway is impassable, but also when the condition thereof is such that the motor bus or busses cannot make the trip within a reasonable time. If the trip cannot be made within a reasonable time, the public convenience and necessity is not adequately served, although the bus may at some late hour finish the trip. We believe and find that the public convenience and necessity requires train service when, on account of inability of motor busses to arrive in Delta on time, reasonable rail and motor bus connections cannot be made in Delta. We shall not attempt at this time to limit the excess time required, by reason of the condition of the highway, to make the motor trip, but shall for the present leave the matter to the discretion of the Western Slope company and the Railroad Company, subject to what we have stated about reasonable time connections. We do believe it ad-

visable and necessary, in order that this Commission and the public may have a check on the delays that may occur in the motor bus operations, due to bad roads or accidents, that a registration book be kept in the railroad and motor bus offices in Delta, Somerset and Paonia, which should have columns for and show the number of the bus, the date, time of departure, time of arrival, and cause for delay, if the delay exceed one-half hour, which should be filled in and signed daily by the driver and initialed by the operator or agent for correctness. This book should be kept open for the inspection of the Commission and any representative thereof and the public in general. We believe, since the rail passenger service is now in operation and the time for its being put on for regular summer and fall service is so near at hand, that the Railroad Company should continue to operate said train until October 15, at which time it should furnish express car service on Tuesdays, Thursdays and Saturdays in connection with the operation of its freight train for and during the period expiring on October 31.

ORDER.

It Is Therefore Ordered, Upon the conditions hereinafter stated that the public convenience and necessity does not and will not, in the future, require the operation of passenger, baggage and express service on the North Fork Branch of The Denver and Rio Grande Western Railroad Company, except as hereinafter required.

Be It Further Ordered, That the authority for partial abandonment, as herein granted, is upon and subject to the condition that Western Slope Motor Way, Inc., and The Denver and Rio Grande Western Railroad Company within twenty days from this date shall file with this Commission amendments to their passenger tariff which shall provide:

(a) For an interchange of passengers and baggage one with the other, to and from all points on the Railroad Company's system and on that part of the system of the Western Slope company running from Delta to Somerset.

(b) For the same baggage allowance per passenger on all baggage originating at or destined to the stations at Delta and Somerset and intervening points, as is now made by the Railroad Company.

That said authority is granted upon and subject to the further condition that The Denver and Rio Grande Western Railroad Company shall cause to be maintained to and from all points on the said North Fork Branch, when there is no railway express service thereon, substantially the same express service and rates as are now in effect.

IT IS FURTHER ORDERED, That the Railroad Company shall from June 15 to June 30, both inclusive, and from October 15 to October 31, both inclusive, furnish express service on its freight train on the North Fork Branch on Tuesdays, Thursdays and Saturdays, and that it shall furnish passenger, baggage and express service as now performed, daily on said branch from July 1 to October 14, both inclusive.

IT IS FURTHER ORDERED, That when the highway from Somerset to Delta is impassable or in such condition the trip by motor bus cannot be made within a reasonable time and reasonable railroad and bus connections cannot be made in Delta, the Railroad Company shall furnish passenger, baggage and express service, provided it has knowledge of such condition not later than 11:59 o'clock P. M. of the day preceding.

IT IS FURTHER ORDERED, That a book be kept in the railroad and motor bus offices in Delta, Somerset and Paonia, which should have columns for and show the number of the bus, the date, time of departure, time of arrival, and cause for delay, which should be signed daily by the driver and initialed by the operator or agent for correctness, provided, however, no record need be made of the cause of delay unless the delay exceeds thirty minutes. This book shall be kept open for the inspection by the Commission and any representative thereof and the public in general.

IT IS FURTHER ORDERED, That when rail passenger, baggage

and express service is furnished, the Western Slope company shall not be required to furnish such service by bus or busses.

Jurisdiction of this matter is retained by the Commission for such further action as future operations and conditions may require.

RE COLORADO & SOUTHERN RAILWAY COMPANY.

[Application No. 770. Decision No. 1234.]

Service — Jurisdiction of Commission — Abandonment — Intrastate branch line—Interstate business.

1. The Commission has complete jurisdiction of an application for authority to discontinue passenger train service upon an intrastate branch line of railroad which does some interstate business.

Service—Discontinuance—Passenger train facilities—Other transportation.

2. The Commission should not require a railroad company to continue its passenger train service which is being operated at a loss if the transportation facilities offered the public, aside from rail service, are sufficient to meet all the reasonable requirements of the public.

Service—Discontinuance—Passenger trains—Test period—Safety of highway.

3. Authority to discontinue regular passenger facilities should be granted for a test period where there is a question as to the condition of the public highways as a proper and safe method of operation.

Service—Discontinuance—Return as a whole.

4. The fact that a railroad company does not show a loss over its entire railroad system is not material in a proceeding to determine whether regular passenger service should be discontinued where there is adequate motor transportation service.

Service—Discontinuance—Passenger train—Special transportation.

5. A railroad company upon being authorized to discontinue regular passenger transportation on a branch line was required to carry a tariff on file with the Commission providing for group passenger service of not less than 125 persons, and the carrier was required to operate its freight train as a mixed train, so that passengers might be accommodated in the service, between designated points, it being further provided that there should be no curtailment of express service.

[May 25, 1927.]

Appearances: E. L. Regennitter, Esq., Idaho Springs, Colorado, J. Q. Dier, Esq., and J. L. Rice, Esq., Denver, Colorado, for applicant; B. F. Naphey, Jr., Idaho Springs, Colorado, Joel E. Stone, Esq., Littleton, Colorado, for protestants, Clear Creek County and Gilpin County; John J. White, Esq., Georgetown, Colorado, for The Clear Creek County Metal Mining Association, and for the citizens of Silver Plume, Georgetown, Empire, Lawson, Dumont, Idaho Springs and those represented at the mass meeting in Idaho Springs on December 1, 1926, from Gilpin County; James M. Seright, Esq., Central City, Colorado, for the County Commissioners of Gilpin County, City of Central City and City of Black Hawk.

STATEMENT.

By the **Commission**: On August 10, 1926, The Colorado and Southern Railway Company, applicant herein, filed its application with this Commission for an order authorizing it to discontinue all of its passenger train service on the Clear Creek District branch, and to close its Forks Creek Station as an agency station.

The petition alleges, among other facts, that the applicant, hereinafter called the Railroad Company, owns a line extending from Denver through Clear Creek Canon and serving the towns of Idaho Springs, Dumont, Lawson, Empire and Georgetown to Silver Plume, with a branch extending from Forks Creek to Central City, which railroad is commonly referred to or designated as its Clear Creek District railroad; that for many years prior to December 1, 1921, the Railroad Company operated daily two passenger trains in each direction between Denver and Silver Plume with connecting passenger train service for Black Hawk and Central City, and also during the summer season many additional passenger trains for the accommodation of excursionists and tourists desiring to take the so-called Georgetown Loop trip; that, in recent years since the advent of automobile transportation, the excursion or tourist travel over said Clear Creek District has so fallen off that during the summer excursion or tourist season two regular passenger trains have been

more than sufficient to take care of all passenger transportation requirements between Denver and Silver Plume, and for several years there has been no need or occasion for the operation of special excursion trains; that by virtue of the authority of this Commission, the Railroad Company since December 1, 1921, has been operating two regular passenger trains daily in each direction, between Denver and Silver Plume with connecting train service for Black Hawk and Central City, from on or about June 1 to on or about September 30 of each year, and during the remaining portion of the year one regular passenger train each way daily between Denver and Silver Plume, with connecting train service for Black Hawk and Central City; that in the past few years, the public highway extending into and through the territory served by the Railroad Company has been greatly improved for the use of automobiles, motor busses and trucks; that during said period, the people residing in the communities served by said Clear Creek District railroad, as well as the general traveling public, have acquired automobiles in large numbers and have put the same to use on said highway greatly to the detriment of the passenger business, theretofore carried on by the petitioner, over said Clear Creek District railroad; that, in addition thereto, common carriers by motor bus entered, and are now engaged, in the business of carrying passengers, together with parcels and express for hire upon said highway, in competition with the Railroad Company, and are now operating numerous motor busses between Denver and the principal towns along said railroad, all of which are extensively patronized by the public; that, because of the use of private automobiles and the operation and patronage of common carrier automobiles and motor busses, the passenger business on said railroad has so gradually and continuously declined that there are now but very few passengers being carried upon said passenger trains operated over said railroad; that, because of the decline in, and inactivity in mining in Clear Creek and Gilpin Counties, and the consequent decrease in the population thereof, and because of other reasons, the railroad has been, and is now, being operated at a very heavy loss, "such loss having averaged per annum during the 1921 and 1925

period approximately $125,000''; that, for many years last past, the operation of said passenger trains upon said railroad has resulted in an actual and unavoidable out-of-pocket loss to the Railroad Company of many thousands of dollars per annum, such loss in 1925 being $22,649.29. That, on June 18, 1926, in Application No. 543 of The Denver Cab Company, *et al,* this Commission issued a certificate of public convenience and necessity to The Denver Cab Company and The Rocky Mountain Motors Company, authorizing the operation daily upon regular schedules of motor busses serving the territory now being served by said Railroad; that The Denver Cab Company and The Rocky Mountain Motors Company, pursuant to the authority aforesaid, have inaugurated and are now operating daily regular motor transportation between Denver and Silver Plume; that a large number of so-called sightseeing automobile common carriers are engaged in the furnishing of sightseeing service for tourists between Denver and Silver Plume, many of whom have applications for certificates of public convenience and necessity pending before this Commission; that, because of the conditions now obtaining as aforesaid, the traveling public does not, and will not, patronize said passenger train service and by reason thereof the same is no longer required by or for public convenience and necessity, and there is no longer any public need or demand therefor; that, in the event the passenger train service is authorized to be discontinued over said Clear Creek District, there will no longer be any need for maintaining the station of Forks Creek as an agency station or keeping a station agent thereat.

Protests against this application were filed by The Clear Creek County Metal Mining Association of Georgetown, the Mayor of Silver Plume, Colorado, the Postmaster at Dumont, Colorado, the City of Central City, the City of Black Hawk, Board of County Commissioners of Gilpin County, Gilpin County Metal Miners Association, the Mayor of the Town of Empire, County Commissioners of Clear Creek County, The Clear Creek County Metal Mining Association of Dumont, and petitions by numerous other citizens who reside in that district.

This application was set down for hearing on December 13, 1926, at 11:00 A. M., at Idaho Springs, Colorado, at which time and place the Commission heard testimony for several days, and thereafter continued the hearing to the Hearing Room of the Commission, Denver, Colorado, on the 28th day of December, 1926, at which time further testimony was introduced in support of, and in opposition to the application herein. At the time of the hearing, counsel for the protestants filed a demurrer to the jurisdiction of the Commission to determine herein the matters contained in and prayed for in the application, on the ground that the Commission is without jurisdiction to determine herein the question of abandonment of all passenger service as prayed for in petitioner's application. The Commission took this demurrer to its jurisdiction under advisement, to be disposed of in this order.

The jurisdiction of the Commission in matters relating to the service of a railroad company was passed upon in the case of the People, *ex rel.*, v. Colorado Title & Trust Company, 65 Colo. 472, in which it was held that the Commission has exclusive jurisdiction to determine whether a railroad company may abandon service upon a railroad lying wholly within the State of Colorado. The Railroad Company does not seek an abandonment of its railroad but seeks a discontinuance of the passenger train service offered by the railroad on one of its branch lines. It is claimed that the Interstate Commerce Commission has the sole jurisdiction of the discontinuance of intrastate passenger service of a railroad that does also an interstate business such as is done by the applicant in the instant case. Our attention has not been called to any authority that sustains that contention.

While the Interstate Commerce Commission undoubtedly has exclusive jurisdiction to abandon a railroad doing an interstate business, so far as it relates to interstate business, we know of no law that has taken away the jurisdiction of the State to regulate and supervise the service given on a branch line, lying wholly within the State, even though it does some business in interstate commerce. The Interstate Commerce Commission, in the case

of Railroad Commission of Wisconsin v. Chicago and Northwestern Railroad Company, 87 I. C. C. 195, held that the operation of passenger trains was not within the exclusive jurisdiction of the Interstate Commerce Commission. This application, involving only passenger service and not involving the abandonment of the railroad, the Commission is of the opinion that it has complete jurisdiction of the application herein to determine what passenger service, if any, will be adequate and reasonable on an intrastate branch line of railroad which does some interstate business, and the demurrer is therefore denied.

The issue which the Commission has to determine in the instant application is the reasonable requirements as to passenger transportation required by the public in the territory in question. The Railroad Company takes the position that the public convenience and necessity does not further require a daily passenger service or any passenger service by rail; that the public demands are being fully met by other transportation facilities. The protestants take the position that the public convenience and necessity require passenger service by rail in the territory in question; first, because the public highways are not sufficiently safe to use motor transportation for all year round service, especially on the highway between Black Hawk and Central City and Idaho Springs; second, that the discontinuance of the passenger train service will ultimately result in the abandonment of the railroad. The Commission desires to say at the outset that it does not look upon this application as in any way affecting the freight service by rail to the communities involved nor an abandonment of the railroad; that the only thing that the Commission is now concerned with is the requirements of the public as to passenger service.

We believe it to be a fair statement, based upon investigation and the experience of the past five years, that passenger transportation by rail has been, and still is, on a general decline in this State as well as in other parts of the country, especially as to short distance travel. Motor transportation, which has developed considerably in the past five years, is mainly responsible for the decrease of the use of passenger service by rail. In our

opinion, privately owned automobiles are the cause of most of the loss to the rail carrier. The Commission, of course, has no jurisdiction over such operation. Common carrier motor transportation, of course, has somewhat affected the rail carriers' passenger earnings but not to a very great extent. The elimination of common carrier motor transportation would not materially add to the rail passenger business.

The carrier introduced at the hearings herein evidence showing the loss that it has been sustaining in its passenger business. This evidence, of course, is only a circumstance that goes to show how much the public is using the railroad facilities. The fact alone that the carrier is losing on its passenger service is not controlling in a situation of this kind. The main question is, is the passenger train service reasonably necessary in addition to all other transportation facilities now offered? The carrier's testimony shows that the revenues from passenger service on the Clear Creek branch in 1923 were $62,850.28 per annum; in 1926, $34,490.52. The total revenue from passenger, mail and express in 1923 was $76,666.71, while in 1926 it was $47,313.83. In 1923 the average number of passengers per train was 22.64; in 1924, 18.47; in 1925, 17.86; in 1926, 13.83. The loss on passenger train service in 1923 was $10,553.53; in 1924, $16,066.33; in 1925, $16,889.40; in 1926, $21,008.93. This evidence clearly indicates that the loss is undoubtedly becoming greater, and further shows that the traveling public is gravitating to either privately owned automobiles or to common carrier motor transportation.

If there were no other passenger transportation facilities except by rail, the Commission's problem would be simple. Passenger service by rail would then be necessary. If, however, the transportation facilities now offered the public, aside from rail service, are sufficient to meet all the reasonable requirements of the public, then it would be false economy and arbitrary on the part of the Commission to require the Railroad Company to continue its passenger train service.

In this connection, the condition of the public highway, as a proper and safe method of operation, has given the Commission

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great concern. The evidence in this regard is in dispute. Testimony was offered by the carrier that the public highways were sufficiently safe for motor transportation. On the other hand, the public offered a considerable amount of testimony that the public highway, especially between Black Hawk, Central City and Idaho Springs, is not sufficiently safe for motor transportation. While the record shows that motor transportation has been successfully operated on the highways in question, nevertheless, because of their alleged unsafeness, and for this reason only, the Commission has concluded to establish a test period to definitely determine whether the public highways in question are sufficiently safe for motor transportation. If not, then, of course, the carrier will be required to furnish rail passenger transportation. If they are sufficiently safe, then, in the opinion of the Commission, under the record as it now stands, the motor passenger transportation service offered to the public meets all the reasonable requirements of the territory involved. In this connection, the Commission desires to state that, on June 18, 1926, a certificate of public convenience and necessity was issued to The Denver Cab Company and The Rocky Mountain Motors Company to operate as a common carrier of passengers and express in the territory in question. Their operations are, in our opinion, financially dependable, and have behind them considerable transportation facilities and experience. If it were otherwise, the Commission would hesitate before turning over to this utility, at least permanently, the privilege of serving the public in this important territory.

The Commission also has before it for decision the application of Oscar Williams, Application No. 792, hearing on which was concluded on the 15th day of December, 1926. The Commission will issue to said Oscar Williams a certificate of public convenience and necessity, to be in effect for the test period, to operate between Central City, Black Hawk and Idaho Springs as a common carrier of passengers. While this test period is in effect, the Commission will retain jurisdiction over this application.

Something should be said about the expressed fear of the public, and the record is replete with such fears, that the discontinu-

ance of the passenger service in the Clear Creek District is an entering wedge to abandon the entire railroad in the Clear Creek District. The Commission desires to state *emphatically* that such is not the case so far as its jurisdiction is concerned. The main industry in the Clear Creek District is the mining industry. We believe it is fair to state that the mining activities within the last few years have increased about 50 per cent. Not as it relates to tonnage offered the railroad for transportation but as to the revival of mining activities. The Commission appreciates that mining activities cannot be carried on in the Clear Creek District without rail transportation facilities of freight. Especially does that apply to the shipment of ore. The record sufficiently indicates, and the Commission so states, that the public convenience and necessity will require transportation of a rail carrier to transport freight from the Clear Creek District as long as there are any substantial mining industries located there. The Commission further states that it will, in nowise, permit the curtailment of the rail transportation facilities of freight from the Clear Creek District territory. At least not until the mining industry has been exhausted. One of the reasons, but not the controlling reason, for permitting the discontinuance of the passenger service is to make more certain, permanent and efficient the freight service now offered by the Railroad Company, which is very essential to a continuance of the mining industry. The economies that the Railroad Company will be permitted to make, if the passenger service should finally be discontinued, should work towards a better and more efficient freight service. An exhibit introduced by the Railroad Company indicates that the entire operation on the Clear Creek District is being carried on at a loss at the present time, and, perhaps, if the passenger service should be discontinued, this loss will be greatly reduced and probably eliminated. The public involved, however, should make every effort to see to it that the Railroad Company obtains all freight business, to which it is justly entitled, and not permit it to go to privately owned or common carrier trucks. The Railroad Company should receive all the cooperation and encourage-

ment possible from the public in the shipment of the freight that requires transportation.

The protestants contend very strongly that, because the Railroad Company has not shown a loss over its entire system, under the authority of the case of The Colorado and Southern Railway Company v. Railroad Commission, 54 Colo. 90, the carrier is required to furnish the passenger service in question under any and all circumstances. As stated before, the Commission only considers the evidence introduced by the carrier, insofar as loss on the passenger train service in the Clear Creek District is concerned, as a circumstance in determining the reasonableness of the passenger service. The Colorado and Southern Railway Company case, *supra,* involved the abandonment of all railroad service whatsoever. If the railroad had been permitted, in that case, to abandon its entire service, the public would have been without any transportation facilities and, therefore, the Court properly held that the order of the Railroad Commission refusing abandonment was proper. The legal obligations of the railroad is to furnish the necessary transportation facilities. The question as to what is necessary is what the Commission is attempting to decide in the instant case. The Commission, in the instant case, is of the opinion that the motor transportation facilities do meet all the requirements of the traveling public, provided the public highways are sufficiently safe for such operation and, in order to determine whether such highways are sufficiently safe, it will establish a test period of one year. In the meantime, it will retain jurisdiction. The Commission, therefore, feels that the facts involved in the case of The Colorado and Southern Railway Company v. Railroad Commission, *supra,* are different entirely from those in the instant case and the fact that the Railroad Company did not show a loss over its entire railroad system is not material in the instant case.

During this test period, the Commission believes that the public interest requires certain conditions so that, in no event, the public may suffer for want of passenger transportation. The Railroad Company will be required to carry a tariff on file with the Commission providing for group passenger service of not

less than one hundred twenty-five persons to any point in the Clear Creek District. The rail carrier will also be required to operate its freight train as a mixed train, so that passengers may be accommodated in this service, both to and from the Silver Plume branch, as well as to the Black Hawk branch. Furthermore, the rail carrier will be required to cause, and be maintained, substantially the same express service and rates, both to incoming and outgoing points, as now prevails.

After a 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 operation of the regular passenger train service now offered by the applicant to the traveling public, provided that the public highways are sufficiently safe for motor transportation service. That in order to determine the safety of the highways for motor transportation, a test period will be established from June 5, 1927, to June 4, 1928, inclusive, and that, during that test period the Railroad Company will not be required to maintain a regular passenger train service, except as provided by the order herein, and will not be required to maintain a station agent at Forks Creek, Colorado.

ORDER.

IT IS THEREFORE ORDERED, That the public convenience and necessity require that The Colorado and Southern Railway Company be, and it is hereby, authorized to discontinue its passenger, baggage and express service on the Clear Creek District branch for the period of one year, commencing on June 5, 1927, and extending to June 4, 1928, inclusive, unless otherwise ordered by the Commission, subject to the following conditions:

(a) That The Colorado and Southern Railway Company shall cause to be maintained, to and from all points on the said Clear Creek branch when there is no railway express thereon, substantially the same express service and rates as are now in effect.

(b) That The Colorado and Southern Railway Company shall keep on file with this Commission, or file upon request, a tariff providing for Group Passenger Transportation, to and

from points in the Clear Creek District, of groups not less than one hundred twenty-five (125) persons.

(c) That The Colorado and Southern Railway Company shall restore said passenger train service if, and whenever, the operation of motor bus service shall, for any reason, be discontinued, or shall, at any time, be found by this Commission to be inadequate, unsafe or insufficient to serve the needs of the territory involved.

(d) That the regular freight trains operated by The Colorado and Southern Railway Company shall carry a passenger coach for the accommodation of passengers during the test period above mentioned.

The Commission expressly retains jurisdiction over this application, and the matters therein involved, during the test period above mentioned, and until this matter shall be finally disposed of.

RE THOMAS L. WILSON.

[Application No. 802. Decision No. 1242.]

Common carriers—Miner transporting fellow workmen.

Doubt expressed whether a miner transporting fellow workmen to and from the mine in which he and they work is a common carrier.

[May 26, 1927.]

Appearance: Hawley & Erickson, Trinidad, Colorado, for applicant.

STATEMENT.

By the **Commission**: On December 27, 1926, Thomas L. Wilson, applicant herein, filed his application with this Commission for a certificate of public convenience and necessity to operate a motor vehicle transportation system for the transportation of passengers from Trinidad to Tollerburg and return. On January 7, 1927, The Colorado and Southern Railway Company filed a protest against this application. The same was set down for public hearing at the Court House, Trinidad, Colorado, on May 10, 1927, at which time evidence in support of said application was received.

The applicant is a miner who lives at Trinidad, but works in a coal mine at Tollerburg, Colorado. He desires to transport a number of miners who live at Trinidad to Tollerburg each morning, and after working hours to return the same miners to their homes in Trinidad. He does not desire any authority to operate his motor transportation system in any other way. His schedule provides for leaving Trinidad at 5:30 A. M., arriving at Tollerburg at 6:30 A. M., and leaving Tollerburg at 4:30 P. M. and arriving Trinidad 5:30 P. M. There is some question as to whether the applicant's operation is such as would bring him within the term of a common carrier. However, since the same is not sufficiently defined in the evidence to make it a private carrier, the Commission deems it advisable from a regulatory standpoint for the present to consider it as a common carrier. His capital investment is $1500.00.

After a careful consideration of all the evidence introduced at this hearing, the Commission is of the opinion, and so finds, that the public convenience and necessity requires the motor transportation system for the transportation of passengers by Thomas L. Wilson, applicant herein, from Trinidad to Tollerburg and return, but not between any intermediate points, limited to the schedule hereinabove mentioned.

ORDER.

It Is Therefore Ordered, That the public convenience and necessity requires the motor vehicle transportation system for passengers by Thomas L. Wilson from Trinidad to Tollerburg and return, and this order shall be deemed and held to be a certificate of public convenience and necessity therefor, subject to the following conditions:

(a) That the applicant shall not be permitted to do any transportation between any intermediate points, all of his business originating and terminating at Trinidad and Tollerburg, Colorado.

(b) That the applicant's operation is limited to the schedule defined in his application, which leaves Trinidad at 5:30 A. M.,

arriving Tollerburg 6:30 A. M.; leaves Tollerburg 4:30 P. M., arriving Trinidad 5:30 P. M.

(c) That the applicant 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. 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 H. D. RICE.

[Application No. 845. Decision No. 1265.]

Certificate of convenience and necessity issued authorizing motor vehicle transportation for one year of passengers on sightseeing round trips from the City of Boulder to various scenic points, subject to conditions imposed.

[June 1, 1927.]

Appearance: Frank L. Moorhead, attorney for applicant, Boulder, Colorado.

STATEMENT.

By the **Commission**: The above applicant, in addition to a large number of other applicants, all of whose cases were set for hearing and heard in the Court House in the City of Boulder, on May 19, 1927, filed an application for a certificate of public convenience and necessity authorizing the transportation of passengers by motor vehicle to a number of scenic attractions in Colorado. Most of the applicants seek to render round trip service from Boulder. There is no proposal by any of the applicants to operate on a regular schedule, nor is there any suggestion that the proposed operations will be in competition with any established transportation service for passengers operated on schedule, except The Glacier Route, Inc., operating between Boulder and the scenic points named in the certificate issued to said

The Glacier Route, Inc., and except as the round trips from Boulder to Estes Park may possibly affect the established one-way trips between Boulder and Estes Park. All operations over the routes designated are limited solely to round trip service and no one-way operations are in contemplation, except as hereinafter stated.

The proprietors of a large number of sightseeing motor vehicle operations in the City of Colorado Springs suggested to the Commission that a certificate be issued to those operating out of that city for a 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 better to determine what the public convenience and necessity requires. This suggestion was adopted in most of the operations out of that city and we have deemed it advisable to adopt the same scheme with reference to the operations out of the City of Boulder.

The Commission is frank to admit that there are several problems in connection with these operations which it is not now in a position intelligently to solve, and which may be more satisfactorily solved and adjusted after the experience under regulated service for one year, including the experience and knowledge that may be gained under the operation of what is known as H. B. No. 430, passed this year by the legislature. Some of the applicants in this sightseeing and tourist business desire also the privilege of operating a taxi service from the City of Boulder, under private contract, to any point where a patron may desire to go. The Commission, on the record made, and for lack of more experience and knowledge, has been unable to determine just how and to what extent to regulate such service and, therefore, defers any opinion as relating to such service until the final determination of this and the other said applications, except that it is now of the opinion, and so finds, that the public convenience and necessity does not and will not in the future require the operation from the City of Boulder of any one-way trips where there is now an established service either by motor vehicle or railroad, or in part by one and in part by the other.

The Commission is of the opinion that the public convenience and necessity does now require that the applicant herein receive a certificate of public convenience and necessity to operate a motor transportation system from Boulder to the various points named in the application herein 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 sometime within the next year, unless such time is further extended, and the record made in this application shall be taken and considered as a part of the record when the 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 a term of one year to operate a motor transportation system for the transportation of passengers on round trips from the City of Boulder to the various points named in the application herein, 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 between the City of Boulder and any point where there exists regular established transportation by either railroad or motor vehicle carriers, or in part by one and in part by the other.

(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 all legislative action already or hereafter to become effective.

IT IS FURTHER ORDERED, That this order and certificate shall not become effective, and no rights shall be exercised thereunder, until such time as applicant shall have filed with the Commission a certificate by the Clerk of the City of Boulder, showing compliance by the applicant with all municipal requirements of said city relating to the applicant and the operations to be conducted by him.

In the following applications certificates were issued which are substantially identical with the certificate issued In Re H. D. Rice, Application No. 845, Decision No. 1265:

The Yellow Cab Co., Application No. 838, Decision No. 1266.

W. N. Clark, Application No. 859, Decision No. 1267.

J. F. Gordon, Application No. 851, Decision No. 1268.

H. F. Brandhorst, Application No. 850, Decision No. 1269.

Ray S. Hall, et al., doing business as Hall's Black & White Cab Co., Application No. 848, Decision No. 1270.

Seth Armstead, doing business as Armstead's Scenic Tours, Application No. 882, Decision No. 1271.

Roy Armstead, Application No. 883, Decision No. 1272.

John Grant, Application No. 884, Decision No. 1273.

Ford Dunning, et al., doing business as Dunning Brothers, Application No. 887, Decision No. 1274.

E. E. Harris, Application No. 895, Decision No. 1275.

C. W. Townsend, Application No. 896, Decision No. 1276.

Ben Wacker, Application No. 897, Decision No. 1277.

R. R. Welch, Application No. 904, Decision No. 1330.

Art W. Quinlan, Application No. 905, Decision No. 1331.

Edward E. Hubman, Application No. 926, Decision No. 1332.

The Glacier Route, Incorporated, Application No. 909, Decision No. 1368.

RE FRANK A. HART.

[Applications Nos. 294 and 308. Decision No. 1279.]

Certificates of convenience and necessity—Transfer—Cessation of operation—Effect.

Failure to operate for a year under a certificate of convenience and necessity leaves nothing to transfer, and warrants an order canceling the certificate.

[June 3, 1927.]

STATEMENT.

By the **Commission**: On February 28, 1927, Frank A. Hart addressed a letter to the Commission from Jacksonville, Florida, in which he states that he regrets to write that he is surrendering his certificates for the operation of trucks and busses, and that it is impossible for him to return to Colorado to conduct his business, and he feels the only honorable thing to do is to surrender his privilege and allow the same to be canceled voluntarily. On March 4, 1927, the applicant telegraphed the Commission that he had received an offer of $25.00 for his trucking permit from one George Mahon, and requested that the sale be allowed to go through.

In the application of Oscar Baughman, Application No. 854, involving the same territory, which was heard on May 13, 1927, at Colorado Springs, a notice of which was received by Mr. Hart, it was testified that Hart has not operated as a common carrier over the particular lines in question for the past year.

Under all the circumstances above enumerated, the Commission is of the opinion, and so finds, that the public convenience and necessity requires the cancellation of the certificates issued in Applications Nos. 294 and 308.

ORDER.

IT IS THEREFORE ORDERED, That the certificates of public convenience and necessity issued to Frank A. Hart in Applications Nos. 294 and 308, be and the same are hereby canceled and held for naught.

RE EDWARD S. ARMENTROUT, *et al.*

[Applications Nos. 881 and 891. Decision No. 1284.]

Certificates of convenience and necessity—Choice of applicant—Priority of application—Financial ability.

The one of two applicants for certificates authorizing motor carrier service should be granted the certificate whose financial condition is somewhat stronger and whose application was filed first, other considerations being equal.

[June 3, 1927.]

Appearances: O. E. Collins, Esq., Attorney for Ed. S. Armentrout, Colorado Springs, Colorado; John M. Meikle, Esq., Attorney for George B. Mahon, Colorado Springs, Colorado.

STATEMENT.

By the **Commission**: These two cases, by consent of applicants, were consolidated for hearing.

The application of Ed. S. Armentrout was filed April 30, 1927, that of George B. Mahon on May 9, 1927. The two applications were set down for hearing and were heard at the City Hall in Colorado Springs on May 14, 1927. Both applicants seek a certificate authorizing the transportation by them by motor vehicle, of baggage between the town of Green Mountain Falls and the City of Colorado Springs. The applicant Mahon asks also for the authority to transport baggage between the town of Cascade and the City of Colorado Springs. The towns of Green Mountain Falls and Cascade are mountain resorts located fifteen and twelve miles respectively west of Colorado Springs, in the valley of Fountain Creek, in what is commonly called Ute Pass. The population of Green Mountain Falls and Cascade during the summer is approximately 1800 and 200 respectively. During the balance of the year it is some 25 and 15 respectively. The summer population begins arriving about the 15th of June and, for the most part, has departed by Labor Day, although a few people continue to stay there until somewhat later.

While there is rail service to and from Colorado Springs once daily, no station has been maintained at either of said towns for some fifteen years and very few of the summer inhabitants or

visitors use the train in going to and from the two towns. The transportation used by them is motor vehicle. No objection to the applications has been filed by the railroad company.

The Commission finds that the public convenience and necessity requires that there be in operation during the summer season, being June 15 to September 15, both inclusive, a motor vehicle transportation system between the towns of Green Mountain Falls and Cascade and the City of Colorado Springs, and that a certificate of public convenience and necessity authorizing the operation during said seasonal period of a motor transportation system between said points be issued.

It is agreed by both applicants, and the Commission finds, that there is not enough business to warrant the issuance of a certificate to both of them. The Commission has given careful consideration to the question to which of the applicants a certificate should be issued. Both seem dependable both morally and financially, although the financial responsibility of the applicant Armentrout is substantially greater than that of the applicant Mahon. The applicant Armentrout has also more equipment. His capital investment in his two trucks is $650. While the date of the filing of an application ordinarily is one of the least important considerations yet, other things being equal or nearly so, it may of necessity turn the scales. We are inclined to believe, and so find, that because of the somewhat stronger financial condition of the applicant Armentrout and because also his application was filed first, public convenience and necessity requires that the certificate be issued to him, upon and subject to the following conditions which we find the public convenience and necessity requires:

(a) That he render the same class of service to the town of Cascade and the people temporarily residing there in the summer that is rendered to the town of Green Mountain Falls and its population, such service including the making and maintaining of an arrangement by which orders may be left at all reasonable hours at some reasonably convenient place in Cascade for the transportation of baggage thereto and therefrom.

(b) That, aside from a minimum charge to be made for all pieces of baggage, the charges be based on weight.

(c) That the applicant shall not carry any express unless it be baggage sent to Colorado Springs by express.

ORDER.

IT IS THEREFORE ORDERED, That the application of George B. Mahon, No. 891, be and the same hereby is denied.

IT IS FURTHER ORDERED, That the public convenience and necessity does now and in the future will require that a certificate of public convenience and necessity be issued to the applicant, Ed. S. Armentrout, authorizing and requiring him to operate a motor vehicle transportation system for the transportation during the seasonal period, June 15 to September 15, both inclusive, of baggage between the towns of Green Mountain Falls and Cascade and the City of Colorado Springs, Colorado, and that 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:

(a) That he render the same class of service to the town of Cascade and the people temporarily residing or sojourning there in said seasonal period, that is rendered to the town of Green Mountain Falls and its population, such service including the making and maintaining of an arrangement by which orders may be left at all reasonable hours at some reasonably convenient place in Cascade for the transportation of baggage thereto and therefrom.

(b) That, aside from a minimum charge to be made for all pieces of baggage, the charges be based on weight.

(c) That the applicant shall not carry any express unless it be baggage sent to Colorado Springs by express.

IT IS FURTHER ORDERED, That the applicant 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.

RE HARRY LARGE.

[Application No. 839. Decision No. 1304.]

Certificate of public convenience and necessity denied because applicant had been operating as a common carrier before obtaining a certificate.

[May 18, 1927.]

Appearances: Joel E. Stone, Esq., Denver, Colorado, for applicant; Elmer L. Brock, Esq., Denver, Colorado, for The Denver and Salt Lake Railway Company.

STATEMENT.

By the **Commission**: This is an application for a motor vehicle carrier system for the transportation of passengers between Denver and East Portal, Colorado. A protest was filed against this application by The Denver and Salt Lake Railway Company. The same was set down for hearing at Denver, Colorado, on May 18, 1927. At the hearing it developed that the applicant herein has been unlawfully operating as a common carrier since the filing of his application on March 17, 1927. The law is that no motor vehicle common carrier can operate without first having obtained a certificate of public convenience and necessity. Since the effective date of the last Rules and Regulations adopted by the Commission January 1, 1927, the Commission has taken the position that no applicant would receive a certificate of public convenience and necessity if he unlawfully operates at the time of the filing of his application and thereafter. These facts

appearing from the testimony, counsel for protestant, The Denver and Salt Lake Railway Company, moved that this application, for the reasons above stated, be denied. This motion was granted.

ORDER.

IT IS THEREFORE ORDERED, That the application of Harry Large, No. 839, be and the same is hereby denied.

RE THE DENVER AND INTERURBAN MOTOR COMPANY.

[Application No. 790. Decision No. 1338.]

Corporations—Disregarding corporate fiction.

The corporate existence or "fiction" as it is sometimes called may not ordinarily be disregarded, particularly when use of the corporation is not resorted to to effect illegal or fraudulent acts.

Certificates of convenience and necessity—Automobiles—Conditional grant.

A certificate of convenience and necessity for the operation of an automobile transportation line was granted to an automobile company, the stock of which was owned by a railroad company, on condition that the stock should not be transferable without an order of the Commission for a period of ten years, that the equipment should not be encumbered in any way, and that the railroad should extend its credit to the automobile company, to the extent of its capital stock, in the sum of $250,000.

[June 24, 1927.]

Appearances: J. Q. 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 March 7th of this year the Commission made an order that the public convenience and necessity does now, and in the future will, require the operation of a mo-

tor vehicle system for the transportation of passengers, packages, express, mail and newspapers by The Denver and Interurban Motor Company, applicant herein, between Denver and Boulder via Louisville, Superior, Marshall and Semper daily, and Eldorado Springs during the summer season on the route described in Exhibit 3 herein, and that the order shall be taken, deemed and held to be a certificate of public convenience and necessity therefor, subject to the following terms and conditions:

"(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 * * *".

On March 21 the applicant filed its petition for rehearing and for modification of said order, asking for the elimination of all the terms and conditions above quoted. The applicant proposes in said petition, in lieu of those terms and conditions, the following conditions which it therein agrees to comply with, namely, to:

"Issue Seventy-two Thousand Five Hundred ($72,500.00) Dollars of its capital stock, at par, in full payment and satisfaction of all its present indebtedness, amounting to said sum, which includes all indebtedness incurred in the purchase of the equipment now owned by it.

"Issue and sell at par, for cash, additional shares of its capital stock in the sum of Seventy-six Thousand ($76,000.00) Dollars, so as to make its total issued capital stock, including the

($1500.00 thereof now outstanding) amount to the sum of One Hundred Fifty Thousand ($150,000.00) Dollars, all of which will be fully paid. Thereupon the applicant will own unencumbered assets of the approximate value of One Hundred Sixty-seven Thousand ($167,000.00) Dollars." (The applicant has accumulated $17,000 in two years of operating under the certificate issued in Application No. 454.)

It further appears from said petition that The Colorado and Southern Railway Company will own all of the stock of the applicant, except the necessary qualifying shares held by the directors.

We are now told that the railway company is unwilling to assume the burdens imposed. Moreover, the attorney for the applicant stated at the hearing on the petition for rehearing and modification, that his belief is that if the Commission does not modify its original order, neither the applicant nor the railway company will accept a certificate with the conditions named.

We shall first consider the conditions contained in the Commission's original order as if they had been imposed in the absence of any representations or promises made by the applicant.

Disregarding the possibility that the retention of the conditions imposed might result in abandonment of the proposed operations, the question then is whether the Commission has the power to, or may properly, make the said requirements. Here we might say that the communities affected, until recently, were served by The Denver and Interurban Railroad Company, an electric line which also was a subsidiary of The Colorado and Southern Railway Company. The receiver of said company was authorized by the Federal Court for the District of Colorado to and did sell the property of said road for junk purposes, and the road is no longer in operation. There was, and is, a widespread opinion that no court, not excluding the Federal Court, has jurisdiction to authorize the discontinuance of the operation of a purely intrastate carrier.

People *ex rel.* v. Colo. Title & Trust Co., *et al.*, 65 Colo. 472.

The result is that a good deal of feeling has been engendered. In passing on the questions involved in this application, it is proper for the Commission to consider any past experience, in order to determine what properly should be done now, but, of course, it is not proper to make any unlawful or improper requirements in order to punish any person or corporation for some course of action taken.

One of the best reasons for organizing a corporation is, and always has been, to escape certain burdens that accompany operation of a business by the persons or corporations who become stockholders in the corporation. If A, B and C organize a motor vehicle transportation company and ask this Commission for a certificate of public convenience and necessity, the Commission could not properly, in the ordinary case, require A, B and C to agree to extend credit to the corporation, particularly if its assets are ample, or to agree not to sell or encumber their stock therein. Neither can the Commission ordinarily, as we view it, make these requirements of a corporation owning stock in another corporation. This is a matter of law with which this Commission has nothing to do, and the wisdom of which it has no right to criticize.

Of course, there are quite a number of cases holding that, under some conditions and circumstances, it is proper to disregard the corporate existence or "fiction," as it is sometimes called.

14 Corpus Juris 62, Note 82, Bishop v. U. S., 16 Fed. (2d) 410, and cases cited.

But, as is stated in the note in 1 A. L. R. 610, ". . . the rule is that the corporate entity will not be disregarded . . . ordinarily, corporate existence cannot be disregarded. The exceptions to this rule are few." See also the supplemental note in 34 A. L. R. 597.

We believe an examination of the cases holding that the corporate existence may be disregarded, dicloses that in most of them something illegal was attempted through the use of the corporation. In Northern Securities Company v. U. S., 193 U. S. 197, an illegal combination in restraint of trade was effected by the transfer of the stock of competing railroad companies

to a holding company. In Southern Pacific Terminal Company v. Int. Com. Comsn., 219 U. S. 498, it appears that an unlawful preference was being given a certain shipper by the terminal company, which was a part of the Southern Pacific System. Numerous other cases of this nature could be cited. A man controlling a corporation and owning practically all its stock might probably be denied a discharge in his own bankruptcy case because of fraudulent acts committed through the instrumentality of the corporation. In this case, however, there is no attempt to do a fraudulent or illegal act. At most it is an attempt through the use of the subsidiary corporation to escape from burdens incident to direct ownership. As we have said, this is not only a common purpose, but one which the law has made legitimate.

But on examining the supplemental and amendatory petition in Application No. 454, in which we issued a certificate to applicant authorizing its Denver-Boulder operation via Lafayette, we find the following:

"That applicant is a subsidiary of and all of its capital stock as issued will be owned by The Colorado and Southern Railway Company, which is also similarly the owner of all of the outstanding capital stock of The Denver and Interurban Railroad Company; that the amount of applicant's capital stock is Two Hundred and Fifty Thousand ($250,000) Dollars, which amount of money will be advanced by The Colorado and Southern Railway Company in the purchase of its said capital stock and used by applicant in acquiring the latest and best motor vehicle equipment, as described in the original application, and such other property as may be necessary."

In other words, the applicant, in order to get the original certificate, promised that The Colorado and Southern Railway Company would pay into the treasury of applicant's predecessor Two Hundred and Fifty Thousand ($250,000) Dollars. In reliance upon that representation and promise, this Commission issued the certificate. Moreover, the same officer stated at the original hearing in this case that the resources of said railway company would be back of the operations of the applicant.

We recall no evidence being introduced showing why this amount of money should not be paid into the treasury of the applicant. One would think that, when the operations are to be enlarged, more capital than was originally promised would be necessary. In view of this promise made in Application No. 454 and the said statement made in this case, and of the lack of any showing why the promise should not be carried out, particularly in view of the enlarged operations, we are of the opinion and find that the public convenience and necessity requires The Colorado and Southern Railway Company either to pay enough more money into the treasury of the applicant in purchase of stock so that the total amount of stock sold shall equal $250,000, or that said railway company shall extend credit to the applicant for an amount equal to the difference between the amount already paid into the treasury and $250,000.

In reaching this conclusion we take into consideration the fact that the attorneys for the applicant herein are the attorneys for the railway company, and that the president of the applicant, who signed said supplemental and amendatory petition in Application No. 454, and who made the said statement at the original hearing in this case, was at the time he signed said petition and made said statement the Vice-President and General Manager of the railway company.

We believe also that it is proper for this Commission to require, and we find that the public convenience and necessity does require, that the applicant herein shall not, in any way, use or encumber its equipment or other assets for any other purpose than those connected with the operation of the applicant.

ORDER.

It Is Therefore Ordered, That a rehearing be granted and that said original conditions of the said order be, and they hereby are, eliminated from said order, except as herein retained.

It Is Further Ordered, That The Colorado and Southern Railway Company either pay enough more money into the treasury of the applicant for its stock so that the total amount of stock sold shall equal $250,000, or that the said company shall

extend credit to the applicant for an amount equal to the difference between the amount already paid into the treasury and $250,000, and that the applicant shall make a written report to this Commission within twenty days from this date of this requirement having been complied with.

IT IS FURTHER ORDERED, That the applicant shall not, in any way, use or encumber its equipment or other assets for any other purpose than those connected with the operations of the applicant.

IT IS FURTHER ORDERED, That the applicant within a period of fifteen days within the date hereof file tariffs of rates, rules and regulations and time schedules, as required by the Rules and Regulations of the Commission governing motor vehicle carriers.

IT IS FURTHER ORDERED, That the original order herein shall remain and continue in full force and effect, except as herein modified.

Chairman Bock dissenting:

I regret exceedingly that I am compelled to dissent from the order of my colleagues in the rehearing herein. I am very strongly persuaded that the conditions expressed in the original order are reasonable, based upon the record made in the case, and intended to protect the public interest, which, after all, is the Commission's first concern. As was so well expressed in the recent case of The Kansas Gas and Electric Light Co. v. Public Service Commission of Kansas, 251 Pac. 1097, 1099, that "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."

A recital of the history leading up to this certificate is necessary to a complete understanding of the original order. The first application to operate a motor vehicle carrier transportation system by a subsidiary of The Colorado and Southern Railway Company between Boulder and Denver was filed by The Denver and Interurban Railroad Company on May 28, 1925 (Application No. 454), which at that time was operating an electric in-

terurban line between Denver and Boulder. Prior to that time the Commission held on at least two occasions that the public convenience and necessity did not require motor transportation between Boulder and Denver, because the public was being sufficiently served by The Colorado and Southern Railway Company and The Denver and Interurban Railroad Company. In that particular application filed by The Denver and Interurban Railroad Company the following allegations are set out:

"That it is the opinion and belief of The Denver and Interurban Railroad Company and of its officers that its revenues can be so increased and augmented by engaging in automobile or motor bus transportation between Denver and Boulder; that because of the growing demand for and appeal to the traveling public of motor bus transportation, it is believed that transportation conditions between Denver and Boulder are such as to warrant and justify the operation of motor busses between said cities and the intermediate territory, provided such motor bus operations are in cooperation with and supplementary to the existing railroad service hereinabove referred to and not in competition therewith; that if authority to engage in such motor bus transportation is granted to a rival or competing motor bus transportation company, not under the control of or owned by The Denver and Interurban Railroad Company, the result inevitably will be that The Denver and Interurban Railroad Company will be forced to apply to this Commission for authority to discontinue all of its service, dispose of all of its property and go out of existence."

There is also an allegation contained in that application that The Denver and Interurban Railroad Company is a subsidiary of The Colorado and Southern Railway Company.

At the time of the hearing therein a supplemental and amendatory petition was filed, praying that in the event a certificate should be granted it be issued to The Denver and Interurban Motor Company. In that supplemental and amendatory petition the following allegation is contained:

"That applicant is a subsidiary of and all of its capital stock as issued will be owned by The Colorado and Southern Railway

Company, which is also similarly the owner of all of the outstanding capital stock of The Denver and Interurban Railroad Company; that the amount of applicant's capital stock is Two Hundred and Fifty Thousand ($250,000) Dollars, which amount of money will be advanced by The Colorado and Southern Railway Company in the purchase of its said capital stock and used by applicant in acquiring the latest and best motor vehicle equipment, as described in the original application, and such other property as may be necessary."

After that hearing, and on August 4, 1925, the Commission entered its order therein, from which I desire to quote the following language:

"The City of Boulder has had steam railroad transportation between there and Denver for a number of years, commencing about 1880. The Colorado and Southern Railway Company has been the rail carrier for a number of years last past. Owing to a very considerable growth of the University of Colorado and the Chautauqua, it was decided in 1908 by The Colorado and Southern Railway Company to put in a popular service, which at that time was considered to be the electric line service, between those points. This electric line service was furnished by The Denver and Interurban Railroad Company, a subsidiary of The Colorado and Southern Railway Company. Witnesses for The Denver and Interurban Railroad Company testified that the territory in question has grown and that there now is a real demand for a different type of service, designated as motor bus or motor coach service, and that since The Colorado and Southern Railway Company and its subsidiary are in the transportation business which has served this territory for a number of years, they have come to the conclusion that it was their duty to meet the popular demand for motor bus transportation. The financial plan of the applicant depends upon ownership by The Colorado and Southern Railway Company, it being the parent company and supplying the funds or moneys therefor, and through its control of the stock of the subsidiary companies directs their operation. In other words, the relation existing between The Colorado and Southern Railway Company and The

Denver and Interurban Railway Company furnishing electric service, will be the same as it relates to The Denver and Interurban Motor Company, which will furnish the motor bus transportation. All this means that, in effect, The Colorado and Southern Railway Company, which has furnished the steam railroad transportation in the territory in question for years, and which later, through the agency of The Denver and Interurban Railroad Company, furnished the electric service, now desires to furnish, through The Denver and Interurban Motor Company, the motor bus service. * * *

"This Commission recognizes that its first duty is to the public interest, and was very much impressed with the testimony introduced by the Boulder Chamber of Commerce, which was to the effect that the citizens of Boulder were mainly interested in retaining the present passenger transportation service they now receive through the Denver and Interurban Railroad, and that, therefore, if the Commission was of the opinion that the public convenience and necessity required motor transportation between Boulder and Denver, that it should grant such a certificate to such applicant whose operation would most tend to preserve to the citizens of Boulder the present passenger transportation facilities."

The considerations guiding the Commission in imposing the conditions in the instant application were to make effective the representations that The Colorado and Southern Railway Company had furnished the territory in question transportation for a number of years, and that, therefore, it should retain control of the transportation facilities, and furthermore the desire of the public to have The Colorado and Southern Railway Company retain control because of its financial dependability and the natural benefits that would be derived from such a single control, in the event that it was absolutely and legally effective. Promises that are not binding are meaningless.

The evidence in the instant hearing by Robert Rice, Vice-President and General Manager of The Colorado and Southern Railway Company, and President of The Denver and Interurban Motor Company, is to the effect that the applicant company was

incorporated by The Colorado and Southern Railway Company, through officers of that company; that The Colorado and Southern Railway Company is behind this company and the sole stockholder, except the qualifying shares of directors. The witness also admitted that at the hearing in Application 454 he testified that The Colorado and Southern Railway Company would guarantee the financial backing of the applicant to the sum of $250,000. The following is part of his testimony at the hearing in the instant application:

"Q. (By Mr. Dier) So that when the question of the financial responsibility of The Denver and Interurban Motor Company comes up or is involved, the answer to that question is by reference to the financial responsibility of The Colorado and Southern Railway Company?

A. I think so.

Q. (By Chairman Bock) Mr. Rice, as I understand your testimony now and your testimony at Boulder that you referred to, that in the showing that you made as to the financial dependability of this Motor Company, you submit the financial strength of The Colorado and Southern Railway?

A. Yes, sir.

Q. And the Commission was asked to consider that financial situation in connection with the granting of the certificate?

A. Yes, sir."

Regardless of the question of "ultimate ownership" responsibility, for which there is some authority, and the further question where one corporation is subsidiary to and owned and controlled by another, that courts look through mere names to learn the real relationships between the corporations and will disregard the mere formal separation into legal entities, the Commission, by requiring the acceptance of the certificate by The Colorado and Southern Railway Company, intended to hold this railroad primarily responsible for a continued, dependable transportation system in the territory in question. True, the Commission has no power to require the acceptance of the certificate of public convenience and necessity issued herein by The Colorado and Southern Railway Company, or, for that matter, by

the applicant, and, therefore, undoubtedly did not desire to grant a certificate unless such acceptance was made. If the public shall not have the legal advantage of primarily holding The Colorado and Southern Railway Company responsible for the intrastate transportation offered to the territory in question, although the Railway Company has through its stock ownership the power to control this transportation operation as long as it desires, then, in my opinion, the public interest would be far better served to give other motor operations a certificate in that territory, thereby creating a competitive situation between the motor and rail carrier, the effect of which would be through this competitive situation to insure efficient and convenient transportation facilities from all carriers. At the time of the hearing in the instant case two applications, in addition to the application herein, were pending and are still pending for a certificate of public convenience and necessity to operate in that territory. The financial responsibility of at least one of the applicants is as good or better than the applicant herein, if The Colorado and Southern Railway Company is not to assume the conditions contained in the original order.

On the question whether the Commission has power to impose the conditions contained in the original order, the law expressly states that "the Commission shall have power after hearing to issue said certificate * * * 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." (C. L. 1921, Sec. 2946 (c).) If the conditions are unreasonable or arbitrary, which in my opinion they are not, the applicant has its right to review in the courts. True, the reasonableness of the conditions must be reflected in the record, and abundant facts appear to warrant such conditions. The record shows that The Denver and Interurban Railroad Company, a subsidiary of The Colorado and Southern Railway Company, after the order granted in Application No. 454, and the applicant herein had obtained the first certificate to operate between Boulder and Denver, was abandoned by foreclosure proceeding in the Federal court, without authority from this Commission

and contrary to the law as expressed in Public Utilities Commission v. Colorado Title and Trust Company, 65 Colo. 472, wherein the Colorado Supreme Court held that the Commission had exclusive jurisdiction to determine whether a railroad company may suspend service upon and dismantle a railway line wholly within the State. The abandonment of The Denver and Interurban Railroad Company was subsequent to the issuance of the first certificate to the applicant herein, and, therefore, the Commission did not attach such conditions in that certificate as are contained in the instant order. In fact, the certificate in Application No. 454 was granted so as to preserve the electric rail service of The Denver and Interurban Railroad Company for the City of Boulder. The failure of the Commission, therefore, to include such conditions in the first order should not be a ground upon which to predicate unreasonableness.

This is not a matter in which the Commission is attempting to punish a utility for abandonment without authority by the Commission, but rather a situation by which the Commission, in the conditions designated, attempted in the future to protect the public in its transportation facilities. If the Commission upon the record in the instant case, because of the separate corporate entity, does not possess the power to make The Colorado and Southern Railway Company responsible, then the Commission's power to enforce proper and efficient transportation in the interest of the public is impotent indeed. I cannot believe that the Commission's power is thus circumscribed. The Commission has the power, under the record as made, to impose such conditions as the public convenience and necessity may require, which, in effect, means any reasonable conditions that will protect the public interest. A certificate of public convenience and necessity to operate as a common carrier intrastate upon the public highway is not issued as a matter of right, but a privilege based upon the police power of the State, and dependent upon the public needs. This is legislative power delegated by the legislature to this Commission to administer. The legislature itself possesses the same power. Could it be claimed that a certificate granted by the legislature of the State could not contain the

conditions in the instant order sufficient to fully protect the public interest, subject only to such constitutional limitations as would be applicable? Any attempt through the use of a subsidiary corporation to escape burdens incident to direct ownership, such as the record discloses and as it relates to common carrier liability intrastate, should not be permitted, and if necessary some way found by which the public interest is fully protected. This, in my opinion, the conditions imposed in the original order attempts to do. If they are arbitrary, unreasonable or unconstitutional, which I do not believe they are, the applicant has its right to review and remedy in a court of law. Any order that does not sufficiently protect the public interest may likewise be arbitrary and unreasonable.

After a careful consideration of the motion for rehearing filed herein, I am of the opinion that the same should be denied.

THE CLEAR CREEK POWER & DEVELOPMENT COMPANY

v.

PUBLIC SERVICE COMPANY OF COLORADO.

[Case No. 315. Decision No. 1340.]

Procedure—Elastic and free from technicalities.

1. The procedure of the Commission should be free from technicalities and as elastic as the ends of justice will permit.

Monopoly and competition—Service—Extension.

2. It is proper for the Commission to determine in a case instituted by the filing of a complaint by one utility whether another similar utility may extend its equipment and service to a particular territory or area.

Courts—Commissions—Jurisdiction—Temporary injunction.

3. That a court of equity granted a temporary injunction to preserve the status quo pending the determination by the Commission of the right of a utility to serve a particular area does not mean that the court will then take over and exercise duties delegated to the Commission.

Procedure—Motion to dismiss—Conditioned on untenable ground alone.

4. The Commission will not dismiss a complaint on motion of the applicant if dismissal is sought only upon a condition which the Commission cannot agree to.

[June 24, 1927.]

Appearances: John J. White, Esq., Georgetown, Colorado, Attorney for plaintiff; D. Edgar Wilson, Esq., Denver, Colorado, Attorney for defendant.

STATEMENT.

By the **Commission**: On April 27, 1927, the Clear Creek Power and Development Company filed a complaint alleging that it is and at all times has been since January 10, 1922, a corporation organized and existing under and by virtue of the laws of the State of Colorado, and that it and its predecessors since 1907 have been engaged in the business of generating and furnishing electric current for light and power in the town of Empire and in the mines and mills in the immediate vicinity and territory. It alleges that the defendant is unlawfully constructing a transmission line from one of the latter's main lines in said county of Clear Creek into said Empire territory and is making or has made arrangements to supply electric energy to certain mines and a mill in said territory. The complaint concludes with a prayer for an order prohibiting the construction or extension of said transmission line by the defendant into said territory of Empire, and that the defendant be prohibited and enjoined from in any manner invading said territory or any part thereof and from supplying any power or electric current to any person or corporation in said vicinity, and that the rights of the "complainant be permanently established to serve in said Empire district and territory with electrical power and current," and for any other and additional relief, which shall be meet and proper.

It appears that the plaintiff understood that the defendant was proceeding with the construction of said transmission line after the said complaint was filed. It thereupon filed a complaint in the district court of Clear Creek County praying for

a temporary restraining order and, on final hearing, for a permanent injunction. This complaint was filed on May 7, 1927. An order termed "A temporary restraining writ of injunction" appears to have been entered in said case on May 10, 1927.

The defendant filed its answer on May 18, 1927, denying specifically or on information and belief most of the allegations contained in said complaint. It admits that it is constructing or has constructed a transmission line from one of its main lines in Clear Creek County into said Empire territory, and that it has entered into a contract to supply electric current and power to certain companies doing business therein. It admits that at the present time complainant is supplying a certain mill in said territory with electric current for light and other purposes but alleges that the arrangement, as the complainant well knows, is a temporary one. It denies that the complainant has supplied said current and power efficiently. It denies that the construction by it of said transmission lines into said territory constitutes a wrongful or unlawful invasion of the complainant's rights. It denies that the Empire territory heretofore has been supplied with electric current by complainant only. It denies that the complainant, its predecessors or grantors supplied said district or territory with electric current prior to the year 1913. It further denies that the building of the transmission line in question is a construction into territory never before served by the defendant, its predecessors or grantors. The defendant admits also that it has not heretofore made application to this Commission for authority to construct a transmission line to said mines and mill.

Further answering, the defendant states that long prior to 1917 said territory was served and supplied with electric energy by the predecessors and grantors of the defendant and that as the successor and grantee of those companies, the defendant has a lawful right to furnish electric energy therein.

On June 2, 1927, the defendant herein filed what is termed an amendment to its answer in which it alleges, among other things, that the mining companies in question had made written applications to the defendant for extension of its lines so as to serve

their mines and mill; that it accepted said application and in accordance therewith constructed or reconstructed a transmission line to the mines and mill aforesaid; that the electric energy furnished by the complainant has an uneven and unsteady flow and is totally unfit and unsuited for the purpose of running the machinery in said mines and mill.

The said amendment to the answer prays as in its original answer or in the alternative that this Commission enter an order approving and ratifying the construction by it of said line and authorizing this defendant to supply and sell electric energy to said mines and mill and granting it a certificate of public convenience and necessity for the extension, construction, erection, maintenance and operation of its transmission line and distribution system for the distribution of electrical energy in said territory.

Thereafter the plaintiff filed written objections to the jurisdiction of this Commission to proceed further in the matter, claiming that the district court of Clear Creek County, sitting as a court of equity, has authority to determine all the questions involved in the application.

There appear to be three points involved herein:

One. Is it proper to determine in this matter, originally a complaint proceeding, the question raised by the prayer in the amendment to the answer for alternative relief, namely, whether, in the event defendant is not now entitled to operate in the vicinity, a certificate of public convenience and necessity should be issued to it authorizing such operation?

Two. Would the Commission now have jurisdiction to consider the questions raised and to grant the relief prayed in the complaint if the complainant had not gone into a court of equity since the filing of the complaint?

Three. If it would have such jurisdiction, does the fact that the complainant has gone into a court of equity terminate the jurisdiction of the Commission?

Rules of procedure of this Commission do not specifically provide for or forbid that applications for certificates of public convenience and necessity be made by way of counterclaim. In

Colorado Power Company v. Pirie, the former being the predecessor of the defendant herein, and the latter being the predecessor of the complainant herein, being Case No. 235 before this Commission, it appears that the complainant brought suit to prevent the defendant from supplying electric current to the city of Idaho Springs upon the ground that it alone had that right. The defendant answered denying the allegations of the complaint and asked for a certificate, just as has been done by the defendant in this case. The case was tried upon the issues made by the proceedings and the decision of the Commission was affirmed in Pirie v. Public Utilities Commission, 72 Colo. 65.

The procedure of an administrative body such as this Commission is should be free from technicalities and as elastic as the ends of justice will permit. We believe and find that the counterclaim in this answer is proper.

Section 35 (a) concludes as follows:

* * * and, provided, further, that if any such public utility, in constructing or extending its line, plant or system, shall interfere or be about to interfere with the operation of the line, plant or system of any other public utility already constructed, the commission, on complaint of the public utility claiming to be injuriously affected, may, after hearing, make such order prohibiting such construction or extension or prescribing such terms and conditions for the location of the lines, plants or systems affected as to it may seem just and reasonable.

This language seems so clear as to completely dispose of the question of the original jurisdiction of the Commission to determine the questions raised and to grant, if the facts should warrant, the relief prayed for in the complaint. The uniform practice of the Commission has been to assume and exercise jurisdiction in matters of this sort.

We believe that it was doubtless proper, if the facts warranted, for the plaintiff to seek and secure from the district court of Clear Creek County such order or orders as might be necessary to preserve the *status quo* pending the final order of the Commission. While this Commission possesses only administrative

authority, it is necessary for it in the exercise of such authority, in the absence of a judicial sentence, to take such action and to make such orders as it deems just and legal. We, therefore, conclude that no court merely because it is called upon to preserve a status is going to assume and take over the administrative duties delegated by the legislature to this Commission. No authority has been cited to the Commission to justify the contention that merely because it is necessary to call on a court of equity to preserve a status, that court will then take over and exercise administrative duties and functions of an administrative body. The maxim that equity renders complete relief is, we believe, confined to judicial relief. The one case which seemed to us possibly to support the contention of the complainant, People v. P. & P. U. Ry. Co., 273 Ill. 440, 446, simply holds that a court has jurisdiction to determine the rights of a carrier and a private individual arising out of a contract entered into by them.

Colorado authorities bearing on this question are: People v. Colorado Co., 65 Colo. (1918) 472; Clark v. Public Utilities Commission, 78 Colo. (1925) 48. Other cases are Fogelsville, etc., Co. v. Pennsylvania, etc., Co., 114 Atl. (Pa. 1921) 822, and Kinder v. Looney, 283 S. W. (Ark., 1926) 9.

As to the question of the right of the complainant to have his complaint dismissed, we might state that during the argument on its objections, the Commission asked its attorney whether, irrespective of the question of the jurisdiction of the Commission to proceed further, the complainant desires to have the complaint dismissed. We were told that dismissal is not desired unless it be upon the express condition that the Commission, because of the action taken in said court, no longer has jurisdiction. Therefore, to say nothing of the effect on the defendant asking for affirmative relief before the objections of the complainant were filed, we are unable to dismiss when we are asked to do so on a condition which we cannot and do not approve.

ORDER.

IT IS THEREFORE ORDERED, That the objections of the complainant to the further exercise of jurisdiction by the Commission be, and they hereby are, overruled, and that the questions raised by the pleadings filed shall stand for hearing in regular course.

RE PUBLIC SERVICE COMPANY OF COLORADO.

[Application No. 805. Decision No. 1342.]

Certificates of convenience and necessity.

Certificate of convenience and necessity issued authorizing exercise of franchise rights granted by the town of Palisade.

[June 24, 1927.]

STATEMENT.

By the **Commission**: On December 31, 1926, Public Service Company of Colorado filed its application praying for an order authorizing the applicant to exercise franchise rights by ordinance granted to The Palisade Service Company and granting to applicant a certificate of public convenience and necessity for the extension, construction, erection, maintenance and operation of its power plants and stations, transmission lines and distribution systems, for the generation and distribution of electrical energy in the territory described in the foregoing application.

A hearing was had in the Hearing Room of the Commission on May 25, 1927. No objection to the application was made.

The applicant is a corporation organized, existing and doing business as a public utility under and by virtue of the laws of the State of Colorado, having its principal office and place of business in the City and County of Denver, in said State. It is authorized and empowered by the State of Colorado to construct, acquire, maintain and operate transmission lines, power stations, systems and appliances for the generation, transmission, distribution and sale of electrical energy and electricity for heat, light, power, motive and other purposes.

On March 15, 1916, the town of Palisade, Colorado, passed an ordinance entitled:

"An ordinance granting to The Palisade Service Company, its successors and assigns, the right and authority to furnish and distribute electric energy to the Town of Palisade, State of Colorado, all additions thereto and the inhabitants of the said Town of Palisade, State of Colorado, all additions thereto and the inhabitants of the said Town of Palisade, and of the additions thereto, and granting right and authority to The Palisade Service Company to construct, erect and maintain and operate such plants, distributing stations, poles, wires and appliances as may be necessary for the furnishing and distribution of such electric energy."

The franchise was granted for a period of twenty years from the date of said ordinance.

Thereafter said The Palisade Service Company, by mesne conveyances and assignments, transferred to The Grand Junction Electric, Gas and Manufacturing Company all its right, title and interest in and under said franchise. On November 24, 1926, the applicant acquired by purchase, transfer, assignment, and conveyance from the said The Grand Junction Electric, Gas and Manufacturing Company all of the latter's right, title and interest in and under said franchise.

Section 35 (b) of the Public Utilities Act provides, *inter alia*,

"No public utility shall henceforth exercise any right or privilege under any franchise, permit, ordinance, vote or other authority hereafter granted, or under any franchise, permit, ordinance, vote or other authority heretofore granted, but not heretofore actually exercised, or the exercise of which has been suspended for more than one year, without first having obtained from the Commission a certificate that public convenience and necessity require the exercise of such right or privilege."

Section 35 (c) contains the following language:

"If such public utility desires to exercise a right or privilege under a franchise, permit, ordinance, vote or other authority which it contemplates securing, but which has not as yet been

granted to it, such public utility may apply to the Commission for an order preliminary to the issue of the certificate."

It appears that the applicant has been exercising its alleged rights or privileges since prior to the filing of its application without applying for said "order preliminary." However, as heretofore, there has been some doubt on the part of some people as to the necessity for a certificate of public convenience and necessity being granted before exercising the rights or privileges under such an assignment by another utility of the rights or privileges theretofore exercised by the latter, we have concluded in this case not to deny the certificate on account of the failure to secure such order.

It further appears that the applicant has other electrical facilities situate outside of the town of Palisade within the county of Mesa and that there is at the present time no other public utility competing with the applicant in the town of Palisade or in the rural and suburban districts along the route of the applicant's transmission line or lines in said county.

The evidence shows that the capital investment, as of the time of the filing of the application, is $75,000. However, this amount shall not be binding on the Commission in any valuation hearing held for the purpose of determining reasonable rates.

After considering the evidence, we are of the opinion and find that the public convenience and necessity does now, and in the future will, require the exercise by the applicant of the said franchise rights by ordinance granted to said The Palisade Service Company, its successors and assigns, to which the applicant has succeeded, as aforesaid.

We further find that the public convenience and necessity does now and in the future will require that the applicant be permitted to furnish electrical current for light, power and other purposes to whomsoever may desire the same and as it may be practicable along the route of its said transmission line or lines in said county of Mesa; and that the applicant be granted the privilege of extending its facility or line, plant or system situate in said town of Palisade and county of Mesa into territory contiguous to said facility or line, plant or system, provided any

desired extension is made before the territory into which the extension is to be made may be lawfully served by another public utility.

ORDER.

IT IS THEREFORE ORDERED, That the public convenience and necessity does now, and in the future will, require the exercise by the applicant of the said franchise rights by ordinance granted to said The Palisade Service Company, its successors and assigns, to which the applicant has succeeded, as aforesaid, 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 public convenience and necessity does now, and in the future will, require that the applicant be permitted to furnish electrical current for light, power and other purposes to whomsoever may desire the same and as it may be practicable along the route of its said transmission line or lines in said county of Mesa; and that the applicant be granted the privilege of extending its facility or line, plant or system situate in said town of Palisade and county of Mesa into territory contiguous to said facility or line, plant or system, provided any desired extension is made before the territory into which the extension is to be made may be lawfully served by another public utility.

Similar certificates were issued in the following applications filed by the same applicant:

Application No. 560, Decision No. 1343 (Aurora).
Application No. 758, Decision No. 1344 (Hillrose).
Application No. 807, Decision No. 1345 (Hooper).
Application No. 806, Decision No. 1346 (Fruita).
Application No. 829, Decision No. 1347 (Moffat).
Application No. 808, Decision No. 1348 (Rifle).
Application No. 765, Decision No. 1349 (Ovid.)
Application No. 735, Decision No. 1350 (Brush).
Application No. 799, Decision No. 1351 (Sedgwick).
Application No. 559, Decision No. 1352 (Brighton).
Application No. 722, Decision No. 1353 (Leadville).

WESTERN SLOPE MOTOR WAY, INC.,

v.

JOHN A. DIXON, *et al.*

[Case No. 317. Decision No. 1358.]

Contract carriers—Private—Definition.

"A private contract carrier operation is such as is entered into by the carrier with certain persons, and contemplates the carriage of property of certain persons to places prescribed in individual agreements entered into for that purpose."

[July 7, 1927.]

Appearances: Thos. R. Woodrow, Esq., Denver, Colorado, for complainant; J. A. Dixon and H. A. Dixon, per se.

STATEMENT.

By the **Commission**: On June 7, 1927, the within complaint was filed against the defendant, John A. Dixon, in which it is alleged he is now, and for several months prior hereto has been, engaged in hauling freight between Montrose and Grand Junction, Colorado, by motor truck as a common carrier for hire over the public highways without any certificate of public convenience and necessity of the Public Utilities Commission of the State of Colorado; that said operation is in violation of the laws of the State of Colorado in such case made and provided, and in violation of the orders, rules and regulations of the Commission. Defendant, J. A. Dixon, filed no written answer.

This case was set down for hearing at the Court House, Grand Junction, Colorado, on June 27, 1927, at which time evidence in support of this complaint was received.

The defendant, J. A. Dixon, appeared at said hearing, and it developed from his testimony that it was his son, H. A. Dixon, who was conducting this operation. H. A. Dixon was also in attendance at the hearing and without objection was made a defendant and testified herein. It appears from the testimony that J. A. Dixon is the owner of a truck which he is loaning to H. A. Dixon, his son, without payment of hire or compensation. This truck is being used in this operation. In addition thereto, H. A.

Dixon has another truck that he uses. Defendant, H. A. Dixon, transports all of the freight of the Skaggs Stores in that territory. He also admitted that, whenever he could obtain an entire truckload of freight in the territory in question, he would haul the same for anyone who had such quantity of freight to offer. The testimony further shows that he did haul for several people in Montrose under such circumstances. It may be that the defendant's operation for Skaggs is as a private contract carrier; the other operations appear to carry the earmarks of common carrier operations. Evidently the defendant is anxious to obtain what is called a return haul, and therefore, when delivering goods to Montrose, Colorado, he endeavors and solicits freight to haul back to Grand Junction. A private contract carrier operation is such as is entered into by the carrier with certain persons, and contemplates the carriage of property of certain persons to places prescribed in individual agreements entered into for that purpose. No such agreements were introduced in the record. The Commission, of course, has no jurisdiction over strictly private contract carriers, and the order herein entered does not pertain to such operations.

The complainant is operating a scheduled freight service between the points in question under a certificate of public convenience and necessity, and the unlawful operations of the defendants are very injurious to it.

After a careful consideration of the testimony, the Commission is of the opinion, and so finds, that the defendants have violated the Public Utilities Act in operating as a common carrier of freight between Montrose and Grand Junction without first having obtained a certificate of public convenience and necessity; that the operation of the defendants is in opposition to, and interferes with, the operations of the complainant, and if the defendants persist in the continuation of such operation, as disclosed by the evidence herein, except as it strictly relates to private contract carrier business, the same will constitute a violation of the Public Utilities Act.

ORDER.

IT IS THEREFORE ORDERED, That the said defendants, J. A. Dixon and H. A. Dixon be, and they are hereby, prohibited from further operation of their motor vehicle transportation service of freight as common carriers between Grand Junction and Montrose, Colorado, and that the defendants be, and they are hereby, required to cease and desist from further operation of said motor vehicle carrier operations between said points.

IT IS FURTHER ORDERED, That, if within twenty days from the date of this order the defendants are still conducting said motor vehicle carrier operations, 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, and to take such other action as he shall deem necessary in the premises.

THE PIKES PEAK CONSOLIDATED FUEL COMPANY
v.
THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, *et al.*

[Case No. 272. Decision No. 1372.]

Procedure—Rehearing—To permit second attempt to secure review. The Commission will not grant a rehearing merely because the parties desiring a review of the Commission's order took the wrong course therefor, and may take the proper course only if a rehearing is granted and then final decision is made again.

[July 14, 1927.]

Appearances: L. J. Williams, Esq., Denver, Colorado, for complainant; W. M. Campbell, Esq., Denver, Colorado, for defendants.

STATEMENT.

By the **Commission**: On December 18, 1924, the Commission signed an order disposing of the questions raised by the complaint and answers. Two applications for rehearing were filed,

that of The Denver and Rio Grande Western Railroad Company, et al., being dated December 24, 1924. The applications for rehearing were denied on January 12, 1925. Thereafter the defendants, in the manner provided by Section 2961 of the Compiled Laws of 1921, filed in the Supreme Court their petition for a writ of review, which was issued and served upon this Commission. Thereafter, and on February 11, 1926, the Supreme Court, after having rendered its opinion in Clark, et al., v. Utilities Commission, et al., 78 Colo. 48, dismissed said writ of review on its own motion.

On April 24, 1926, The Denver and Rio Grande Western Railroad Company, The Atchison, Topeka and Santa Fe Railway Company and The Colorado and Southern Railway Company filed what is termed an application for rehearing, in which they allege "that the ends of justice demand that they be permitted to file this second application for rehearing." They further request that in the event the application for rehearing should be denied, the order of December 18, 1924, be amended so the petitioners may be given sixty days' additional time in which either to put into effect the rates prescribed in said order, or to take such other steps as they may deem necessary for the protection of their rights.

The complainant filed objections to the application and moved that the same be stricken.

The defendants undoubtedly exercised good faith in attempting to secure a review of the order of this Commission lowering certain rates on coal and slack, and doubtless did not know until the decision was made in the Clark case that that part of the Utilities Act seeking to impose original jurisdiction upon the Supreme Court is unconstitutional. The Commission always welcomes reviews of its orders in order that the rights of the parties may be safeguarded and the Commission in its future proceedings may have the benefit of the decisions passing on its orders. Moreover, we sympathize with the hard situation now occupied by defendants, but no new grounds, aside from the hardship resulting from the predicament in which the defendants find themselves, are stated.

We doubt whether in an ordinary case we should permit successive applications for rehearing, assuming that we have the power so to do. If not permitted in the ordinary case, should an exception be made in cases where the parties have been misadvised as to legal procedure so that they may start again on the right track? We believe not. Concerning both the granting of a rehearing and amending the original order to meet the particular situation, we believe the language of the Supreme Court in the Clark case is applicable: "We know of no rule which requires or sanctions such an order." An order granting a rehearing really involves a consideration of the original order and a conclusion that the same might probably be erroneous. The said order in this case was made by the Commission before two of the present members thereof were appointed. We believe a proper regard for orderly procedure requires that when a case has been decided, an application for rehearing has been heard and denied, and the case has thus reached what ordinarily is considered its final stage before review, the Commission, as constituted from time to time thereafter, should not continue hearing and granting applications for rehearing although possibly (we do not say or intimate actually) the majority opinion on the questions originally determined might change with each change of membership of the Commission. What the Commission as now constituted might have decided if the questions determined had originally been presented to it, we do not know.

In passing we hight say that we are not unmindful of the decision of the Supreme Court in People ex rel., etc., v. District Court, 76 Colo. 169, in which it held that the power is inherent in a court to set aside its judgment and grant a new trial when the action is demanded by justice. That power existing in a court is doubtless an equitable power which it is doubtful whether this administrative body has. Moreover, in that case the failure of the parties seeking a review in the Supreme Court to procure their bill of exceptions was due, not to an error as to legal procedure, but to an alleged impossibility in fact without fault on their part to procure such bill.

It would seem that probably the defendants in this case have the power to raise the questions, originally determined, in a new proceeding, if they should be so advised. Therefore, their situation is not so serious as might first appear.

Under all the circumstances, the Commission is of the opinion that the defendants' motion for leave to file the second application for rehearing should be denied.

ORDER.

IT IS THEREFORE ORDERED, That the motion for leave to file the second application for rehearing be, and the same is hereby, denied.

IT IS FURTHER ORDERED, That insofar as said application may be filed without an order of the Commission, the motion of the complainant to strike the same be, and the same is hereby, granted.

RE RULE 18, RELATING TO HEATING VALUE OF GAS.

[Case No. 84. Decision No. 1376.]

Gas—Heating value.

Order made for an investigation of the necessity and propriety of revising Amended Rule 18, relating to the heating value of gas.

[July 16, 1927.]

STATEMENT.

By the **Commission:** On August 29, 1923, the Commission revised Rule 18 relating to the regulation of the heating value of gas. Prior to the said revision, the said rule required that gas, when tested within one mile of the manufacturing plant, should give a monthly average total heating value of not less than 575 British thermal units, commonly called B.t.u., per cubic foot, with the further requirement that at no time should the total heating value of the gas at such point fall below 525 B.t.u. per cubic foot. In the amended Rule 18, adopted August 29, 1923, the Commission left the standard heating value, within certain

limitations, to the utility. At the time this rule was revised it was assumed that a lowering of the B.t.u. standard is not necessarily detrimental to the consumer's service. It was also suggested at the time that the Bureau of Standards had made the statement, based on exhaustive tests made in the Baltimore investigation, that the "relative efficiency of gases of different heating value when gas was used in domestic range burners showed conclusively that for the ordinary commercial gases over the range of 300 to 600 B.t.u. there was no perceptible difference in efficiency." Since that time the Bureau of Standards has made an investigation of the gas heating values, especially as related to the Denver situation, with the result that it is erroneous to conclude that low heating values necessarily result in the saving of fuel or production expense, and that the reduction of heating value causes no increase in the customers' bills. The idea has gone out over Colorado and the United States that this Commission, in allowing gas utilities to adopt their own B.t.u. content, concluded that the value of a unit of gas for heating purposes is not affected by the heat or B.t.u. content thereof, and that the monthly bills of consumers will not be raised as a result of the lowering of the B.t.u. content, although the said amended rule contains nothing to that effect. The Commission, therefore, feels that it should have the benefit of experiment and investigation made in gas heating values since the order of August 29, 1923, and has concluded, on its own motion, to make a further investigation of this matter with a view to determining the necessity and propriety of revising Amended Rule 18 where it in any way may be found unreasonable, unfair, unjust, incomplete, inadequate, equivocal or misleading.

ORDER.

IT IS THEREFORE ORDERED, That the Commission enter into an investigation of the necessity and propriety of revising Amended Rule 18 where it in any way may be found unreasonable, unfair, unjust, incomplete, inadequate, equivocal or misleading, and that said investigation shall include the question of the effect of the lowering of the B.t.u. content upon the volume of gas consumed,

and that the engineer and accountants make such investigation as they and the Commission shall deem necessary in the premises.

IT IS FURTHER ORDERED, That a hearing be held on this matter in the Hearing Room of the Commission, State Office Building, Denver, Colorado, on September 20, 1927, at 10:00 o'clock A. M.

IT IS FURTHER ORDERED, That a copy of this order and a notice of this hearing be served on all gas utilities within the State of Colorado, and all municipalities served by gas utilities, with permission to appear and introduce testimony, without formal pleading or answer.

RE PUBLIC SERVICE COMPANY OF COLORADO.

[Application No. 941. Decision No. 1377.]

Certificates of convenience and necessity—Order preliminary.

Order preliminary made declaring that certificate of convenience and necessity will issue authorizing exercise of franchise rights granted by the town of Palisade.

[July 21, 1927.]

Appearances: D. Edgar Wilson, Esq., attorney for applicant, Public Service Company of Colorado.

STATEMENT.

By the **Commission**: The applicant, Public Service Company of Colorado, a Colorado corporation, on July 19, 1927, filed its application in which it prays for an order of the Commission authorizing it to accept a certain franchise granted by an ordinance of the town of Palisade, Colorado, passed, adopted, approved and published by said town, and authorizing applicant to proceed to operate and exercise rights of said franchise so granted, pending the issuance to applicant of a certificate of public convenience and necessity in the premises. Said application further prays that the Commission grant to applicant a certificate of public convenience and necessity for the extension, construction, erection, maintenance and operation of its power plants and stations, transmission lines and distribution systems for the generation and distribution of electrical energy in the territory described in the application.

On June 24, 1927, the Commission entered an order, constituting a certificate of public convenience and necessity, authorizing applicant to exercise certain franchise rights by ordinance granted to The Palisade Service Company, its successors and assigns, to which the applicant had succeeded. Now it appears from said verified application that the said town of Palisade has by its Board of Trustees passed, adopted and approved another ordinance, the title of which reads as follows:

"An ordinance granting to Public Service Company of Colorado, a corporation organized and existing under and by virtue of the laws of the State of Colorado, its successors and assigns, the right, privilege and authority to erect, construct, maintain and operate a substation or substations, electric light and power plants, transmission lines, and a distribution system for the distribution and sale of electricity within the corporate limits of the town of Palisade, Mesa County, Colorado."

Said ordinance provides for and requires written acceptance and approval thereof by the applicant and is not effective until so accepted and approved.

It further appears to the Commission from the statements made by D. Edgar Wilson, Esq., attorney for the applicant, that both the applicant and the said town of Palisade are desirous of the applicant making and filing its written acceptance and approval and entering upon the exercise of the rights and privileges granted by said ordinance at as early a date as possible.

It appears also to the Commission that the terms and provisions of said ordinance are reasonable.

The Commission finds that the public convenience and necessity requires the making of an order preliminary to the issue of the certificate, declaring that it will thereafter, upon application, and the making of necessary proof, issue the desired certificate, upon such terms and conditions as it may designate, after the applicant has obtained and made effective the contemplated franchise, permit, ordinance, vote or other ordinance.

ORDER.

IT IS THEREFORE ORDERED AND DECLARED, By the Commission, that it will hereafter, upon application and the making of necessary proof, issue the desired certificate, upon such terms and conditions as it may designate, after the applicant has obtained and made effective the contemplated franchise, permit, ordinance, vote or other ordinance.

THE CADILLAC SIGHT SEEING COMPANY, *et al.*

v.

THE ANTLERS LIVERY & TAXICAB COMPANY, *et al.*

[Case No. 316. Decision No. 1378.]

Rates—Motor vehicle sightseeing—Proof re reasonableness—Adequacy. Complaint alleging sightseeing motor vehicle rates are unfair, unreasonable and unjust held not to have been sustained by adequate proof.

[July 25, 1927.]

Appearances: Thomas I. Purcell, Esq., attorney for the complainants; F. C. Matthews, Esq., for Pikes Peak Auto Company; O. E. Collins, Esq., attorney for The Elk Hotel; Hungerford and Smith, Esqs., attorneys for The Antlers Livery & Taxicab Company; Harry Anderson, *pro se;* Thomas L. Reasoner for the Scenic Auto Company; C. M. Hammond for The Hammond Scenic Auto Company; Lee Hanthom, Esq., for Buster and Williams.

STATEMENT.

By the **Commission:** On May 18, 1927, complainants, The Cadillac Sight Seeing Company, Mr. D. L. James, Colorado Springs Sightseeing Company, Kight & Tarman, B. E. Beals, Bryant Auto Livery, C. F. Garriott Sightseeing Company, T. E. Anderson, G. E. Bateman, Geo. I. Wetherld, Pikes Peak Auto Livery, Manitou, Colorado, Pikes Peak Auto Livery, Colorado Springs, Colorado, Irvine Sight Seeing Company and Colorado Touring Company, filed their complaint against the respondents, The Antlers Livery & Taxicab Company, The Pikes Peak

Automobile Highway Company, Conway Brothers, Harry Anderson, Buster & Williams, Scenic Auto Company, The Elk Hotel and The Hammond Scenic Auto Company, alleging that the respondents are all holders of certificates of public convenience and necessity authorizing the operation by them of motor vehicle carrier systems for the transportation of passengers on round trip sightseeing tours out of Colorado Springs and Manitou; "That in accordance with the rules and regulations of the Public Utilities Commission of the State of Colorado, the above named plaintiffs and all other persons, firms and corporations operating under certificates from the Public Utilities Commission of the State of Colorado, in the Pikes Peak region, excepting the above named defendants, filed a uniform tariff, which is hereto attached and made a part hereof, which tariff is fair, reasonable and just, both to the passengers and the operators of said motor vehicles;" that the respondents filed a tariff with the Commission similar in its general scope to the tariffs of the complainants, but in certain particulars differing therefrom in that certain tours and combination tours made or conducted by the defendants, for such compensation and rates are unfair, unreasonable and unjust.

The respondents filed their answers denying that their rates are unfair, unreasonable or unjust. The matter was set for hearing and heard in the City Hall, in Colorado Springs, on June 8, the hearing extending into the following day.

It might be stated that prior to the opening of the tourist season in Colorado Springs and Manitou, the Commission co operated with the sightseeing operators and the Chief of Police of the City of Colorado Springs, in an earnest endeavor to work out a uniform tariff covering all of the tours out of said points, that would be fair to the traveling public and at the same time permit the operators to make a reasonable return on their operations. The Commission understood that all of the operators had agreed to the said uniform tariff, generally referred to as the Harper tariff (bearing the name of the Chief of Police of Colorado Springs). Thereafter the respondents filed their tariffs containing certain variations which consisted of their giving

more and greater service for the money than is given by the same or similar trips under the Harper tariff.

The Commission prior to the filing of the complaint herein had never conducted a hearing which would warrant it in fixing rates for the various motor tours out of the said cities. Before the Commission would be justified in this case, in holding that the rates attacked by the complainants are unreasonable, it would have to be proven by a preponderance of satisfactory evidence that they are unreasonable. Quite a few witnesses testified as to the cost of operating under the conditions existing in the Pikes Peak region, but when they were cross examined and a basis for their opinions was sought, their opinions appeared not to have any such basis of actual facts as would justify this Commission in holding that the alleged unreasonableness of the rates had been proven by a preponderance of the evidence. Moreover, there was testimony by respondents, or some of them, to the effect that the cost of operating cars of a much higher value than those owned by most of the operators, is away below estimates of cost given by the complainants. The complainants did not bring before the Commission any reliable cost accounting records kept by them. The case which the complainants must make before they can secure an order finding the rates of the respondents to be unreasonable, should be based in large part on reliable, accurate, written records kept in a systematic and orderly fashion.

After careful consideration of all the evidence offered in the case, the Commission is of the opinion, and so finds, that the complainants have not sustained the burden of proving the rates in question of the respondents to be unfair, unjust and unreasonable.

The Commission believes that this case is of sufficient importance to make it advisable to continue the matter of the application for further hearing after the end of the present season, with the suggestion that in the meantime the complainants prepare and keep such thorough records that they may show much more definitely and certainly their costs of operation. The Commis-

sion further suggests that the respondents refrain from advertising or making any contracts on the basis of the attacked rates, for the season of 1928, until this case is disposed of.

ORDER.

IT IS THEREFORE ORDERED, That this matter should be, and it hereby is, continued for further hearing at such time and place as the Commission shall hereinafter designate.

RE HENRY P. KIDD, *et al.*

[Application No. 293-A. Case No. 306. Decision No. 1381.]

Certificates of convenience and necessity—Conducting operations not authorized in certificate—Revocation.

1. The Commission held, in view of all the facts and circumstances, that while the failure of a motor vehicle carrier to limit himself to the transportation of commodities authorized in the certificate of public convenience and necessity issued to him, his certificate should not be revoked.

Certificates of convenience and necessity—Transfer—Convenience and necessity of operation.

2. The question of public convenience and necessity is not open to consideration in an application for authority to transfer a certificate.

[July 25, 1927.]

Appearances: J. G. Scott, Esq., attorney for Henry P. Kidd, C. E. Martin and F. E. Martin, co-partners, and White Motor Express Company, a corporation; John Q. Dier, Esq., attorney for The Colorado and Southern Railway Company; Erl H. Ellis, Esq., attorney for The Atchison, Topeka and Santa Fe Railway Company; Thomas R. Woodrow, Esq., attorney for The Denver and Rio Grande Western Railroad Company.

STATEMENT.

By the **Commission**: By agreement of the attorneys for the parties hereto the application for an order authorizing the transfer of the certificate in question and the application for revocation of said certificate were consolidated for hearing.

On December 18, 1924, the Commission made an order that the public convenience and necessity required and would require the operation of a motor vehicle carrier system for the transportation of petroleum, petroleum products, automobile accessories and tires between the City and County of Denver and the City of Colorado Springs and intermediate points by Henry P. Kidd, C. E. Martin and F. E. Martin, co-partners, doing business under the firm name and style of White Motor Express Company.

The revocation of the said certificate is sought on the ground that the holders of the certificate have not observed the very clear and explicit restrictions contained in said order, but, on the contrary, have been engaged in the transportation of all kinds of freight over the said route. The certificate holders frankly admit that they have not restricted their business as required by the certificate and order, but allege in justification of their conduct that at about the time the certificate was granted them a number of other carriers, all of whose entire operations were and are in violation of law, began and continued such extensive operations over said route that the certificate holders were faced with the alternative, after about three months of operation under the certificate, of either going out of business entirely or widening the scope of their business temporarily in order to hold on until the operations by the other operators could be eliminated or stopped.

The evidence shows that a number of operators, particularly the Western Transportation Company, the Mid-West Transit Company and William John Honeyman, have been carrying freight of all kinds and classes without a shadow of authority over the route of the said certificate holders; that they were cutting into the business of the said firm to such an extent that it could not, with the restrictions imposed upon it, continue operations, and that about three months after the granting of said certificate the holders thereof branched out into the general freight business, although at all times, in spite of the fact that their competitors have had lower rates, they have maintained the rates specified in their tariffs.

The evidence further shows that in every respect, except the failure to restrict their operations as required by the certificate, the certificate holders have cooperated with the Commission, and at their own expense have done a great deal of work designed to eliminate and terminate the operations of said competitors. This work, if successful, will benefit the complaining railroads as much as or more than the certificate holders.

The failure of the operators to observe the very clear restrictions contained in the said order is indeed a most serious matter. In fact, it is much more serious than a great many other acts which have been held sufficient to warrant a revocation (P. U. R. 1922-B, 239, 618; P. U. R. 1922-C, page 4). The certificate holders doubtless should have filed application with the Commission stating the hard position in which they found themselves and asking, temporarily, for a widening of the scope of their authority.

One important consideration which seems to have been overlooked by the parties to the case is the needs and requirements of the public. The original certificate was issued because of a finding that the public convenience and necessity required the operations by the applicants. If their certificate is revoked, who then will perform the service found necessary? Obviously, the competitors who have no right to carry freight of any kind would get and hold the business until such time as the Commission can stop them. There are no third parties with clean hands asking for a certificate. After a careful consideration of all the facts and circumstances, the Commission feels that in fairness it is proper to state that during the period in question, the law with reference to motor vehicle carriers has been unsettled and uncertain; that throughout the State there have been operators carrying on business contrary to law, and that the Commission without a special attorney has been unable to cope effectively with the situation, in spite of generous and effective assistance rendered by the Attorney General's office.

Each case of this kind must be considered on its own particular facts, and we emphatically state that this case shall not be a

precedent in any other case in which the facts are not practically identical.

The Commission is of the opinion and so finds that the public convenience and necessity does not require the revocation of the certificate granted in Application No. 293 to the said Henry P. Kidd, C. E. Martin and F. E. Martin.

The evidence shows that on December 30, 1926, articles of incorporation of White Motor Express Company, a corporation, were executed and that a copy thereof was filed in the office of the Secretary of State of the State of Colorado on January 3, 1927; that Henry P. Kidd, C. E. Martin and F. E. Martin, co-partners, on or about November 1, 1926, agreed to sell, transfer, assign and convey to said corporation then to be organized, all of the equipment, docks and other assets of said co-partnership; that thereafter all of the physical assets of said firm were duly transferred to and have ever since been held by said corporation. Henry P. Kidd is the President and Treasurer of said corporation and owns all of the outstanding shares of stock, except two qualifying shares issued to two other persons. Said Kidd is a man of experience and has reasonable financial resources.

One of the objections urged by the railroad companies, who protest against the authorization of the transfer of the certificate, is that C. E. Martin and F. E. Martin, two of the co-partners, did not join in the application. However, the original application for the order of approval was signed with the firm name. C. E. Martin, the father of F. E. Martin, appeared at the hearing and stated that both he and his son join in and request the order of approval.

Another objection raised is that at the present time and in the future there will be no public convenience and necessity to be served by the continuation of the operations under the certificate. As has been held before, this is a question which is not properly raised on an application for authorization of the transfer. (*Re* Harry Satero, P. U. R. 1926-D, 296.)

The third objection is that the operators have been guilty of exceeding the authority granted them. This matter already has been considered herein.

After considering all the evidence and the objections made to the transfer, the Commission is of the opinion, and so finds, that the public convenience and necessity requires the authorization by the Commission of the transfer of the certificate granted in Application No. 293.

ORDER.

IT IS THEREFORE ORDERED, That the petition for revocation of the certificate granted to Henry P. Kidd, C. E. Martin and F. E. Martin, co-partners, doing business under the firm name and style of White Motor Express Company, be, and the same is hereby, denied.

IT IS FURTHER ORDERED, That the public convenience and necessity requires the transfer of the certificate in question by the co-partners, Henry P. Kidd, C. E. Martin and F. E. Martin, doing business as White Motor Express Company, to White Motor Express Company, a corporation, and the same is hereby authorized.

RE THE PARADOX LAND & TRANSPORT COMPANY.

[Application No. 789. Decision No. 1399.]

Certificates of convenience and necessity—Interstate motor vehicle operators—Necessity of procuring—Proof—Public convenience and necessity.

Statute requiring those desiring to operate as motor vehicle carriers to procure a certificate of convenience and necessity applies to interstate operators, although no showing of public convenience and necessity of the operation need be made.

[August 12, 1927.]

Appearances: George H. Swerer, Esq., Denver, Colorado, for Applicant; 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; Erl H. Ellis, Esq., Denver, Colorado, for The Atchison, Topeka and Santa Fe Railway Company.

STATEMENT.

By the **Commission**: On September 29, 1926, The Paradox Land and Transport Company filed its application with this Commission for a certificate of public convenience and necessity authorizing it to operate a motor vehicle system for the transportation of passengers and light express between Denver, Colorado, Raton, New Mexico, and Amarillo, Texas. It is alleged in the application that the transportation business as carried on by the applicant is strictly an interstate business insofar as the State of Colorado is concerned, and that the applicant is ready and willing to comply with all regulations of the State of Colorado, through this Commission, concerning public automobile carriers.

On November 9, 1926, The Denver-Colorado Springs-Pueblo Motor Way, Inc., and The Denver and Rio Grande Western Railroad Company filed a motion to dismiss this application on the ground that this Commission has no jurisdiction to issue to the applicant a certificate of public convenience and necessity for a motor bus transportation system in interstate commerce. This motion was adopted by The Colorado and Southern Railway Company and The Atchison, Topeka and Santa Fe Railway Company and was set down for argument on December 17, 1926.

Section 35 of the Public Utilities Act provides as follows:

"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 requires or will require such construction * * *."

Section 3 of the Public Utilities Act provides that, "the term 'public utility' when used in this Act includes every common carrier * * *."

Section 2 (e) of the Public Utilities Act provides that, "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 * * * by indiscriminately accepting, discharging and laying down either

passengers, freight or express between fixed points or over established routes * * *."

Section 1 (d) of House Bill 430, effective July 30, 1927, defines a motor vehicle carrier as including "every person * * * owning, controlling, operating or managing any motor vehicle used in serving the public in the business of transporting persons or property for compensation over any public highway between fixed points or over established routes, or otherwise * * *."

Section 4 of House Bill 430 provides that, "No motor vehicle carrier as defined in this Act shall hereafter operate any motor vehicle for the transportation of either persons or property, or both, without first having obtained from the Commission a certificate declaring that the present or future public convenience and necessity requires or will require such operation * * *."

The above sections make no distinction between interstate and intrastate carriers. A reading of House Bill No. 430 seems fairly clearly to require the conclusion that the provision last quoted includes interstate operators. Section 8 of said Act requires the filing of monthly statements showing, *inter alia,* the passenger miles and ton miles traveled. If the interstate operators were not required to procure certificates, it would be difficult to determine whether the reports required were being filed. Unless, therefore, the Supreme Court of this State or the Supreme Court of the United States has decided that this Commission has no jurisdiction to grant a certificate to an operator engaged exclusively in interstate commerce, nothing remains but to assume that this Commission has jurisdiction.

The first case by the Supreme Court of the United States affecting state control of interstate motor vehicle carriers was Buck v. Kuykendall, 267 U. S. 307, P. U. R. 1925-C, 483. Buck, a citizen of Washington, wished to operate an auto stage line over the Pacific Highway between Seattle, Washington, and Portland, Oregon, as a common carrier for hire exclusively through interstate passengers and express. He obtained from Oregon the license prescribed by its laws. Having complied with the laws

of Washington relating to motor vehicles, their owners and drivers, and alleging willingness to comply with all applicable regulations concerning common carriers, Buck applied there for the prescribed certificate of public convenience and necessity. It was refused on the ground that the public convenience and necessity did not require his operation. To enjoin interference by its officials with the operation of the proposed line, Buck brought a suit against Kuykendall, the Director of Public Works. The Supreme Court of the United States in that case decided that the refusal of the certificate by the Washington Commission constituted a direct burden on interstate commerce; that the primary purpose in refusing the certificate was not regulation, with a view to safety or conservation of the highways, but the prohibition of competition; that it determined not the manner of use, but the persons by whom the highways may be used; that it prohibited such use to some persons while permitting it to others, for the same purpose and in the same manner. There is nothing in this case that prevents a state commission from issuing a certificate of public convenience and necessity to a motor vehicle carrier engaged exclusively in interstate commerce. The case decides that a denial of a certificate under the circumstances is a direct burden on interstate commerce and is unreasonable.

In the case of Clark, *et al.*, v. Poor, *et al.*, Public Utilities Commission of Ohio, 47 Sup. Ct. 702, the Court had before it a suit by interstate carriers in which they sought to enjoin the enforcement by the Public Utilities Commission of Ohio of the requirement of a certificate of public convenience and necessity and the payment of a tax for the use of the highway. In that case the Court said: "The plaintiffs did not apply for a certificate or offer to pay the taxes. They refused or failed to do so, not because insurance was demanded, but because of their belief that, being engaged exclusively in interstate commerce, they could not be required to apply for a certificate or to pay the tax. Their claim was unfounded."

A similar question was recently before the Supreme Court of the State of Kentucky in the case of Grigger and Stepp v. Allen, 292 S. W. 811. In that case the interstate carrier had not applied

for a certificate. The Court said: "The taxi man is stoutly relying on Buck v. Kuykendall, 267 U. S. 307, in which case Buck had applied for a permit or certificate and had been refused. The state authorities were enjoined. Before the taxi man can get much comfort out of this case, he must bring himself within it. He must make an application for a certificate as a bus operator * * *; not having done that, he should have been enjoined from engaging in every form of transportation along this route * * *." Other cases holding substantially in the same manner are as follows:

Canon Ball Transportation Co. v. Public Utilities Commission of Ohio, 149 N. E. 713;

In re Schappi Bus Line, Inc., P. U. R. 1925-E, 525;

Newport Electric Corporation v. William M. Oakley, 129 Atl. 673;

In re Arizona Pacific Transit Co., P. U. R. 1924-C, 501.

Our Supreme Court has never directly passed upon this question.

The Commission, therefore, is of the opinion that while it has no right to deny a certificate of public convenience and necessity to a carrier engaged exclusively in interstate commerce, in the event such carrier is willing to comply with all other provisions of the Public Utilities Act it has jurisdiction to grant such a certificate, without a showing of public convenience and necessity, providing the carrier will comply with all other provisions of the laws of this State governing common carriers.

ORDER.

IT IS THEREFORE ORDERED, That the motion to dismiss by The Denver and Rio Grande Western Railroad Company and the Denver-Colorado Springs-Pueblo Motor Way, Inc., be, and the same is hereby, overruled.

RE THE MONTEZUMA COUNTY TELEPHONE COMPANY.

[Investigation and Suspension Docket No. 77. Decision No. 1427.]

Rates—Free telephone toll service—Discrimination irrespective of return on total operation.

1. Rendition of free "toll service" between two district communities held to be an unlawful discrimination, without respect to the question whether the utility is earning a sufficient return.

Rates—Free telephone toll service—Business and social rates built thereon—Ground for continuation.

2. That business, social and other relations have been built up on the basis of free toll service between two district communities is no ground for continuing such service if it constitutes unlawful discrimination.

[September 21, 1927.]

Appearances: John G. Russell, Esq., Dolores, and Leroy J. Williams, Esq., Denver, for applicant, The Montezuma County Telephone Company; John J. Downey, Esq., Cortez, for protestants, The Montezuma Valley Irrigation Company, The Cortez Chamber of Commerce, and the Towns of Cortez and Dolores; A. J. Waldron, Esq., Dolores, for protestants, himself and subscribers in the Town of Dolores.

STATEMENT.

By the **Commission**: On May 17, 1926, there was filed with the Commission by The Montezuma County Telephone Company, a toll rate schedule entitled Colo. P. U. C. No. 1, Original Sheet No. 3-B, to become effective July 1, 1926, by which there was to be made effective between the exchanges of Cortez and Dolores, toll charges as follows:

Day Rate

10c, Limit 5 minutes, overtime 2c per minute.

Evening Rate (7 to 9)

5c, Limit 5 minutes, overtime 1c per minute.

On June 11, 1926, the Cortez Chamber of Commerce filed its protest by J. G. Dunning, Secretary. On the same day A. J. Waldron, Dolores, filed an informal written protest on behalf of subscribers on the exchanges at both Cortez and Dolores. On

June 16, 1926, The Montezuma Valley Irrigation Company filed its objections. On October 7, 1926, there were filed the written objections and protest by a large number of subscribers of the company.

On June 15, 1926, the Commission suspended the effective date of the proposed rates for ninety days. Thereafter further suspension was made.

Pursuant to notice duly given the cause came on for hearing and was heard in the Town Hall in Dolores, Colorado, on October 11, 1926. The Commission made its order on February 10, 1927. On March 7, 1927, the protestants filed their application for a rehearing. Argument of this application was heard in the Hearing Room of the Commission in Denver on August 23, 1927, at which time and place the only person appearing before the Commission was the Denver attorney for The Montezuma County Telephone Company. The attorney for the protestants submitted the case on the brief which he had theretofore filed.

The telephone company furnishes telephone service to the towns of Dolores and Cortez and to the intervening and surrounding country. It maintains and operates an exchange in each of the two towns. The towns are separated by a distance of thirteen miles. There are about an equal number of subscribers on each exchange. Up until the time of the filing of the tariff in question, no charges had been made for toll calls between the two exchanges. The town of Cortez has no railroad connections. The nearest railroad point is Dolores. The evidence showed certain business relations between the two towns but it wholly failed to show that the business and social relations of the two communities are such as to constitute them one community. It did show that a very large majority of the telephone conversations carried on between the subscribers of these two exchanges are by a comparatively few people. Two parties, one calling the other, made a total of 67 calls in one test period of two weeks. An engineer for The Montezuma Valley Irrigation Company testified that in his opinion the toll service rendered would cost that company at least six hundred ($600.00) dollars per year.

Two points were made by the protestants. One is that no showing had been made that the present income of the company is not sufficient without adding the toll charges. The other is that business relations had been built up on the strength of the free service between the two towns and that, therefore, it would be inequitable now to impose the toll charges.

Irrespective of the question whether the company is making a reasonable return on its investment without the toll charges, the rendition of this service to a comparatively few at the expense of all of the subscribers is a discrimination which should not be tolerated where the exchanges are situated in two separate towns constituting separate business and social communities. It is true that the subscribers on an exchange receiving only local exchange service do not make the same use of the telephone—some will make and receive a great many more calls than others, but in most cases, particularly in small communities, it is impracticable to meter such service. But, as has been stated by the Wisconsin Railroad Commission in *Re* Wisconsin Telephone Company, P. U. R. 1926-C, 546, there must be some limit to the extent to which this flat rate service should be extended. A fairly clear distinction exists between service rendered a town and its immediate territory and toll service between two separate and distinct towns and their adjoining territories. On this point we quote at some length from decisions in other cases.

"Turning to the question of discrimination we have the argument presented in this case that the discrimination is really no greater than that which exists in any city where flat rate users who are subscribers for exchange service use service in very different quantities. The same condition of course exists in every exchange, and unless service is reduced to a measured basis so that each subscriber can pay exactly for the units which he uses, this element of apparent discrimination is bound to exist. It is a discrimination, however, due rather to the inability of the company to place in effect a schedule of rates which will entirely remove such discrimination, or one due to an acceptance of the principle that there should be and may properly be a difference in charge for the same amount of service or a different amount

of service rendered for the same charge. Unquestionably two business subscribers paying the same amount for their exchange service may receive widely different amounts of service. Metering of telephone business in small exchanges is uneconomical and the results produced, particularly when we recognize the fact that for any subscriber a large part of the cost of service is fixed, do not warrant the expense. In other words, the discrimination which exists in exchange flat rates can hardly be considered an unreasonable discrimination in view of all the facts. Whether this can be extended so that we may say that toll service should be placed on a flat rate basis, is the question here. Obviously there must be some limit to the extent to which this flat rate service can be extended. In this state generally cities situated as are Chippewa Falls and Eau Claire can secure their telephone connection only on a toll rate basis. If it is not discriminatory, and unjustly so, as between subscribers in Eau Claire and Chippewa Falls to permit some to receive large amounts of interexchange service at the expense of others, it must follow that it would not be discriminatory to permit all cities at similar distances to receive this service on a flat rate basis. If this is the case, what is to prevent the extension of that flat rate service to cities situated at distances of twenty or thirty or a hundred miles from each other? At what point can any line be drawn between that which should be handled on a flat rate basis and that service to which message rates should apply? The discrimination which exists in the ordinary exchange due to parties paying the same amount receiving different quantities of service is a discrimination which can hardly be held to be unjust because its elimination is uneconomical and not in line with general practice. On the other hand, the elimination of the discrimination which unquestionably exists in these exchanges between parties using large amounts of intercity service and those using small amounts can be accomplished by placing in effect a standard system of handling the business which is effective in practically all other similar situations, and, it might be added, has been subject to very little complaint. Under these conditions we can hardly hold that the elimination of this discrimination will work a material

hardship. Also it seems to us that without any question there is an unjust discrimination in this case, unjust because of the great quantities of service which some parties receive which are paid for by others, and unjust also because its continuance is unnecessary and the remedy for it lies in the adoption of a system of handling the business which is almost universally in effect."

Re Wisconsin Telephone Co., P. U. R. 1926-C, 546, at 550-551.

"Telephone companies operating both exchanges and toll lines must necessarily place a limitation upon the area served by the exchange, without charge other than the usual subscribers' exchange charge. The limitation can properly be the town or city and adjacent territory or community. The town of Glendale and the surrounding territory is one community, and the city of Phoenix and the surrounding territory is another community. We cannot eliminate distance and declare the Glendale and Phoenix territory as one community.

"* * *

"An investment is necessary in toll lines and equipment separate and apart from the investment in plant equipment and lines for the local exchange service and, while the subscribers are charged for the use of the telephone, the rental covers the exchanges, and not the toll services. At the present time the telephone company has no revenue from the toll service between the Glendale and Phoenix exchanges, notwithstanding the fact that they have a large investment in toll lines and equipment in order to render the service. Toll lines and exchange service are necessarily separate services."

Re Mountain States Teleph. & Teleg. Co., P. U. R. 1917-B, 248, 251.

"There are two ways of charging for a service of this kind; by one method the cost of furnishing the service is distributed over all of the subscribers of the exchange; and by the other the subscribers who actually use the service pay the cost of furnishing the same. There is no such thing as free service and the subscriber must either pay for same in the form of an addition to

his monthly bill for local exchange service, or on a measured service or toll basis. It is, therefore, obvious that in order to eliminate discrimination the subscribers should be required to pay for the toll service as it is used. For this reason the establishing of a toll rate between the exchanges involved herein, places the cost of the service upon the subscribers who use it and eliminated unjust discrimination."

Re Ogle v. Home Telephone Co., P. U. R. 1924-D, 306, 312.

In answer to the argument that business, social and other relations have been built up and established on the basis of free toll service, we adopt the following language, found in *Re* Wisconsin Telephone Company, supra, 551-553:

"How serious the effect on business may be if a toll rate is established, we, of course, are not in a position to judge. If we may place full reliance on the arguments offered on behalf of the cities and of their commercial organizations, the results would be extremely serious. Nevertheless, we have the situation in a number of other instances in which cities very similarly located receive their telephone service on a toll rate basis and in which business, social, and other relations have adapted themselves readily to that basis. The situation may be somewhat aggravated here by the fact that for a long time past no toll rates have been in effect, and that conditions have adjusted themselves to that basis. However, we question whether we can hold that because certain business conditions have grown up as a result of this unlimited service, we can prevent the establishment of a rate which is reasonable in and of itself and of a principle of administering the telephone business which is recognized as reasonable and proper in practically all other cases; nor do we believe that over a period of time there will be any serious disruption. Some inconvenience there is bound to be as a result of any change. Suppose, for example, that water service in one of these cities were supplied on a flat rate basis, and an individual customer because of receiving this service without reference to the amount of water that he required, used large quantities of water for unusual uses in his establishment, would the fact that

placing that customer on a meter basis would disrupt his business relations or inconvenience him in the conduct of his business be any justification for permitting him to continue to receive that which he did not pay for, and which must be paid for by other customers? We think the only answer must be a negative one.

"* * * The business man who perhaps makes 100 or 200 calls per month between these exchanges could not and would not under such conditions expect the bulk of the residence users who made little or no use of this service to pay his bill. We fail to see any distinction between that case and the one which we have here so material as to affect the conclusion. It is true that in this case the exchanges are owned by the same company, and it is also true that there exists a physical connection. So far as the relation between customers is concerned, there is no distinction. So far as the principle which should govern in establishing the basis for meeting the cost of this connection, we think the situations are identical. In other words, we can only conclude that where a connection of this kind is to be continued, its continuance is not for exchange purposes and the cost of such continuance should be set by toll rates paid by those who benefit from the service. The fact that there is in practically every schedule of exchange rates some element of discrimination and that some parties receive a service for which they do not fully pay is not an adequate argument for extending this principle into the toll field where it is unnecessary in practice to have such discrimination exist.

"We think, therefore, that as a matter of law the company may establish a toll rate providing the rate established is not unreasonable."

To the same effect is the recent case of Re Wisconsin Telephone Co., P. U. R. 1927-D, 193.

The further argument was made by the telephone company that in rendering free toll service to the patrons of these two exchanges a discrimination is being made against the patrons of all other exchanges in the State similarly situated, even though they be on different telephone systems. A case cited in support

of this contention is Re Mountain States Telephone and Telegraph Company, supra, 251-252, in which the Arizona Corporation Commission said:

"To permit free toll service between the exchanges of Glendale and Phoenix would be placing a burden on some other community or exchange within the state not enjoying such a privilege, and the records show that there is no other community or exchange within the state having such privilege. It cannot be denied that toll service between exchanges is a valuable service, and that it should be charged for at reasonable toll rates.

"* * *

"Free toll service between the Glendale and Phoenix exchanges is a discrimination against every other exchange located within the state of Arizona not having a like privilege; and it is apparent that there are other exchanges within the state that would be entitled to a similar service in the event that we allowed a free service between the town of Glendale and the city of Phoenix."

Whether the rendition of a free service of this kind by one company is an unlawful discrimination against other communities similarly situated paying for such service on a wholly different system, as may be the case, we do not need to decide, for the reason that there is an unlawful discrimination against some of the subscribers of this company in favor of others. One form of unlawful discrimination is sufficient to condemn the practice without more.

We therefore conclude, irrespective of whether the company is now earning a sufficient return on its investment without adding a new source of revenue, that this free toll service is a discrimination and a proper charge should be made therefor. If the result thereof should be an excessive return on its property, the remedy would be the lowering of rates and not the rendering of this service without charge.

The contention of the protestants went more to the question as to whether there should be any toll charge at all than to the question whether the particular charges proposed were reasonable, but we believe that the question of the reasonableness of

these charges has fairly been raised. Unfortunately, no satisfactory evidence of the value of the company's assets has been offered. But the toll charges are the usual ones made in similar territories between exchanges situated at the same distance apart.

Therefore, borrowing the language of the Wisconsin Railroad Commission, we conclude generally, having reached the conclusion that there is an unlawful and unjust discrimination in the rendition of such service without charge, that such disruption of business and social relations as the protesting parties fear, even if it should materialize, which we doubt, is not a basis on which the Commission can refuse to authorize the establishment of the toll rates, and having further concluded that the company has a right to establish toll rates, and that the rates which it has proposed are reasonable, we can only reach the conclusion that this proceeding should be discontinued.

Quite a little evidence was devoted to the question as to what exchanges the various subscribers in the two communities involved should be attached. We shall assume for the present that such connections will be made as are reasonable and in accord with the best telephone practice, the company giving due consideration to the present situation and needs of the subscribers and their desires to elect flat rate service from one exchange or the other, but not from both, even though this may possibly entail the addition of a mileage charge to those subscribers who are not reasonably within what might properly be called the exchange area of the exchange on which they desire their connection.

The Commission further concludes that the former decision and order should be withdrawn.

ORDER.

IT IS THEREFORE ORDERED, That the order of the Commission made herein on February 10, 1927, be, and the same is hereby, withdrawn *in toto*.

IT IS FURTHER ORDERED, That the order heretofore entered in this proceeding suspending the operation of the schedules desig-

nated therein, be, and it is hereby, revoked and set aside as of March 1, 1927, and that this proceeding be discontinued.

It Is Further Ordered, That the motion be, and the same is hereby, denied.

RE GIACOMELLI BROTHERS.

[Applications Nos. 933 and 934. Decision No. 1428.]

Common carriers—Operating as—Reliance upon decision of Commission—Effect.

1. Motor vehicle operators should not be penalized for conducting their operations in reliance upon a decision of the Commission that they were not under the jurisdiction of the Commission.

Monopoly and competition—Adequacy of existing service—Complaints—Busses.

2. One item of proof that the public convenience and necessity does not require an additional motor vehicle operation over a route is that no complaints have been made to the Commission against the service being rendered by the certificated operator.

Common carriers—Automobiles—Self-appellations.

3. The question whether one is a common carrier or not is not determined by what he calls himself.

Common carriers—Automobiles—Indiscriminately accepting passengers or holding out.

4. One who either indiscriminately accepts passengers or holds himself out "for such purposes" is a common carrier.

Common carriers—Test of status—Time schedules or fixed routes—Necessity.

5. One may be a common carrier although he has no time schedules and no fixed routes, and reserves the right to refuse to transport passengers under exceptional circumstances.

[September 22, 1927.]

Appearances: William A. Way, Esq., Silverton, Colorado, for applicants; Thomas R. Woodrow, Esq., Denver, Colorado, for The Denver and Rio Grande Western Railroad Company and The Western Slope Motor Way, Inc.; Frank L. Ross, Esq., Denver, Colorado, for The Silverton Northern Railroad Company, and James Pearson.

STATEMENT.

By the **Commission**: These two applications were consolidated for hearing. A joint order will be entered.

On June 27, 1927, Anthony Giacomelli and Frank Giacomelli, co-partners, doing business under the firm name and style of the Giacomelli Brothers, filed their application praying for a certificate of public convenience and necessity authorizing the operation of a motor vehicle system for the transportation of passengers between Silverton, Colorado, and Eureka, Colorado, and intermediate points. On June 30, 1927, James Pearson, a certificate holder engaged in transporting passengers between the two said points, filed his objections and protest. This case and application No. 933 were set for hearing and heard in the Court House in Silverton on Monday, August 8, 1927.

Evidence was given as to the financial responsibility of the applicants, the nature of their equipment, the nature of the equipment of James Pearson, the certificate holder, and other matters which for obvious reasons we do not deem advisable to discuss at any length, if at all.

Three questions arise in Application No. 934. Have applicants been operating contrary to a rule of the Commission? If so, are they excused because of reliance upon a previous decision of the Commission relating to their operations? If they are so excused, have they shown that public convenience and necessity requires their operation between Silverton and Eureka?

Rule 3 (b), adopted November 4, 1926, effective January 1, 1927, reads as follows:

"No motor vehicle carrier shall begin operation or business as such without first obtaining from the Commission a certificate of public convenience and necessity therefor."

Since January 1, the Commission has been consistently taking the position that in the case of any application filed on or after that date in which it appears that the applicant has been operating since the filing of his application, that fact alone would warrant and require the denial of his application. In this case the applicants do not claim that they were not advised as to the

rule (even assuming, which we do not concede, that that would be a valid excuse) but denied that they had been operating as common carriers between the points named, and as authority cite the decision of this Commission in Case No. 281.

Their own evidence very strongly suggested that they had been violating this rule. Frank Giacomelli testified that they never operate except on call. However, he did say that he ran between Silverton and Eureka every day in 1926 when he was in Silverton; that they had solicited passengers to all points; that they had not failed in that year more than three times to get passengers when the Sunshine Mine was open; that most of the time this year or season he had left Silverton for Eureka at about 8:30 A. M.; that the Eureka trip constitutes the larger portion of his business. Paul Hoffman, a witness for the applicants, testified that every time he is in Eureka the applicants, or one of them, are waiting for business. He then testified that they are not there always.

James Pearson testified that the Giacomelli car leaves Silverton almost every day for Eureka between 8:15 and 8:30 A. M.; that his time for leaving is 8:30 A. M.; that the applicants go around town (Silverton) and pick up passengers and leave just ahead of his car. He further testified that the same condition exists in the afternoon. Pearson testified also, as did the witness, Wilbur Damon, that between July 20 and August 7 of this year, the applicants hauled 98 passengers between the two points named, while Pearson hauled 78.

The testimony of Wilbur Damon, a driver for Pearson, and of David McLane, formerly an employee of Pearson, showed further that almost every day the car of the applicants sits in Eureka about thirty feet from the car of Pearson waiting for passengers coming down from the mine around 9:30 in the morning and 2:30 in the afternoon (these being the hours at which the miners reach Eureka from the mine) and transports them to Silverton slightly ahead of the hour for leaving by the Pearson car.

As practically all of the operations by the applicants between Silverton and Eureka were conducted before the new law known

as House Bill No. 430 became effective and, as we shall hereinafter point out, the new law is quite as wide, possibly wider, in its scope, we shall determine whether the operations of the applicants have been those of a common carrier, by reference to the terms of the act approved April 12, 1915 (C. L. 1921, Sec. 2914). That act subjects to the laws of the State pertaining to public utilities those operations in which the operators indiscriminately accept and discharge passengers "between fixed points or over established routes." The Commission in Case No. 281 construed the language "between fixed points or over established routes" very strictly. After the decision by our Supreme Court in the case of Greeley Transportation Company v. People, 79 Colo. 307, this limitation was practically eliminated by the logic of that case. As stated therein, the business defined by the statute, inclusive as well as exclusive of limitations, was that of a common carrier before the passage of the act, and the Court holds that all common carriers are within the act. If the Commission had had the advantage of this case at the time that Case No. 281 was decided, it would have undoubtedly held that the applicants herein were common carriers between Silverton and Eureka. There is nothing in that act requiring that there be regular schedules.

Therefore, we conclude that the applicants were operating up to the time of the hearing as common carriers.

In spite of the fact that the Commission has heretofore overruled its decision in Case No. 281, we are constrained to and do hold in this case, in view of that decision affecting and sanctioning the operations of the applicants, that the applicants should not be penalized for acting in reliance upon the decision, and for operating up until the date of the hearing.

However, the Commission is of the opinion, and so finds, that there has been no proof of public convenience and necessity for the operation of the applicants between Silverton and Eureka. One reason for such conclusion is that there have been no complaints made to the Commission against the equipment and service of Pearson. Another is that Pearson has not had an oppor-

tunity to enjoy the benefit of his certificate, because of the very disastrous competition of the applicants.

There was considerable testimony as to the unsatisfactory condition of the equipment of Pearson. If Pearson had been running without the unlawful and highly injurious competition of the applicants this testimony would have considerably more weight. We might add also that no complaint has been filed with the Commission against the service rendered by Pearson. If the applicants were of the opinion that the equipment and service of Pearson are not adequate they should have refrained from engaging in an unlawful operation until such time as their application could be heard and determined. While the case of Richardson v. McKelverry, et al., P. U. R. 1923-B (Cal.) 49, was one in which a complaint had been filed against an alleged unlawful operation, the language of the Commission applies to the situation here. It reads as follows:

"Furthermore, the contention that an existing operator holding a certificate authorizing operation of passenger stage service over a particular route has not been rendering efficient service nor properly meeting traffic requirements in no way affects the status of defendants in this proceeding, their remedy in such case being either the filing of a formal complaint to compel the existing carrier to improve his service or the filing of an application in their own behalf for a certificate permitting them to inaugurate a service which would meet traffic requirements."

It is not surprising that the evidence shows that Pearson, the certificate holder, in the year 1926 earned a profit of only $156.00, and that during 1927 up to the time of the hearing he had lost $6.50 without including depreciation on his equipment.

On June 27, 1927, the applicants, as co-partners, filed their application praying that in the event the Commission finds that the nature of their business is such as to constitute them common carriers a certificate of public convenience and necessity be issued authorizing the operation by them of a motor vehicle system for the transportation of passengers between Silverton, Colorado, the town of Eureka, the city of Ouray, the city of Durango and other points.

The case was set for hearing and heard in the Court House in the town of Silverton on Monday, August 8, 1927, and then and there consolidated for hearing with Application No. 934.

It appeared when the case, Application No. 933, was called, that no notice of the filing of said application and of the setting of said case had been given to James Pearson, The Silverton Northern Railroad Company, The Denver and Rio Grande Western Railroad Company and The Western Slope Motor Way, Inc., with which parties the applicants might possibly compete. They therefore made their oral objections and protests and took part in the hearing in opposition to the granting of the application.

The attorney for the applicants very clearly took the position that the nature of the service desired to be rendered by the applicants is such that they would not be common carriers and that, therefore, they do not need and the Commission should not issue, a certificate of public convenience and necessity. This position has been further taken in a written brief filed by him. The position of counsel for applicants was taken with such earnestness and sincerity that we have most carefully considered it and the case as a whole. As we have herein stated in some detail, the applicants clearly have been operating as common carriers up to the time of the hearing, between the town of Silverton and the town of Eureka. Their operations between these towns have been designed to and have most effectively and injuriously affected the operation by James Pearson, operating between these points under a certificate of public convenience and necessity. Not only have the operations between Eureka and Silverton been those of a common carrier, but they doubtless will continue as such, even though they are termed taxi operations. Therefore, the Commission is of the opinion and so finds, that the Application No. 933 should be denied so far as it relates to the operations between Silverton and Eureka.

The question then arises whether as to the other operations out of Silverton the applicants are common carriers. The evidence shows that practically all of the other operations by applicants are between Silverton and Ouray and Silverton and Durango; that the applicants hold themselves out to the public at

all hours to transport any and all persons to Ouray and Durango, except that they reserve the right to refuse business under exceptional circumstances, such as unusually bad road or weather conditions.

Some of the language of the Commission in Case No. 281, being a complaint filed by James Pearson against the applicants herein and others, follows:

"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."

Since then the law relating to motor vehicle carriers, which has been in a formative and growing state, has been developed quite a little. Moreover, there is now effective a law passed during the last session of the Legislature of this State, known as House Bill No. 430, which provides:

"The term 'motor vehicle carrier' when used in this act means and includes every corporation, person, firm, association of persons, lessee, trustee, receiver or trustee appointed by any court, owning, controlling, operating or managing any motor vehicle used in serving the public in the business of transporting persons or property for compensation over any public highway between fixed points or over established routes, or otherwise, who indiscriminately accept, discharge and lay down either passengers, freight or express, or who hold themselves out for such purpose by advertising or otherwise."

Without deciding whether the issuance of a certificate is governed by the law in effect at the time the application was filed or that in effect at the time of the hearing and now we shall consider whether it should issue under either.

As it is undoubtedly true that the test for determining whether or not a given operator is a common carrier, under the statute quoted, is not whether he operates between fixed points, or over established routes, as the law now reads:

"* * * between fixed points or over established routes or otherwise * * *."

Following the term "or otherwise" the definition proceeds: "who indiscriminately accept, discharge or lay down either passengers, freight or express or who hold themselves out for such purpose by advertising or otherwise."

Therefore, any carrier who either indiscriminately accepts passengers or who holds himself out for such purpose either by advertising "or otherwise" is a common carrier. Whether one indiscriminately accepts passengers or holds himself out in any manner "for such purposes" is a question of fact which is determined by the facts and circumstances of his operations. One case of a private carrier operating for hire would be the carrying under private contract of a certain person or group of persons entered into in good faith and not for the mere purpose of evading the law as has occasionally been done by common carriers in several cases, one of which was reviewed by the Supreme Court of Colorado in Davis v. Colorado, 79 Colo. 642. See also a similar case, Franchise Motor Freight Assoc. v. California Shippers, P. U. R. 1925-C, 382.

The question whether one is a common carrier or not is not determined in any manner by what he calls himself. A common carrier being such by the facts in the case is such carrier wholly irrespective of the fact that he may call himself a private carrier. The language in the case of Richardson v. McKelverry, *supra,* is to the point:

"Terming a specific automobile service as a rent car or taxi service does not in itself make it so. It is the actual operation and the service held out by the operator to the general public which must be considered in determining whether or not operation is in violation of the provisions of the automobile stage and truck transportation act or whether it comes within the rent car or taxicab class."

It is argued also that as the applicants do not have any time schedule for arrival or departure particularly as it relates to all operations other than the Silverton-Eureka route, they are not

common carriers. We find nothing in the Act making the question of time schedules a test.

It is further argued that on these operations there are no fixed rates. If it be necessary, to constitute applicants common carriers, that they charge fixed rates, the evidence as to the rates shows that ordinarily when the roads are not in an unusually bad condition and the trip is taken during the daytime, the charge for transportation to Durango, irrespective of the number of passengers therein, is $30.00 and to Ouray $15.00. It appears, therefore, that their rates are, in the usual and ordinary case, fixed ones. Concerning both the effect of the absence of a time schedule and a uniform schedule of rates, we quote again from the case of Richardson v. McKelverry, *supra*:

"The Commission has further held on numerous occasions that the fact that an operator has no established time schedule for arrival or departures, nor a published or fixed schedule of rates under which he operates, is not sufficient ground for determining that he is not engaged in the business of transportation of persons or property over a regular route or between fixed termini as defined in sub-section e of paragraph 1, chapter 213, Statutes of 1917, as amended."

In the case of State v. Boyd Transfer and Storage Company, 209 N. W. (Minn.) 872, P. U. R. 1927-A, 182, it appears that the defendant, a transfer and storage company, was hauling household goods from Minneapolis to other points within a radius of 600 miles; that it did not operate according to schedule; that the routes and termini of its haulings were not predetermined by plan or custom; that the routes and termini were wholly subservient to occasion and constantly varying requirements. The company claimed to have reserved the right to refuse business of anyone who for any reason might be objectionable to it. It declined to send out the trucks, when, because of road or weather conditions, the business would be non-profitable. Moreover, when its local transfer business in Minneapolis and St. Paul required the use of all of its trucks, it declined to haul any business to the points within said radius. It claimed, moreover, that it had never expressly held itself out as, and that it really was not, a

common carrier. The statute in the State of Minnesota does not contain the term "or otherwise" following the language thereof "between fixed termini or over a regular route." In order, therefore, to hold that the company was operating in violation of the law, it was necessary to find first that it was a common carrier and second that it was a common carrier operating between fixed termini or over a regular route. Concerning the first question the Supreme Court of Minnesota said:

"On that showing, (the one we have described) we assume, without deciding, that, as to its trucking of household goods from Minneapolis to other points, defendant is a common carrier."

Assume that the rights of applicants are fixed by the old law, C. L. 1921, Sec. 2914, the routes taken by the applicants, with negligible exceptions, are from Silverton to Ouray and Silverton to Durango. Even under the law in Minnesota the operations of the applicants would be held to be "between fixed termini or over a regular route" because in that State the quoted phrase is defined by the statute to mean:

"The termini or route between or over which an auto transportation company usually or ordinarily operates any motor vehicle, even though there may be departures from said termini or route."

State v. Boyd Transfer and Storage Co., *supra,* P. U. R., 185.

Wholly irrespective of the fact that the applicants have been engaged in this service without a certificate, we are of the opinion, and so find, that the public convenience and necessity does not require the additional operation of the applicants. They stated at the hearing that they could not operate profitably if they were denied a certificate authorizing operations over the routes of the present certificate holders. There was little testimony concerning the necessity of authorizing an additional operator on the routes in question and that was almost wholly confined to one of the applicants.

ORDER.

It Is Therefore Ordered, That the applications No. 933 and No. 934 be, and the same are hereby, denied.

RE O. W. TOWNSEND, DOING BUSINESS AS THE CORNHUSKER STAGE LINES.

[Application No. 888.]

[Temporary Certificate Application No. 13. Decision No. 1435.]

Certificates of convenience and necessity—Considerations determining question of issuance—Those affecting public or individuals.

1. In determining whether public convenience and necessity requires a proposed motor vehicle operation, the rights, welfare and interest of the general public and not the private benefit or advantage of a carrier, shipper or consignee, are to control.

Certificates of convenience and necessity—What public wants—Evidence of need.

2. What the public wants is impelling evidence of the public's convenience and need in transportation.

Monopoly and competition—Automobiles—Paralleling rail route—Clear showing by applicant.

3. Before the Commission will authorize a motor vehicle operation which will virtually parallel the lines of existing carriers, a clear and affirmative showing must be made that existing facilities are inadequate or unsatisfactory.

Certificates of convenience and necessity—Opinion of county commissioners—Effect.

4. While the opinion of county commissioners as to whether public convenience and necessity requires a motor vehicle operation is not binding upon the Commission, it is entitled to considerable weight.

Certificates of convenience and necessity—Automobiles—Operations mean curtailment and elimination of rail service.

5. The public must realize that the institution and maintenance of motor vehicle operations means the curtailment and some elimination of rail service.

Certificates of convenience and necessity—Evidence of necessity—Interstate operations justifying intrastate.

6. The fact that a motor vehicle carrier is operating in interstate commerce has no bearing on the question whether public convenience and necessity requires an intrastate operation.

Certificates of convenience and necessity—Automobiles—Offer to charge lower rates than rail—Effect.

7. The mere fact alone that a motor vehicle operator would charge lower rates than those charged by rail carriers is not controlling in determining the question of public convenience and necessity.

[October 13, 1927.]

Appearances: Harry S. Class, Denver, Colorado, for applicant; J. Q. Dier, Esq., Denver, Colorado, for Chicago, Burlington & Quincy Railroad Company; E. G. Knowles, Denver, Colorado, for Union Pacific Railroad Company; George H. Swerer, Denver, Colorado, for The Platte Valley Transportation Company; D. Edgar Wilson, Denver, Colorado, for The Colorado Motor Way, Inc.

STATEMENT.

By the **Commission**: On May 5, 1927, O. W. Townsend, doing business under the name and style of the Cornhusker Stage Lines, filed two applications, one for a temporary, the other for a permanent certificate authorizing the transportation of passengers by motor vehicle each way between Denver and Julesburg and intermediate points. As qualified and modified thereafter the applicant now seeks to transport passengers from Denver to Sterling and Julesburg and all points intermediate to the two latter and from Sterling and Julesburg and intermediate points to Denver.

Applicant seeks also a certificate of public convenience and necessity covering his interstate operations between Denver and the point where his line crosses the State line in northeastern Colorado.

Protests were filed by The Platte Valley Transportation Company, the Chicago, Burlington & Quincy Railroad Company, The Colorado Motor Way, Inc., Union Pacific Railroad Company and the Boards of County Commissioners of Weld and Morgan Counties.

The applications were set down for hearing and were heard on August 16 and 17, 1927, in the Court House in Sterling, at which time evidence in support of and in opposition thereto was received. The two applications were consolidated on order of the Commission.

The applicant has headquarters in Hastings, Nebraska. He has been in the motor transportation business for some four years. He has some thirty-two pieces of equipment operating over 1,102 linear miles. His daily mileage amounts to about five

thousand bus miles. Seventy-six people are in his employ, thirty-two being drivers. He has a complete repair shop employing thirty-one people. He serves one hundred and twelve communities and does an extensive intrastate operation in the State of Nebraska. He carries public liability and property damage insurance and has a very complete double entry bookkeeping system of accounts showing detailed costs of operations. His net worth, according to Exhibit G, is $135,667.77, although four years ago he was worth practically nothing. His equipment consists of twenty-five passenger Mack parlor busses which are modern with all up-to-date conveniences. Since about April 15, 1927, he has operated interstate from and to Nebraska. Exhibit E is a proposed schedule calling for two trips each way daily between Julesburg and Denver intrastate. Exhibit F is a detailed statement of costs of operation, the total of which is $.1625 per mile. He proposes to operate on a rate of 2.6 cents per mile, round trip one and one-half of regular fare, good for thirty days. The testimony shows without doubt that the applicant is operating on a most efficient and economical basis and that a certificate could not be denied him on any other ground than that public convenience and necessity does not require any such operation as is proposed.

As has been stated and heretofore clearly established, "the doctrine that certificates to operate a stage or freight service shall be granted or acted upon the basis of whether the rights, welfare and interest of the general public will be advanced by the prosecution of the enterprise and not upon the private benefit or advantage that may accrue to any carrier, shipper or consignee." *Re* Motor Transit Co., P. U. R. 1922-D, 495, 500. As was said by the Indiana Public Service Commission in *Re* Newcastle Transit Co., P. U. R. 1926-B, 185, 189:

"What the public wants is impelling evidence of the public's convenience and need in transportation."

In determining whether or not the welfare and interest of the general public will be advanced by the prosecution of the proposed enterprise there are several considerations which we deem controlling in this case.

It has been held repeatedly "on applications for certificates of public necessity and convenience, particularly where an additional service is proposed which will virtually parallel existing carriers, that a clear and affirmative showing must be made that the existing transportation facilities are inadequate or unsatisfactory." *Re* Motor Transit Co., *supra,* 504.

To the same effect is the language of the Arizona Corporation Commission in *Re* Jerome-Union Stage Line, P. U. R. 1922-E, 850, 852:

"The showing required of an applicant before this Commission for a certificate that the public convenience and necessity requires the operation of motor vehicles for compensation over the public highways, whether for the transportation of persons or property, must be affirmative."

In support of the application herein J. A. McClary, Esq., of Sedgwick, a State Representative, E. R. Kielgass, of Sedgwick, formerly a newspaper editor, now engaged in the collection and reporting business, were the only two witnesses other than the applicant who testified that the public convenience and necessity requires the proposed operation. Another witness, J. H. King, Esq., of Sterling, a State Senator, testified that he sells petroleum products to applicant for the use of his busses running through Sterling, and that occasionally there is a demand for local bus service. Mr. King further testified that the present train service is very good and that the people of the communities of Sterling, Sedgwick and Julesburg have on an average almost one car to the family.

On the other hand, there were numerous witnesses (some twenty in number), residing in Fort Morgan, Julesburg and intervening towns and cities, who testified that the public convenience and necessity does not require a motor bus operation. Among these witnesses were the mayor of Sterling, president of the chamber of commerce of Sterling, the city clerk of the city of Sterling, who presented a resolution passed by the city council of said city against the granting of the certificate, a newspaper editor of Julesburg, a newspaper editor of Ovid, a hotel proprietor of Julesburg, a banker of Julesburg, two county com-

missioners of Logan County and the president of the First National Bank of Fort Morgan. Moreover, the boards of county commissioners of both Morgan and Weld Counties filed petitions and protests. So far, therefore, as the wishes of the people of these communities are concerned, the evidence would indicate that the overwhelming sentiment is against the granting of a certificate. The following language of the North Dakota Board of Railroad Commissioners in *Re* Fargo-Moorhead Trucking Co., Inc., P. U. R. 1927-A, 350, 359, concerning the shipping public is quite as applicable to the traveling public.

"While the testimony of the applicant seems to present certain convenience to the shipping public, preponderance of testimony in this case shows that the shipping public is satisfied with present shipping facilities."

While the Commission does not consider binding upon it the opinions of county commissioners as to whether there exists a public convenience and necessity, we do believe they are entitled to considerable weight. As is stated by the California Railroad Commission in *Re* Miller, P. U. R. 1927-A, 626, 631: "It (the policy of the board of county commissioners) is an important factor to be considered in determining whether public convenience and necessity will be subserved by authorizing the proposed service. All other things being equal, we should feel inclined to deny a certificate, upon such a showing of opposition in such board by the county."

The communities involved are served by quite a number of trains. This is particularly true of Fort Morgan and Sterling and intervening communities which are served by the trains of both the Union Pacific and the Burlington. The evidence shows the passenger business to and from the stations on these lines has very greatly decreased in the past few years, due very largely to the use of private automobiles. The evidence shows also a strong desire on the part of the communities involved not to have their passenger service further curtailed. It is obvious that sufficient loss of passenger traffic by the railroads may properly result in further curtailment of service. The curtailment of service by these railroads would seriously affect the communities

involved by eliminating the means of transporting milk, cream and other commodities, to say nothing of passengers. The statement made by the Montana Board of Railroad Commissioners in *Re* Hugh Kelly, P. U. R. 1927-A, 832, 835, is in part applicable here.

"It would be unfair to Philipsburg residents to cloud the issue by false hopes of both train and motor vehicle service. Based on the past five years' experience this statement can, and should be, made at this time: The admission of a competitive motor carrier to the Drummond-Philipsburg branch must mean the elimination of passenger service and severe diminution of rail freight service. The rail branch is now operated at a heavy loss; it is sustained by a great system, but total dependence on system strength is unfair to shippers who must meet the bills. As a mining and agricultural center Philipsburg is in fact vitally dependent upon continuing rail service. Based on revenues it now contributes to the branch, present service can only continue if the loss sure to be inflicted by a competitive motor vehicle carrier is avoided, and avoided now."

We quote also from Maryland Public Service Commission in *Re* Red Star Line, Inc., P. U. R. 1927-B, 145, 157:

"Additional transportation, which is offered now, may result in less transportation of a character that is vital to the needs of the people."

The Maryland Commission in the case cited points out further that even though the rail carrier does not protest against the proposed operation of a motor bus line, it is the duty of the Commission to prevent duplication of service if it is not necessary to the public, in order to avoid giving an excuse to the rail carrier to endeavor at a later date to cut down the service it is rendering, the language of the Commission being:

"Train service is still a necessity, while, to a large extent, competitive motor bus service is a transportation luxury. The mere fact that a rail carrier does not protest against a motor bus line which parallels the rail line—in the present case no substantial protest was made by the Pennsylvania Railroad against the paralleling of its Philadelphia line in Maryland—does not

relieve this Commission of the obligation of preventing such duplication of service if it is not necessary to the public. This is because no excuse should unnecessarily be given rail carriers to endeavor to cut down the service they are now rendering."

The argument is made that the applicant will in any event operate over the roads in interstate commerce and that the State should derive some revenue from his operation by allowing him to carry passengers intrastate. The Maryland Commission in the case cited meets the argument with the following statement:

"It seems to the Commission that the test should be embodied in a formula something like this:

"If the interstate line asking for intrastate privileges on routes over which it is operating, were not in existence, would such privileges be granted by the Commission to an intrastate line, entirely within the Commission's jurisdiction, on the ground that the granting of them is necessary to the public welfare and convenience?"

The Commission then concludes:

"There being sufficient service along that railroad now to meet the requirements of the public, the Commission is of the opinion that the public welfare and convenience do not require the granting of the permits applied for. Such privileges as are asked could not at this time be granted to a purely intrastate line."

The most important reason—not to say the only one of consequence—for granting the certificate to the applicant is that he offers to render service at one cent a mile less than the rates of the railroads and to sell round trip tickets good for thirty days at one and one-half times the one-way fare. While this is a matter that is entitled to serious consideration and great weight, we have concluded that the fact alone is not sufficient to overcome the other considerations found in the case. If the rates were higher than those of the railroads it might well be argued that there could be no danger of the applicant securing enough business to result in a curtailment of rail service. In *Re* International Bus Corporation, P. U. R. 1927-A, 346, in granting a certificate authorizing a motor bus operation, the New York Public Service Commission laid stress on the fact that the rates

of fare of the bus operator would be higher. The Commission said:

"With respect to the other railroads, it is thought, in view of the matter of the service, involving as it does much higher rates of fare and a longer running time, no substantial competition will be felt." (349)

Another consideration is that there is now in operation between Sterling and Greeley a motor bus system, and another between Greeley and Denver, the latter making frequent trips each way daily.

The Commission therefore concludes, for the reasons stated, that the public convenience and necessity does not require the issuance of the certificate authorizing the operation by the applicant of a motor vehicle system for the transportation of passengers intrastate.

In reaching this conclusion the Commission is quite mindful of the fact that it should not attempt to put motor vehicle transportation in a straightjacket, (and that when the showing justifies and the public convenience and necessity really requires the issuance of a certificate, taking into consideration the rates of fare, the greater convenience, the need for and effect upon existing service, and the inability or failure, if it exists, of the railroad companies to meet the competition of this new form of transportation, then the Commission will have open no other course than to grant the certificate.

As to the interstate operation, the Commission has no ground for its denial. It must under the statute (House Bill No. 430) and its decisions issue it.

ORDER.

IT IS THEREFORE ORDERED, That the application for a certificate authorizing intrastate operations should be, and the same is hereby, denied.

IT IS FURTHER ORDERED, That that portion of the application asking for a certificate authorizing its said interstate operation be, and the same is hereby, granted.

Commissioner Bock dissenting:

I regret exceedingly that I am unable to concur with my colleagues in the disposition of this application. The applicant proposes to transport by motor vehicle passengers in intrastate between Julesburg and Sterling and intermediate points and from Sterling and Fort Morgan and return, but not to intermediate points on a rate of 2.6 cents per mile, round trip one and one-half of regular fare, good for thirty days. This is substantially less than the rates charged by the railroad carrier. In my opinion the public is entitled to transportation at the lowest rate consistent with proper service. A substantially cheaper transportation service, when based upon sound economic principles and on which there can be realized a fair return to the carrier, is a public convenience and necessity. The cost of operation by the applicant is 16.25 cents per mile. This is a very low cost as compared to operations by rail carriers. In this connection, I desire to call attention to an address made by Hon. A. G. Patterson, Chairman of the Alabama Public Service Commission, to the National Association of Railroad and Utilities Commissioners at Asheville, North Carolina, on November 9, 1926, in which, referring to the economics of motor vehicle carrier transportation, he stated:

"* * * If with an improved system of highways the motor bus can furnish to the people a more convenient, efficient and economical method of transportation, the people should not be denied the benefits thereof because the granting of certificates to such motor vehicle carriers to carry on business will necessarily result in some loss to the rail carriers. * * * If such motor vehicle transportation can be carried on for the people at a lower cost than rail transportation, and the difference in cost is sufficient to warrant consideration, then we think that alone might justify the granting of a certificate to a motor vehicle carrier, even if the rail carrier traversing the territory served was already in a position to carry all the persons and goods offered to it but for the rendition of such service demanded a substantially higher reward. * * * The people are entitled to the benefits that will accrue from improved highways and the development of the motor vehicle just the same as they are entitled

to the benefits growing out of the development of science in any other field. * * * The man is foolish who holds to the view that regulation should ever be exercised in such way as to deprive the people of any better, more convenient or more economical method of carrying on their affairs."

Furthermore, the president of one of the largest railroads of our country is reported to have said recently that, all things considered, the most economic transportation is the most desirable, and if the railroads cannot provide it, so much the worse for the railroads.

Because of the low cost of operation, I am of the opinion that a temporary certificate for a period of six months should be granted to the applicant for the purpose of more definitely ascertaining whether this cost includes all charges of operation and if so, whether such operation can be successfully and economically conducted on the rates proposed. Incidentally this would also determine whether the public would travel on the proposed system. The auditor of the Commission could personally examine the accounts of the applicant during the six months' period and thereafter a further hearing could determine whether, under all the facts and circumstances, a permanent certificate of public convenience and necessity should issue. If the proposed intrastate operation, after such an investigation, is economically sound upon the rates as proposed by the applicant, he should be issued a certificate of public convenience and necessity conditioned that he will maintain the passenger fare suggested.

RE RULE 18, RELATING TO HEATING VALUE OF GAS.

[Case No. 84. Decision No. 1434.]

Gas—Heating value—Rule 18.

Revised Rule No. 18, relating to heating value of gas, adopted.

[October 8, 1927.]

STATEMENT.

By the **Commission**: On July 16, 1927, this Commission entered an order instituting an investigation of the necessity and propriety of revising Amended Rule No. 18 regulating the heat-

ing value of gas wherein it may in any way be found unreasonable, unfair, unjust, incomplete, inadequate, equivocal, or misleading and providing that said investigation shall include the question of the effect of the lowering of the B.t.u. content upon the volume of gas consumed. Notice of the hearing was immediately given to all utilities.

A hearing on this matter was held in the Hearing Room of the Commission, Denver, Colorado, September 20, 1927, at which time evidence relating to the heating value of gas and the effect of lowering or raising the B.t.u. content upon the volume consumed by the customers was introduced.

Mr. E. R. Weaver, Chemist of the Bureau of Standards, Washington, D. C., testified at length on this matter. He has been connected with the Bureau in this work for the past fifteen years and in the past four or five years has devoted most of his time to gas problems of public utilities throughout the United States. His investigations have been most extensive and thorough and the Commission was very much impressed with his testimony, especially as it relates to the changing of the B.t.u. content per cubic foot to the consumer without any change in the charge to the consumer. According to his contention, ably supported by his testimony, the results of all tests throughout the country, made or checked by the Bureau, show without exception and the Commission so finds that with the proper adjustment of appliances and devices a decrease or increase of the B.t.u. content is followed by an increased or decreased consumption of gas in direct proportion to such decrease or increase. All the other testimony, being that of representatives of Greeley Gas and Fuel Company, Otero County Gas Company and Trinidad Electric Transmission Railway and Gas Company, was to the same effect. Mr. Weaver proposed certain changes in Rule No. 18, the most important one of which is that whenever the B.t.u. content of gas shall be reduced that the rate schedule for gas shall be also reduced in direct proportion.

After a careful consideration of this entire matter, the Commission has formulated a new rule to be designated as "Revised Rule No. 18."

ORDER.

IT IS THEREFORE ORDERED, That the following "Revised Rule No. 18" regulating the heating value of gas is hereby declared to be reasonable and shall be observed and followed by all gas utilities either owned or operated within the jurisdiction of this Commission.

Amended Rule No. 18—Heating Value of Gas

Each utility supplying gas for domestic or commercial purposes shall establish and maintain a standard heating value for its product, which standard shall be the monthly average total heating value of the gas as delivered to consumers at any point within one mile of the manufacturing plant or center of distribution. The utility shall declare this standard expressed in B.t.u. per cubic foot as a part of its schedule of rates on file with the Commission.

This standard heating value shall be that value which is on file with the Commission as a part of the utility's schedule of rates on the effective date of this Revised Rule No. 18, or that value which shall be declared by the utility, provided, however, that any change in value shall be made in accordance with the conditions hereinafter stated.

If the utility finds it more practical, economical and efficient to render service with gas of another heating value than the standard heating value on file with the Commission, the utility may file a new heating value standard and a new rate schedule; and if the conditions hereinafter stated shall have been complied with and the Commission shall not have suspended the new rate schedule as provided in Section 48 of the Public Utilities Act (C. L. 1921, Sec. 2957) or ruled against the change, such new heating value standard and rate schedule shall become effective thirty days from the date on which they are filed with the Commission. The conditions which must be met by a utility thus voluntarily changing its heating value standard are as follows:

(1) The rate schedule for gas shall be so changed that every

part or kind of charge in the rate shall be reduced and may be increased in direct proportion to the reduction or increase of the B.t.u. content, except that the minimum charge, service charge or customer charge shall remain unchanged.

(2) Readjustment of customers' appliances and devices to render unimpaired service under the new standard shall be promptly made by the utility without charge to the customers.

(3) The utility shall be prepared to justify the standard it adopts before the Commission by such pertinent facts as may be required.

The utility shall maintain the heating value of the gas with as little deviation as is practicable and such deviation is limited to the range of 5 per cent above to 5 per cent below the standard adopted.

To obtain the monthly average heating value of gas, the results of *all* tests of heating value made on any day shall be averaged, giving the average total heating value for that day. The monthly average total heating value shall be the average of all such daily averages taken during the calendar month. It is understood that all records and statements are based on tests made under standard conditions, *i. e.*, at 60 degrees Fahrenheit and under a pressure of 30 inches of mercury.

IT IS FURTHER ORDERED, That the present Revised Rule No. 18 shall be stricken from the rules regulating the service of gas, electrical and water utilities effective October 10, 1927.

IT IS FURTHER ORDERED, That said "Revised Rule No. 18" shall take effect on the tenth day of October, 1927, and shall continue in force until suspended, modified or set aside by this Commission.

RE ALICE JAMES LILLEY.

[Application No. 922. Decision No. 1438.]

Certificates of public convenience and necessity—Whether certificate required—Will operation be profitable?

1. In determining whether public convenience and necessity requires the operations of a motor vehicle line, due consideration should be given to question whether operation will be profitable.

Certificates of convenience and necessity—That transportation of certain items alone not profitable immaterial.

2. In determining whether the public convenience and necessity requires a proposed motor vehicle operation, it is immaterial that certain items of freight could not be transported alone profitably.

[October 13, 1927.]

Appearances: Flor Ashbaugh, Esq., Littleton, Colorado, for Applicant; Thomas R. Woodrow, Esq., Denver, Colorado, for The Denver and Rio Grande Western Railroad Company; Erl H. Ellis, Esq., Denver, Colorado, for The Atchison, Topeka and Santa Fe Railway Company; J. L. Rice, Esq., Denver, Colorado, for The Colorado and Southern Railway Company.

STATEMENT.

By the **Commission:** On June 10, 1927, there was filed an application of Alice James Lilley, in which she prays for a certificate of public convenience and necessity authorizing the operation of a motor vehicle system for the transportation of milk and dairy products from the vicinity of Littleton, Colorado, to Denver, Colorado, and to transport to and from Denver and Littleton and vicinity other commodities. Protests were filed by The Denver and Rio Grande Western Railroad Company, The Atchison, Topeka and Santa Fe Railway Company and The Colorado and Southern Railway Company.

The application was set down for hearing and was heard in the Hearing Room of the Commission in Denver on October 3, 1927, at which time evidence in support of and in opposition thereto was received. The testimony shows that the applicant has been transporting by motor truck milk and cream from the vicinity of Littleton to Denver since about the year 1915. It

shows further that shortly thereafter she began transporting from Denver to Littleton fresh vegetables, fruits, meats, drugs, ice cream, small repairs for machinery and heating plants and ice cream from Denver to Littleton, and repairs for machinery and dairy equipment from Denver to farmers in the Littleton district. There was evidence that on rare occasions the applicant had hauled some ground feed to the farmers, but the extent of this business was so small as to be of no consequence.

The applicant is a woman of strong financial standing, and is assisted in the operation of her business by her son-in-law. Her equipment consists of one Service truck of the value of $3,250, and one Ford truck of the value of $400.

There was some question raised by the opposition as to whether or not, when proper allowance is made for all expense of operation, including depreciation, the applicant is really making a profit. If the public convenience and necessity requires such operations as she is conducting, and the volume of business is great enough, the operation can properly be made to pay if it is not so doing at this time.

There was made also a point to the effect that the volume of the business done by the applicant, other than the milk and cream business, is so small that alone it would not pay and that, as we understood the contention, therefore the public convenience and necessity does not require the applicant to transport anything else other than milk and cream. The Commission is of the opinion, that in determining whether or not the public convenience and necessity requires the operation by any applicant, due consideration should be given to the question of whether or not the operation as a whole can be made to pay. On the other hand, if it appears that there is a real public need for the transportation of certain goods along with a large volume of another commodity, the fact that it would not be profitable to transport those goods alone is of no importance.

The evidence further shows that occasionally the merchants of Littleton have occasion to return merchandise received by them which either was not ordered or if ordered is unsatisfactory, and that the service of the applicant in returning such merchandise

is cheaper and much more convenient than that rendered by the railroads.

The evidence shows that as to milk and cream, repair parts for machinery and heating plants, and the perishable commodities such as fresh fruits, vegetables, fresh meats, ice cream and drugs, the service rendered by the applicant is much more expeditious, and, therefore, much superior so far as the preservation of most of the commodities hauled is concerned. It shows also that these things would move by private carriers if no certificate of convenience and necessity is issued.

After consideration of all the evidence introduced in the case, the Commission is of the opinion, and so finds, that the public convenience and necessity does now and in the future will require the operation of a motor vehicle system for the transportation by the applicant of milk and cream from the vicinity of Littleton to Denver, and of merchandise returned by the merchants in Littleton to wholesale and jobbing houses in Denver, and for the transportation from Denver to Littleton of perishable vegetables, fresh fruits, meats, ice cream, drugs and repairs for heating plants and machinery, but not for any other commodities, and from Denver to Littleton farmers in the vicinity of Littleton of repairs for machinery, but not for the transportation of any other commodities.

ORDER.

IT IS THEREFORE ORDERED, That the public convenience and necessity does now and in the future will require the operation of a motor vehicle system for the transportation by the applicant of milk and cream from the vicinity of Littleton to Denver, and of merchandise returned by the merchants in Littleton to wholesale and jobbing houses in Denver, and for the transportation from Denver to Littleton of perishable vegetables, fresh fruits, meats, ice cream, drugs and repairs for heating plants and machinery, but not for any other commodities, and from Denver to Littleton farmers in the vicinity of Littleton of repairs for machinery, but not for the transportation of any other commodities.

IT IS FURTHER ORDERED, That the applicant shall file tariffs of rates, rules and regulations and time schedules as required by the rules and regulations of this Commission covering motor vehicle carriers within a period of not to exceed fifteen days from the date hereof.

IT IS FURTHER ORDERED, That the applicant shall operate such motor vehicle carrier system according to the schedule filed with this Commission, except when prevented from so doing by the Act of God, the public enemy or unusual or 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 ALBERT SCHWILKE.

[Application No. 631. Decision No. 1448.]

Certificates of convenience and necessity—Involuntary temporary discontinuance of operation begun prior to 1917—Effect.

1. Temporary discontinuance of operations during years 1917 and 1918, although due to fact that a competitor caused his equipment to be levied upon and sold, prevented applicant from procuring a certificate under provision of statute giving right to certificate to all operators whose operation had been in effect since prior to date Public Utilities Act became effective in year 1917.

Common carriers—Purpose of regulation—Safe, dependable service.

2. The purpose of the law authorizing and regulating common carriers is to furnish the public with safe, dependable service at the lowest rates consistent therewith.

Monopoly and competition—Duplication of motor vehicle service—When allowed.

3. The Commission has never issued a certificate authorizing a duplication of motor vehicle service over a route unless it appeared that the service already being rendered is inadequate, that there would be no ruinous competition or that the second applicant, operating on a sound, businesslike basis, could afford service at cheaper rates than the existing certificated carrier.

[October 13, 1927.]

Appearances: Neil F. Graham, Esq., Fort Collins, Colorado, for the applicant; D. Edgar Wilson, Esq., Denver, Colorado, for The Rocky Mountain Motor Company, the Rocky Mountain Parks Transportation Company and The Colorado Motor Way, Inc.; D. A. Maloney, Esq., Denver, Colorado, for The Northern Transportation Company; J. Q. Dier, Esq., Denver, Colorado, for The Colorado and Southern Railway Company and the Chicago, Burlington and Quincy Railroad Company; A. S. Habenicht, Esq., Denver, Colorado, for the American Railway Express Company.

STATEMENT.

By the **Commission**: On May 10, 1926, Albert Schwilke filed his application for a certificate of convenience and necessity authorizing the operation of a motor vehicle system for the transportation of goods, wares and merchandise to and from Estes Park and a number of other points named in the application. At the hearing the applicant waived his claim to all other routes than to and from Estes Park and the following points:

Loveland, Fort Collins, Greeley, Longmont, Lyons and all points on the road between Loveland and Estes Park.

Answers protesting the issuance of the certificate were filed by The McKie Transfer Company, Ed Harbison, doing business as the Harbison Transfer Company, The Over-Land Motor Express Company, the Chicago, Burlington and Quincy Railroad Company, The Colorado and Southern Railway Company, the American Railway Express Company, the Rocky Mountain Parks Transportation Company and The Colorado Motor Way, Inc. The case was set down for hearing and heard in Fort Collins on September 14, 1927. After applicant waived his claim to certain routes, most of the protestants did not contest the application further.

The evidence shows that the applicant has been engaged in the transportation of goods over State highways for a number of years, operating at all times out of Estes Park. His operations to Lyons began in 1906, to Longmont and Loveland in 1912, to Greeley in 1916, to Fort Collins in 1921. He operated first by

wagon and team which were superseded by motor vehicle on the advent of the automobile truck. The applicant is a man of character and a long record of dependable service.

The applicant's application having been filed before the new motor vehicle law (House Bill No. 430) became effective, he would be entitled to a certificate authorizing him to continue such operations as may have begun prior to July 16, 1917, and continued uninterruptedly down to date. However, the evidence shows that during the years 1917 and 1918 the applicant unfortunately was not in business, due, as he testified, to the fact that one of the companies objecting to his application caused his equipment to be levied upon and sold. He did testify that during those two years he continued to serve the Hickman and Lumbeck Grocery Company, a wholesale concern in Greeley, by transporting its merchandise from Greeley to Loveland and Estes Park and points intermediate thereto. This operation was, however, a private operation as we view it. The applicant testified that he did not intend to go out of business and that as soon as he was able he procured new equipment and resumed operations. In view of the long period of years during which the applicant has been operating and of the dependable character of his operations we are reluctant to be compelled to hold that he was really out of business during the years 1917 and 1918 and that therefore he cannot receive a certificate by reason of continuous operation antedating July 16, 1917.

There are now freight operations conducted under certificates issued by this Commission over all the routes sought to be traversed by the applicant except between Estes Park and Fort Collins. There is no contention that the service being rendered by those certificate holders is not adequate and satisfactory. The contention is made that it is better for the public that another certificate be issued in that there will be more competition and thus the public will be furnished transportation at lower rates and monopolies avoided. The whole purpose of the law authorizing and requiring regulation of common carriers, whether they be by rail or motor vehicle, is to furnish the public with safe, dependable service at the lowest rates consistent therewith. The

power and the duty of the State to regulate common carriers is general and has long since been universally admitted and upheld. The reason for such regulation is all the greater where the common carrier, instead of establishing and maintaining his own right-of-way, conducts his business upon highways built and maintained by the public. Regulation which covers both rates as well as the privilege of operation necessarily carries with it a limitation upon competition. The following language which we deem pertinent here is taken from Kansas Gas and Electric Company v. Public Service Commission of Kansas, 251 Pac. 1097-1099:

"The very enactment of the statute 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 attendant on unnecessary duplication of public utilities. * * * 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. * * * 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."

Up to the present time the Commission has never issued a certificate authorizing a duplication of motor vehicle operation over a given route unless it appeared that the service already rendered was not adequate, that there would be no ruinous competition or that the second applicant could, while operating on a sound businesslike basis, afford transportation at cheaper rates than those already in effect. There has been no complaint to date as to the rates now being charged on the routes over which the applicant desires to serve. Moreover, the Commission stands ready at any time if the unreasonableness of the rates of any

carrier are questioned, to determine their reasonableness and to order them reduced if they are shown to be unreasonable.

We might add that there are quite a number of burdens carried by those operating at the present time under certificate from this Commission. Among these are the requirements that they pay a tax based on the ton miles and carry substantial insurance. The Commission almost daily has called to its attention cases in which certificate holders, who in every respect are complying with the law designed to protect the public, are unable to operate at a reasonable profit, if any profit at all, because of unlawful motor vehicle operation in a field where there is not enough business to justify duplication.

After careful consideration of all the evidence and the principles involved therein, the Commission is of the opinion and so finds that the public convenience and necessity does not require the issuance to the applicant of a certificate of public convenience and necessity except the operation between Estes Park and Fort Collins. The Colorado Motor Way, Inc., is carrying express matter from Loveland to Fort Collins. Freight and express is being carried between Estes Park and Loveland by the Rocky Mountain Parks Transportation Company. The Commission is of the opinion and so finds that the public convenience and necessity does require the issuance to the applicant of a certificate authorizing the transportation of freight between Estes Park and Fort Collins.

The Commission might add that the evidence shows that 90 per cent of the freight hauled by the applicant from Greeley is for the Hickman and Lunbeck Grocery Company, and that this operation and a large part of the applicant's other operations, particularly those between Loveland and Estes Park, are operations that might properly be carried on by the applicant as a private carrier.

ORDER.

IT IS THEREFORE ORDERED, That the application herein be, and the same is hereby, denied, except as hereinafter granted.

IT IS FURTHER ORDERED, That the public convenience and ne-

cessity requires the motor vehicle system of the applicant herein for the transportation of freight between Estes Park and Fort Collins, and this order shall be deemed and held to be a certificate of public convenience and necessity therefor.

IT IS FURTHER ORDERED, That the applicant, in the event he desires to accept the certificate granted, shall file with the Commission within fifteen days a written acceptance thereof.

IT IS FURTHER ORDERED, That in the event the applicant files such acceptance, he shall within twenty days from that date file tariffs of rates, rules and regulations and time schedules as required by the rules and regulations of this Commission covering motor vehicle carriers.

IT IS FURTHER ORDERED, That in the event the applicant accepts such certificate, he shall operate such motor vehicle carrier system according to the schedule filed with this Commission, except when prevented from so doing by the Act of God, the public enemy or unusual or 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 STANLEY POWER COMPANY.

[Application No. 892. Decision No. 1486.]

Certificates of convenience and necessity—When needed—Electric plant constructed prior to 1917.

1. No certificate of convenience and necessity is needed to validate the construction of an electric plant and system prior to the year 1917.

Certificates of convenience and necessity—When needed—No franchise rights granted.

2. No certificate of convenience and necessity can be issued by the Commission authorizing exercise of franchise rights or privileges, when no such rights or privileges have been obtained.

[November 7, 1927.]

Appearance: Ab. H. Romans, Esq., Loveland, Colorado, for the applicant.

STATEMENT.

By the **Commission**: On May 10, 1927, there was filed in the office of the Commission an application by the Stanley Power Company, a corporation, for a certificate of public convenience and necessity to operate within the town of Estes Park and the adjacent territory. The matter was set for hearing and was heard in the school house in the town of Estes Park on August 30, 1927. No appearance was made at the hearing other than that of the applicant, although the town of Estes Park was duly notified of the application and of the hearing, and the mayor thereof testified.

The evidence shows that for a number of years the applicant has been serving the inhabitants of the town of Estes Park and vicinity and a number of tourist hotels with electricity and power. This service has covered an area extending about six miles east, two miles north, six miles west and four miles south of the town. The company has an investment of approximately $100,000.00 and a plant that is capable, with proper adjustments, of substantially increased capacity. The service has been satisfactory and dependable.

Mr. Samuel Service, the mayor of the town, testified that the town had never granted the applicant a franchise, permit, ordinance, vote or other authority, although some such action had been considered. The statute gives this Commission the authority to issue a certificate authorizing "the construction of a new facility, line, plant or system or of any extension of its facility, line, plant or system" and requires that such a certificate shall be secured before the public utility shall begin the construction of a new, or the extension of an old, facility, line, plant or system. The statute [C. L. of Colorado, 1921, Sec. 2946 (c)] further provides that "No public utility shall henceforth exercise any right or privilege under any franchise, permit, ordinance, vote or other authority hereafter granted * * * without first having obtained from the Commission a certificate that public convenience and necessity require the exercise of such right or privilege."

From a reading of the application and a consideration of the testimony, we do conclude that the applicant is not seeking a certificate retroactively approving and authorizing the construction which took place in 1909. Moreover, there would be no need of such certificate, because the act applies to construction made after the act and not that already made when the act became effective. We cannot grant a certificate authorizing the exercise of a right or privilege under any franchise, permit, ordinance, vote or other authority because no such franchise, permit, ordinance, vote or other authority has been granted.

There are no other provisions in the statute by which this Commission has jurisdiction to issue a certificate. It may be that the applicant will desire "to exercise a right or privilege under a franchise, permit, ordinance, vote or other authority which it contemplates securing but which has not as yet been granted to it," [C. L. of Colorado, 1921, Sec. 2946 (c)]. In such an event the statute provides that the public utility "may apply to the Commission for an order preliminary to the issue of its certificate." The Commission will, therefore, treat the application as such and will give the applicant a reasonable time in which to secure a "franchise, permit, ordinance, vote or other authority."

The Commission finds that the public convenience and necessity requires the making of an order preliminary to the issue of a certificate declaring that it will hereafter upon further application herein, and the making of necessary proof, issue the desired certificate, upon such terms and conditions as it may designate, after the applicant has obtained and made effective the franchise, permit, ordinance, vote or other authority.

ORDER.

It Is Therefore Ordered, That the Commission will hereafter upon application and the making of necessary proof, issue the desired certificate to the applicant, upon such terms and conditions as it may designate, after the applicant has obtained and made effective the contemplated franchise, permit, ordinance, vote or other authority.

RE COLORADO MOTOR WAY, INC.

[Application No. 953. Decision No. 1490.]

Abandonment—Motor vehicle service—Duty of operator and public. Authority to abandon motor bus operation between Greeley and Longmont denied with statement that the operator and the public should more effectively work for the success of the operation.

[November 7, 1927.]

Appearances: D. Edgar Wilson, Esq., Denver, Colorado, Attorney for Colorado Motor Way, Inc.; Clay R. Apple, Esq., Greeley, Colorado, for the towns of Mead and Johnstown.

STATEMENT.

By the **Commission**: On August 11, 1927, Colorado Motor Way, Inc., a corporation, filed its petition in which it prays for an order authorizing it to discontinue its automobile or motor bus transportation operations between the cities of Longmont and Greeley, Colorado, and intermediate points, the two main ones being the towns of Johnstown and Mead. Written protests were filed by the towns of Mead and Johnstown. The case was heard in the Court House in Greeley on September 12, 1927.

The evidence shows, after giving the objectors the benefit of all doubts, that the line in question is being operated at a loss. It shows further that the applicant, which operates motor bus lines from Denver to Fort Collins and from Denver to Greeley, thence to Fort Collins via Windsor, has not done all that it reasonably could and should to acquaint the shipping and traveling public with the service being rendered by it over the route in question. This does not apply so much to the people residing in the towns of Mead and Johnstown. Because of their limited size, the people residing therein must be more or less familiar with the service of the applicant. The evidenc further shows, on the other hand, that the business men in Mead and Johnstown, who naturally sincerely desire the continuance of the operation, have not done all that they reasonably could and should to make

the operation a profitable instead of a losing one. If the operation is finally to be ordered continued for the benefit of the people along the route, it is their duty to show that they have exerted all reasonable efforts to assist the motor vehicle carrier in making the operation a profitable one. We believe it is incumbent upon them, particularly the business men, to require as much merchandise as possible to be shipped to them over the applicant's line, if the rates and service are reasonable.

The towns of Mead and Johnstown have no other form of passenger and express transportation than that afforded by the applicant. Discontinuance of such service would seriously affect these two towns.

The Commission is of the opinion and so finds that the public convenience and necessity does not now require that the applicant be permitted to discontinue its said operation. It is further of the opinion that the applicant should be permitted to renew its application within a reasonable time, at which time the Commission will set the matter down for further hearing and determination.

ORDER.

It Is Therefore Ordered, That the petition of the Colorado Motor Way., Inc., for an order authorizing it to discontinue its passenger, express and parcel transportation by motor vehicle between Longmont and Greeley, Colorado, should be, and is hereby, denied.

It Is Further Ordered, That the applicant shall have leave, if it so desires, to renew its application after it and the communities involved have had a reasonable opportunity to give the operation in question further trial and more effective support.

RE THE PUBLIC SERVICE COMPANY OF COLORADO, *et al.*

[Applications Nos. 954 and 958. Decision No. 1497.]

Certificates of convenience and necessity—Electric utility—Preemption of territory not presently to be served.

It is unwise and contrary to public convenience and necessity to preempt a territory in favor of an electric utility which is not now and may never be willing to serve it.

Order made with respect to service of Brush-Ft. Morgan-Weldona territory by two electric utilities.

[November 19, 1927.]

Appearances: Paul W. Lee, Esq., Attorney for Public Service Company of Colorado; Stoten R. Stephenson, Esq., Attorney for the city of Fort Morgan, Colorado.

STATEMENT.

By the **Commission**: On August 15, 1927, the Public Service Company of Colorado filed its application praying for authority to extend, construct, maintain and operate a transmission line from the western boundary of the town of Brush, Colorado, to the unincorporated town of Weldona, Colorado, together with all substations and other facilities necessary thereto. Thereafter written protest was filed by the city of Fort Morgan.

On August 24, 1927, the city of Fort Morgan filed its application praying for authority to extend, construct, maintain and operate a light and power transmission line into territory north and northeast of the city of Fort Morgan and to the Country Club, situated slightly west and about a mile and one-half north thereof.

The two cases were set for hearing in the Hearing Room of the Commission on September 19, 1927. While they were not consolidated for hearing, they were heard largely in the same manner as if they had been consolidated. While the main immediate purpose of building the transmission line from Fort Morgan to Weldona is to serve the town of Weldona, the application of the Public Service Company of Colorado alleges, and

the evidence shows, that it expects to render service along the route of the line. As said line would closely parallel for several miles the line sought to be built by the city of Fort Morgan, and as the two applicants could not at the time of the hearing come to any agreement as to how the territory should best be divided, the Commission proposed at the conclusion of the two hearings that the parties go over and consider carefully the territory common to the two applications and endeavor to reach a conclusion satisfactory to themselves and for the best interests of the public. Thereafter representatives of the parties, in company with the Engineer of this Commission, made a trip over the territory and finally reached an agreement which is set forth in correspondence now on file with the Commission consisting of a letter dated November 1, 1927, written by H. H. Kerr, Superintendent of the Electric Department of Public Service Company of Colorado, addressed to Messrs. Lee, Shaw and McCreery; a letter dated November 1, 1927, written by Paul W. Lee, Esq., to Stoton R. Stephenson, Esq.; a letter dated November 2, 1927, written by Stoton R. Stephenson, Esq., to this Commission and a letter dated November 10, 1927, written by Paul W. Lee, Esq., to this Commission. The letter last referred to was accompanied by a map showing the route to be taken by Public Service Company of Colorado as finally agreed upon, said map being marked "Exhibit 'A'—44-C, 240-1."

The Commission is of the opinion and so finds that the extensions and locations to be made by the two applicants as agreed upon by them meet and serve the public convenience and necessity.

The route of Public Service Company of Colorado as agreed upon and approved by this Commission is as follows:

Beginning at approximately the SW corner of the SE Quarter of the NE Quarter of Sec. 3, T. 3 N., R. 56 W. of the 6th P. M. on the line of the western boundary of the town of Brush, thence following the main highway to the west through centers of Secs. 3, 4, 5 and 6, T. 4 N., R. 56 W.; thence north along the section line road to a point near Dodd station, situated between the South Platte River and the Union Pacific railroad in Sec. 25,

T. 4 N., R. 57 W.; thence in a southwesterly direction along a private right-of-way lying between said river and said railroad, crossing said railroad at a convenient point in Sec. 26 to meet the main highway near the center of Sec. 26 and thence along said highway which extends to the west through the centers of Secs. 26, 27, 28, 29 and 30 of T. 4 N., R. 57 W., thence west into Section 25, immediately west of said Section 30, to a point near the Fort Morgan Country Club; thence south approximately one-half mile; thence west approximately along the southern boundary of Secs. 25 and 26, T. 4 N., R. 58 W.; thence south approximately a mile and a half to the new State Highway; thence west and south along the new State Highway to the section line road extending north from the new State Highway between Range 58 and Range 59, both west of the 6th P. M.; thence north along said section line road to the SE corner of Sec. 1, T. 4 N., R. 59 W.; thence west one-half mile; thence north one-half mile to the center of said Sec. 1; thence west one-half mile; thence north one-half mile to the NW corner of said Sec. 1, and thence west approximately a mile and a half to Weldona.

The Commission further finds in accord with the agreement of the parties that the public convenience and necessity requires that the Public Service Company of Colorado should be permitted to attach to this extension such business as may develop along this line and in the territory contiguous thereto, including the unincorporated community of Weldona and the Fort Morgan Country Club, except that along the east and west highway extending through the centers of Secs. 27, 28, 29 and 30, T. 4 N., R. 57 W., it may serve only those customers on the south side of said line whose improvements are fronting on said half section line.

The Commission finds also in accord with the said agreement of the parties, that the public convenience and necessity requires that the application of the City of Fort Morgan for permission to construct a proposed extension of its distribution sys-

tem to the north from Main Street of said city through the center of Sec. 31 and the south half of Sec. 30, T. 4 N., R. 57 W., to the point of meeting with the said line authorized to be constructed by Public Service Company of Colorado should be granted, and the City of Fort Morgan should be allowed to attach such business as may develop along this line and in the territory contiguous thereto, except those customers along the half section line through the centers of Secs. 27, 28, 29 and 30, T. 4 E., R. 57 W., whose improvements are fronting on the said half section line. The Commission finds that the proposed extension of the City of Fort Morgan's distribution system to the west into Sec. 1, T. 5 N., R. 58 W., also its extensions to the east to serve customers in Sections 3, 4, 5, 8, 9 and 10, T. 3 N., R. 57 W., and also to the south through the center of Section 7, T. 3 N., R. 57 W., are required by the public convenience and necessity, and that these extensions should be completed and the City of Fort Morgan allowed to serve this area and consumers contiguous thereto insofar as practicable.

In the agreement of the parties and also in the testimony taken at the hearing, evidence was introduced in regard to the rural territory south of the Burlington railroad and southwest of the City of Fort Morgan which is further described as Secs. 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 20, 21, 22, 23 and 24, T. 3 N., R. 58 W., and territory immediately contiguous to these sections which was referred to as a profitable rural territory desiring electric service. While Public Service Company of Colorado "agreed to give the City of Fort Morgan the first refusal, that is, the first chance to serve the customers" in this area, it appears that the said City of Fort Morgan does not now desire or consent to render the service at any time in the near future. While the agreement with respect to this territory is entitled to and will receive such consideration as it deserves, the Commission is of the opinion and so finds that it would be unwise and contrary to the public convenience and necessity to pre-empt this territory in favor of a utility which may never be willing to

serve it. There appears not to be any desire on the part of the Public Service Company of Colorado to serve the said territory at this time. Therefore, for the same reason, as well as on account of the said agreement, no certificate authorizing such service should be issued to said company.

The Commission finds that the capital to be invested by Public Service Company of Colorado in constructing said extension to be made by it is Thirty-three Thousand Dollars ($33,000), and that the capital to be invested by the City of Fort Morgan in constructing the extension to be made by it is Three Thousand Dollars ($3,000). However, neither of these amounts shall be binding on the Commission in any valuation case conducted for the purpose of determining reasonable rates.

ORDER.

IT IS THEREFORE ORDERED, That the public convenience and necessity does now and in the future will require that the applicant, Public Service Company of Colorado, be, and it is hereby, authorized to construct, maintain and operate a transmission line from the western boundary of the town of Brush, Colorado, to the unincorporated town of Weldona, Colorado, along the route hereinabove described and to furnish light and power to the territory and the inhabitants thereof which also is described herein, and this order shall be deemed and held to be a certificate of public convenience and necessity therefor.

IT IS FURTHER ORDERED, That the public convenience and necessity does now and in the future will require the construction, maintenance and operation of a transmission line by the City of Fort Morgan to the north and east of said city along the route hereinabove described and to furnish light and power to the territory and the inhabitants thereof which also is herein described, and this order shall be deemed and held to be a certificate of public convenience and necessity therefor.

IT IS FURTHER ORDERED, That insofar as the applicants, or either of them, now seek a certificate of public convenience and necessity to serve the territory southwest of the City of Fort Morgan, more particularly described hereinabove, public conven-

ience and necessity requires that the same be, and it is hereby, denied.

IT IS FURTHER ORDERED, That the applicants shall file with the Commission within twenty days from the date hereof their tariff of rates and rules and regulations covering the territory involved herein.

RE L. BICKLE WILSON, *et al.*, DOING BUSINESS AS PLATTE VALLEY TRANSPORTATION COMPANY.

[Application No. 835. Decision No. 1502.]

Certificates of convenience and necessity—Piecemeal acquisition of prohibited route—Motor vehicles.

A certificate to operate over a certain route was refused to a motor utility already lawfully operating in neighboring territory where the proposed additional route would constitute a through service between points expressly refused to the applicant in a previous application for such entire route, a certificate being issued, however, to permit service to other intermediate points having a public necessity therefor.

[November 19, 1927.]

Appearances: Swerer & Johnson, Esqs., Denver, Colorado, for applicants; J. Q. Dier, Esq., Denver, Colorado, for Chicago, Burlington & Quincy Railroad Company; E. G. Knowles, Esq., Denver, Colorado, for Union Pacific Railroad Company; Harry S. Class, Esq., Denver, Colorado, for Cornhusker Stage Line.

STATEMENT.

By the **Commission**: On March 7, 1927, L. Bickle Wilson and Joseph F. Lindsey, co-partners doing business under the name and style of The Platte Valley Transportation Company, filed their application for a certificate of public convenience and necessity authorizing the operation by them of a motor vehicle system for the transportation of passengers and express packages between Fort Morgan and Denver, Colorado, and intermediate points including Wiggins, Keenesburg, Hudson, Fort Lupton, and Brighton. Objections and answers were filed by Union Pacific Railroad Company and Chicago, Burlington & Quincy

Railroad Company. An informal protest was filed by the Board of County Commissioners of Morgan County. The applicants do not now seek to do any business between Fort Lupton and Denver except such as is either destined to Denver from points east of Fort Morgan or originates in Denver and is destined to said points.

The case was set for hearing and was heard in the Court House in Sterling, Colorado, beginning on August 16, 1927. The case was consolidated for hearing with Application No. 888.

In the order entered in Application No. 888, the Commission found that the public convenience and necessity does not require the transportation of passengers from Denver to Sterling and Julesburg and points intermediate to the two latter, and from Sterling and Julesburg and intermediate points to Denver. The applicants are now transporting passengers under a certificate from this Commission to and from Sterling and Greeley, and intermediate points, including Brush and Fort Morgan. If this application were granted, there would then be operating a system between Sterling and Denver via Brush and Fort Morgan, as the route of the applicant runs from Sterling through Fort Morgan. What we said and found in the order in Application No. 888, as to the lack of convenience and necessity for the operations of the applicant in that case, applies equally to this case so far as the operations to and from Sterling are concerned. The preponderance of evidence as to Fort Morgan is that the public convenience and necessity does not require the operation proposed by the applicants.

The country between Fort Morgan and Keenesburg is sparsely settled. There is almost a total lack of any showing of a demand or need on the part of the people living in this territory for such an operation as the applicants seek to furnish. The evidence shows that seventy-five or eighty per cent of the traveling salesmen use their own automobiles.

Keenesburg and Hudson are two towns situated in a very fertile, irrigated country. There are many business dealings between the banks, automobile agencies, and other business concerns situated in Fort Lupton, Hudson and Keenesburg. There

is, at the present time, no public carrier operating between these points, all of which are situated in Weld County.

After a careful consideration of all of the evidence, the Commission is of the opinion, and so finds, that the public convenience and necessity does require the operation of a motor vehicle system for the transportation of passengers and express between Fort Lupton and Keenesburg, via Hudson and other intermediate points; that, as to the other portions of the route over which the applicants desire to operate, the public convenience and necessity does not require that a certificate be issued them.

ORDER.

IT IS THEREFORE ORDERED, That the public covenience and necessity does now and in the future will require the operation of a motor vehicle system for the transportation of passengers and express between Fort Lupton and Keenesburg, via Hudson and other intermediate points, by L. Bickle Wilson and Joseph F. Lindsey, co-partners doing business under the name and style of The Platte Valley Transportation 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 application, as it relates to the other portions of the route over which the applicants desire to operate, be, and the same is hereby, denied.

IT IS FURTHER ORDERED, That the applicants shall, if they see fit to accept the certificate herein granted, file in the office of this Commission their formal acceptance thereof within twenty days from the date hereof.

IT IS FURTHER ORDERED, That the applicants herein 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 of not to exceed twenty days from the date hereof.

IT IS FURTHER ORDERED, That the applicants shall operate such motor vehicle carrier system as set forth herein at such times and under such schedules as are on file for this operation with this Commission, except when prevented from so doing

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 & RIO GRANDE WESTERN RAILROAD COMPANY.

[Application No. 440. Decision No. 1518.]

Service—Managerial discretion—Carrying coach on different freight train.

Change of service consisting of the carrying of a passenger coach on one freight train instead of another held to be a matter purely within the managerial power of the carrier.

[December 6, 1927.]

Appearance: Thomas R. Woodrow, Esq., Denver, Colorado, for The Denver and Rio Grande Western Railroad Company.

STATEMENT.

By the **Commission**: This is an application by The Denver and Rio Grande Western Railroad Company to discontinue a so-called water train running from LaVeta to Cucharas Junction and return daily except Sunday. This train has been running for a number of years. Sometime after the applicant began running the water train, a passenger coach was added to it for the purpose of handling the few local passengers in that territory. The application was filed on April 28, 1925. On May 14, 1925, the Commission was advised by the applicant that it was preparing a new timetable, to become effective May 24, 1925, on which the passenger coach heretofore operated on the water train would be operated on No. 161 from Walsenburg to LaVeta, and return on No. 162 from LaVeta to Walsenburg, which would involve no curtailment of service as defined in General Order No. 34 of this Commission.

On December 11, 1925, the LaVeta Commercial Club advised this Commission that they are doubtful if the expense of a hearing would be justified in that particular matter, and therefore consented to the dismissal of the application.

The Commission is of the opinion that this change in passenger service between LaVeta and Walsenburg was not a curtailment of the service and therefore it was not necessary to file an application with this Commission authorizing the same, but was purely the exercise of the managerial power of the applicant. However, this Commission set this matter down for hearing on December 5, 1927, in the Hearing Room of the Commission, Denver, Colorado. No appearance was made by anyone in opposition to the particular change in question.

The applicant, through its counsel, moved that the application be dismissed, there being no curtailment of service involved.

ORDER.

IT IS THEREFORE ORDERED, That Application No. 440 be, and the same is hereby, dismissed.

RE FORT MORGAN-BRUSH TRANSPORTATION COMPANY.

[Application No. 833½. Decision No. 1519.]

Certificates of convenience and necessity—Desires of public—Materiality.

1. One important consideration in determining whether public convenience and necessity requires a motor vehicle operation is whether the public affected wants it.

Certificates of convenience and necessity—Meaning of term "public convenience and necessity."

2. The term "public convenience and necessity" does not mean an absolute necessity. It means a reasonable necessity.

Certificates of convenience and necessity—"Necessity" defined.

3. Definition of necessity quoted: ". . . a public need without which the public is inconvenienced to the extent of being handicapped in the pursuit of business . . ."

[December 6, 1927.]

Appearances: Frank J. Mannix and R. R. Carpenter, Esqs., Denver, Colorado, attorneys for the applicant; John Q. Dier, Esq., Denver, Colorado, for the Chicago, Burlington & Quincy Railroad Company and American Railway Express Company; E. G. Knowles, Esq., Denver, Colorado, for the Union Pacific Railroad Company.

STATEMENT.

By the **Commission**: On March 4, 1927, Fort Morgan-Brush Transportation Company, a corporation, filed its application for a certificate of public convenience and necessity authorizing it to operate a motor vehicle system for the transportation of freight and express from Fort Morgan and Brush to Denver and from Denver to the two named points. On March 12 the Chicago, Burlington & Quincy Railroad Company filed its answer and protest.

The matter was set for hearing and was heard in the Court House in Fort Morgan beginning on October 4, 1927. At the hearing it developed that the applicant is a well-managed corporation with reliable men in charge of dependable operations. The equipment of the applicant is good. For a number of months the applicant has been operating as a common carrier over the route in question. A truck leaves Brush, which is east of Fort Morgan, about 8:00 o'clock in the morning. The last truck going west leaves Brush at about noon. The service eastbound is overnight, the trucks leaving Denver at about 7:00 o'clock in the evening. They arrive in Fort Morgan from 1:00 to 3:00 o'clock in the morning and at Brush in time to begin deliveries by about 6:30 in the morning. Deliveries in Fort Morgan begin about 6:00 o'clock. Quite a number of business men from both Fort Morgan and Brush testified in support of the application and to the usual effect in such cases as this, that freight is received later in Denver by the applicant than by the railroad, is delivered earlier in their stores, drayage charges being eliminated. On the other hand, quite a large number of business men, including the mayor of Fort Morgan,

the president of the Civic Club of Brush, the president of the First National Bank of Fort Morgan, the editor of the newspaper in Fort Morgan and others, testified in opposition to the application. The Chicago, Burlington & Quincy Railroad Company operates a daily L. C. L. service, except Sunday, both east and westbound. The cars are set out in Fort Morgan and Brush shortly before midnight. They are opened at 7:00 A. M. The evidence shows also that the railroad company is willing to open them at any earlier hour desired by the business men. The drayage charges in Fort Morgan and Brush are unusually low. One drayman testified that he delivers meat and fruit first, and that all of the merchandise handled by him is delivered by 10:30 A. M. Another drayman testified that all of the perishables handled by him are delivered by 8:00, and that all of the rest of the merchandise is delivered by 8:30 to 9:00 A. M. In addition to the L. C. L. service there is a tri-weekly refrigerator service in the summer time and a heated car service in the winter. The express service from Denver to the two points named is such that a merchant at those points can telephone to Denver at 5:00 o'clock and get his goods by express the next morning. The county commissioners of Morgan County also testified against the issuance of a certificate.

One important consideration in determining whether or not a sufficient showing has been made is whether the public affected wants the new mode of transportation. A careful consideration of the record leads us to the opinion, and the Commission so finds, that while the service of the applicant offers certain conveniences, a slight saving due to the elimination of drayage charges, the showing made in the record does not show sufficiently that the people of the communities involved want or need motor truck transportation. The local communities of Fort Morgan and Brush seem to consider the service of the railroad and express company indispensable, and fear that the issuance of a certificate for the operation of a motor vehicle system will result in an impairment or reduction of railroad service.

As stated above, the evidence shows that the applicant is a well managed corporation with reliable men in charge of dependable operations. The record, however, in the instant case does not convince us that the public convenience and necessity requires its operation. The Commission is constrained to say that if and when the public convenience and necessity requires a motor vehicle carrier operation of freight between Fort Morgan and Denver that the applicant should be entitled to receive first consideration.

The Commission has heretofore held that the term "public convenience and necessity" does not mean an absolute necessity but that it means a reasonable necessity. A recent definition of "necessity" given by the Supreme Court of Oklahoma in Chicago R. I. & P. Ry. Co. v. State, et al., 258 Pac. 874, is: "* * * a public need without which the public is inconvenienced to the extent of being handicapped in the pursuit of business * * *." If this should be a proper definition of necessity, the Commission is of the opinion that no necessity is shown in this case because there is no showing that the communities involved really would be handicapped in the pursuit of their business without the operation of the applicant. Therefore, the Commission is of the opinion, and so finds, that the public convenience and necessity requires that the application herein be denied.

We keenly regret the fact that the applicant has built up quite a substantial business on the route in question and has invested considerable money in equipment, and that the officers and employes will have to find other employment or business. However, they must be held to have gone into this business fully realizing if a certificate should not be granted they would have to face the situation now confronting them.

ORDER.

IT IS THEREFORE ORDERED, That the application herein be, and the same is hereby, denied.

RE ALBERT FOURET, *et al.*, DOING BUSINESS AS FOURET BROTHERS AND RED BALL AUTO SERVICE.

[Application No. 921. Decision No. 1523.]

Monopoly and competition—Evasion of exclusive franchise by route extension—Motor utility.

1. The crossing of the city limits by the busses of one utility operator cannot be said to be an evasion of a city ordinance granting an exclusive franchise for motor utility operation in that vicinity to another operator where the passengers are destined to a point beyond the city limits.

Certificates of convenience and necessity—Regulation of emergency operation prior to regulation measured by character of service—Busses.

2. An applicant for a certificate of convenience and necessity to transport passengers to and from a circus grounds outside of a city during such times only as fairs were being held there, who had rendered such service in good faith regularly since 1917, and prior to the regulatory act, is entitled to the benefit of the presumption of convenience and necessity if he has so served every year that the fair was actually held and his continuous operation is not broken.

[December 12, 1927.]

Appearances: Samuel Freudenthal, Esq., Trinidad, Colorado, for the applicants; B. M. Erickson, Esq., Trinidad, Colorado, for Charles Maxday, Sr., Inc.

STATEMENT.

By the **Commission**: On June 9, 1927, Albert Fouret and Joseph Fouret, co-partners, doing business as Fouret Brothers and as The Red Ball Auto Service, filed their application for a certificate of public convenience and necessity authorizing the operation of a motor vehicle system for the transportation of passengers between Trinidad, Colorado, and the so-called circus grounds, situated just across the street from the city limits of said city, and the fair grounds, situated about one-half or three-fourths of a mile beyond the limits of said city, at those times only when there should be held a circus or county fair.

Charles Maxday, Sr., Inc., which has by virtue of a city ordinance of the city of Trinidad and a certificate of public conven-

ience and necessity from this Commission the exclusive right to operate throughout the year a motor bus system for the transportation of passengers on established routes throughout the city of Trinidad, filed its protest. The said certificate from this Commission and another certificate authorize the transportation of passengers to both the said circus and fair grounds. Thereafter the applicants filed amendments to their said application.

The case was set for hearing and was heard in the Court House in Trinidad on October 14, 1927.

There was introduced in evidence protestant's Exhibit A, which is an ordinance granting an exclusive right to operate a motor bus line within the city of Trinidad. There is attached to the application a certificate by the city clerk of the city of Trinidad stating there is no ordinance forbidding the operations of any person from said city to the two points named, situated outside thereof. Along the center of North avenue runs the dividing line between said city and the territory outside thereof. Abutting on North avenue are the so-called circus grounds. The regular route over which the busses of the protestant run daily throughout the year follows North avenue on the south side thereof, or within the city limits. The applicants' evidence shows that they enter North avenue from Rosita street, cross the former to the north side thereof, or across the city limits, and there deliver their passengers, and then proceed to the east end of the block and cross back into the city on San Pedro street. The protestant offered evidence that it is much better to enter North avenue from San Pedro street and avoid crossing said avenue twice, intimating that the purpose of crossing said avenue is to evade the ordinance. However, we not only have the certificate of the clerk of the city that this operation by the applicants to the circus grounds does not violate the ordinance granting the exclusive franchise to the protestant, but it would appear that the applicants have been following this route for a number of years prior to the passage of said ordinance. Moreover, irrespective of that fact, as the passengers are destined to a point beyond the city limits, we cannot say that the crossing

of those limits by their busses is an evasion of the ordinance. If the circus grounds were on the south side of North avenue and the applicants proceeded to deliver them on the opposite side of the avenue, we would have a somewhat different situation.

There was some evidence introduced by the applicants to the effect that during the rush hours on days when a circus or the fair is being held the busses of the protestant are crowded so that there is no sitting room left, and that occasionally it is difficult to get on the busses at all. Albert Fouret testified that he could take care of all the passengers going to and from both of the outside points and that he supposed the protestant also could do the same.

The Commission is in receipt of a certified copy of a resolution passed by the city council of the city of Trinidad on July 11, 1927, protesting against the issuance of a certificate to the applicants, stating that the issuance of such certificate would result in lowering the proceeds of the respondent to such an extent "as to endanger the operation of such (respondent's) line, and that the protestant's line is able adequately to handle all crowds on all special occasions."

There was evidence introduced by the protestant showing that his bus operations in the city of Trinidad are being conducted at a loss, and that the continuance thereof is more or less a matter of public service for the benefit of the city. It contended, therefore, that the applicants should not be permitted to step in some two or three times a year and participate in the hauling of the passengers to the two points named, thus cutting down its already insufficient revenues.

The evidence shows that the applicants' equipment to be used in these operations consists of four busses of the market value of $17,000.

After a careful consideration of all the evidence, we are of the opinion and so find that the protestant is equipped to and can reasonably and adequately serve all passengers going to and from the two points named, and that there is really no need for an additional service. However, the application herein was filed, as stated, in June of this year. At that time and until August

1 of this year any person who had been operating continuously since prior to July 16, 1917, was entitled as a matter of right, irrespective of any showing of public convenience and necessity, to a certificate authorizing the continuance of the said operations. The evidence shows that the applicants have been transporting passengers to and from said points since prior to 1917. There was evidence showing that the fair in Trinidad has not been held every year since 1917 and it was argued, therefore, that there had not been a continuous operation since prior to 1917. If the fair had been held every year and the applicants had failed since 1917 to render service each and every year, the situation would be entirely different; but since the applicants have rendered the service each and every year sinc 1917 in which a fair was held, we are of the opinion that their service has been continuous. If the application had been heard and disposed of prior to August 1 of this year, a certificate would, therefore, have to be issued. The fact that the hearing could not be had prior to August 1, although under the rules and regulations of the Commission it could have been heard sooner, we think should not penalize the applicants and that their rights should be the same as if the hearing had been had before August 1, 1927, effective date of House Bill 430.

We are of the opinion, therefore, and so find that the applicants are entitled to and should receive from the Commission a certificate of public convenience and necessity authorizing the operation of a motor vehicle system for the transportation of passengers between the city of Trinidad and the so-called circus and fair grounds.

ORDER.

IT IS THEREFORE ORDERED, That the applicants herein, Albert Fouret and Joseph Fouret, co-partners, doing business as Fouret Brothers and as The Red Ball Auto Service, are entitled to a certificate of public convenience and necessity authorizing the operation of a motor vehicle system for the transportation of passengers between the city of Trinidad and the so-called circus and fair grounds, 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 herein shall file tariffs of rates, rules and regulations and distance 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 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 motor vehicle common carriers, and also subject to any legislative action that may in the future be taken with respect thereto.

RE EDD. D. HARRISS.

[Application 691. Decision No. 1547.]

Certificates of convenience and necessity—Continuous motor vehicle operation since prior to 1917—Effect.

1. One engaged in continuous motor vehicle operation since prior to the year 1917, and filing an application prior to January 1, 1927, probably entitled to a certificate of convenience and necessity irrespective of convenience and necessity of the operation.

Certificates of convenience and necessity—Long continued service—Evidence of dependability and reliability.

2. Long continued service "speaks considerably for the dependability and reliability of" an applicant.

[January 4, 1928.]

Appearances: A. P. Anderson, Esq., Denver, Colorado, and W. O. Peterson, Esq., Pueblo, Colorado, for applicant; D. A. Maloney, Esq., Denver, Colorado, for The Camel Truck Line.

STATEMENT.

By the **Commission**: This application comes up on a rehearing granted by this Commission on an order entered on August 25, 1927. The application is for a certificate of public convenience and necessity to operate as a motor vehicle carrier between Pueblo and Fowler, in Fowler and within a radius of about

fifteen miles thereof. This application was set down for rehearing at Rocky Ford, Colorado, on the 16th day of November, 1927, at which time evidence in support of and in opposition thereto was received.

At the commencement of the hearing the attorneys for applicant asked leave to amend paragraph three of the amended application by substituting for the last paragraph therein the following language:

"From the City of Pueblo, following the State Highway south of the Arkansas River to Fowler and return. Petitioner also makes side trips in connection therewith to and from Fowler to the different ranches and places north and south of the Arkansas River, and within a radius of 15 miles of Fowler. That a map of said route is attached hereto and marked Exhibit A."

There being no objection to this amendment the same was allowed. All protests on file are also considered as protests to this amendment.

This Commission on the 26th day of September, 1924, issued a certificate of public convenience and necessity to The Camel Truck line to operate as a motor vehicle carrier in the transportation of freight and merchandise between Pueblo and Rocky Ford, including all intermediate points. Fowler and other small places within a radius of fifteen miles from Fowler are intermediate points.

The applicant produced a very large number of witnesses, mainly business men residing in Fowler and Manzanola; their evidence was to the effect that the applicant had been doing their motor vehicle transportation business commencing sometime about 1915; that he had been in the business of transporting freight in and around Fowler for a long time; that applicant is now operating four motor vehicle trucks in the conduct of his business; that the applicant maintains a depot, with someone continually in charge, in the center of the business section of Fowler for the convenience of the shipping public; that no other motor vehicle carrier furnishes such service to the City of Fowler and vicinity; that scheduled operation of The Camel Truck Line is such that its deliveries into Fowler are not convenient to the

shipping and receiving public, it being somewhat after closing hours; that the schedule of the applicant is to leave Fowler at 8:00 a. m. for Pueblo, and to leave Pueblo at 2:00 p. m. for Fowler, thereby permitting a delivery of the goods from Pueblo before 5:00 p. m.; that generally the public convenience and necessity requires the proposed operation of the applicant in Fowler and vicinity; that because of the long continuance by the applicant in the transportation business in and around Fowler he is better qualified to give the personal service that meets the convenience of each shipper.

The testimony of the applicant was to the effect that he has been in the business of transporting freight for a number of years, and that in 1915 he commenced to use motor vehicles for that purpose; that in 1916 he operated two motor vehicles regularly twice a week, and that in 1921 he commenced his daily operation. The capital invested in applicant's motor vehicle operations is approximately $10,000.

The protestant, The Camel Truck Line, presented some evidence by a number of witnesses residing at Rocky Ford, to the effect that the service of protestant company has been satisfactory. No testimony was introduced by the protestant showing that the service was satisfactory at Fowler and vicinity, and met all the public convenience and necessity.

While the burden is upon the applicant to show by a preponderance of the evidence that an additional motor vehicle carrier service is necessary in the territory in question, we believe that the applicant has fully sustained that burden. The facts are undisputed that the service given by the applicant in the City of Fowler is considerably more adequate than that now furnished by The Camel Truck Line. We believe, however, that the applicant's regular schedule of operation should be made a part of his certificate, so that his operation will not conflict with the operation of The Camel Truck Line, whose schedule is at a different time.

Quite a little testimony was introduced as to the convenience of the applicant's service to the vicinity in and within a radius of fifteen miles from Fowler in the transportation of products of

agriculture, including livestock. The record is undisputed in that respect.

A further reason why the Commission is persuaded that the certificate herein should issue is that the applicant has been operating as a motor vehicle carrier prior to 1917. His application herein was filed prior to January 1, 1927. Under these circumstances he would probably be entitled to a certificate to operate as a motor vehicle carrier under the same conditions and circumstances as he did prior to 1921. This long-continued service in this particular business speaks considerably for the dependability and reliability of the applicant.

After a careful consideration of all the facts and circumstances, and the evidence introduced herein, the Commission is of the opinion, and so finds, that the public convenience and necessity requires the motor vehicle carrier operation by the applicant to operate on regular schedule between Fowler and Pueblo, Colorado, leaving Fowler at 8:00 a. m. for Pueblo and leaving Pueblo to return to Fowler at 2:00 p. m., applicant, however, not to do any intermediate business except such as comes within the fifteen mile radius of Fowler; that the public convenience and necessity requires the motor vehicle system of the applicant to operate as an irregular motor vehicle carrier of freight within the City of Fowler and a radius of fifteen miles from and to the City of Fowler.

The record on rehearing was considerably broader than in the first hearing. The former decision and opinion in the instant application will be withdrawn. P. U. R. 1927 E, 730.

ORDER.

It Is Therefore Ordered, That the public convenience and necessity requires the operation by the applicant of a motor vehicle carrier system for the transportation of freight on regular schedule between Fowler and Pueblo, Colorado, leaving Fowler at 8:00 a. m. for Pueblo, and leaving Pueblo to return to Fowler at 2:00 p. m., daily except Sunday, and to operate as

an irregular carrier of freight within the City of Fowler and a radius of fifteen miles from and to the City of Fowler and this order shall be deemed and held to be a certificate of public convenience and necessity therefor, subject to the following conditions:

(a) That the applicant shall not operate from and to any intermediate point between Fowler and Pueblo except such as comes within the fifteen mile radius of Fowler.

(b) That the applicant shall not operate on any other regular schedule between Fowler and Pueblo except as stated in this order.

IT IS FURTHER ORDERED, That the applicant shall file tariffs of rates, rules and regulations and time and distance 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 terms of this certificate except when prevented from so doing by the Act of God, the public enemy, or unusual or 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.

BOARD OF COUNTY COMMISSIONERS OF WELD COUNTY

v.

J. E. CLAYBURG.

[Case No. 331. Decision No. 1551.]

Common carriers—Evasion by motor vehicle carrier—Frequent changing of customers.

1. Frequent changing of customers by one claiming to be a private motor vehicle operator would indicate a resort to subterfuge.

Common carriers—Motor vehicle operator serving 5 customers in city of 15,000 population, etc.

2. A motor vehicle operator serving five customers in a city of approximately 15,000 population having some 400 mercantile concerns of various kinds found not to be a motor vehicle carrier as defined by statute.

[January 7, 1928.]

Appearances: J. G. Scott, Esq., Denver, Colorado, for complainant; Clay R. Apple, Esq., Greeley, Colorado, for defendant.

STATEMENT.

By the **Commission:** This is a complaint by the Board of County Commissioners of the County of Weld, State of Colorado, complaining against the defendant that he owns, controls and operates one motor vehicle, using the same in serving the public in the business of transporting property for compensation over the public highways between Denver, Colorado, and Greeley, Colorado, and intermediate points, and indiscriminately accepts, discharges and lays down freight and express and holds himself out for such purposes for the public generally without having ever obtained a certificate of public convenience and necessity from this Commission, and without having paid the tax provided for in Section 7, Chapter 134, Session Laws 1927, and an order to cease and desist is prayed for.

The defendant filed an answer to this complaint, denying the allegations thereof, and alleging that he is under contract with five persons in Greeley to transport to and from Denver such merchandise as said persons need.

This matter was set down for hearing at the Court House, Greeley, Colorado, on December 15, 1927. At that time the parties hereto entered into the following stipulation:

"It is stipulated and agreed by and between the parties hereto by their respective attorneys that the facts in the above entitled matter are as follows, to-wit:

"That defendant now owns, controls, operates and manages and for about two years last past has owned, controlled, operated and managed one motor vehicle, an International 1½ ton speed wagon, using the same in the carrying of property for compensa-

tion between Denver and Greeley, Colorado, for five (5) only persons, or firms, or corporations in the City of Greeley, Colorado, as follows:

"Consumers Oil Company (retail and wholesale petroleum products).

"Irving Fallek (batteries and battery repairs).

"W-F Hardware Company (retail hardware).

"Greeley Co-operative Company (feed and grain).

"Boise-Payette Lumber Company (nails and hardware).

"That defendant hauls property for the above five (5) persons or firms and no other except as hereafter stated, and has refused and does now refuse to haul for any other (excepting an occasional farmer), and does not advertise for other business.

"That such transportation is conducted for said persons and firms under verbal contract with such persons; that the method of operation by defendant is upon specific orders received from such persons to obtain and carry for them and to them certain specific merchandise; that he does not operate regular schedules; that the defendant does hauling for Hickman-Lunbeck, wholesale grocery company, of groceries from Greeley to Fort Morgan and intermediate points, upon specific orders from said Hickman-Lunbeck Grocery Company, making a trip every Thursday for said company.

"That defendant does not have a certificate of public convenience and necessity from The Public Utilities Commission of the State of Colorado, and has never applied for one.

"That defendant does not pay any taxes as provided by Section 7, Chapter 134 of Session Laws of Colorado, 1927.

"That Greeley is a city of about 15,000 population and has approximately 400 mercantile establishments of various kinds; that said city of Greeley is situated 52 miles north and east of Denver on a paved highway."

Section 1 (d) of Chapter 134 of the Session Laws of 1927 defines a motor vehicle carrier as follows:

"The term 'motor vehicle carrier' when used in this act means and includes every corporation, person, firm, association of persons, lessee, trustee, receiver or trustee appointed by any court, owning, controlling, operating or managing any motor vehicle used in serving the public in the business of transporting persons or property for compensation over any public highway between fixed points or over established routes, or otherwise, who indiscriminately accept, discharge and lay down either passengers, freight or express, or who hold themselves out for such purpose by advertising or otherwise."

The stipulation of facts herein, in our opinion, does not bring such a motor vehicle operation within the meaning of the above quoted section as a common carrier. The Commission assumes, however, that the agreements entered into by Mr. Clayburg are made in good faith. If, for instance, he should make contracts such as described in the stipulation with other merchants in Greeley, increasing the number thereof as opportunity presents itself and changing around considerably and with some frequency his service to other merchants, it would be an indication that he is attempting to evade the law and using the alleged contracts as a subterfuge to circumvent the law. In other words, in the opinion of the Commission, there must be some permanency to such contracts, otherwise he would become a common carrier.

Our Supreme Court, in the case of Davis v. the People, 79 Colo. 642, said that mere schemes to evade the law once their true character is established are impotent for the purpose intended, and that courts sweep them aside as so much rubbish.

The number of parties with which such contracts are entered into, depending somewhat upon the number of shippers and population of the particular community, in a great measure determines the status of a carrier. The defendant in the instant case expressly stipulates that he does not hold himself out to the public to transport freight and express, and does not indiscriminately accept and transport freight and express, and designated specifically in the stipulation with whom he has an agree-

ment to transport and that he refuses to transport for any other. Under these circumstances the Commission is of the opinion that the complaint herein should be dismissed for want of jurisdiction.

ORDER.

IT IS THEREFORE ORDERED, That the complaint of the Board of County Commissioners of the County of Weld, State of Colorado, against J. E. Clayburg, Case No. 331, be, and the same is hereby, dismissed for want of jurisdiction.

RE FRANK PLESS, *et al.*, DOING BUSINESS AS PLESS AND DAVIS.

[Application 987. Decision No. 1553.]

Monopoly and competition—Duplication of motor vehicle service—Showing required to warrant.

1. Before issuing a certificate of convenience and necessity authorizing a duplication of service "a strong showing of inadequateness of existing service should be made."

Certificates of convenience and necessity—Operation as motor vehicle carrier without certificate—Effect.

2. Operation as a motor vehicle carrier without a certificate of convenience and necessity will not necessarily result in a denial of an application for a certificate, in spite of the Commission's rule 3 (b) of Rules and Regulations relating to motor vehicle operations.

[January 7, 1928.]

Appearances: Harry S. Class, Esq., Denver, Colorado, attorney for applicant; D. A. Maloney, Esq., Denver, Colorado, attorney for The Northern Transportation Company; E. G. Knowles, Esq., Denver, Colorado, attorney for the Union Pacific Railroad Company; John Q. Dier, Esq., Denver, Colorado, attorney for The Colorado and Southern Railway Company; A. S. Habenicht, Denver, Colorado, for the American Railway Express Company; D. Edgar Wilson, Esq., Denver, Colorado, attorney for the Colorado Motor Way, Inc.

STATEMENT.

By the **Commission**: On November 15, 1927, there was filed the application of Frank Pless and Walter Davis, doing business under the firm name and style of Pless and Davis, for a certificate of public convenience and necessity authorizing the operation of a motor vehicle system for the transportation of freight, milk and cream between Denver, Colorado, and La Salle, Colorado, and those intermediate points of Ione and others intermediate to Ione and La Salle. Answers and protests were filed by The Northern Transportation Company, Colorado Motor Way, Inc., Union Pacific Railroad Company and the American Railway Express Company. The case was heard in the Court House in Greeley on December 16, 1927.

The evidence shows that for over three years the applicants have been operating between La Salle and Denver, hauling merchandise for the merchants from Denver and milk and cream from the farmers in the vicinities of La Salle, Peckham, Gilcrest, Platteville and Ione to Denver. They gather the milk and cream not only at the points named but at the doors of the farmers and deliver the same on the dock of an ice cream manufacturer in Denver. In rendering this service they not only save the farmers the trouble and expense of carting their cream and milk to a railroad station and the drayage from the depot in Denver but effect a considerable saving in time.

Quite a number of merchants in the towns named testified that the service of the applicants in hauling merchandise for them is a convenience and necessity. A few instances were pointed out by different witnesses of unsatisfactory service by The Northern Transportation Company, a certificate holder which operates through each and all of the points named. They showed a desire to be served by a system which has its headquarters nearer to them and which gives somewhat closer contact. The headquarters of these applicants is in La Salle, which is eight miles from Greeley and is considerably further from Platteville and Ione. The Commission has always taken the position that before issuing a certificate authorizing a separate operation over the route

of an existing authorized carrier, a strong showing of inadequateness of existing service should be made. The Commission has the power to regulate service and always has stood ready to hear any complaints against service and to make such orders with reference thereto as the convenience and necessity of the public should require. No complaint has heretofore been made by the merchants in any of the towns named against the service of the certificate holder.

The Commission is of the opinion that the service of The Northern Transportation Company in the past has not been all that it should have been in this particular territory, and that unless such service is reasonably satisfactory the public convenience and necessity may require the issuance of an additional certificate. However, it might be said that since the application herein was filed an experienced and efficient operator, one S. L. Leach, who resides in and has his headquarters in Greeley, has been made president and manager of The Northern Transportation Company.

The testimony in the instant case showed that the applicant at the time of the filing of his application and thereafter operated as a motor vehicle carrier, without first having obtained a certificate of public convenience and necessity. In the case of *In re Harry Large,* P. U. R. 1927 E, 356, this Commission held that no applicant would receive a certificate of public convenience and necessity if he unlawfully operates at the time of the filing of his application and thereafter. In that case, on motion of protestant, the Commission denied the application. A similar motion has been made in the instant case. In the Large case the Commission had before it a flagrant intentional violation. The ruling of the Commission in that case was based on its rule 3 (b) which reads: "No motor vehicle carrier shall begin operation or business as such without first obtaining from the Commission a certificate of public convenience and necessity therefor."

Since the adoption of said rule which became effective January 1, 1927, the Commission has found that the motor vehicle carriers throughout the State for the most part have had very little

knowledge of the law or our rules and regulations governing their operations. The Commission has found also that in a great many cases a denial of a certificate solely on the ground of the violation of this rule would not only work a hardship on many of the applicants, but on the shipping public as well. Of course, the rule adds nothing to the law as the law exists or as it existed prior to the enactment of House Bill No. 430. The failure of the Commission to deny a certificate on this ground only cannot, of course, legalize an operation made unlawful by the statute, but in determining whether or not a certificate should be denied because of violation of a statute the Commission feels that it must take into consideration other questions such as the need of the public for the operation in question, the duration of the operation, the good faith of the operator, etc.

After careful consideration of all of the evidence and in view of the facts stated, the Commission is of the opinion and so finds that at the present time the public convenience and necessity does not require the motor vehicle system of the applicants for the transportation of merchandise to and from the points named; that during a period of ninety days the merchants doing business in said towns with The Northern Transportation Company should give the service of the latter company a fair test and that in the meantime the Commission should retain jurisdiction of the application.

The Commission further finds that the public convenience and necessity requires the motor transportation system by the applicant of milk and cream to Denver, Colorado, from the farmers located in the vicinities of La Salle, Peckham, Gilcrest, Platteville and Ione.

There was some evidence that the transportation of milk and cream alone cannot be done profitably. The evidence on this point was not as definite and certain as it might have been. If this contention is proved on final hearing, the fact will be given such consideration as it deserves.

ORDER.

IT IS THEREFORE ORDERED, That at the present time the public convenience and necessity does not require the motor vehicle system of the applicants for the transportation of merchandise between Denver, Colorado, and La Salle, Colorado, and those intermediate points of Ione and others intermediate to Ione and La Salle, and this portion of the application for the present shall be, and is hereby, denied.

IT IS FURTHER ORDERED, That the Commission should and it hereby does retain jurisdiction of the application.

IT IS FURTHER ORDERED, That the public convenience and necessity requires the motor transportation system by the applicant of milk and cream to Denver, Colorado, from the farmers located in the vicinities of La Salle, Peckham, Gilcrest, Platteville and Ione, 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 applicant 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 schedule filed with this Commission except when prevented from so doing by the Act of God, the public enemy or unusual or 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.

IT IS FURTHER ORDERED, That applicant shall file his written acceptance of the certificate herein granted within a period of twenty days hereof.

PUBLIC SERVICE COMPANY OF COLORADO
v.
CITY OF LOVELAND.

[Case No. 341. Decision No. 1576.]

Certificates of convenience and necessity—When required—New territory.

1. No certificate is necessary for the construction of a new electrical extension into contiguous territory not already served by another public utility of like character.

Certificates of convenience and necessity—Failure to obtain—Effect on extension rights.

2. The failure to ask for a certificate until after an extension is constructed cannot give the utility any greater right thereto than if it had asked before, in view of the premium that would otherwise be put on the violation of the law.

Certificates of convenience and necessity—Proper evidence—Inadequate service.

3. A complaint of inadequate service of an existing utility will not be entertained for the first time in a hearing on a complaint against unauthorized competing service.

Monopoly and competition—What constitutes service in a territory—Electricity.

4. A utility may not single out isolated, unserved inhabitants of a territory through which existing competitive service is offered as constituting together unserved territory.

Monopoly and competition—What constitutes service in a territory—Electricity.

5. A private utility serving four customers in a territory and offering to build other extensions on reasonable terms subject to the authority of the Commission was held to be engaged in "service" within a "territory" to the exclusion of competition from a municipal utility without a certificate.

[February 6, 1928.]

Appearances: Paul W. Lee, Esq., Denver, Colorado, attorney for petitioners; George L. Nye, Esq., Denver, Colorado, and Reid Williams, Esq., Loveland, Colorado, attorneys for respondent.

STATEMENT.

By the **Commission**: On November 18, 1927, Public Service Company of Colorado filed its petition in which it alleges, *inter alia*, that it has a transmission line running through the limits

of the city of Loveland north to the city of Fort Collins, and that it owns and operates a certain low voltage line running north from said city of Loveland to a brick-yard, from which latter line electricity for light and power purposes is furnished to the said brick-yard and other customers on said line; that the city of Loveland is engaged in the construction of an extension of its system running north along the Lincoln Highway for a distance of four miles and has been, and is now, actively soliciting customers along the line of said extension, all of whom, it is alleged, may be served by means of the so-called brick-yard line of petitioner. It further alleges, on information and belief, that it is the intention of respondent to extend its projected line to carry same a distance of six miles north of said city of Loveland and to use said line to compete with the petitioner along the whole distance of the said brick-yard line. It is further alleged that the construction is under way and the projected line will be completed in the near future. The allegation is also made that respondent has neither sought nor obtained a certificate of public convenience and necessity authorizing the construction by the respondent of said line.

The petition concluded with a prayer that the said city of Loveland be ordered to desist and refrain from the construction of said proposed extension north from the city of Loveland, unless and until a certificate of public convenience and necessity be issued to the said city for the said construction.

The said city of Loveland was duly served with a copy of the petition and on December 2, 1927, filed its answer. The answer alleges that the petition herein does not state facts sufficient to constitute a cause of action against the respondent or to entitle the petitioner to any relief at the hands of this Commission, and that the Commission is without jurisdiction in the premises. The said answer further alleges that the respondent is a municipal corporation of the second class, and that for more than two years last past in its proprietary capacity it has owned and operated a hydro-electric generating, transmitting and distributing system within and without its municipal limits for the purpose of supplying itself, its inhabitants and residents in territory

contiguous to its facility, plant and system with electrical current for light and power purposes; that prior to the first day of November, 1927, respondent was solicited by certain residents living north of said city in territory alleged to be contiguous to respondent's facility, plant and system, and not theretofore served by a public utility of like character, for leave to connect with respondent's system and facility so that said residents might be served with current for light and power purposes; that on November 1, 1927, respondent entered into a contract with the said residents by which "respondent undertook to construct a transmission line due north from the northernmost terminus of its then existing line outside its municipal boundaries at what is known as 'cemetery corner,' along the line of the Lincoln Highway a distance of approximately a mile and a quarter, with another line branching to the west at a point approximately one-third of a mile north of said cemetery corner and following the Lincoln Highway to the west a distance of about one-third of a mile, and thence northward along the Lincoln Highway a distance of about one and one-third miles to the Koemmann corner, with a branch line commencing at what is known as 'Sum Vu' corner on the Lincoln Highway and extending westward a distance of approximately one-third of a mile, for the said residents and at their expense."

It is further alleged that the said line was fully and completely constructed and carrying electrical current prior to the 19th day of November, 1927, and that the premises of many of whom it was designed to serve had been connected therewith and were receiving electrical current prior to said date.

Respondent further alleges and contends herein that the territory in which it has constructed the said transmission line is contiguous to its facility, or line, plant and system, and that said territory was not theretofore served by a public utility of like character; and that the said transmission line, so constructed, was and is an extension within territory already served by it and necessary in the ordinary course of its business; and that the respondent is not required to obtain from this Commission any

certificate of public convenience and necessity before constructing said line.

On January 13, 1928, petitioner filed a motion, alleging that both the answer and proof show that the said extension by the city had been constructed on and prior to November 19, 1927, and praying that petitioner be granted leave to amend its prayer in order that same conform to the proof. The amendment or amended prayer reads:

"Petitioner prays that the city of Loveland be ordered to desist and refrain from continuing to serve customers by means of its transmission line extension built north from the city of Loveland, as described in the complaint and answer, unless and until a certificate of public convenience and necessity be issued to the said city for the said construction, saving unto the petitioner all rights to protest against the granting of said certificate, in the event the same shall hereafter be applied for, as being not in the public interest and in violation of the vested rights of the petitioner."

The matter was set for hearing and was heard in the city hall in the city of Loveland on December 9, 1927.

Some two or more years ago the petitioner or its predecessor in interest owned the electrical distribution system in Loveland and furnished the city and its inhabitants all of the electrical energy sold therein. Its transmission line came up through Berthoud from the south and ran on through the city of Loveland north along the Colorado and Southern Railway tracks to Fort Collins. It then had constructed and in operation a few so-called fringe lines running outside of the city of Loveland with which to furnish electrical energy to certain customers in territory contiguous thereto. One of these lines ran for some few hundred feet north to the cemetery. Another, which was built some six or seven years ago, was a low voltage line hung on the poles carrying the high voltage line running to Fort Collins, which said low voltage line transmitted electrical energy to a brick-yard some six miles north of the city of Loveland and three other customers, two of whom are within a mile of the city of Loveland. The city of Loveland some two or three years ago took over from the peti-

tioner the distribution system in said city and certain of the fringe lines running out therefrom, including the short one running up to the cemetery, and ever since has been operating said lines. It did not take over the high voltage transmission line running north from Berthoud to Fort Collins. Neither did it take over the low voltage or brick-yard line.

On or about November 1st some eighteen persons living north of Loveland entered into a contract with the latter by which the latter would construct a transmission line over which it agreed to furnish electrical energy to the other parties thereto. According to this contract all the expense was to be borne by the prospective customers and the title to the transmission line was to become and remain the property of the city. The said line, constructed within the time stated in the answer, runs north from the cemetery a distance of about a third of a mile where it branches, the main branch following the Lincoln Highway for a distance of about a mile and a half, the other branch going straight north for a distance of a mile or less. (These distances are based on Exhibit 4 introduced by defendant.) From the main branch of this line so built a short branch runs directly west from what is known as "Sum Vu" corner directly across the line of the petitioner in order to serve two customers a short distance to the west thereof. At the point of said crossing the brick-yard line almost reaches the highway where the main branch of respondent's extension runs. The greatest distance at any one point between the main branch and the brick-yard line of respondent's extension is a little over a quarter of a mile. The branch of the extension which runs due north parallels the main branch and is less than a quarter of a mile therefrom.

Aside from the short extension which the city had to the cemetery corner, it had no transmission lines running north from the city limits. In addition to the brick-yard line of the petitioner the proof shows that it has had for some time a distribution line paralleling the eastern boundary of the city of Loveland at a distance therefrom of about one-third of a mile, and continuing on north of the northernmost limit of said city for about half a mile, and then running west about a quarter of a mile.

The respondent in support of its allegations (1) that this Commission has no jurisdiction over this matter, and (2) that, therefore, the city needs no certificate in order lawfully to construct said line, contends, first, that the territory into which it built the line is "contiguous to its facility, or line, plant or system, and not theretofore served by a public utility of like character;" and, second, that it was "an extension within or to territory already served by it, necessary in the ordinary course of its business." The latter contention seems to have been abandoned in the brief for respondent, and, apparently, necessarily so, for the reason that it is inconsistent with the second part of the first contention. Obviously a utility cannot consistently say a territory was not theretofore served by any utility, and that said territory was theretofore "served by it."

The Commission is disposed to, and does, take the position and so finds that the territory served by respondent's newly constructed line is contiguous to respondent's "facility, or line, plant or system."

The one question then remaining is whether or not said "territory" was "theretofore served by a public utility of like character."

Some point was made during the hearing that the brick-yard line was constructed in 1920, since our statute became effective, and without having obtained a certificate of public convenience and necessity. The construction of the brick-yard line probably was an extension within the statute. Lexington Home Telephone Company v. Fairbury Telephone Co., *et al.*, P. U. R. 1927 A 111. If the territory in question is contiguous to the city's "facility, or line, plant or system," as the city necessarily contends and we so find, it was contiguous to petitioner's or petitioner's predecessor's "facility, or line, plant or system." At the time of the construction of the brick-yard line there was without question no other public utility of like character serving the territory. Therefore, the petitioner needed no certificate authorizing the construction of the brick-yard line.

It is admitted that the petitioner has been serving four customers on its brick-yard line for a number of years. Not only

has the petitioner actually been serving the four customers in question ever since long prior to November 1, 1927, but since in the year 1926 (Bonham testified 1925, but the stamp of the Commission shows differently) there has been on file in the office of this Commission, rules and regulations by which any and all customers in the territory north of Loveland were offered and undoubtedly could have gotten at any time the desired extensions made to their properties by petitioner. According to these rules and regulations the petitioner would bear a portion of the expense, estimated at one and one-half times the first year's revenue from each customer, with a minimum allowance to each customer of $50.00 on said construction.

In order to show that the territory had not theretofore been served by a public utility of like character, reliance seems to have been made by said city on two facts. One is the unsatisfactory relations which the people living north of Loveland have had in their negotiations with petitioner and its predecessor. The other is in substance that, as a matter of fact, these particular customers whom it is now serving had not been served before and that, therefore, their farms or the territory including those farms constitutes unserved territory.

As to the first point, the fact seems to be that petitioner's predecessor and the petitioner itself until 1926 had a very illiberal policy and too stringent requirements in connection with construction of extensions from its brick-yard line. The people dealing therewith rather properly had cause for dissatisfaction and some disgust. But the evidence failed to show that since said rules and regulations were filed in 1926, petitioner has violated, or refused to comply with the same. One man in the territory in question conducted negotiations with the petitioner for an extension to his house alone and was told that the cost would be about $310.00, or about one-half of that amount, if there should be one additional customer. Thereafter no further attempt was made individually or collectively to get service from petitioner. On the contrary, the citizens in question united together and conducted joint negotiations with the city. We are unable to see how these unsatisfactory negotiations, all but one

of which were, as was stated, prior to the filing by the petitioner of its said rules and regulations, have any bearing on the question whether the territory was being served at the time of the construction by the city. If these facts have any bearing on that question, it is an answer to say that for about a year petitioner has, in a manner required by law (that is, by filing rules and regulations with this Commission) stood willing and legally bound to construct a line to the residents of the territory, using heavier and more expensive wire, with poles set closer together at a less total cost to the customers than they have gotten the line built for them by the city. Moreover, by the tariff of rates on file with the Commission, the said citizens would be furnished current at the same prices at which they are getting it from the city.

A citation is made of the case of Farmers Electric and Power Company v. Ault (Colo.), P. U. R. 1920-D, 214, in which the Commission said that a utility may not perform its duty negligently, carelessly or inefficiently, or in any other unsatisfactory manner, until complaint is made, and then correct its service and still insist upon the field not being invaded by a competitor. In the first place, it may be said that in that case after the complaint was filed the respondent, instead of denying the jurisdiction of the Commission, asked for an order granting a certificate as of the date of the beginning of the construction. The Commission has held a number of times, as it did in the Ault case, that a failure to apply for a certificate before beginning the new construction work, particularly where the failure to apply seasonably is due to a misconception of the utility's rights, would not necessarily of itself cause a denial of a certificate. We undoubtedly would take the same position with reference to this situation. But in this case no request has ever been made for a certificate. The city takes the position up to this very time that it does not need a certificate. Obviously the failure to ask for a certificate until after an extension is constructed cannot give the utility any greater right thereto than if it had asked before. Otherwise a premium would be put on violation of the law, and the purpose of the statute would be wholly defeated.

In the second place, it was the service itself being rendered by the utility up to the very time of the hearing of the Ault case which was being complained of, not some past unsatisfactory negotiations with reference to service. In the third place, the unsatisfactory service which the utility in that case appeared to have been furnishing was of such a fundamental and inherent nature that a complaint to the Commission doubtless would have availed nothing. Here, if the farmers who are getting this service from the city of Loveland had gotten together and made or asked for a proposition for the building of a line by the petitioner to all of them, they doubtless would have had no trouble whatever. If they had met with difficulties an informal complaint made to this Commission, immediately would have gotten them their rights. The Commission heretofore has repeatedly denied certificates in cases in which at the hearing for the first time the applicant and his witnesses complained of the service of an existing certificate holder where there was a failure ever to complain prior thereto about unsatisfactory service which might be improved at the suggestion or on the order of the Commission. In the matter of the application of Giacomelli Brothers, Applications Nos. 933 and 934, Decision No. 1428, decided by this Commission on September 22, 1927. Pless and Davis, Application No. 987, Decision No. 1558, decided by this Commission on January 7, 1928. See also the case of Alfred T. Burbridge, Application No. 558, Decision No. 1457, decided by this Commission on October 13, 1927. The language of the California Commission in Richardson v. McKelverry, *et al.*, P. U. R. 1923-B 49, quoted by us in the Giacomelli Bros. case, is applicable here. It follows:

"Furthermore, the contention that an existing operator holding a certificate authorizing operation of passenger stage service over a particular route has not been rendering efficient service nor properly meeting traffic requirements in no way affects the status of defendants in this proceeding, their remedy in such case being either the filing of a formal complaint to compel the existing carrier to improve his service or the filing of an application

in their own behalf for a certificate permitting them to inaugurate a service which would meet traffic requirements."

Of course, the obvious purpose of the legislative restriction upon extensions by public utilities is to protect the public which supports the utilities. If the reasoning of the city is approved it could continue paralleling another line indefinitley. The petitioner by the same reasoning doubtless could follow the city's lead and build extensions competing with practically all the fringe lines of the city.

The city in our opinion takes entirely too narrow a view of the meaning of the word "serve" and the word "territory." The latter is very broad in its meaning. It is defined in Webster's New International Dictionary as: "a large extent or tract of land; region, district." It is defined in the Century Dictionary and Encyclopedia as: "Any extensive tract, region, district, or domain; as an unexplored territory in Africa." The word "serve" has been defined in Webster's New International Dictionary as: "To wait upon; to supply the wants of * * * to be sufficient for * * * to be in subjection or bondage." Suppose the petitioner had been serving every other farmer up the Lincoln Highway north of Loveland and offering to serve all the others, it would not be reasonable to pick out the remaining farms, being every other one, and say that they together constitute unserved territory or that they separately constitute unserved territories, any more than one could pick out a house in the city of Denver where the occupants had been using kerosene lamps and say that the said house is situated in territory not served by a public utility.

Take another supposititious case where the petitioner might have its distribution line running up the Lincoln Highway for eight miles serving all for the first two miles, none for the next three, and all for the last three. Could it reasonably be said that the area along the highway where the residents had not actually been connected, although they could have been if they desired, is territory not heretofore "served?" We think not.

The petitioner is serving four customers in the territory. It is and for a year has been offering to build to others extensions

of better materials and at lower prices than the extension in question was made. Moreover, it can be compelled without any question to make said extensions. It is, therefore, not only serving four customers, but is offering to serve all others, is "in subjection" to service, and, in legal contemplation, is serving the territory in question.

ORDER.

IT IS THEREFORE ORDERED, That the motion for leave to file the amendment to the complaint consisting of an amended prayer be, and the same is hereby, granted.

IT IS FURTHER ORDERED, That within a reasonable time the respondent shall cease and desist from serving customers over the said extension line or lines which it has constructed north from the cemetery corner north of Loveland.

IT IS FURTHER ORDERERD, That not unduly to inconvenience the patrons of said line or lines the respondent shall continue serving them until they have had a reasonable time in which to have service rendered them according to law.

IT IS FURTHER ORDERED, That the Commission shall retain jurisdiction of this case for such other and further orders herein as the facts and future developments may warrant.

Chairman Bock dissenting:

Section 2946 (a), Compiled Laws of Colorado, 1921, provides that "* * * this section shall not be construed to require any corporation to secure such certificate * * * for an extension into territory either within, or without, a city and county, or city or town contiguous to its * * * line * * * and not theretofore served by a public utility of like character."

The majority opinion concedes that the extension from the line of the plant operated by the city of Loveland complained against is contiguous to its line but that the territory into which this line was extended had "theretofore been served" by the Public Service Company of Colorado. The word "territory," as applied to the facts in this case, in my opinion, requires a narrow construction as to size because the Commission is dealing here with "contiguous" territory for which no authorization is required from this Commission. The word contiguous is defined by Webster as

"in actual or close contact." The size of territory involved here cannot be considered as extensive as where a utility is making an application for a certificate for new territory. We find here an unusual situation where it is possible for two utilities to make the claim of contiguous territory and, therefore, of necessity, the territory involved would be in actual or close contact to the lines of the utilities.

Section 2946 (a), *supra*, also provides that "if any such public utility in constructing or extending its line, plant or system shall interfere, or be about to interfere, with the operation of the line, plant or system of any other public utility already constructed, the Commission, on complaint of the public utility claiming to be injuriously affected, may, after a hearing, make such order prohibiting such construction or extension, or prescribe such terms and conditions for the location of the lines * * * affected, as to it may seem just and reasonable." No testimony was introduced that this extension by the city of Loveland interfered with the operation of the line of the Public Service Company of Colorado. To place such a construction upon the language of the section involved herein, that would make out of "contiguous" territory "occupied" territory, as contended for by the Public Service Company of Colorado, would, in my opinion, be contrary to the public interest. The competitive spirit to serve the public in contiguous territory should at least not be circumscribed and subdued to the extent and under the circumstances contended for by the petitioner herein.

The testimony shows that the extension of the city of Loveland was from the so-called "cemetery line." As stated by the respondent, the words "contiguous" and "not theretofore served," as used in said Section 2946 (a), have the same meaning for the city as for the Public Service Company of Colorado. The only question is whether the extension by the city of Loveland was made into contiguous territory to both utilities, but already served by the Public Service Company. In my opinion, the record is clear and undisputed that the contiguous territory to both utilities involved in the instant case had not theretofore been "served" by the Public Service Company.

The particular territory involved has been developed recently because of the paved construction on the Lincoln Highway, which was completed somewhat over a year ago. The line of the Public Service Company of Colorado is approximately one-fourth of a mile, more or less, from the Lincoln Highway. As I construe the testimony, no customers residing on the Lincoln Highway are being served by the Public Service Company of Colorado, nor are they being served by it on the line extended directly north from the cemetery corner. Negotiations were carried on several times with the Public Service Company of Colorado by the public residing in that contiguous territory but none of them were ever "served" before the extension of the city of Loveland's line. The fact that the Public Service Company of Colorado had a tariff on file with this Commission, covering general service to rural communities, did not of itself "serve" the public in that particular contiguous territory. The facts are undisputed that the city of Loveland was actually serving the territory involved at the time it was served with the copy of the petition herein.

The Commission, in the instant case, from the language in Section 2946 (a), *supra*, has jurisdiction of this petition and may prescribe such terms and conditions for the location of the lines, so that, hereafter, it may be definitely determined just how far the line of the city of Loveland may be extended, and what shall constitute contiguous territory. The claim made by the petitioner, therefore, that the permission of the extension by the city of Loveland would bring about a chaotic situation is, in my opinion, unfounded. There is nothing in the record, in the instant case, that would justify a finding that the extension of this line for two miles will bring about destructive competition, which, in its ultimate effect, would result in injury to the public.

In my opinion, the extension made by the city of Loveland into the contiguous territory herein does not require any authority from this Commission, but the facts and circumstances involved may require such an order as would more definitely establish the territory served and the location of the lines of both utilities involved herein.

ROY DAVIS, *et al.*,

v.

LA JARA ELECTRIC COMPANY.

[Case No. 313. Decision No. 1577.]

Valuation—Leased transmission lines—Improvident contracts.

A local distributing utility is entitled to include in its rate base the value of a transmission line which it has leased to a generating company for a long term at a nominal rental but making thereby a substantial saving by reason of being released from line losses and maintenance.

[February 6, 1928.]

Appearances: Merle M. Marshall, Esq., Alamosa, Colorado, for complainants; W. W. Platt, Esq., Alamosa, Colorado, for defendant.

STATEMENT.

By the **Commission**: On January 5, 1927, Roy Davis and some twenty-four other persons, all being residents of the town of La Jara, filed their complaint against The La Jara Electric Company alleging that the defendant charges a rate of 20 cents primary and 10 cents secondary per k.w.h. for lighting and a fixed charge of $1.00 per h.p. per month, plus an energy charge of 10 cents per k.w.h. for all energy used for power purposes; that defendant purchases the electric current sold by it to the residents of said town from the Public Service Company of Colorado at the rate of 4 cents primary and 3 cents secondary, metered to defendant at the corporate limits of La Jara; that adjoining towns enjoy rates of 15 cents primary, 8 cents secondary and a power rate of about 5 cents; that the high rates maintained by the defendant company are unfair to the inhabitants and users of electrical current within the town of La Jara and that said rates are unjust. There are further allegations to the effect that if the defendant maintained a lower power rate, it would earn a fair return because of the greater use of current for power purposes. The complaint concludes with a prayer that the defendant be required to lower the rates and charges to 15 cents primary, 7 cents secondary and a power rate of 5 cents per k.w.h.

The defendant filed its answer on January 18, 1927. This answer at some length alleges facts to justify the rates. We shall not detail these allegations as we shall state such facts proved under the answer as appear to us to be material to the decision of the questions involved.

The town of La Jara was originally served by The La Jara Electric and Creamery Company, whose lighting system was constructed in 1912. That company furnished electricity from its steam plant in La Jara. The operation of this system was not a success and the company some years later made an assignment for the benefit of creditors, and is said to have been furnishing service for a few hours each day at high rates. Finally the plant burned down and the town was without electrical service. Thereupon, certain business men of the town sent a committee to the Colorado Power Company, which was operating in that part of the state, which offered the power company a bonus of $5,000 if it would supply electricity at retail to the people of the town. This offer was declined. Certain business men of the town then organized defendant company, selling stock to such of the citizens as desired to subscribe therefor. The nearest point at which Colorado Power Company was then operating was Alamosa. The company expended some $14,195 in the construction of the transmission line of 12½ miles length from the city limits of Alamosa to the city limits of La Jara and about $10,000 more in acquiring and improving the distribution system in La Jara. The transmission line from Alamosa was apparently built as cheaply as possible, the wire used being second hand wire bought at a considerable discount. For about three years after the line from Alamosa was built, the defendant had its power bought from the Power Company delivered at the city limits of Alamosa. In February, 1923, the Power Company leased the line to Alamosa for a period of twenty years, and by the terms of the lease agreed to pay a rental of $100 a year therefor, to keep the said line in repair and at the end of the term turn over the same in as good condition as it was when the lease was made, and to deliver the current, at the same rates as had been in effect at the city limits of La Jara instead of the city

limits of Alamosa. It was further agreed that this line should be used for the transmission of current to other towns. The Power Company thereupon built a transmission line from La Jara to Manassa, Sanford, Antonito and Romeo using the line from Alamosa to La Jara to carry the current not only for La Jara but for the other towns named. The other towns are themselves served by the Power Company, which built distribution systems therein, and are enjoying the rates which are those or substantially those stated in the complaint. However, in order to induce the Power Company to serve them the said towns raised and contributed to the Power Company various amounts of money as follows:

Manassa	$5,200
Sanford	4,000
Antonito	3,000
Romeo	1,300

It is argued that the customers of the defendant are in fact being discriminated against and that they should and would have the same rates as are enjoyed by the consumers in other towns if the proper valuation were placed by the Commission on the properties of defendant used and useful in serving its customers.

According to the testimony of the electrical engineer of this Commission the distribution system in the town of La Jara might have been built more scientifically by elimination of some of the equipment, and the town could today be adequately served by a system which could probably be built at some $2,000 less than the value claimed by the defendant.

We have had no argument or dispute over the various theories of valuation. Without going into details of revenues, expenses, etc., we believe it is fair to say that complainants in effect admit that if the total value of the line from Alamosa to La Jara, as determined by any theory, should be included in the rate base, the returns now realized by the defendant company are such that the rates are reasonable even though the distribution system in the town should be valued at some $2,000 less than the value claimed by the defendant. The argument is made that since the defendant voluntarily gave away, as it is claimed, for

twenty years the said line from Alamosa for what is called the nominal rental of $100, the total value of said line should not be included for rate making purposes.

It appears that the citizens who built the line to Alamosa were actuated by motives of civic pride more than by any desire to earn money on their investment. The Power Company would not build down to the town and furnish the citizens of the town with current even though it was offered a bonus of $5,000. The citizens then did what seemed to be the only thing left to do. We feel, therefore, that the Commission should be careful not to take any action which would in effect penalize the citizens for entering upon what seems to have been a laudable undertaking.

If the defendant had not made the leasing contract with the Power Company, it is quite possible that today the defendant would still be buying its current at the city limits of Alamosa and that the other towns named would not be enjoying the benefits of electricity. If it were still operating under the old condition it would be without the $100 rental. It would have to bear the costs of maintenance, which were estimated to be some $100 per year. It would also be standing the line losses, which are substantial between Alamosa and La Jara, amounting to some $387 per annum. The result then of the making of the contract in question is to save the consumers in La Jara a total of some $587 per year. If the defendant had not entered into this contract it could hardly be contended that the value of the line from Alamosa should not be included in its entirety in the rate base. It is, therefore, difficult to conclude that after the defendant has entered into a contract saving the consumers $587 per year the value of the said line should in large part be eliminated from the rate base.

The Public Service Company of Colorado, the successor of the Power Company, is not a party to this proceeding. As to what, if anything, the Commission might do with reference to the said contract between it and the defendant in a case in which the Public Service Company were before the Commission, we venture no opinion.

We do think it very material that the other towns, which are enjoying the other rates, raised and donated to the Power Company various substantial sums of money. The town of Manassa, whose population we understand is comparable with that of La Jara, gave to the company $5,200 as an inducement for serving the said town. The defendant offered in its answer, at the hearing and in its brief, to make the same rates to its customers as are enjoyed by the customers in the other towns if the town of La Jara or any individuals would donate to the defendant the sum of $5,000.

There was some evidence that the defendant might, by the reduction of its power rate, sell enough more electrical energy for power purposes to warrant a substantial reduction in rates. This contention was disputed and evidence on the point was introduced by defendant. The number of users of electricity for power purposes in La Jara is undoubtedly quite limited at the present time. If the net revenues should be increased by lowering the power rate, it certainly would be to the interest of the defendant to lower it. The Commission is unable to find from the evidence that the defendant in its refusal to lower that rate has acted unwisely or unreasonably.

After careful consideration of the complaint, with which we were at first seriously impressed, and the evidence introduced on both sides, we are of the opinion and so find that the rates now being charged by the defendant are not unjust and unreasonable.

Chairman Bock did not participate in this hearing and decision.

ORDER.

IT IS THEREFORE ORDERED, That the complaint herein be, and it is hereby, dismissed.

PUBLIC SERVICE COMPANY OF COLORADO

v.

CITY OF LOVELAND.

[Case No. 341. Decision No. 1616.]

Service—Extension—General rules and regulations as offered to serve.

1. General rules and regulations relating to service extensions and applying to all customers, present and prospective, wherever the company's lines run, are, notwithstanding their inclusive nature, to be construed as an offer of service to prospective customers in a particular territory.

Service—Jurisdiction of Commission—Extensions—Municipal plants.

2. The mere fact that a municipal utility professes to serve the inhabitants of a city does not give the Commission the power to require the utility to make extensions beyond the city limits.

Monopoly and competition — Electric extension — Practicability — Served territory.

3. A case involving a complaint by an electric utility against an illegal extension by a municipal plant does not turn upon the question whether the extension could be made by the municipal plant without using any more wire or without using a great deal more than would be required by the public utility company if it gave service to the consumers in question, but it turns upon the question whether the territory in which the customers in question are located was "theretofore served" by the private company.

Procedure—Amendment of complaint without hearing.

4. The amendment of a complaint asking the prevention of an unauthorized service extension, so as to forbid service on the extension instead when it appears that the line has already been constructed, is not improper and erroneous because it was not germane to the original relief asked and was allowed without hearing, if it appears that a copy of the amendment was received by the respondent the day before it was filed and that no objection has ever been filed or made to it.

Constitutional law—Due process—Order forbidding service.

5. An order forbidding the use of an electric line which has been constructed without legal authority does not take property without due process of law.

Monopoly and competition—Unauthorized electric extension—Order forbidding use.

6. An order forbidding a municipal plant to render service on an extension constructed without legal authority does not in effect compel the customers of that plant to enter into contracts with the company serving the territory.

Orders—Retention of jurisdiction to modify.

7. An order requiring a municipal plant to cease and desist from serving customers over an unauthorized extension line within a reasonable time was amended to provide a definite time, in view of the power of the Commission at any time to rescind, alter, or amend any orders made by it.

Monopoly and competition—Unauthorized invasion of territory—Damage.

8. A public utility complaining against an unauthorized invasion of its territory by a municipal plant is not required to show any damage or interference with it.

[March 6, 1928.]

STATEMENT.

By the **Commission:** The Commission entered its order herein on February 6, 1928. On February 16th respondent filed its petition for rehearing. This Commission was created by the legislature for the purpose of protecting the rights and interests of the public. We have been, and are now, loath to make any order restricting or limiting the conduct of a utility owned and operated by a portion of the public. In order, therefore, to have any further possible light on the questions involved, the Commission requested and the attorneys for the parties kindly made oral argument on the petition for rehearing.

It is alleged that the finding of the Commission that for a year prior to the original hearing the petitioner had been offering to build to other prospective customers extensions of better materials and at lower prices than the extension was made by the respondent, is not supported by the evidence. The extension in question without including transformers and secondary construction—from the line proper to the customers' buildings—was $1,557. The cost of the transformers and secondary construction was not shown, but in view of the testimony concerning the incomplete cost of transformer and secondary construction to Koemmann it appears the total cost to the consumers would be well over two thousand dollars. (Tr. page 20.) The Terry lake extension is two and a half miles long, serves exactly the same number of customers with more expensive materials at a total cost to them of seven hundred dollars. It is described as a comparable or similar situation. (Tr. pages 59-60.)

In support of the allegation that the Commission's finding that the petitioner was offering to serve all other customers in the territory in question, is not supported by the evidence, it is argued that the rules and regulations constituting said offer were general in their nature, applying to all customers present and prospective wherever the petitioner's lines run and, therefore, cannot be construed as an offer to prospective customers in the territory in question. These rules and regulations are inclusive, as clearly shown by the language used by the respondent. If they are inclusive they cannot be exclusive.

In determining whether or not the territory in question was theretofore served by a utility of like character, the Commission quoted a definition from a dictionary in which the term "in subjection" to service is found. Respondent now says that insofar as the finding contemplates that respondent was not "in subjection" to service in the same manner and to the same extent that petitioner was, it is not supported by the evidence. In oral argument the attorneys for respondent went so far as to say, as we understood them, that once the lines of a municipality owned and operated utility cross the municipal limits, the Commission has wide powers in ordering extensions, even to the extent of requiring the city to rebuild its plant or to build an additional unit, provided the city is not required to act contrary to good business principles and economy, to be determined largely by the Commission. Even in the case of privately owned public utilities there is a substantial limitation upon the power of the Commission to order extensions. The mere fact that a utility professes to serve the inhabitants of a city does not give the Commission the power, it has been held, to require the utility to make extensions beyond the city limits. *Re* Vance, *et al.*, 241 Pac. (Okla.) 164, P. U. R. 1926-B, 67. The question of the power of a commission to order extensions of service is discussed in Volume 1, Spurr's Guiding Principles of Public Service Regulation, 113, *et seq.* On page 114 thereof appears this sentence: "Although the commissions have considerable latitude in the matter of ordering extensions of service, their authority over the subject is not arbitrary."

Concerning the powers and duties relating to the rendering of service by a municipality to the customers outside thereof, we quote as follows from Colorado Springs v. Colorado City, 42 Colo. 75, 85-86:

"It is true, as counsel for the city assert, that the water, the water system, and other public utilities of a municipality are held by it and by its officers in trust for its citizens, and for the public; that neither the city nor its officers can renounce this trust, disable themselves from performing their public duties, or so divert or impair these utilities that they are rendered inadequate to the complete performance of the trust under which they are held. But it is equally true that municipalities and their officers have the power, and it is their duty, to apply the surplus power and use of all public utilities under their control for the benefit of their cities and citizens; provided, always that such application does not materially impair the usefulness of these facilities for the purposes for which they were primarily created."

The court in that case even suggested that if a contract is made for outside service which is being rendered to the detriment and impairment of the requirements of the citizens of the municipality, "a question will be presented that may call for the interposition of a court of equity." Does a municipality, once it crosses its boundary with a short extension serving a cemetery which may be, and doubtless is (although there is no evidence on the point), the burying ground for its own citizens, do away with all discretion on the part of its council as to the wisdom and propriety of any and all extensions and surrender these questions to the state Commission? We believe not.

The case of Lamar v. Wiley, 80 Colo. 18, is cited. There some broad language is found, particularly on page 23. The only question involved in that case was simply one of jurisdiction of this Commission over the rates charged by the municipal corporation to persons outside thereof. If the cemetery in question is not municipally owned, the Commission undoubtedly would have jurisdiction over the rates charged it. It might also have jurisdiction to order, in the absence of any serious contention

that the city has no surplus energy, that service be rendered to persons living between the city limits and the cemetery, and probably to persons living in the immediate vicinity of the cemetery. We doubt very seriously whether the Commission would have had power to order the extension made by the city for some two miles north of the city if the city had objected that it had never made any profession of service to this territory—as the city never had—and that in the opinion of the city council it would be contrary to the best interests of the city to make such extension.

It is true that when the distribution system in the city of Loveland was taken over by the city, there were certain fringe lines which went along with the system, but on the north side of the city the cemetery line was the only one in existence up to the time the extension in question was made. Therfore, as to the long stretch of territory north of the cemetery there having been no profession of service by the city, this Commission would have had no power, against the wishes of the city, to order the extensive extensions made and herein complained of.

In Fravert v. Town of Rifle, Case No. 290, Decision No. 948, P. U. R. 1926-B, 298, it appears that the complainant had built a duplex house on some lots in West Rifle adjacent to a two-inch water line connecting with a water main in the town of Rifle, and that the two-inch line was built for the purpose of serving consumers in West Rifle. The opinion of the Commission is not clear, but seems to recognize that there is serious question as to the jurisdiction of the Commission to order the town of Rifle to make, or permit to be made, the connection with the complainant's property, in front of which the service pipe ran.

It is stated that the evidence disclosed that the territory in question could not reasonably, practically or efficiently be served from petitioner's brick-yard line; that in order to serve them petitioner would be obliged to duplicate the construction made by respondent. The evidence showed that the petitioner would "service customers from the brick-yard line." (Tr. page 55.) However, a line doubtless would take off therefrom and run east to "Sum Vu" corner, running north and south therefrom. As-

suming that the petitioner would have to duplicate the construction of the line built by the respondent, we do not understand that anything turns on that question. Let us assume that the A company is serving a city and all of the residents thereof, furnishing extensions to any and all persons desiring service, and that the B company is serving the territory on one side of the city up to the very city limits. There may be a tract within the city limits, but bordering thereon, of some two or three acres on which is located a residence near the city limits. It may very well be that the company serving the outside territory would have to construct a shorter line to reach the prospective customer than would the company serving in the city. That fact would not mean that the territory within the city is not already served.

It is rather obvious that it would be impractical to make separate extensions to each and every one of the consumers. The only difference between the length of the new wire which would be hung by the petitioner and the length of the wire actually hung by the respondent is the distance from the point at the south side of the cemetery where the line started to the first customer north.

We believe that this case does not turn on the question whether the extension could be made by respondent without using any more wire or without using a great deal more than would be required by the complainant, if it gave service to the consumers in question. We can conceive of a great many cases in which one utility might make extensions to consumers in territory served by another utility without using any more materials in its construction of the extension than would be used by the company serving the territory.

The one ultimate fact for determination, as we view the case, is whether the territory in which the consumers in question are located, was "theretofore served" by the petitioner. Petitioner had been serving one customer on the Lincoln Highway, about two-thirds of a mile north of the customer at the north end of respondent's extension, another customer on that highway south of most of the consumers in question, and another east of the

highway as it formerly ran directly south into Loveland. It is inconceivable that every plot of ground on which a residence, barn or pumping plant might be constructed and which should not yet be connected with some electric system, should be called unserved territory. If it should, then every vacant lot in a city completely covered with a distribution system would be unserved territory, even though a service wire should run along the street or alley on which the lot abuts.

Suppose petitioner after filing its said rules and regulations, should refuse for some reason to serve the consumers involved in this case, and they should file a complaint asking the Commission to require it to serve them. Could it reasonably be argued by petitioner, in view of its professions as to service and its actual practice as shown by the brick-yard extension and other extensions referred to in the evidence, that these consumers paralleling closely the brick-yard line are in territory which it is not serving? If it could, the Commission would then be confronted with the serious question of the extent of its power to require extensions into territory not served by a utility.

It was stated on oral argument that no finding of fact had been made as to whether or not the territory in question had heretofore been served by petitioner. We do now find that it had been served by it.

Complaint is made that allowing petitioner to amend its prayer for relief without hearing and without giving the respondent an opportunity to be heard was improper and erroneous because said amendment was not germane to the original relief asked by the petitioner. The amendment was filed on January 13th. On the day before a copy of said amendment was received by the attorneys for respondent. No objection was ever filed with or made to the Commission, although it waited therefor. The original ultimate purpose of the complaint was not merely to prevent the construction of the extension, but was to prevent the rendering of service to the customers in question without a certificate of convenience and necessity therefor. It appeared at the hearing that the line had already been constructed. The complainant, it seems to us, properly asked for leave to amend its prayer

so as to conform to the facts shown. Section 2947 Compiled Laws, 1921, states that "No informality in any proceeding * * * before the Commission * * * shall invalidate any order, decision, rule or regulation made, approved or confirmed by the Commission." The practice of the Commission has been designed to be and is as free from formalities and technicalities as is possible. The practice of the Commission has been to allow an application for a certificate to be filed by the respondent in a complaint case such as this. The amendment under our practice was permissible.

As to the question whether the order takes respondent's property without due process of law, we can only say that property unlawfully devoted to public service is not taken without due process by an order forbidding its use for such purpose. Greeley Tpn. Co. v. People, 79 Colo. 307, 315.

It was argued that the order of the Commission in effect compels respondent's customers to enter into contracts with the petitioner. The order does not so require. Out of consideration for the convenience of the persons now being served by respondent, the Commission determined, and does now intend, to see that they have a reasonable time in which to make their own free choice and that in the meantime their service shall not be interrupted by any order of the Commission. The order does not require them to do anything.

Something has been said about the order being so indefinite and uncertain as to make it difficult or impossible to comply therewith. We cannot see how one can be really concerned over that part of the order. The Commission, without any retention of jurisdiction, has power under Section 2958, C. L. 1921, at any time to rescind, alter or amend any orders made by it. Therefore, in order to avoid any uncertainties and misunderstanding, we are of the opinion that that portion of the order retaining jurisdiction of the case should be withdrawn and eliminated, and that the time in which respondent should cease and desist should now be made definite and certain. The Commission finds that the public convenience and necessity requires the respondent to cease and desist serving consumers on the extension made

north from the cemetery, situated north of the city of Loveland, sixty days after the expiration of the time allowed by law for applying for a writ of review; provided, however, that if application be seasonably made for a writ of review, then and in that event the respondent shall cease and desist sixty days after the order of the Commission is affirmed, if it be affirmed, at the end of litigation with respect thereto.

The Commission is of the opinion that the city of Loveland simply misconstrued its rights and authority. The Commission does not want in any manner to penalize it, and announced during the argument on petition for rehearing that it would go as far as it properly may in preventing any loss to the city and the consumers by reason of the construction in question. The attorney for the petitioner, while admitting he had no express authority at the time, suggested in oral argument that in his opinion it is a proper case for the petitioner to, and that it probably would, take over the line, paying the city the exact cost of the construction, and in addition allow each customer the usual credit of a minimum of $50.00.

Some question has been raised as to the jurisdiction of the Commission in this proceeding to make such an order as it made, particularly as there is no allegation by the petitioner that the extension in question will interfere with the operation of petitioner's system or that petitioner will be injuriously affected thereby. Section 2954, Compiled Laws, 1921, provides that: "Complaint may be made * * * by any corporation * * * by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any public utility * * * in violation, or claimed to be in violation, of any provision of law." The act then proceeds to authorize hearing and order. The Commission has frequently and continuously proceeded under these provisions of the act, and does not require that the petitioner or complainant filing the complaint show any damage or interference with him or it. Many cases could be cited.

After careful consideration of the petition for rehearing, the Commission is of the opinion that the same should be denied.

ORDER.

IT IS THEREFORE ORDERED, That the petition for rehearing be, and the same is hereby, denied, except as herein otherwise ordered.

IT IS FURTHER ORDERED, That the public convenience and necessity requires respondent, the city of Loveland, Colorado, and it is hereby ordered, to cease and desist serving consumers on the extensions made north from the cemetery, situated north of said city, sixty days after the expiration of the time allowed by law for applying for a writ of review; provided, however, if application be seasonably made for a writ of review, respondent shall then cease and desist sixty days after the order of the Commission is affirmed, if it be affirmed, at the end of litigation with respect thereto.

IT IS FURTHER ORDERED, That all parts of the order proper heretofore made on February 6, except that one granting leave to file the amendment to the complaint, be, and the same are hereby, withdrawn.

RE HILL TOP AND DENVER TRUCK LINE.

[Application No. 803. Decision No. 1620.]

Certificates of convenience and necessity—Effect of issuance upon rail service—Abandonment of drastic curtailment.

1. Action of Commission on an application for motor vehicle operation should be such as not to give excuse for abandonment or drastic curtailment of rail service.

Service—Railroad—Duty to afford schedule and service required by public.

2. Rail carrier opposing the issuance of a motor vehicle certificate of convenience and necessity should carefully investigate and give the schedule and afford such regularity of service as will reasonably well accommodate the public.

[March 12, 1928.]

Appearances: A. P. Anderson, Esq., Attorney for applicant; J. Q. Dier, Esq., Attorney for The Colorado and Southern Railway Company, Protestants.

STATEMENT.

By the **Commission:** This proceeding arises upon the application of Charles W. Weaver and Lillian Coulson, doing business under the name of the Hill Top and Denver Truck Line, filed December 30, 1926, praying for a certificate of public convenience and necessity from this Commission to operate a motor vehicle common carrier freight line between the community of Hill Top and the city of Denver, outlining and setting forth a well defined route over which they wish to collect milk, cream and livestock for the Denver market, returning with such merchandise as the public, which they serve, may require.

This application was set down for hearing in the Hearing Room of the Commission at Denver on August 23, 1927. Evidence was then and there taken to determine the public convenience and necessity for such an operation. The protesting railroad, The Colorado and Southern Railway Company, had, through error, received no notice of the setting of this hearing, and asked to introduce evidence at a later date, which was granted, being finally heard on October 13, 1927.

The evidence submitted by the applicant tended to show that the neighborhood accommodated by this operation is in close proximity to the railroad, which was and is operating a milk train daily on the Falcon branch into Denver, where the milk and cream is delivered to several large dairy concerns.

At the time of this hearing the applicants had been operating about one year, running two trucks and also operating a mercantile business at Hill Top. Several witnesses testified to the convenience and necessity of this operation, the principal point of which was the early hours of the morning when the pick-up of the milk and cream was made.

The Colorado and Southern Railway Company introduced evidence that it is able to serve the public in this community at any hour in the morning desired; that it is fully equipped to do so and that the continuance of service along the line serving this territory depends upon the hauling of the commodities, which the applicant is diverting from its line. That during the month

of December, 1926, the revenue derived from the transportation of milk and cream increased $433.00, but that the further use of the truck lines had decreased the income derived from the transportation of these commodities 50 per cent.

The Board of County Commissioners of both Elbert and Arapahoe counties protested the granting of this application, setting forth that the prosperity and development of the entire district across their counties depends upon the continued operation of the railroad line now struggling for its very existence on account of the competition of the truck lines.

The Colorado and Southern Railway Company serves the public daily with freight, mail, baggage and express, one man handling both baggage and express, the railroad and express company each paying one-half of his salary.

It seems to the Commission that this service offered by the railroad should be encouraged by restricting the trucking operations to the picking up and delivering of the milk, cream and farm produce to receiving points along the railroad, thereby insuring for the railroad the proceeds of its labors in the development of the territory which it has served for the past forty years. There is no question as to the right of the applicants to haul their own merchandise and supplies to their store at all times, and for which they need no certificate. We might have an entirely different situation if the revenues from this branch line, which in many respects is so essential to the welfare of the communities served, were greater. The evidence introduced in this case by the railroad indicates rather clearly that it is possibly getting ready to ask for very drastic curtailment or possible abandonment of the line. As we held in the case in re Townsend, P. U. R. 1928-A 175, the Commission should be very careful not to give a railroad an excuse to curtail or abandon service that is vital to the communities involved.

We are of the opinion that the railroad company should carefully investigate and determine what schedule will most accommodate the communities affected, and should use all reasonable efforts to give a service at hours and with such regularity that the shippers of milk and cream may be reasonably well accom-

modated by rail service. If after a reasonable test period has elapsed and it is then shown that the railroad company has not rendered reasonably adequate service for the shipment of milk and cream, the Commission will be glad to consider further the question of the public convenience and necessity for such an operation as is proposed by the applicants herein.

After considering all the facts and evidence introduced in this matter, the Commission is of the opinion and so finds that the public convenience and necessity does not at this time require the operation of the applicant as set forth in the application herein. Commissioner Bock dissents.

ORDER.

IT IS THEREFORE ORDERED, That the present and future public convenience and necessity does not now require the transportation operation between the town of Hill Top and the city of Denver, as herein set forth by the applicant, and a certificate of public convenience and necessity therefor is hereby denied.

RE N. J. FITZMORRIS, DOING BUSINESS AS THE FITZMORRIS TRANSPORTATION COMPANY.

[Application No. 989. Decision No. 1665.]

Certificates of convenience and necessity—Previous denial—Failure of applicant to obey order to cease and desist—Effect.

1. To issue a certificate of convenience and necessity after a similar application had been denied and the applicant had been ordered to cease and desist, which order was violated, would put a premium on law violation.

Certificates of convenience and necessity—Opinion of public—Weight.

2. While the Commission will not grant or refuse an application merely because a majority of the public are for or against an application, the opinion of the public affected is of considerable importance.

[April 9, 1928.]

Appearances: Harry S. Class, Esq., Denver, Colorado, for applicant; E. G. Knowles and Montgomery Dorsey, Esqs., Den-

ver, Colorado, for Union Pacific Railroad Company; D. A. Maloney, Esq., for The Northern Transportation Company, Denver, Colorado; D. Edgar Wilson, Esq., Denver, Colorado, for Colorado Motor Way, Inc.

STATEMENT.

By the **Commission**: On November 15, 1927, there was filed by N. J. Fitzmorris, doing business under the name of The Fitzmorris Transportation Company, an application for a certificate of public convenience and necessity authorizing the operation of a motor vehicle system for the transportation of freight, general merchandise, milk and cream between Denver, Colorado, and Ault, Colorado, and the intermediate point of Eaton, Colorado. Thereafter written objections were filed by Union Pacific Railroad Company and American Railway Express Company. The Commission received also written objections from Colorado Motor Way, Inc., and The Northern Transportation Company against the issuance of any certificate which would in any manner authorize competition with them.

The case was duly set for hearing and was heard in the Court House in Greeley, Colorado, on February 7, 1928. At the hearing it developed that the applicant had heretofore applied for a certificate authorizing the same sort of operations over the same route and that the application had been denied, the date thereof being May 5, 1926. It further developed that, in Case No. 339, which was brought by the County Commissioners of Weld County as complainants against the unlawful operation of the applicant, he was by order dated January 4, 1928, required to cease and desist his said operations. In spite of the two said orders, the applicant continued his operations without any change whatever.

The Commission has had placed upon it the duty of enforcing the laws relating to motor vehicle operators. We believe the Commission would be remiss in the performance of its duties if it issued a certificate to an applicant who has flouted the law as has the applicant herein. To issue a certificate under these circumstances would put a premium on law violation.

Moreover, the evidence concerning the public convenience and necessity does not support the application. The preponderance of the evidence by the merchants of Ault and Eaton is against the granting of the application. The Commission should not grant or refuse an application merely because a majority of the public involved are for or against it, but the ideas of the public affected, as to whether or not they need a proposed service, is of considerable importance. The Commission in the case of re Townsend, Application No. 888, quoted as follows from Indiana Public Service Commission in re Newcastle Transit Co., P. U. R. 1926-B, 185, 189:

"What the public wants is impelling evidence of the public's convenience and need in transportation."

The applicant owed a duty to make an affirmative showing of convenience and necessity. In this we find he has failed.

ORDER.

IT IS THEREFORE ORDERED, That the application of N. J. Fitzmorris, doing business under the name of The Fitzmorris Transportation Company, for a certificate of public convenience and necessity authorizing the operation of a motor vehicle system for the transportation of freight, general merchandise, milk and cream between Denver and Ault, Colorado, and the intermediate point of Eaton, Colorado, be, and the same is hereby, denied.

RE JOHN HANSSEN, JR.

[Application No. 1036. Decision No. 1666.]

Certificates of convenience and necessity—Result of issuance—Curtailment of already limited rail service.

1. Motor vehicle certificate of convenience and necessity denied where rail service on branch line is already limited and issuance of certificate might be followed by curtailment of such service.

Certificates of convenience and necessity—Convenience and necessity—Points on main line of railroad, and on weak branch line.

2. Motor truck transportation to and from a town situated on the main line of a railroad might be a public convenience and necessity, whereas it might not be for a town situated on a branch line operated at a heavy loss.

[April 9, 1928.]

Appearances: T. Lee Witcher, Esq., Canon City, Colorado, attorney for applicant; Thos. R. Woodrow, Esq., Denver, Colorado, for The Denver and Rio Grande Western Railroad Company.

STATEMENT.

By the **Commission:** On January 25, 1928, John Hanssen, Jr., filed an application for a certificate of public convenience and necessity authorizing the operation of a motor vehicle system for the transportation of goods, wares, merchandise and commodities between the towns of Silver Cliff and Westcliffe and the city of Pueblo and the intermediate points of Florence and Wetmore on the route designated as the "Hardscrabble Route" and the intermediate points of Florence, Canon City, Texas Creek and Hillside on the route designated as the "River Route."

Thereafter written objections were filed by The Atchison, Topeka and Santa Fe Railway Company and The Denver and Rio Grande Western Railroad Company.

The case was regularly set for hearing and was heard in the court house in Canon City on March 27, 1928. Westcliffe is the terminal point of a branch line of The Denver and Rio Grande Western Railroad which runs from Texas Creek, a point on the main line of said railroad company. Hillside is an intermediate point on said branch. Silver Cliff is a little over a mile from Westcliffe and is not reached by a railroad. The population of Westcliffe is from three to four hundred and of Silver Cliff about one hundred and fifty.

The evidence shows that the said branch line of the railroad is operated at quite a substantial loss and that the volume of traffic, aside from cattle, hay, potatoes, head lettuce, peas and

cauliflower, which is not great, is extremely small. In spite of this, the railroad furnishes tri-weekly service between Texas Creek and Westcliffe. The applicant was asked whether or not if the Commission authorizes the proposed motor vehicle operations by him, the public served by said branch line would be willing to have their rail service curtailed. He stated that he believed they would not. It is obvious that sufficient loss of business on this branch line might possibly make it incumbent on the Commission, if so requested, to authorize the curtailment of service thereon. The statement of the Montana Board of Railroad Commissioners in re Hugh Kelly, P. U. R. 1927-A, 832, 835, is in part applicable here:

"It would be unfair to Philipsburg residents to cloud the issue by false hopes of both train and motor vehicle service. Based on the past five years' experience this statement can, and should be, made at this time: The admission of a competitive motor carrier to the Drummond-Philipsburg branch must mean the elimination of passenger service and severe diminution of rail freight service. The rail branch is now operated at a heavy loss; it is sustained by a great system, but total dependence on system strength is unfair to shippers who must meet the bills. As a mining and agricultural center Philipsburg is in fact vitally dependent upon continuing rail service. Based on revenues it now contributes to the branch, present service can only continue if the loss sure to be inflicted by a competitive motor vehicle carrier is avoided, and avoided now."

We quote also from Maryland Public Service Commission in re Red Star Line, Inc., P. U. R. 1927-B, 145, 157:

"Additional transportation, which is offered now, may result in less transportation of a character that is vital to the needs of the people."

As was stated *in re* Red Star Line, Inc., *supra*:

"no excuse should unnecessarily be given rail carriers to endeavor to cut down the service they are now rendering."

Train service is still a necessity. A motor vehicle operation might be considered a public convenience and necessity to a town situated on the main line of a railroad over which opera-

tions must of necessity be continued, whereas the same service for a town situated on a branch line operated at a heavy loss, might very properly be held not to be a public convenience and necessity.

While some explanation was made by the applicant of the difficulty of getting the merchants and other citizens of the communities situated on the branch line to come and testify in his behalf, it would seem that if those citizens seriously wanted such service they would take the necessary time and inconvenience to appear at the hearing.

After careful consideration of the evidence we are of the opinion and so find that the public convenience and necessity does not require the motor vehicle operation of the applicant.

ORDER.

IT IS THEREFORE ORDERED, That the application of the applicant, John Hanssen, Jr., for a certificate of public convenience and necessity be, and the same is hereby, denied.

RE C. W. TOWNSEND, DOING BUSINESS AS THE CORNHUSKER STAGE LINES.

[Application No. 1054. Decision No. 1673.]

Interstate commerce—Commission may not unduly burden—Measures to prevent unauthorized intrastate operation.

While the Commission cannot unduly burden interstate commerce, it can and should take necessary steps to prevent an interstate operator having no certificate authorizing intrastate business from engaging in the latter.

[April 20, 1928.]

Appearances: Harry S. Class, Denver, Colorado, Attorney for applicant; J. Q. Dier, Denver, Colorado, Attorney for The Colorado and Southern Railway Company; E. C. Knowles, Denver, Colorado, Attorney for Union Pacific Railroad Company; D. Edgar Wilson, Denver, Colorado, Attorney for Colorado Motor Way, Inc.

STATEMENT.

By the **Commission**: This is an application for a certificate of public convenience and necessity authorizing a motor vehicle transportation system for passengers between Denver, Colorado, and the Colorado-Wyoming state line, exclusively in interstate transportation. Protests were filed against this application by The Colorado and Southern Railway Company, the Colorado Motor Way, Inc., and the Union Pacific Railroad Company.

A hearing was had on the above application on March 25, 1928, at 10:00 o'clock A. M., in the Hearing Room of the Commission, Denver, Colorado, at which time testimony in support of the same was received. The evidence is undisputed as to the responsibility of the applicant and his dependability as a motor vehicle carrier of passengers. Furthermore, the applicant is willing to submit to all the laws of the State of Colorado governing motor vehicle carriers interstate.

The route that he will follow from Denver to the Wyoming state line is designated as U. S. Highway No. 85. The proposed schedule and the fare to be charged over the route in question with stop-over privileges indicates that there may be some conflict with the Colorado Motor Way, Inc., which is an interstate passenger carrier between Denver and Greeley, Colorado. The fares to be charged by the applicant are on a somewhat lower basis than the intrastate carrier. It is the intention of the applicant to sell tickets with stop-over privileges at points between Denver and the Wyoming state line destined to interstate points outside of Colorado.

After a careful consideration of all the testimony in this case, the Commission is of the opinion, and so finds, that the laws of the State of Colorado and of the United States require the issuance of a certificate of public convenience and necessity to O. W. Townsend, doing business under the name and style of the Cornhusker Stage Lines, authorizing operation on U. S. Highway No. 85 between Denver, Colorado, and the Colorado-Wyoming state line.

The Commission is quite aware of the fact that it cannot by any order unduly burden interstate commerce. It can, however,

and should take such steps as are reasonably necessary to prevent in proper cases the doing of intrastate business by any interstate carrier who has no authority from the Commission to engage in intrastate business. There has been made no showing in this case of any reason or necessity for the doing of intrastate business by the applicant.

The Commission has had considerable complaint against a number of interstate operators on account of many representations that they are engaging in unlawful intrastate business. The Commission, therefore, is of the opinion and so finds that the public convenience and necessity requires that the applicant be required, in the sale of interstate tickets carrying stop-over privileges, to collect from the passenger at the time of the sale of the original ticket the full amount of the fare for the interstate journey, and that the purchaser of the ticket be required by the applicant at the time of sale thereof to sign his name thereon on a line to be provided therefor, and that the same person who bought the ticket be required to present the same ticket or a portion thereof bearing his said signature on a motor bus of the applicant when beginning the remainder of his journey, and to sign his name in the presence of the driver on another line to be provided therefor on said ticket or the portion bearing his said original signature.

ORDER.

It Is Therefore Ordered, That, in compliance with the laws of the State of Colorado and the laws of the United States, a certificate of public convenience and necessity should issue to C. W. Townsend, doing business under the name and style of the Cornhusker Stage Lines, to operate a motor vehicle system for the transportation of passengers between Denver, Colorado, and the Colorado-Wyoming state line over U. S. Highway No. 85; and this order shall be taken, deemed and held to be a certificate of public convenience and necessity therefor.

It Is Further Ordered, That within twenty days from the date of this order the applicant shall be required to file with this Commission a tariff and the rules and regulations governing

stop-over privileges on passenger tickets sold by the applicant, with stop-over privileges within this State.

IT IS FURTHER ORDERED, That the applicant be required, in the sale of interstate tickets carrying stop-over privileges, to collect from the passenger at the time of the sale of the original ticket the full amount of the fare for the interstate journey, and that the purchaser of the ticket be required by the applicant at the time of sale thereof to sign his name thereon on a line to be provided therefor, and that the same person who bought the ticket be required to present the same ticket or a portion thereof bearing his said signature on a motor bus of the applicant when beginning the remainder of his journey, and to sign his name in the presence of the driver on another line to be provided therefor on said ticket or the portion bearing his said original signature.

RE J. M. BUSTER, *et al.*, DOING BUSINESS AS THE BUSTER AND WILLIAMS TOURING COMPANY.

[Application No. 572. Decision No. 1683.]

Certificates of convenience and necessity—Motor vehicle sightseeing operations in Pikes Peak region.

Certificate of convenience and necessity issued authorizing motor vehicle transportation on sightseeing round trips from Colorado Springs to scenic points in the Pikes Peak region.

[April 21, 1928.]

Appearance: Chester B. Horn, Esq., Colorado Springs, Colorado, Attorney for applicants.

STATEMENT.

By the **Commission**: On March 29, 1927, the Commission issued a certificate of public convenience and necessity to the above applicants good for only one year from the date thereof, and retained jurisdiction of the same for further hearing and determination and such disposition as the Commission should find the public convenience and necessity would require. A fur-

ther hearing was had on this application in the City Hall, Colorado Springs, Colorado, on April 10, 1928.

The evidence on the continued hearing was to the effect that the applicants have an investment of approximately $25,000.00 in their motor vehicle carrier operation consisting of ten automobiles.

It further appears, and the Commission so finds, that the present and future public convenience and necessity requires the motor vehicle carrier system of the applicants. An order will issue granting a final certificate.

Some of the applicants in sightseeing operations operate also what may be termed a taxi service at an hourly charge. Nothing, however, appears in the record from which the Commission could designate a definite territory in which to permit such an operation. Where, however, such service is rendered to various scenic attractions in the Pikes Peak region, the tariff should designate an hourly charge if it is desired to make such charge. Until and unless the Commission otherwise orders, such a taxi service will not be disturbed but the operations therein should be reflected in the monthly reports on the passenger mile tax.

No further certificate number will be assigned, and the applicants will continue to use the present certificate number on their equipment, as provided by the rules and regulations.

The tariffs of the applicants on file with the Commission do not conform with the rules and regulations in the following respect:

All passenger tariffs must be prepared in book, sheet or pamphlet form on good quality paper, not exceeding 8½ x 11 inches, nor less than 8 x 11 inches in size.

Each tariff must show in the upper right hand corner the initials "Colo. P. U. C. No." followed by the number, the first number to be No. 1. (If the tariff filed last year did not show a Colo. P. U. C. number, then the new tariff should be No. 1. If, on the other hand, last year's tariff did show a Colo. P. U. C. number as outlined above, the new tariff should take the next consecutive number.)

This number bears no relation to your certificate number and

should not be confused therewith. If the sample form shown on page 38 of the Rules and Regulations is followed in complying with Rule 14, applicants should have very little difficulty in preparing their tariffs. The applicants should within twenty days from the date hereof, file tariffs in conformity with the Rules and Regulations Governing Motor Vehicle Carriers.

ORDER.

IT IS THEREFORE ORDERED, That the present and future public convenience and necessity requires, and will require, the proposed motor vehicle carrier system of the applicants herein 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 therefor, 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 applicants 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 ten automobiles as appears from the testimony adduced herein.

IT IS FURTHER ORDERED, That the applicants 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 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.

Similar orders were issued in the following applications, the number of cars allowed and the point or points from which operations were authorized being stated:

The Pikes Peak Automobile Co., 20 cars; Colorado Springs. Application No. 573, Decision No. 1684.

Hammond Scenic Auto Co., 19 cars; Colorado Springs and Manitou. Applications Nos. 581 and 999, Decision No. 1685.

Thomas L. Reasoner, doing business as The Gray Line Motor Tours, 12 cars; Colorado Springs. Application No. 594, Decision No. 1686.

Harry L. Anderson, doing business as The Anderson & Harry Seeing Colorado Co., 5 cars; Manitou. Application No. 595, Decision No. 1687.

Edward E. Nichols, doing business as The E. E. Nichols Hotel & Realty Co., 3 cars; Manitou. Applications Nos. 601 and 602, Decision No. 1688.

George J. Wetherald, et al., doing business as The G. & W. Garage and Tours Co., 6 cars; Manitou. Application No. 612, Decision No. 1689.

C. F. Garriott, doing business as The C. F. Garriott Sight Seeing Co., 2 cars; Colorado Springs. Application No. 613, Decision No. 1690.

F. B. Bryant, doing business as The Bryant Auto Livery, 5 cars; Colorado Springs. Application No. 615, Decision No. 1691.

Almeron Davis, 1 car; Colorado Springs. Certificate not transferable. Application No. 620, Decision No. 1692.

W. F. Conway, et al., doing business as Conway Brothers, 15 cars; Colorado Springs. Application No. 621, Decision No. 1693.

The Yellow Cab Co. of Colorado Springs, 12 cars; Colorado Springs. Application No. 635, Decision No. 1694.

James W. Carey, doing business as The Jim Carey Auto Livery, 3 cars; Colorado Springs. Application No. 636, Decision No. 1695.

William Irvine, 6 cars; Colorado Springs. Application No. 637, Decision No. 1696.

T. A. Hailey, doing business as The Rocky Mountain Sightseeing Co., 3 cars; Manitou. Application No. 639, Decision No. 1697.

Russell Foster, 1 car; Manitou. Certificate not transferable. Application No. 640, Decision No. 1698.

George H. Miller, 2 cars; Colorado Springs. Certificate not transferable. Application No. 643, Decision No. 1699.

Luther C. Johnson, 1 car; Colorado Springs. Certificate not transferable. Application No. 647, Decision No. 1700.

Henry Muscati, 1 car; Manitou. Certificate not transferable. Application No. 651, Decision No. 1701.

John M. Thompson, et al., doing business as The Colorado Springs Sightseeing Co., 6 cars; Colorado Springs. Application No. 652, Decision No. 1702.

L. L. Schwartz, 1 car; Colorado Springs. Certificate not transferable. Application No. 653, Decision No. 1703.

James T. Freeman, 1 car; Colorado Springs. Certificate not transferable. Application No. 661, Decision No. 1704.

Frank W. Hoepner, 1 car; Manitou. Certificate not transferable. Application No. 664, Decision No. 1705.

Arthur S. Willis, doing business as The Colorado Springs Scenic Co., 4 cars; Colorado Springs. Applications Nos. 670 and 939, Decision No. 1706.

The Cragmor Sanatorium Co., 2 cars; Cragmor. Application No. 689, Decision No. 1707.

C. W. Kight, et al., doing business as Kight and Tannan Sightseeing Co., 4 cars; Colorado Springs. Application No. 694, Decision No. 1708.

P. B. McCrary, et al., doing business as The Colorado Touring Co., 2 cars; Colorado Springs. Application No. 715, Decision No. 1709.

Florenz Ordelheide, 2 cars; Colorado Springs. Application No. 718, Decision No. 1710.

Tony Colyn, et al., doing business as The Cadillac Sightseeing Co., 8 cars; Colorado Springs. Application No. 733, Decision No. 1711.

J. G. Shabouh, et al., doing business as The Pikes Peak Auto Livery, 16 cars; Colorado Springs and Manitou. Application No. 736, Decision No. 1712.

George E. Bateman, 1 car; Manitou. Certificate not transferable. Application No. 749, Decision No. 1713.

T. H. Smith, 1 car; Rodeo Camp Ground, Colorado Springs. Application No. 753, Decision No. 1714.

F. J. Burghart, 2 cars; Manitou and Colorado Springs. Application No. 780, Decision No. 1715.

The Antlers Livery & Taxicab Co., 40 cars; Colorado Springs. Application No. 787, Decision No. 1716.

William Olson, 1 car; Manitou. Certificate not transferable. Application No. 837, Decision No. 1717.

Jesse Taylor, 1 car; Manitou. Certificate not transferable. Application No. 846, Decision No. 1718.

B. E. Beals, 2 cars; Colorado Springs. Application No. 847, Decision No. 1719.

O. J. Lepel, 1 car; Colorado Springs. Certificate not transferable. Application No. 855, Decision No. 1720.

W. H. Walker, 1 car; Manitou. Certificate not transferable. Application No. 865, Decision No. 1721.

P. P. Turner, 2 cars; Colorado Springs. Certificate not transferable. Application No. 713, Decision No. 1759.

John O'Byrne, 2 cars; Colorado Springs. Certificate not transferable. Application No. 592, Decision No. 1787.

T. E. Anderson, 1 car; Manitou. Certificate not transferable. Application No. 614, Decision No. 1788.

The Seven Falls Co., 3 cars; Seven Falls and Stratton Park. Application No. 750, Decision No. 1789.

The Mountain Circle Auto Co., 3 cars; Colorado Springs. Application No. 849, Decision No. 1790.

Charles Heter, 2 cars; Colorado Springs. Application No. 856, Decision No. 1791.

Beryl Spradling, 1 car; Manitou. Certificate not transferable. Application No. 864, Decision No. 1792.

Harry Fraser, 1 car; Manitou. Certificate not transferable. Application No. 915, Decision No. 1793.

Mrs. D. P. Gaines, 2 cars; Colorado Springs. Application No. 666, Decision No. 1794.

Otto Quillin, doing business as Otto's Auto Scenic Co., 3 cars; Prospect Lake Auto Camp. Application No. 668, Decision No. 1795.

L. E. Dicks, 2 cars; Colorado Springs. Application No. 599, Decision No. 1947.

RE THE YELLOW CAB COMPANY OF BOULDER.

[Application No. 838. Decision No. 1737.]

Certificates of convenience and necessity—Motor vehicle sightseeing operations out of Boulder.

Certificate of convenience and necessity issued authorizing motor vehicle transportation of passengers in sightseeing round trip operations between Boulder and various scenic points, subject to conditions stated.

[May 10, 1928.]

Appearance: C. D. Bromley, Esq., Boulder, Colorado, Attorney for applicant.

STATEMENT.

By the **Commission**: On June 1, 1927, the Commission issued a certificate of public convenience and necessity to the above named applicant for only one year from the date thereof, retaining jurisdiction of the application for further hearing and determination and such disposition as the Commission should find the public convenience and necessity would require. A further hearing was had on this application in the Court House in Boulder, Colorado, on April 23, 1928.

The evidence at the continued hearing shows that the applicant has an investment of approximately fourteen thousand eight hundred and seventy-five ($14,875.00) dollars in eleven automobiles.

It further appears, and the Commission so finds, that the present and future public convenience and necessity requires the

motor vehicle carrier system of the applicant. An order will issue granting a final certificate.

A number of other cases involving applications of the same general nature as that of the applicant herein were heard at the same time and place. It appears that occasionally the motor vehicle operators in Boulder are called upon to make round trips to various scenic points in the State, other than those in what might be termed the Boulder district; that to most of the points outside of the Boulder district the operators have on file with the Commission tariffs fixing certain rates. It further appears, however, that because it is impracticable to attempt to fix specific rates to every scenic attraction in the State, and that because of varying road conditions a flat mileage charge cannot be made, the operators have been stating in their tariffs a minimum and maximum mileage rate to all points other than those to which fixed fares are stated. This arrangement might very easily be subject to considerable abuse if any substantial amount of business is done to the points to which those rates apply. For the time being and until the Commission has had the benefit of a more extensive record, it will not disturb this situation, but suggests that if the operators desire to continue such a system they ought to have their minimum and maximum mileage rates as close together as possible, and to have them apply only to points rather far removed from Boulder and not ordinarily visited. Until and unless the Commission otherwise orders, the service by the applicants to other scenic points than in the Boulder region in the State of Colorado will not be disturbed, but such operations should be reflected in the monthly reports on the passenger mile tax.

No further certificate number will be assigned and the applicant will continue to use the present certificate number on its equipment, as provided by the rules and regulations.

The tariffs of the applicant on file with the Commission, will, if they conform to the rules and regulations of the Commission, be considered as the tariffs under the final certificate.

ORDER.

IT IS THEREFORE ORDERED, That the present and future public convenience and necessity requires, and will require, the proposed motor vehicle carrier system of the applicant herein, The Yellow Cab Company of Boulder, for the transportation of passengers from Boulder to the various scenic attractions in the Boulder region, 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 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, without stop-over privileges.

(b) That no one-way transportation of passengers is permitted between the city of Boulder and any point where there exists regular, established transportation by either railroad or motor vehicle carriers or in part by one and in part by the other.

(c) That the quantity of equipment to be used in this operation shall be limited to eleven automobiles.

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.

In the following applications certificates similar to the one in the Yellow Cab application were issued:

C. E. Lewis, et al., doing business as The L-L Auto Tours, 7 cars. Application No. 930, Decision No. 1738.

C. W. Townsend, 2 cars. Application No. 896, Decision No. 1740.

Ray S. Hall, et al., doing business as Hall's Black and White Cab Co., 1 car. Application No. 848, Decision No. 1741.

H. F. Brandhorst, 1 car. Application No. 850, Decision No. 1742.

J. F. Gordon, 1 car. Application No. 851, Decision No. 1743.

W. N. Clark, 2 cars. Application No. 859, Decision No. 1744.

Roy Armstead, doing business as Armstead Scenic Co., 4 cars. Application No. 883, Decision No. 1745.

John Grant, doing business as Out West Sightseeing Co., 2 cars. Application No. 884, Decision No. 1746.

Art W. Quinlan, 3 cars. Application No. 905, Decision No. 1796.

E. E. Harris, 1 car. Application No. 895, Decision No. 1797.

RE THE GLACIER ROUTE.

[Application No. 909. Decision No. 1749.]

Common carriers—Automobiles—Brokerage business.

Question raised whether plan by which a motor vehicle operator turning over passengers to different persons owning and operating their own cars does not make him merely a broker as to such business.

[May 10, 1928.]

Appearances: A. W. Fitzgerald, Esq., Boulder, Colorado, for applicant; Chas. D. Bromley, Esq., Boulder, Colorado, for The Yellow Cab Company of Boulder.

STATEMENT.

By the **Commission**: On November 24, 1926, the applicant was granted a certificate of public convenience and necessity authorizing the operation of a motor vehicle carrier system for the transportation throughout the year of passengers and baggage in what is known as the Glacier territory, west of Boulder, being between Boulder, Lyons, Allenspark, Nederland and certain other places. On May 24, 1927, the applicant filed an application for a certificate authorizing the extension of the operations of its said system so as to do a general round-trip sightseeing business, and to make certain special trips, transporting students of the University of Colorado under the direction of and in cooperation with the Recreational Department of said university.

The Commission retained jurisdiction over this supplemental application in order that it might, after operations of the various sightseeing applicants had been conducted for a year, better determine what the public convenience and necessity requires.

A further hearing was had on the application in Boulder, Colorado, at the Court House on April 23, 1928.

At the hearing preceding the order of July 12, 1927, the State University's Director of Recreation in the summer school testified that the special service rendered by the applicant had been entirely satisfactory and that said business is increasing yearly.

The applicant has engaged in its general and special sightseeing operations six thousand ($6,000.00) dollars in seven automobiles owned directly by it and rents ten automobiles of the value of eight thousand ($8,000.00) dollars.

It further appears, and the Commission so finds, that the present and future public convenience and necessity requires the motor vehicle carrier system of the applicant. An order will issue granting a final certificate.

The applicant, it appears, does not itself own enough automobiles to take care of repeated peak demands. For some years it has been entering into relations with a number of automobile owners by which it is claimed that the applicant leases their equipment for the tourist season. The owners of these cars are supposed to operate only for the applicant. Most of the passengers which they transport are turned over to them by the applicant. Some business is originated by the said automobile owners, but all revenues from any and all passengers are supposed to be turned over to the applicant. Eighty-five per cent of all the revenue derived from passengers hauled by these persons is turned over to them by the applicant, fifteen per cent being kept by the latter. The applicant insures their automobiles in its name and makes certain other outlays for them, for all of which they reimburse the applicant.

These individuals owning their own cars are expected and required by the applicant not to do any other business than that which is done in the name of and for the applicant. However, during the past season the Commission had numerous complaints from various persons to the effect that frequently a number of these persons were engaged in independent operations which were never reported to the applicant, and the proceeds from which were never delivered to the applicant.

Aside from the question whether or not these persons do any business in addition to that done under the plan and arrangement made with them, there is serious question whether or not the applicant is not engaged as a mere broker and the third persons themselves are not the real operators. Inasmuch as the custom is one of somewhat long standing and the other operators seem to confine their protests almost solely to the alleged independent business not reported nor accounted for to the applicant, we have concluded for the time being not to disturb the situation. However, if these third persons are operating for the applicant and under its certificate it is fully responsible for their conduct, and the payment of all taxes when due. It will, therefore, be expected to assume and perform the duty of seeing that they do not at any time engage in any transportation business except for the applicant, the proceeds of which are delivered to it. If the applicant cannot restrict these third persons in this manner, or if for any other reasons inconsistent with regulatory power such operations should not be proper, either the applicant's certificate will have to be revoked or this manner of doing business will have to be permanently eliminated.

The Commission is of the opinion that the business done for the Recreational Department of the University of Colorado is a common carrier business and that a tariff of rates should be on file for said business which cannot be secured by bids at variance with the tariff. It is doubtless true that the university itself, or department thereof, makes a contract for this business. However, the students themselves pay therefor. Any member of the public is entitled to the service on entering the university or, at least, this department thereof. See Terminal Taxicab Company vs. Dist. of Col., 241 U. S. 252.

A number of other cases involving applications of the same general nature as that of the applicant herein were heard at the same time and place. It appears that occasionally the motor vehicle operators in Boulder are called upon to make round trips to various scenic points in the State, other than those in what might be termed the Boulder district; that to most of the points outside of the Boulder district the operators have on file with

the Commission tariffs fixing certain rates. It further appears, however, that because it is impracticable to attempt to fix specific rates to every scenic attraction in the State, and that because of varying road conditions, a flat mileage charge cannot be made, the operators have been stating in their tariffs a minimum and maximum mileage rate to all points other than those to which fixed fares are stated. This arrangement might very easily be subject to considerable abuse if any substantial amount of business is done to the points to which those rates apply. For the time being and until the Commission has had the benefit of a more extensive record, it will not disturb this situation, but suggests that if the operators desire to continue such a system they ought to have their minimum and maximum mileage rates as close together as possible, and to have them apply only to points rather far removed from Bouder and not ordinarily visited. Until and unless the Commission otherwise orders, the service by the applicants to other scenic points than in the Boulder region in the State of Colorado will not be disturbed, but such operations should be reflected in the monthly reports on the passenger mile tax.

No further certificate number will be assigned and the applicant will continue to use the present certificate number on its equipment, as provided by the rules and regulations.

The tariffs of the applicant on file with the Commission will, if they conform to the rules and regulations of the Commission, be considered as the tariffs under the final certificate.

ORDER.

It Is Therefore Ordered, That the present and future public convenience and necessity requires, and will require, the proposed motor vehicle carrier system of the applicant, The Glacier Route, Inc., for the transportation of passengers from Boulder to the various scenic attractions in the Boulder region, 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 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, without stop-over privileges.

(b) That no one-way transportation of passengers is permitted between the city of Boulder and any point where there exists regular, established transportation by either railroad or motor vehicle carriers or in part by one and in part by the other.

(c) That the quantity of equipment to be used in this operation shall be limited to seventeen automobiles.

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.

FRANK PLESS, *et al.*, DOING BUSINESS AS PLESS AND DAVIS.

[Application No. 987. Decision No. 1766.]

Service—Automobiles—Holding trucks beyond hour of scheduled departure.

1. Practice of holding trucks after hour when they are due to leave Denver for freight which is not delivered on time condemned.

Operating expenses—Salaries and wages—Inactive member of firm operating under motor vehicle certificate.

2. The public should not be required to carry the burden of paying a salary to an inactive member of a firm holding a motor vehicle certificate of convenience and necessity.

[May 17, 1928.]

Appearances: Harry S. Class, Esq., Denver, Colorado, Attorney for the applicants; D. A. Maloney, Esq., Denver, Colorado, Attorney for The Northern Transportation Company; E. G. Knowles, Esq., Denver, Colorado, for Union Pacific Railroad Company.

STATEMENT.

By the **Commission**: On January 7, 1928, the Commission entered an order denying the application herein for a certificate of public convenience and necessity authorizing the operation of a motor vehicle system for the transportation of freight between La Salle and Ione and intermediate points and Denver. The Commission, however, retained jurisdiction of the application and held another hearing in its Hearing Room on May 7, 1928. The evidence taken at this last hearing shows that a number of the merchants in the towns served are not yet satisfied with the operations being conducted by The Northern Transportation Company, which operates between Greeley and Denver and intermediate points. The main ground of objection is that the deliveries by the latter company are made over a period varying two hours or more. The evidence does show, however, that the service of the certificate holder has been much more satisfactory in the past thirty days.

One reason why the service of The Northern Transportation Company has been somewhat irregular is that it has had to wait in Denver a number of times at the request of wholesale and jobbing houses, who stated their alleged inability to deliver goods to the depot before the leaving time. While the waiting by the carrier was done to accommodate the shippers and the consignee, it tends to inconvenience more people than are convenienced. No shipper would expect a railroad company to hold a train. Neither is it reasonable to disrupt the service of a motor vehicle carrier by such delays. If a given shipper cannot get his goods to the dock of the truck line on time he will have to expect a competitor who can do so to get the business. Hereafter we shall expect The Northern Transportation Company to operate its truck or trucks serving the people in the towns affected on schedule time.

Another important reason why the La Salle people desire the issuance of a certificate to the applicants is in order that the shippers of that district may be able to ship their milk and cream to Corbett's Ice Cream Company, a Denver manufacturer of ice

cream, which buys all its milk and cream from the farmers in that territory. It is stated that no other truck company operating as a common carrier is engaged in hauling milk and cream from La Salle to Denver. The evidence tends to show that the operation of the applicants, even though confined to the hauling of milk and cream, will be a profitable one. One of the two applicants has been engaged in operating the line. The other, while out of the State, has been drawing a salary of one hundred and fifty ($150.00) dollars a month merely because he has furnished the equipment. The Commission, of course, recognizes the right of an operator to earn enough money to pay the depreciation on his equipment and a fair return thereon, but there is no duty on the part of the public to pay a salary to anybody who is not engaged in rendering a service in the operation.

The evidence brought out in the first hearing shows that the milk and cream is delivered by the farmers to the consignee at their farms and that the transportation by the applicants thereof is not for the farmers but for the consignee. This being true, the hauling of the milk and cream does not make the applicants common or motor vehicle carriers, and they owe no duty to secure or operate under a certificate of public convenience and necessity therefor. It is also true that they could aid a very limited number of other customers without becoming common carriers. Those customers, however, as we have pointed out in other decisions, cannot be shifted from day to day in such a way as to constitute an evasion of the law. We believe, therefore, that the applicants will be able to continue to operate and to transport the milk and cream at a profit.

The Commission is on this date denying a certificate to an applicant who heretofore has been engaged in the hauling of freight between Denver and Brighton, the latter point being on the route of The Northern Transportation Company. As soon as the Commission is justified it expects to require The Northern Transportation Company to operate out of Denver a truck or trucks serving the towns affected herein, which will not stop until after Fort Lupton has been passed. In this way much

time will be saved for the merchants and others receiving freight at Ione and La Salle and intermediate points.

The Commission fully appreciates the views of a number of the witnesses in this case, not only that they are entitled to the service of a local man, but that competition is demanded. It is just a question of time before others residing in some of the other towns than La Salle will desire a certificate and will be supported by the people living in their respective towns. Moreover, the whole theory of regulation carries with it a limitation on competition. If competition is not limited the Commission necessarily is prevented in large measure from controlling the rates charged and service rendered. It is the duty of the Commission to hear complaints as to rates and service, and to regulate them as the facts may require. This duty it stands ready to perform at all times.

The Commission, therefore, is of the opinion and so finds that the public convenience and necessity does not require the motor vehicle operation of the applicants herein.

ORDER.

IT IS THEREFORE ORDERED, That the application herein of Frank Pless and Walter Davis, co-partners, doing business under the firm name and style of Pless and Davis, be, and the same is hereby, denied.

RE LINDLEY N. WHITE.

[Application No. 794. Decision No. 1768.]

Revenue—Evidence of soundness of operation.

1. One operating a truck with a gross income of only $100 to $150 per month is not conducting his business on sound business principles.

Service—Automobiles—Shopping—Payment therefor.

2. The public must not expect personal services of a truck operator in the nature of shopping without paying therefor.

[May 17, 1928.]

Appearances: Carl Cline and Eugene J. Ackerson, Esq., Denver, Colorado, Attorneys for applicant; E. G. Knowles, Esq.,

Denver, Colorado, Attorney for Union Pacific Railroad Company; D. Edgar Wilson, Esq., Denver, Colorado, Attorney for Colorado Motor Way, Inc.; D. A. Maloney, Esq., Denver, Colorado, Attorney for The Northern Transportation Company; Grant LeVeque, Esq., Brighton, Colorado, Attorney for Fuller Truck Line.

STATEMENT.

By the **Commission**: On October 28, 1926, Lindley N. White filed his application for a certificate of public convenience and necessity authorizing the operation of a motor vehicle system for the transportation of freight and merchandise between Denver and Brighton. Thereafter written objections were filed by Union Pacific Railroad Company and Colorado Motor Way, Inc.

The case was duly set for hearing and was heard in the Hearing Room of the Commission on March 21, 1928. A number of business men from Brighton appeared and testified in support of the application. The applicant and the Fuller Truck Line, which has a certificate authorizing operations between Fort Lupton, Brighton and Denver, and to some extent, The Northern Transportation Company, operating between Greeley and Denver and intermediate points, are dividing the Brighton business. A number of the Brighton merchants find the service of the Fuller Truck Line satisfactory and adequate. The only reason on the part of those patronizing the applicant for preferring his service is that he renders more of a personal service in Denver, going from place to place and buying various articles, particularly parts for machinery and farm implements.

The evidence shows that the applicant is not conducting his operation on sound business principles. He realizes only one hundred to one hundred and fifty dollars a month, with which to pay depreciation on his equipment, a profit thereon, and his own salary.

The president of The Northern Transportation Company expressed a willingness to do the shopping in Denver which is being done by the applicant, provided the persons for whom this service is rendered are willing to pay a reasonable charge therefor. Unless compensation is received for these and other serv-

ices, the public will not have the dependable operations to which they are entitled.

The Commission considered the issuance of a certificate to the applicant upon the condition that he consent to its being without right of transfer. To this he protested but finally consented. However, the issuance of such a certificate, in our opinion, would tend to injuriously affect the operations of the other carriers whose operations we have already found are required by the public convenience and necessity. If the present certificate holders of motor transportation do not furnish adequate service, the Commission stands ready to see that it is furnished.

After careful consideration of all the evidence, we are of the opinion, and so find, that the public convenience and necessity does not require the motor vehicle operation of the applicant.

ORDER.

IT IS THEREFORE ORDERED, That the application herein of Lindley N. White be, and the same is hereby, denied.

RE THE COLORADO & SOUTHERN RAILWAY COMPANY.

[Application No. 1051. Decision No. 1800.]

Service—Rail—Between Como and Alma.

Authority granted to curtail rail service between Como and Alma to two regular scheduled round trips per week by a mixed train carrying passengers, carload and less than carload freight upon conditions stated.

[May 29, 1928.]

Appearances: J. Q. Dier, Esq., and J. L. Rice, Esq., Denver, Colorado, for The Colorado and Southern Railway Company; John M. Boyle, Esq., Fairplay, Colorado, Luke J. Kavanaugh, Esq., Denver, Colorado, and Kenaz Huffman, Esq., Denver, Colorado, for residents of Park County.

STATEMENT.

By the **Commission**: This is an application by The Colorado and Southern Railway Company to curtail its train service, which is now being operated six days a week, on its Como-Alma branch. The application alleges, among other facts, that the operation of one freight train when ten carloads of freight are offered on said line for transportation, with a minimum of one freight train per week in each direction on said branch, would fully serve all public needs in the territory involved; that conferences have been held by representatives of the applicant, the County Commissioners of Park County and the people residing in said territory, as well as between representatives of the applicant and a committee duly appointed at a mass meeting, for the purpose of endeavoring to agree upon the curtailment of the train service; that as a result of said conferences, and as a compromise in the matter, an agreement was, on January 18, 1928, made between the applicant and the committee to the effect that, with the approval of this Commission, the train service on said branch should be reduced to two regular scheduled round trips thereover per week with a mixed train carrying carload and less than carload freight and passengers, and that the train service now in effect shall be reestablished at and during such times as automobiles are unable to operate over the public highway on account of snow or other causes, and that the present agency station at Fairplay should be discontinued and a custodian or other satisfactory representative should attend to the reception and delivery of freight and other business with the public at Alma and Fairplay, and that the petitioner should provide telephones in its station buildings at Fairplay and Alma.

An answer was filed by the committee making the above described agreement in which it is alleged that when the train service is curtailed as proposed, the same should remain in effect without further reduction until such time as the carload shipments on said branch fall below five hundred cars per year for two consecutive years; that the custodian or representative at Fairplay and Alma should be on full time duty for the purpose

of receiving and delivering freight, receiving orders for cars, phone messages and other communications; that the applicant should keep sufficient empty cars along said branch to accommodate the shippers and to furnish extra train service when ten or more cars of freight are available for transportation over and along said branch; that the points along said Como-Alma branch heretofore designated and published by said applicant as railroad shipping points should still be carried as such in all publications to the same extent as heretofore.

Answer was also filed by Charlotte M. Bishop, representing certain mining interests in Park County. A third answer was filed by a number of citizens of Park County, headed by H. J. Tharp, opposing any curtailment whatsoever.

This matter was set down for hearing in the Hearing Room of the Commission, State Office Building, Denver, Colorado, on April 17, 1928, at which time evidence in support of and in opposition to the application was received. The testimony shows that the applicant operates a branch narrow gauge line of railroad in Park County, Colorado, extending from Como in a southerly direction for a distance of 16.3 miles to Garos, and thence northwesterly through the town of Fairplay for a distance of 15.2 miles to the town of Alma; that said branch is commonly known as the Como-Alma branch, and has a total length of 31.5 miles; that there is a well improved public highway extending from Como to Fairplay and extending thence in each direction practically parallel to said branch line of railroad from Fairplay to Alma and Garos. The main auto road from Como to Fairplay is direct instead of following the line of this carrier, reducing the mileage considerably.

The commodities transported on this branch are mainly livestock and hay. Livestock generally moves in the months of September, October and November. The hay movement commences on or about August 15 of each year. For many years past The Colorado and Southern Railway Company has been operating over said branch one mixed train for the carriage of passengers and freight in each direction each day, except Sunday. Because of the great improvement of the highways in Park County and

the increased use of automobiles and trucks on said highways, practically all public travel to and from the territory served by this branch is by automobile, and a certain portion of less than carload freight moved in said territory is hauled in trucks over the highways. During the year 1926 the total number of runs of the train was 626, total number of passengers carried, 671; average passengers per train per day, 1,072; average passenger revenue per day, $2.96. In 1927 the train operated 607 runs, carrying 702 passengers, average passengers per day being 1.156, average passenger revenue per day being $3.43. The freight service revenue for 1927 amounted to $10,922.70. The total operating revenues received by the carrier amounted to $14,269.70. The total operating expenses for 1927 amounted to $63,368.44. The net deficit from the rail carrier's operation in 1927 amounted to $39,298.74. Applicant's Exhibit 5, which was introduced to show the savings to be effected by the substitution of two scheduled trips per week instead of six trips, shows that the carrier would effect a saving of $11,603.67 per annum. By a very great weight of the evidence, the record shows that the branch in question is mainly used for the transportation of freight; that the use of the passenger service is very slight, being a little over one passenger per day as stated. In 1927 830 cars of freight were shipped over this branch. So far, therefore, as the regular scheduled service is concerned two regular scheduled round trips per week by the train carrying passengers and both carload and less than carload freight should suffice to meet all demands of the shipping and travelling public.

Some conflicting testimony was introduced as to the number of cars per train that the engine could haul on this branch. The testimony, however, of the rail carrier is definite to the effect that ten cars could be handled on the regular scheduled train. Furthermore, the service between Denver and Como, over which practically 95 per cent of the freight received goes, is twice a week on Tuesdays and Fridays. The scheduled service should be so coordinated on the branch that the Denver train will carry this freight. Furthermore, it is reasonable under all the evidence to require the carrier to furnish special train service when

ten cars or more are offered for such transportation. On the days on which there is scheduled train operation, however, the carrier should be required for the convenience of the shipper to transport all freight offered and make proper connection at Como with the regular scheduled Denver train on Tuesdays and Fridays. It is important that the freight offered on the regular schedule days reach the markets as early as possible. The special train service referred to as going to Denver means, of course, from any point on the branch to Denver and is not related to any scheduled service.

The record is not sufficient to warrant the Commision in finding that a custodian should be substituted for the station agency at Fairplay, serving Fairplay and Alma. Until the Commission otherwise orders, the station agency service at Fairplay should be continued.

Several large shippers appeared and testified to the effect that the proposed schedule as arrived at in the conference between shippers and carrier would be satisfactory. The testimony in opposition to the application was not sufficient to convince the Commission that no curtailment should be allowed. The traffic offered by the mining industry at Alma is not of sufficient quantity to warrant the Commission in requiring a daily freight service.

There have been filed with the Commission applications by M. L. Miller and Richard A. Spurlock to serve the public by motor transportation between Fairplay, Alma and Como. The Commission will set these applications down for hearing, to be determined prior to the effective date of this order, so that the public will not be inconvenienced if the public convenience and necessity requires such motor transportation.

After careful consideration of all the evidence introduced at the hearing, the Commission is of the opinion and so finds that the needs of the shipping and travelling public will be satisfied by two regular scheduled round trips per week, with a mixed train carrying carload and less than carload freight and passengers, upon the following conditions:

That the train service shall be reestablished at and during such times as automobiles are unable to operate over the public highways between Como and Fairplay, the county road supervisor to determine when such a condition exists.

That the present agency station at Fairplay shall be continued until otherwise ordered by this Commission, and that telephone service shall be provided in the station buildings at Fairplay and Alma.

That the carrier shall receive and transport all freight offered by the public on the days on which the regular scheduled train is operated.

That the carrier shall furnish special train service when it is offered in ten cars or more on any days on which there is no regular scheduled service.

That the said two regular scheduled round trips per week shall not be disturbed until the Commission further orders otherwise.

That the points along said Como-Alma branch heretofore designated and published by the carrier as shipping points shall still be continued as such in all publications of said carrier to the same extent as heretofore.

That this order entered herein shall become effective on June 15, 1928.

ORDER.

It Is Therefore Ordered, That The Colorado and Southern Railway Company be, and it is hereby, authorized to curtail its mixed train service on the Como-Alma branch to two regular scheduled round trips per week, with a mixed train carrying carload and less than carload freight and passengers, upon the following conditions:

(a) That the train service shall be reestablished at and during such times as automobiles are unable to operate over the public highways between Como and Fairplay, the county road supervisor to determine when such a condition exists.

(b) That the present agency station at Fairplay shall be continued until otherwise ordered by this Commission, and that tele-

phone service shall be provided in the station buildings at Fairplay and Alma.

(c) That the carrier shall receive and transport all freight offered by the public on the days on which the regular scheduled train is operated.

(d) That the carrier shall furnish special train service when it is offered in ten cars or more on any days on which there is no regular scheduled service.

(e) That the said two regular scheduled round trips per week shall not be disturbed until the Commission further orders otherwise.

(f) That the points along said Como-Alma branch heretofore designated and published by the carrier as shipping points shall still be continued as such in all publications of said carrier to the same extent as heretofore.

That this order shall become effective on June 15, 1928.

RE THE CHEYENNE MOUNTAIN COMPANY.

[Application No. 1089. Decision No. 1801.]

Certificates of convenience and necessity—Automobiles—Congestion of traffic in front of operator's office—Materiality.

1. The Commission, in passing upon an application for a certificate of convenience and necessity for a sightseeing operation originating at a city office, is not concerned with the matter of congestion of the street in front of the office, that being a matter under the jurisdiction of the city.

Rates—Reduction based upon sound economics—Public interest.

2. A reduction in rates, if based upon sound economics, is always in the interest of the public.

Rates—One particular motor vehicle trip—Non-compensatory—Issuance of certificate.

3. That rates proposed to be made a part of a temporary certificate may not be compensatory will not prevent issuance of certificate where evidence indicates applicant is able to bear loss without raising rates on other operations, and that public could be served if applicant ceased all operations.

[May 31, 1928.]

Appearances: J. A. Carruthers, Esq., Colorado Springs, Colorado, for applicant; C. H. Smith, Esq., Colorado Springs, Colorado, for protestants.

STATEMENT.

By the **Commission**: This is an application by The Cheyenne Mountain Company, a Colorado corporation, for a certificate of public convenience and necessity to operate a regular scheduled passenger sightseeing service by busses between Colorado Springs and the summit of Cheyenne Mountain over the Cheyenne Mountain highway. Protests were filed against this application by The Antlers Livery & Taxicab Company, The Gray Line Motor Tours, Anderson & Harry, Hammond Scenic Auto Company, Inc., Buster & Williams Touring Company and Conway Bros. All of the protestants are certificate holders operating a motor vehicle carrier sightseeing service in the Pikes Peak Region.

The first hearing had on this application was held in the City Hall in Colorado Springs, Colorado, on the 11th day of April, 1928. At that time, at the request of the protestants, it was stipulated that they should have ten days in which to file a protest against this application if they desired to do so; that if no protests were filed, the Commission could enter its order on the record as then made.

The above mentioned protests were filed subsequently and the Commission thereafter set this application for further hearing on May 18, 1928, in the City Hall, in Colorado Springs, Colorado, at which time further testimony was received. The testimony shows that the applicant has an investment of approximately $450,000; that it is the owner of four fourteen passenger White Motor Company busses of a value of $6,000; that the proposed operation will tend to promote, increase and develop the tourist travel to the summit of Cheyenne Mountain; that the present rate by certificate holders in touring cars not operated on regular schedule is $2.00 per person, and, if transportation is made in connection with other tours to other scenic interests, it is $1.50 per person; that the purpose of the proposed operation is to give the tourist public, as well as the public in Colorado

Springs, an opportunity to visit the summit of Cheyenne Mountain on a regular scheduled service at the rate of $1.00 per person; that the public at Colorado Springs, as well as the tourists who come there, could, by the proposed operation, spend some time on the summit of Cheyenne Mountain by staying up there between busses on scheduled service. The scheduled service proposed is as follows:

PM	PM	AM	AM		AM	PM	PM	PM
5:00	2:00	11:00	8:30	Lv. Colorado Springs	Ar. 11:00	1:30	4:30	7:30
6:00	3:00	12:00	9:30	Ar. Summit Cheyenne Mountain	Lv. 10:00	12:30	2:30	6:30

The public taking advantage of this operation would be transported at a $1.00 or 50 cent less rate than the lowest present rate furnished by certificate holders operating touring cars and busses, and a passenger could leave Colorado Springs at 8:30 a. m. and remain on the summit of Cheyenne Mountain until 6:30 p. m. No such service is now offered to the public on this trip to the summit of Cheyenne Mountain.

Testimony of the protestants is to the effect that the rate of $1.00 is non-compensatory and so unreasonably low as to be confiscatory; that the applicant in using the depot of the Pikes Peak Auto Company, as is contemplated, would congest traffic and would interfere with the depot of the protestant, The Gray Line Motor Tours; that it is unsafe for the traveling public to operate busses on the scenic tours in the Pikes Peak Region because of narrow roads and sharp, dangerous curves on most of said tours, including Cheyenne Mountain; that the equipment now in use in the Pikes Peak Region is adequate to serve and transport the traveling public to the various points of scenic interest. The testimony as to whether the rate proposed is compensatory or not is not very satisfactory. No definite evidence was produced which would indicate that the $1.00 rate to the summit of Cheyenne Mountain per bus seating fourteen passengers is unreasonably low and confiscatory. The applicant's testimony, mainly based on conclusions, is to the effect that it would be a compensatory rate. Evidence that the use of the

depot by the applicant at the office of The Pikes Peak Auto Company is an unfair advantage and that traffic will be congested if operation is conducted from there was not clear and was insufficient to base a finding thereon. Moreover, the matter of street congestion in Colorado Springs is one for determination and solution by the city of Colorado Springs. It licenses and exercises considerable authority over all motor vehicle operators conducting their operations in and from that city. The following language by the Massachusetts Department of Public Utilities in *Re* New York, New Haven & Hartford R. Co., *et al.*, P. U. R. 1926-D, 157, 159, is applicable here:

"We do not deem it necessary in considering this petition to deal with the problem of congestion in the streets of Boston. Generally speaking the determination of the problem of congestion of the streets should be left to the authorities of the respective communities. Licenses must be obtained from each municipality in which the motor bus operates."

While we believe that there is sufficient equipment now to serve the tourist public at Colorado Springs to the scenic attractions in the Pikes Peak Region, as related to touring cars, for round-trip service, yet the applicant in question here proposes a regular scheduled service rather than a touring car service offering to the public a more convenient way to enjoy the scenic attractions on the summit of Cheyenne Mountain at a rate of $1.00 or 50 cents less per passenger than the public now enjoys. With the reduced rate more business may be developed. After all, the main concern of the Commission is the convenience and necessity of the public and a reduction in rates, if based upon sound economics, is always in the interest of the public. As stated above, the record is not sufficient on which to determine definitely whether this operation at $1.00 per round trip from Colorado Springs to the summit of Cheyenne Mountain is compensatory.

Even if we assume, for the sake of argument, that the fare proposed will not be compensatory, there is serious doubt whether that fact of itself is enough to warrant the Commission in denying the application. The applicant might be able to

render this service to the public for an indefinite length of time without making any profit on this particular operation and without making an excessive charge for any other common carrier operation. In view of the large number of operators in the sightseeing business in Colorado Springs and the fact that this trip is but one of a great number, it would seem rather certain that the public will continue to be taken care of in the district on this tour as well as others, even though at some later date the applicant herein might find it inadvisable to continue operating on the fare proposed, or at all.

In Farmers Tel. Co. v. Wis. Tel. Co., P. U. R. 1928-A, 486, it appears that the Wisconsin Telephone Company was furnishing telephone service in Lancaster at rates which probably were causing a loss to the company. A competing concern, the Farmers Telephone Company of Lancaster, filed with the Wisconsin Commission a petition alleging that the rates for local service charged by the Wisconsin Telephone Company at Lancaster are discriminatory, and requesting the Commission to establish uniform rates for telephone service in the city of Lancaster applicable to both the Wisconsin Telephone Company and the Farmers Telephone Company. We quote at some length from the decision of the Wisconsin Commission as follows:

"In administering the public utility act, this Commission has construed the law to mean that a utility may reduce its rates without the formality of a hearing by merely filing the new schedule with the Commission, subject, of course, to the power of the Commission to act should there be discriminatory or other objectionable features in the proposed schedule. It has been assumed that the utility management is competent to determine whether a lower rate is consistent with the financial status of the company, and even though a utility has placed in effect rates which are less than the actual cost of the service rendered, the Commission has not seen fit to interfere unless the successful operation of the utility was threatened, or unless unjust discrimination was created thereby. In other words, the Commission has refrained from taking action which would deprive the

public of the benefits of a low service rate if the company is willing to provide service on that basis.

"In the present case, there can be no reasonable question of the ability of the Wisconsin Telephone Company to continue to furnish telephone service in Lancaster even at a loss; and such loss would, under proper accounting practice, be taken from the amount available for return and would not be charged to the cost of operation of any other property of the company. The Commission has no information to indicate that the losses sustained at Lancaster have not been taken care of properly in this manner. The two companies which are competing at Lancaster are on an equal footing as regards the legal right to serve. If, therefore, either should prove to be unable to meet the competition of the other and should retire from the field, the city of Lancaster would still be in a position to secure reasonably adequate service at reasonable rates. There is nothing in the present situation, therefore, which jeopardizes the telephone service of the people of Lancaster other than the competitive condition which this Commission is powerless to eliminate."

"* * * No limit is placed upon such competition by the statutes except such regulations as have been made generally applicable to all business operations. Whether either company has been guilty of unfair practices as regards the other utility is not a question for the determination of this Commission.

"The sole question presented for decision is whether under the existing competitive conditions the existing rates are unreasonable or discriminatory as regards the public. No request for authority to increase rates having been made by the Wisconsin Telephone Company, the reasonableness of the rates as regards the company is not in issue.

"The Commission finds:

"1. That the existing rates of the Wisconsin Telephone Company are reasonable as regards the public served thereunder.

"2. That the fact that these rates are lower than the Commission would be obliged to authorize upon the proper application of the Wisconsin Telephone Company does not give rise to unjust discrimination against other telephone users in the city

of Lancaster or against other patrons of the Wisconsin Telephone Company in other cities.

"3. That the rates complained of are not such as to jeopardize the furnishing of reasonable adequate telephone service to the city of Lancaster."

The Commission in 1927 issued certificates good for one year applying to the general run of sightseeing operations in the Pikes Peak Region, in order that it might have the benefit of the experience gained by the regulated operations during that season before issuing final certificates. We are inclined to believe that it is advisable to follow the same procedure with this application. It is not certain that the applicant herein will want to continue operation of busses on this tour after it has had the benefit of the experience of this season's operations. Moreover, it makes as a part of its application the fare named. If it cannot succeed or make a profit with this fare it may not want to continue the same, although it might continue the busses in operation.

The Commission, therefore, finds that the public convenience and necessity requires that the applicant operate the proposed regular scheduled service by motor busses between Colorado Springs and the summit of Cheyenne Mountain during the season of 1928 at the fare proposed. The Commission will retain jurisdiction over this application until further order is made prior to the beginning of the season of 1929.

ORDER.

It Is Therefore Ordered, That the public convenience and necessity requires the proposed motor bus operation by The Cheyenne Mountain Company on regular schedule four times per day between Colorado Springs and the summit of Cheyenne Mountain for the season of 1928 only, charging a fare of $1.00 per person for the round trip, 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 applicant shall file with this Commission, within at least twenty days, tariffs of rates, rules

and regulations, and a schedule as required by the Rules and Regulations of the Commission governing motor vehicle carriers; 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.

IT IS FURTHER ORDERED, That the Commission shall retain jurisdiction over this application until it has been finally disposed of.

RE THE COLORADO AND NEW MEXICO COAL OPERATORS' ASSOCIATION

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*

[Case No. 296. Decision No. 1808.]

Rates—Coal from Pikeview and northern Colorado points to Limon and points east on Rock Island.

Rates on coal from Pikeview to destinations on the Rock Island, Limon and points east thereof to the State line, found to be reasonable maximum rates, and rates from northern Colorado fields unreasonable, excessive and prejudicial to extent they exceed $2.15 per ton to Limon, and to points east thereof to extent they exceed by 40 cents rates from Pikeview.

[May 31, 1928.]

Appearances: Albert L. Vogl and F. O. Sandstrom, 806 Patterson Building, Denver, Colorado, for complainant; A. B. Enoch, Room 1025 La Salle Street Station, Chicago, Illinois; J. C. La Coste, Kansas City, Missouri; D. Edgar Wilson, Denver, Colorado, for Chicago, Rock Island and Pacific Railway Company; J. Q. Dier, Denver, Colorado, for The Colorado and Southern Railway Company, and Chicago, Burlington & Quincy Railroad Company; Henry C. Vidal and J. C. Bailey, Colorado Springs, Colorado, for Pikes Peak Fuel Company, interveners.

STATEMENT.

By the **Commission**: This matter is before the Commission by virtue of the complaint of the above named complainant in Case 296, filed with the Commission March 17, 1926.

Complainant is a Colorado corporation, organized not for profit, composed of producers of coal in various districts in Colorado and New Mexico, including those of the so-called northern Colorado district, approximately twenty-three miles north of Denver. It alleges that the defendants in the transportation of coal from the northern fields publish and maintain rates which are unjust, unreasonable and excessive on shipments to destinations on the line of the defendant, The Chicago, Rock Island and Pacific Railway Company east of Limon, Colorado, to the State line, and that the traffic of the said northern fields is subjected to undue and unreasonable prejudice and disadvantage, and that mines and shippers of coal located at Pikeview are accorded undue and unreasonable preference and advantage over the mines and shippers of coal from the northern fields, which constitutes an unlawful discrimination against the shippers located in the northern fields in favor of the shippers located in the Pikeview district. Reasonable and non-prejudicial rates for the future are sought. Rates and difference in rates will be stated in amounts per ton of 2,000 pounds.

A similar complaint was filed with the Interstate Commerce Commission involving rates from the same origin groups to interstate destinations in Kansas, Nebraska, Missouri and Iowa. In pursuance to notice duly given by the Interstate Commerce Commission and by the Colorado Commission, the matter was set down for hearing and heard at Estes Park, Colorado, September 9, 1926, at 10:00 o'clock A. M., before representatives of both commissions.

The Pikes Peak Fuel Company, with mines at Pikeview, intervened in opposition to the complaint. At the hearing this intervener also filed a motion for continuance on the ground that it intended to file a complaint making similar allegations in respect of the rates from its mine to destinations on the Union

Pacific and the Chicago, Burlington and Quincy, and that the entire body of rates should be considered together. It is this intervener's position that if there is undue prejudice by reason of the adjustment of rates to Rock Island destinations, it is offset by the advantages enjoyed by mines in northern Colorado in respect of traffic to destinations on other lines. There is nothing to indicate lack of opportunity on the part of this intervener seasonably to have prepared and filed a complaint raising the issues on which it desired to rely. The motion for continuance of this proceeding was properly denied by the presiding commissioner.

The mines of what might be termed the component members of the complainant are served by the Colorado and Southern, the Union Pacific, and the Chicago, Burlington & Quincy, and the average distance from all mines to Denver is 23.7 miles. The rates assailed apply over these lines to Denver and/or Pullman and the Rock Island beyond. The alleged preferred mine at Pikeview is served by the Denver and Rio Grande Western and shipments therefrom move over that line to Colorado Springs and the Rock Island beyond. The rates hereinafter referred to are those on lump coal.

Hereinafter the various railroads mentioned will be referred to as follows:

The Atchison, Topeka and Santa Fe Railway Company as Santa Fe.

Chicago, Burlington & Quincy Railroad as the Burlington.

The Colorado and Southern Railway Company as the Colorado and Southern.

Union Pacific Railroad Company as the Union Pacific.

The Chicago, Rock Island and Pacific Railway Company as the Rock Island.

The Denver and Rio Grande Western Railroad Company as the Rio Grande.

Missouri Pacific Railroad Company as the Missouri Pacific.

The present rates in effect to Limon, Colorado, at which point traffic from the two fields meet, are as follows: Pikeview, $1.74,

Northern Colorado, $3.06 in connection with the Rock Island, $2.90 in connection with the Union Pacific when originating at points on the Colorado and Southern and/or the Burlington, and $2.45 when originating at points on the Union Pacific. The rates from Pikeview to points east of Limon in Colorado are on a graduated scale, viz: Genoa $1.86, Bovina $1.90, Arriba $1.92, Flagler $2.18, Seibert $2.24, Vona $2.29, Stratton $2.31, Bethune $2.42, Burlington $2.44 and Paconic $2.55, while the rates from northern Colorado to the same destination blanket from Genoa to Peconic at $3.10. The distance to Limon from Pikeview is 83 miles and from northern Colorado 114 miles, a difference of 31 miles between the two districts.

It appears, that since traffic from the two districts meets at Limon, the logical conclusion is to determine what, if any, difference should prevail at that point and to maintain the same rates relatively to all points east thereof in Colorado.

Complainant's exhibit shows the following distance scales in the surrounding territory (we have extended said scales for only the distances which are comparable with the distances involved in this proceeding).

KANSAS			TEXAS				OKLAHOMA		
			Interstate Traffic		Intrastate Traffic				
			Single Line	Joint Line	Single Line	Joint Line		Joint Line	
Miles	Rate		Rates	Rates	Rates	Rates	Miles	Coal	Slack Coal
5	80	5 and less	60	70	39	62	5	95	83
10	100	10 and over 5	60	70	39	62	10	95	83
15	110	20 and over 10	60	70	44	67	15	105	92
20	110	30 and over 20	60	70	49	71	20	105	92
25	110	40 and over 30	60	80	53	76	25	115	100
30	110	50 and over 40	70	100	61	84	30	115	100
35	110	60 and over 50	70	100	67	90	35	125	109
40	130	70 and over 60	70	100	73	96	40	125	109
45	140	80 and over 70	80	110	80	103	45	135	117
50	140	90 and over 80	100	110	87	109	50	135	117
55	140	100 and over 90	100	130	91	114	55	144	125
60	140	110 and over 100	100	130	96	118	60	144	125
65	170	120 and over 110	110	130	100	123	65	148	127
70	170	130 and over 120	110	130	105	128	70	148	127
75	180	140 and over 130	110	140	109	132	75	157	135
80	180	150 and over 140	130	140	115	138	80	157	135
85	180	160 and over 150	130	140	120	143	85	166	143
90	180	170 and over 160	130	140	125	147	90	166	143
100	200	180 and over 170	140	160	129	152	95	175	150
110	200	190 and over 180	140	160	134	156	100	175	150
115	200	200 and over 190	140	170	138	161	110	177	151

KANSAS		TEXAS				OKLAHOMA		
		Interstate Traffic		Intrastate Traffic				
		Single Line	Joint Line	Single Line	Joint Line		Joint Line	
Miles	Rate	Rates	Rates	Rates	Rates	Miles	Coal	Slack Coal
120	200					120	184	157
125	210					130	186	158
130	210					140	193	164
135	220					150	200	170
140	220					160	206	175
145	220					170	212	180
150	220					180	218	185
155	220					190	224	190
160	220					200	230	196
165	230							
170	230							
175	230							
180	240							
185	240							
190	240							
195	240							
200	250							

NORTH DAKOTA

Distances	Rate
30 miles and less	73
40 miles and over 30	85
50 miles and over 40	97
60 miles and over 50	97
70 miles and over 60	97
80 miles and over 70	109
90 miles and over 80	109
100 miles and over 90	122
110 miles and over 100	122
120 miles and over 110	122
130 miles and over 120	122
140 miles and over 130	134
150 miles and over 140	134
160 miles and over 150	134
170 miles and over 160	146
180 miles and over 170	158
190 miles and over 180	158
200 miles and over 190	170

HOLMES AND HALLOWELL SCALE

Distances	Rate
30 miles and less	86
40 miles and over 30	94
50 miles and over 40	102
60 miles and over 50	111
70 miles and over 60	119
80 miles and over 70	128
90 miles and over 80	136
100 miles and over 90	145
110 miles and over 100	153
120 miles and over 110	160
130 miles and over 120	168
140 miles and over 130	175
150 miles and over 140	182
160 miles and over 150	190
170 miles and over 160	197
180 miles and over 170	204
190 miles and over 180	211
200 miles and over 190	219

The Holmes and Hallowell scale was prescribed by the Interstate Commerce Commission for application from the head of the lakes to destinations in Minnesota, North Dakota and South Dakota, 69 I. C. C. 11.

The record does not show the conditions surrounding the establishment of these State scales or whether they actually move the traffic in the various States. However, generally speaking, carriers' tariffs carry an alternative application, whereby if the rates named in one section of the tariff are lower than the rates named in another section, the lower rates will apply, from which we draw the conclusion that if these rates do not move the traffic, it is moved at rates even lower than the ones shown in the scales.

The average per mile of road density of traffic for the year 1924 is as follows: Kansas, 941,849; Texas, 896,631; Oklahoma, 879,178; North Dakota, 674,046, and Colorado, 709,200. With the exception of North Dakota the traffic density in these States exceed that of Colorado.

In cases 244 and 250, decision 611, decided June 4, 1923, this Commission prescribed rates from Walsenburg, Canon City and Trinidad districts to destinations on all lines in Colorado east of Denver, Colorado Springs, Pueblo and Trinidad. In that case the following rates were prescribed as reasonable maximum rates on lump coal:

ROCK ISLAND.

Destination	Walsenburg-Canon City	Trinidad
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.

Nepesta	1.76	2.00
Sugar City	2.00	2.25
Arlington	2.20	2.45
Haswell	2.30	2.55

SANTA FE.

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

Operators in northern Colorado testify that the coals produced in that district vary greatly in quality. That produced in Boulder county is sub-bituminous and commands a price of $1.00 or $1.25 per ton higher than that produced in Weld county. That from the Lafayette district, also sub-bituminous, brings about 50 to 60 cents per ton more than that from Weld county. The latter is a lignite and the testimony shows that it is the only coal produced in northern Colorado which is at all comparable with that produced at Pikeview. Witnesses for complainants testify that the high-grade sub-bituminous coals produced in northern Colorado are not sufficient to supply the local demand and that the Weld county coal is the only coal available for shipment to points other than Denver and northern Colorado. They testify further that in order to sell this coal in competition with Pikeview they must meet the delivered prices made by that mine, and that any difference in the freight rates must be absorbed by them.

On the other hand, a witness for the Pikes Peak Company testified that the Pikeview coal had never been a factor in the trade at the Missouri River markets until it was given a differential under northern Colorado by the Rock Island; that the Pikeview mine could not ship to destinations on the Burlington and Union Pacific where northern Colorado mines enjoy a rate advantage; that the Rock Island affords it the only destination territory to the east where it can successfully compete; that even in this territory its sales have fallen off from 20,000 tons in 1923 to 12,000 in 1925; and that in 1925 northern Colorado mines shipped 108 cars to destinations on the Rock Island as compared with 404 cars from Pikeview.

Exhibits of record show that in December, 1925, and January, 1926, the price delivered in Denver of coals from northern Colorado and from Pikeview mines were as follows: Grant mine (Weld county) lump, $5.70 for ordinary and $6.20 for specially prepared; Puritan mine (Weld county) lump, $6.50; Pikeview, $6.20 and $6.75. Northern Colorado mines enjoy a rate advan-

tage of 25 cents at Denver and complainants urge that the ability to sell Pikeview coal in Denver at prices as high as or higher than that obtained for northern Colorado coal in the face of a rate disadvantage, refutes the testimony of its witness in respect of the situation along the Rock Island. The witness for the Pikes Peak Company testified that the yard in Denver was established in an endeavor to find a market to make up for the lost demand in other directions and that business since 1923 has shown a steady decline. In 1923 the movement to Denver was 23,221 tons as compared with 15,064 tons in 1924 and 13,515 tons in 1925.

The Rock Island contends that the rates from Pikeview are depressed and are less than reasonable maxim, made purposely so in order to afford the Pikeview mine an opportunity to dispose of some of its coal to Rock Island destinations. However, there is nothing of record which substantiates the contention that these intrastate rates are depressed or subnormal.

As heretofore shown the routes from the two districts meet at Limon, so that any difference in transportation conditions must exist, if at all, west of that point. The Rock Island makes no serious contention that transportation conditions are not substantially similar from Denver to Limon as from Colorado Springs to Limon. Coal from the Pikeview mine moves less than five miles into Colorado Springs before tender to the Rock Island. The average distance from mines in northern Colorado to Denver is 23.7 miles.

From the record we find that the present rates from Pikeview to destinations on the Chicago, Rock Island and Pacific Railway, Limon and east thereof to the State line are reasonable maximum rates and that the rates from the so-called "Northern Colorado fields" to Limon are unreasonable, excessive and prejudicial to the extent that they exceed a rate of $2.15, and to destinations east thereof they are unreasonable, excessive and prejudicial to the extent that they exceed the present Pikeview rates by more than 40 cents.

ORDER.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and having, on the date hereof, 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 above named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before July 16, 1928, and thereafter to abstain from publishing, demanding or collecting rates for the transportation of coal, in carloads, from and to points specified in the succeeding paragraph hereof which shall exceed the rates therein prescribed.

IT IS FURTHER ORDERED, That the above named defendants according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before July 16, 1928, upon notice to this Commission and to the general public by not less than thirty days' 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 coal, in carloads, from mines in the northern Colorado district to Limon, Colorado, on the Rock Island, a rate of $2.15 and to destinations on the Rock Island east thereof, rates which shall not exceed by more than 40 cents per ton of 2,000 pounds the present rates on coal, in carloads, from the mine at Pikeview, Colorado, to the same destination.

AND IT IS FURTHER ORDERED, That this order shall continue in force until the further order of the Commission.

THE COLORADO AND NEW MEXICO COAL OPERATORS' ASSOCIATION

v.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *et al.*

[Case No. 296. Decision No. 1934.]

Rates.

Previous order modified by excluding Limon as point to which rates are prescribed.

[October 2, 1928.]

Appearances: Albert L. Vogl and F. O. Sandstrom, 806 Patterson Building, Denver, Colorado, for complainant; A. B. Enoch, Room 1025 La Salle Street Station, Chicago, Illinois; J. C. La Coste, Kansas City, Missouri; D. Edgar Wilson, Denver, Colorado, for The Chicago, Rock Island and Pacific Railway Company; J. Q. Dier, Denver, Colorado, for The Colorado and Southern Railway Company and Chicago, Burlington & Quincy Railroad Company; Henry C. Vidal and J. C. Bailey, Colorado Springs, Colorado, for Pikes Peak Fuel Company, interveners.

STATEMENT.

By the **Commission**: On May 31, 1928, the Commission entered an order in the above entitled case. Thereafter and on June 14, 1928, the rail carrier, defendants herein, filed a petition for rehearing, setting forth eight grounds therefor. The only grounds that we deem pertinent and of any merit are those numbered one and eight, setting forth that the findings and order of this Commission are erroneous and illegal in that this Commission went outside of the issue in this case by including rates to Limon, Colorado, and that the rates to Limon from Pikeview and from the northern fields, respectively, were not involved or in issue in this proceeding. It is true that the rates from Limon, Colorado, for some reason unknown to the Commission, were not complained of. However, Limon is in practically the same territory and is similarly affected as are the other points involved herein. A modified order will be entered elimi-

nating rates to Limon, Colorado. However, in publishing out the rates prescribed in the original order the rates to Limon should not exceed the rates to the next more distant point, namely, Genoa, Colorado. Unless the rates to Genoa are held as a maximum it would only result in another complaint, the result of which would be obvious.

MODIFIED ORDER.

IT IS THEREFORE ORDERED, That the above named defendant, according as they participate in the transportation, be, and they are hereby, notified and required to put in effect on or before November 10, 1928, the rates prescribed by this Commission in its Decision No. 1808, dated May 31, 1928, except the rates to Limon, Colorado.

IT IS FURTHER ORDERED, That this order shall continue in force until the further order of the Commission, and that the petition of the defendants for rehearing is hereby denied.

RE COLORADO CAB COMPANY, *et al.*

[Applications Nos. 894, 903, 917, 919 and 1073. Decision No. 1810.]

Certificates of convenience and necessity—Finding of public convenience and necessity must precede issuance.

1. Before issuing a certificate of convenience and necessity the Commission must find that the public convenience and necessity requires it.

Monopoly and competition—Automobiles—Duplication of service—Inadequacy of present service—Opportunity to correct.

2. Authorities cited with approval in support of the proposition that before authority will be granted to duplicate motor vehicle operations inadequacy of existing operations must be shown, and that present operators must be given opportunity to make their service adequate.

Monopoly and competition—Purpose of protecting existing carriers—Benefit to public.

3. The purpose of protecting existing carriers is not to favor them but to benefit the public.

Service—Rates—Order affecting—Result in permanent net loss on entire operation.

4. An order requiring additional service or a reduction in rates could not be made if it appears that the result thereof would cause a permanent net loss on entire operation.

Monopoly and competition—Service—Rates—Increase in competition—Effect.

5. The more carriers there are dividing the business in a certain territory, the less probability there is of the Commission regulating service and rates for the public benefit.

Service—Misrepresentation about trips not authorized to be made—Revocation of certificate.

6. Doubt was expressed whether motor vehicle carriers should be permitted to hold their certificates if they continue to misrepresent facts about trips they are not authorized to make.

Certificates of convenience and necessity—Considerations affecting question of issuance—Public not private welfare.

7. In passing upon an application for a certificate of convenience and necessity, action must be determined by the public welfare, not the private benefit or advantage that may accrue to any particular person or community.

[June 7, 1928.]

Appearances: Walter E. Schwed, Esq., Denver, Colorado, attorney for The Colorado Cab Company; A. J. Gould, Esq., Denver, Colorado, attorney for Charles W. Davis; Erskine R. Myer, Esq., Denver, Colorado, attorney for Michael P. Masterson; Charles H. Small, Esq., Denver, Colorado, attorney for The Burke Taxicab Line, Inc., and C. W. Whitney and L. H. Perry; D. Edgar Wilson, Esq., Denver, Colorado, attorney for The Rocky Mountain Motor Company and The Rocky Mountain Parks Transportation Company; Sam Feldman, Denver, Colorado, for The Champa 3 Auto Livery Company.

STATEMENT.

By the **Commission**: On May 12, 1927, The Colorado Cab Company, a corporation, filed its application No. 894, for a certificate of public convenience and necessity authorizing operation between Denver and Estes Park for the transportation of passengers on one-way tickets and for the transportation of passengers from Denver to Lookout Mountain and return over the same route, and from Denver to Lookout Mountain and return

via the Mt. Vernon Canon. Thereafter the application was amended so far as the Estes Park operation is concerned by changing the prayer so as to ask for authority to sell round-trip tickets with stop-over privileges in Estes Park. The applicant offers "to make said Estes Park trip with one or more passengers at any time between 7 A. M. and 7 P. M. upon receiving one hour's notice and requiring your petitioner, during the season from October 1 to June 1, to make said Estes Park trip with four or more passengers at any time when the roads are open between 7 A. M. and 7 P. M., upon receiving one hour's notice."

On May 19, 1927, Charles W. Davis, doing business as Davis Sightseeing Service, filed his application for a certificate of public convenience and necessity authorizing the transportation of passengers between the points and over the routes in the State of Colorado as follows:

"Denver to Golden via South Golden road to Lookout Mountain; Returning via Mt. Vernon Canon and South Golden road to Denver or vice versa."

And that petitioner be granted the privilege of selling round-trip tickets in Denver for the trip to Estes Park with a fifteen day stop-over privilege. Thereafter he filed an amended prayer changing the stop-over time to an indefinite one to be fixed by the Commission. In other respects the amendment is the same as that in Application No. 894.

On June 1, 1927, Michael P. Masterson, doing business under the name and style of The Masterson Auto Service Company, filed his application for a certificate of public convenience and necessity for the transportation of passengers from Denver to Estes Park, from Denver to Lookout Mountain and return by the same route, and from Denver to Lookout Mountain and return via Mt. Vernon Canon. Thereafter he filed an amended prayer substantially the same as that filed in Application No. 894.

On June 6, 1927, The Burke Taxicab Line, Inc., a corporation, filed its application for a certificate of public convenience and necessity authorizing the transportation of passengers on one-way trips between Denver and Estes Park. It thereafter filed an amendment by which it asks also to be authorized to sell

round-trip tickets with reasonable stop-over privileges. In other respects the amendment is substantially the same as that in Application No. 894.

On March 19, 1928, C. W. Whitney and L. H. Perry, co-partners, doing business under the firm name and style of Whitney and Perry Sightseeing Company, filed an application for a certificate of public convenience and necessity authorizing the transportation of passengers on one-way trips between Denver and Estes Park. Thereafter the applicants filed an amendment asking also that they be allowed to sell round-trip tickets with reasonable stop-over privileges. In other respects the amendment as to the hours of operation, the number of passengers required, etc., during definite portions of the year is substantially the same as that in Application No. 894.

Objections and protests were made to all of the above named applications by The Champa 3 Auto Livery Company, The Rocky Mountain Motor Company, The Rocky Mountain Parks Transportation Company and The Denver Cab Company, all corporations. The cases were all set down for hearing on April 13, 1928, were by agreement consolidated for hearing, and were heard on that day and the following day in the Hearing Room of the Commission. Thereafter briefs were filed.

All of the applicants have heretofore been granted certificates authorizing the transportation of sightseers on round-trips completed in one day to Estes Park, and to transport passengers via Lookout Mountain on longer trips than those which they now ask to add to their schedules. The reasons given for the short trips, to and from Lookout Mountain, are that frequently tourists and others passing through Denver have time for a very short trip and would like to make this trip because of lack of time for a longer one.

After careful consideration of the evidence the Commission is of the opinion and so finds that the public convenience and necessity requires the transporting by the applicants of passengers on round-trips from Denver to Lookout Mountain and return on the routes specified in their applications.

A more serious question arises with reference to the transpor-

tation of passengers by the applicants one way to Estes Park or on round-trip tickets with stop-over privileges there.

When the applicants herein were originally before the Commission asking for certificates they proposed to do no one-way business between Denver and Estes Park or any round-trip business with stop-over privilege because, as they stated, they preferred to keep the passengers by bringing them back the same day and taking them on other trips after their return to Denver. The Commission issued two certificates, one for regular scheduled service throughout the year, to The Rocky Mountain Parks Transportation Company, the other to The Champa 3 Auto Livery Company, authorizing the operation on a regular twice daily schedule between Denver and Estes Park from June 1 to September 15, inclusive. It is admitted that there is no need for an additional scheduled service.

Before considering whether the record before us warrants granting authority to the applicants to transport passengers from Denver to Estes Park on one-way trips or round-trips with stop-over privileges, we will refer to the considerations and the law governing this and other commissions. As was stated by the Ohio Commission *in re* J. B. McLain, *et al.*, P. U. R. 1924-B, 188, 189, "we shall administer the law as we find it." Our jurisdiction to grant certificates is, and has been, based on the requirement that we must find that the public convenience and necessity requires such issuance. We think the applicants fully appreciate this.

In *Re* Rhoads, P. U. R. 1924-C, 303, 308-309, this Commission said in the course of its decision:

"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 interests 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."

The Commission said also in that case:

"However, in this proceeding, the public is not complaining of the service being rendered by the transportation company."

We might add at this point that in this case none of the public who were not interested either directly or indirectly in a financial way in the proposed operations of the applicants, except one person, complained of the service of the existing certificate holders. That complaint was based upon a driver for one of the certificate holders forgetting to pick up one certain passenger.

In *Re* Fay Elliott, P. U. R. 1926-A, 380, this Commission said, 382:

"* * * that to permit more motor truck carriers to operate than is reasonably necessary to properly take care of the business to be handled over said line of route will deprive said protestant of the benefit of his certificate already granted by this Commission, and to admit several to this field of activity will tend to decrease the volume of business for each utility, and tend to make the overhead expense and other expense of each utility heavier, even to the point of being burdensome, and that it would be only a matter of time until the weakest and less able financially to withstand the pressure of little or no business must abandon their activities as public utilities; that the protestant is at this time adequately prepared financially and with equipment to take care of all business offered to him in the said territory, and that to permit competition would further divide the business now adequately handled."

In the case of Greeley Transportation Company, Decision No. 853, this Commission in refusing an application for a certificate said in the course of its opinion:

"The general principle of public utility regulation protecting the utility which is rendering to the public a service reasonably adequate and practically sufficient against injustice 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."

The decision in the case of The Champa 3 Auto Livery Company, Application No. 545, Decision No. 1106, sets forth the public convenience and necessity for the sightseeing motor vehicle carrier operations from Denver to Estes Park. In that decision the Commission sets forth its reasons why only an operator giving regular scheduled service should be permitted to sell one-way tickets to and from Estes Park. The Commission in that case quoted at some length as follows from an opinion by the Supreme Court of Kansas in the case of Kansas Gas and Electric Company v. Public Service Commission of Kansas, 251 Pac. 1097-1099:

"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 attendant 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."

We held in the case of *Re* Edd D. Harriss, P. U. R. 1927-E, 730, 731:

"In order to make out a case of public convenience and necessity of a motor vehicle system for the transportation of freight between Fowler and Pueblo, Colorado, where the Commission has already granted one certificate, it is necessary to prove that the public convenience and necessity requires an additional operation and that the present operation is not sufficient to meet all public demands."

The decisions by other Commissions, generally sustained by the courts, are practically unanimously in accord with the view which this Commission has taken. The Ohio Supreme Court in Columbus D. & M. Elec. Co. v. Public Utilities Commission of Ohio, 155 Northeastern 646, P. U. R. 1927-D, 773, 775, held that while it would seem the record would have warranted the Commission in finding the service between two certain points inadequate, yet—"had it so found, it would have been its duty, before granting an additional certificate over such route, and serving substantially the same territory, to have given the existing mo-

tor transportation company a reasonable time to make its service adequate." The same was held by the South Dakota Commission in *Re* J. L. Barker, 1927-B, 163, 170, in which the Commission said: "And that in the event existing service is shown to be inadequate, the existing carrier should, under the law, be given an opportunity to furnish adequate service."

In its opinion in *Re* United Stages, *et al.*, P. U. R. 1925-A, 688, 696, the California Commission said:

"The primary interest of the citizens of Santa Monica and the duty of the Commission lie in the safeguarding of adequate provision for the existing operations of transportation companies now operating in that community. Anything that would tend to jeopardize the existing service, or that would tend to prevent such transportation companies from adequately meeting the full growing demands of such service would not meet the requirements of public convenience and necessity."

The Maine Commission in *Re* Maine Motor Coaches, Inc., P. U. R. 1926-B, 545, 553-554, stated:

"We feel that the principle of regulated monopoly so generally adopted throughout the nation, and particularly in our own State, by restriction upon competition as expressed in legislative enactment, with respect to other branches of public service applies with equal force to those of our citizens who have established such business, with the consent of the State, expressed through this Commission, of transporting passengers over regular routes upon the highways of this State between regular termini for hire."

The Commission then quoted Hon. Herbert Hoover, Secretary of Commerce, as follows:

"It seems to me there are two final tests of this question. The first is: Is the service adequate and is the industry progressive in its provision for future need?

"The second is: Are the rates reasonable in themselves, and are the profits taken by the industry upon the capital invested extortionate?"

The Commission then points out, on page 555:

"This will make for high-grade equipment, a jealous guarding of the rights thus obtained, while the opposite course would be fraught with such uncertainty as to result in the use of deteriorated equipment and a half-hearted response to the public need of service. Certainty in any business is an economic bulwark. A feeling of insecurity cannot contribute to the attainment of a high standard by the ordinary man in any endeavor of life."

Toward the end of the opinion the Maine Commission cites cases from some twenty-seven jurisdictions, including Colorado, in support of its views.

The New Hampshire Commission in *Re* Jos. Cavaretta, P. U. R. 1925-C, 292, 293, held:

"It is not in the public interest to have two bus lines running over the same route in competition."

The Virginia Court of Appeals in Norfolk Southern Railroad Company v. Commonwealth, 126 S. E. 82, P. U. R. 1925-C, 555, 563, held:

"Existing transportation systems should be protected so far as compatible with the public interest. There should be no unreasonable or unnecessary duplication of service, to the point that efficient service is made impossible."

It is obvious that the purpose of protecting the existing certificate holders is not for the ultimate purpose of favoring them. The ultimate purpose is the protection and benefit of the public. As was stated by the Indiana Commission in *Re* Highway Transportation Company, P. U. R. 1926-D, 594, 602:

"Not the carriers but the public weal must be the dominant consideration."

The duty imposed upon this Commission by the legislature to find the public convenience and necessity, for each motor vehicle carrier operation, would obviously be intolerable and indefensible had not the legislature conferred upon the Commission the power of regulating both rates and service. All regulation must be based upon reason. An order requiring additional service by an authorized carrier when it appears that he cannot render such service, except at a permanent net loss on his entire oper-

ation, could not be sustained. The same is true of a reduction of his rates. Therefore, the more carriers there are dividing the business between them in a certain territory, the less possibility there is of this Commission regulating the service and rates for the benefit of the public.

We hoped, in the hearing of these cases, to have some offer made by the two authorized schedule carriers to reduce their rates on Estes Park business. While no such offer was made, the power of the Commission over those rates undoubtedly exists and would be exercised upon a proper record.

Now, as to the grounds on which the applicants in these cases contend that the public convenience and necessity requires the certificates sought. One of the grounds is that one of the authorized carriers, The Rocky Mountain Parks Transportation Company, transports its passengers in large busses and that the public does not like to ride in these busses. Here it might be repeated that most, if not all, of the testimony for the applicants as to the inadequacy of the service of the existing certificate holders was given by themselves. We have never heard any complaint from the public either in the hearing of these cases or otherwise, about riding in busses. Moreover, one of the existing certificate holders transports his guests in touring cars.

The applicants contend that frequently throughout the day and at various hours thereof, people desire to go to the Park and that, therefore, the scheduled service of the certificate holders does not meet the needs of the public. The Champa 3 Auto Livery Company throughout the summer season from June 1 to September 15, inclusive, makes regular trips to the Park, leaving Denver at 8:30 A. M. and 2:30 P. M.; The Rocky Mountain Parks Transportation Company's schedule from Denver to Estes Park in 1927 was as follows:

Lv. Denver 7:45 a. m. going via Big Thompson Canon during the period of June 1 to October 1.

Lv. Denver 2 p. m. going via the North St. Vrain, the year around.

Lv. Denver 8 a. m. going via the South St. Vrain, during the period June 15 to September 15.

According to its schedule now on file with this Commission it will operate this year on an additional schedule from June 1 to

September 30, leaving Denver at 3:15 P. M. The uncontradicted testimony of its manager is that at the regular charge it will at any time transport four or more persons in a private automobile to Estes Park over any of the routes preferred. The tariff on file with the Commission covers such operation during any time of the year when the roads are open.

The applicants in their applications state that they will transport one passenger at the regular rate during the summer season. However, on the stand each and all of the applicants or their officers refused to state that he or his company would transport one passenger, but testified that it would be seen that the passenger is taken. In other words, the plan is that if one man has one passenger he will not feel justified in making the trip to the Park. He will get in touch with some of the other applicants and between them they will try to make up a party which will justify one man's going. How long it will take in any given case to get these plans all made and the customers together is not, of course, certain. We believe that such a plan tends to incommode and inconvenience the passenger and that he would be much better off if he could go to a place from which he knows he will be taken at a given time without waiting for a number of carriers to try to get together enough passengers to justify one of them making the trip. Suppose a passenger has gone to the Park and stopped over indefinitely. On a rainy day, when none of the applicants herein might have no occasion otherwise to go to the park, he wants to return. He goes to the depot and presents himself. None of the applicants are there to transport him. It would seem the result will be that he will be turned over to one of the authorized carriers who have to and do operate whether the day is fair or foul.

The Rocky Mountain Parks Transportation Company is rendering daily service not only during the summer season but throughout the year, via both Longmont and Loveland. It is true it has the mail contract from Longmont to the Park but it has no contract from Loveland thereto. The applicants herein will not, during the winter season, make the trip unless they have at least four passengers.

The applicants contend also that they stop and allow their passengers to take pictures. The manager of The Rocky Mountain Parks Transportation Company testified also that their drivers have authority to stop and allow their passengers to take pictures. We have no doubt the same is true of the drivers for The Champa 3 Auto Livery Company.

The applicants testified that the trip via the North St. Vrain is far less attractive than that via the South St. Vrain and the Big Thompson Canon and that they will follow any one of the routes which the majority of their passengers desire. Suppose one of the applicants has five passengers and that three of them are in a hurry to get to the Park and should, therefore, ask him to go by the North St. Vrain. He would thus be compelled to force the other two to forego seeing the scenery on either of the other two routes. The operator might have the same number of passengers on the return trip, three of whom had come up via the South St. Vrain and two via Big Thompson Canon. The three would naturally compel the other two to go back over a route which they had followed coming up.

It thus appears, and we so find, that there is already available to the sightseeing and traveling public going to Estes Park reasonably adequate service with the certainty that they may go by one of three routes any day they so desire.

The contention that has given us most concern is that by limiting the number of carriers who may transport passengers one way or on round-trips with stop-over privileges, has resulted in keeping a large number of people from visiting the Park and has hurt the business of people in the Park, including the hotel proprietors and those renting cabins. The way this is brought about is by the applicants, as they frankly admit, telling the people who approach them about the taking of the Estes Park trip, that it is a long, dusty road with nothing to see and that they had better go somewhere where they can see some real scenery. The Commission was really surprised with the boldness with which the applicants admit that they misrepresent the facts, al-

though they are now holding certificates from this Commission, and are thus held out to the public by the State as being reliable operators on whom this Commission has put its stamp of approval. We frankly admit that it would be proper for the applicants to try to interest prospective customers in only a one-day round-trip to the Park or in other trips which they are authorized to make, but we sincerely doubt whether, if the applicants continue to make such representations as they frankly admit making in the past, they are entitled to continue to hold any certificate of public convenience and necessity whatever.

Two hotel proprietors out of a large number in the Park, appeared and testified that their business had dropped off considerably as a result of the applicants and others not having authority to do more than make the round-trip trips in one day. One or two owners and renters of cottages testified in support of the applications. The testimony shows without a doubt that the business in the Estes Park region continued to grow up to about 1920 and that since it not only has not grown, but has fallen off. It was long after 1920 before the Commission took any action with reference to the operations to and from the Park. We are inclined to believe that while the misrepresentations by the applicants may have kept some business from the Park which otherwise would have gone there, the amount thereof is greatly overestimated.

The Commission regrets that its action has had any injurious effect upon any one individual, whether it be hotel proprietors or the applicants themselves, but after considering all of the advantages of scheduled operations restricted in such a manner as to give the Commission power to regulate rates and service, the advantages to the public far outweigh whatever disadvantages there may be. The operation of any law is inclined to hurt some few people in a financial way. The gasoline dealers, selling gas and oil to the applicants, would doubtless make a little more money if the applicants could run to Estes Park in the manner sought. Restrictions on building permits owing to zoning laws has injured many people in a financial way. The opera-

tion of numerous other laws could be cited. We adopt the language of the Maine Commission in *Re* Maine Motor Coaches, Inc., *supra*:

"The question ought to be determined upon the basis of whether the rights, welfare, and interest of the general public will be advanced by the prosecution of the enterprise and not upon the private benefit or advantage that may accrue to any particular person or community." (554)

Section 2946, C. L. 1921, provides in part as follows:

"(a) 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 requires or will require such construction."

Some of the applicants contended that they were operating their motor vehicle system prior to July 16, 1917, the date on which said statutory provision became effective, and that prior to that time they were making one-way trips and round-trips with stop-over privileges to Estes Park; that, therefore, they having filed their applications before the new law, known as House Bill 430, became effective, they are entitled to certificates of public convenience and necessity authorizing the making of such trips irrespective of whether the public convenience and necessity so requires. Assuming that they are right in their contentions as to the law, the evidence as to their operations to the Park prior to 1917 was meager, unsatisfactory, did not show any operations as now proposed by the applicants and, in the opinion of the Commission, was insufficient to warrant the Commission in finding that they have been making such trips prior to July 16, 1917.

After careful consideration of all the evidence the Commission is of the opinion and so finds that the public convenience and necessity does not require the issuance to the applicants of certificates authorizing the transporting of passengers to Estes Park on one-way trips or on round-trips with stop-over privileges.

ORDER.

IT IS THEREFORE ORDERED, That the applications of each and all of the applicants herein, The Colorado Cab Company, Charles W. Davis, doing business as Davis Sightseeing Service, Michael P. Masterson, doing business as The Masterson Auto Service Company, The Burke Taxicab Line, Inc., and C. W. Whitney and L. H. Perry, co-partners, doing business under the firm name and style of Whitney & Perry Sightseeing Company, so far as they relate to the one-way operation to Estes Park or the round-trip operation thereto with a stop-over privilege, be, and they are hereby, denied.

IT IS FURTHER ORDERED, That the applications of the applicants herein so far as they ask for authority to transport passengers on round-trips from Denver to Lookout Mountain and return in the ways and manners specified in their applications, be, and the same are hereby, granted, 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 quantity of equipment to be used in this operation shall be limited to such as has heretofore been authorized by this Commission.

IT IS FURTHER ORDERED, That the applicants herein shall within a period of fifteen days from the date hereof, file tariffs of rates, rules and regulations as required by the Rules and Regulations of the Commission Governing Motor Vehicle Carriers.

RE M. L. MILLER, *et al.*

[Applications Nos. 1053 and 1055. Decision No. 1815.]

Certificates of convenience and necessity—Choice of applicants—Considerations controlling.

Certificate of public convenience and necessity issued to the one of two applicants who already had equipment and whose financial condition was stronger, and whose proposed rates were lower.

[June 12, 1928.]

Appearances: John M. Boyle, Esq., Fairplay, Colorado, at-

torney for applicant, M. L. Miller; Robinson & Robinson, Denver, Colorado, attorneys for applicant, Richard A. Spurlock.

STATEMENT.

By the **Commission**: On February 10, 1928, M. L. Miller, applicant in No. 1053, filed his application with this Commission for a certificate of public convenience and necessity authorizing him to operate as a motor vehicle carrier for the transportation of passengers, freight, merchandise, baggage and express between Alma, Fairplay, Garo and Como, Colorado, and intermediate points. No protests were filed against this application.

On February 14, 1928, Richard A. Spurlock, applicant in No. 1055, filed his application with this Commission for a certificate of public convenience and necessity authorizing him to operate as a motor vehicle carrier for the transportation of passengers and express between Como and Alma, Colorado, and intermediate points. No protests were filed against this application.

These applications were set down for hearing at the Hearing Room of the Commission, State Office Building, Denver, Colorado, on June 8, 1928, at which time evidence in support of the same was received. That there is a public convenience and necessity for motor vehicle transportation of passengers, freight and express is unquestioned. This is mainly because the Commission, in an order dated the 29th day of May, 1928, authorized The Colorado and Southern Railway Company to curtail its mixed train service between Como, Fairplay and Alma, effective June 15, 1928, requiring the rail carrier to only operate twice weekly. The necessity, therefore, of motor vehicle operation in the territory involved is apparent.

A more difficult question for the Commission to determine is to whom this certificate should be issued. M. L. Miller filed his application on February 10, 1928, Richard A. Spurlock filed his application on February 14, 1928. Miller is therefore first in time. The testimony shows that Miller for the past four years has been in the trucking business in and around Alma, Colorado, and prior to that time had operated a passenger sightseeing serv-

ice in the Pikes Peak Region. Spurlock has been transporting the mail from the depot to the postoffice at Fairplay for the past eight years, and for a short time operated in the Pikes Peak Region in the transportation of sightseeing passengers. Both applicants have had considerable experience in motor vehicle transportation. Miller's equipment consists of two enclosed cab Reo Speed Wagon trucks, 1¼-ton capacity, and one Studebaker Sedan and one Studebaker 7-passenger touring car. The investment in this equipment is approximately $5,000. Spurlock has no equipment at the present time, but filed an amendment to his application, which was allowed, in which he proposes to purchase, if granted a certificate, one 1-ton truck, with closed cab of sufficient capacity to accommodate two passengers, and one closed 5-passenger automobile. The testimony shows that this investment would be approximately $2,500.

The personal standing of both applicants in the community is very good. The financial ability of Miller amounts to approximately $65,000, while the financial ability of Spurlock amounts to approximately $6,000..

Miller proposes to operate his passenger service at approximately the same rates as are now charged by the rail carrier, in some instances a little lower and some a little higher. Spurlock's proposed passenger rates are substantially higher than those offered by Miller.

The Commission after a careful consideration of all the facts and circumstances is of the opinion that because Miller was first in time, now has his equipment ready to serve, and his financial dependability is considerably greater than Spurlock, that he should be given the certificate. The Commission does this with some reluctance, because it recognizes that Spurlock is also a reliable man. The evidence, however, is clear that the public convenience and necessity can only support one motor vehicle carrier operation in the territory involved.

Miller proposes to take care of the territory around Garo, Colorado, having made arrangements with one W. A. Clevenger, which arrangement will be only temporary, until such time as

Clevenger can establish a route between Hartzel and Fairplay. No such proposal is made by Spurlock.

The Commission, after a careful consideration of the evidence, is of the opinion, and so finds, that the public convenience and necessity requires the proposed motor vehicle carrier system for the transportation of passengers, freight, merchandise, baggage and express by the applicant M. L. Miller between Alma, Fairplay, Garo and Como, Colorado, and intermediate points.

The Commission further finds that the application of Richard A. Spurlock should be denied.

ORDER.

IT IS THEREFORE ORDERED, That the public convenience and necessity requires the proposed motor vehicle carrier system for the transportation of passengers, freight, merchandise, baggage and express by the applicant, M. L. Miller, between Alma, Fairplay, Garo and Como, Colorado, and intermediate points, 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 application of Richard A. Spurlock, No. 1055, be, and the same is hereby, denied.

IT IS FURTHER ORDERED, That the applicant, M. L. Miller, shall file tariffs of rates, rules and regulations and time schedules as required by the Rules and Regulations of this Commission covering motor vehicle carriers, within a period not to exceed twenty days from the date hereof.

IT IS FURTHER ORDERED, That the applicant, M. L. Miller, shall operate such motor vehicle carrier system according to the schedule filed with this Commission except when prevented from so doing by the Act of God, the public enemy or unusual or 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 MID-WEST TRANSIT COMPANY COMPANY, *et al.*

[Applications No. 698 and 950. Decision No. 1816.]

Certificate of convenience and necessity—Automobiles—Applicant violated injunction to cease and desist—Operation through dummy—Effect on application.

1. The Commission will not issue a certificate of convenience and necessity to a corporation, which after being denied a certificate and ordered by an injunction to cease and desist continued to operate through an individual who was a mere dummy.

Certificates of convenience and necessity—Automobiles—Considerations bearing upon question of issuance.

2. In passing upon an application for a certificate of public convenience and necessity the Commission must take into consideration the needs of the public and the good faith of the operator as well as violation of the statute by the operator.

Certificates of convenience and necessity—Automobiles—Ownership of stock of applicant by one who had violated court order to cease and desist—Disregarding corporate entity.

3. The fact that one who has violated an injunction to cease and desist from operating as a motor vehicle operator owns a majority of the stock of a corporation is no ground for denying a certificate to the corporation, the legal entity being distinct from the stockholder.

[June 16, 1928.]

Appearances: D. A. Maloney, Esq., and Frank J. Mannix, Esq., Denver, Colorado, attorneys for applicant in Application No. 698; J. G. Scott, Esq., Denver, Colorado, attorney for applicant in Application No. 950; Thos. R. Woodrow, Esq., Denver, Colorado, attorney for The Denver and Rio Grande Western Railroad Company, protestant; J. Q. Dier, Esq., Denver, Colorado, attorney for The Colorado and Southern Railway Company, protestant; Erl H. Ellis, Solicitor for Colorado, The Atchison, Topeka and Santa Fe Railway Company, protestant; Arthur E. Aldrich, Esq., Denver, Colorado, attorney for Consolidated Truck Line, protestant.

STATEMENT.

By the **Commission**: On June 8, 1926, The Mid-West Transit Company, hereinafter referred to as The Mid-West, filed an application for a certificate of public convenience and necessity au-

thorizing operation of a motor vehicle system for the transportation of freight between Denver and Pueblo and intermediate points. Protests against this application were filed by The Atchison, Topeka and Santa Fe Railway Company, The Denver and Rio Grande Western Railroad Company, White Motor Express Company, American Railway Express Company and The Colorado and Southern Railway Company.

On March 7, 1927, the Commission entered an order in The Mid-West's application denying the certificate. In this order the Commission stated that applicant introduced some testimony tending to show public convenience and necessity, but that the showing made was not sufficient to convince it that the public is demanding this service. On March 11, 1927, The Mid-West filed a motion for rehearing. On August 25, 1927, the Commission issued an order granting a rehearing.

This application was set down for rehearing on Tuesday, November 8, 1927, in the Court House, Pueblo, Colorado, and on Wednesday, November 9, 1927, in the City Hall, Colorado Springs, Colorado, at both of which times further testimony in support of and in opposition thereto was received.

On August 6, 1927, the White Motor Express Company filed its application, No. 950, for an amended certificate authorizing the applicant to carry freight and express of all kinds between Pueblo, Colorado Springs and Denver, and intermediate points. Protests were filed by The Atchison, Topeka and Santa Fe Railway Company, The Colorado and Southern Railway Company and The Denver and Rio Grande Western Railroad Company.

On January 6, 1928, the White Motor Express Company, hereinafter referred to as the White Company, filed an amended protest, answer and cross-petition in which it prayed for the denial of the application of The Mid-West and for the amendment of its certificate as prayed for in its application filed on August 6, 1927.

On January 17, 1928, the County Commissioners of Pueblo County filed a statement with the Commission to the effect that, with reference to the amended protest and answer and cross-

petition of the White Company, the board recommends that the same be granted.

Stipulations, one written, the other oral, were made to the effect that all of the evidence heretofore received by the Commission on October 5, 6, 7 and 8, 1926, and that received at hearings already had on rehearing in The Mid-West case should be considered as evidence now before the Commission in the two cases.

Hearings on the two applications, consolidated for hearing by consent, were held on March 19, 1928, and subsequently thereto, in the Hearing Room of the Commission in Denver, Colorado, at which time further evidence was introduced. On March 19, 1928, a second amended protest, answer and cross-petition, varying slightly from the first, was filed by the White Company prior to the hearing on that day. At the same time the Consolidated Truck Company, a corporation, which recently had filed its application for a certificate authorizing operation by it over the same route, filed protests against the issuance of a certificate to either of the applicants herein.

The record in this case is very voluminous. A large number of witnesses from Denver, Colorado Springs and Pueblo testified as to the public convenience and necessity of motor transportation of freight in the territory in question. The Commission does not believe it necessary to detail this testimony. Suffice it to say that the evidence introduced in the hearing on these applications convinces the Commission that there exists a public convenience and necessity for transportation by motor vehicle carrier of freight in the territory involved.

However, aside from the testimony of public convenience and necessity, another very important issue has arisen in the hearings as to the reliability and dependability of the applicants, and as to the propriety, under all the facts, of granting a certificate to either. After the Commission denied a certificate to The Mid-West on March 7, 1927, said applicant continued to operate as a motor vehicle common carrier of freight in the territory in question in violation of the Public Utilities Act. Thereafter, the Commission caused injunction proceedings to be brought

against The Mid-West in the District Court of Denver County, which culminated in the issuance of an injunctive writ reading as follows:

"Doth Order, Adjudge and Decree that a temporary injunction forthwith issue, restraining the defendant, its officers, agents, servants and employes, and each of them, from operating any motor vehicle as a common carrier for the carrying of freight or express between the Cities of Denver and Pueblo, Colorado, or intermediate points, or between any other cities and towns within the State of Colorado, as a common carrier, or carrying on the business of a common carrier over any such routes in competition with railroads or other authorized carriers as a common carrier or otherwise, without first having obtained a certificate of public convenience and necessity from the Public Utilities Commission of the State of Colorado, and that said defendant, its agents and employes, and each of them, absolutely cease and desist therefrom until the further order of this court."

After this injunction was issued operations continued uninterrupted but under the name of The Southeast Transportation Company, hereinafter called The Southeast. The testimony shows that Earl J. Brown and his wife as co-partners, under the name of E. J. Brown Garage and Transfer Company, own and lease a very large number of trucks; that they leased trucks to The Mid-West, the stock of which is owned by E. J. Brown and his family. There was introduced in evidence leases purporting to be signed by the Transfer Company by E. J. Brown, and The Southeast by James S. Luddy, both dated April 5, 1927, one purporting to lease one truck to The Southeast to September 1, 1927, the other purporting to lease two trucks to The Southeast for the same period. The hearing at which their introduction was made was held long after September 1, 1927, but Brown seemed to know nothing about whether they were still operating under those leases or otherwise. He promised at that time in Pueblo that he would, when the case was heard further in Denver, bring in his records showing receipt of the periodical payments of rent of these trucks and further showing deposits thereof in a bank or banks. When the case was heard further,

he not only did not bring in such records, but when required to bring them in by subpoena issued by the protestants, he refused so to do. Some argument ensued as to whether or not the Commission should cause contempt proceedings to be brought but the protestants did not insist, one reason apparently being that, from all the evidence already in the record, it is quite clear that James S. Luddy, purporting to do business as The Southeast Transportation Company, was nothing more nor less than a dummy being used in a crude way by The Mid-West and Brown to violate not only the order of this Commission but the injunction of the District Court. The business went on, as stated, exactly as it did before, the same depot being used, the same people in charge. Luddy, who is, and was, an oil salesman who made his appearance at the depot from which the trucks operated in Denver not more than once or twice a week, when he was put on the stand and was asked to testify, refused on the ground that his answers might tend to incriminate him. Under all these circumstances, the Commission feels, in the interest of sound regulation and proper regard for the enforcement of the motor vehicle act, it should deny the application of The Mid-West.

Coming now to the White Company's application, which was consolidated for hearing with The Mid-West's application, the Commission, on December 18, 1924, issued to the White Company, then a co-partnership, a certificate of public convenience and necessity for the operation of a motor truck line between Denver and Colorado Springs for the carrying of specified classes of freight, to-wit: Petroleum, petroleum products, automobile accessories and tires. On June 25, 1927, upon application by the White Company, a co-partnership, and after due hearing thereon by this Commission, an order was entered authorizing the transfer of said certificate of public convenience and necessity to the White Company, a corporation, organized under the laws of the State of Colorado. The White Company, both as a co-partnership and as a corporation, has been continuously engaged since December 18, 1924, as a motor truck line transporting freight and express between Denver and Colorado Springs, Colorado.

The chief claim, however, of the protestants is that the White Company did not limit itself to the hauling of the particular commodities designated in its certificate of public convenience and necessity. This matter received considerable attention by this Commission in the hearing of the application to transfer the certificate to the White Company, a corporation. The protestants in the transfer case raised that same issue therein. Furthermore, the railroads filed a complainst against the co-partnership, Case No. 306, which was heard at the same time that Application No. 293-A, the transfer case, was heard. In the complaint brought by the railroads the carrying of other commodities except those mentioned in the certificate was earnestly urged, with the request that the certificate be cancelled. The Commission, in its decision in Application No. 293-A and Case No. 306, stated that a number of operators, particularly The Western Transportation Company, The Mid-West Transit Company and William John Honeyman, had been carrying freight of all kinds and classes without a shadow of authority over the route of the certificate holder; that they were cutting into the business of the White Company to such an extent that it could not, with the restrictions imposed upon it, continue operations; that about three months after the granting of said certificate the holder thereof branched out into the general freight business although at all times, in spite of the fact that its unlawful competitors had lower rates, it had maintained the rates specified in its tariffs; that in every respect except the failure to restrict its operations as required by the certificate the White Company had cooperated with the Commission, and at its own expense had done a great deal of work designed to eliminate and terminate the operations of said competitors; that this work if successful would benefit the complaining railroads as much or more than the certificate holder; that the law with reference to motor vehicle carriers has been unsettled and uncertain, and that throughout the State there have been operators carrying on business contrary to law; that under all the circumstances in the case, the petition to revoke the certificate was denied and the transfer to the White Company, a corporation, was authorized.

As is well known, the Commission was, until recently, enjoined by the Federal Court in two cases from enforcing its statutes, and even now the particular territory in question is still being subjected to considerable wildcat operation, litigation concerning which is pending in the courts. The question, therefore, as to the carrying of commodities by the White Company not contained in its certificate has heretofore been passed upon by the Commission, and the circumstances and conditions under which this was being done are not such as to cause this Commission to deny a certificate to the White Company.

Another reason why this Commission believes that if a certificate is granted it should be issued to the White Company is that, in its opinion of March 7, 1927, denying the application of the three applicants, William John Honeyman, Application No. 434, The Mid-West Transit Company, Application No. 698, and The Western Transportation Company, Application No. 740, all asking for a certificate to operate as motor vehicle carriers of freight between Pueblo, Colorado Springs and Denver, it used the following language:

"The Commission granted to the White Motor Express on December 18, 1924, a certificate to operate motor truck transportation of petroleum and petroleum products and automobile accessories between Colorado Springs and Denver. That company was represented at the hearings in the instant cases, and made the statement for the record that in the event that the Commission should determine that the public convenience and necessity required more motor truck service between Denver and Colorado Springs and to Pueblo, that it, having been granted a limited certificate at the time in which they were ready to give an unlimited service to Colorado Springs, should now receive such a certificate. No shipper has made any complaint of the service offered by the White Motor truck line to this Commission. It is assumed, therefore, that the same meets all the requirements of the shipping public in the limited way that it is authorized to do business. The Commission, of course, cannot upon the records made in the instant cases broaden the authority to the White Motor truck operation, but the Commission feels that if in the

future the public convenience and necessity requires a further and broader motor truck service in the territory between Pueblo and Denver, everything else being equal, the White Motor Truck Company should receive the first consideration."

Counsel for protestants quoted the case of *in re* Large, P. U. R. 1927-E, 356, as an authority which should cause the Commission to deny the certificate to the White Company. In *re* Frank Pless and Walter Davis, Application No. 987, P. U. R. 1928-B, 783, the Commission somewhat modified the doctrine laid down in the Large case. In the Pless and Davis case, *supra,* we said:

"The Commission has found also that in a great many cases a denial of a certificate solely on the ground of the violation of this rule would not only work a hardship on many of the applicants, but on the shipping public as well. Of course, the rule adds nothing to the law as the law exists or as it existed prior to the enactment of House Bill No. 430. The failure of the Commission to deny a certificate on this ground only cannot, of course, legalize an operation made unlawful by the statute, but in determining whether or not a certificate should be denied because of violations of a statute the Commission feels that it must take into consideration other questions such as the need of the public for the operation in question, the duration of the operation, the good faith of the operator, etc."

The Commission, therefore, is of the opinion, under all the facts and circumstances, that it should not deny a certificate to the White Company solely on its violation of its certificate in transporting other commodities except such as are designated therein. We do not want it understood, however, that in deciding this we generally approve of such conduct.

The only other question remaining relative to the application of the White Company is the relationship of Earl J. Brown to this operation. The testimony shows that Henry P. Kidd, who is Manager of the White Company, in 1927 entered into certain financial negotiations with Mr. Brown which resulted in temporary control of the White Company by Mr. Brown. The testimony of Mr. Kidd, as well as Mr. Brown, is to the effect that this control was temporary and to secure a loan made by Mr.

Brown to the White Company; that during the existence of that loan Mr. Brown wanted to assure himself of its repayment by having control of its board of directors; that during that period some of Mr. Brown's employes were conducting the operation while Mr. Kidd had gone for his health to California; that on Mr. Kidd's return he again assumed management of the motor operations and is now in charge of the same. Furthermore, the stock control of the White Company's operation by Mr. Brown has ceased. Assuming, however, merely for the purpose of this discussion, that Mr. Brown did, through control of the majority of the capital stock of the company, take over actual ownership of same, should the Commission for that reason only deny a certificate to the White Company. The White Company is a Colorado corporation, a separate legal entity. The testimony shows that Mr. Kidd is the owner of some, if not the majority, of the capital stock. The corporation is the legal certificate holder, authorized to conduct a motor operation between Colorado Springs and Denver. The Commision has no jurisdiction over the issuance or transfer of stocks or securities of corporations. In fact, it has no jurisdiction whatsoever over the stocks and securities of a corporation, except as it may consider them as a condition in the issuance of a certificate of public convenience and necessity in the interest of the public. Mr. Brown had a legal right to purchase the stock, and the stockholders of the White Company had a legal right to sell to Mr. Brown without any authority whatsoever from this Commission. That is a situation which is controlled by the law that governs this Commission, no matter how we may personally feel about it.

The Commission requested the submission of authorities on the question of the relationship of Mr. Brown with the stock and control of the board of directors of the White Company as it affects the issues in this case. No authorities were furnished by the protestants. In The Mid-West we have an operation without a certificate. In the White Company we have an operation authorized by a certificate from this Commission. Mr. Brown's connections with an unlawful operation would, it seems to us, rest upon a different basis than his connections with an author-

ized operation. In our opinion, the evidence shows that Mr. Brown never had more interest in the White Company's operation than to secure the loan that he had made to it by temporarily controlling the stock and the directorship. Assuming, however, that the premises of the protestants are correct, we know of no authority or law by which the certificate held by the White Company could be prejudiced merely because Mr. Brown saw fit to purchase some or all of its stock, especially since there is nothing in the Public Utilities Act giving the Commission any jurisdiction whatever over the stocks or securities of a corporation.

The financial dependability of the White Company has been questioned. True, it has been operating with partly leased equipment from Mr. Brown, under a contract which this Commission could not and would not sanction. The issuance of a certificate to the White Company will involve its standing upon its own financial bottom. However, the testimony shows that if this certificate should be broadened to include the transportation of all kinds of freight between Denver, Colorado Springs and Pueblo the White Company is in a position to obtain credit and financial ability through certain negotiations in the sum of $100,000. This, we believe, is fully ample to take care of the financial dependability.

After a careful consideration of all the facts and circumstances, the Commission is of the opinion, and so finds, that the public convenience and necessity requires the motor vehicle system of the White Company for the transportation of freight and express between Denver, Colorado Springs and Pueblo, and intermediate points.

The Commission further finds, after careful consideration of all the evidence, that the application of The Mid-West should be denied.

OTTO BOCK, *Chairman.*

Commissioner Allen concurring specially:

I concur in the conclusion reached by the Chairman that the public convenience and necessity requires the issuance of a cer-

tificate to the White Motor Express Company. However, I differ with him in respect to the answer to the question of the relation of Earl J. Brown to that company. It is true that Brown claims to have exercised control only temporarily for the purpose of securing the loan made by him to it. The testimony concerning the loan or loans, and the manner of paying back a part thereof is quite questionable.

Kidd, the active and dominating head of the company since its incorporation, left for California, where he spent a number of months. The White operations continued out of the depot used by Brown and his companies in Denver. A very significant fact is that immediately upon Brown's acquiring control (merely temporary for the purpose of securing his loan, as he claims), his operations through his dummy Luddy under the name of The Southeast Transportation Company, ceased operations between Denver and Colorado Springs. After this change Brown was taken to Colorado Springs and introduced to a number of the shippers, who were told that the business had changed from The Mid-West or The Southeast to the White Company. Harold Richards, who as it has been stated, was at one time a director at Brown's direction, testified that Brown told him that he was going to operate the White, and that on or about August 1, Brown told him that he had completed the deal for the White Company. After Kidd came back from California he went to work on a salary.

One Kiser was brought in as a witness and testified that he was prepared to back the White Company financially, the purpose of this testimony apparently being to show that Brown was not in control and that the White Company could expect and would get the necessary financial assistance from Kiser.

The record may not show clearly, but it was obvious to me from the time the White Company began taking part in the hearings, that there was no real controversy between it and The Mid-West. It will be noted in the brief of the attorney for the White Company that while it points out reasons why it should receive

a certificate, no attempt is made to make any comparison between the claims of the two. If it made any difference to the attorneys for the White Company and The Mid-West Company, which gets the certificate, this situation clearly would not exist.

Brown's denial that he has bought control of the White Company is entitled to very little weight. He denied he was interested in The Southeast. We find The Southeast was Brown or The Mid-West.

I think it fairly clear and find that Brown bought control of the White Company and that he now has control thereof in spite of the various devices and subterfuges that have been resorted to for the purpose of making the Commission believe otherwise.

The question, then, is whether the fact that Brown bought and has and doubtless will continue to have control of the White Company should warrant refusal of a certificate to it. At the conclusion of the hearings I expressly requested the attorneys for the protestants to give the Commission some light on this question, intimating at the time that we are confronted with the question of separate identity of the White Company. The attorneys for the protestants have not dwelt on this question at all in their briefs, although it is the only one about which a special request was made.

The Chairman already has pointed out why, in our opinion, there would be no ground for denying the certificate if the ownership of the stock had remained in Kidd. I frankly admit that I do not relish the idea of giving a certificate to a company which is owned and controlled by Brown, who has been guilty, in my opinion, of a gross and flagrant violation of the orders of the Commission and the District Court. On the other hand, we cannot, for the reasons pointed out, say that the applicant, White Motor Express Company, has done anything which should penalize it. If it has not, does the mere purchase of the controlling stock by Brown penalize the company? We think not. The only conceivable ground on which I see that we could deny the cer-

tificate is that the company is in such irresponsible hands that it cannot be expected adequately and reasonably to serve the public. But the facts show that since, as well as before, Brown gained control, the service of the White Company has been quite good and satisfactory.

Commissioner Jones dissents.

ORDER.

IT IS THEREFORE ORDERED, That the public convenience and necessity requires the motor vehicle carrier system of the White Motor Express Company, a corporation, for the transportation of freight and express between Denver, Colorado Springs, Pueblo and intermediate points, 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 applicant shall file tariffs of rates, rules and regulations and time and distance 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 schedule filed with this Commission, except when prevented from so doing by the Act of God, the public enemy or unusual or 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.

IT IS FURTHER ORDERED, That the application of The Mid-West Transit Company be, and the same is hereby, denied.

RE PUBLIC SERVICE COMPANY OF COLORADO.

[Application No. 1133. Decision No. 1833.]

Sale—Commission jurisdiction—Contract of sale.

1. The Commission has no jurisdiction over the purchase and sale of the property of public utilities and, therefore, has no authority to approve a contract between companies with respect to such a transaction.

Certificates of convenience and necessity—Commission jurisdiction—Preliminary order.

2. The Commission has jurisdiction to issue a preliminary order in the event that a public utility desires to exercise the right or privilege under a franchise or ordinance which it contemplates securing but which has not as yet been granted.

Certificates of convenience and necessity—Commission power—Excessive purchase price.

3. It is the power and duty of the Commission in determining whether or not a certificate should be granted authorizing the exercise of rights under a franchise in possession of the purchaser of a public utility, to safeguard the public interest by preventing such utility from getting into a position where it might claim to have the right to earn a return on an unreasonable and excessive purchase price.

Franchises—Necessity for certificate—Contractual obligation.

4. No contractual rights exist between a municipality and a public utility based upon a franchise until its certificate of public convenience and necessity is issued by the Commission authorizing the exercise of the rights under such franchise, and a franchise purporting to be obtained previous to the grant of such Commission authority is void.

Franchises—Contractual rights before certificate issued.

5. No contractual rights exist between a municipality and a public utility based upon a franchise until after a certificate of convenience and necessity is issued authorizing the exercise of the franchise rights.

[June 23, 1928.]

STATEMENT.

By the **Commission**: On May 19, 1928, Public Service Company of Colorado filed an application with this Commission in which it is alleged, among other facts, that the applicant is engaged in the business of generating and distributing electric current for light and power purposes in the counties of Alamosa and Conejos, State of Colorado, and is serving the city of Ala-

mosa and utilizing in connection with its distribution system within the county of Conejos a certain transmission line connecting said city of Alamosa and the town of La Jara in Conejos County, said transmission line being owned by The La Jara Electric Company; that on May 8, 1928, applicant entered into a contract with the said The La Jara Electric Company for the purchase of all the physical property of said company, including the transmission line from Alamosa to La Jara, the distribution systems in La Jara and Richfield, and all rights-of-way and easements required and used in connection therewith, and the substation in La Jara, together with all appliances used in connection with the same, office equipment, supplies and all rights, franchises and privileges appurtenant thereto, subject, however, to the ratifications of the stockholders of The La Jara Electric Company to be given at a meeting of said stockholders now called to be held on June 9, 1928, and also subject to the order of approval of this Commission.

The application further alleges that the amount agreed to be paid by the Public Service Company for said property is not in excess of the reasonable value thereof; that in the event said contract shall be ratified and the same thereupon be consummated and the approval order of this Commission shall be entered, petitioner contemplates and intends to make application for a new franchise to operate in said town of La Jara; that the applicant is able to generate and distribute electricity at substantially less cost than The La Jara Electric Company, and in the event such purchase and sale shall be consummated, it proposes and intends forthwith to file a new schedule of rates with this Commission substantially reducing the rates now prevailing in said town; that it is for this reason and other reasons that the consummation of said contract is in the public interest and in conformity with public convenience and necessity; and that the territory included within the town of La Jara and Richfield and between La Jara and Alamosa is not served by any other utility than The La Jara Electric Company and the applicant.

No protests were filed against this application. The same was set down for hearing June 5, 1928, in the Hearing Room of the

Commission, State Office Building, Denver, Colorado, at which time evidence in support of the same was received.

The Commission has no jurisdiction over the purchase and sale of the property of public utilities and, therefore, has no authority to approve the contract between The La Jara Electric Company and the Public Service Company. It has jurisdiction to issue a preliminary order in the event a public utility desires to exercise a right or privilege under a franchise or ordinance which it contemplates securing but which has not as yet been granted to it. Such order, if and when issued, should declare that the Commission will thereafter, upon application, under such rules and regulations as it may prescribe, issue the desired certificate upon such terms and conditions as it may designate after such public utility has obtained the contemplated franchise or ordinance.

While the Commission does not have any jurisdiction over the purchase and sale, as such, of the property of public utilities, it does have the power and duty in determining whether or not a certificate of public convenience and necessity should be granted authorizing the exercise of rights under a franchise, whether procured by its predecessor or by it, to safeguard the public interest by preventing the utility from getting into a position by which it might have, or claim to have, the right to earn a return on an unreasonable and excessive purchase price.

The testimony shows that in the event the contract in question is ratified by the stockholders, the applicant contemplates and intends to make an application for a new franchise to operate in the town of La Jara. Exhibit No. 4 is a copy of an application by the Public Service Company to the Board of Trustees of the town of La Jara for the presentation of an ordinance granting the Public Service Company a franchise in said town to construct, acquire, maintain and operate, transmit and distribute electricity in said town for light, heat and power or other purposes. A copy of the contemplated ordinance is contained in this exhibit. The testimony further shows that an ordinance or franchise was granted to The La Jara Electric Company, approved and adopted on the 28th day of September, A. D. 1920, for the

period of twenty years. No certificate of public convenience and necessity authorizing the exercise of the rights and privileges under this ordinance was ever obtained by The La Jara Electric Company from this Commission. It is, therefore, null and void and of no effect. No contractual rights exist between a municipality and a public utility based upon a franchise until after a certificate of public convenience and necessity is issued by this Commission authorizing exercise of the rights under such franchise.

The testimony is clear that the applicant contemplates and intends to make an application for a new franchise to operate in said town of La Jara. The La Jara Electric Company and the Public Service Company are the only utilities serving the public in the territory in question with electric energy. An application for a franchise is pending before the Board of Trustees of the town of La Jara. If the purchase and sale referred to above is consummated, the applicant intends to file a new schedule of rates with this Commission substantially reducing the rates now prevailing in said town on a similar basis as now prevails in other communities served by the applicant at nearby points.

After a careful consideration of all the evidence, the Commission is of the opinion that the preliminary order prayed for should issue.

ORDER.

It Is Therefore Ordered, That the Colorado Public Utilities Commission will, upon application by the Public Service Company of Colorado, under such rules and regulations as this Commission may prescribe, issue a certificate of public convenience and necessity upon such terms and conditions as it may therein designate, after the applicant has obtained the contemplated franchise or ordinance, which said franchise shall reflect a substantial reduction in the rates now prevailing in the town of La Jara.

RE G. & W. GARAGE AND TOURS COMPANY.

[Case No. 367. Decision No. 1846.]

Fines and penalties—In lieu of suspension of certificate.

A motor vehicle operator found guilty of violating a tariff was permitted at his request to pay $50 to the secretary of the Commission to be turned into the State treasury in lieu of the suspension of his certificate, notwithstanding a doubt whether the Commission had authority to impose a fine upon such operator.

[July 25, 1928.]

Appearances: Mr. Geo. J. Wetherald, Manitou, Colorado, for G. & W. Garage and Tours Company; Mr. Benjamin A. Payne, Colorado Springs, Colorado, for the Hammond Scenic Auto Company.

STATEMENT.

By the **Commission**: Complaint was made to this Commission against Geo. J. Wetherald, E. E. Wetherald and Joseph Premo, co-partners, doing business as the G. & W. Garage and Tours Company, to the effect that on June 13, 1928, said firm transported from Colorado Springs a party of tourists to the summit of Pikes Peak, and that in connection therewith an additional trip was given free. On June 22 the Commission made an order requiring the respondents to show cause why their certificate should not be revoked. The respondents wrote a letter to the Commission stating frankly that they had given two trips on the day in question to a party of tourists at the price of one, but stated that they did not know they were violating the law or their tariff. The case was duly set for hearing and was heard in the Hearing Room of the Commission on July 20, 1928.

The evidence showed that Geo. J. Wetherald, one of the co-partners, told a representative of a large party of tourists that if he would get him a load or two of passengers he would take them to Pikes Peak by way of the Cave of the Winds without making any additional charge for that part of the trip to the Cave. The Cave trip is not combined with the Pikes Peak trip

in the tariff of the respondents or any of the other operators in the Pikes Peak region. In all of their tariffs the Cave of the Winds trip is one for which an additional and separate charge is to be made. However, the said Wetherald testified in all apparent sincerity that he did not realize that the making of this trip via the Cave of the Winds was a violation of his tariff. After all the conferences and hearings the Commission has had in Colorado Springs at which the sightseers of that region have been present, and after repeated questions made by the Commission to operators whether they were familiar with the rules and regulations of the Commission, it is difficult to understand how at this late day such a violation of the tariff and the law could be made innocently by an operator. However, the Commission is inclined to give the respondents the benefit of the doubt and instead of revoking their certificate concluded to suspend it for a reasonable time. The Commission, therefore, suggested that it would take such course. Thereupon the said Geo. J. Wetherald proposed that in lieu of the suspension he be allowed to pay some reasonable amount as or in the nature of a fine. The Commission pointed out that it is doubtful whether under the law it has the power to fine an operator, but stated to the representative of the firm that if he so desired he would be permitted to pay $50.00 to the secretary of the Commission, to be turned into the state treasury in lieu of a suspension of the certificate.

The payment of $50.00 has been made to the secretary of the Commission. There remains nothing further but to dismiss the proceeding.

ORDER.

It Is Therefore Ordered, That the proceeding herein be, and the same is hereby, dismissed.

Commissioner Bock did not participate in the disposition of this case.

RE WILLIAM CRAIG.

[Application No. 1019. Decision No. 1852.]

Monopoly and competition—Promise of improved service.

1. The Commission will not refuse to authorize additional service over a route inadequately served because of the mere promise of the existing operator to purchase adequate facilities in the future, especially where ample opportunity has been afforded in the past and he has not done so.

Monopoly and competition—Fundamental inadequacy of service.

2. A certificate will be granted authorizing additional service where the inadequacy and unsatisfactory nature of existing service is of a fundamental nature.

Service—Automobiles—Passenger cars for large shipments.

3. The use of passenger cars for large shipments of flour and other freight, requiring the shipments to be broken up into small portions, was held to be inadequate, and additional service by motor truck was authorized.

Monopoly and competition—Soliciting bus patronage on railroad premises.

4. The solicitation and advertisement for passengers by a bus operator on railroad premises was held to be improper and the operator was ordered to refrain from such practices and to see that his employees did likewise.

Monopoly and competition—Automobile companies.

5. Additional service was authorized over a route where existing service by passenger cars was inadequate to take care of hauling freight and express exceeding 25 pounds, leaving the other type of business to be carried on by the original operator.

[July 27, 1928.]

Appearances: Benjamin B. Russell, Esq., Durango, Colorado, Attorney for applicant; J. J. Downey and H. W. Murray, Esqs., Cortez, Colorado, Attorneys for O. T. Weedin.

STATEMENT.

By the **Commission**: On December 29, 1927, William Craig filed his application for certificate of public convenience and necessity, authorizing the transportation of passengers, express and freight between Dolores, Colorado, and McElmo, Colorado, and intermediate points. On January 14, 1928, O. T. Weedin filed his written objections. The case was regularly set for hearing

and was heard at the Court House in Cortez, Colorado, on June 10, 1928.

The applicant has been carrying mail between Dolores and McElmo and intermediate points, including Cortez, for two years. Dolores is situated twelve miles from Cortez and McElmo is about twenty-eight miles west of Cortez.

He proposes to use in his operation a two-ton Graham truck at the value of $1,800 and a one-ton Ford truck at the value of $250. He has in addition a covered spring wagon and team of horses of the value of $350 which he is compelled to use a part of the time when the roads are impassable on account of snow or other weather conditions.

The applicant operated unlawfully for a time due to being advised that he needed no certificate. A temporary injunction was issued against his continued operation, after which he strictly obeyed the same.

O. T. Weedin has a certificate for the transportation of passengers, express and freight between Dolores and Cortez. A great number of witnesses appeared and testified that the service rendered by O. T. Weedin, particularly in the transportation of freight, is unsatisfactory and inadequate. Mr. Weedin owns no truck. Most of the time he attempts to haul his freight in a twelve-passenger White passenger bus, which obviously does not have the capacity for a large amount of freight. He introduced in evidence an order given to a truck dealer on December 22, 1927, for a truck. He testified that the order is still in effect and that he still desires to procure the truck and that the dealer had been unable to make delivery. It is difficult for the Commission to understand why a man cannot purchase a truck, if he so desires, within a period of more than six months. Moreover, he testified that he is of the opinion that he does not need a truck. From the evidence the Commission is of the opinion that Mr. Weedin is not likely in the future to take delivery of or purchase a truck. However, the Commission will not base its order on the possibility or probability of his purchase of the truck. The attorneys for Mr. Weedin attempted to show that the large volume of testimony given in support of the application and to the effect

that the service being rendered by Mr. Weedin is unsatisfactory and inadequate is based on sympathy for the applicant herein.

Without going into the evidence in detail, the Commission is of the opinion and so finds that the town of Cortez needs additional transportation service between Cortez and Dolores, and that the service of the certificate holder, Weedin, is unsatisfactory and inadequate. It is true the Commission has repeatedly held it would not issue an additional certificate where inadequacy of the service complained of is of a nature that might be expected to be remedied by order of the Commission or otherwise. However, where the inadequacy and unsatisfactory nature of the service is of a fundamental nature, as we find it to be in this case, we have consistently granted an additional certificate.

We might say that some of the complaints against Mr. Weedin's operation are that he has no truck, as already stated; that large shipments of flour and other freight, instead of being hauled at one time as an operator would be expected to handle the business, is broken up into small shipments which are piled in a passenger bus; that he does not haul and deliver smaller shipments with promptness and dispatch; that the consignees of flour complain that the same is not delivered in Dolores in good condition and that they come personally on Sundays to get mill products because of the dissatisfaction with Weedin's service; that his drivers are not competent and that at times Mr. Weedin himself will not entrust or permit a driver to bring some shipment, such as plate glass, but postpones the transportation thereof until he himself can handle it, and that he has too many details to look after in order to handle all of the business properly.

One phase of the evidence dealt with Mr. Weedin's alleged improper conduct in soliciting passengers for Durango via Cortez, on the premises of the Rio Grande Southern Railroad. If this is objected to by the railroad, as it evidently has been, he has no right to make any such solicitation on their property and will be expected in the future to refrain therefrom and see that his

employes do likewise. He will also be expected to refrain from advertising in any manner whether on his bus or otherwise that he is carrying passengers to Durango. If passengers want to ride with him to Cortez and there take the motor bus which runs direct to Durango it is their privilege.

Mr. Weedin is equipped primarily, and apparently adequately, to handle passengers and express. The Commission does not feel at the present time authority should be given to another carrier to haul more than freight and express shipments exceeding twenty-five pounds. If the applicant herein is permitted to haul the freight and express exceeding twenty-five pounds, we believe that with a division of such business the present certificate holder, Weedin, should be able to conduct his business more efficiently than it has been conducted in the past. If he cannot remedy the situation it might be that the public convenience and necessity will later require the granting of a further certificate to the applicant herein or some other person.

After careful consideration of the evidence, the Commission is of the opinion and so finds that the public convenience and necessity requires the motor vehicle operation of the applicant herein for the transportation of freight and express weighing in excess of twenty-five pounds between Cortez and Dolores, but that it does not require the transportation at this time by the applicant for passengers and express shipments weighing less than twenty-five pounds.

There is no authorized operation by any other person than the applicant between Cortez and McElmo. The evidence shows that the public convenience and necessity requires a public carrier operation for the transportation of passengers, express and freight between those points. The Commission is therefore of the opinion and so finds that the public convenience and necessity requires the motor vehicle operation of the applicant for the transportation of passengers, express and freight between Cortez and McElmo and intermediate points, and express, regardless of weight, and freight between Dolores and McElmo and points intermediate to Cortez and McElmo.

ORDER.

IT IS THEREFORE ORDERED, That the public convenience and necessity requires the motor vehicle operation of the applicant, William Craig, for the transportation between Cortez and Dolores of freight and express shipments weighing in excess of twenty-five pounds, and for the transportation between Cortez and McElmo of passengers, freight and express, and freight and express, regardless of weight, between Dolores and McElmo and points intermediate to Cortez and McElmo, 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 applicant 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 system according to schedules filed with this Commission, except when prevented from so doing by the Act of God, the public enemy, or unusual or 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 did not participate in the disposition of this case.

RE W. E. WHITE, *et al.*

[Applications Nos. 1002 and 1014. Decision No. 1856.]

Monopoly and competition—Duplication of service—Good service—Low rates—Public convenience and necessity.

1. In order to afford the communities served by a motor vehicle operator the best service possible at the lowest rates consistent with good business, the Commission will not issue additional certificates unless it appears that the public convenience and necessity requires them.

Certificates of convenience and necessity—Abnormally low rates—Promise of—Effect on application.

2. While the Commission is in sympathy with the desire of an applicant to put into effect an abnormally low rate, it will not issue a certificate merely because of such a proposal, as no operator can continue in business with rates that are not compensatory.

Rates—Proposed before certificate granted—Right to charge compensatory.

3. Whatever rates an applicant for a certificate of convenience and necessity may propose to charge, after receiving the certificate he would be entitled as a matter of law to charge such rates as are compensatory.

Monopoly and competition—Theory—Permanency and dependability—Proposed operation not based upon sound basis.

4. The whole theory of regulation is contrary to the granting of a certificate of convenience and necessity to one who does not propose to operate on a basis that will insure permanency and dependability.

[July 30, 1928.]

Appearances: Earle Bryant, Esq., Montrose, Colorado, Attorney for W. E. White; Lee W. Burgess, Esq., Grand Junction, Colorado, Attorney for A. E. Bivens; Thos. R. Woodrow, Esq., Denver, Colorado, Attorney for the Rio Grande Southern Railroad Company, The Denver and Rio Grande Western Railroad Company and the Western Slope Motor Way, Inc.; William L. Knous, Esq., Montrose, Colorado, Attorney for Montrose Auto Stage and Taxi Company.

STATEMENT.

By the **Commission**: On November 29, 1927, W. E. White filed an application for a certificate of public convenience and necessity authorizing the transportation of freight and express between the town of Norwood, Colorado, and the city of Grand Junction and between the town of Norwood and the city of Telluride, Colorado. The Board of County Commissioners of San Miguel County filed a written statement to the effect that said Board is in favor of granting this application. The Board of County Commissioners of Montrose County filed a written disapproval. The Western Slope Motor Way, Inc., filed a written answer and protest. The Board of County Commissioners of

Mesa County filed a written resolution opposing and protesting the granting of a certificate. The Denver and Rio Grande Western Railroad Company and the Rio Grande Southern Railroad Company filed a motion to dismiss the application for the reason that the applicant had been operating unlawfully.

On December 20, 1927, there was filed with the Commission the application of A. E. Bivens for a certificate of public convenience and necessity authorizing the transportation of freight and express between Grand Junction, Montrose, Placerville, Norwood, Redvale, Naturita and Nucla, all being within the State of Colorado. The Denver and Rio Grande Western Railroad Company, the Rio Grande Southern Railroad Company and the Western Slope Motor Way, Inc., filed their joint answer and protest. Informal written disapproval of the granting of the certificate was filed by the Board of County Commissioners of Montrose County and the Board of County Commissioners of Mesa County. The Board of County Commissioners of San Miguel County filed a written approval.

The two cases were set for hearing and were heard in a consolidated hearing in the court house in the city of Montrose on July 6. The applicant Bivens was given leave to abandon a portion of his application which asks for authority to operate beyond Montrose to Grand Junction and offered, if granted a certificate, to make three trips per week each way between said points. On July 23 the Commission received from the applicant formal motion asking not only for authority to abandon a portion of the route as stated but for leave to amend so that the application would seek authority to transport freight and express between the city of Montrose and Nucla and to lay down and pick up freight and express originating or terminating at Montrose at the intermediate points of Placerville, Redvale, Norwood and Naturita. When the abandonment of a portion of the route was announced the attorney for the two railroads named and the Western Slope Motor Way, Inc., withdrew the objection of his clients.

The motion to dismiss the application of White is denied for the reason that there was no showing at the hearing that he had

in any substantial manner, if at all, operated since the filing of his application as a common carrier. There was some evidence that he hauled a trunk as a matter of accommodation for a friend and that he hauled several loads of cattle, but there was no evidence that he had hauled cattle for other people after the filing of the application.

It should be stated at this point that on November 16, 1926, the Commission issued a certificate to A. E. Bivens, authorizing the transportation of passengers, freight and express between Placerville and the town of Paradox and intermediate points. Thereafter, the Commission approved the transfer to Gio Oberto of that portion of the certificate authorizing the transportation of freight between said points. Since then Mr. Bivens has been transporting passengers and express under that portion of the certificate which was transferred to Mr. Oberto.

There was some evidence to the effect that the freight and express business done by Mr. Bivens, both for himself and Mr. Oberto, has not been satisfactory. However, Mr. Bivens explained each particular case mentioned, and, after consideration of the evidence, both pro and con, the Commission is of the opinion and so finds that no showing has been made of any substantial inadequacy or insufficiency of service on the part of Mr. Bivens. We do believe, however, that Mr. Bivens should, as Norwood is the principal point served by him and as he lives in Placerville, make arrangements to have a local office and representative in Norwood to take orders and otherwise deal with the public there for him.

The evidence shows public convenience and necessity for a motor vehicle operation to Montrose or Grand Junction from the country west and north of Placerville, which is situated on the Rio Grande Southern Railroad. We shall not go into the details of the evidence except to say that milk and cream is now carried by truck from Norwood to Placerville in the afternoon. It arrives by rail in Grand Junction at 6:00 o'clock the following evening. It is not delivered to or received by the creamery until the next morning. Thus the shipment moves before reaching the creamery through the whole of one day and a part of two others,

while by truck, with a transfer at Montrose to the Western Slope Motor Way, Inc., it would leave Norwood at 3:00 or 4:00 o'clock in the morning and be delivered in Grand Junction at noon or about 1:00 P. M. of the same day. Without a transfer in Montrose, it might move somewhat quicker by truck.

The next question is whether certificates should be issued to both the operators, or to one, and if one, to which one. The applicant Bivens not only is and has been for several years past conducting operations both for himself or Oberto, but is also and has been carrying the United States mail between Placerville, Norwood, Redvale, Nucla, Naturita, Redrock and Paradox, on what is called the "Star Route."

The policy of the Commission, after careful thought and study, has always been to give the communities served by a truck operator the best service possible at the lowest rates consistent with good business, and, in order to carry out this policy, not to issue additional certificates unless it appears that the public convenience and necessity requires it. In fact, the law expressly imposes this duty upon us. While the application of Mr. White does not seek authority to duplicate the present operation of Mr. Bivens and Mr. Oberto, the granting of a certificate to Mr. White would seriously cut down their business because at the present time freight destined to Grand Junction from Norwood is hauled by truck to Placerville. We have not overlooked the fact that Oberto is now the freight carrier. But Oberto's failure to employ Bivens or to pay Bivens sufficient compensation would tend to affect both of the present operations.

There is quite a tendency in the district on the part of the merchants to hire a man engaged as a private carrier who does not come within the classification of a common carrier. Even though two certificates were issued it is rather apparent that much of the hauling would be done by others than the certificate holders. It is quite questionable whether, if a certificate were granted to White, Bivens and Oberto could continue to operate under authority of the Commission heretofore granted except at a loss, which, as a matter of law, could not be compelled.

One of the main contentions made by White is that he would haul freight from Norwood to Grand Junction, a distance of 136 miles, for an abnormally and extraordinarily low rate of 50 cents per 100 pounds, although the rate from Grand Junction to Norwood would be $1.00, which is also low. The purpose of offering this low rate, particularly the one from Norwood, is in order to move farm products which is said not to be able to move on high rates. This is a laudable desire with which we are in sympathy, but experience has shown that no man can operate for any length of time on rates other than such as are compensatory, not to say producing some reasonable profit. The Commission cannot believe that the applicant can continue in business for any length of time with such rates.

It is true that Mr. White is operating a store, and that claim is made that because he hauls his own freight he can afford to make these low rates for others. He might start out with such low rates, but if they are not compensatory he would be entitled, as a matter of law, to increase them. Even if he is willing to make up the loss from the profits of his store so long as he desires to operate the store, he might conclude to and sell the store. He might then, as one witness stated on the stand, have to double his rates. The whole theory of regulation in this and other states is contrary to the granting of a certificate to an applicant who does not propose to operate on a basis that will insure permanency and dependability.

Another point in favor of the granting of a certificate to Mr. Bivens is that he proposes to make the round trip between Norwood and points west thereof and Montrose three times a week, which is oftener than the applicant, White, is willing to operate. We find that the public convenience and necessity requires three regular round trips per week.

After careful consideration of the evidence, the Commission is of the opinion and so finds that the public convenience and necessity does not require the motor vehicle carrier system proposed by the applicant, White, between Norwood and Grand Junction, but that it does require the motor vehicle operation by

the applicant, Bivens, between Placerville, Norwood, Redvale, Naturita, Nucla and Montrose.

The Commission stands ready on request of the shippers in the district affected to investigate and determine what are reasonable and proper rates to be charged between Montrose and the other points named, and between Montrose, where the freight is proposed to be turned over by Mr. Bivens to the Western Slope Motor Way, Inc., at Grand Junction.

The Commission further finds that the public convenience and necessity does not require the applicant Bivens to duplicate the service being rendered by the Montrose Auto Stage and Taxi Company in the transportation of express between Placerville and Montrose, and that the applicant herein should be limited to the transportation of freight and express between Placerville and Montrose which weighs in excess of fifty pounds.

Evidence was introduced showing that eggs, poultry, hogs, wheat and hay to be shipped from Norwood and consumed in Telluride is not only much more expeditiously, but more satisfactorily shipped by truck, and that one mining company had refused to accept hogs shipped by truck to Placerville and then by rail from that point to Telluride.

After a careful consideration of the evidence, the Commission is of the opinion and so finds that the public convenience and necessity requires a motor vehicle operation by the applicant, W. E. White, for the transportation of freight from Norwood to Telluride for local consumption in Telluride, and for the transportation of freight which originates in Telluride, from Telluride to Norwood. The Commission is of the opinion and so finds that the public convenience and necessity does not require the transportation by the applicant White of any freight from Norwood to Telluride which is not to be used and consumed in Telluride, or the transportation from Telluride to Norwood of any freight originating by rail at any other point and ultimately destined to Norwood. Such freight as is hauled from Norwood and is destined ultimately to other points than Telluride, and

such freight as originates by rail and is ultimately destined to Norwood should be hauled by the certificate holder operating between Norwood and Placerville.

ORDER.

IT IS THEREFORE ORDERED, That the public convenience and necessity does not require the motor vehicle system of the applicant, W. E. White, for the transportation of freight and express between Norwood and Grand Junction; that the public convenience and necessity does require the motor vehicle operation of the applicant, W. E. White, for the transportation between Norwood and Telluride of such freight only as originates in Norwood and is shipped to Telluride for local use and consumption there and such freight as originates in Telluride for shipment to Norwood, 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 public convenience and necessity requires the motor vehicle operation of the applicant, A. E. Bivens, for the transportation of freight and express between Nucla, Naturita, Redvale, Norwood and Montrose and for the transportation between Montrose and Placerville of freight and express in excess of fifty pounds, 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 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 applicants shall operate such motor vehicle 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 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 respect to motor ve-

hicle carriers and also subject to any future legislative action that may be taken with respect thereto.

Commissioner Bock did not participate in the disposition of this case.

RE WESTERN SLOPE MOTOR WAY, INC., *et al.*

[Applications Nos. 1139 and 1148. Decision No. 1857.]

Certificates of convenience and necessity.

Certificate of convenience and necessity for motor vehicle transportation of freight between Grand Junction and Rifle, denied, and one granted for the transportation of freight between Grand Junction and Glenwood Springs and intermediate points.

[July 30, 1928.]

Appearances: Noonan & Noonan, Esq., Glenwood Springs, Colorado, for applicants in Application No. 1139; Thos. R. Woodrow, Esq., Denver, Colorado, for applicant in Application No. 1148.

STATEMENT.

By the **Commission**: On June 7, 1928, H. E. Butler and E. W. Butler, a co-partnership, doing business under the firm name and style of H. E. Butler and Son, filed their application for a certificate of public convenience and necessity authorizing the operation of a motor vehicle system for the transportation of freight and express between Grand Junction and Rifle, Colorado, and intermediate points, and in the territory within a radius of two hundred miles of said points.

On June 15, 1928, the applicant filed an amendment to his application in which he asked for authority to transport freight, express, livestock, farm and ranch products and supplies, coal, gasoline, oil, commodities, goods, wares, merchandise and sundries and articles of personal property. The Denver and Rio Grande Western Railroad Company filed its objection and protest. James C. Ashley filed an informal protest in which he alleges that applicant seeks to cover too much territory. Thereafter, said The Denver and Rio Grande Western Railroad Com-

pany filed its amended answer and cross petition asking that in the event that a certificate is granted, it be granted to the Western Slope Motor Way, Inc., a subsidiary of said railroad company.

On June 22, 1928, The Western Slope Motor Way, Inc., a corporation, filed its application for a certificate of public convenience and necessity authorizing the operation of a motor vehicle system for the transportation of freight between Grand Junction, Glenwood Springs and intermediate points. The two cases were set down for hearing and were heard in the court house in Glenwood Springs on June 27 and 28, 1928. The two cases were consolidated for hearing.

The applicants, Butler and Son, propose to operate between Grand Junction and Rifle. The other applicant, The Western Slope Motor Way, Inc., proposes to operate between Grand Junction and Glenwood Springs. The Butlers now own and operate a 1926 one-ton Chevrolet truck of the value of $500.00, and propose to purchase another truck that will more adequately handle their business. They have been operating two round trips per week, one on Tuesday, another on Friday and making additional trips whenever the volume of their business required. They propose to begin operating a regular schedule of two days a week and to increase their regular operations if business demands.

The Western Slope Motor Way, Inc., is a motor vehicle transportation company operating between Grand Junction, Delta, Montrose, Paonia, Hotchkiss and other points on the north fork of the Gunnison River. It has engaged in such operations or the greater portion thereof in excess of two years. This company proposes, if granted a certificate, to operate daily, except Sunday, each way in the summer time and three times a week in the winter time, unless business justifies more frequent trips.

Most of the evidence introduced is to the effect that the public needs a motor vehicle freight operation to and from Grand Junction. Some two or three witnesses for the Motor Way testified that they believe no freight service, other than that now being rendered by the railroad company, is needed. However, the evi-

dence strongly preponderates in favor of the public need. The main reason for the opinion that motor vehicle service is necessary is that it is so much more expeditious. After careful consideration of the testimony, the Commission is of the opinion that the public convenience and necessity does require a motor vehicle operation to and from Grand Junction.

The next question is whether both applications should be granted, and if not, to which of the applicants a certificate should be issued. The Butlers do not desire to operate further up the Colorado River than Rifle, while the Motor Way proposes to operate between Glenwood Springs and Grand Junction. If a certificate is granted to Butler, part of the territory will lie unserved by a motor truck system. The evidence shows that two truck lines, one operating between Grand Junction and Rifle, the other between Grand Junction and Glenwood Springs, would not be profitable. If the territory up the river from Rifle is to be served it should be served by an operator serving Rifle and other points intermediate to it and Grand Junction.

We further find from the evidence that a two or three day a week operation will not adequately serve the needs of the towns and cities in question. Moreover, even though the Butlers were willing to operate between Glenwood Springs and Grand Junction and to operate oftener than they now propose, the public will be better served, in the opinion of the Commission, by the Motor Way. The Motor Way purchases its gasoline at wholesale prices and buys its tire service at very low prices, which are on a mileage basis. It is already an operation rendering most satisfactory service. It has its overhead, which will not be substantially increased. It has with The Denver and Rio Grande Western Railroad Company a common auditor, treasurer and attorney. In fact, all of its officers, except the president, are officers of the railroad company.

The Motor Way plans to put into service two new three-ton trucks, one of which would operate one way, the other the other way on the route. These trucks would cost approximately $4,000 each. They would make better time than smaller trucks and the Motor Way will make deliveries from Grand Junction

much earlier in the day than the Butlers, who would have to operate their truck or trucks from Grand Valley to Grand Junction before loading up for the return trip.

After careful consideration of the evidence, the Commission is of the opinion and so finds that the public convenience and necessity does not require the proposed motor vehicle operation of the applicants, H. E. Butler and E. W. Butler, between Grand Junction and Grand Valley, but does require the motor vehicle operation of the Western Slope Motor Way, Inc., between Grand Junction and Glenwood Springs and all intermediate points, except Clifton and Palisade, which are already served by other certificate holders.

The testimony as to the irregular operations of the applicants, H. E. Butler & Son, is meager. It indicates that the miscellaneous volume of hauling is not great. However, the Commission is of the opinion and so finds that the public convenience and necessity requires the motor vehicle operation of the applicants, H. E. Butler & Son, for the transportation of freight between Grand Valley and the vicinity thereof included in a radius of 15 miles, and all other points within a radius of 125 miles from Grand Valley; provided, however, no freight originating at Grand Junction, Glenwood Springs or any intermediate point on the main highway running between Grand Junction and Glenwood Springs shall be transported to Glenwood Springs, Grand Junction or any of said intermediate points.

At some later date a more detailed showing may be made by the applicants, H. E. Butler & Son, justifying the granting of a more extended certificate covering a miscellaneous hauling.

ORDER.

It Is Therefore Ordered, That that portion of the application of H. E. Butler & Son for authority to transport freight and express between Grand Junction and Rifle should be, and the same is hereby, denied.

It Is Further Ordered, That the public convenience and necessity requires a motor vehicle operation of the applicants, H. E. Butler & Son, for the transportation of freight between

Grand Valley and the vicinity thereof included in a radius of 15 miles, and all other points within a radius of 125 miles from Grand Valley; provided, however, no freight originating at Grand Junction, Glenwood Springs or any intermediate points on the main highway running between Grand Junction and Glenwood Springs shall be transported to Glenwood Springs, Grand Junction or any of said intermediate points, 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 public convenience and necessity requires the motor vehicle operation of the applicant, the Western Slope Motor Way, Inc., for the transportation of freight and express between Grand Junction and Glenwood Springs and all intermediate points, except Clifton and Palisade, 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 tariffs of rates, rules and regulations, and that the applicant, Western Slope Motor Way, Inc., shall file 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, Western Slope Motor Way, Inc., shall operate such motor vehicle system according to schedules filed with this Commission, except when prevented from so doing by the Act of God, the public enemy, or unusual or extreme weather conditions, and this order affecting both applicants 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 did not participate in the disposition of this case.

RE THE EXHIBITORS FILM DELIVERY & SERVICE COMPANY.

[Application No. 1009. Decision No. 1865.]

Common carriers—Test—Serving whole public.

1. To be a common carrier it is not necessary to serve the whole public.

Common carriers—Test—Advertising.

2. One may be a common carrier without advertising.

Common carriers—Test—Transportation of all kinds of commodities.

3. To be a common carrier it is not necessary that all sorts of freight or express be transported.

Common carriers—Test—Written or other kinds of contracts with patrons—"Contract" carrier.

4. The test whether one is a common carrier is not whether he has separate written or other kinds of formal contracts with each customer.

Common carriers—Test—Serving sufficiently large portion of public.

5. The test whether one is a common carrier is whether he is serving a sufficiently large portion of the public in carrying the goods he accepts.

Common carriers—Test—Uniform rates and service.

6. Uniform rates and service to all patrons are required of common carriers, but the absence thereof has nothing to do with the question whether one is a common carrier.

Common carriers—Test—What he does—What he says about himself.

7. A common carrier is such by reason of what he does in spite of what he says about himself.

Common carriers—Film express.

8. A motor vehicle operator indiscriminately serving the whole film exhibiting public and delivering exchange motion picture films between the various theaters in different communities was held to be a common carrier within the meaning of the statute requiring certificates of public convenience and necessity for common carrier operation by motor.

[August 7, 1928.]

Appearances: Duke W. Dunbar, Esq., Denver, Colorado, attorney for the applicant; Erl H. Ellis, Esq., Denver, Colorado, attorney for the American Railway Express Company.

STATEMENT.

By the **Commission**: On December 17, 1927, The Exhibitors Film Delivery & Service Company, a corporation, filed its application in which it takes the position that the service being rendered by it to motion picture or film exhibitors is not that of a common carrier or "motor vehicle carrier" as defined in the statute, but praying "that in the event the Commission determines that the proposed service will constitute that of a motor vehicle carrier, it be granted a certificate of public convenience and necessity authorizing the operation of a system of exhibitors film delivery service." An answer and protest was filed by American Railway Express Company and Colorado Motor Way, Inc. The case was set for hearing and was heard in the Hearing Room of the Commission on March 12, 1928. The Express Company alone appeared at the hearing.

When the case came on for hearing the applicant asked the Commission in the event that it should decide that the service being rendered by it is that of a common carrier, it should not pass upon the question of public convenience and necessity or issue a certificate of any kind. Briefs have been filed by both the applicant and the Express Company. The latter takes the position that while it really does not object to the Commission expressing itself on the question, it is not within the power of the Commission to render declaratory judgments or decisions and that from a legal and practical viewpoint the hearing is upon a moot question. This position would be well taken if the applicant were not already operating. If it is operating as a common carrier it is the duty of the Commission to order it to cease and desist from such operation, because it has and wants no certificate therefor. Therefore, it is the duty of the Commission to determine whether or not the applicant is operating in the State of Colorado as a common carrier.

The application states that the stock in the applicant is owned by men who have been in the film delivery service in and near Kansas City for a period of ten years, and have increased their business to such an extent "that they are now operating eight

(8) trucks out of Kansas City." Pursuant to their determination to extend their business into new fields, they organized a Colorado company, which is the applicant. Their certificate of incorporation, a copy of which was filed with the Commission, states:

"The object for which our said Company is formed and incorporated is for the purpose of: to gather, receive, transport, distribute and deliver motion picture films and other goods and merchandise of whatsoever kind and nature, and to carry on a general transportation, freight and express business to and from all points and places, either in or out of this State, where it may seem advantageous and profitable to carry on such business, and to own and operate a line or lines of motor vehicles and trucks for such transportation, and to that end to own, lease and operate cars and vehicles of whatsoever nature and description * * *."

The applicant has one truck leaving Denver daily at about 9 P. M., passing through the towns of Brighton, Fort Lupton, Platteville, Greeley, Eaton, Ault, Nunn and Cheyenne, returning by way of and through Wellington, Fort Collins, Loveland, Berthoud, Longmont and Boulder. It has another truck leaving Denver and passing through Colorado Springs, terminating its trip in Pueblo. Under separate written contracts with the exhibitors, it picks up motion picture films at the various Denver offices of the distributors and delivers them in the motion picture houses in each and all of the towns and cities named. At the time of delivering the films it picks up those already used and ready for return to the distributors or to other exhibitors, as directed by the distributors. The charge for these services is 5 or 6 cents a reel, depending upon the distance of the exhibitor from Denver. The exhibitors pay for the transportation both from and to the distributors.

The evidence shows that the applicant serves all of the motion picture houses or exhibitors except one, in the towns and cities into and through which it operates. It is very willing to serve the one house not now being served and any others who may come into the field.

The applicant contends that it is not a common carrier. The express company contends that it is. At the time of the hearing we were of the opinion that the applicant is a common carrier and another review of the authorities and a reading of the briefs filed have convinced us that it is such a carrier without any substantial doubt. The term "motor vehicle carrier" applies to one "serving the public in the business of transporting persons or property for compensation over any public highway between fixed points or over established routes, or otherwise, who indiscriminately accept, discharge and lay down either passengers, freight or express, or who hold themselves out for such purpose by advertising or otherwise."

In order that a carrier be a common carrier, it is not necessary that he serve the whole public. No common carrier does. In Terminal Taxicab Co. v. Dist. of Col., 241 U. S. 252, it appears that the company was "under contracts with hotels by which it agreed to furnish taxicabs and automobiles within certain hours reasonably to meet the needs of the hotel, receiving the exclusive right to solicit in and about the hotel, but limiting itself to serve guests of the hotel." The court, speaking through Mr. Justice Holmes, held, "We do not perceive that this limitation removes the public character of the service, or takes it out of the definition in the act. No carrier serves all the public. His customers are limited by place, requirements, ability to pay and other facts. But the public generally is free to go to hotels if it can afford to, as it is free to travel by rail, and through the hotel door to call on the plaintiff for a taxicab * * *. The service affects so considerable a fraction of the public that it is public in the same sense in which any other may be called so. German Alliance Ins. Co. v. Kansas, 233 U. S. 389. The public does not mean everybody all of the time." This case was cited and quoted from with approval in Davis v. People, *ex rel.*, 79 Colo. 642, 644.

In the case we have here the applicant is indiscriminately serving the whole film exhibitor public with the exception of one exhibitor, whom it obviously is very desirous of serving. It is true that it may not be advertising. There is no need therefor. If it is indiscriminately accepting, discharging and laying down

express, advertisement is unnecessary. It is generally conceded not only in Colorado but elsewhere, that in order for an operator to be a common carrier he does not need to haul all sorts of freight or express. Some operators confine themselves to the moving of furniture, others to livestock, still others to milk and cream. As is stated in Campbell v. A. B. C. Storage and Van Company, 187 Mo. App. 565, 174 S. W. 140: "It is not necessary that he (a common carrier) carry all kinds of goods. If he professes to carry only a certain kind, this does not take from him his status as a common carrier * * *" (571).

In a few isolated cases there is found language indicating that one who operates under private contracts is not a common carrier. An examination of all the authorities, however, leads one irresistibly to the conclusion that in determining whether or not a given operator is a common carrier, the test is not whether he has separate written or other kind of formal contracts with each and every one of his customers. On the contrary, the test is whether he is serving a sufficiently large portion of the public in the carrying of those kinds of goods which he accepts. As is stated in the Campbell case *(supra)*: "For if the defendant, by reason of the circumstances, is a common carrier as to the goods in question, it cannot by any special contract change its status as such or exempt itself from the responsibilities growing out of that relationship." It is true that once it is determined that a carrier is a common carrier the law steps in and imposes upon him the duty of making uniform rates and rendering equal service to all persons, but the fact that the law imposes upon a common carrier such a duty has nothing whatever to do with the test as to whether he is a common carrier.

In the Davis case *(supra)* it appeared that the operator was serving 121 members under a contract with a so-called merchants and manufacturing association, which was organized for the sole purpose of evading the law, as Davis had been denied a certificate by this Commission. In one case an operator in Greeley had picked out seventy-five of the leading merchants and business men in that city and made separate written contracts with each and all of them. He then contended he was a "contract" car-

rier. The question is not whether he is a "contract" carrier. It is whether he is a common or private carrier. If an operator serving seventy-five business men without any formal written contracts is a common carrier, the making of such contracts does not make him a private carrier.

It is quite true, as has been held in a number of cases, including those decided by the Supreme Court of the United States, that a private carrier cannot lawfully be converted into a common carrier against his will, but it is equally as clear that a common carrier is such by reason of what he does in spite of what he says about himself.

A few cases bearing on the questions involved here might be mentioned. In Smitherman and McDonald, Inc., et al., v. Mansfield Hardwood Lbr. Co., 6 Fed. (2d) 29, it appears that the lumber company extended its private railroad line some three miles to carry oil for one party who for a while was the only shipper. Later it made contracts with four other shippers of oil and held itself willing and ready to haul oil and oil supplies for any others under private contract, although it professed not to be a common carrier. It was held to be a common carrier of oil and oil equipment.

Western Maryland Dairy, Inc., concluded to transport to its depot milk which it purchased from certain farmers. It bought out certain individuals and companies who had been transporting the milk and thereafter carried the milk on its routes to its plant in its own trucks. The farmers were charged for the transportation, in some cases more and in others less, than they had paid before. The transportation charge was somewhat camouflaged and referred to as a "differential." The milk was bought "f. o. b. Baltimore." The Maryland Court of Appeals, in West, *et al.*, v. Western Md. Dairy Co., 135 Atl., 136 P. U. R. 1927-B, 524, held that the carrier of the milk, the dairy company, came within the terms of the public freight motor vehicle law of Maryland and quoted from a decision in another case in which it was stated that the "plan of operation bore evidence of being a studied attempt to reap the rewards of common carriers without incurring the corresponding liabilities."

The port of Seattle, which was operating a ferry, entered into a contract with a bus company by which the latter agreed to transport passengers going to or from the ferry. The bus company was held to be a common carrier. State v. Ferry Line Auto Bus Company, 161 Pac. (Wash.) 467. In Textile Alliance, Inc., v. Keahon, Inc., 211 N. Y. S. (Sup. Ct.) 205, it appears that the trucker had a contract with the United States for the exclusive transportation of imported merchandise from the steamship docks to certain places of appraisal. The United States restricted this service to one operator and paid him his certain charges. However, the importers reimbursed the Government. The operator was held to be a common carrier.

The Pennsylvania Public Service Commission in Wayne Transportation Company v. Leopold, *et al.*, P. U. R. 1924-C, 382, held that two men, both working in a mill, one owning a five-passenger car, the other a seven-passenger car, making morning trips from home to the mill and evening trips in return, carrying on these trips with them eleven other workmen who resided in the same place and were also employed at the mill, or in the town in which it was located, were common carriers. The contention of the operators in that case was much the same as that in this one. According to the Commission, "They sustained this contention mainly upon the allegation that they do not hold themselves out as carriers for the public at large, or for passengers indiscriminately, inasmuch as the passengers they carry, practically speaking, are the same persons every day. In effect, the contention of respondent is that their passengers are carried under private contract." The Commission, continuing, said: "With this contention the Commission cannot agree. Courts and commissions have repeatedly held that the distribution between common and private carriage *does not* necessarily *depend upon whether written or oral contracts have been entered into* but rather upon the nature and character of the carriage or service rendered and upon actual conditions of service as disclosed by testimony." (Italics ours.) The Commission quoted from another case decided by it, one significant sentence of the quoted matter being: "There are numerous acts which tend to

establish common carriage; that all of them must exist in a particular case in order to establish common as distinguished from private carriage is not the law.

The California Railroad Commission, which probably has done more work than any other State Commission in the field of regulation of automobile carriers, held in Forsythe v. San Joaquin Light and Power Corp., P. U. R. 1926-C, 344, that a corporation in transporting its employes and their families by auto stage on public highways between a city and its construction camps for definite fares fixed by written instructions to its labor agent and noted on employment contracts for deduction from wages, is a transportation company as defined by the auto stage and truck transportation act of 1917.

In Restivo v. West, *et al.*, P. U. R. 1926-A, 639, 129 Atl. 884, the Maryland Court of Appeals held that an operator transporting passengers under a so-called charter agreement by which the passengers presenting themselves for transportation were said to charter the vehicle for thirty ($30.00) dollars a trip, was a common carrier. The Commission said: "It is difficult to determine with exactness just when the owner of a motor vehicle is operating as a common carrier, as that term is ordinarily understood in the law, but the courts have not been inclined to excuse the increasing number of those who earn their livelihood by transporting persons or goods for hire in motor vehicles from the responsibilities of common carriers simply on technical grounds * * *."

A rather unusual contract for transportation is set forth in Goldsworthy, *et al.*, v. Maloy, *et al.*, decided by the Maryland Court of Appeals and reported in 141 Md. 674, 119 Atl. 693, P. U. R. 1923-C, 626. One Goldsworthy was the owner of a large motor truck for the use of which he had a license permitting him to operate the truck for hire. (Apparently as a private carrier.) One Buckell entered into a contract with Goldsworthy by which Goldsworthy hired his truck "unto the party of the second part for and during a period of two weeks from the date hereof and thereafter for a like period of two weeks from time to time until either of the parties shall give the other one week's

notice of his desire to discontinue the same for the purpose of transporting such persons as the said party of the second part shall desire, from Gilmore, Allegany County, Maryland, to Barton, Allegany County, Maryland, and from Barton to Gilmore, making each working day one trip with the said truck each way." The contract further stipulated that the trip should be made at such time in the day as to deliver the passengers in time for their daily occupations and to return with them at the termination of their day's work. The owner of the truck was to receive a stated amount for every trip and so much per passenger for all passengers in excess of a certain number. The State Public Service Commission secured an injunction which, on appeal, was sustained. The Maryland Court, in the course of its opinion, said: "If it be held that an owner of a motor vehicle can thus relieve himself of complying with the requirement of the law, to obtain a permit from the Public Service Commission, and from being placed in the class of common carriers, it will furnish an easy way to evade the law. If Goldsworthy can say, 'I am not a common carrier; I only carry such persons as Buckell shall desire, or such as may be designated by him,' and keep up that business for an indefinite time, of hauling from half a dozen to twenty or more persons every trip, without being amenable to the law as a common carrier, it would be useless to pass such statutes as we have on the subject." (632.) The court further stated in a concluding paragraph of its opinion: "The owners certainly should not too readily be permitted to enter into contracts or adopt measures which will enable them to readily evade the law or the spirit of the statutes intended to govern them."

While in the case before us the revenue that would be received by the State from the operation in question of the applicant would be comparatively small, we see no reason why, if a carrier transporting films for all of the exhibitors except one in its territory and standing ready to serve that one and all other persons as they come into the field, is not a common carrier, a carrier hauling groceries to all of the merchants in a large area of the State might not also operate as a private carrier. The same

would be true of those now hauling livestock, milk and cream and other special commodities under certificates issued by this Commission. Thus the purpose of the statute would largely be defeated.

It is doubtless true that in this case the operator renders some personal service in connection with its transportation. The same is true of many other common carriers, including the Express Company, protestant herein. Such special services are a matter to be governed by tariff provisions and rules and regulations which are required by this Commission to be filed with it by all common or motor vehicle carriers.

Of all the cases cited by the applicant only one appears to be in point, although we do not agree with a statement found in another case. The one case in point is identical with the case here. The Federal District Court for the Eastern District of Michigan, Southern Division, held in Film Transport Co. v. Mich. P. U. C., *et al.*, 17 Fed. (2d) 857, that an operator serving 150 theatres in the southern part of the State under separate contracts is not a common carrier. The exhibitors served appeared probably to be the greater part of those in the given territory. The language of the court being: "* * * the plaintiff is serving a large class of shippers, though perhaps not all the individuals in the class shipping in a given territory." (858.) The opinion in the case is rather short and is apparently based upon a total misconception of the decision rendered by the Supreme Court of the United States in Mich. P. U. C., *et al.*, v. Duke, 266 U. S. 570. The court said in the Film Transport Case, "The test, however, applied to the transportation company in the Duke case * * * when applied to the plaintiff in this case leads invariably to the same conclusion." One looks in vain for any suggestion in the Duke case which could conceivably require such a decision as was made in the Film Transport case. In the Duke case it appeared that the operator was serving three customers. The language of the court being: "His sole business * * * is limited to the transportation covered by his three contracts." The three customers were shipping their own products only. There is no suggestion in the Duke case that one who

otherwise would be a common carrier could, by the simple expedient of making some formal written contracts, withdraw himself from that class. The important point in the Duke case obviously is that the carrier was serving only three customers, not that he had written contracts or any contracts at all.

In Hissem v. Guran, *et al.*, 146 Northeastern (Ohio) 808, it appears that Guran and Myers were "under a contract of employment with a branch of the Summit County Milk Producers Association, whereby they were employed for hire to collect and transport milk and cream of the members of the said association, and no one else, to the White Rock Dairy Company of Akron, and no other person, upon a regular schedule of price, depending upon the distance and the character of highways covered * * *." (808, Col. 2.) It does not appear who paid the transportation charges or whether the milk was bought f. o. b. the milk dairy's depot or to the farmer's gate, although there is found this language in the opinion (808, Col. 2): "Guran and Myers do not serve the public generally, or any person or firm other than members of the association, in accordance with the contract." The court made this statement in the course of its opinion (809, Col. 2): "The authorities are equally uniform in holding that, if a carrier is employed by one or a definite number of persons by a special contract * * * he is only a private carrier." This is the statement with which, as we stated above, we cannot agree because without question, taken literally, it is wholly out of line with the authorities in the country bearing on the point. If this were the law one carrier might conceivably haul for 500 or 1,000 or more farmers, provided each and all of them made a separate contract or that all had the dairy company make the contract for them. In this State we not only have common carriers hauling milk for the farmers under certificates from the Commission, but we have private carriers hauling for one dairy company the milk which it purchases delivered to the dairy at the farmer's gate. Where the carrier hauls for a large number of farmers, whether under special contracts or otherwise, and they pay the freight, he is a common carrier. When he is employed by the dairy company to collect and haul

for it, milk which is delivered to the dairy at the farmer's gate, he is a private carrier.

After careful consideration of the evidence the Commission is of the opinion and so finds that the operation now being conducted by the applicant, The Exhibitors Film Delivery & Service Company, is that of a common carrier and that not having and not asking for a certificate therefor, either for intrastate or interstate business, it should be ordered to cease and desist from said operation.

Of course, we are not called upon to express any opinion as to the public convenience and necessity for such operation, as the applicant has expressly asked us not to do so. An expression of opinion on this question would be gratuitous and uncalled for because the case, so far as that question is concerned, is moot and the briefs of the parties do not discuss the question.

ORDER.

IT IS THEREFORE ORDERED, That the applicant, The Exhibitors Film Delivery & Service Company, cease and desist its motor vehicle operation for the transportation of motion picture films over the highways in the State of Colorado, both in intrastate and interstate commerce until the applicant shall have asked for and secured a certificate of public convenience and necessity therefor.

Commissioner Bock did not participate in the disposition of this case.

RE E. E. ASHFORD, *et al.*

[Applications Nos. 1167 and 1170. Decision No. 1871.]

Certificates of convenience and necessity—Choice of applicants—Considerations.

Of two applicants a certificate of convenience and necessity was issued to one who had been a long-time resident of the State and owned both real and personal property situated in the State, while the other had resided in the State only a little over two months and owned only personal property.

[August 17, 1928.]

Appearances: E. E. Ashford, Colorado Springs, Colorado, pro se; John O'Byrne, Colorado Springs, Colorado, pro se.

STATEMENT.

By the **Commission:** On August 2, 1928, E. E. Ashford filed his application for a certificate of public convenience and necessity authorizing the transportation of passengers and baggage between Colorado Springs and the Navajo Sanatorium, situated some fourteen miles northeast of Colorado Springs. On August 9, 1928, John O'Byrne filed his application for a certificate of public convenience and necessity to conduct the same sort of operation between the same points. No protests were filed in either case. The two cases were set for hearing and were heard in the City Hall in the city of Colorado Springs on August 14, 1928. The applications were consolidated for hearing.

Navajo Sanatorium has been in operation some six months. It is said to have a capacity at the present time of some seventy-five patients with the prospect that the capacity will be considerably enlarged. In addition to the resident patients, their friends and relatives going to and from the sanatorium, many other patients go there for examination and treatment, making the round trip in one day. There is no regular transportation to or from the sanatorium at the present time.

It is the opinion of the Commission, and we so find, that the public convenience and necessity requires a motor vehicle operation for the transportation on regular schedule of passengers and baggage between the said Navajo Sanatorium and Colorado Springs.

The question then arises as to which of the applicants should receive a certificate. According to both applicants, who were the only witnesses, the head of the institution is willing to have either of them operate and expresses no preference between the two.

Ashford has resided in Colorado Springs a little over two months, having come from California, where he has resided for the past six or eight years. His household goods are still in California, with the prospect of a sale of them there. He owns

no real estate, but does own one Willys-Knight 1926 sedan of the value of twelve hundred ($1,200) dollars. This sedan is now in Colorado Springs. In addition he owns some four Ford automobiles of the value of fifteen to twenty-five dollars ($15.00 to $25.00) each. They are all still located in California. He has some twelve hundred ($1,200) dollars on deposit in a bank in Colorado Springs and has loaned out some fifteen hundred ($1,500) dollars to two thousand ($2,000) dollars, which is well secured.

O'Byrne has resided in Colorado Springs some forty-two years. He owns two Pierce-Arrow automobiles of the value of two thousand ($2,000) dollars, one of which is encumbered to secure an indebtedness of four hundred ($400) dollars. He owns also, clear of encumbrance, two houses situated in Colorado Springs, one being a six-room, the other a two-room residence.

O'Byrne testified that the sightseeing business, which he is authorized to conduct under a certificate heretofore issued by the Commission, has been very poor and that he can, without interference with his sightseeing business, spare one car regularly and both in emergencies.

Both of the applicants impressed the Commission as being reliable and thoroughly dependable. From the facts we have stated, both seem to be in a financial condition to render adequate service. It is, therefore, difficult to make a choice between the two.

However, after careful consideration of the evidence the Commission is of the opinion, and so finds, that the public convenience and necessity requires the proposed motor vehicle operation of the applicant, John O'Byrne, and does not require the proposed operation of the applicant, E. E. Ashford.

ORDER.

IT IS THEREFORE ORDERED, That the public convenience and necessity requires the motor vehicle operation of the applicant, John O'Byrne, for the transportation of passengers and baggage between Colorado Springs and Navajo Sanatorium, 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 application of E. E. Ashford be, and the same is hereby, denied.

IT IS FURTHER ORDERED, That the applicant, John O'Byrne, 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, John O'Byrne, operate such motor vehicle carrier system according to the schedule filed with this Commission, except when prevented from so doing by the Act of God, the public enemy or unusual or 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 MILDRED R. YOUNG.

[Application No. 1061. Decision No. 1873.]

Certificates of convenience and necessity—Monopoly and competition—Offer to conduct needed but unprofitable service—Effect on application to duplicate other service.

The fact that an applicant for a certificate of convenience and necessity offers to conduct operations needed by the public but which alone are not profitable is an important consideration in determining whether to authorize duplication of another service.

[August 20, 1928.]

Appearances: W. F. Noonan, Esq., Glenwood Springs, Colorado, attorney for the applicant; Frank Delaney, Esq., Glenwood Springs, Colorado, attorney for Harp Brothers, protestants; Raymond E. Janes, Meeker, Colorado, pro se, protestant; Thos. R. Woodrow, Esq., Denver, Colorado, attorney for The Denver and Rio Grande Western Railroad Company and Western Slope Motor Way, Inc.

STATEMENT.

By the **Commission**: On February 28, 1928, Mildred R. Young filed her application for a certificate of public convenience and necessity authorizing the transportation of freight and express between the town of Rifle and the town of Rangely, via the town of Meeker and intermediate and adjacent points. On March 7, 1928, the Commission received a communication from Raymond E. Janes, protesting against the issuance of the certificate. The case was duly set for hearing and was heard in the Court House in Glenwood Springs on April 27, 1928. On May 17 the applicant filed an amendment to her application in order to conform to the proof made. In said amendment she asked authority to establish, maintain and conduct a general trucking business for the transportation of freight, express, livestock, farm and ranch products and express, oil well supplies, gasoline, oil, commodities, goods, wares, merchandise and sundries and articles of personal property of all kinds and character between the town of Rifle and the town of Rangely and intermediate and adjacent points by way of and passing through the town of Meeker.

On June 2 the Commission made an order in which it stated that while there was a substantial amount of evidence to the effect that there is enough freight being transported between Rifle and Meeker to warrant the granting of a certificate to the applicant even though two certificates already had been granted authorizing operations between the two said points, neither of the certificate holders appeared at the hearing in person or by attorney, and that the evidence on this point was not as specific and detailed as the Commission feels it should be before making a final order. The order further stated that the Commission should have somewhat more definite evidence of the ability or inability of the two certificate holders to take care of the business between Rifle and Meeker adequately. The case was set for further hearing in the Court House in Glenwood Springs on June 27, with the proviso that the further evidence should be limited to that part of applicant's operations which she proposes

to conduct in hauling freight to and from Meeker and Rifle as distinguished from the miscellaneous business originating and terminating in Rangely and points outside of Meeker and Rifle. The case came on for hearing and was heard further in the Court House in Glenwood Springs at the time set.

At the hearing the Harp Brothers, certificate holders operating between Rifle and Meeker, filed their written protest. At the same time the applicant filed an amendment to the application as amended. In said amendment she asks for authority to establish, maintain and conduct a general trucking business for the transportation of freight, including livestock, farm and ranch products, oil well supplies, etc., between the town of Rifle and the town of Rangely and all intermediate or adjacent points within a radius of two hundred miles by way of and passing through the town of Meeker.

The case has given the Commission much study and careful consideration. The applicant is a very efficient business woman who has engaged in a general trucking business in the Meeker territory. She owns two large White trucks of the value of approximately ten thousand ($10,000) dollars, each of which has a maximum load capacity of ten thousand (10,000) pounds. Since 1924 her trucks have been engaged in the transportation of heavy oil machinery, equipment and casing from Rifle, situated on the railroad, to the Rangely oil field, situated about sixty-five miles west of Meeker. She has served the Texas Production Company, The Mid-West Refining Company and the Amazon Drilling Company. Her oil equipment operations have also been carried on between the Rangely field and other oil fields in the Craig district. No other operator in the district is able to handle such heavy shipments.

There was considerable evidence to the effect that the two certificate holders operating between Meeker and Rifle are not able to haul all of the farm and ranch products, including grain, wool, livestock, livestock feed, etc., between the farms and ranches in the Meeker district. There was some difference of opinion as to whether the freight being shipped out of the Meeker territory is increasing or not.

At the time of the first hearing of the case the Commission heard another case in which it had ordered an unlawful operator to show cause why he should not cease his operations between Meeker and Rangely. Thereafter an order was entered requiring him to cease his freight and express operations, which were being carried on without a certificate. When said order was issued there was left no carrier serving Rangely and the farmers and ranches situated between that point and Meeker. The applicant offers to conduct a regular transportation service between Rifle and Rangely, and she is the only one who to this date has offered to serve the territory west of Meeker. This consideration is deemed an important one, as the Commission feels that although the volume of freight and express between Meeker and Rangely may not be great, the people of that territory should have some other service than that afforded by parcel post by the mail carrier.

The town of Meeker, which is the county seat of Rio Blanco County, has no rail connections, the nearest railroad point being Rifle. Evidence was introduced to the effect that Harp Brothers and Raymond E. Janes, the two authorized certificate holders operating between Rifle and Meeker, are able to handle all of the freight between those two points. The evidence tended to show further that without hauling some freight between Rifle and Meeker which terminates or originates at those points, the applicant could not afford to conduct a regular operation, or any at all, along the route west of Meeker to Rangely or to haul the miscellaneous farm and livestock products from the Meeker territory to Rifle, and the farm and ranch supplies from Rifle to said Meeker territory.

The evidence shows that in past years the highway between Rifle and Meeker becomes impassable at times and that Harp Brothers, in order to keep open the highway and transport freight over the same, have to keep some sixteen (16) head of mules and horses, combination freight and passenger sleds and wagons and two stage barns on said highway. There was some evidence also to the effect that the applicant could not haul freight over said highway in the winter with her equipment.

After careful consideration of all of the evidence the Commission is of the opinion and finds that the public convenience and necessity requires the proposed motor vehicle operations of the applicant for the transportation:

1. Of oil well equipment and supplies between the Rangely field and Rifle and other points situated within a radius of two hundred (200) miles of said field.

2. Of farm products including grain, wool and livestock from the farms and ranches in the Meeker territory to Rifle and of ranch supplies from Rifle to the farms and ranches in said territory.

3. Of freight for five (5) individuals, firms or corporations situated in the town of Meeker between Meeker and Rifle, provided and on the condition that said transportation can be and is conducted by the applicant herself with regularity throughout the whole year.

4. Of freight and express of all kinds between Rifle and Rangely and points intermediate to Rangely and Meeker, provided such transportation can be and is conducted by the applicant herself with regularity throughout the whole year.

The Commission is further of the opinion that unless the applicant herself can make trips regularly throughout the year, she should not be authorized to haul freight for any individuals, firms or corporations in Meeker and that the freight and express which she carries to and from Rangely and points intermediate thereto and Meeker should originate or terminate in Meeker and not in Rifle.

ORDER.

IT IS THEREFORE ORDERED, That the public convenience and necessity requires the proposed motor vehicle operations of the applicant, Mildred R. Young, for the transportation:

1. Of oil well equipment and supplies between the Rangely field and Rifle and other points situated within a radius of two hundred (200) miles of said field.

2. Of farm products including grain, wool and livestock from the farms and ranches in the Meeker territory to Rifle and

of ranch supplies from Rifle to the farms and ranches in said territory.

3. Of freight for five (5) individuals, firms or corporations situated in the town of Meeker between Meeker and Rifle, provided and on the condition that said transportation can be and is conducted by the applicant herself with regularity throughout the whole year.

4. Of freight and express of all kinds between Rifle and Rangely and points intermediate to Rangely and Meeker, provided such transportation can be and is conducted by the applicant herself with regularity throughout the whole year. And this order shall be taken, deemed and held to be a certificate of public convenience and necessity therefor.

IT IS FURTHER ORDERED, That unless the applicant herself can and does make trips regularly throughout the year, she shall not be authorized to haul freight for any individuals, firms or corporations in Meeker and that the freight and express which she carries to and from Rangely and points intermediate thereto and Meeker shall originate in Meeker and not in Rifle.

IT IS FURTHER ORDERED, That the applicant file with this Commission within ten days from the date of this order and from time to time thereafter, a statement giving the names of such five individuals, firms or corporations situated in the town of Meeker, and that the applicant will not transport freight for any other individuals, firms or corporations in Meeker than those appearing on the statement on file with this Commission.

IT IS FURTHER ORDERED, That the applicant shall within twenty days from this date, in the event she desires to accept the certificate granted her herein or any part thereof, file a written acceptance with the Commission accordingly, and that in the event she desires to accept that part of the certificate authorizing the transportation of any freight originating in Rifle and terminating at Meeker or originating in Meeker and terminating at Rifle she shall agree to conduct a regular operation to Rangely and points intermediate thereto and Meeker.

IT IS FURTHER ORDERED, That the applicant 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 schedule filed with this Commission except when prevented from so doing by the Act of God, the public enemy or unusual or 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.

CITY OF CRIPPLE CREEK
v.
CRIPPLE CREEK WATER COMPANY.

[Case No. 330. Decision No. 1878.]

Service—Right to discontinue—Fire hydrants.

1. A city should not be required to continue to rent a number of fire hydrants which have become unnecessary by reason of a reduction of population and property hazards, notwithstanding the fact that a discontinuance of such rentals might so lower the available return as to make necessary a rate increase.

Rates—Procedure—Evidence for reduction.

2. No reduction will be made in the rates of a utility unless there is ample evidence before the Commission that will permit of a reasonable determination as to the advisability of such action.

[August 27, 1928.]

Appearances: E. B. Upton, Esq., Cripple Creek, Colorado, attorney for the City of Cripple Creek, Colorado; Page M. Brereton, Esq., Denver, Colorado, attorney for The Cripple Creek Water Company.

STATEMENT.

By the **Commission**: On October 26, 1927, the City of Cripple Creek, Colorado, filed a complaint in which allegations were made as to the marked and rapid decrease of the population of

said city, the wrecking and removal of many of the residences and business houses of the city and the marked decrease of the assessed valuation of the property therein.

The complaint further alleged that by virtue of the decreased valuation of property the revenue of the city had decreased in even greater proportion; that the outstanding bonded indebtedness of the city was $78,000, although the assessed valuation is only slightly over $500,000; that the city, because of the decrease in number of buildings needing fire protection, no longer has use for some thirty fire hydrants; that the rate is excessive in comparison with rates in other cities and that the city is not able to pay the existing fire hydrant rental. The complaint alleges also that the city is unable to operate and continue paying the excessive rental; that negotiations had been conducted with the defendant for the purpose of securing a reduction in the fire hydrant rentals and that no success had resulted from said negotiations.

The complaint concluded with a prayer that this Commission investigate the rates and charges of the defendant for hydrant rentals and reduce such charges to a reasonable rate, effective July 1, 1927, and for such other relief as may be proper in the premises. On November 14, 1927, The Cripple Creek Water Company, defendant, filed its answer in which it admitted a number of allegations of the complaint. It denied, however, that the complainant is not able to raise sufficient revenue to pay its obligations and operating expenses and that the rate of the fire hydrant rental heretofore fixed by the Commission is excessive considering the valuation and operating expenses of the defendant. The defendant admitted that the needs of the city of Cripple Creek are less than when the population was larger, but alleges that it was induced to invest its capital in its plant for the purpose of supplying a demand which was actual and reasonable when the investment was made, and that the defendant is not in any way responsible for reduction of the demand and should not, therefore, be penalized for it.

It denied that the present fire hydrant rental is excessive and that the complainant is unable to pay the same. It alleges that

in 1926 the defendant sustained an operating loss of $434.33 and that with the best and most economical management the system cannot pay a fair return on the investment even at present rates. It then asks that the complaint be dismissed.

The case was set for hearing and was heard in the Hearing Room of the Commission on July 17, 1928. The evidence showed without any contradiction that the reductions in population, in assessed valuation and the number of buildings in the city of Cripple Creek in the past twenty years has been very great and that the city is wrestling with a very difficult problem in meeting its obligations. The evidence further showed the city's bonded indebtedness is $78,000, as alleged in the complaint. A recital of the details of the evidence as to the loss of population, the number of houses wrecked, the stringent financial condition of the city, etc., would serve no useful purpose. It may be stated, however, that at the present time the population appears to be some 1,900, and that in a period of slightly over three years ending June 27, 1928, 80 wrecking permits have been granted, pursuant to which buildings had been wrecked. The original bonded indebtedness of the city, created in 1916 to pay city warrants, has been reduced by only $2,000 in the years 1925, 1926 and 1927. All of the said bonded indebtedness, amounting to $78,000, matures in the year 1931.

In Case No. 31, the decision in which was entered on March 25, 1916, the Commission fixed the total valuation of the property of the defendant used and useful for serving the city of Cripple Creek at $150,000. In that case the Commission allowed a reduction of the number of fire hydrants to be left in service in said city to 100 and fixed the annual charge of each hydrant at $52.50. In accordance with this order, the city council of the city of Cripple Creek designated 100 hydrants which the city desired to retain.

There are two questions raised and requiring decision. One is whether the number of the hydrants should be reduced, and if so, to what extent. The other is whether the rental per hydrant should be decreased.

The evidence was convincing and undisputed that in view of the number of houses now in Cripple Creek, 65 hydrants are ample to afford to the city protection against fire. The Commission attaches hereto and makes as a part hereof Exhibit "A" showing the location of the 65 hydrants which the city reasonably needs to have retained. Those not included in this statement are the ones which the Commission finds are no longer necessary.

The Commission had anticipated, after its Engineer had in company with an engineer of the Mountain States Inspection Bureau, made a report tending to support the allegations that a large number of the hydrants are no longer necessary, that the defendant herein might ask to have broadened the issues so as to raise the question of the reasonableness of the rates on the remaining hydrants and probably to the individual consumers residing in the city. However, no such broadening of the issues was attempted or requested.

The financial statement introduced in evidence and based upon the annual reports of the defendant for the years 1916 to 1927 show very substantial profits for the years 1916, 1917 and 1918. The profits shown are arrived at after deducting for depreciation during each of those years some $4,300 or $4,400 in excess of the amount allowed in said Case No. 31 to be reduced. The profits include three very substantial items, one for each of the three years, totaling some $32,000. These items appear opposite the words: "Add—Other Income." If this other income was derived from property included in the used and useful property on which the Commission in that case made a valuation it should be taken into consideration in arriving at the net profits from the property valuation of $150,000. If it was derived from other property not included in that valuation it should be disregarded. The evidence does not show that it was derived from property not included in that valuation, and, so far as the Commission knows, the company has no other property from which any substantial revenue could be derived. The defendant testified that the reason for its showing a depreciation greatly in excess of that allowed by this Commission is that the Federal

Government allows the greater depreciation in arriving at the amount of income tax to be paid by the defendant.

The total taxes shown by the reports of the defendant to have been paid during the 12-year period, 1916-1927 total $81,272.32. The evidence produced by the complainant shows that the taxes paid in Teller County during that period amount to $71,153.95, making a difference of $10,118.37. The complainant admits that probably the company's report properly includes an annual corporation flat tax amounting to $660 for the 12 years. This would leave a difference of $9,458.37. One item which received considerable attention at the hearing is the taxes shown by the annual report for the year 1921. This report shows the amount thereof to have been $12,750.07. The taxes for the preceding year were $6,360.57 and those for the succeeding year are $6,526.73. The secretary of the defendant was of the opinion that this greatly increased amount for the year 1921 was due to some change in bookkeeping or a change made in the fiscal year of the company. He was given leave to mail to the Commission any further information which he might have bearing on this item but to date no information has been received. In view of the fact that a normal amount of taxes seems to have been paid in both the preceding and succeeding years, it is hard to understand this very large item appearing in the report for the year 1921. Even though this amount is excessive by some $6,000, we do not understand how the difference between the taxes shown by the records of Teller County to have been paid and those as shown by the annual reports could amount to more than $9,000, as the taxes stated in the annual reports for the various years are all in odd amounts and with two exceptions for an odd number of cents. Assuming, however, that the taxes paid are less by $9,458.37 than the total amount as shown by the annual reports for the years 1916 to 1927 inclusive, and that the depreciation deducted had been $2,500 per year, the authorized amount, instead of the amounts that are shown by the reports to have been deducted, the total income for the 12-year period is $113,981.02. A return of 7% on $150,000 for the period in question would amount to $126,000. However, this does not tell the whole story. Begin-

ning with the year 1919 the income of the defendant has been so greatly lower than the income for the years 1916 to 1918, inclusive, that it cannot be at all comparable with the 3-year period 1916-1918.

We find that the total income for the 6-year period, 1922 to 1927, inclusive, allowing a deduction of only $2,500 yearly for depreciation, is $24,798.38. While this is an average for the 6 years of a little over $4,000, the first year of the period, 1922, shows a much larger profit than any of the succeeding years. The profit for that year was $6,245.06. For the 6-year period the net return per year on $150,000 is .0275 plus. The profit for the year 1927 is $3,357.20. The elimination of 35 hydrants on which the defendant is receiving a commission-fixed rate of $52.50 will reduce the gross income of the defendant $1,837.50.

In spite of these figures, the City of Cripple Creek argues that the Commission should not only order the elimination of 35 hydrants, but should reduce the rates paid by the city on the remaining 65. The next to the last paragraph of the brief submitted by the city reads: "'Even if it be contended that the city has not in this case shown sufficient to be entitled to a reduction on the price per hydrant a year, it has proven that it does not need to exceed sixty-five fire hydrants, and the company has made no denial of this fact by answer or evidence and it is to be remembered that the company has made no request or showing for any increase of rates whatsoever." This paragraph rather impliedly recognizes that although the Commission might order the elimination of the 35 hydrants, it would not be warranted in reducing the rates in view of the evidence submitted. On the other hand, it should be stated that the sentence may somewhat be due to the fact that the Commission during the hearing questioned the sufficiency of the evidence to warrant a reduction in the rental.

On the contrary, the defendant contends that in view of its already meager income the Commission is not justified in ordering the elimination of the 35 hydrants because such action would be an unwarranted reduction of the rates. It might be stated here that there was no evidence introduced at the hearing bear-

ing on the present value of the property of the defendant used and useful. The evidence was confined to the financial condition of complainant and a comparison of hydrant rates with those in other cities.

Even though the Commission should not order the elimination of the 35 hydrants we would not feel justified on the evidence introduced in this case, in spite of the very serious situation of the city, with which the Commission fully sympathizes, in reducing rates. What the evidence might show in another hearing on the rates should be we do not, of course, express any opinion. But assuming that the defendant is entitled to all of the gross income which it is now receiving and conceivably to more, we are of the opinion and so find that it is contrary to good economics to require the city to pay for the maintenance and upkeep of 35 hydrants which are no longer necessary. The Commission is of the opinion that they should be disconnected and sold for such value as they may have. If they have no second-hand value it would be better to disconnect them and relieve the city of the cost of maintenance and upkeep. No evidence was submitted bearing on the question of the value of the hydrants, the cost of removal, the maintenance, upkeep, etc., but we are of the opinion in the absence of any showing to the contrary that it is not in accord with sound business principles to continue them in use though the net loss by reason of their discontinuance and possible sale might have to be made up in some other manner.

The Commission is, therefore, of the opinion and so finds that the public convenience and necessity does not longer require the maintenance of the 35 hydrants not included in Exhibit "A." The complainant asks for an order effective July 1, 1927. No hydrant rental whatever has been paid by the city for the period beginning July 1 to date. While the evidence does not show very clearly, if at all, how the situation prior to March 21, 1928, the date of the report made to the Commission by its engineer, compared with the situation at that time, we believe it is fairly inferable that the condition was substantially the same on October 26, 1927, the date of the filing of the complaint, as it was

in March and at the time of the hearing. We believe it fair, therefore, to and we do find, that the public convenience and necessity did not require the 35 hydrants in question on and after October 26, 1927, and that the city should be relieved of payment of rental therefor from that date. The ground of making our order effective as of October 26, 1927, is that the rights of the complainant should be determined as of the date of the filing of the complaint. We doubt the propriety of relieving the city of the payment of the rental on those hydrants prior to the date of the filing of its complaint even though for a few months prior thereto it was engaged in good faith in what resulted in a fruitless attempt to settle the matter without recourse to this Commission.

The defendant, on page 8 of its typewritten brief, in support of its argument that in view of the evidence before the Commission it would not be warranted in making a reduction of either the hydrant rentals or the number of hydrants (because the latter course would reduce the total income of the defendant), cited Ohio & Colorado Smelting & Refining Co. v. Public Utilities Commission, *et al.*, 68 Colo. 137. We call attention to this citation because on pages 8 and 9 of that brief a certain portion of the opinion of the Court in the case cited is quoted which might indicate that the Commission on its own motion should have made a thorough examination and valuation of the property of the defendant. In the case cited it appeared that this Commission had ordered reduced a rate which was being paid to the Colorado Power Company under a contract entered into with a private corporation, without having established a reasonable value of the property of the power company either as a whole or of the local plant in Salida as a part thereof. The Court pointed out that the Commission could not be lawfully excused for this failure and that it is not like a court to consider and determine only that which is brought before it. It further pointed out that one of the duties of the Commission is to investigate and determine in the interests of the State.

However, on page 9 of the brief the defendant stated: "* * * but we respectfully submit that the Commission is not called

upon to do this by the complaint or pleadings filed here, and that no good could result to the city and perhaps no good could result to the company, by taking such action."

The complainant cites the same case on page 6 of its brief and suggests that in some other hearing of a different nature "there could be many matters and facts to consider not relevant or pertinent to this hearing." It states also on the same page of its brief: "However, for the present purpose that is unnecessary." The case is cited again in the brief of the complainant on page 8, but the citation is in connection with and in support of an argument that the Commission should judge fairness of rates in view of the financial ability, etc., of the city as distinguished from and without regard to the consideration of the value of the investment of the utility.

Irrespective of whether the Commission itself on its own motion and through its engineering force should have made the necessary examination, study and valuation of the refining company's system, the fact remained in that case that until it did have the evidence before it of such valuation it could not lawfully increase the rate being paid by the customer. In the case now before the Commission we are not reducing any rate. We are simply holding that even though the elimination of some of the hydrants might conceivably entitle the defendant to higher rates, any loss of revenue should, if necessary, be made up by securing higher rates instead of forcing the city to pay a return on the investment in and the upkeep and maintenance of the unnecessary hydrants. The Commission has stood ready in this case to conduct a rate hearing in which evidence of a valuation should come before it, but the defendant has expressly stated that it is not necessary. The complainant has joined in this petition.

Moreover, in addition to the fact that the parties themselves have not seen fit to submit the case on any evidence bearing on the present value of the system, it might be stated that the engineering force of the Commission is limited and that it has been otherwise engaged since the filing of the complaint, and that the Commission has not thought it advisable in view of other work

which the engineering force has been compelled to give attention to, to order its force to take the large amount of time necessary to make a complete survey of the system and a valuation thereof.

ORDER.

IT IS THEREFORE ORDERED, That the public convenience and necessity does not require and has not required since October 26, 1927, the use of the 35 hydrants now in use not included in Exhibit "A" furnished by the defendant, The Cripple Creek Water Company, for the use of the complainant, the City of Cripple Creek, and that the city should be, and the same is hereby, relieved of the duty of making payment of the rental therefor after said date.

IT IS FURTHER ORDERED, That the prayer of the complainant asking for a reduction in rates of the remaining hydrants be, and the same is hereby, denied.

EXHIBIT "A."

1. C and Eaton
2. C and Carr
3. Thurlow near C Street
4. B and Golden
5. B and Eaton
6. B and Carr
7. B and Bennett
8. B and Masonic
9. B and May
10. B and Thurlow
11. Broadway and Hettig (between N. A and N. B near County Hospital)
12. A and El Paso
13. A and May
14. A and Masonic
15. A and Bennett
16. A and Carr
17. A and Eaton
18. West Street, center of block
19. Colorado Avenue and Thurlow
20. 1st and El Paso
21. 1st and May
22. 1st and Warren
23. 1st and Masonic
24. 1st and Bennett
25. 1st and Carr
26. 1st and Eaton
27. 1st and Golden
28. Florissant and Pikes Peak
29. Florissant and Galena
30. Crystal and Galena
31. Crystal and Pikes Peak
32. 2nd and Golden
33. 2nd and Eaton
34. 2nd and Carr
35. 2nd and Bennett (S. W. Corner)
36. 2nd and Masonic
37. 2nd and El Paso
38. 3rd and Warren
39. 3rd between Bennett and Myers
40. 3rd and Bennett (S. W. Corner)
41. Bennett between 2nd and 3rd
42. 3rd and Carr
43. 3rd and Eaton
44. 3rd and Golden
45. Placer and Golden
46. Hayden and Pikes Peak
47. Porphyry and Golden
48. Prospect and Galena
49. Prospect and Pikes Peak

50. 4th and Golden
51. 4th and Eaton
52. 4th and Carr
53. 4th and Bennett
54. 4th and Irene
55. 4th and Whiting
56. 5th and Bennett
57. 5th and Eaton
58. 5th and Golden
59. Carbonate and Pikes Peak
60. Bison and Pikes Peak
61. Bison and Golden
62. Carr east of tracks between N. 5th and Main
63. Main and Mine
64. Main and Golden
65. Silver and Lode

RE ARVADA ELECTRIC COMPANY.

[Application No. 1160. Decision No. 1880.]

Rates—Franchises—Commission jurisdiction—Construction of ordinance.

1. A definite statement in one section of an ordinance that certain rates specified in two other particular sections of the same should be subject to the regulation of the Commission, presumably does not apply to rates also fixed in the first section itself.

Rates—Franchises—Waiver.

2. A utility which has been given a franchise by town ordinance specifying rates to be charged stands in the same position as if the ordinance had not specified such rates, where, by its own action, no benefit has been claimed by reason of the insertion of such rates in such ordinance.

Rates—Franchises—Duty of Commission—Waiver.

3. It is the duty of the Commission to the public to take such necessary steps as will prevent rates which have been inserted in an ordinance granting a franchise from having any higher standing or securer footing than they would have if they had not been so inserted, notwithstanding the announced intention of the utility to claim no special benefit from such rates.

Certificates—Condition—Waiver of franchise rate.

4. Authority was given to a utility to exercise franchise powers given in an ordinance, which also specified rates to be charged, upon condition that the utility waived any rights to charge such rates, without the approval of the Commission.

[August 27, 1928.]

Appearances: Robert G. Strong, Esq., Denver, Colorado, for applicant; George B. Campbell, Esq., Denver, Colorado, *pro se, et al.*, protestants.

STATEMENT.

By the **Commission:** On July 13, 1928, The Arvada Electric Company, a Colorado corporation, having its principal office and place of business in the town of Arvada, Jefferson County, Colorado, filed its application for an order authorizing the exercise by it of franchise rights granted by an ordinance passed by the town of Arvada. George B. Campbell, Esq., filed with the Commission a letter in which he stated that he had been authorized by many of the customers of the applicant to file a protest against the rates on the ground that they are inequitable, discriminatory and unjust and to ask this Commission to take jurisdiction of the matter, by a public hearing of the same, and permit the customers of said company to present their side of the case prior to taking action upon the schedule of rates filed by said company. The letter continued, stating: "We will file a petition to that effect in the near future, and will seek to have your Commision make a thorough investigation of the plant, the books, and determine what would be fair rates to be awarded to said company, and desire to be notified of any date of hearing that your Commission may set." The matter was set for hearing and was heard in the Hearing Room of the Commission in Denver on August 2, 1928.

No petition or any other instrument has been filed by Mr. Campbell or any other persons relative to the rates to be charged by the company.

The applicant has been serving the town of Arvada for twenty years. No other like utility has been serving said town. The value of its equipment used in serving the town and the contiguous territory is $170,000.00 That portion of the equipment used in serving the town alone is said by the president of the applicant to be worth $65,000.00. However, these figures shall not be binding upon the Commission in any hearing had for the purpose of fixing or passing upon rates.

On July 9, 1928, the Board of Trustees of the town of Arvada passed an ordinance granting the applicant certain franchise rights, privileges and authority to own, erect, construct, extend,

operate and maintain a plant or system for the supply, distribution and sale of electricity within the corporate limits of said town of Arvada, and any further additions thereto, for a period of twenty-five years. On July 13, 1928, the applicant accepted said ordinance.

Section XI authorizes the applicant "to charge consumers within the town limits of the town, for electric service, at not to exceed the following rates:" The rates are then stated in detail. Sections XII and XIII fix the rates to be charged for the lighting of streets, avenues, alleys, bridges and public places of the town and for energy consumed by the town for water pumping purposes. The last paragraph contained in Section XI of said ordinance reads as follows: "The contract rates provided for in Section XII and Section XIII shall be subject to the jurisdiction of the Public Utilities Commission with full power and authority to regulate the same." While the last paragraph of Section XI, which was quoted by us, makes no reference to its rates under Section XI, we understand that the statement made by Mr. Sterne applies to them as well as to those rates to be charged under Sections XII and XIII. However, we cannot overlook the fact that, presumably for some reason or other, the statement does not apply to rates stated in Section XI.

Mr. George B. Campbell, Esq., appeared with a number of witnesses and offered to make proof that the rates, particularly those charged to the residents of the town, are unreasonable. In this connection we might state that, as the evidence shows, on July 12, 1928, the applicant filed a tariff of rates identical with those set forth in the ordinance. The rates applying to the town of Arvada were a reduction. Therefore, the Commission, pursuant to its practice, authorized the said rates to become effective July 16, on less than the thirty days' notice which is required in all cases other than those where a reduction is made. The rates were, therefore, effective prior to the date of the hearing. W. C. Sterne, president of the applicant, testified in effect, as we understood him, that this applicant does not, and will not claim in any rate hearing that might be held by this

Commission, any greater right to charge the rates specified in said ordinance than if they had been omitted therefrom.

The Commission during the hearing informed Mr. Campbell that if he was prepared to show that the applicant on account of any fundamental reason or reasons, such, for instance, as an antiquated, inefficient system, could not lawfully be required to furnish electrical energy in the town of Arvada at reasonable rates as compared with rates prevailing in other towns similarly situated, the Commission would hear testimony along that line. But it further held that so far as the particular rates now in effect and proposed to be charged at the present time are concerned, the Commission would not hear evidence on them, as the hearing on the application should not be converted into a rate case, and as is stands ready, in the performance of its duty, at any time upon proper application to hear evidence and fix reasonable rates.

The applicant might conceivably contend that since the town has seen fit to pass an ordinance fixing rates, it is entitled to the benefit thereof, including possibly a strong presumption that those rates are fair. If it should be, the Commission would have owed the duty to hear evidence concerning the reasonableness of the rates. But the position taken by the applicant in support of its objection to the admission of evidence attacking the reasonableness of the ordinance rates is wholly inconsistent with any claim that the rates are entitled to more consideration than if they had not been fixed in said ordinance.

Our uniform practice in passing upon the question of granting authority to exercise franchise rights granted in an ordinance not fixing rates has been not to require any evidence as to the reasonableness of rates that the utility is then charging or that it proposes to charge in the immediate future. This practice obviously is based upon the assumption that the duty of the Commission to safeguard the rights of the public does not require it in such a hearing to consider rates, because they at all times are subject to the power of the Commission to change them. We therefore adhere to the opinion expressed at the hearing herein that if by the action of the applicant and this Com-

mission no benefit can be claimed by the applicant by reason of the insertion of the rates in the ordinance, the case stands in the same position as other cases in which the ordinance does not specify rates.

Not having permitted the protestants to go into the matter of rates, except as hereinbefore stated, we feel it our duty to the public to be sure that such steps have and will be taken as are necessary to prevent the rates in question from having any higher standing or securer footing than they would have if they had not been inserted in the ordinance. If the applicant's president was sincere in his statement to the Commission made while on the stand as a witness (and we have no reason to doubt his sincerity), the applicant should have no hesitancy in cooperating with the Commission towards the end stated.

In Denver and South Platte Railway Co. v. City of Englewood, 62 Colo. 229, the Supreme Court of this State held that the legislature had conferred no specific power upon the town of Englewood to enact a rate-making ordinance and that "The only specific power conferred upon the municipality by this section is to grant a franchise in the form of an ordinance. There does not appear a suggestion as to a rate-making power, and no such power can be inferred." (234)

The court then continued in the same paragraph, saying: "It may be conceded that as between the parties, such ordinance constituted a valid contract."

On page 236 the court's opinion continues as follows: "From the sections quoted, and from other provisions of the act, it fully appears that the legislature intended to delegate to the Public Utilities Commission the administration, supervision, and regulation, of all service rendered to the public throughout the State, including municipalities. Rates and regulations fixed by contract are specifically included within the powers of the Commission.

"From what has been said it will be seen that the town of Englewood had no express authority to fix a rate of fare, so as to limit or prohibit the assumption of such power by the legislature."

As to the question of the impairment of the contract made by virtue of the passage and acceptance of the ordinance the Court held, page 240:

"The contract, having been entered into without express legislative authority, was permissive only. It was conditioned upon the exercise of the sovereign power over the subject-matter. All this the parties to the contract were bound to know when they entered into it. There can be no impairment of the contract by the act of the State in claiming its own, when it is not bound by the contract. The supervision and regulation of the rates by the State, through the Public Service Commission, do not take from either of the parties to the contract any right which they had thereunder. Such supervision and regulation do not therefore impair the obligation of a contract."

The court finally concluded on page 241 with the following language:

"It follows, therefore, that the power to regulate the rates of the public utility in question is vested by the act exclusively in the Public Utilities Commission. The law fully provides that every order or decision made by the Commission may be reviewed by the Supreme Court, upon the application of either party, or of any person pecuniarily interested in the utility, for the purpose of having the lawfulness of the order or revision determined."

In Ohio and Colorado Smelting and Refining Co. v. Public Utilities Commission, *et al.*, 68 Colo. 137, the court passed upon the power of this Commission to change the rates which had been agreed upon in a contract entered into by the utility and a private corporation relative to the rate to be charged the latter for electrical energy consumed by it. The court called attention to the fact that it had heretofore decided the question as to contracts entered into by municipalities in relation to rates to be charged by public utilities, as affected by the after asserted power of the State, and held that a careful review of the authorities "leads us to the conclusion that this rule as to the after asserted exercise of the police power applies equally in the case

of contracts relating to a public service as between persons and corporations." (142)

However, we find in the opinion, on page 148, the following significant language:

"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."

Whether the statement made by the court and just quoted, that the changing of rates fixed by contract between a public utility and a private corporation is the exercise of a grave and dangerous power, would apply with equal force to the action of the Commission in changing rates fixed by a municipal ordinance and accepted by the utility, we are not quite sure. If the court should hold that the changing by this Commission of the rates fixed by this ordinance is the exercise of a very grave and dangerous power that should be asserted with the greatest caution, it would then appear that in some further rate hearing the proof that might be submitted in support of an attack on the rates would have to be stronger than what might ordinarily be required in a rate hearing where rates which have not been fixed by an ordinance are in question. That the statement would apply to rates fixed in an ordinance was assumed by this Commission in *Re* Coal Creek Water & Light Co., P. U. R. 1926, 15, 571,573.

After careful consideration of the evidence the Commission is of the opinion and so finds that the public convenience and necessity requires the exercise by the applicant of the franchise rights granted it under and by virtue of the terms of the ordi-

nance passed by the Board of Trustees of said town of Arvada on July 9, 1928, upon the condition that, and if and when the applicant shall within twenty days after the date hereof file with the Commission a written statement and agreement duly authorized by applicant's board of directors to be made, signed and filed by its president, reading as follows:

"Pursuant to the order of The Public Utilities Commission of the State of Colorado made on August 27, A. D. 1928, and to make effective said order authorizing the exercise by the applicant of the franchise rights granted it by the Board of Trustees of the town of Arvada, Colorado, on July 9, 1928, the undersigned, The Arvada Electric Company, hereby waives and renounces any and all rights that it might conceivably have to charge any fixed or certain rates specified in said ordinance, and the undersigned agrees that The Public Utilities Commission of the State of Colorado shall have the same power and jurisdiction to hear and determine the question of and to fix fair, reasonable and lawful rates that it would have if nothing whatever had been said in said ordinance about said rates, provided, however, that said rates so specified in said ordinance shall remain in force and effect until such time, if any, as they may lawfully be changed, as in the change of rates not fixed in an ordinance."

Chairman Bock did not participate in the hearing and disposition of this case.

ORDER.

It Is Therefore Ordered, That the public convenience and necessity requires the exercise by the applicant, The Arvada Electric Company, of the franchise rights granted it under and by virtue of the terms of an ordinance passed by the Board of Trustees of the town of Arvada on July 9, 1928, upon the conditions that and if and when the applicant shall cause to be filed with this Commission such a written statement and agreement as is described hereinbefore.

RE THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY.

[Application No. 1022. Decision No. 1892.]

Commissions—Jurisdiction—Abandonment of branch rail line—Transportation Act of 1920.

The jurisdiction of the Commission over an abandonment of a branch line of a rail carrier has been considerably circumscribed by the Transportation Act of 1920.

[August 31, 1928.]

Appearances: E. N. Clark, Arthur Ridgway and B. W. Robbins for applicant; Adair J. Hotchkiss and Clifford H. Stone for Endner Lumber Company, Monmouth Mining & Leasing Corporation, Adair J. Hotchkiss, F. S. Hotchkiss, Leon A. Hotchkiss, E. C. Hotchkiss, Dan McIntyre, Sidney McIntyre, D. W. McIntyre, Paul Swisher, J. M. Swisher, George Hopkins, Andrew Hopkins, M. W. Bennett, C. M. Long, George D. Manville and Edgar Pennington, interveners.

STATEMENT.

By the **Commission**: On January 4, 1928, The Denver and Rio Grande Western Railroad Company filed its application with this Commission for the abandonment, so far as it relates to intrastate traffic, of its Floresta branch, extending from Crested Butte in a general westerly direction a distance of 10.7 miles, more or less, to Floresta, all in the County of Gunnison, State of Colorado. Protest was filed against this abandonment by The Endner Lumber Company, a Colorado corporation, engaged in the manufacture and sale of lumber and lumber products in the County of Gunnison, Colorado. The Monmouth Mining & Leasing Corporation, Adair J. Hotchkiss, F. S. Hotchkiss, Leon A. Hotchkiss, E. C. Hotchkiss, Dan McIntyre, Sidney McIntyre, D. W. McIntyre, Paul Swisher, J. M. Swisher, George Hopkins, Andred Hopkins, M. W. Bennett, C. M. Long, George D. Manville and Edgar Pennington, who are interested mainly in sheep raising and proposed mining of bog iron ore, intervened in opposition to the application.

On December 27, 1927, the applicant filed an application with the Interstate Commerce Commission (Finance Docket No. 6644) under paragraph 18 of Section 1 of the Interstate Commerce Act for the same abandonment as involved in the instant application. This Commission, on May 21, 1928, at the request of the Interstate Commerce Commission, heard the application in Finance Docket No. 6644 jointly with No. 1022 in Gunnison, Colorado, at which time evidence in support of and in opposition thereto was received.

The jurisdiction of this Commission over an abandonment of the branch line of the rail carrier has been considerably circumscribed by the Transportation Act of 1920. The power of the State agency over abandonment of a rail carrier in intrastate service only was fully discussed by the Supreme Court of the United States in a case arising out of an abandonment in this State, State of Colorado v. United States, *et al.*, 271 U. S. 153. Any findings and order made by this Commission herein are, therefore, subject to the limitations of its jurisdiction as indicated by State of Colorado v. United States, *et al., supra.*

No serious contention was made that the deficit in operation by the rail carrier was so great as to amount to an undue burden upon and a discrimination against interstate commerce. However, a proposed report by an examiner of the Interstate Commerce Commission has been made from the record and our Commission finds itself practically in substantial agreement with the same. Since the proposed report goes into a detailed statement of the facts, we deem it unnecessary to repeat the same.

There is a certain situation, however, in this matter that we deem of some importance, and that is the effective date of the order to abandon. The testimony shows that since 1893 there have been only one or two attempts to keep the line open in the winter time, but it was found to be entirely impractical and expensive, so no further attempt was made. There is a heavy snowfall where this branch is located. The altitude of Crested Butte is 8,878. The altitude of Kebler, the highest point, is 9,957, and

the altitude of Floresta is 9,861. The average annual depth of snowfall for a ten-year period at Floresta was 467.1 inches. As compared with that, Cumbres Pass has an average annual depth of 260 inches for a period of seventeen years. Marshall Pass has a record of 175 inches average annual snowfall for a thirteen-year period. Corona, on the Moffat Road, with an elevation of 11,600 feet, has an average snowfall of only 370 inches, as compared with 467.1 inches at Floresta. In 1927 this branch was opened on June 27 and closed on September 6. Under these circumstances, and having in mind the effective date of this order, it would seem unfair to make the effective date during any time of the present year, since it is very doubtful that the branch will be open for another thirty days. In our opinion the effective date should be such as will accommodate those who desire to transport machinery, lumber now cut, merchandise and livestock before the abandonment takes place. The effective date, therefore, should not be until August 1, 1929. This would permit also those interested in the bog iron ore situation to more definitely ascertain whether this prospective mining industry can be developed to a sufficient extent to warrant the continuation of the branch, at least from that point where these ore deposits are located. If in the meantime it should develop from definite facts that this prospective bog iron ore industry could be profitably conducted and could give the rail carrier sufficient traffic to warrant a continuation of the branch to the extent of accommodating this mining industry, then those interested in mining bog iron ore should be permitted to file a petition to reopen this case for that purpose.

After consideration of all the evidence and circumstances surrounding the same, the Commission is of the opinion and so finds that the present and future public convenience and necessity permit the abandonment, as it relates to intrastate traffic only, by The Denver and Rio Grande Western Railroad Company of the Floresta branch, extending from Crested Butte in a general westerly direction approximately 10.7 miles to Floresta, all in Gunnison County, State of Colorado.

ORDER.

IT IS THEREFORE ORDERED, That the present and future public convenience and necessity requires the abandonment by The Denver and Rio Grande Western Railroad Company of the Floresta branch, extending from Crested Butte in a general westerly direction approximately 10.7 miles to Floresta, all in Gunnison County, State of Colorado, as it relates to intrastate traffic only, and this order shall constitute sufficient authorization therefor.

IT IS FURTHER ORDERED, That this order shall take effect and be in force from and after August 1, 1929.

IT IS FURTHER ORDERED, That The Denver and Rio Grande Western Railroad Company when filing schedules cancelling tariffs applicable on said branch shall, in such schedules, make specific reference to this order by date and application number.

RE SOUTHERN COLORADO POWER COMPANY.

[Application No. 1174. Decision No. 1899.]

Franchises—Provision for payment to city of percentage of gross earnings—Discrimination.

1. The payment by an electric utility to a city of a percentage of the gross earnings from sale of energy therein is a discrimination against the users of electricity.

Franchises—Provision for payment to city of percentage of gross earnings—In lieu of all pole, wire and other similar fees and taxes.

2. Utility permitted until further order of the Commission to pay to city percentage of gross revenue inasmuch as ordinance provided that the payment thereof should be in lieu of all pole, wire and other license fees and similar taxes.

[September 6, 1928.]

Appearances: J. W. Preston, Esq., Pueblo, Colorado, attorney for applicant.

STATEMENT.

By the **Commission**: The applicant, Southern Colorado Power Company, a corporation, on August 13, 1928, filed its application in which it prays for an order of the Commission au-

thorizing it to accept a certain franchise when and if granted and to exercise the rights and privileges therein given, which said franchise was to be granted by the City Council of the city of Rocky Ford, Colorado.

Since the filing of said application and on September 4, 1928, the said City Council of Rocky Ford passed an ordinance granting a franchise to applicant. The said ordinance grants to the applicant the right, privilege and franchise to construct, erect, build, own, operate and maintain within the said city of Rocky Ford such mechanical, electrical or other appliances, plant and apparatus as may be necessary for the generation, transmission, transforming or distribution of electricity for illuminating, power, heating and other purposes, with the right and privilege to construct, maintain and operate transmission lines for the purpose of conducting into, from and through said city, electricity generated there or elsewhere, and to sell or furnish electricity to the said city of Rocky Ford and the inhabitants thereof, and to distribute the same by means of mains, wires, cables and lines of poles with wire strung thereon, over, upon, along, under and across the streets, alleys, bridges, public ways and public places in the said city. The franchise granted is for a period of twenty-five years.

The applicant alone has been serving said city and the inhabitants thereof with electrical energy since 1911. It has a small generating plant situated in Rocky Ford which is used only for emergency purposes. The company owns a steam plant situated in Pueblo and another in Canon City, and a hydro-electric plant situated on Beaver Creek near Cripple Creek. Most of the energy consumed in Rocky Ford is generated in the Pueblo plant. The capital investment in Rocky Ford and that portion of the investment situated outside thereof but properly allocated thereto, is $278,000.00. This amount, however, shall not be binding upon the Commission in any investigation involving valuation upon which to base reasonable rates and charges.

Section 5 of said ordinance requires the applicant to pay to said city of Rocky Ford 2 per cent of all collected gross earnings

derived by the applicant from all electricity sold by it in Rocky Ford during the term of the franchise to the inhabitants of said city. This undoubtedly is, according to a long line of authorities, a discrimination against the users of electricity in said city, for the obvious reason that instead of all the taxable property situated within that city paying its pro-rata share of the amount of revenue which will thus be derived from the applicant, the users of electricity alone are required to pay this revenue to the city. However, the franchise further provides that said payment shall be in lieu of all pole, wire, meter, occupation, privilege, franchise, license or other similar tax now or hereafter assessed or levied against the applicant by the said city for any purpose whatsoever, and that should the city at any time impose any such tax then, in that event, the obligation therein imposed to pay the 2 per cent of the said gross revenue collected shall cease and determine without affecting the remainder of said franchise. As a practical matter, then, in view of the laws of this State, the citizens of said city purchasing electrical energy from the applicant might lawfully be required in another way and manner to raise the same amount of revenue. While this Commission will not now refuse permission to the applicant to exercise the franchise rights granted by said ordinance, it will reserve the right at any time in the future when the public convenience and necessity demands and for good cause, to forbid the payment of any percentage of its gross revenue to said city.

After a careful consideration of all the evidence and facts and circumstances surrounding the application, the Commission is of the opinion and so finds, subject to the qualification hereinbefore made with reference to the payment of a percentage of its gross revenues to the city, that the public convenience and necessity requires the exercise by the applicant of the rights and privileges granted to it in and by said ordinance passed on September 4, 1928, by the City Council of the city of Rocky Ford, Colorado.

ORDER.

IT IS THEREFORE ORDERED, That, subject to the qualification hereinbefore made with reference to the payment of a percentage of its gross revenues to the city, the public convenience and necessity requires the exercise by the applicant of the rights and privileges granted it by an ordinance passed by the City Council of the city of Rocky Ford, Colorado, on September 4, 1928, and this order shall be taken, deemed and held to be a certificate of public convenience and necessity therefor.

RE THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.

[Application No. 1100. Decision No. 1918.]

Service—Station agency—Continuance—Evidence of need—Expense and receipts.

1. While expense of operating a station agency and the receipts therefrom are not controlling, they are an indication of what the requirements of service are.

Service—Railroads—Effecting economies—Duty.

2. A rail carrier is required to make all economies possible without affecting such reasonable and efficient service as may be required.

[September 21, 1928.]

Appearances: Erl Ellis, Esq., Denver, Colorado, for applicant; C. C. Hearnsberger, Esq., La Junta, Colorado, for protestants.

STATEMENT.

By the **Commission**: This is an application by The Atchison, Topeka and Santa Fe Railway Company for authority to close as an agency station the present station of Bloom, Otero County, Colorado, and to discontinue the maintenance of the station operator or agent at that point. In support of the application it is alleged that there is no public convenience or necessity demanding the continuance of such station; that the revenue received from the maintenance of the station is wholly inadequate

to take care of the actual outlay in maintaining the same; that there has been a great falling off in business done at the station; that the population in that vicinity has materially declined; that the discontinuance of the expense of maintaining an agent and keeping up the station building is a proper and logical economy on the part of the railway company.

Protest was filed against this application by approximately seventy citizens in that community in which it was alleged that in order that the freight for outlying patrons may not be left unprotected, that they may not be isolated fifteen or more miles from a point where medical attention may be summoned in case of sickness and in view of the fact that they have given the railway their freight and passenger business in preference to bus and truck lines that the application be denied.

This matter was set down for hearing at the court house, Trinidad, Colorado, on September 7, 1928, at which time evidence in support of and in opposition thereto was received. The testimony shows that Bloom has been an agency station for at least the past fifteen years. It is located between Timpas and Thatcher, both of which are now agency stations and both approximately fifteen miles from Bloom. While there is not a great deal of business at either Timpas or Thatcher, yet according to the evidence the agency is required there for operating purposes. Up to four or five years ago there were more dry farmers around Bloom than there are now. There was also considerable cattle raising in this territory but owing to the depressed condition of the cattle industry commencing approximately in 1921 this traffic was very seriously affected. In 1927 one car of wool was shipped out and one car of feed was shipped in. So far as the passenger, express and freight service is concerned at Bloom, it will not be affected by the discontinuance of the station agency except that passengers will have to flag the trains, that consignees will have to assume the responsibility of the shipment after it is put off the station at Bloom and consignors will have to make arrangements either at Timpas or Thatcher or with the conductor of the freight train that operates through Bloom for the billing of freight. There is no telephone service

in this community except that at the station, which is owned and controlled by the railroad as a part of its dispatching service. The expense of operating the station agency at Bloom was in 1927 approximately $2,186 which does not include other expenses as fuel, oil, stationery, etc., which amounts to approximately $125.00 per annum. The receipts for 1927 at this station were $1,556.68. While the expense of operating a station agency and the receipts obtained in the way of revenues are not controlling, yet they are an indication as to what the requirements are in the way of service. The Commission, of course, is required to determine what the public can reasonably require as services from the rail carrier under all the facts and circumstances in the case. The rail carrier is required to make all economies without affecting the reasonable and efficient service required. The evidence indicates that a full station agency at Bloom is not required. On the other hand, the fact that Bloom has no telephone service and that some L. C. L. shipments are made to and from Bloom should also receive some consideration and if possible give the community such service as under all the facts and circumstances they require. Under similar circumstances some of the rail carriers arrange to place in charge caretakers or resident agents who, among other things, accept and receive the express and freight and see that it is locked up in the station and use the telephone at the station for such purposes as the exigencies of the occasion may require. It is our opinion that such service should be given to Bloom.

After a careful consideration of all of the evidence introduced at this hearing, the Commission is of the opinion and so finds that the public convenience and necessity does not require the agency station and the maintenance of a station operator at that point, subject to the conditions to be hereafter stated in the order.

ORDER.

IT IS THEREFORE ORDERED, That The Atchison, Topeka and Santa Fe Railway Company be, and the same is hereby, authorized to discontinue the agency station at Bloom, Colorado, and

the maintenance of a station operator or agent at that point, subject to the following condition:

(a) That the rail carrier arrange for a caretaker or resident agent at Bloom to accept and receive freight and express, to take care of the station and to use the telephone at such station for billing carload shipments through other stations and the sending of telegrams by telephone in emergency cases through other stations.

IT IS FURTHER ORDERED, That this order become effective on October 15, 1928.

HITCHCOCK & TINKLER EQUIPMENT COMPANY
v.
DENVER AND SALT LAKE RAILWAY COMPANY.

[Case No. 384.]

MOFFAT TUNNEL IMPROVEMENT DISTRICT
v.
DENVER & SALT LAKE RAILWAY COMPANY.

[Case No. 385. Decision No. 1924.]

Evidence—Discontinuance of spur track—Violation of order.

The sole consideration on a complaint against the discontinuance of a spur track by a railroad without leave of the Commission in violation of its general order is to determine why such order was disregarded and evidence as to lack of necessity or safety of such equipment is immaterial.

[September 29, 1928.]

Appearances: Whitehead and Vogl, Esqs., Denver, Colorado, for Hitchcock & Tinkler Equipment Company; Montgomery and Myer, Esqs., Denver, Colorado, for The Moffat Tunnel Improvement District; Elmer L. Brock, Esq., Denver, Colorado, for The Denver and Salt Lake Railway Company.

STATEMENT.

By the **Commission**: The above complaints were filed against The Denver and Salt Lake Railway Company, a common carrier

operating a steam railroad system within the State of Colorado, in which it is alleged in substance that a switch or spur track located at West Portal, Colorado, was abandoned and discontinued by the rail carrier without any notice to this Commission, as required under General Order No. 15, issued by this Commission on April 13, 1916.

Answer was filed by the defendant, which, in substance, is a general denial of the complaint, and an allegation that prior to the institution of this proceeding the rail carrier removed the spur track complained of in the complaint for the reason that its existence, and particularly its connection with the main line, presented a serious hazard to railroad operations, the employes and the public, and that the spur in question was never a standard spur but was a temporary arrangement in connection with the construction of the Moffat Tunnel.

The answer admits also that incidental to the construction of the Moffat Tunnel the Moffat Tunnel Commission caused a certain railroad switch or spur to be constructed connected with the main line of the Moffat road at or near West Portal, and that said switch or spur was constructed for and used by the Tunnel Commission in connection with the construction of the Moffat Tunnel; that the spur track was the property of the Moffat Tunnel; that the complainant, Hitchcock & Tinkler Equipment Company, requested the rail carrier to deliver cars on said spur and that it has refused to permit Hitchcock & Tinkler Equipment Company to load cars on said spur; that the Hitchcock & Tinkler Equipment Company has served upon the rail carrier a request in writing from the Moffat Tunnel Commission that the rail carrier furnish to the complainant cars on said spur. The answer was filed in Case No. 384, but by stipulation was also considered as the answer in Case No. 385.

The matter was set down for hearing in the Hearing Room of the Commission, State Office Building, Denver, Colorado, on September 24, 1928, on which date some testimony was received. Thereafter further testimony was received on September 29, 1928.

After the introduction of testimony by both complainants, including testimony by the president of the rail carrier on cross-examination, a motion was made by the complainants to restore the service and spur which had been discontinued and abandoned. After some argument by counsel the Commission decided to grant the motion and issue an order requiring the rail carrier to restore the switch or spur and the service thereon by the rail carrier within five days from the date hereof.

General Order No. 15, one of the general orders duly adopted and promulgated by this Commission to regulate common carriers, and in force and effect ever since April 13, 1916, provides that no steam carrier shall discontinue its service, or any part thereof, or remove its tracks or any part thereof, without first having filed with this Commission a written notice of its intention to discontinue, abandon or remove its service or tracks, or any part thereof, within the State of Colorado, said notice to be filed with the Commission thirty days prior to the discontinuing of its service, or the abandonment or removal of its tracks, or any part thereof.

The testimony shows that the steam carrier discontinued this service and abandoned this switch or spur without complying with General Order No. 15, and over the objections of both of the complainants. A temporary injunction was sought in the District Court of the City and County of Denver by the complainants in Case No. 384 which was denied by the court on the ground that this Commission had ample jurisdiction over this matter, and that, therefore, the complainant has a remedy without injunction.

It is admitted that the spur track was constructed in January, 1928, prior to the time the rail carrier used the main track, with which the spur is connected, for its main line operation, and that it was used down to about the time of its removal. Since approximately February 26, 1928, the main track adjoining said switch has been used as the main line of the steam carrier. It is admitted that the Moffat Tunnel Commission has used the spur track in question in shipping in sand and gravel and other commodities, and the Hitchcock & Tinkler Equipment Company

have been using the spur track in shipping out from West Portal several carloads of machinery and equipment.

The spur or switch track in question was discontinued, torn up and removed sometime about September 7, 1928, by and with the consent and authority of the president of the rail carrier. This, in our opinion, was in violation of General Order No. 15.

The defendant contends that the spur track in question was not reasonably necessary, and was hazardous and only of temporary construction. So far as the reasonableness of the spur, as well as the hazard, is concerned, that is an issue that would have properly come up if the rail carrier would have pursued its remedy under General Order No. 15. All this Commission is attempting to determine now is whether this switch or spur, and the service thereon, was rendered by the rail carrier to the complainants prior to the abandonment, and whether the discontinuance and abandonment was in violation of General Order No. 15. We are not now attempting to determine the reasonableness of a spur at the place in question, nor the hazards that may be involved. Under the Public Utilities Act the carrier has its remedy in raising those issues in a very peremptory way and a very expeditious manner. No sound reason can be given why General Order No. 15, under the facts and circumstances of this case, should have been disregarded.

In view of the admissions of the president of the rail carrier, the answer of the rail carrier, and the admission of counsel for the rail carrier that Hitchcock & Tinkler Equipment Company used said switch or spur in shipping from West Portal approximately twelve carloads of material in cars placed upon said spur for it by the rail carrier, it is clear that this switch or spur was a facility and service used by the rail carrier in serving the complainant, the Moffat Tunnel Improvement District and Hitchcock & Tinkler Equipment Company, and, it is reasonable to assume, under the law and all the facts and circumstances, any other part of the public that wanted to use the same.

This Commission has always taken the position that rail carriers are required by General Order No. 15 to secure authority from it before abandoning service on and tearing up spur tracks.

The carriers apparently have taken the same position. A number of applications for such authority have been filed recently. Therefore, in view of the admissions as to the existence and use by and with the consent and cooperation of the rail carrier of the spur in question over a period of many months, no useful purpose could be served by prolonging the hearing by taking evidence as to the hazard of this spur and the adequacy of other sidings, which should properly be heard in a hearing on an application by the carrier for authority to remove the spur and abandon the service thereon.

After a careful consideration of the matters herein, the Commission is of the opinion, and so finds, that The Denver and Salt Lake Railway Company should be required to restore the switch track and the service in connection therewith within five days from the date of this order.

ORDER.

IT IS THEREFORE ORDERED, That The Denver and Salt Lake Railway Company, a common carrier, defendant herein, be and it is hereby required to restore the switch or spur track at West Portal, Colorado, removed on or about September 7, 1928, and the service theretofore rendered thereon, within five days from the date hereof.

RE U. S. AIRWAYS, INC.

[Application No. 1192. Decision No. 1935.]

Certificates of convenience and necessity—Airplanes—Interstate carriers.

1. An application for a certificate of convenience and necessity for the transportation of passengers and express by airplanes in interstate commerce must be granted, upon condition of compliance with State regulations, without determining the question of public need, in view of the Commerce Clause of the Federal Constitution and the laws of the State.

Service—Standards of equipment—Qualifications of pilots.

2. The Commission adopted as its standards of equipment and qualifications of pilots the standards prescribed by the Federal government and the Colorado Commission of Aeronautics.

[October 2, 1928.]

Appearances: Francis J. Knauss, Esq., Denver, Colorado, for applicant; D. Edgar Wilson, Esq., Denver, Colorado, for The Chicago, Rock Island and Pacific Railway Company.

STATEMENT.

By the **Commission**: This is an application for a certificate of public convenience and necessity authorizing the applicant to operate lines of airplanes for the carrying of passengers and express matter for hire between Denver, Colorado, and Kansas City, Missouri, in interstate only. No protests were filed against the application.

This matter was set down for hearing in the Hearing Room of the Commission, State Office Building, Denver, Colorado, on September 21, 1928, at which time evidence in support of the same was received.

The applicant is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with a capitalization of $300,000, and, as stated by counsel for applicant, will qualify to do business in the State of Colorado and will furnish to the Commission a certified copy of the articles of incorporation, as well as of the certificate authorizing it to do business in the State of Colorado.

The applicant proposes to engage in the business of transporting passengers and express between Denver, Colorado, and Kansas City, Missouri, by means of airplane. Arrangements have been made with the City and County of Denver to use its municipal airport as soon as the same is completed. Operation will not commence until about January 1, 1929. There is no common carrier airplane service offered to the public between Denver and Kansas City at this time.

The applicant proposes to purchase four Fokker Super-Universal monoplanes, each carrying six passengers and one pilot. The investment necessary to purchase these planes is approximately $80,000, and financial arrangements have been made to purchase said planes.

The Commission will adopt for the present as its standards of equipment and qualification of pilots the standard prescribed

by the Federal Government and the Colorado Commission of Aeronautics, and require the applicant to file proof that it has or will comply therewith.

This being an interstate operation only, the question of public convenience and necessity is not involved, and need not, therefore, be determined.

After a careful consideration of all the evidence, the Commission is of the opinion, and so finds, that the Constitution of the United States and the laws of the State of Colorado require that a certificate of public convenience and necessity be issued to the applicant herein for the transportation of passengers and express, by airplane, between Denver and the Colorado-Kansas State line, in interstate commerce only.

ORDER.

IT IS THEREFORE ORDERED, That the Constitution of the United States and the State of Colorado require the issuance of a certificate of public convenience and necessity to the U. S. Airways, Inc., for the transportation of passengers and express by airplane between Denver and the Colorado-Kansas State line in interstate commerce only, and this order shall be deemed and held to be a certificate therefor, subject to the following limitations and conditions:

1. That the applicant shall file with this Commission a certified copy of its articles of incorporation, and a certificate authorizing it to do business as a foreign corporation in the State of Colorado.

2. That the equipment (including airports) operated by the U. S. Airways, Inc., and its pilots and employes, shall be such as conform to the standards prescribed by the Department of Commerce of the United States Government and the Colorado Commission of Aeronautics, and proof thereof shall be filed with this Commission.

3. That the U. S. Airways, Inc., shall carry liability insurance covering the passengers and the public, and shall submit the policy or policies to the Commission for examination and approval.

4. That the U. S. Airways, Inc., shall file monthly statements of the number of passengers carried and service furnished.

IT IS FURTHER ORDERED, That the applicant shall file tariffs of rates, rules and regulations, and time schedules, at least ten days prior to the commencement of operations.

IT IS FURTHER ORDERED, That this order is made subject to compliance by the applicant with the rules and regulations now in force or to be hereafter adopted by this Commission and the Colorado Commission of Aeronautics with respect to airplane common carriers, and also subject to any future legislative action that may be taken with respect thereto.

RE J. B. STODGHILL.

[Case No. 382. Decision No. 1942.]

Common carriers—Contract carriers—Automobiles.

The fact that a merchant finding his own shipments insufficient to support trucking operations solicited and handled the public business in combination with his own and had a contract with other motor operators for the actual transportation to a freight dock provided by him was held not to exempt such operations from the requirement of a certificate, and a prohibitory order was entered.

[October 10, 1928.]

STATEMENT.

By the **Commission:** On September 11, 1928, the Commission entered an order on its own motion against J. B. Stodghill, respondent herein, in which he was required to show cause by written statement filed with the Commission within ten days from the date thereof why this Commission should not enter an order requiring him to cease and desist from his alleged unlawful operations as a motor vehicle carrier. On the same date the matter was set down for hearing on October 1, 1928, in the Hearing Room of the Commission, State Office Building, Denver, Colorado, at which time the respondent was required to appear and give such testimony and make such showing as he might

deem proper. When the case was called on October 1 no appearance was made by the respondent, Stodghill, nor did he comply with the Commission's order and file a written statement showing why this Commission should not enter an order requiring him to cease and desist from his unlawful operations as a motor vehicle carrier. The Commission at that time continued this case until October 8, 1928, at 10:00 a. m. in the Hearing Room of the Commission, State Office Building, Denver, Colorado. At that time evidence in support of the order to show cause was received.

The testimony shows that at some time in May, 1928, the respondent carried an advertisement in the "Estes Park Trail," which was to the effect that beginning Monday, May 21, his trucks would operate daily for the transportation of freight between Denver and Estes Park, leaving Denver at 5:00 p. m., the Denver depot being at 1910 Wazee Street. The testimony further shows that the respondent is engaged in the fruit and vegetable business at 1102 Champa Street, Denver, and also owns and operates the Estes Park Creamery in Estes Park; that prior to 1927 he had operated his own truck. In 1928 it became necessary for him to procure a new truck for him to handle his business. So he decided to contract and act as a distributor in connection with his own business. The testimony further shows that he made a contract with Albright and Stewart for that purpose; that he arranged for truck dockage space at 1910 Wazee Street, and that he solicited and advertised for business to be carried in order to procure full loads daily as advertised, as his own merchandise would not amount to sufficient tonnage to operate daily service, which he had advertised; that all shipments were delivered at a freight dock at 1910 Wazee Street, and that said Albright and Stewart were transporting all these goods for him under one contract.

A rather unusual contract for transportation is set forth in Goldsworthy, *et al.*, v. Maloy, *et al.*, decided by the Maryland Court of Appeals and reported in 141 Md. 674, 119 Atl. 693, P. U. R. 1923-C, 626. One Goldsworthy was the owner of a large motor truck for the use of which he had a license permitting him

to operate the truck for hire. (Apparently as a private carrier.) One Buckell entered into a contract with Goldsworthy by which Goldsworthy hired his truck "unto the party of the second part for and during a period of two weeks from the date hereof and thereafter for a like period of two weeks from time to time until either of the parties shall give the other one week's notice of his desire to discontinue the same, for the purpose of transporting such persons as the said party of the second part shall desire, from Gilmore, Allegany county, Maryland, to Barton, Allegany county, Maryland, and from Barton to Gilmore, making each working day, one trip with the said truck each way." The contract further stipulated that the trip should be made at such time in the day as to deliver the passengers in time for their daily occupations and to return with them at the termination of their day's work. The owner of the truck was to receive a stated amount for every trip and so much per passenger for all passengers in excess of a certain number. The State Public Service Commission secured an injunction which, on appeal, was sustained. The Maryland Court in the course of its opinion said: "If it be held that an owner of a motor vehicle can thus relieve himself of complying with the requirement of the law, to obtain a permit from the Public Service Commission, and from being placed in the class of common carriers, it will furnish an easy way to evade the law. If Goldsworthy can say 'I am not a common carrier; I only carry such persons as Buckell shall desire, or such as may be designated by him,' and keep up that business for an indefinite time, of hauling from half a dozen to twenty or more persons every trip, without being amenable to the law as a common carrier, it would be useless to pass such statutes as we have on the subject." (632) The court further stated in a concluding paragraph of its opinion: "The owners certainly should not too readily be permitted to enter into contracts or adopt measures which will enable them to readily evade the law or the spirit of the statutes intended to govern them."

The fact that Albright and Stewart were handling all of this freight for Stodghill at a freight dock provided by him does not,

in our opinion, change his status. He solicited and advertised to the public a daily freight service between Estes Park and Denver using Albright and Stewart as his agents for transportation purposes without a certificate of public convenience and necessity from this Commission.

After consideration of all the facts included, the Commission is of the opinion and so finds that J. B. Stodghill, respondent, has unlawfully operated as a motor vehicle carrier as defined in Chapter 134, Session Laws of 1927. An order will enter requiring him to cease and desist from operating as such motor vehicle carrier.

ORDER.

IT IS THEREFORE ORDERED, That J. B. Stodghill be, and he is hereby, required to cease and desist from operating as a motor vehicle carrier, as defined in Chapter 134, Session Laws of 1927, until or unless he is first authorized by a certificate of public convenience and necessity from this Commission so to do.

RE PUBLIC SERVICE COMPANY OF COLORADO.

[Application No. 1005. Decision No. 1961.]

Certificates of convenience and necessity—Not precedent to Federal permit—Water power development.

1. There is no duty imposed either by Federal or State statute upon a utility before securing a preliminary permit from the Federal Power Commission to secure a certificate of public convenience and necessity or any other authority from the State Commission.

Water power—Intention to exploit—Preliminary investigation.

2. The making of borings and stream measurements by a utility on a proposed water power site was held not to show any intention or disposition to do anything more than make investigations.

Certificates of convenience and necessity—Water power—Preliminary permit.

3. It was assumed that an applicant to a State Commission for authority to exploit a water power site not desiring a final certificate of public convenience and necessity was asking for a preliminary order declaring that the Commission would there-

after issue a certificate of public convenience and necessity authorizing the exercise by the applicant of rights and privileges under a final license to be issued by the Federal Power Commission, in view of the State statute prohibiting the exercise of any right or privilege under any franchise or other authority without Commission authority.

Certificates of convenience and necessity—Commission authority—Statutes—Preliminary order.

4. A statute authorizing a utility desiring to exercise a right or privilege, or other authority which it contemplates securing, to apply to the State Commission for an order preliminary to the issue of a final certificate was held to be broad enough to authorize such an order to an applicant considering the exploitation of a water power site, but having no fixed intention of securing the final authority in question.

Water power—Public convenience and necessity—Preliminary permit.

5. Where a utility having a preliminary order to investigate the advisability of a hydroelectric development does not intend to make such construction until a subsequent period, it would be to the interest of the State in most instances that a determination as to the public convenience and necessity of the site be postponed until shortly prior to the time of the actual construction.

Water power—Preliminary order—Duty of Commission.

6. It is the duty of the Commission before granting an "order preliminary" declaring that it will thereafter issue a certificate for the development of a hydroelectric site to consider, to the full extent that it is authorized, the effect of the project upon the interests and the rights of the future consuming public and other companies affected.

Water power—Destruction of scenic beauty.

7. All reasonable care and caution should be exercised to avoid the impairment of scenic beauty of waterfalls and rapids, and it is doubtful whether public convenience and necessity would require any hydroelectric project at the expense of scenic destruction notwithstanding the fact that electrical energy might be retailed within the State at a trifle less than it would otherwise cost.

[October 20, 1928.]

Appearances: Lee, Shaw and McCreery, Esqs., Denver, Colorado, attorneys for applicant; F. A. Sabin, Esq., Pueblo, Colorado, attorney for The Arkansas Valley Ditch Association; James Grafton Rogers, Esq., Denver, Colorado, attorney for The Arkansas Valley Sugar Beet and Irrigated Land Company; Harry L. Lubers, Esq., Denver, Colorado, attorney for Fort Lyon Canal Company; Devine, Preston and Storer, Esqs.,

Pueblo, Colorado, attorneys for The Rocky Ford Ditch Company; Hon. John H. Voorhees, Pueblo, Colorado, attorney for The Lake Meredith Reservoir Company and The Twin Lakes Reservoir and Canal Company; E. N. Clark, Esq., Denver, Colorado, and Devine, Preston and Storer, Esqs., Pueblo, Colorado, for The Denver and Rio Grande Western Railroad Company; T. Lee Witcher, Esq., Canon City, Colorado, attorney for the city of Canon City; W. O. Peterson, Esq., Pueblo, Colorado, attorney for the city of Pueblo and the Pueblo Commerce Club; George B. Baker, Esq., Pueblo, Colorado, Joe E. Gobin, Esq., Pueblo, Colorado, and John H. Voorhees, Esq., Pueblo, Colorado, for the Pueblo Chapter of the Izaak Walton League of America; C. W. Porter, Esq., Pueblo, Colorado, attorney for the Colorado Division of the Izaak Walton League of America and The Colorado Fish and Game Protective Association; J. E. Maloney, Denver, Colorado, representing the Colorado State Highway Department; Mr. Roman Michel, Texas Creek, Colorado, *pro se*.

STATEMENT.

By the **Commission**: On December 6, 1927, Public Service Company of Colorado, a corporation engaged in the generation and sale of electrical energy throughout various parts of the State of Colorado, hereinafter referred to as the applicant, filed its application in which it alleges that on July 6, 1927, acting under the provisions of "The Federal Water Power Act" (41 Stat. 1077) it applied to the Federal Power Commission, hereinafter referred to as the Power Commission, for a "preliminary permit" covering its proposed scheme of development of a water power project to be located in Fremont County, on the Arkansas River, which is not navigable. The proposed development is to construct a diversion dam across the Arkansas River below Texas Creek, impounding 529 acre-feet of water; thence diverting and conveying 300 cubic feet of water per second by a gravity line on the south side of the river to Spikebuck; thence through a tunnel to Webster Park; thence by a gravity line to a forebay reservoir with a capacity of 193 acre-feet; thence by a pressure line and tunnel to a power house on the Arkansas

River under a static head of 674 feet, same being located about 3.5 miles above Canon City. The approximate installed capacity of said hydroelectric project is alleged to be 25,000 kilowatts.

The application further alleges that the proposed use of the power to be developed by said project is for additional power requirements of the petitioner in supplying its existing and future markets, and that it is proposed to connect the contemplated project (referred to as the Royal Gorge project, because of the location in said gorge of the proposed power house) with petitioner's central system, consisting of the Shoshone hydro plant on the Colorado River near Glenwood Springs, the Boulder hydro plant on the Colorado River near Glenwood Springs, the Boulder hydro plant on Boulder Creek near the city of Boulder, and the Valmont steam plant near said city of Boulder; that these three plants are now interconnected and supplying cities and territories therein named; that the proposed interconnection of the Royal Gorge project will be made by 100,000-volt transmission lines at Leadville, via Salida, and Denver, via Colorado Springs, forming a loop line with the existing 100,000-volt line now in operation from Leadville to Denver, via Dillon and Idaho Springs, and that the proposed line from the Royal Gorge project to Leadville will supply power to the company's present market at Salida and Alamosa.

The purpose of seeking a "preliminary permit" from the Power Commission is alleged to be the maintenance of petitioner's priority of application for a license under the terms of "The Federal Water Power Act," under which the said Commission has authority to grant such permit for a period not exceeding a total of three years, as in the discretion of the said Commission may be necessary for making examinations and surveys for preparing maps, plans, specifications and estimates, and for making financial arrangements.

It is alleged also that it is now considered by the applicant "that the proposed 'Royal Gorge Project' may be feasibly and economically constructed, and will afford additional central plant capacity at a cost to applicant less than that which would be entailed in constructing additional steam plant capacity at Val-

mont, and that the merits of the project as now understood are such as to justify the applicant in incurring necessary expenses in making a complete survey of the same and preparing maps and plans, in making complete measurements of the stream flow and collection of such engineering data as may be necessary to make an accurate estimate of the cost of construction of the complete project, and it is estimated that the cost of this preliminary work will be $10,000."

The application filed with this Commission further alleges that the preliminary estimate of the entire cost of said project as now made is $4,500,000. The applicant alleges also that it is now considered by it that upon completion of the necessary work of investigation within the time prescribed by the Federal "preliminary permit," it "will then be found to be necessary, in view of the present existing increase and demand, and anticipated future demand, to supply additional plant capacity."

It is further alleged that as the water diverted by the applicant would be returned to the stream above the intake of the highest ditches in the district, there would be no conflict with existing irrigation rights, but that conflict would exist at times of minimum stream flow with the water supply of the city of Canon City, which now diverts its water by a pipe line at a point above the point at which the applicant would return its water to the stream; and that negotiations "are now under way with said city looking to the making of a contract" by which the water to which the city is entitled under its decrees would be carried by the applicant and rendered available to the city below the proposed power plant.

It is then alleged that public convenience and necessity "will require the proposed construction," etc.

The application concludes with a prayer, "that an order be entered herein declaring that the Commission will thereafter, upon application and under such rules and regulations as may be prescribed, issue a certificate of public convenience and necessity, upon such terms and conditions as may be then designated, after this applicant has obtained the contemplated authority

from the Federal Power Commission granting a license to construct said Royal Gorge Project."

Protests were filed by the following: Silver State Lodge No. 446, B. of R. T., Denver; Silver State Division No. 451, B. of L. E., Denver; Business and Professional Women's Club, Denver; The Denver Federation of Federated Women's Clubs; Town of Cortez, Board of County Commissioners of Montezuma County, Cortez; Grand Junction Woman's Club; Grand Canon Division No. 29, B. of L. E., Pueblo; Chipeta Lodge No. 480, Durango; Board of County Commissioners of Huerfano County, Walsenburg; Department of the Interior, Denver; City of Ouray, Denver Chamber of Commerce, O. R. C. Division No. 44, Denver; Board of County Commissioners of San Juan County, Silverton; Alamosa County Chamber of Commerce, Lodge No. 401, B. of R. T., Alamosa; Ouachita National Park Foundation Society, Fort Smith, Arkansas; Fort Lyon Canal Company, Las Animas; Lodge No. 32, B. of R. T., Pueblo; Board of County Commissioners of San Miguel County, Telluride; Grand Junction Trades and Labor Assembly, Mr. Roman Michel, Texas Creek; B. of R. E. Division No. 196, Alamosa; East Side Woman's Club of Denver; The Farmers Educational and Cooperative Union of Colorado, Grand Junction; The Women's Civic Club of Aspen, The San Juan Women's Club of Silverton, The Denver Scenic Line Service Club, Mt. Ouray No. 140, B. of L. F. and E., Salida; Lodge No. 349, B. of R. T., Grand Junction; City Federation of Women's Clubs, Pueblo; The Mancos Mesa Verde Club; Executive Board of Women's Citizenship Club, Alamosa; Senator Grant Sanders, Durango; Pueblo Chapter of the Izaak Walton League, Wednesday Current Events Club, Denver; Lodge No. 220, B. of R. T., Leadville; Colorado Board of Corrections, Montrose; Lodge No. 31, Salida; O. R. C. Division No. 132, Salida; Sierra Blanca Division No. 209, B. of L. E., Durango; The Tuesday Study Club of Wray, Town of Mancos, The Sarah Platt Decker Delphian Chapter of Englewood, O. R. C. Division No. 441, Alamosa; Division No. 575, B. of L. E., Gunnison; Town of Dolores, O. R. C. Division No. 63, Durango; Board of County Commissioners of Arapahoe County,

Littleton; The Fairmount Community Club, Grand Junction; Hebrew Ladies' Aid Society, Trinidad; City of Grand Junction, Association of M. C. H. & A. of The D. & R. G. W. R. R. Co., Salida; The Trinidad-Las Animas County Chamber of Commerce, Mizpah Lodge No. 805, B. of L. F. & E., Alamosa; Lamar Woman's Club, Grand Junction Lions Club, Board of County Commissioners of Mesa County, Grand Junction; O. R. C. Division No. 325, Grand Junction; O. R. C. Division No. 36, Pueblo; Board of County Commissioners of La Plata County, Durango; Association of M. C. H. & A. of The D. & R. G. W. R. R. Co., Denver; Mrs. Agnes S. Clark, Parkdale; B. of L. F. & E., Grand Junction; City of Salida, Lions Club, La Junta; Izaak Walton League of La Junta, The Colorado Mountain Club, Denver; Town of Rico, Grand Valley Subdivision No. 488, B. of L. E., Grand Junction; Town of Romeo, Grand Junction Chamber of Commerce; Division No. 820, B. of L. E., Alamosa; Division No. 199, B. of L. E., Salida; Minturn Woman's Club, The Scenic Line Service Club, Alamosa; Pierian Club, Trinidad; Association of M. C. H. & A. of The D. & R. G. W. R. R. Co., Alamosa; City of Durango, Pueblo Commerce Club, Mr. and Mrs. A. R. Holst, Franktown; City Federation of Woman's Clubs, Trinidad; Legislative Council, Colorado Federation of Women's Clubs, Denver; Board of County Commissioners of Dolores County, Rico; The Lions Club of Telluride, The Grand Junction Fruit Growers' Association, Rico Lions Club, Board of County Commissioners of Alamosa County, Alamosa; Board of County Commissioners of El Paso County, Colorado Springs; Ouray Recreation Association, Colorado Springs Chamber of Commerce, The Business and Professional Women's Clubs, Inc., Glenwood Springs; Board of County Commissioners of Garfield County, Glenwood Springs; Izaak Walton League of America, Chicago, Ill.; Town of Rifle, Glenwood Springs Chamber of Commerce, Lions Club, Glenwood Springs; Board of County Commissioners of Pueblo County, Pueblo; Salida Chamber of Commerce, City of Monte Vista, City of Delta, Board of County Commissioners of Ouray County, Ouray; Board of County Commissioners of Costilla County, San Luis; Mile High Lodge No.

680, B. of R. T., Salida; Rio Grande Lodge No. 670, B. of L. F. & E., Salt Lake City, Utah; Association of M. C. H. & A. of The D. & R. G. W. R. R. Co., Grand Junction; Executive Board of Colorado Federation of Women's Clubs, Denver; Denver Lodge, B. of L. F. & E., Izaak Walton League, Colorado Division, Denver; Bessemer Irrigation Ditch Company, Pueblo; Arkansas Valley Association of County Commissioners, Las Animas; City of Glenwood Springs, Rifle Chamber of Commerce, City of Montrose, Montrose County Chamber of Commerce, Town of Minturn, Southern Colorado Power Company, Pueblo (Conditional); Colorado State Highway Department, Denver (Conditional); Town of Buena Vista, The Denver and Rio Grande Western Railroad Company, Gunnison County Chamber of Commerce, The Eagle Valley Commercial & Improvement Association, Eagle; City of Pueblo, North Side Woman's Club, Denver; Town of Eagle, City of Colorado Springs, Board of County Commissioners of Eagle County, Redcliff; City of Alamosa, Committee on Conservation, Colorado Federation of Women's Clubs, Denver; City of Antonito, National Exchange Club of Pueblo, The Delta County Chamber of Commerce, West Side Woman's Club, Denver; The Salida Scenic Line Service Club, The Woman's Club of Denver, Arkansas Valley Ditch Association, Pueblo; Women's Club of Grand Junction, South Side Woman's Club, Denver; Residents of Hooper, Residents of Mosca, Colorado Chapter, D. A. R., Denver; The Home Garden Club, Denver; Board of County Commissioners of Chaffee County, Buena Vista; The Colorado Game & Fish Protective Assn. and The Izaak Walton League of America, Denver; Fourth Avenue Club of Denver, Historic Art Club, Denver; South Side Campaign W. C. T. U., Denver; Lodge No. 59, B. of L. F. & E., Pueblo; The Young Ladies' Clio Club, Denver; Mesa County Women's Extension Club, Grand Junction; Denver Woman's Council, P. E. O. Sisterhood, Pueblo; City of Florence, Town of Rockvale, Town of Coal Creek, Florence Chamber of Commerce, Rocky Ford Chamber of Commerce, Izaak Walton League of America, Pueblo Chapter, Pueblo; The Augusta Community Club, Denver; Grand International Auxiliary to the B.

of L. E., Pueblo; Upper Arkansas River Protective Association, Coaldale; D. A. R., Colorado Springs; Colorado State Reformtory, Buena Vista; Bond Department of The International Trust Company, Denver; Woman's Club of Colorado Springs, Residents and Taxpayers of Florence, Southeastern Colorado Chamber of Commerce, La Junta; La Junta Canal and Reservoir Company.

The following filed answers approving the granting of the application: Board of County Commissioners of Fremont County, Canon City; City of East Canon, Canon City Chamber of Commerce, Town of South Canon, City of Canon City, City of Brighton, Board of County Commissioners of Adams County, Brighton; City of Leadville.

The case was duly set for hearing in the Court House in Pueblo, at which place, covering periods of many days, it was heard. The burden of the opposition was borne by The Denver and Rio Grande Western Railroad Company, The Arkansas Valley Ditch Association and The Izaak Walton League of America.

The history of the case and the reason for its being filed with this Commission might briefly be stated. The date of the filing of the application with the Power Commission for a "preliminary permit" to be issued by it has been stated as July 6, 1927. This Commission on October 28, 1927, wrote to the Power Commission, advising it that, "This Commission desires to protest the granting of the application by your Commission unless an application is first filed with the Colorado Commission and a certificate of public convenience and necessity is issued to the applicant. In our opinion no permit should be granted under the application filed with your Commission until the question of public convenience and necessity has been determined by this Commission."

The Power Commission wrote this Commission on November 5, 1927, saying in part: "Since some States, at least, do not appear to be in a position to grant a certificate of convenience and necessity at that stage of the proceedings where an applicant is merely collecting data, making surveys and preparing designs for his project, and since a preliminary permit does not

grant any authority for construction, but merely maintains the priority of the permittee while he is making investigation and obtaining the necessary State authority, the Commission has held that the acquisition of such certificate need not necessarily be a requirement precedent to the issuance of a preliminary permit. In those cases, however, where such certificate may be had on the basis of such information as applicants file with this Commission for a preliminary permit, it would appear obviously desirable that such certificate be issued before permit is given by this Commission. If, therefore, your Commission is in a position to consider and act upon an application for a certificate of convenience and necessity at this stage, this Commission will defer its action until the Public Service Company has made application to your Commission for a certificate of convenience and necessity and your Commission has acted thereon."

This Commission wrote the Power Commission on November 15, 1927, saying it "is in a position to consider and act upon application for certificate of public convenience and necessity at this stage * * * but we suggest that no action be taken by your Commission in any power application until this Commission has determined the question of public convenience and necessity."

The Power Commission wrote the applicant on November 18, 1927, referring to the letter written by this Commission and stated, inter alia, "This Commission will withhold action upon your application of July 6, 1927, until you have made appropriate filing with the State Public Utilities Commission and that Commission has determined the question of public convenience and necessity." Thereupon the applicant filed its application with this Commission.

The attorney for the applicant at the beginning of the hearings frankly stated to the Commission that the applicant had thought it had no reason for approaching the Commission at this juncture; that it does not know whether it ever would conclude to build the project, even though authority therefor could be procured, but that the Company had merely determined that it is at least worth while to spend not in excess of $10,000 in contin-

uing its researches and in an endeavor to arrive at a conclusion as to whether with its developed demand this particular project is a worthy one, and is better for the company and better for the public than a similar steam development. He stated a number of possible difficulties which might conceivably prove to be too formidable to go ahead. Aside from the operating difficulties that might be encountered by reason of water priorities on the river, it was stated that the applicant wants to await the development of coal prices, which, at the present time, are such as to render the cost of generation of electrical energy by the proposed project greater than by steam. Another contingency is the development of a market for electrical energy.

In addition the attorney for the applicant very frankly stated that the applicant would not want to develop the project in the face of the avalanche of protests based on the alleged impairment of the scenic attraction of the gorge unless that point could be decided in advance "of our going ahead with it;" that "regardless of substantial economic advantages in the development of the gorge (the applicant) would desire to forego their realization in the event public opinion could not be satisfied that there would not be a substantial interference with the scenic features. * * * If it could be ascertained 'at the threshold' that the obstacle of public sentiment or public prejudice could not be surmounted, it was felt by the Company to be desirable to learn this at once and conserve money and energy for attainable ends." On this point the applicant further stated through its attorney that instead of resisting a determination of the scenic issue, it welcomed it and that the good will of the public with respect to this matter means more to it than any economic advantage it might gain by the possible construction of the project.

The evidence introduced by the applicant went in some detail into the various portions of the project so far as it has been tentatively worked out. It shows that the applicant has no final determination either as to the desirability of building the project or as to the manner in which it would be built and operated if constructed at all.

The attorneys for the applicant, The Denver and Rio Grande Western Railroad Company, The Arkansas Valley Ditch Association and The Izaak Walton League of America, have written exhaustive briefs in order to aid, and they have aided the Commission in arriving at what it deems the proper conclusion. As frequently happens, there are discussed a number of questions, the determination of which is not necessary for a proper disposition of this case. We desire frankly to deal with those which we consider of importance.

It may be stated that the purpose of the Commission in taking its stand in its correspondence with the Power Commission was to exercise such jurisdiction as it might conceivably have, to the end that those resources in the State subject to its jurisdiction might properly be protected from any improper encroachment and to prevent the tying up, contrary to the public interest, for a period of years, of an asset in the form of water power. Therefore, out of an abundance of caution it wrote the letters dated October 28 and November 15.

The Power Commission, instead of making its own determination as to whether or not the applicant owed any duty to secure any authority from this Commission before going further with its application which it had filed in Washington, with all deference, left it to this Commission to determine what requirements we might properly make and to make them before allowing the applicant herein to proceed further before it (the Power Commission). The applicant might then have refused to come before this Commission and attempted to show the Power Commission that it owed no duty to seek any authority from the State Commission at the then stage of its proceedings before the Power Commission. Instead of doing this, it filed its application here, although obviously against its conviction as to the necessity therefor. The position, then, of the applicant in this case has been a rather difficult one because it has followed a course, if not out of deference to, at least in compliance with, the wishes of this Commission, which it did not consider necessary or proper.

We quote as follows certain Colorado and Federal statutory provisions:

"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; * * * No public utility shall henceforth exercise any right or privilege under any franchise, permit, ordinance, vote or other authority hereafter granted, or under any franchise, permit, ordinance, vote or other authority heretofore granted, but not heretofore actually exercised, * * * without first having obtained from the Commission a certificate that public convenience and necessity require the exercise of such right or privilege; * * * 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. * * * If such public utility desires to exercise a right or privilege under a franchise, permit, ordinance, vote or other authority which it contemplates securing, but which has not as yet been granted to it, such public utility may apply to the Commission for an order preliminary to the issue of the certificate. The Commission may thereupon make an order declaring that it will thereafter, upon application, under such rules and regulations as it may prescribe, issue the desired certificate, upon such terms and conditions as it may designate, after such public utility has obtained the contemplated franchise, permit, ordinance, vote or other authority. Upon the presentation to the Commission of evidence satisfactory to it that such franchise, permit, ordinance, vote or other authority has been secured by such public utility, the Commission shall thereupon issue such certificate." Sec. 2946, C. L. Colo. 1921.

"The (Federal Power) Commission is hereby authorized and empowered:

"(d) To issue licenses * * * for the purpose of constructing, operating and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other works necessary or convenient * * * for the development, transmission and utilization of power, * * * upon any part of the public lands and reservations of the United States. * * *

"(e) To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 802 of this chapter: * * *." Title 16, Conservation, U. S. C. A., Sec. 797.

"Each preliminary permit issued under this chapter shall be for the sole purpose of maintaining priority of application for a license under the terms of this chapter for such a period or periods, not exceeding a total of three years, as in the discretion of the Commission may be necessary for making examinations and surveys, for preparing maps, plans, specifications and estimates, and for making financial arrangements. * * *." Id., Sec. 798.

"Each applicant for a license hereunder shall submit to the Commission—

"(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power, and in any other business necessary to effect the purposes of a license under this chapter." Id., Sec. 802.

As this Commission has been responsible for the applicant taking a course which it originally did not and doubtless does not now deem proper, we believe frankness and fairness dictate that we should at this time determine whether or not the position heretofore taken by this Commission, namely, that the applicant is required by the Colorado statute before securing its "preliminary permit" to secure from this Commission an "order preliminary," a certificate of public convenience and necessity or other

authority is tenable. In this connection we quote again parts of the Federal and State Acts. The Federal Act reads, as stated above, that the applicant submit to it:

"(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power, and in any other business necessary to effect the purposes of a license under this chapter."

The Colorado Act provides (Sec. 2946, supra) that:

"No public utility shall henceforth exercise any right or privilege," etc., "without first having obtained from the Commission a certificate," etc.

Subdivision (c) of said section provides that:

"If such public utility desires to exercise a right or privilege under a franchise, permit, ordinance, vote or other authority which it contemplates securing, but which has not as yet been granted to it, such public utility may apply to the Commission for an order preliminary to the issue of the certificate."

As to the Colorado statute, we need only say "may" certainly does not mean "must."

As to the requirement of the Federal statute, we quote with approval from the brief of The Arkansas Valley Ditch Association:

"The right of a corporation, foreign or domestic, to engage in the power business, or any other business, in this State, is granted by the State under charter or articles of incorporation. Such right was procured by the proponent and has been by it exercised for many years. The purpose of the certificate issued by this Commission is to confer a certain right upon a corporation already engaged in business or by its articles or charter authorized so to engage. * * * The construction of such facility, plant or system so permitted or authorized is not development of power."

We might say in addition that proof of the right to engage in the business of developing, transmitting and distributing power, and any other business, does not include proof of authority from a State Commission to construct and/or operate a particular project to be *used in* the business.

Therefore, we conclude that there is no duty imposed by either the Federal or State statute upon a utility before securing a "preliminary permit" from the Power Commission to secure a certificate of public convenience and necessity, an "order preliminary," or any other authority from this Commission. In arriving at this conclusion, we take the stand that we are not warranted on any ground of policy in claiming any jurisdiction we clearly do not have.

The Arizona Corporation Commission, on January 4 of this year, made an order which, following a number of whereases, concludes as follows:

"Now, therefore, it is ordered that each and every such water corporation and/or electrical corporation now exercising or which contemplates the exercise of any right or privilege under any franchise or permit heretofore granted without having obtained from the Arizona Corporation Commission a certificate that the public convenience and necessity require the exercise of such right or privilege, immediately and forthwith file with the Commission, its application for such certificate as provided by law by the Constitutional provisions and the rules and regulations of the Commission." *Re* Electric and Water Corporations, P. U. R. 1928-B, 774, 778.

This order does not require water corporations or electrical corporations to procure an order, certificate or other authority from the Arizona Commission before the issuance of the Federal "preliminary permit." It requires a certificate authorizing the exercise of the rights and privileges under those permits and franchises which already have been issued.

An order was issued by the Tennessee Railroad and Public Utilities Commission on October 10, 1927, which, instead of laying down any rule as to when authority should be procured from

the State Commission, simply orders the secretary of the Commission to issue citations to a number of persons, firms and corporations requiring them to appear before the Commission so that a full hearing and thorough investigation might be had for the purpose of ascertaining whether that Commission should grant or refuse the issuance of certificates of public convenience and necessity and the terms and conditions on which such certificates should issue. One of the whereases preceding the order proper reads as follows:

"Whereas, none of the applicants has made application to this Commission for the certificate aforesaid, despite the fact that one or more of said firms or corporations have proceeded so far with their plans as to make borings, stream measurements, etc., and spend considerable sums of money, thereby manifesting a disposition to go forward with their program without securing the proper certificates of public necessity and convenience from this Commission." *Re* Water Power Development, P. U. R. 1927-E, 670, 674.

It will be noted from this language that the Tennessee Commission concludes that the making of borings, stream measurements, etc., and the spending of considerable sums of money, manifest a disposition to go forward with the program, which, we assume, is the building of the project. Aside from any question of the right of a utility to exercise the rights or privileges under the "preliminary permit" without authority from this Commission, we cannot agree that the making of borings and stream measurements shows an intention or a disposition to do anything except to make certain investigations. Before concluding that the spending of considerable sums of money shows any intention or disposition we should want to know for what the money is being spent and approximately how much, as the word "considerable" is a relative one.

One of the corporations required by the order of the Tennessee Commission to appear before it was the Tennessee Eastern Electric Company, which thereafter filed a bill in equity in the chancery court, seeking declaratory relief against the operation

of certain of the rules and regulations of the Tennessee Commission. It appears in the report of that case in P. U. R. 1928-D, 50, 55, that the electric company had "proceeded to acquire lands and water rights necessary for the construction of a hydro-electric plant in the Holston River near Hemlock Ridge, such location being in the heart of the present territory served by it," and that it had purchased land on both sides of the stream and had actually acquired in fee 69 per cent of the land necessary for the dam site and flowage area, and had an additional 17 per cent under option, "its total investment in the Holston River project amounting, at this date, to about five hundred thousand dollars." Without doubt no public utility would have the right in this State in view of our statute, to go so far toward the construction of a new plant as to spend five hundred thousand dollars for the acquisition of land on which the project would be built and operated, without first securing a certificate from this Commission.

On page 63 of the report of the Tennessee case is found the following:

"It is to be observed our statutes do not require that an application for either a license or permit shall be first made to the Federal Water Power Commission, nor is the granting or refusal of a certificate of convenience and necessity made to depend on the action of the Federal Commission. Rather the opposite view should be taken, inasmuch as the Federal Act declares no license will be granted by the Federal Commission until the applicant has complied with state laws."

We cannot, for the reasons already given, agree with the statement contained in the last sentence just quoted.

The position taken by the Commission is simply that the Colorado law does not require a utility to come before this Commission before securing the Federal "preliminary permit." If the "preliminary permit" is such a permit that the rights or privileges thereunder could be exercised only by authority from this Commission, it might be very desirable for the Power Commission, if it sees fit and deems proper, to require a utility to

secure an "order preliminary" before granting the "preliminary permit." Such "order preliminary" would declare only that the Commission would thereafter issue a certificate authorizing exercise of the rights or privileges under the "preliminary permit."

Attention is called to the fact that the applicant has not asked that a certificate of public convenience and necessity be issued at this stage of the proceeding before this Commission. Moreover, it does not expressly ask for an order declaring that the Commission will issue a certificate of public convenience and necessity authorizing the construction of the proposed plant or the exercise of either the "preliminary permit" or "license" which it contemplates obtaining from the Power Commission. It is possible, in view of the allegations in the application, that public convenience and necessity require the construction of the project, that the applicant believes a certificate authorizing exercise of the "license" necessarily carries with it authority to construct the project, without which the "license" could not be exercised. Since the prayer asks for an order declaring that the Commission "will thereafter" issue a certificate of public convenience and necessity "after this applicant has obtained the contemplated authority from the Federal Power Commission granting a license to construct said Royal Gorge project," it necessarily contemplates something more than an "order preliminary" declaring that the Commission will hereafter grant a certificate authorizing the exercise of the rights or privileges under the "preliminary permit."

The only "order preliminary" which this Commission has authority under the Colorado act to make is an order declaring that it will thereafter issue a certificate authorizing the applicant to exercise a "right or privilege" under a "franchise, permit, ordinance, vote or other authority, which it contemplates securing, but which has not as yet been granted to it." That being true, this Commission would have no authority under the statute to issue an "order preliminary" declaring that it will hereafter authorize the construction of a facility, plant or system, as distinguished from authorizing the exercise of rights or privileges

under a franchise or other "authority." We must, therefore, assume that the prayer of the application seeks an "order preliminary" declaring that the Commission will hereafter issue a certificate of public convenience and necessity authorizing the exercise by the applicant of the rights or privileges under the final "license" to be issued by the Power Commission.

The prayer of the application, considered without reference to applicant's brief, seems fairly clearly to justify the conclusion which we have just reached. However, the matter is complicated by the brief of the applicant. In it it states that there are a number of possible dispositions which might be made of the case. Five such dispositions are stated, the first being: "The preliminary order might now be issued in accordance with the prayer of the application." In the third sentence following this statement there is found this language: "If this Commission desires to the treat the Federal *preliminary permit* as a franchise there is nothing preventing it from so doing." (The other four suggested possible dispositions that might be made of the case are to deny the application on the merits, postpone the determination, dismiss the proceeding without regard to any supposed want of jurisdiction, and dismiss the application for lack of jurisdiction.) In the argument under the first suggestion as to issuing the "order preliminary" in accordance with the prayer of the application is found the statement: "Nevertheless, in granting the order at this time, it appears to us that the Commission would be obliged to treat the Federal *'permit'* as a 'franchise, permit * * * or other authority'." The next sentence contains the suggestion that the final Federal "license" could not be treated as such franchise as is contemplated by the Colorado statute, because that license will never issue unless and until full compliance has been made with the State law. We then find in applicant's brief this statement: "So, the order to be issued now approving the application would mean that at some indefinite time after the granting of the Federal *'permit'* the petitioner could make final application and would thereupon receive a final certificate."

We already have pointed out why we do not believe the requirement of the Federal act with reference to the submission of evidence as to compliance with the requirements of the State law does not require the submission of evidence showing authority from a State commission to the applicant either to construct the proposed project or to exercise rights or privileges under the "license." Even if we should be wrong in that conclusion, we do not see how the Federal act as construed by the applicant could change the meaning of the language in our act, which has no connection with or dependency upon the Federal act. Our act clearly prohibits a utility from exercising "any right or privilege under any franchise, permit, ordinance, vote or other authority," "of the proper county, city and county, municipal or other public authority," "without first having obtained from the (this) commission a certificate * * *." If the language of the Federal act should be construed according to the contention of the applicant, and we assume, as it seems we should, that the word "license" used in the Federal act comes within the meaning of our statutory language quoted (although possibly not within the meaning of the word "franchise"), it would mean that the applicant would first have to obtain from this Commission an "order preliminary" and submit proof thereof to the Federal Commission before securing such "license." If the applicant assumes that this Commission in issuing an "order preliminary" will be obliged to treat the Federal "permit" as a "franchise, permit * * * or other authority," and not so to treat the final Federal "license," we do not understand why it did not simply ask for an "order preiminary" declaring that hereafter the Commission will issue a certificate authorizing the exercise of the "preliminary permit" and for nothing more. However, in spite of what the applicant says about the meaning of the word "license," it seems to regard it necessary to have a wider and broader "order preliminary" than one merely granting authority to exercise the "preliminary permit," and in effect, as we read the prayer, asks for such broader order, as is shown by the prayer which contemplates

the issuance of the final certificate only *after* the granting of the "license" as distinguished from the "preliminary permit." This may be due to the difficulty of applicant's position, to which reference already has been made.

The brief of The Arkansas Valley Ditch Association indicates that in the opinion of its attorney it is not necessary to secure authority to exercise the rights or privileges under the "preliminary permit." We find in his brief the following language:

"The only action contemplated under the preliminary permit is that of investigation and preparation of data, etc., which the applicant inherently possesses. The only thing which he *acquires* (his) under such permit is the preservation of his priority as against rival claimants during investigation, etc., for a period not longer than three years."

While it is true that this language concludes a paragraph, the first sentence in which states that a certificate or order from this Commission is not a condition precedent to the procuring of the Federal "preliminary permit," we find on the next page of said brief this language:

"In other words, we believe that the preliminary permit should be procured first, the federal 50-year license second, and the certificate of public convenience and necessity last."

Since, as we have tried to point out, the language of the prayer of the application, without reference to its brief, is designed by the applicant to ask for an "order preliminary" declaring that hereafter the Commission will issue a certificate authorizing the exercise of something more than the rights or privileges under the "preliminary permit," we need not and do not decide whether authority from this Commission is necessary to exercise rights or privileges under the "preliminary permit." The Arizona Commission takes the position that under the Arizona law authority from that Commission is necessary to the exercise in the State of those rights and privileges. See the Arizona case, supra.

We shall consider whether this Commission should on the

record made and in view of all the facts and circumstances, issue an "order preliminary," declaring that it will hereafter issue a certificate authorizing the exercise of the rights or privileges under the final "license" to be issued by the Power Commission if the applicant finally concludes it wants such license and the Power Commission decides to grant it.

Our first question, then, is whether or not the language of the act is broad enough to authorize us to make an "order preliminary" when there is no fixed intention of securing the "license," which the applicant may or may not determine it will secure. This question would seem to turn on the meaning of the language, "which it contemplates securing." The transitive verb "contemplate" is defined in Webster's New International Dictionary as "To view or consider with continued attention; to regard thoughtfully; to meditate on; to study; * * * To have in mind as contingent or probable or as an end or intention; to look forward to; to purpose or intend." The intransitive verb is defined in the same dictionary as: "To consider or think studiously; to ponder; to reflect; muse; meditate." If the language of the statute gives authority to the Comimssion to issue the "order preliminary" only in the event that the applicant definitely intends to secure the authority, then the Commission would not be authorized to issue the order. However, we shall assume for the purposes of this case, that the language is broad enough to authorize such an order even though the applicant has no fixed intention to secure the authority in question.

Passing, as we have stated, the question of the necessity of a utility securing authority from this Commission to exercise the rights or privileges under a "preliminary permit," it seems obvious that it is inadvisable for this Commission to attempt in any case to say by an order made by it that the public convenience and necessity will require three years in the future the construction of an electric plant at that time. If the utility does not contemplate or intend in any event to make such construction until three years later, it would be in the interest of

the State, in most cases at least, that a determination as to public convenience and necessity should be postponed until shortly prior to the time of the contemplated construction.

One sufficient reason why this Commission should not now make an "order preliminary" declaring that it will hereafter issue a certificate of public convenience and necessity is that no sufficient showing has been, or possibly, could be, made at this stage to justify the making of such order. The applicant itself is merely considering or contemplating the project. There are uncertainties such as the future price of coal, the future development of demand for additional electrical energy, the plans and methods of constructing and operating the project which quite conceivably may convince the applicant itself that not only its own business interests, but the public convenience and necessity as well forbid the building of the project. A fortiori, they may likewise convince the Commission so far as public convenience and necessity is concerned.

Another consideration is whether, in view of the fact that a large portion if not most of the energy produced at the Royal Gorge would have to be brought to Denver over a new transmission line or lines costing, according to the evidence, some $1,250,000, and of the further possibility that a project might be built by another company which might distribute the energy to people in closer proximity thereto at a much less cost, the public convenience and necessity would require the building and operation of the project by the applicant. We have heard no suggestion that the building of the project would result in any lower rates, although we have heard quite a little about the proper balancing of the steam and hydroelectric power produced by the applicant. Of course, the applicant might answer that its rates are subject to control and regulation. But if with the expense of bringing the energy to Denver the project should make possible only a balancing of the two kinds of power, it might conceivably be more in the interest of the public to have the power developed by a company which would deliver the same to its consumers at a lower cost of transmission from the plant.

We could, and before granting an "order preliminary" declaring that we would hereafter issue a certificate, we should consider, to the full extent that we are authorized, the effect of the project upon the interests and the rights of the irrigation companies. But we do not believe, in view of the fact that the whole matter is "up in the air," to use the expression of applicant's attorney, that any useful purpose could be served by going at length into the many matters which properly should be considered before granting the application.

Of course, our statute says that a certificate issued after the "order preliminary" shall be issued "upon such terms and conditions as it (the Commission) may designate." We have in all "orders preliminary" so far made assumed that these terms and conditions should be made when the final certificate is granted, and our orders have so stated. See Applications Nos. 992, 993 and 1133. Whether the terms and conditions should be imposed in the "order preliminary" or in the final certificate makes little difference. The difficulties preventing the making of an "order preliminary" at the present time go to the very substance of the question whether any "order preliminary" should be made and not to a minor matter of mere details which either now or later should be provided for by some terms and conditions. Their solution should precede the "order preliminary" definitely committing the Commission to the proposition that public convenience and necessity require the project and the exercise of rights or privileges under the Federal "license."

A very large part of the evidence is devoted to the question of the effect upon the scenic beauty of the gorge of the withdrawal above the gorge during low water stages, which occur frequently, of all but some fifty cubic feet per second of water. A possible alternative suggested by applicant is the diversion of all the water during the night and passing all of it during daylight hours.

The applicant's attorney stated repeatedly that as a matter of policy and without regard to the economic considerations of the project, it desires a liquidation of the "scenery issue" by the

Commission. It welcomed the action of The Denver and Rio Grande Western Railroad Company in taking the lead on this phase of the case in making its thorough investigation and detailed presentation of evidence.

It goes without saying that Colorado's climate and scenery are and doubtless will continue to be in the future its greatest and most invaluable assets. It is impossible to place a money value on them. All reasonable care and caution should be exercised to avoid the impairment of the scenic beauty of this State, particularly such an outstanding feature as the famous Royal Gorge. There are questions which are capable of exact determination with a strong degree of certainty by some fixed scientific or other rule. Unfortunately the question of the effect of the diversion at low water stages of all the water flowing through the gorge except some 50 or even 70 or 100 cubic feet per second is not one subject to such determination. It may be a question of opinion, but we doubt seriously whether the pleasing effect upon one's mind of viewing the canyon when there is running in the same only fifty cubic feet of water is as great as when there is running some three hundred feet or more. Therefore, we doubt whether the public convenience and necessity requires the contemplated project so constructed and operated as to divert all of the water but 50 cubic feet per second or any comparable amount from the gorge, even though the people of the State of Colorado might conceivably buy their electrical energy from the applicant at a trifle less than it would otherwise cost. We doubt seriously whether the public convenience and necessity would require any project if the greater part of the water is to be taken from the gorge in low water stages or if all of it is to be diverted during the night, even though none is taken out during the day.

The Commission is, therefore, of the opinion, and so finds, that the application should, for the reasons which we have stated, be denied.

Bock, Chairman, specially concurring:

I concur with the majority opinion in the order denying the

application herein, but for different reasons than those given by it. The correspondence with the Federal Power Commission, commencing with October 28, 1927, is sufficiently set out for the purposes of this opinion in the opinion by my colleagues; also the letter from the Power Commission to the applicant. The applicant's petition was filed on December 26, 1927. It will be noted that in all of the correspondence between the Federal Power Commission and this Commission a prior determination of the question of public convenience and necessity was stressed. The applicant was fully familiar with this correspondence at the time of the filing of the application and must have known that this was the issue to be determined by this Commission. That applicant fully understood that this was a necessary issue appears from its application, because it is expressly alleged therein that "petitioner, therefore, shows that the future public convenience and necessity will require the construction of the proposed extension and addition to its existing central system of electric generation, and that the proposed construction will be in the public interest, and that said construction will not interfere with the operation of lines, plant or system of any other public utility already constructed." The applicant, therefore, was fully aware of the issues that it was required to meet and the proof necessary to sustain its prayer. This quotation from the applicant's petition somewhat follows the language of Section 2946 (a) C. L. Colo., 1921, which in part is 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 first having obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such construction." The prayer, however, of the application herein is undoubtedly predicated upon the following language in Section 2946 (c) C. L. Colo., 1921, which in part is as follows: "If such public utility desires to exercise a right or privilege under a franchise, permit, ordinance, vote or other authority which it contemplates securing but which has not as yet been granted to it, such public

utility *may* apply to the Commission for an order preliminary to the issue of the certificate. The Commission *may* thereupon make an order declaring that it will thereafter, upon application under such rules and regulations as it may prescribe, issue the desired certificate upon such terms and conditions as it may designate after such public utility has obtained the contemplated franchise, permit, ordinance, vote or other authority. Upon the presentation to the Commission of evidence satisfactory to it that such franchise, permit, ordinance, vote or other authority has been secured by such public utility, the Commission shall thereupon issue such certificate." The applicant herein prayed that an order be entered declaring that the Commission will thereafter, upon application and under such rules and regulations as may be prescribed, issue a certificate of public convenience and necessity upon such terms and conditions as may be then designated, after this applicant has obtained the contemplated authority from the Federal Power Commission granting a *license* to construct said Royal Gorge project. It will be noted that the application is predicated upon the issuance of an order by this Commission declaring that the Commission will thereafter issue a certificate of public convenience and necessity after the applicant has obtained from the Federal Power Commission a license in a preliminary permit. This is another indication to me that the issue of public convenience and necessity must necessarily be determined by this Comission under the application as filed. If the Commission should issue an order as prayed for, this order must necessarily embody the certificate which it shall later issue. It must recite in substance that if and when the applicant shall have produced said evidence that it has procured the Federal license, the Commission will issue its certificate designating the terms and conditions which, in fact, are the stipulations to be embodied in the certificate to be later issued. This construction seems reasonable because the statute says that upon presentation of the required proof by the applicant that the necessary authority has been by it procured, "the commission shall thereupon issue such

certificate." The terms and conditions embodied in the certificate, if any, should be determined and designated by the Commission at the time the order issues, not at the time the certificate issues. The rules and regulations mentioned in Section 2946 (c) in my opinion merely refer to rules of procedure.

The next question which has given me considerable concern is whether a preliminary permit or license from the Federal Power Commission is such "public authority" as is within the meaning of Section 2946 (b). I concede that there are some weighty arguments on both sides. However, not having the benefit of a judicial determination of this question, and this Commission being an administrative body only, administering the laws as it finds them, it is in my opinion warranted in holding that the preliminary permit and license issued by the Federal Power Commission is such public authority as is within the meaning of Section 2946 (b). Assuming, however, that this construction is erroneous, which I do not concede, the Commission may, nevertheless, considering all the correspondence between it and the Federal Power Commission, of which the applicant had knowledge at the time of filing its application, and further considering the allegations in the application, some of which are predicated on Section 2946 (a), and the statements to the effect that applicant desires the determination of the scenic issue at this time, admissions of counsel for applicant at the time of the hearing, and the answers of some of the protestants, disregard the prayer of the application and construe it to be an application under Section 2946 (a) and dispose of the issue as to the future public convenience and necessity of the construction and extension of the plant, system and facilities involved in this application upon the record as made herein before any permit or license is granted by the Federal Power Commission.

Was the Commission warranted in objecting to the Federal Power Commission that no permit be issued to the applicant until this Commission had an opportunity to pass on the question of public convenience and necessity of the proposed project?

It does not seem to be clearly understood that in order that the applicant legally construct and operate the proposed plant or system, two certificates of public convenience and necessity may be required. The certificate to operate and construct under Section 2946 (a) is absolutely necessary. The certificate of public convenience and necessity to exercise rights under public authority, such as a permit or license, is also required, if the license or preliminary permit from the Federal Power Commission is such public authority as is within the construction of Section 2946 (b). Section 2946 (a), C. L., 1921, authorizes the Commission to pass on the question of future as well as present public convenience and necessity. This section also places upon this Commission the duty of preventing any interference in the operation of a line, plant or system of any public utility already constructed, by the construction or extension of the line, plant or system of another utility. In other words, the Commission, as much as consistent with public convenience and necessity, should prevent any duplication of service and injurious competition in the same territory. The general policy, therefore, of the State as expressed through its public utility laws, in my opinion, is that this Commission has general supervision in the interest of the public as to the territory in which an electric utility may serve the public. Under the terms of the Federal Water Power Act, Section 9, no license will be granted by the Federal Power Commission until the applicant has complied with the requirements of state law with respect "to the right to engage in the business of developing, transmitting and distributing power." I wholly disagree with the majority in their construction of Section 9 of the Federal Water Power Act, in which they say that the procuring of a charter or articles of incorporation in this State to engage in the power business gives the RIGHT in Colorado to engage in the business of developing, transmitting and distributing power, and the issuance of such a charter through the designated agencies of this State fully satisfies the provisions of said Section 9, and that the same is satisfactory evidence that the appli-

cant has complied with the requirements of the laws of this State with respect to the right to engage in the business of developing, transmitting and distributing power. No such right exists in this State by the mere issuance of a charter by the Secretary of State for that purpose. If such a right ever existed, it has certainly been limited by the provisions of the Public Utilities Act and, in my opinion, no right to engage in the business of developing, transmitting and distributing power can be exercised except as is authorized by the Public Utilities Act.

Section 2946, C. L. 1921, was enacted by the legislature of this State for the purpose of giving this Commission control and regulation over the right of a utility to engage in the business of developing, transmitting and distributing power. That section contemplates that no construction or operation of a new facility, plant or system shall begin without first having obtained from this Commission a certificate of public convenience and necessity. The correspondence between the Federal Power Commission and this Commission is in absolute harmony on that question. There is no controversy over this matter between the Power Commission and this Commission. That this Commission has authority to hear the issue of public convenience and necessity before the Federal Power Commission grants a permit, cannot be denied. The granting or refusal of a certificate of public convenience and necessity does not depend on the action of the Federal Power Commission. The objection by this Commission to the issuance of a permit before such issue is determined is, in my opinion, in the interest of sound public policy, so that the state, through its designated agency, may properly regulate and conserve for the public any contemplated power projects, and that they may only be developed in such a way as the public convenience and necessity may require. The granting of the preliminary permit by the Federal Power Commission freezes a proposed project as long as it is in existence, which may be as long as three years. That priority right held by certain interests may be very detrimental to the

public welfare. The authorization to make financial arrangements under a preliminary permit is a very important step for a public utility to take before it has any authority from the state commission to construct or operate. This was the position of the Tennessee Railroad and Public Utilities Commission in re Water Power Development, P. U. R. 1927-E, 670. In the order issued therein by the Tennessee Commission it is expressly stated that full power and authority have been conferred by law on that commission "to protect the rights of the people by issuing or refusing certificates of public convenience and necessity, as the interest and welfare of the state may require." The order in that case further stated that the "commission has been advised by the Federal Power Commission that the following named persons, firms and corporations having filed applications with said commission for preliminary permits on the streams set opposite their respective names (naming several applicants) * * * none of the applicants has made application to this Commission for the certificate aforesaid, * * * and whereas it is made the duty of this Commission under the law, upon its own initiative, to order a public hearing with due notice to all interested parties whenever it is deemed proper or necessary for such hearing to be held * * * ordered * * * to appear before this commission to the end that a full hearing and thorough investigation may be had for the purpose of ascertaining whether this commission should grant or refuse the issuance of certificates of public convenience and necessity, and the terms and conditions upon which such certificates shall issue." The Tennessee Commission in this case had practically the same problem before it that this Commission had in the instant case, except that it cited the utility before it to show cause. The Colorado Commission did not cite the applicant to come before it, but objected to the Federal Power Commission of the issuance of a permit until the issue of public convenience and necessity could be determined. This, I deem, is necessary in the public interest. The Tennessee order subsequently was litigated in the Tennessee Chancery Court, Ten-

nessee Eastern Electric Company vs. Harvey H. Hannah, Commissioner, et al., P. U. R. 1926-D, 50, and the court in that case held that it was proper to require the utility to apply for a certificate of public convenience and necessity before the issuance of a preliminary permit from the Federal Power Commission.

The failure of utilities to file applications for certificates of convenience and necessity before engaging in such activities within the State of Arizona was the cause of the issuance of an order by the Arizona Corporation Commission, Re Electric and Water Corporations, P. U. R. 1928-B, 774, in which it was required that "each and every such * * * electrical corporation now exercising, or *which contemplates* the exercising of, any right or privilege under any franchise or permit heretofore granted without having obtained from the Arizona Corporation Commission a certificate that the public convenience and necessity require the exercise of such right or privilege, immediately and forthwith file with the commission its application for such certificate * * *." While the order issued by the Arizona Commission referred to the exercise of any right or privilege under any franchise or permit, and not authority to construct and operate a power plant, line or system, nevertheless, it had in mind the same general purpose, as will appear from a reading of the entire order, to co-operate with the Federal Power Commission and to establish a policy to protect the public interest in requiring utilities to obtain authority from it in order that the rights of the state may be fully safeguarded.

In my opinion, it is not our problem to construe the Federal Power Act, but it is our problem to require the enforcement of all the provisions of the Public Utilities Act, and in order to insure such enforcement in the interest of the public of the entire State, not only as it applies to the facts in the instant case, but to all other power projects that may be in contemplation, that this Commission require a determination of the issue of public convenience and necessity first, and therein is pur-

suing a policy that is both sound and wise and is in harmony with the intent and purpose of Section 2946, C. L. 1921.

That the Commission may consider the future as well as the present in determining the issue of public convenience and necessity, has been determined by the Supreme Court of the State of Washington in Northern Pacific Railroad vs. Department of Public Works, 256 Pac. 333.

Counsel for applicant seem to think that they were coerced by this Commission in filing this application. No such thought was even entertained by this Commission. Its purpose in objecting to the issuance of a preliminary permit or license by the Federal Power Commission before it had an opportunity to pass upon the issue of public convenience and necessity was that it conceived it to be its duty to do so in the public interest. If this action was not warranted in law, which I do not concede, applicant had its remedy in the courts, but instead of taking such action the applicant voluntarily submitted to the jurisdiction of this Commission and at no time raised the question of jurisdiction, but insisted upon having at least some of the important issues in this case involved in the future public convenience and necessity determined by this Commission upon the application as filed.

Counsel as well as witness for the applicant stated that from their viewpoint the main question was the importance of the scenic attraction of the Royal Gorge and whether the same should be preserved, and that in some way this issue should be decided in advance of their going ahead with it. The statement of one of the witnesses for applicant in regard to the scenic attraction was to the effect that they would like to have that matter passed on by somebody, because they did not feel that they could go up against this wave of public sentiment against this project even if all of the other factors might justify such a proceeding. The record is full of such statements. In fact, it seemed to me that the applicant was pursuing a sound policy of public relations in assuming that generous attitude; that it

wanted the public satisfied and did not desire to do anything that would be contrary to an expressed public opinion.

The term "public convenience and necessity" is very broad, and includes every issue directly affecting the welfare of the public.

Maine Motor Coaches, Inc., vs. Public Utilities Commission, 130 Atl. 866.

Choate, et al., vs. Illinois Commerce Commission, 141 N. E. 12.

New York and S. W. R. Co. vs. Board of Public Utilities Commissioners, et al., 101 Atl. 49.

Oroville Electric Corporation vs. Railroad Commission, 147 Pac. 118.

In my opinion, the question of the effect upon the Royal Gorge as a scenic attraction by the construction of the proposed power plant is one of the issues that this Commission may consider in determining the question of public convenience and necessity. The Denver and Rio Grande Western Railroad Company operates its main line of railroad through this gorge, and has done so for many years. It is the main scenic attraction on this railroad. The railroad advertises as "The Scenic Line of the World" and the "Royal Gorge Route." The Royal Gorge is featured as the main scenic attraction. As is well stated by counsel for The Denver and Rio Grande Western Railroad Company, while Colorado is long on scenery, "nobody ever suggested that it was long on Royal Gorges. There is only one in the known universe, just as there is only one Niagara Falls, one Yellowstone Park, one Yosemite and one Grand Canyon. Nature will never construct another." That the Royal Gorge as a scenic attraction is a valuable asset to the Denver and Rio Grande Western Railroad is very clearly established in the record. The main competitors of the Denver and Rio Grande Western Railroad for passenger traffic through the Rockies are The Atchison, Topeka and Santa Fe Railway Company and the Union Pacific Railroad Company. The mileage of both of these rail carriers between western and eastern points is materially

less than The Denver and Rio Grande Western Railroad Company. It, therefore, is necessary that some special reason must attract the passenger tourist who travels between east and west to induce him to ride over the Denver and Rio Grande Western Railroad. For instance, the difference in mileage between the Union Pacific Railroad and the Denver and Rio Grande Western Railroad between Denver and Salt Lake City is approximately one hundred seventy-five miles. The passenger service between Denver and Salt Lake City over the Union Pacific is far more expeditious, and yet the testimony shows that a large number of passengers travel between Denver and Salt Lake City solely because of the scenic attractions, the major one being the Royal Gorge. To in any way mar or detract from this scenic attraction would undoubtedly seriously reflect itself in the passenger revenues of The Denver and Rio Grande Western Railroad Company. It is a well known fact that passenger revenues of rail carriers have decreased very materially in the last ten years, and anything that will attract passenger traffic to the rail carrier, especially in view of the intense competition by motor vehicle transportation, should be encouraged rather than discouraged. That the public is interested in this phase from an economic as well as an esthetic standpoint cannot be questioned.

The large number of protests on file, as well as the testimony introduced, also indicate that the public as a whole is interested in retaining as much as possible nature's scenic attractions. The public looks upon such unmarred, natural scenic attractions as belonging to it, to be retained as a heritage to future generations. The great value of such attractions for the enjoyment of the great outdoors as an essential part of the character-building and the spiritual and physical development of citizenship, is fully appreciated by a large part of the public. In my opinion, this Commission should be sympathetic toward that viewpoint, and should give this public expression some consideration in the determination of this application. The importance to the public of the conservation of natural scenic

attractions is indicated by a recent action of the President of the United States in signing Public Resolution No. 67 restraining the Federal Power Commission from issuing a permit for a power site at the Great Falls of the Potomac, situated only twelve miles from Washington, where undoubtedly a greater demand for electric energy exists than in the territory involved in the instant application. This is merely referred to as showing the great public interest which exists in the retention of places of natural scenic interest.

Coming now to the economic phases that enter into the question of the future public convenience and necessity, counsel for the applicant at the beginning of the hearing frankly admitted that applicant did not know whether it would ever finally conclude to build the project, even though authority therefor could be procured, but that the company had merely determined that it was at least worth while to spend not in excess of $10,000 in continuing its research in an endeavor to arrive at a conclusion as to whether, with its developed demand, this particular project is a worthy one and is better for the company and better for the public than a similar steam development. Aside from the operating difficulties that might be encountered by reason of water priorities on the river, it was stated that the applicant wants to await the development of coal prices, which at the present time are such as to render the cost of generation of electric energy in the proposed project greater than steam generation. Tersely stated, the applicant had not definitely determined at the time of the hearing what it would finally do in regard to the construction of the plant and transmission lines.

As stated above, in my opinion, this Commission is required to make a finding of public convenience and necessity upon the record as made. If applicant's testimony was all that could be considered in the determination of the economic phases involved in the issue of public convenience and necessity, then that alone would require the Commission to deny the application, because no satisfactory showing was made. However, other parties to the record put in considerable testimony showing the

absence of public convenience and necessity. There is, in my opinion, sufficient testimony to determine at this time upon the record as made whether the future public convenience and necessity requires the proposed power plant and transmission lines. The testimony shows that the estimate to construct the power plant is approximately $4,500,000. The testimony further shows the construction of the transmission line to Denver will cost over $1,250,000. There is no testimony in the record upon which the Commission can predicate a finding at this time that this construction is reasonably necessary for the future. The applicant now has a hydro plant at Shoshone on the Colorado River, near Glenwood Springs. It has a hydro plant on Boulder Creek near the city of Boulder, and it has a steam plant at Valmont, near the city of Boulder, and smaller steam plants in other localities. The record is clear that those plants are sufficient to meet all the requirements of the electric energy consuming public, and may now produce more electric energy than required. Furthermore, since coal prices at present are such as to render the cost of generation of electric energy by hydro plant greater than steam generation, and since there is no definite indication that coal prices are on the increase, it would seem to be in the public interest that the Commission should not at this time sanction such a large expenditure, at least not until economic necessity requires more electric energy to the extent that a hydro plant at that place is reasonably necessary; and if it should become necessary to produce more electric energy in the meantime, the applicant could build an addition to its Valmont steam plant with less expense and with less generation cost. It is admitted that the proposed project by the applicant is mainly for the purpose of serving the population at Denver. This proposed project is located a little over one hundred miles from Denver in territory in which the applicant does not serve the electric energy consuming public. The nearest community served by the applicant is Salida, Colorado, where it now has plants which are sufficient, in addition to the Alamosa plant, to serve all present needs. The Commission, in

determining the economic phase of the necessity of constructing the proposed project, should also consider the present service and needs of the consuming public in the territory in which this project is located. Canon City is served by The Southern Colorado Power Company, which has a steam plant within a short distance from the proposed power plant of the applicant. Pueblo is approximately forty miles east of the proposed plant, which city has shown considerable growth in the last ten years and which is the second metropolis in the State. The Arkansas Valley, located east of Pueblo, is in a very thickly settled farming community with several good sized cities and towns. From a careful consideration of the record of this case, it is reasonable to assume that that particular part of the State above described, which is considerably nearer to the proposed project, may need more electric energy a great deal sooner than Denver and vicinity, which may obtain, if necessary, more electric energy from hydro and steam plants that could be located more adjacent to that territory than the proposed plant. Furthermore, the potential possibility of the applicant, if authority is granted and the proposed plant is constructed, to enter into competition with other public utilities now adequately serving cities, towns and farming communities in the Arkansas Valley, may seriously affect such service. The applicant now serves about sixty per cent of the people of the State with electric energy. In other words, it is of great importance to Pueblo and the lower Arkansas Valley, now rapidly growing and developing, that if power development on the Arkansas River is possible, such power should not be appropriated for use in the northeastern part of the State, but should be conserved and used for the inhabitants of the Arkansas Valley. No showing was made that authority to construct the proposed power plant and its operation would be reflected in the cost of service to the public. To add to the valuation of the plants and facilities of the Public Service Company approximately $6,500,000 would, of necessity, require that the applicant be permitted to also earn a reasonable return on that valuation. No such necessity was shown in

the record that would permit this Commission to add such a valuation to the rate base of the Public Service Company.

Testimony was also introduced by irrigation interests in the Arkansas Valley that obtain their water supply from the Arkansas River, which was to the effect that the proposed project would result in a serious disturbance of the regulation of water rights, to the extent that it would seriously injure those who are depending upon regular irrigation service. It was further contended, and the record is undisputed on that point, that the Arkansas Valley has been developed to its fullest extent of possible development by direct decrees. Any further improvement must be brought about by storage. Sites for storage reservoirs exist in the mountains. Without their development and the development of other reservoirs on the plains, no progress is possible except by improved methods of administration and use. If the applicant's proposed project would be authorized on the Arkansas River, further storage development could never take place. The administration of the Buena Vista power plant already affects junior rights in certain reservoirs and deprives them of water at vital times. In determining the question of public convenience and necessity, this Commission should give some consideration to the effect the proposed project would have upon the present and future development of the agricultural industry in the Arkansas Valley.

After a careful consideration of all the evidence introduced and the facts and circumstances connected therewith, I am of the opinion that, upon the record as made herein, the present and future public convenience and necessity does not require the construction of the proposed plant, extension and addition to the existing system of electric generation as proposed in said application, and therefore concur in the denial of the application herein.

ORDER.

It Is Therefore Ordered, That the application herein be, and the same is hereby, denied.

RE GREELEY TRANSPORTATION CO.

[Application No. 1092. Decision No. 1995.]

Service—Commission jurisdiction—Conduct of employees.

1. The conduct of bus drivers in loafing and smoking at intermediate points while passengers wait is a detail of service over which the Commission has power and which it will, if necessary, take steps to correct.

Monopoly and competition—Commission jurisdiction—Automobiles.

2. The Commission will not authorize competitive motor operation where there is a likelihood of a rate war ensuing, in view of its limited jurisdiction to prevent reduction of rates by such company.

Monopoly and competition—Lower rates—Automobiles.

3. There is no necessity for granting competitive authority to a motor utility solely because of a proposal to operate at cheaper rates than the existing utility, in view of the right of both utilities to insist at all times upon rates that will yield a reasonable return on their investment and the jurisdiction of the Commission at all times to reduce excessive rates.

Monopoly and competition—Right of State to regulate.

4. Limitation of competition between public utilities is lawful and actually required for the protection of public interest, in view of the exercise by the State of its power to regulate the rates of public utilities as distinguished from private business.

Appearances: E. H. Houtchens, Esq., Greeley, Colorado, attorney for applicant; D. Edgar Wilson, Esq., Denver, Colorado, and Clay R. Apple, Esq., Greeley, Colorado, attorneys for Colorado Motor Way, Inc., protestant; E. G. Knowles, Esq., Denver, Colorado, attorney for Union Pacific Railroad Company.

[November 24, 1928.]

STATEMENT.

By the **Commission**: On April 13, 1928, The Greeley Transportation Company, a corporation, filed its application for a certificate of public convenience and necessity authorizing the transportation of passengers in an intracity service in the city of Greeley, and also the transportation in a separate service of passengers between Greeley and Denver and intermediate points. Thereafter written protests and answers, relating solely to the intercity operations, were filed by Union Pacific Railroad Com-

pany, Colorado Motor Way, Inc., hereinafter referred to as the Motor Way, and The Colorado and Southern Railway Company. The city of Greeley filed a demurrer, and as grounds therefor alleged that this Commission has no jurisdiction over the city of Greeley or of the streets or highways within the corporate limits thereof; that the application does not state facts sufficient to give this Commission any authority or jurisdiction over said city or its said streets; and that two separate applications for a certificate of public convenience and necessity covering two separate and distinct routes have been united improperly in one application. The case was set for hearing and was heard in the Court House in Greeley on September 12, 1928.

Section 4 of House Bill No. 430, passed at the last session of the Legislature, reads as follows:

"No motor vehicle carrier as defined in this act shall hereafter operate any motor vehicle for the transportation of either persons or property, or both, without first having obtained from the Commission a certificate declaring that the present or future public convenience and necessity require, or will require, such operation, * * *."

The applicant is without question a motor vehicle carrier as defined in said act. That this Commission does have jurisdiction over public utilities operating in those cities other than what are known as Home Rule cities needs, in our opinion, no argument at this time. The question then is whether public convenience and necessity does require the motor vehicle operation of the applicant within the city of Greeley. The applicant has been conducting a city transportation operation in said city for almost six years. It operates regularly two busses. Its equipment consists of two 21-passenger Reo busses, 1 25-passenger Mack bus and 1 17-passenger Reo bus. The value of all of said equipment is $25,000.00. The encumbrance thereon amounts to $4,500.00.

The evidence shows without any question that the applicant has been rendering an efficient, satisfactory and a much needed service in the transportation of passengers within said city, and that in so doing it has and does now comply with all ordinance

requirements of said city. No other operator is furnishing such service.

After careful consideration of the testimony the Commission is of the opinion and so finds that the public convenience and necessity requires the motor vehicle operation of the applicant for the transportation of passengers within the city of Greeley.

The applicant proposes to use in the service which it desires to render between Greeley and Denver, three 29-passenger modern Mack busses with baggage racks inside. The cost of each of these busses would be $11,000.00. Of the total purchase price of $33,000.00, one-third would be paid down and the balance would be paid in installments. A large part of the original purchase price would be borrowed by the applicant.

On April 28, 1925, the applicant filed with this Commission an application for a certificate authorizing the transportation of passengers between Greeley and Denver without stopping to take on or discharge passengers at intermediate points. On June 6, 1925, that application was denied. In the course of the opinion in that case the Commission stated that the Motor Way, protestant herein, had been operating under a certificate issued on September 15, 1923, and that the transportation service afforded by said company was sufficient to meet all reasonable demands made by the public in the communities affected. The Commission further stated that if a certificate were granted to the applicant the authorized operator would suffer such losses that the deficit "would perhaps be so large as to seriously affect its continued operation."

The applicant seeks in this case to support its application by its offer to make the trip between the two terminal points in an hour and forty minutes, being ten minutes less than the time now taken by the protestant, Colorado Motor Way, Inc., and by its offer to transport passengers one way between the terminal points for $1.50 and on a round trip for $2.50. The rates of the Motor Way now in effect are $1.90 one way and $3.40 for the round trip.

Under the statute it is the duty of this Commission before granting any certificate to find from the evidence that the public

convenience and necessity requires it. The question then is whether the public convenience and necessity has been shown in this case to require the proposed operation by the applicant. Before answering this question we will refer to a number of authorities. In the course of the opinion of the Commission in Application No. 436, in which it denied the application previously filed by the applicant herein, we stated:

"The general principle of public utility regulation protecting the utility which is rendering to the public a service reasonably adequate and practically sufficient against injustice 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."

In *Re* Fay Elliott, P. U. R. 1926A, 380, we said, 382:

"* * * that to permit more motor truck carriers to operate than is reasonably necessary to properly take care of the business to be handled over said line of route will deprive said protestant of the benefit of his certificate already granted by this Commission, and to admit several to this field of activity will tend to decrease the volume of business for each utility, and tend to make the overhead expense and other expense of each utility heavier, even to the point of being burdensome, and that it would be only a matter of time until the weakest and less able financially to withstand the pressure of little or no business must abandon their activities as public utilities; that the protestant is at this time adequately prepared financially and with equipment to take care of all business offered to him in the said territory, and that to permit competition would further divide the business now adequately handled."

We held in the case of *Re* Edd D. Harriss, P. U. R. 1927E, 730, 731:

"In order to make out a case of public convenience and necessity of a motor vehicle system for the transportation of freight between Fowler and Pueblo, Colorado, where the Commission has already granted one certificate, it is necessary to

prove that the pubic convenience and necessity requires an additional operation and that the present operation is not sufficient to meet all public demands."

In its opinion in *Re* United Stages, et al., P. U. R. 1925A, 688, 696, the California Commission said:

"The primary interest of the citizens of Santa Monica and the duty of the Commission lie in the safeguarding of adequate provision for the existing operations of transportation companies now operating in that community. Anything that would tend to jeopardize the existing service, or that would tend to prevent such transportation companies from adequately meeting the full growing demands of such service would not meet the requirements of public convenience and necessity."

The Maine Commission in *Re* Maine Motor Coaches, Inc., P. U. R. 1926B, 545, 553-554, stated:

"We feel that the principle of regulated monopoly so generally adopted throughout the nation, and particularly in our own state, by restriction upon competition as expressed in legislative enactment, with respect to other branches of public service, applies with equal force to those of our citizens who have established such business, with the consent of the state, expressed through this Commission, of transporting passengers over regular routes upon the highways of this state between regular termini for hire."

The Maine Commission, after quoting Honorable Herbert Hoover, then stated, page 555:

"This will make for high-grade equipment, a jealous guarding of the rights thus obtained, while the opposite course would be fraught with such uncertainty as to result in the use of deteriorated equipment and a half-hearted response to the public need of service. Certainty in any business is an economic bulwark. A feeling of insecurity cannot contribute to the attainment of a high standard by the ordinary man in any endeavor of life."

The Virginia Court of Appeals in Norfolk Southern Railroad Company v. Commonwealth, 126 S. E. 82, P. U. R. 1925C, 555, 563, held:

"Existing transportation systems should be protected so far as compatible with the public interest. There should be no unreasonable or unnecessary duplication of service, to the point that efficient service is made impossible."

It is obvious that the ultimate purpose is the protection and benefit of the public. As was stated by the Indiana Commission in *Re* Highway Transportation Company, P. U. R. 1926D, 594, 602:

"Not the carrier but the public weal must be the dominant consideration."

In addition to the operations of the Motor Way, hereinafter described, Union Pacific Railroad Company operates four passenger trains daily each way between Greeley and Denver.

The service rendered by the protestant, the Motor Way, is shown by the evidence to be generally satisfactory, although there was some substantial complaint and evidence in support thereof about the drivers for that company loafing and smoking at intermediate points while the passengers wait in the busses. Such conduct undoubtedly is annoying to the passengers. We believe the evidence is such that that company doubtless has seen to it that this practice of some of the drivers has been discontinued. If it has not it is a detail of service over which this Commission has power and which it will, if necessary, promptly take steps to correct.

We do not regard the ten minutes proposed by the applicant to be saved in its trip between the terminal points, even if it could safely operate on such schedule, a matter of a great deal of importance. Moreover, whether it could safely operate on such a schedule would remain to be seen.

The said protestant is now making eight regular runs daily from Denver to Greeley, an additional run on Sundays without any stops at intermediate points, and still another run on Saturdays, Sundays and holidays. In the other direction it makes eight regular runs and one additional run on Saturdays, Sundays and holidays. It is admitted that the said protestant is able to transport all passengers desiring to travel over the route in question. The evidence shows that for each average

bus mile the protestant's busses run they carry an average of less than ten passengers in busses with a capacity of almost three times that number.

However, the argument is made that with the reduced rates which the applicant proposes to put into effect the increased business will be such that there will be enough business for both the present operator and the applicant. This is merely a speculation. Whether any greatly increased number of people will ride on motor vehicles over the route in question merely because the one way fare would be reduced forty cents and the round trip fare ninety cents is very doubtful.

There was some opinion evidence that the applicant could afford to operate at a profit at the rates proposed, but the information upon which the opinion was based was so meager and unsatisfactory as to make the evidence of little value. There was no evidence tending to show that because of any inherent difference between the mode of operation of the applicant and that of the protestant the applicant can operate at any lower cost than does the protestant. The evidence does show that the protesting operator lost $12,000.00 in one year when the applicant herein was unlawfully operating over the route in question.

What the public is interested in is an efficient, dependable operation at a reasonable cost. If a certificate were granted to the applicant herein it is probable that a rate war would immediately ensue. The stronger of the two operators would survive. Such a warfare cannot, in the long run, be for the public interest, although the public might appear to benefit temporarily. It is true that this Commission has power to regulate rates, but its jurisdiction to prevent reduction of rates, particularly those of a company whose financial strength will not be seriously impaired thereby, is limited, as we pointed out in *Re* The Cheyenne Mountain Co., App. No. 1089, decided by this Commission this year.

As we view the case the only possible ground for granting the certificate would be one of rates. As we have stated, there is no evidence that because of any inherently different manner

of operation the applicant can operate at any lower cost than the certificate holder does. The rates of the certificate holder may on proper showing be ordered by this Commission to be reduced. Unless they are voluntarily reduced, the Commission expects in the reasonably near future to enter on its own motion upon an investigation thereof. If they are unreasonably high they will be ordered lowered and the public will then have the benefit of the continued operation of the present holder at such rates as are reasonable. The Commission stands ready and eager to see that the public at all times gets the service it is entitled to at reasonable rates and will gladly receive and hear complaints to that end.

There was quite a little evidence about a contract entered into on February 5, 1926, after the previous application of the applicant had been denied by which the applicant agreed that it would not operate between Greeley and Denver and the protestant, the Motor Way, agreed that it would not operate between Denver and Pueblo. There was further evidence bearing on the violation of said agreement which tended to show that the applicant had taken passengers from Greeley to Denver in a bus; that the protestant had sold some tickets to Pikes Peak as distinguished from Colorado Springs. However, the Commission does not base its finding and order on said contract or any evidence relating thereto.

It is elementary that a common carrier, whether by motor vehicle or rail, is entitled under the constitution of the State of Colorado and that of the United States, to charge such rates as will enable it to earn a fair return on its investment. Orders of state commissions are being set aside frequently by the courts because the rates fixed are such as are held to deprive carriers of their constitutional rights. If a certificate were granted to the applicant herein both it and the Motor Way would obviously be entitled to charge such rates, however high, as would enable them to pay all costs of operation, including depreciation of equipment, and to earn a reasonable return on their investments. The public thus would be required to support two operations instead of one.

It is quite possible that this Commission after a hearing on the rates of the Motor Way would be warranted on the basis of its present volume of business, in lowering them. If we are warranted in lowering them and the volume of business should then greatly increase, as the applicant contends, as the result of such reduction, we might quite conceivably be warranted in making further reductions based on the greater volume of business. It should be remembered, however, that there is in every territory a limit to the potential traveling public. However, the average number of passengers per mile could increase almost 200 per cent before reaching the seating capacity of the Motor Way's busses. It could thus handle a volume of business almost three times as great as that now handled without any substantially increased cost of operation. It is quite obvious that if the total business handled by the Motor Way, under rates which this Commission intends to see are reasonable, should be divided with another operator duplicating the service and operating expense of the Motor Way, both the Motor Way and the competitor would have to increase the rates and this Commission under the law would be powerless to interfere. Assuming, as we do, that the service of the Motor Way is reasonably adequate and satisfactory, and that there is no reason why its operating costs are any higher than would be the costs of rendering a similar service by another, and that this Commission has the power to and will limit the returns of the Motor Way to such as are reasonable, within constitutional limitations, the granting of a certificate to the applicant herein would be contrary both to the fundamental principles of regulation and utility commission practice and the best interests of the public served.

The legislative policy of limitation of competition is justified and made necessary for the public benefit because of the power in the State over rates. There exists in the State no police or other power to limit the prices of the ordinary retail or wholesale merchants. Limitation of competition between such merchants would not only be unlawful but wholly indefensible because of the lack of power over their prices. But since the

State may lawfully and does limit the rates of public utilities, as distinguished from a private business, limitation of competition between such utilities is lawful and actually required for the protection of the public interest.

After careful consideration of the evidence the Commission is of the opinion and so finds that the public convenience and necessity does not require the proposed motor vehicle operation of the applicant between Greeley and Denver.

ORDER.

IT IS THEREFORE ORDERED, That the demurrer of the city of Greeley be, and the same is hereby, overruled.

IT IS FURTHER ORDERED, That the public convenience and necessity requires the proposed motor vehicle system of the applicant, The Greeley Transportation Company, for the transportation of passengers within the city limits of the city of Greeley, 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 application for a certificate authorizing the transportation of passengers between Greeley and Denver and intermediate points be, and the same is hereby, denied.

IT IS FURTHER ORDERED, That the applicant 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 schedule filed with this Commission, except when prevented from so doing by the Act of God, the public enemy or unusual or 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.

M. L. MOAURO

v.

WOLF CREEK RAILROAD COMPANY, *et al.*

[Case No. 321. Decision No. 2012.]

Common carriers—Railroads—Constitutional provision.

1. By the terms of Article XV, Sec. 4, of the State Constitution all railroad companies in Colorado are common carriers, and continue such as long as they retain their corporate existence.

Service—Railroads—Extension—Jurisdiction of Commission to require.

2. Sections 2935, 2936 and 3000, C. L. of Colorado, 1921, held to confer power upon the Commission to require a railroad company to make an extension of its tracks to a mining property in order to afford rail service to the mine.

[December 19, 1928.]

Appearances: Denious & Moore, Esqs., Denver, Colorado, for complainant; Elmer L. Brock, Esq., Denver, Colorado, for defendant, The Denver and Salt Lake Railway Company; Frank E. Gove, Esq., Denver, Colorado, for defendant, Wolf Creek Railroad Company.

STATEMENT.

By the **Commission**: This case was brought by the complainant, M. L. Moauro, to require the defendants, Wolf Creek Railroad Company and The Denver and Salt Lake Railway Company, to extend the rail line of the Wolf Creek Railroad Company to connect with the proposed mine of the complainant. The complaint alleges in substance that the Wolf Creek Railroad Company owns a line of railroad connected with the line of railroad of The Denver and Salt Lake Railway Company and extending northerly along Wolf Creek to a point beyond the mine of the International Fuel Corporation; that the defendant, The Denver and Salt Lake Railway Company, as lessee or otherwise, actively operates and controls the Wolf Creek Railroad; that the complainant is the owner and holder of certain leasehold interests in and to the Northeast Quarter of Section 10, Township 6 North, Range 87 West, Routt County, Colorado, and other adjoining properties alleged to contain

valuable and workable coal deposits; that it is the purpose and intention of the complainant at once to develop said property and begin active coal mining operations thereon, if, and when, he can procure railroad facilities for the shipping of said coal from the mine to the customers; that the only way such facilities can be furnished and supplied is by requiring the defendants to construct a spur track connected with the northern terminal of the Wolf Creek Railroad Company, extending northerly along Wolf Creek about fifteen hundred feet near the mouth of complainant's proposed mine; that the construction of said spur track will not be burdensome to the defendants, and the tonnage of coal which will be furnished by complainant will make the construction thereof profitable to the said defendants.

The answer of the Wolf Creek Railroad Company alleges that the defendant is not now, and never was, a common carrier and that, therefore, this Commission has no jurisdiction over this defendant or its property, and has no power or authority to order or compel the construction of the railroad tracks sought by complainant to be constructed, and then denies each and every allegation in the complaint. The answer of The Denver and Salt Lake Railway Company admits the allegations in paragraph 2 of the complaint and, in effect, denies every other allegation, except it admits that it makes use of a portion of the line of the Wolf Creek Railroad Company for certain and specific purposes under arrangement with said company therefor.

This complaint was set down for hearing in the Hearing Room of the Commission, State Office Building, Denver, Colorado, on September 17, 1928, at which time evidence in support of, and in opposition thereto, was received. The testimony shows that the complainant is the holder of a lease from the Federal government covering some five hundred acres of coal lands, which was delivered to him on May 19, 1928; that for a part of this transaction, complainant was required to, and did, execute a bond for the faithful performance of the lease requiring an expenditure of at least ten thousand

($10,000) dollars for development on or before April 30, 1929, and ten thousand ($10,000) dollars during each year thereafter for two additional years. Complainant testified that he and his associate are financially able to comply with the requirements of their lease; that it is their purpose to proceed at once with the development of the mine; that the location has been thoroughly prospected and contains an abundance of high grade coal. A report by a skilled engineer was also introduced, giving the details of the development and the character and extent of the coal therein.

As usual, a number of questions are argued in the brief. In our opinion only two of these questions require our attention and disposition. The first question is, is the Wolf Creek Railroad Company a common carrier subject to the jurisdiction of this Commission. The second question is, has this Commission jurisdiction over the issues involved in this complaint and, if so, is the complainant entitled to the relief sought.

Article XV, Section 4, of the State Constitution provides:

"All railroads shall be public highways, and all railroad companies shall be common carriers. Any association or corporation organized for the purpose shall have the right to construct and operate a railroad between any designated points within this State, and to connect at the State line with railroads of other States and territories. Every railroad company shall have the right with its road to intersect, connect with or cross any other railroad."

It will be noted, therefore, that by the terms of the Constitution of this State all railroad companies in Colorado are common carriers. The Wolf Creek Railroad Company was incorporated under the laws of the State of Colorado applicable to railroads on May 18, 1915. It is therefore chartered as a railroad company for a term of fifty years. Its purpose was to construct a railroad line from a junction with The Denver and Salt Lake Railway Company's tracks at Mount Harris, Routt County, northerly and northwesterly to meet the requirements of the Wadge Coal mine of the Colorado Coal Company and other mines which, it was thought, were about to be devel-

oped. The entire capital stock of the company was taken and is still held by the Colorado Coal Company, a subsidiary of The Victor-American Fuel Company, which now operates a mine adjoining the tracks of the Wolf Creek Railroad Company. According to the testimony, the original plan of construction was immediately abandoned. Only one mile of track was laid. Some time thereafter, one thousand feet of this track was destroyed by flood, and abandoned. Since that time only approximately four thousand feet of track has been in existence. However, the charter of the Railroad Company has never been dissolved, and the contract testified to as existing with The Denver and Salt Lake Railway Company is with the Wolf Creek Railroad Company.

Counsel for the Wolf Creek Railroad Company calls our attention to Section 2818 of Compiled Laws of Colorado, 1921, wherein it is provided that, if any railroad corporation organized under the Railroad Incorporation Act shall not begin the construction of its road and expend thereon twenty per cent of the amount of its capital stock within five years after the date of its organization, its corporate existence and power shall cease. No matter whether this section can be invoked only by the State and that no railroad can be discontinued and dismantled without first obtaining the consent of this Commission, and no matter what the Railroad Company has in effect been doing since it obtained its charter, since the charter as a railroad is still in existence, this Commission is constrained to hold that, because the Constitution provides that a railroad shall be a common carrier, the defendant, Wolf Creek Railroad Company, therefore, is a common carrier so long as it retains its corporate existence for that purpose from the State. Defendant argues very strenuously that since it does not perform any functions of a common carrier it is not subject to the jurisdiction of this Commission. It is a fact, however, that the defendant has voluntarily taken on the legal status of a railroad corporation and up to now has retained this corporate legal entity. Surely in view of the constitutional provision above referred to, it cannot retain its present legal

entity and claim to be only a private carrier and merely the owner of an industrial track or plant facility.

Having concluded that, by express provision of the Constitution of this State, the Wolf Creek Railroad Company is a common carrier, the only other question remaining is whether the Commission has jurisdiction over the relief sought and, if so, should the relief under the evidence as introduced herein be granted.

We quote from the following statutes which, in our opinion, give this Commission jurisdiction over the relief sought in the complaint filed herein:

"Whenever the Commission, after a hearing had upon * * * complaint, shall find that the * * * equipment, appliances, facilities or service of any public utility * * * are * * * inadequate or insufficient, the Commission shall determine the * * * adequate * * * equipment, appliances, facilities, service or methods to be observed, furnished, constructed, enforced or employed, and shall fix the same by its order * * *."

Section 2935 Compiled Laws of Colorado, 1921.

"Whenever the Commission, after a hearing * * * upon complaint, shall find the additions, extensions, * * * or improvements to, or change in the existing * * * equipment, * * * 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 secure adequate service or facilities, the Commission shall make and serve an order directing that such additions, extension, * * * improvements or changes be made, or such structure or structures be erected in the manner and within the time specified in such order."

Section 2936 Compiled Laws of Colorado, 1921.

"If, in the judgment of the Commission, after a careful, personal examination and investigation, and after a hearing before the Commission, * * * the Commission shall find that * * * improvements or increased facilities in respect to * * * trackage, * * * switches, * * * or any other element of the serv-

ice of common carrier shall be necessary and with the reasonable power of any common carrier to make or adopt for the * * * accommodation of the public in the shipping and handling of property, the Commission shall make such reasonable order requiring any common carrier to do any such thing deemed by the Commission to be proper in respect to such matters within a reasonable time, to be fixed by the Commission, as to them shall seem so necessary and within such reasonable power of such common carrier * * *."

Section 3000 Compiled Laws of Colorado, 1921.

The above quoted sections from our laws clearly indicate to us that this Commission has jurisdiction to grant the relief prayed for. The only question remaining for its determination is whether the extension of the track of the defendant, Wolf Creek Railroad Company, ought reasonably to be made to secure adequate service or facilities and whether the improvements or increased facilities in respect to trackage, as involved in the instant case, are necessary and within the reasonable power of the defendants to make or adopt for the accommodations of the public in the shipping and handling of property.

To grant the relief asked herein, the Commission must find from the record that the construction, ownership and operation over the proposed extension ought reasonably to be made and is within the reasonable power of the Wolf Creek Railroad Company to make and adopt. The defendant railroad company operates less than one mile of track, which was mainly constructed pursuant to a contract of August 10, 1915, between The International Fuel Company and the Wolf Creek Railroad Company (Exhibit No. 6) and for the purpose of serving the Wadge Mine, operated by a subsidiary of The Victor-American Fuel Company and The International Fuel Company, now operated by The Pinnacle-Kemmerer Coal Company. The Denver and Salt Lake Railroad Company operates with its equipment on the defendant's tracks. The Wolf Creek Railroad Company has never done anything more, so far as operation is concerned, than to construct the track. It has no equipment whatsoever. It has never published or filed

tariffs or made reports either to the Interstate Commerce Commission or to this Commission. It has never carried for hire, or otherwise, any freight of any character for any person or corporation. It has no employes and no payroll. Its total annual revenue consists of the interest charge of $390.00 a year paid by The Pinnacle-Kemmerer Coal Company. In 1926 the company's expenses for taxes, etc., exceeded its income by $355.11. In 1927 the deficit amounted to $964.67. These losses have been paid by The Colorado Coal Company, the sole stockholder of the defendant rail company. The complainant offers to pay the entire cost of the proposed extension plus a reasonable rental or sum by way of interest for the use of that portion of the track now constructed, including the upkeep of the road. If the Commission should grant the relief prayed for, defendant rail carrier would assume all usual burdens with respect to the proposed extension, would therefore in some measure have to supervise the same because of such burdens, and have to pay the tax thereon and could be required to file a tariff, at least with this Commission, covering all commodities carried over said proposed extension. Furthermore, the evidence shows that the coal industry is in a depressed condition; that the competitive situation in this industry is very intense and that some of the best financed coal operators are not making any profit. If the proposed extension should be required with such a condition existing in the coal industry, it can reasonably be assumed that the complainant might be unable to profitably conduct his coal mining operations, with the result that the use of the extension for transportation of the complainant's freight would be abandoned, leaving the burden of ownership of the same upon the rail carrier to continue the payment of taxes, etc.

Under all the circumstances, therefore, the Commission is unable to find from the record that the proposed construction of the spur track is within the reasonable power of the defendant rail carrier to make or adopt. An order will, therefore, be entered dismissing the complaint herein.

ORDER

It Is Therefore Ordered, That the complaint herein be, and the same is hereby, dismissed.

Commissioner Allen concurred in the result reached.

TOWN OF OAK CREEK

v.

THE DENVER AND SALT LAKE RAILWAY COMPANY.

[Case No. 376. Decision No. 2016.]

Crossings—Railroad grade—Accidents—Major responsibility to avoid—Stop before passing.

While the rail carrier is under some duty to protect the public at grade crossings, the major responsibility in preventing accidents rests with those crossing the tracks, who should stop before crossing.

[December 22, 1928.]

STATEMENT.

By the **Commission:** This is a complaint by the Board of Trustees of the town of Oak Creek, Colorado, against the inadequate protection of the public at the crossing of The Denver and Salt Lake Railway Company on Sharp Avenue in that town. This case was set down for hearing in the Town Hall, Oak Creek, Colorado, on November 8, 1928, at which time evidence in support of and in opposition thereto was received.

Oak Creek is a town of approximately 1,400 people located about four miles from Phippsburg. At Phippsburg the defendant has a railroad yard and roundhouse. At Oak Creek and a mile or two west thereof there are several coal mines which ship considerable tonnage over the defendant rail carrier. The track of the defendant carrier through Oak Creek is a part of the switching and railroad yard at Phippsburg. Considerable switching is carried on through the town of Oak Creek daily to Phippsburg. Engines are frequently run backward through the town pushing long strings of cars ahead of them, the town being situated between Phippsburg and the coal mines. Sharp Avenue is the main street of the town of Oak Creek. The block just east of the crossing is built up solid to about fifty or sixty feet from

the track, and there is no visibility along the track in either direction for anyone approaching the track until he is close to the same. From the west the visibility to the north is obscured by buildings on the north side of the street. To the south there are no obstructions of the visibility but there is a steep grade of about 8 per cent approaching the track from the west, and this creates a further danger from this side. The physical conditions at the crossing are poor as to visibility and grades. The operations by the switch engine from Phippsburg in going to the mines and switching ten or fifteen cars ahead of the engine through the town of Oak Creek adds considerably to the hazard. Owing to the fact that there is a heavy ascending grade toward Phippsburg, these trains go over the crossing in question at a fair rate of speed and power.

If the operating conditions over this crossing were such as would result from a normal traffic situation with regular freight and passenger trains passing through the town, we would not feel warranted in considering the same so dangerous as to warrant special attention. We believe it to be a fair statement that the situation at this crossing in Oak Creek is perhaps not comparable to any crossings located in other towns through which the defendant carrier operates. We are, therefore, dealing here with an abnormal traffic situation. The evidence of the complainant warrants the installation of gates, the placing of a watchman at the crossing or an automatic bell signal. While the rail carrier is under some duty to protect the public at railroad crossings, and especially dangerous ones, we believe that after all the major responsibility in the prevention of accidents over railroad crossings rests with the pedestrian and the drivers of vehicles. The driver of a vehicle should, in approaching such a crossing as the one in question, stop before he crosses the same. This Commission, of course, has no jurisdiction to require the driver of every vehicle to stop at railroad crossings before proceeding, but the town could, under its police power, make this requirement. Several accidents have happened at this crossing, but the evidence discloses that a bell signal or wigwag would not have prevented the same.

Under all the circumstances, we do not believe that the record is sufficient to warrant us in requiring a gate or a wigwag bell signal. We do believe, however, that defendant rail carrier should provide a more conspicuous warning sign than it uses at most of its railroad crossings. The evidence shows that in the rail carrier's yards at Utah Junction on Pecos Street it has a large electric sign stretched across the street in the center of the crossing entitled: "Stop, Look, Listen," which at night time flashes, and the same has proven satisfactory in that location. While certain hazardous conditions do not exist in the Pecos Street crossing as exist in the instant crossing, yet there is considerably more traffic over the same.

After a careful consideration of all the evidence introduced at this hearing, the Commission is of the opinion and so finds that the safety of the public requires a danger signal such as is now used by the defendant carrier at the Pecos Street crossing at Utah Junction.

ORDER.

It Is Therefore Ordered, That The Denver and Salt Lake Railway Company be, and it is hereby, directed and required to install at the Sharp Avenue crossing over its right-of-way and tracks in the town of Oak Creek, Colorado, an electric danger signal stretched over the center of its right-of-way, having thereon the words "Stop, Look Listen," which will flash after dark, which signal shall be substantially the same as the danger signal of the defendant carrier now located at the Pecos Street crossing at Utah Junction, said danger signal to be installed, operated and maintained by the defendant railroad carrier at its expense.

It Is Further Ordered, That said danger signal be installed, connected and in operation by the defendant railway company within thirty days from the date of this order.

It Is Further Ordered, That the defendant railway company submit to this Commission for its approval a detailed plan of the proposed danger signal within fifteen days from the date of this order.

E. G. OTTINGER

v.

COLORADO CENTRAL POWER COMPANY.

[Case No. 368. Decision No. 2018.]

Payment—Deposit to guarantee—Rule 11 of Commission.

1. The requirement that electric utility customers make a deposit to secure payment of bills is authorized by Rule 11 of the Commission.

Discrimination—Deposit charge—New customers—Antagonism.

2. Where an electric company, permitted by Commission rules to demand a deposit from new customers to secure payment of bills, has seen fit to adopt its own rule to demand and receive only $10 deposit from new business consumers, the action of the company in requiring more than that amount from a new business customer because of an apparent antagonism which the individual bore to the company is an unreasonable discrimination against the latter.

[December 26, 1928.]

Appearances: R. W. Booze, Golden, Colorado, and D. Shepard, Platteville, Colorado, for Colorado Central Power Company.

STATEMENT.

By the **Commission**: On June 6 of this year E. G. Ottinger of Platteville, Colorado, wrote the Commission a letter complaining that because of his refusal to pay a deposit of $24.00 to Colorado Central Power Company, which is engaged in the distribution of electric energy in Platteville, the said company disconnected his service. He requested that the Commission investigate the matter of the propriety of the demand of the deposit and that in the meantime his service be restored. The Commission's electrical engineer immediately telephoned the company, requesting it to restore and maintain service until such time as the matter could be heard. The Commission thereupon on June 22 on its own motion converted the matter into a formal proceeding, making the said E. G. Ottinger and the said Colorado Central Power Company parties thereto. The matter was duly set for hearing and was heard in the Hearing Room of the Commission in Denver on December 21. Although

notice was duly given to Mr. Ottinger, he did not appear in person or by an attorney.

At a date prior to the time of the beginning of the controversy Colorado Central Power Company adopted a uniform policy requiring new customers to make a deposit for the purpose of guaranteeing payment of current bills. This policy was adopted pursuant to authority contained in Rule 11 of this Commission regulating the service of gas, electric and water utilities. The said rule reads in part as follows:

"Any utility may require at any time from any consumer or prospective consumer a cash deposit intended to guarantee payment of current bills. Such required deposit shall not exceed the amount of an estimated ninety days' bill of such consumer, or in the case of a consumer whose bills are payable in advance, it shall not exceed an estimated sixty days' bill for such consumer."

The evidence shows that one Bohlender was the predecessor of Ottinger in the operation of a pool hall in Platteville; that he was succeeded in said business by a partnership known as Ottinger and Bennett, Ottinger being the party hereto; that the said partnership took their electricity under Bohlender's contract with the company; that Bennett withdrew from the firm in February of this year and that the company understood that Bohlender desired to terminate his contract and allow Ottinger to make his own with the company; that thereupon the company, through its district manager, Shepard, requested a deposit of $10.00, following which a controversy arose. Shepard then concluded that because of the apparent antagonism which Ottinger bore to the company, the company should and did require a deposit of $24.00, being an estimated ninety days' bill.

The evidence further shows that the company has been demanding of new resident consumers a $5.00 deposit and of new business consumers a deposit of $10.00. Since the adoption of the policy in question 45 deposits have been made, 13 of them being by business consumers.

The demand for such deposits for new customers is not only permitted by Rule 11 of this Commission, but is made by a large number of utilities. The company, instead of adopting a rule authorized by the rule of this Commission by which it would charge an estimated ninety days' bill, has decided to demand and receive only $10.00 from business men. This being true, we are of the opinion and so find that a demand of more than $10.00 from Mr. Ottinger constitutes an unreasonable discrimination against him.

We are of the opinion and so find that the demand of $10.00 is reasonable and proper.

It now appears that there is some question as to whether the said Bohlender is willing to continue his contract for electric service at the pool hall with the bills being sent in the first instance to Ottinger. However, this is a matter very largely for the determination of the parties themselves.

ORDER.

IT IS THEREFORE ORDERED, That the Colorado Central Power Company serve electrical energy to the said E. G. Ottinger upon his making a deposit with the said company of $10.00 to guarantee payment of current bills.

IT IS FURTHER ORDERED, That the said company shall be under no obligation and duty to serve said E. G. Ottinger under a contract with him without such deposit.

CHARLES DAILEY

v.

ROARING FORK WATER, LIGHT & POWER COMPANY.

[Case No. 348. Decision No. 2034.]

Procedure—Objection to assignment of claims—Rate complaint.

1. Equity and good conscience requires that an objection by an electric company to the right of a complainant alleging excessive charges to recover reparation for the whole period claimed, because of several assignments of the property to which service was rendered should be overruled, where such assignments were within the immediate family and within the control

of the complainant, and where the objection was not made in the company's brief or in a motion to dismiss the complaint.

Electricity—Judicial notice of Commission—Power load.

2. The Commission took notice without detailed proof that a sheet of paper on a mechanical newspaper press is so slight as to have inconsequential effect upon the amount of power consumed.

Electricity—Power load—Starting of motor.

3. The additional demand which a power motor makes upon the current supply for an instant when starting was not considered as having any bearing upon the question of maximum demand of such motor over a considerable period.

Evidence—Test by company employees—Electricity.

4. The Commission assumed that three tests made of the maximum demand of a consumer's electric motor showing practically the same results were properly conducted, where the company did not see fit to make further tests.

Reparation—Common law remedy—Overcharges.

5. The right of a utility patron to recover for overcharges at common law was sustained where it could be proven that the charge was unreasonable and the payment was involuntary.

Payments—Payment under protest—Utility patrons.

6. A customer paying a public utility or a common carrier the charge demanded does so involuntarily and under compulsion, where he believes, and has indicated his protest to the company, that the charge is excessive.

Reparation—Recovery under the public utility act—Common law.

7. The right of a utility patron to recover overcharges that may be enforced under the Public Utilities Act is the same as that previously existing at common law.

Statutes—Remedial effect.

8. The Public Utilities Act is a statute enacted for the public good to give additional and specific remedies to substantial rights previously existing at common law.

Commissions—Force of decisions of superior court.

9. It is the duty of the Commission as an administrative body to obey without question the binding decisions of the superior courts of the State.

Reparation—Statutes of limitation—Effect upon utility remedies.

10. A six-year statute of limitations being purely remedial in its applications does not apply to a proceeding brought before the Commission for the recovery of overcharges, in view of the fact that the legislature prior to the completion of the statutory bar had extended the time by giving an additional remedy through the Commission.

Reparation—Limitation of action—Public Utilities Act.

11. A provision of the Public Utilities Act requiring that claim for overcharges shall be made not more than two years after the right accrued is not a mere statute of limitations but is a jurisdictional restriction upon the power of the Commission as distinguished from a rule of law for the guidance of it in reaching its conclusions.

Reparation—Limitation of action—Knowledge of wrong.

12. The fact that a complainant asking the recovery of overcharges accruing more than two years prior to the claim had no knowledge of the wrong done to him is immaterial, where the limitation of action so placed by a provision of the Public Utilities Act is a jurisdictional restriction upon the power of the Commission to entertain such action.

Discrimination—Recovery of overcharges.

13. The payment of overcharges under a lawful order to a customer who is entitled to and who has taken proper steps to recover the same cannot constitute unlawful discrimination.

Reparation—Advertisement as a set off.

14. The Commission must assume and conclude that advertisements carried by an electric company in a paper owned by a consumer seeking the recovery of alleged overcharges were worth the charges made for them, and the taking of such advertisements does not give rise to a bar or reduction of the complainant's claim.

[January 8, 1929.]

Appearances: Noonan & Noonan, Esqs., Glenwood Springs, Colorado, attorneys for complainant; George L. Nye, Esq., Denver, Colorado, attorney for defendant.

STATEMENT.

By the **Commission**: On February 4, 1928, the Commission received a letter dated February 1, 1928, from Charles Dailey, complaining that beginning in June, 1909, The Roaring Fork Water, Light and Power Company, hereinafter called the Company, had been making excessive charges against him for electrical energy furnished in Aspen for the operation of his printing plant. On February 15 the Commission converted the matter, on its own motion, into a formal proceeding, making as parties to the proceeding said Dailey and the Company. The Company filed its answer and its amendment thereto. The matter was duly set for hearing and was heard in the Court House in Glenwood Springs. Thereafter the parties filed exhaustive briefs, the reply brief alone covering some 43 pages.

The evidence shows that prior to and until June, 1909, the complainant had been publishing in Aspen a daily paper called the Aspen Democrat, using water power therefor, and that in that month he purchased from one Wheeler another paper, consolidated the two, and that since then he has been publishing the paper continuously to the time of the filing of the complaint, as a daily to January 1, 1927, thereafter as a weekly. Beginning with the month of June, 1909, and ending with the month of December, 1927, the complainant paid twenty dollars ($20.00) per month for his electrical energy used in operating the machinery in his printing plant. This energy was furnished first by The Roaring Fork Electric Light and Power Company and later by said The Roaring Fork Water, Light and Power Company. D. R. C. Brown, at all times president of both companies, testified that the assets and property of the former company "were all transferred into the new company."

It is rare that this Commission has occasion to decide a case involving as many questions of law. We shall not separately state the various allegations found in the answer and amendment thereto, but shall take up the questions whose determination seems essential to a proper disposition of the case.

The answer of the Company alleges "That the title to and the ownership of said newspaper and said newspaper plant has changed several times, but that during most, if not all, of the time since 1909 the said Dailey has been connected therewith as owner, manager for or agent of the owner, and has been the individual actively in charge of said newspaper plant and business." The complainant was asked, "Who owns that paper?" He answered, "I do." He was then asked whether or not his newspaper plant had been mortgaged and sold under mortgage. He answered, "No, sir; you are thinking of the old Aspen Democrat, Mr. Nye." In reply to the next question: "How often has the ownership of that plant changed since 1909?" Daily answered: "Twice, my wife and son." Q. "Then it has not been in your continuous ownership since 1909?" A. "Practically, yes; that is, it was in the family." Daily further testified that his son Charles Dailey, Jr., came "home from

the war in the summer of 1919 and stepped into full partnership with me in the office." While some question has arisen in our minds as to the right of complainant to recover the whole of any excessive charges paid for electrical energy furnished for operating the plant, we have concluded that the Company is not in a position now to raise the point, because it is not raised specifically, if at all, in its brief and motion to dismiss the complaint made by its attorney at the conclusion of the evidence for the complainant. Throughout the hearing and the briefs the complainant is assumed to be the party who paid and bore the charges. The son testified as one of his witnesses in aid of his father's claim for the whole. If the matter had been specifically raised we have no doubt that complainant could and would have shown an assignment in fact by both his wife and son, if they ever had any right to a portion of the excessive charges, even though such an assignment might not have been in writing. We believe, in view of the record as a whole, it would be inequitable at this time for the Company to contend that complainant is not entitled to recover all excessive amounts, if any, that have been paid. In this connection we quote as follows from Denver and Rio Grande Railroad v. Ryan, 17 Colo. 98, 104, the substance of which is applicable here:

" 'From time immemorial it has been a well-recognized and most salutary rule of the common law, that if counsel neglect to object or to point out errors occurring at the trial in such time and manner as will give opportunity for their correction, they will not, in general, be heard to complain of such errors in a court of review. This rule is so reasonable, and so essential to the administration of justice, that we cannot believe it could have been the intent of the legislature to overthrow it altogether. Any other rule would enable a party to sit silently by, knowing some error had been committed against his interest, of which perhaps no other person was aware at the time, and thus take the chances of a verdict in his favor, while having the sure means of setting aside the verdict if it happened to be against him. The law in this jurisdiction never has per-

mitted, and it is to be hoped that it never will permit, such experiments with judicial proceedings. There will always be enough important questions to review in the appellate courts if parties are required to be vigilant to prevent error in the trial courts.' ''

In Stafford v. The National Granite Co., 70 Colo. 572, the Supreme Court said, 574: ''* * * but plaintiff in error did not specify these objections either in the record or in the assignments of error, so we do not consider them.''

It is true that a statement made in a motion to dismiss the case and some of the statements found in the brief for the Company might be regarded as conceivably covering the point in question, but we believe that equity and good conscience, which we use in a broad sense, require definiteness instead of indefiniteness. The following statement by the appellate court in C. & S. Ry. Co. v. Jenkins, 25 Colo. App. 348, 355, is applicable:

''It is true that in its assignment of errors appellant avers that: 'the judgment and verdict are against the law; the evidence is insufficient to support the verdict; the judgment is contrary to the law and the evidence;' but we are not disposed to think these assignments sufficiently present the contention raised, for the first time, as we have heretofore said, in the reply brief of appellant, that the verdict is excessive and the result of passion and prejudice. * * *.''

While this Commission is not a court in the narrower sense, if at all (this question is one of the many argued in the briefs), its practice and pleadings are much more informal than those in the courts proper.

On this point we conclude by quoting from a quotation of Chancellor Kent made in Mulock v. Wilson, 19 Colo. 296, 301:

''A party acts against good conscience if he will not come forward and disclose his reasons, when called upon by the proper tribunal, but reserves himself for another court, and for the cold, hard purpose of accumulating costs, or of depriving his adversary of the opportunity of correcting his error.''

The Company denies that the complainant was at any time overcharged for electrical power service. It alleged in its answer that electrical energy was furnished Dailey under a contract entered into "about the year 1909" by and between him and the Company's predecessor, by the terms of which Dailey agreed to pay $20.00 per month for electrical energy; that at or about the year 1913 it was agreed between the predecessor company and Dailey that to avoid the expense and inconvenience of installing and operating a meter and to permit the use by said newspaper plant of an unlimited supply of electrical current, the plant would continue to pay the sum of $20.00 per month; that thereafter the Company and its predecessor furnished electrical current and rendered monthly statements "upon the basis of ten horsepower of current consumed at two dollars ($2.00) per horsepower"; that during all of the time from the year 1913 Dailey had full knowledge of the amount of current consumed by his plant and of the amount of the demand of said plant upon the capacity of the Company and paid or authorized the payment of monthly bills "upon the basis of two dollars ($2.00) per horsepower for ten horsepower consumed." In the amendment to the answer it was alleged that during all of said period of time *(1909* to December, *1926)* bills were rendered "* * * upon the basis of an average consumption of ten horsepower for each day."

The evidence shows that during all of the period beginning in 1909 and ending with the date of filing said complaint, the same motor, presses, etc., were in use; that while the motor did have on it during all of said period a plate containing a "6 K. W." rating, which, according to the Company's expert witness, means "about eight horsepower," said plate was on the side of the motor next to the wall, and that the complainant knew nothing thereof or the contents thereon until about the time he wrote the Commission. It further shows that Dailey never knew the maximum demand or the monthly consumption of his motor until shortly prior to the date of his said complaint. About the first of July, 1909, the complainant had a talk with one Doolittle, who was then managing the

Company, asking whether or not he could get a cheaper rate, as he was then operating only in the day, whereas Wheeler had been operating during both the day and the night. Doolittle advised the complainant that the Company was charging him the regular rate and that it was as cheap as he could get. In the winter of 1909 or the spring of 1910, Dailey asked Doolittle if he could not get along cheaper with a regular linotype motor for his linotype and an individual motor on his newspaper press and another little motor to stand between his Chandler and Price jobber and his Cranston pony. Doolittle advised him it would cost him more; that the Company was carrying too big a load on the alternating current to allow him to install any motors using other than direct current. Frequently Dailey asked Doolittle thereafter if he couldn't arrange to get his energy cheaper. Doolittle always replied that he was getting it as cheap as was possible. In the summer of 1919 or later, Mr. Doolittle was called into the office of the plant and was told by Charles Dailey, Jr., that they wanted to be put on the alternating current or some individual motor, the son making a suggestion as to the installation of individual motors and asking if they could not measure their power by putting in a meter. Doolittle replied that it would cost them two hundred dollars ($200.00) to put in a meter and that "you are getting your power just as cheap as you can get it," and that it would cost more than on the flat rate. The complainant testified, and as he was not contradicted, we find, that the cost to complainant of such a meter would have been fifty-five or sixty dollars ($55.00 or $60.00), possibly less, assuming, contrary to the general practice and law, a consumer might properly be made to pay for a meter to measure metered service.

On January 11, 1926, the city council, of which Dailey was a member, met with Mr. Brown and had a talk about a proposed franchise. The complainant found from the proposed schedule that electrical energy for power purposes was to be served at a rate of two dollars ($2.00) per horsepower. He then called by telephone Harry Brown, secretary of the Company, and asked him to send a man to the office to make a test "of my

maximum demand." Harry Brown thereupon sent Joseph Mogan, Jr., for the purpose stated. Mogan made the test required, testifying exactly what he did. We will not go into the details of the test, but do find that it was made in the proper manner with all of the equipment in the plant that could be connected to the motor in operation. The result showed a maximum demand of less than three horsepower. For the purpose of arriving at the rate to be paid the motor should, therefore, be rated as having a maximum demand of three horsepower. While no papers were in the presses, we believe that it is fair to take notice without detailed proof that a sheet of paper on a mechanical press is so very light as to have inconsequential effect upon the amount of power consumed.

It is true that at the moment of starting any motor requires considerably more power than after the instant it is started. However, this demand for an instant is not considered in engineering practice as having any bearing upon the question of maximum demand. It is true also that no tests were made at any time during the period from 1909 to the date of the test in question. However, it is obvious that since the identical machinery had been in the plant during the nineteen years, it would tend after years of use to consume more energy than it did at earlier stages in its life when it would run more smoothly and with less friction.

Not only was the test made by Mogan, an employe sent by the Company for the very purpose, but on the following day one Stitzer, another employe in charge of the electric plant of the Company, made a similar test, and at some later date one Reuter, another employe of the Company, made a third test. The results of the last two tests were practically the same as that of the first. The Company never saw fit to make or have made any other tests, although criticism was made of the ability of the three employes in question and of their authority. We are compelled to assume with assurance that the Company had no doubt the tests were properly made. Otherwise it would have had others made.

After the tests were made the younger Dailey stated to Harry Brown that he had "billed the Times office in the sum of twenty dollars; three of your electricians have made tests and have found the maximum demand about three horsepower; is your Company satisfied that we are using only three horsepower maximum demand?" Brown replied: "We are, that is an established fact as far as the Company is concerned." Young Dailey then stated: "Your franchise (we assume it is the one that was then being proposed or was about to become effective) calls for two dollars a horsepower, twenty-four hour service, therefore, my bill should be six dollars ($6.00), should it not?" Brown replied: "I won't go into the figuring of the bill with you; however, I will tell you this, that your bill has been twenty dollars in the past, and will be twenty dollars in the future." Thereupon at the request of young Dailey, Brown marked the bill "ten horsepower." We find, therefore, that at all times from June, 1909, on the maximum demand of the motor in question was three horsepower.

The Commission has found what the amounts of the bills rendered should have been from the time the first rate schedule was filed by the Company with the Commission. Some of these conclusions are of no materiality if the Commission is correct in its views with reference to other questions. However, we are making our findings with reference to the amounts for which the bills should have been rendered, so that if we are in error in our other conclusions the parties will not be required at a later date to secure findings with reference to these bills, and so that the parties may have the advantage of such findings in case our order is reviewed.

Prior to April 5, 1915, no schedules of the Company were on file with this Commission. But on that date and thereafter successive schedules were filed. The complainant was, of course, entitled to take service on each of them according to the terms thereof.

Detailed evidence was given as to the maximum number of hours during different periods the motor was in operation. KW means kilowatt. KWH means kilowatt hours. HP means

horsepower. The formula for arriving at the KWH consumption was given complainant's son by Harry Brown, the manager of the Company. He made his computations according to the formula and we find that the computations are correct.

We find that the total consumption per month from 1915 to May, 1919, was 268.09 KWH per month, and that when the paper changed from a daily to a weekly the maximum consumption per month became 130 KWH.

For the period April 5, 1915, to October 2, 1915, being approximately six months, the Company's first schedule, Colo. P. U. C. No. 1, was effective. This schedule does not carry a rate for small power consumers. It might, therefore, properly be said that the tariff rate in that schedule applicable to all power consumers other than those having special contracts would be the lighting rate. The question before the Commission, however, is not merely whether the Company charged the rate on file, but whether the rate charged, whether in the schedule or not, was unreasonable. If the lighting rate were applied, we would have a monthly charge of twenty-six dollars and ninety cents ($26.90) arrived at by multiplying 269 KWH by ten cents per KWH. This charge is not only higher than what we find to be the tariff charges for succeeding periods, but is higher by more than 20 per cent than the twenty dollar charge. Moreover, the answer and amendment thereto filed by the Company contain several such allegations as the following: "That during all of said period of time (1909 to December, 1926) bills were rendered * * * upon the basis of an average consumption of ten horsepower for each day." (Amdt. to Ans., p. 3.) "That during all of the time from the year 1913 down to and including the month of December, 1927, the complainant * * * paid, or authorized the payment, of monthly bills * * * upon the basis of two dollars ($2.00) per horsepower for ten horsepower consumed." (Ans., p. 4.)

It is true that there are some allegations in the answer and amendment of special contracts having been made by the complainant and the respondent. There is no evidence whatever of

any contract. The complainant testified that there was no contract ever made.

We consider the language of the answer as an admission by the Company that the bills were rendered upon the basis of maximum demand in terms of horsepower. The language of the pleadings, horsepower consumed or consumption of horsepower, is non-technical and inexpressive. It is like saying that the mileage of an automobile for a month is 35 miles per hour. The language cannot, therefore, conceivably apply to total consumption and can only apply to demand or maximum demand. The basis of the charge being two dollars ($2.00) per horsepower of demand and the respondent having erroneously assumed that the demand was ten horsepower instead of three, we find that the charge during the period in question should have been six dollars ($6.00) per month instead of twenty dollars ($20.00) because, in the absence of proof to the contrary, we must assume that the basis of the charge of the Company is reasonable.

In Colo. P. U. C. Nos. 1 and 2 reference is made to certain special contracts for two large mining companies, which contracts are referred to in the evidence as rates having some bearing upon what complainant should have been charged. Special contracts, which formerly it was the custom of power companies to make, have no bearing upon the rates of any other customer than those with whom the contract was made. Such is the obvious conclusion with reference to the two contracts referred to in the schedules in question. So far as the complainant is concerned, the result would be the same as if the contracts had not been set forth in the schedules.

For the period from October 2, 1915, to May 1, 1919, being 43 months, Colo. P. U. C. No. 2 was effective. This schedule discloses a rate for commercial power consumers of 2c per KWH with no minimum charge. Under this rate the complainant's monthly bills should have been in the amount of $5.36 each.

For the period from May 1, 1919, to January 1, 1921, Colo.

P. U. C. No. 3, Original Sheet No. 4, was effective. This is a period of 20 months. The rate as stated is as follows:

"Power on our 600 volt direct current power circuits at a rate per HP per year of.....$90.00
Minimum per month per HP of demand..... 2.00"

The phraseology used in this rate is not complete enough to show clearly how it was intended that it should apply, a common fault in the rate schedules of this period. The first part expresses a charge based on the HP of connected load, whereas the second part is a minimum, much less per HP, based on HP of demand. Thus there is a conflict between the charges which cannot be reconciled if it was intended that both charges should apply to a single consumer. But, in view of the fact that the special contract for the Smuggler Leasing Company, which was one of the special contracts referred to above and which expired, according to the schedule, on September 1, 1919, shortly prior to the date this rate became effective, it appears that this rate on Original Sheet No. 4 was intended to take the place of said special contract and at the same time serve as a power rate to other consumers who might take service. Thus the rate really classifies power consumers into Large Power Consumers and Small or Minimum Power Consumers, which is common practice, large power consumers being those whose use of electricity is considerable in proportion to the connected load, so that the cost of the electricity itself is the controlling factor, and small or minimum consumers being consumers whose use of electricity is very small, so that the amount of their demand is the controlling factor. To illustrate, ninety dollars ($90.00) per HP year for continuous full load consumption of electricity results in a charge of $0.01377 per KWH, and such practically continuous full load consumption is common for a pumping load such as provided for in the special contract previously enjoyed by the Smuggler Leasing Company. We can find no other interpretation which is reasonable. That this interpretation of the rate is correct is further shown by 1st Revised Sheet No. 4 of this schedule received December 3, 1920, effective January 1, 1921, which cancelled Original Sheet No. 4. This

rate appears below and discloses a rate stated in charges per KWH according to successive blocks depending upon the total use of electricity and also discloses a minimum charge for those small consumers whose use of electricity is insufficient to make the cost of electricity itself material, the customary reason for minimum charges in rate schedules. Application of the rate on Original Sheet No. 4 according to the above interpretation would result in practically the same charges to either the Smuggler Leasing Company or the complainant as would result from the rate which appears below.

First Revised Sheet No. 4, which cancelled the above original Sheet No. 4 on January 1, 1921, is as follows:

"Applicable to any power user on either 600 volt DC power circuit or on either 3 phase AC power circuit.

Rate:

1st 180 KWH of HP of maximum demand, per month, per KWH	$0.013
Next 180 maximum	0.0065
Excess	0.00325

Minimum:

1st 200 HP of maximum demand, per month	2.00
Excess	1.00"

This rate appears also without change in 2nd Revised Sheet No. 4, Colo. P. U. C. No. 3, which makes this rate the one in effect and applicable for the balance of the period up to January 1, 1928, or for 84 months. With a consumption of only 269 or 130 KWH per month, obviously the minimum charge would apply. The maximum demand having been shown to be 3 HP the monthly charge should be six dollars ($6.00). Therefore, the complainant should have been charged according to the minimum, or two dollars ($2.00) per HP of maximum demand per month; that is, 3 HP at two dollars ($2.00) each or six dollars ($6.00) per month.

We summarize the above conclusions and findings as follows:

For the Period	Rate in Effect	Length of Period	Proper Charge per Mo.	Proper Total Charge	Actually Paid $20 per Mo. Total
Apr. 5, 1915, to Oct. 2, 1915...	P. U. C. No. 1	6 Mos.	$6.00	$ 36.00	$ 120.00
Oct. 2, 1915, to May 1, 1919...	P. U. C. No. 2	43 Mos.	5.36	230.48	860.00
May 1, 1919, to Jan. 1, 1921...	P. U. C. No. 3 Orig. Sh. No. 4	20 Mos.	6.00	120.00	400.00
Jan. 1, 1921, to Jan. 1, 1928...	P. U. C. No. 3 1st Rev. Sh. No. 4 & 2nd Rev. Sh. No. 4	84 Mos.	6.00	504.00	1,680.00
Totals				$ 891.28	$3,060.00
Difference				2,168.72	

The next question which arises is whether this Commission has any jurisdiction, if the facts warrant, to order reparation on account of excessive charges made prior to the year 1913, in which the "Public Utilities Act" was passed.

Section 2965, C. L. Colo. 1921, first appeared in the 1913 Act first delegating to the Commission jurisdiction over electric utilities. There were no similar provisions in the acts of 1907 and 1910, dealing with carriers only. The section reads as follows:

"When complaint has been made to the Commission concerning any 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.

"* * * All complaints concerning excessive or discriminatory charges shall be filed with the Commission within two years from the time the cause of action accrues, and the petition for the enforcement of the order shall be filed in the court within one

year from the date of the order of the Commission. The remedy in this section provided shall be cumulative and in addition to any other remedy or remedies in this act provided in case of failure of a public utility to obey the order or decision of the Commission."

The complainant contends that he had the right at common law to recover the excessive charges on a count for money had and received and that the legislature simply created a new remedy for the collection thereof. The respondent contends that the Act of 1913 creates a new right; that at common law an excessive charge had to be both unreasonable and "coercively exacted," citing Cullen v. Seaboard Air Line Co., 58 So. (Fla.) 182. We find that the Florida court in passing quoted Chancellor Kent with respect to the coercion requirement, but the court in that case in the latter part of its opinion, page 184, Col. 2, utters this significant language:

"Nor is it necessary in this action to allege an involuntary payment of the charges by the plaintiff."

The action in question in that case was one brought under the common law.

We find that at common law all that it was necessary to prove was that the charge was unreasonable and that the payment was involuntary. Moreover, the decided weight of authority based, as it seems to us, on superior reasoning, is that whenever a customer pays a public utility or common carrier the charge demanded, it is paid involuntarily and under compulsion. In So. Pac. Co. v. Cal. Adj. Co., 237 Fed. 954, decided by the Ninth Circuit Court of Appeals, it appears that the action was brought at common law. The court said:

"It is well settled that money paid under compulsion may be recovered even in the absence of protest at the time of payment * * * 'To object or protest would be an idle waste of words. The law looks at the substance of things, and does not require useless forms or ceremonies. The corporation and the shipper are in no sense on equal terms, and money thus paid to obtain a necessary service is not voluntarily paid, as the law interprets that phrase.'" (962.)

The court then quotes on the same page from an Illinois case, in which it was said: "They were under a sort of moral duress, by submitting to which appellants have received money from them which, in equity and good conscience, they ought not to retain."

That "a public service corporation which supplies electricity is ordinarily under the same obligation to the public to refrain from exorbitant and unreasonable rates as a common carrier," is held in City of Boston v. Edison Elec. I. Co, 136 N. E. (Mass.) 113, 115, Col. 2. In Clough & Co. v. Boston & M. R. R., 90 Atl. (N. H.) 863, 877, Col. 1, it is pointed out that the action for money had and received, in which excessive charges were recovered at common law, "in its spirit and objects, has been correctly likened to a bill in equity, and it may in general be maintained whenever the evidence shows that the defendant has received or obtained possession of money belonging to the plaintiff, which in equity and good conscience he ought to refund to him * * *. In short, the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged, by the ties of natural justice and equity, to refund the money." The court then points out on the same page that, "The rule here is that excessive payments made under agreements with public officers may be recovered back even when made 'voluntarily'." The court then concludes (877-878): "In view of these decisions, there seems to be no doubt that it is the law of the state that payments to a common carrier in excess of what the carrier may legally charge can be recovered back in an action for money had and received, and that it is no defense that the plaintiff might have sought other remedies for the wrongful charges." It is true that the matter quoted is taken from an opinion "dissenting in part," but the Chief Justice who wrote the main opinion in that case said towards the end thereof, "* * * the plaintiffs are not prevented from recovering the same because the sums paid were paid without protest. The reasons for this conclusion are fully stated in the opinion filed by Judge Peaslee, in which, upon this point all the Justices concur." In Warren Co. v. Maine Cent. R. Co., 135 Atl. (Maine) 526, 529, Col. 2,

the court states, "It is not essential, in case of money collected by a public utility, where the individual is obliged to pay to obtain service, that it be paid under protest or a demand be made before suit."

In Carew v. Rutherford, *et al.*, 106 Mass. 1, 12, the court said:

"In Shaw v. Woodcock, 7 B. & C. 73, it is said that, if a party making a payment is obliged to pay the money in order to obtain possession of things to which he is entitled, the payment is not voluntary, but a compulsory payment, and may be recovered back."

It appears, therefore, from the authorities, that no protest is necessary. As it is pointed out in the Clough Case, *supra*, "* * * the sole object of a protest in these cases is that it evidences the plaintiff's state of mind. It gives notice that he intends to claim his right to a repayment. The only cases where such notice would seem to be of importance would be those where the defendant had subsequently changed its position in reliance upon the validity of the payment. There is no suggestion of such a defense in the brief statement filed in this case." Neither is there any suggestion of such a defense in this case.

However, the complainant here was continually complaining and protesting against the rates of the respondent.

Other cases in support of the rule that no protest need be made may be found in 10 C. J. 449-450.

Therefore, we conclude that the right that may be enforced under the section in question of the Public Utilities Act is the same as that previously existing at common law.

The next question is whether, even though the legislature could have conferred upon this Commission the duty of ordering reparations for excessive charges made prior to the passage of the act, it did in fact do so.

We again quote from the Clough case, page 867, Col. 1, on the question of the construction of a statute:

"The question is what the words used meant to those using them. To ascertain that, the circumstances under which the language was used, the probable purpose, the general policy on the subject, prior legislation upon the subject, the entire legislation

at the time, and the reasonableness or otherwise of one construction or the other, are matters competent for consideration."

We believe that the Act of 1913 is a remedial one or one enacted *pro bono publico*. That being true, as is said in Lewis' Sutherland on Statutes and Statutory Construction, 2nd Ed., Section 583:

"The intention in statutes which are for this purpose recognized as remedial or enacted *pro bono publico* is more liberally inferred, and to a greater extent dominates the letter, than is admissible in dealing with those which must be strictly construed."

We quote again from the same text to the effect that where the new statute deals with procedure only, *prima facie* it applies to all actions, both those which already have accrued and future ones. The text, Section 674, reads as follows:

"No person can claim a vested right in any particular mode of procedure for the enforcement or defense of his rights. Where a new statute deals with procedure only, *prima facie* it applies to all actions, those which have accrued or are pending, and future actions. What was before a subject of equitable relief may be made triable by jury without rights, and new remedies added to or substituted for those which exist. Every case must to a considerable extent depend on its own circumstances. General words in remedial statutes may be applied to past transactions and pending cases, according to all indications of legislative intent, and this may be greatly influenced by considerations of convenience, reasonableness and justice."

Some of the State courts in pointing out why, in their opinion, the remedy for securing reparations before a Public Utilities Commission is exclusive, have called attention to the fact of the unsatisfactory manner of trying a question of reasonable rates before juries, with one jury finding one rate reasonable and others findings otherwise. (See City of Boston Case, *supra*, 116-117.) We believe it is generally conceded that the Public Utilities Commission, specializing largely in rate matters and having expert assistance on its staff, is able to deal with matters of rates, reparations, etc., in a much more satisfactory manner

than they were dealt with at common law. Therefore, while we had the feeling when we first began the consideration of this case that the statute of 1913 giving authority to order reparations, did not apply to claims arising prior thereto, we are now of the opinion that since the statute is a remedial one to improve an unsatisfactory situation, there is no reason why the legislature should have intended to bar those whose claims already had arisen from presenting those claims to and having them passed upon by this Commission. Without any reason appearing therefor, we are unable to limit the broad language, "rate, fare," etc., "for any product or commodity furnished or service performed," to that furnished or performed *after* the act was passed.

Moreover, the Supreme Court seems not to have had any difficulty in concluding in the case of Bonfils, *et al.*, v. The Public Utilities Commission, *et al.*, 67 Colo. 563, that that portion of the section in question which confers jurisdiction on this Commission to order reparations applies to claims arising before as well as after the act was passed. While it is true that this Commission, under another name, during the period when the excess charges complained of in the Bonfils case were made had jurisdiction over railroad rates, the fact is that in the Bonfils case the whole court assumed without question that the new provision in the Act of 1913 applied to excessive charges made before the act was passed. It may be that the rights sought to be enforced in the Bonfils case were grounded somewhat in the Acts of 1907 and 1910 and certain orders of the Railroad Commission, but the material consideration, as we see it, is that irrespective of how the rights arose, the remedy was created subsequent to the making of certain unreasonable charges. Here the right not to be charged unreasonable rates existed at common law. The statute simply created a new remedy.

The Bonfils case is cited in support of complainant's contention that the limitation as distinguished from the remedy itself contained in the 1913 act, has no application to claims that arose prior to the enactment of such provision. That the case does so hold is clear, although three of the seven members of the court

dissented. Attorneys for the respondent say in their brief that with all due respect to the Supreme Court of Colorado "the majority opinion is wrong." Whether it is or not, we express no opinion, as it is the duty of an administrative body to follow the law as enunciated by the Supreme Court of the jurisdiction in which it is functioning.

We further conclude that the six-year statute of limitation, Sec. 6392, C. L. of Colo., 1921, which was not involved in the Bonfils case, has no application here. This proceeding (remedy) is neither an action of debt nor an action of *assumpsit*. When the Act of 1913 was passed, no claim here asserted had been running six years. If an action at common law properly could be brought after the passage of the act, the six-year statute would undoubtedly in such action be a bar to those claims which arose more than six years prior to the institution thereof. But the fact that an action at common law might have been barred by the statute in question does not mean that the remedy here would be barred. While the legislature cannot revive claims already barred, it can, prior to the completion of the bar, either extend the time or give an additional remedy.

We have arrived at what the charges from June, 1909, to the effective date of the 1913 act and those from that date to April 5, 1915, the date of filing of the first schedule should have been, in the same manner that we arrived at the proper charges for the period April 5, 1915, to October 2, 1915. Those charges should, therefore, have been six dollars ($6.00) per month.

Passing now from the period prior to the effective date of the 1913 statute to the period from the effective date of that statute to a date two years prior to the complaint herein, we find it held in a number of cases that the statute "is not a mere statute of limitation, but is jurisdictional, is a limit set to the power of the Commission as distinguished from a rule of law for the guidance of it in reaching its conclusions." U. S. *ex rel* Louisville Cement Company v. Interstate Commerce Commission, 246 U. S. 638; Kansas City Southern Railway Co. v. Wolff, 261 U. S. 133; Phillips v. Grand Trunk, etc., Co., 236 U. S. 662. In Mills S. V. O. & C. Fruit Co. v. So. Pac. Co., P. U. R. 1916B, 734, we find

quoted from the Public Utilities Act of California language which is identical with that hereinbefore quoted from our Section 2965. In the course of its decision in that case the California Commission said:

"It is true that this legal bar was not pleaded as a defense by either of the defendants, and that the Santa Fe has impliedly expressed its willingness to waive this defense if it can legally do so. We are of the opinion, however, that the provision of the Public Utilities Act above quoted is further distinguishable from the ordinary statute of limitations to the extent that it need not be affirmatively pleaded and cannot be waived in a case of this kind by a carrier. The reasoning of the Supreme Court of the United States in the case of A. J. Phillips Co. v. Grand Trunk Western R. Co., 236 U. S. 662, 59 L. Ed. 774, 35 Sup. Ct. Rep. 444, is no less binding upon us than it is convincing. The court was, it is true, construing the Federal statute, which might be considered as being somewhat stronger than ours, as that statute provides that 'all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after.' The court decides the question partly on the strength of this phrase, but its reasoning is such as to apply just as strongly to the present case, and we feel that we cannot explain our position better than by quoting the following language of Justice Lamar (p. 667):

" 'Under such a statute the lapse of time not only bars the remedy, but destroys the liability (Finn v. United States, 123 U. S. 227, 232, 31 L. Ed. 128, 130, 8 Sup. Ct. Rep. 82) whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction. This will more distinctly appear by considering the requirements of uniformity which, in this as in so many other instances, must be borne in mind in construing the commerce act. The obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law, and to treat all shippers alike, would have made it illegal for the carriers, either by silence or by express waiver, to preserve to the Phillips company a right of action which the statute required should be asserted within a fixed period * * *. To

permit a railroad company to plead the statute of limitations as against some and to waive it as against others would be to prefer some and discriminate against others in violation of the terms of the commerce act, which forbids all devices by which such results may be accomplished.' " (738.)

The complainant contends that because of his lack of knowledge of what proper charges should have been made and because of the alleged misrepresentation and fraud on the part of the respondent which was cancelled, the statute did not begin to run until the complainant became aware of his rights. We are unable to understand how any misrepresentations and/or concealed fraud can have any potency to extend the period of the jurisdictional limitation. In the California case the Commission said:

"Complainant proved that it did not know that it had been overcharged until the month of March, 1915, and it claimed that as the overcharges 'were paid under a mistake of fact and under misrepresentation of the defendant company's agents and employees,' the limiting clause in the Public Utilities Act should be interpreted in the light of Section 338, Clause 4, of the California Code of Civil Procedure, and that complainant accordingly had three years from the discovery of its mistake and overpayment in which to bring this action. We cannot so construe the Public Utilities Act, for it states in so many words that all complaints concerning excessive or discriminatory charges shall be filed with the Commission within two years from the time the cause of action accrues. It makes no exception to this limitation and no provision for allowing further time in cases of fraud." (737-738.)

It is contended by the Company that to allow reparation to the complainant herein would cause discrimination against other consumers. It is the opinion of the Commission and we so find that where under the law a customer is entitled to a reparation and takes the proper steps to procure same, the payment thereof cannot constitute unlawful discrimination. If one customer is entitled to reparation and another isn't, they are not similarly situated. If two or more customers are entitled to a reparation there can be no defense to a claim by one that one or more others

have not seen fit to pursue the remedy open for the same purpose.

It is contended also that during various periods the Company carried advertisements in the complainant's paper; that they were worth nothing to the Company and were given to help out the complainant or/and in effect to cut his rates. We must assume and conclude that the advertisements were worth the charges therefor, and that the taking thereof does not constitute a bar or reduction of complainant's claim.

The Commission, therefore, finds and concludes:

That the charges assessed and the charges collected during the period beginning June, 1909, and ending on February 1, 1928, were excessive, unjust and unreasonable and contrary to law to the extent that they exceeded the sum of six dollars ($6.00) per month except for that period from October 2, 1915, to May 1, 1919, during which time the charges collected were excessive, unjust, unreasonable and contrary to law to the extent that they exceeded the sum of five dollars and thirty-six cents ($5.36) per month;

That the respondent is estopped from contending that the full right to recover all excessive charges that may have been made by the respondent is in the complainant, Charles Dailey;

That complainant never knew until shortly prior to making complaint herein what either his maximum demand or his consumption was;

That the complainant is not estopped to make and enforce his claims herein;

That the charges paid during all of the period, 1909, to date of the informal complaint herein, were paid by the complainant involuntarily and under compulsion;

That no unlawful discrimination would be effected by payment to the complainant of all charges paid by him in excess of what the Commission has found to be reasonable and lawful;

That the limitation provision of Section 2965, C. L. Colo., 1921, bars all claims of the complainant from the effective date of the Act of 1913 to the date two years prior to February 1, 1928;

That the remedy provided in said section for securing repara-

tions applies to unreasonable charges and rates made prior to the passage of the act;

That the limitation provision in said section does not apply to those claims arising prior thereto;

That the taking of advertising by the Company in complainant's paper in no manner bars or reduces the claims of complainant;

That none of the provisions in Sections 6392, 6396 and 6397, C. L. Colo., 1921, have any application to this proceeding or to any excessive charges sought to be recovered herein.

The Commission is of the opinion that the evidence with reference to the payments made and the dates thereof is not as clear as it might and should be. On account of the bills not always being paid when due, we are unable to say with desirable certainty what the total of either principal or interest is. The complainant will be given thirty days in which to file a definite statement. If the Company does not agree thereto it will be and is hereby required to file its written objections within twenty days from the date of receipt of a copy of the statement. If they cannot agree, a further hearing for this purpose will be had. In the meantime, no reparation order whatever will be entered and the Commission will retain jurisdiction over the entire case, as the Commission is desirous that both parties may have the unquestioned and untrammeled right to review when this Commission has finished with the case.

DENVER & INTERMOUNTAIN RAILROAD COMPANY

v.

M. B. SWENA.

[Case No. 325. Decision No. 2043.]

Common carriers—Contract carrier—Written contract.

1. One engaged in serving the public or a large part thereof cannot convert himself from a common carrier by the mere expedient of making a number of written or oral contracts, formal or informal.

Commissions—Power to punish violations—Statutory construction.

2. A statute providing that all provisions of the Public Utilities Act should apply to motor vehicles was held to give to the Commission power to punish bus operators for contempt, notwithstanding that particular power was not expressly specified by the statute with regard to bus operators.

Constitutional law—Commission jurisdiction.

3. It is not within the province of the Commission to pass upon the constitutionality of an act of the legislature, particularly the one under which it operates.

[January 17, 1929.]

Appearances: W. A. Alexander, Esq., Denver, Colorado, attorney for The Denver and Intermountain Railroad Company; D. Edgar Wilson, Esq., Denver, Colorado, *amicus curiae*.

STATEMENT.

By the **Commission**: On August 18, 1927, The Denver and Intermountain Railroad Company made a written complaint to this Commission that M. B. Swena was operating a truck line as a motor vehicle carrier between the cities of Golden and Denver, and that he had not received the requisite authority from the Commission for such operations. The Commission, following the receipt of this complaint, made an order requiring the defendant, M. B. Swena, within ten days from that date to answer the complaint in writing. No answer in writing was ever made in compliance with this order of the Commission, but on October 5, 1927, the applicant filed his application for a certificate of public convenience and necessity. Thereafter the written objections and protest were filed by W. G. Eldridge, doing business as The Eldridge Express Company, The Denver and Intermountain Railroad Company and the Board of County Commissioners of Jefferson County.

Both the complaint and the application were set for hearing before the Commission on February 3, 1928. At the time of the hearing the complaint of The Denver and Intermountain Railroad Company and the application of Mr. Swena were consolidated for the purpose of the hearing. Following the taking of evidence and after the Commission was fully advised, it ordered as follows:

"It Is Therefore Ordered, That the application of M. B. Swena, applicant herein, be, and the same is hereby, denied.

"It Is Further Ordered, That M. B. Swena, defendant in case No. 325, cease and desist from operating as a motor vehicle carrier, as defined in Section 1 (d) of Chapter 134, Session Laws 1927, State of Colorado, unless and until lawfully authorized by this Commission.

"It Is Further Ordered, That defendant pay the tax provided for in Section 7, Chapter 134, Session Laws 1927, for the period in which he was operating as a motor vehicle carrier, within ten days from the date of this order."

This order was signed by the Commission on the 23rd day of February, 1928.

On March 13, 1928, W. A. Alexander, as attorney for The Denver and Intermountain Railroad Company, wrote the Commission that the defendant was defying the Commission's order and was continuing his operations as a motor vehicle carrier. Mr. Alexander again brought the matter to the attention of the Commission in his letter of June 2, 1928, alleging, among other things, that "Mr. Swena has ever since the day of the order of the Commission openly violated the provision of that order and is still continuing to do so." The Commission thereupon had one of its inspectors make an investigation of the complaint, and thereafter, on September 11, ordered the defendant to show cause in writing why the Commission should not impose a fine upon him for operating in defiance and violation of said order issued by the Commission on February 23. The Commission set the matter for hearing on November 26, promptly notifying the defendant of said hearing. At the hour set for the hearing the defendant appeared without his regular attorney and without having filed any answer. At the request of the defendant, he was given until November 30 to file his answer, and the matter was then set for hearing on December 3. No answer was filed within the time fixed by the Commission. However, on December 1, a written objection and statement of the defendant was filed. The matter was heard in the Hearing Room

of the Commission on the date fixed, but neither the defendant nor anyone in his behalf appeared.

The said objections of the defendant allege that the Commission is without authority or jurisdiction to impose a fine upon the respondent and that insofar as the law assumes to authorize the imposition thereof by this Commission, the same is unconstitutional and void. The objections further allege that the Commission is without authority to regulate or control the business or operations of the defendant for the reason that for a long time prior to September 11, 1928, the defendant had been operating as a contract or private carrier and not as a common carrier.

The evidence shows that the defendant has paid no attention whatever to the order of this Commission denying him a certificate and requiring him to cease and desist his operations as a motor vehicle carrier; that if there is any difference between his prior conduct and that since the order was entered, he has been more active and has done a more general business than he did before. Since February 23, 1928, he or his employee and driver have been calling on practically every merchant in Golden, soliciting their trucking business between Golden and Denver and transporting freight by motor truck between Denver and Golden for those who would give him the business.

We therefore find that the defendant has willfully, flagrantly and contemptuously violated the order of the Commission.

As to whether or not the defendant is a contract carrier, we do not know, as he did not see fit to appear and enlighten the Commission on any questions of fact. However, as we have previously pointed out in *Re* Exhibitors Film Delivery & Service Company, Application No. 1009, Decision No. 1979, the question which we are called upon to decide is not whether one is a motor vehicle or common carrier, or a contract carrier, but whether he is a common carrier or a private carrier. One engaged in serving the public or a large part thereof cannot convert himself from a common carrier by the mere expedient of making a lot of written or oral contracts, formal or informal.

Section 66 of the 1913 Session Laws, subdivision (a), being Section 2975, C. L. of Colo. 1921, provides as follows:

"Every public utility, corporation or person which shall fail to observe, obey or comply with any order, decision, rule, direction, demand or requirement, or any part or portion thereof, of the commission or any commissioner, except an order for the payment of money, shall be in contempt of the commission and shall be punishable by the commission for contempt in the same manner and to the same extent as contempt is punished by courts of record. The remedy prescribed in this action shall not be a bar to or affect any other remedy prescribed in this act, but shall be cumulative and in addition to such other remedy or remedies."

Section 27 of House Bill No. 430, being Chapter 134 of the Session Laws of 1927, read as follows:

"All provisions of the Public Utilities Act of the state of Colorado, chapter 127, Laws of 1913, and all acts amendatory thereof or supplemental thereto, shall, insofar as applicable, apply to all motor vehicle carriers subject to the provisions of this act."

Prior to the passage of House Bill No. 430, motor vehicle carriers were subject to all applicable provisions of the Public Utilities Act, including Section 66, House Bill No. 430, when considered as a whole, shows clearly that the legislature intended to extend the jurisdiction and powers of this Commission over motor vehicle carriers. There is no provision to be found in the act restricting the jurisdiction theretofore held. It is a general rule of construction of statutes that repeal by implication is not favored. The only possible ground for saying that the legislature intended to repeal Section 66 of the Public Utilities Act is by resort to the maxim *expressio unius est exclusio alterius*. It is true that House Bill No. 430 does expressly grant some of the powers found enumerated in the Public Utilities Act. It is obvious, however, that the legislature did not intend to codify in House Bill No. 430 all the statutory provisions applicable to motor vehicle carriers. For instance, there is no provision in House Bill No. 430 for a review of the orders of

this Commission, but that it was intended that the provisions of the Public Utilities Act relating to review should apply is generally conceded.

The other question, namely, whether or not the provision referred to in Section 65 of the Public Utilities Act is constitutional, is one about which we cannot express any opinion. We are familiar with some twoscore cases in which the various state commissions have held that it is not within the province of a state utilities commission to pass upon the constitutionality of an act of the legislature, particularly the one under which it operates. We quote as follows from the decision of this Commission in Public Service Company vs. City of Loveland, P. U. R. 1924E, 516, 529:

"As has been stated in numbers of Commission's decisions, the Commission is bound to assume the validity of the statute under which it exists and which defines its duties and responsibilities until such time as the Commission shall be judicially advised."

Of course, if the provision in question is unconstitutional, it is immaterial that it might seem advisable that the Commission have such power. We might say, however, in passing, that the Commission, because of its constant experience with and administration of the act, is more familiar with the same and with what constitutes a violation thereof than other agencies. We find that the district attorneys of the State, while they have cooperated generously with the Commission in the enforcement of the laws relating to public utilities, have their hands full of many other matters, and that the power of the Commission to punish for contempt for violation of its orders, checked as it is, and as it should be, by the power of review, would tend towards a much more expeditious disposition of questions of the kind involved herein.

ORDER.

IT IS THEREFORE ORDERED, That the defendant, M. B. Swena, be, and he hereby is, assessed with a fine in the amount of Two Hundred Dollars ($200.00) for his willful, flagrant and contemp-

tuous violation of the said order of this Commission requiring the said Swena to cease and desist from operating as a motor vehicle carrier, which said fine he is required to pay within twenty days from this date to the Secretary of this Commission, to be turned in to the treasury of the State of Colorado, as in the case of any other money collected by the Commission.

RE COLORADO AIRWAYS, INC.

[Application No. 1220. Decision No. 2046.]

Certificates of convenience and necessity—Airplane.

Certificate of convenience and necessity issued authorizing airplane transportation of passengers, freight and express in and about Denver and to any point in Colorado, subject to conditions stated.

[January 18, 1929.]

Appearance: Luke J. Kavanaugh, Esq., Denver, Colorado, for applicant.

STATEMENT.

By the **Commission**: This is an application for a certificate of public convenience and necessity to operate airplanes for the carrying of passengers, freight and express for hire from Denver to any point within the State of Colorado. No protests were filed against the application. The Colorado Commission of Aeronautics submitted a recommendation to this Commission to the effect that the application be given favorable consideration.

At the public hearing held on this application testimony was introduced to show that The Colorado Airways, Inc., is a Colorado corporation; that it now has four licensed planes valued at approximately $15,000, and shop equipment and supplies valued at approximately $20,000; that the president and manager of the applicant has been operating airplanes from Denver for approximately three years, and has had experience in the operation of airplanes for approximately five years. This Company is the successor of operations heretofore conducted by Don Hogan and A. E. Humphreys, Jr. The testimony further shows that the

applicant operates so-called sightseeing trips in and around the vicinity of Denver, and that it operates planes to any point in the State on call and demand, and that it holds itself out to the public to give this service. For approximately two years the applicant carried the United States mail between Pueblo, Denver and Cheyenne, but is not now engaged in such transportation. That it has conformed to all federal and State laws as to pilots and ships, and that none of its passengers or pilots have ever been killed or injured. It has not now and has no present intention of operating between any fixed points.

After a careful consideration of the evidence the Commission is of the opinion, and so finds, that the present and future public convenience and necessity requires the service of the applicant for the transportation by airplane of passengers, freight and express in and about Denver, and to any Colorado points.

ORDER.

IT IS THEREFORE ORDERED, That the present and future public convenience and necessity requires the service, upon call and demand only, by The Colorado Airways, Inc., for the transportation by airplane of passengers, freight and express in and about Denver, and to any Colorado points, and this order shall be deemed and held to be a certificate of public convenience and necessity therefor, subject to the following conditions which, in our opinion, the public convenience and necessity requires:

(a) The applicant shall file with this Commission a certified copy of its Articles of Incorporation.

(b) That the equipment (including airports) operated by The Colorado Airways, Inc., and its pilots and employees, shall at all times be such as to conform to the standards prescribed by the Department of Commerce of the United States, and The Colorado Commission of Aeronautics, and certificates of such conformity at the present time shall be filed with the Commission within twenty days.

(c) That The Colorado Airways, Inc., shall carry liability insurance covering the passengers and the public, and shall submit

the policy or policies to the Commission for examination and approval.

(d) That The Colorado Airways, Inc., shall file semi-annual statements of the number of passengers carried and service furnished.

IT IS FURTHER ORDERED, That the applicant shall file tariffs of rates, rules and regulations within twenty days from the date of this order.

IT IS FURTHER ORDERED, That this order is made subject to compliance by the applicant with the rules and regulations now in force or to be hereafter adopted by this Commission and the Colorado Commission of Aeronautics with respect to airplane common carriers, and also subject to any future legislative action that may be taken with respect thereto.

RE CHARLES H. SMITH, *et al.*, DOING BUSINESS AS SMITH AND SON.

[Application No. 1069. Decision No. 2048.]

Certificates of convenience and necessity—Choice of applicants—Considerations.

Certificate of convenience and necessity will be issued to motor vehicle carrier already having another certificate, and having complied with the law in preference to one operating unlawfully after being ordered to cease and desist.

[January 23, 1929.]

Appearances: Clyde T. Davis, Esq., La Junta, Colorado, for applicant; D. A. Maloney, Esq., Denver, Colorado, for The Camel Truck Line.

STATEMENT.

By the **Commission**: This is an application for a certificate of public convenience and necessity to operate a motor vehicle carrier system for the transportation of freight and express "from Pueblo, Colorado, to Lamar, Colorado, and intermediate points, and between intermediate points, except the carrying of freight and express from Pueblo, Colorado, to Fowler, Manzanola and

Las Animas, Colorado, and from those points to Pueblo; also as irregular motor vehicle carriers of freight and express to and from any point within the City of La Junta, and from any place within a radius of fifteen miles of the City of La Junta to any point between Pueblo and Lamar."

Protests were filed against this application by Jackson's Transfer & Storage Company, The Vaughn Transfer and Transportation Company, The Camel Truck Line and The Atchison, Topeka and Santa Fe Railway Company. The Camel Truck Line in its protest also embodied an application to the effect that if the "Commission finds that a public convenience and necessity exists as between Rocky Ford, Colorado, and La Junta, Colorado, whereby goods may be shipped direct from Pueblo to La Junta and points west of La Junta as far as Rocky Ford, that said certificate be granted to" it, The Camel Truck Line, for the reasons alleged in its protest and application. Subsequently, The Camel Truck Line filed an amended protest and application in which it prayed, "That if your Commission finds a public convenience and necessity exists as between Rocky Ford, Colorado, and Lamar, Colorado, whereby goods may be shipped direct from Pueblo, Colorado, to Lamar, Colorado, and intermediate points, including the towns of McClave and Wiley, located on the branch of the Atchison, Topeka & Santa Fe Railroad running from La Junta to Holly via Swink, with the exception of the rights granted in the certificate of public convenience and necessity issued to the said H. Hayhurst, doing business under the name of The Las Animas Transfer Company, said certificate be granted to this applicant, The Camel Truck Line, for the reasons as hereinbefore stated."

To the application of The Camel Truck Line protests were filed by Jackson Transfer & Storage Company and The Vaughn Transfer and Transportation Company.

The evidence adduced at the public hearing held herein shows that there is a public convenience and necessity existing for a motor vehicle system for the transportation of freight and express east of Rocky Ford, Colorado, as far as Lamar. The testimony shows that between Pueblo and Rocky Ford and inter-

mediate points, considering the present motor vehicle carrier transportation facilities, there is no public convenience and necessity existing for any such additional service. The Commission does not deem it necessary to further discuss that phase of the issues involved herein.

The motor vehicle carrier operations of C. H. Smith and Son, applicants, have been before this Commission heretofore. On February 3, 1928, the Commission on its own motion issued an order to show cause why they should not cease and desist from operating as motor vehicle carriers as defined under our act. A public hearing was had on this matter and on February 14 we issued a decision and order (Case No. 344, Decision No. 1581) in which we stated:

"The evidence is undisputed that these parties have conducted a motor vehicle carrier operation from Pueblo to Lamar and intermediate points for the past three years; that for a good part of that time this service has been daily on somewhat regular schedule; that they have served the public in this territory indiscriminately, and have held themselves out to the public as common carriers within the definition contained in Section 1 (d), Chapter 134, Session Laws of Colorado 1927."

The order issued in that case contained the following paragraph:

"It Is Therefore Ordered, that said Charles H. Smith and Clarence L. Smith, copartners, doing business under the name and style of Smith and Sons truck line, be, and they are hereby, commanded to cease and desist from operating on the public highways between Pueblo and Lamar, Colorado, and intermediate points as motor vehicle carriers as defined in Chapter 134, Session Laws 1927, unless and until they first have obtained from the Public Utilities Commission of Colorado a certificate of public convenience and necessity authorizing such operation."

The evidence indicates that notwithstanding this order of the Commission made against the applicants, Smith and Son, they have continued to operate as motor vehicle carriers between Pueblo and Lamar. Practically all of the witnesses who testified in the instant application for the applicants stated that they have

been doing business with Smith and Son ever since they carried on the transportation business and that there was no intermission in or cessation of this operation. The shipping bills submitted as evidence to this Commission covering a period from September 3 to December 6, 1928, indicate that they have transported goods of innumerable kinds and character to approximately seventy business concerns and received payment of the freight from approximately 65 per cent thereof. The record also indicates that while counsel for the applicants advised them under no circumstances to do business with other persons than ten certain business houses in order that they might acquire a private carrier status, yet they evidently ignored the advice of their counsel and operated in such an extensive way that in our opinion they brought themselves within the definition of a motor vehicle carrier under Chapter 135, Session Laws 1927. From what we have said we are not now passing upon the question as to whether if they had followed the advice given them by counsel they would have been conducting a private carrier operation. That matter is not now before us for determination. We desire, however, to direct applicants to our opinion in the application of The Exhibitors Film Delivery & Service Company, Application No. 1009, Decision No. 1865, which is our last expression of what constitutes a private carrier. Having found the applicants to be operating as common carriers, they should pay the tax provided by law for such operations since February 1, 1928.

The Camel Truck Line in its answer and protest also asked for affirmative relief to the effect that if the Commission should find that a public convenience and necessity exists between Rocky Ford and La Junta, Colorado, that it should then issue a certificate of public convenience and necessity to it. The Camel Truck Line filed an application with this Commission for a certificate of public convenience and necessity on July 10, 1923, (Application No. 260) in which it asked for authority to operate a motor vehicle carrier system over an established public highway known as the Santa Fe Trail between Pueblo and Holly, Colorado. On September 26, 1924, the Commission issued an order (Decision No. 748) denying the application from Pueblo

to any points east of Rocky Ford, but issued a certificate of public convenience and necessity to it, authorizing operations between Pueblo and Rocky Ford and intermediate points. It has conducted a motor vehicle transportation operation between Pueblo and Rocky Ford ever since, although the control of same has changed hands once or twice. Under the present management of The Camel Truck Line the Commission has had no complaints whatsoever relative to its service. Because of considerable wildcat competition The Camel Truck Line has had a difficult time in sustaining itself on a paying basis but has, nevertheless, complied with the orders of this Commission. Since the granting of the certificate to The Camel Truck Line the Commission has also issued other certificates for motor vehicle carrier freight and express service between Pueblo and Rocky Ford which has affected its earnings. The evidence shows that The Camel Truck Line has sufficient facilities and financial standing to procure any and all equipment necessary to take care of all the motor vehicle transportation business between Pueblo and Lamar. Since the granting of a certificate to The Camel Truck Line it has not operated and is not now operating east of Rocky Ford.

The question for the Commission to determine upon the record as made is to which applicant, since there is an existence of public convenience and necessity, should this Commission grant the certificate. We believe that the preference between a motor vehicle carrier operating lawfully under a certificate and one operating unlawfully without a certificate after an order issued by this Commission to cease and desist should be given to the former.

The Commission some time ago granted a certificate of public convenience and necessity to H. Hayhurst for the transportation of freight from and to Pueblo and Las Animas but not to or from any intermediate points, and neither of the applicants herein asked to duplicate such service, it being understood that the Hayhurst operation is sufficient to take care of all the needs of the shipping public as involved in that certificate. The

order issued herein will, therefore, not grant any authority conflicting with the Hayhurst operation.

The Commission, after a careful consideration of all the testimony, is of the opinion and so finds that the present and future public convenience and necessity requires a motor vehicle transportation system for the transportation of freight and express by The Camel Truck Line as an extension of its present route from Rocky Ford to Lamar, Colorado, and all intermediate points along the public highway known as the Santa Fe Trail and all points located within a distance of approximately one mile north and south thereof, including the towns of Wiley and McClave, but not from Pueblo to Las Animas or from Las Animas to Pueblo.

Smith and Son's application also includes a request for a certificate authorizing an intra-city motor vehicle carrier system of freight and express in La Junta. None of the protestants are opposed to the granting of this certificate. Furthermore there is not now such an authorized motor vehicle carrier serving the public within the city of La Junta. The Commission is of the opinion and so finds that the public convenience and necessity requires a motor vehicle carrier system for the transportation of freight intra-city in La Junta by Charles H. Smith and Clarence L. Smith, co-partners, doing business under the name of Smith and Son Truck Line.

The Commission also finds that the public convenience and necessity does not require the proposed motor vehicle carrier system of Smith and Son except as heretofore stated.

ORDER.

It Is Therefore Ordered, That the present and future public convenience and necessity requires a motor vehicle transportation system for the transportation of freight and express by The Camel Truck Line as an extension of its present route from Rocky Ford to Lamar and all intermediate points along the public highway known as the Santa Fe Trail and all points located within a distance of approximately one mile north and south thereof, including the towns of Wiley and McClave, but

not from Pueblo to Las Animas or from Las Animas to Pueblo, and this order shall be deemed and held to be a certificate of public convenience and necessity therefor.

IT IS FURTHER ORDERED, That The Camel Truck Line shall file tariffs of rates, rules and regulations and time and distance 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 Camel Truck Line 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 or extreme weather conditions; and this order is made subject to compliance by The Camel Truck Line 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.

IT IS FURTHER ORDERED, That the present and future public convenience and necessity requires a motor vehicle carrier system for the transportation of freight by Charles H. Smith and Clarence L. Smith, co-partners, doing business under the name of Smith and Son Truck Line, intra-city in the city of La Junta and this order shall be deemed and held to be a certificate of public convenience and necessity therefor.

IT IS FURTHER ORDERED, That Charles H. Smith and Clarence L. Smith, co-partners, doing business under the name of Smith and Son Truck Line, shall file tariffs of rates, rules and regulations 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 Charles H. Smith and Clarence L. Smith, co-partners, doing business under the name of Smith and Son Truck Line, shall operate such motor vehicle carrier system except when prevented from so doing by the Act of God, the public enemy or unusual or extreme weather conditions; and this order is made subject to compliance by Charles H. Smith and Clarence L. Smith, co-partners, doing business

under the name of Smith and Son Truck Line, 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.

IT IS FURTHER ORDERED, That in all other respects the application of Charles H. Smith and Clarence L. Smith, co-partners, doing business under the name of Smith and Son Truck Line, be, and the same is hereby, denied.

IT IS FURTHER ORDERED, That except as herein authorized, said Charles H. Smith and Clarence L. Smith, co-partners, doing business under the name of Smith and Son Truck Line, shall cease and desist from operating as a motor vehicle carrier as defined in Chapter 134, Session Laws 1927.

IT IS FURTHER ORDERED, That said Charles H. Smith and Clarence L. Smith, co-partners, doing business under the name of Smith and Son Truck Line, pay the tax required by Section 7, Chapter 134, Session Laws 1927, from February 1, 1928, within twenty days from the date hereof.

IT IS FURTHER ORDERED, That the said The Camel Truck Line and the said Charles H. Smith and Clarence L. Smith, co-partners, doing business under the name of Smith and Son Truck Line, be, and the same are hereby, required to file their written acceptance of the certificates of public convenience and necessity herein granted within a period not to exceed twenty days from the date hereof.

RE WILLIAM JOHN HONEYMAN, *et al.*

[Case No. 388. Decision No. 2054.]

Common carriers—Automobiles—"Contract" carrier—Materiality.

1. In determining whether one is operating as a "motor vehicle carrier," as defined by the statute, "the question is not whether carrier is a 'contract' carrier or not, but whether he is a public or private carrier."

Commissions—Duty to advise one operating unlawfully.

2. It is not the function of the Commission to advise one who has been operating unlawfully as a motor vehicle carrier

"just what sort of operations the respondent may engage in without violating the law."

Certificates of convenience and necessity—Right to operate without.

3. The fact that the public convenience and necessity may have required the respondent's motor vehicle operation after his application was denied does not justify his continued operation without a certificate.

[January 28, 1929.]

Appearances: David P. Strickler, Esq., Colorado Springs, Colorado, and A. P. Anderson, Esq., Denver, Colorado, attorneys for respondent; Jack Garrett Scott, Esq., Denver, Colorado, as amicus curiae.

STATEMENT.

By the **Commission**: On October 10 last this Commission entered an order requiring William John Honeyman to show cause by written statement to be filed with the Commission why the Commission should not enter an order requiring him to cease and desist from operating as a motor vehicle carrier as defined in Chapter 134, Session Laws 1927. He filed his answer admitting certain allegations made by the Commission in its order with reference to proceedings already had relating to his operations. He denied that he is operating as a motor vehicle carrier and alleged that his operation is that of a private carrier and that as such he is not under the supervision of this Commission.

He further alleged that heretofore he filed with this Commission his application for a certificate and that the same was denied on March 7, 1927; that the Commission denied the application for the reason that the business of carriage of freight by motor vehicle had not so far sufficiently developed as to demonstrate that there was public convenience and necessity therefor when the same came in competition with rail carriers; that since that time the business of carrying freight by motor vehicle has so far developed as to conclusively demonstrate that it performs a service for the public which is one of public convenience and necessity, even where such service is in competition with the rail carriers, and that for that reason this Commission has since said

time granted various certificates of public convenience and necessity to other applicants therefor for service in competition with rail carriers, including the identical route over which respondent operates.

The facts hereinafter stated are those developed at the hearing on the order to show cause. The respondent began operating as a motor vehicle or common carrier in 1923 and has ever since been engaged in transporting freight between Denver, Colorado Springs and Pueblo. The business was built up by active solicitation. He applied for a certificate of public convenience and necessity on April 25, 1925. The application was denied in March, 1927. In April following an injunction was issued by the District Court prohibiting his continued operation as a common carrier, an appeal was perfected to the Supreme Court of this State, resulting in an affirmance of the District Court. The respondent then sought an injunction in the United States District Court for the District of Colorado. That court denied the injunction. He then went into the District Court in El Paso County on a writ of certiorari, which later was dismissed on his motion. During all of the period from the time he began his operations in 1922 or 1923 to the month of August, 1928, the respondent, according to his own admission, was operating as a common carrier in spite of the order denying his application and of the injunction issued thereafter requiring him to cease and desist.

In or about August, 1928, he retained new counsel, being one of the attorneys herein, who advised him in order to avoid a violation of the law to enter into written contracts with his customers. A formal printed contract was prepared. A large number of contracts were introduced in evidence at the hearing. Still others were sent in by the respondent thereafter with his letter of January 12, 1929. The total number of these printed contracts is 165.

In October Honeyman organized The Honeyman Transportation Company, a corporation, controlled by Honeyman. At the hearing it having developed that the corporation had succeeded

Honeyman in the ownership and operation of the business, the said corporation was added as a party respondent.

Honeyman admitted that his company had been transporting goods for quite a number of firms or corporations who have no written contracts, saying that in those cases the freight had been accepted through error. He first testified that his agents in Denver, Pueblo and Colorado Springs have contracts on hand by which they are able to determine whether or not a shipment offered is from or destined to a customer having a written contract. He thereafter testified when asked whether his employes in these three cities have a list of all the persons with whom his company has contracts, "No, they haven't a list of all of them."

Honeyman was asked at the hearing if he would produce all of his freight bills showing freight carried on January 4 and 5 of this year. This he thereafter did. Concerning these bills the attorney for the certificate holder operating over the route in question, who appeared at the hearing as "amicus curiae," makes the following statements, which have not been contradicted:

"An analysis of the information contained in these freight bills shows that there were 97 individual shipments. Of these, there was only one shipment in which he had a contract with both the consignor and the consignee; and even in this case there is some question about it * * *.

"Furthermore, of the 97 shipments, it appears that only four were in cases where Honeyman had contracts with the shipper, or consignor. Of the total number, there are 36 cases in which he had no contracts with either the consignor or the consignee."

The 45 contracts enclosed with Honeyman's letter of January 12 were collected after the hearing. Concerning these contracts and others which he claims he was unable to locate, we quote as follows from Honeyman's letter:

"In the forty-five contracts enclosed, all these contracts were left with the shippers and were signed by them at the time, but for some reason we had neglected to take them up, but they were signed by the shippers at the time noted thereon.

"There are two dated in January, 1929, these were also left with the parties in August, but had been neglected to be signed at the time, although a complete agreement to do so had been entered into.

"The Commission will note that in the list of bills enclosed there are a number of bills for which shipments were made where we have been unable to send the contracts. In all these cases contracts were left with the shippers, and to my personal knowledge in most instances we did have contracts with these parties, but at the present time we have been unable to find them. In many of these cases the shippers claim that they have signed a contract with us but we have been unable to find them."

Honeyman testified that he imagines there are four or five hundred business concerns in Colorado Springs, somewhat more in Pueblo and more in Denver than in Colorado Springs and Pueblo combined. When Honeyman purported to begin operating under the contracts he sought contracts from all of the customers which he had developed in the five or six years he had been in business. At the time of the hearing his company was using in the operation in question nine trucks, one of which was bought in August or September of last year.

We believe it is of some possible significance that the so-called contracts do not bind any of the customers to ship all of their freight over his line.

The testimony is somewhat conflicting as to the uniformity of his rates, although it appears clearly that they are not strictly uniform. We deem this question of uniformity of rates as having no great bearing on the issue raised, for the reasons hereinafter stated.

Concerning one shipment which Honeyman referred to in his testimony as having been offered his company and refused, he testified: "We had no contract with them and *we couldn't come to an agreement on price.*" When asked the question: "That was the main thing, you couldn't agree on price? If you had agreed on price, you would have made the shipment?" He answered: "If we agreed on the price that would have been a contract."

Honeyman was asked what was the ultimate limit in number of customers that he proposed to serve. He answered: "As far as I can see and have been informed, the number makes no difference," and that he did not propose to limit the company to any particular number. It appeared that quite a number of the consignees of freight shipped from Denver have no contracts, while the wholesale or jobbing houses in Denver do. He was asked this question: "Who do you think you are hauling for, if Jones, a wholesaler here (Denver), ships some tires, we will say, to Colorado Springs, with the Colorado Springs dealer paying the freight?" He answered: "Well, ordinarily, the one who pays the freight." He was then asked, "Well, do you turn down any of those shipments where they are f. o. b. the warehouse or place of business of the consignee unless you have a contract with the consignee," He answered: "No, because I don't think there would be a great deal of difference there, because it is really both of them, the goods belong to the consignor until they are delivered to the consignee."

The Commission does not believe that determination of this case depends upon the answer to the question whether the customers are the consignees who pay the charges or the shipper. In the first place, the evidence shows quite clearly that the respondent has taken any and all business offered him irrespective of whether he had the so-called contract with either the consignor or the consignee.

Moreover, as this Commission has held before, the question is not whether a carrier is a contract carrier or not, but whether he is a public or private carrier.

We quote as follows from our decision in the application of The Exhibitors Film Delivery & Service Company, No. 1009:

"In order that a carrier be a common carrier it is not necessary that he serve the whole public. No common carrier does. In Terminal Taxicab Co. v. Dist. of Col., 241 U. S. 252, it appears that the company was 'under contracts with hotels by which it agreed to furnish taxicabs and automobiles within certain hours reasonably to meet the needs of the hotel, receiving the exclusive right to solicit in and about the hotel, but limiting

itself to serve guests of the hotel.' The court, speaking through Mr. Justice Holmes, held, 'We do not perceive that this limitation removes the public character of the service, or takes it out of the definition in the act. No carrier serves all the public. His customers are limited by place, requirements, ability to pay and other facts. But the public generally is free to go to hotels if it can afford to, as it is free to travel by rail, and through the hotel door to call on the plaintiff for a taxicab * * *. The service affects so considerable a fraction of the public that it is public in the same sense in which any other may be called so. German Alliance Ins. Co. v. Kansas, 233 U. S. 389. The public does not mean everybody all of the time.' This case was cited and quoted from with approval in Davis v. People, *ex rel.*, 79 Colo. 642, 644.

"In the case we have here the applicant is indiscriminately serving the whole film exhibitor public with the exception of one exhibitor, whom it obviously is very desirous of serving. It is true that it may not be advertising. There is no need therefor. If it is indiscriminately accepting, discharging and laying down express, advertisement is unnecessary. * * *

"In a few isolated cases there is found language indicating that one who operates under private contracts is not a common carrier. An examination of all the authorities, however, leads one irresistibly to the conclusion that in determining whether or not a given operator is a common carrier, the test is not whether he has separate written or other kind of formal contracts with each and every one of his customers. On the contrary, the test is whether he is serving a sufficiently large portion of the public in the carrying of those kinds of goods which he accepts. As is stated in the Campbell case (supra) (174 S. W. 140): 'For if the defendant, by reason of the circumstances, is a common carrier as to the goods in question, it cannot by any special contract change its status as such or exempt itself from the responsibilities growing out of that relationship.' It is true that once it is determined that a carrier is a common carrier the law steps in and imposes upon him the duty of making uniform rates and rendering equal service to all persons, but the fact

that the law imposes upon a common carrier such a duty has nothing whatever to do with the test as to whether he is a common carrier."

In Board of County Commissioners of Weld County v. Leach, Case No. 332, it appeared that Leach transported freight between Denver and Greeley for some fifty or seventy-five customers in the city of Greeley, all of which was done under separate written contracts. Respondent admitted that under these facts he was a motor vehicle carrier and agreed to the issuance of an order by this Commission requiring him to cease and desist.

In Smitherman v. McDonald, Inc., *et al.*, v. Mansfield Hardwood Lumber Company, 6 Fed. (2nd) 29, it appears that the lumber company extended its private railroad line some three miles to carry oil for one party who for a time was its only shipper. Later it made contracts with four other shippers of oil and held itself willing and ready to haul oil and oil supplies for any others under private contract, although it professed not to be a common carrier. The court held that it was a common carrier. Here a corporation not only is hauling freight for a multitude of people who have so-called contracts, but it is hauling for any and everybody who offers freight irrespective of the existence of any contract with the shipper or consignee.

In Wayne Transportation Co. v. Leopold, *et al.*, P. U. R. 1924C, 382, the Pennsylvania Public Service Commission held that two men, both working in a mill, one owning a five-passenger car, the other a seven-passenger car, making morning trips from home to the mill and evening trips in return, carrying on these trips with them eleven other workmen who resided in the same place and were also employed at the mill, or in the town in which it was located, were common carriers. The contention of the operators in that case was much the same as that in this one. According to the Commission, "They sustained this contention mainly upon the allegation that they do not hold themselves out as carriers for the public at large, or for passengers indiscriminately, inasmuch as the passengers they carry, practically speaking, are the same persons every day. In effect, the contention of respondents is that their passengers are carried

under private contract." The Commission, continuing, said: "With this contention the Commission cannot agree. Courts and commissions have repeatedly held that the distinction between common and private carriage *does not* necessarily *depend upon whether written or oral contracts have been entered into,* but rather upon the nature and character of the carriage or service rendered and upon actual conditions of service as disclosed by testimony." (Italics ours.) The Commission quoted from another case decided by it, one significant sentence of the quoted matter being: "There are numerous acts which tend to establish common carriage; that all of them must exist in a particular case in order to establish common as distinguished from private carriage, is not the law."

The California Railroad Commission held in Forsythe v. San Joaquin Light and Power Corp., P. U. R. 1926C, 344, that a corporation in transporting its employes and their families by auto stage on public highways between a city and its construction camps for definite fares fixed by written instructions to its labor agent and noted on employment contracts for deduction from wages, is a transportation company as defined by the auto stage and truck transportation act of 1917.

The Maryland Court of Appeals in Goldsworthy, *et al.*, v. Malloy, *et al.*, 141 Md. 674, 119, Atl. 693, P. U. R. 1923C, 626, said concerning what it considered an evasion of the law, "The owners certainly should not too readily be permitted to enter into contracts or adopt measures which will enable them to readily evade the laws or the spirit of the statutes intended to govern them."

We believe this Commission has never had a case before it in which it appeared more clearly that the carrier was a common carrier.

In respondent's brief he states that if the Commission should find that he has in any respect violated the law he would like the advice of the Commission with reference thereto so that he may "earnestly and honestly try to confine himself to that operation only which can be carried on by a private carrier." While it is somewhat refreshing at this late day, after respondent has

for so long openly and contemptuously violated the law with respect to the subject and an injunction sustained by the Supreme Court, and has failed to follow the advice of his present attorney, to hear him say that he desires to observe the law, this Commission cannot properly assume the role of an advisor and bind itself as to just what sort of operations the respondent may engage in without violating the law. Each case must necessarily stand on its own facts.

In Barbour, *et al.*, v. Walker, *et al.*, 259 Pac. (Okla.) 552, it appeared that the defendants were associated in the transportation of freight and merchandise between Oklahoma City and Shawnee under separate contracts with five individuals and firms in Oklahoma City. These concerns with which the defendants held contracts "were of the principal business houses engaged in their respective line of commodities in Oklahoma City." The court held that "since the defendants were operating under five separate, distinct contracts with as many principal concerns of Oklahoma City they had in effect resolved themselves from the character and status of private motor carriers not subject to regulation, if such in fact was the case, to that of public motor carriers, * * *."

This Commission held in *Re* Clayburg, Case No. 331, that Clayburg, hauling freight for some six persons and firms in the city of Greeley, where, according to stipulation filed, there are some four hundred mercantile establishments, was not a common carrier.

It obviously would be improper to attempt to say in advance what respondent could do in order to become a private carrier. It is clear, however, that the operations would have to be far different from what they ever have been.

Concerning the allegations that after the respondent's application was denied the Commission issued a certificate authorizing another carrier to operate over the route in question, and that since the order had been entered motor truck transportation has developed to such an extent that what was once considered not to be a public convenience and necessity has now developed to be such, we must answer that this Commission is a

fact-finding body. We decided the respondent's application upon the facts introduced in evidence. Our order and the reasonableness thereof was subject to review. If the applicant had respected the order and taken such steps as were possible to preserve his priority until such time as he could, as has been done since by another operator, make a case showing public convenience and necessity, he would be in quite a different position than he is today. We do not see how the question whether or not he is now operating in violation of the law can be made to turn upon any such collateral facts as he relies upon.

The Commission is of the opinion and so finds that The Honeyman Transportation Company, a corporation, has, continuously since its organization, been operating as a motor vehicle carrier and that William John Honeyman, the other respondent herein, as president and general manager thereof, has been and is aiding and abetting in such operation in violation of the law.

ORDER.

IT IS THEREFORE ORDERED, That The Honeyman Transportation Company, a corporation, respondent herein, immediately cease and desist from operating as a motor vehicle carrier as defined in Section 1 (d) of Chapter 134 of the Session Laws of 1927 of the State of Colorado.

IT IS FURTHER ORDERED, That William John Honeyman immediately cease and desist from violating the law of the State of Colorado by conducting a motor vehicle common carrier operation without a certificate of public convenience and necessity either by his personal conduct of such an operation or through participation in such conduct by The Honeyman Transportation Company or any other agency.

IT IS FURTHER ORDERED, That the Secretary of this Commission be, and he is hereby, instructed to send a copy of the decision and order herein to the District Attorney of the City and County of Denver.

RE PUBLIC SERVICE COMPANY OF COLORADO.

[Application No. 765. Decision No. 2056.]

Certificates of convenience and necessity—Sale of municipal plant to private interests—Conspiracy.

1. Whether or not there has been a conspiracy on the part of a private company to force a municipality to sell its plant has no bearing upon the question of whether or not the Commission should issue a certificate to the private company to do business in that locality.

Monopoly and competition—Rehearing—Authorization of competing plant.

2. The Commission on rehearing admitted that it had inadvertently exceeded its own powers in the granting of a previous order authorizing the construction of a new plant by a private corporation, which had acquired the distribution system of a municipal plant where the territory possibly conflicted with another municipal plant not made a party to the proceeding.

Municipal plants—Rights of purchaser—Commission powers.

3. The mere fact that a town can construct its own plant without authority from the Commission does not mean that the vendee of its distribution system can do the same thing.

Certificates—When required—Purchase from municipal plant.

4. Reasons why authority is needed in the case of a private corporation to do business apply with the same force in the case of a utility whose property has been purchased from a municipality as in any other case.

Monopoly and competition—Electric system—Municipal plant.

5. One important consideration which would have to enter into the decision of whether or not the granting of authority to a private company would conflict with an existing municipal plant already operating in adjacent territory would be what the best interests of the consumers to be served by the extension are, which in turn would involve the consideration of the comparative cost of energy by both plants.

Monopoly and competition—Municipal plants—Excessive energy.

6. Notwithstanding the primary duty of a municipality to use only its surplus energy for service outside of its corporate limits, such a plant with respect to such service has certain aspects of a public utility entitling it to invoke proper protection under the provisions of the statute with reference to interference where there appears that there is and will continue to be a surplus supply of energy.

[January 30, 1929.]

Appearances: Paul W. Lee, Esq., Denver, Colorado, and L. E. Anderson, Esq., Brush, Colorado, attorneys for applicant;

G. E. Hendricks, Esq., Julesburg, Colorado, attorney for the town of Julesburg.

STATEMENT.

By the **Commission**: The town of Julesburg, on October 26, 1928, filed a petition asking that the order theretofore entered herein granting a certificate of public convenience and necessity to Public Service Company of Colorado be reopened and reconsidered and upon reconsideration this Commission deny to Public Service Company:

"A certificate of public convenience and necessity to add to its investment by the construction of power plants and station or new transmission line or lines, or to duplicate the investment of your petitioner, within said territory, to provide any other source of supply of electrical energy than from the power station of your petitioner so long as your petitioner has ample capacity therefor."

Public Service Company filed its answer consisting of some twelve pages. The matter was set for hearing and was heard in the courthouse in Julesburg on the 28th day of November. The parties have since filed briefs which the Commission has read and considered carefully.

For a period of some twenty years last past Julesburg has owned, operated and maintained a municipal plant for the generation and distribution of electric energy. On June 9, 1919, it entered into a contract with the town of Sedgwick, situated about fifteen miles southwest thereof in the same county, containing a recital to the effect that the parties were desirous of entering into an agreement "whereby Julesburg is to furnish Sedgwick sufficient electrical current, during the life of this contract, for the use of Sedgwick for light and power purposes and for the purpose of furnishing current for light and power to consumers along the transmission line and under the Sedgwick system of distribution."

Sedgwick agreed to make exclusive use of electrical current furnished by Julesburg under the terms of this contract for lighting the streets and for power for pumping water for the

Sedgwick water system. The contract was to continue for a term of ten years, expiring June 9th of this year. The town of Sedgwick built, between Sedgwick and Julesburg, a transmission line which it has at all times owned and operated. Julesburg built a transmission line to its town limits, at which place a substation was constructed. At this substation the electric energy has at all times been delivered to Sedgwick.

Ovid is a town intermediate to Julesburg and Sedgwick. The distribution system in Ovid was owned and operated until in the year 1926 by The Julesburg Co-Operative Grain Company, a corporation, which purchased its energy from Sedgwick. The energy distributed in Ovid has been transmitted thereto over a short transmission line running north a short distance from Ovid, connecting with the Julesburg-Sedgwick line. In 1926 the Grain Company sold its distribution system to Public Service Company, which procured an ordinance from the town of Ovid in the same year granting, as is stated in the title thereof:

"TO PUBLIC SERVICE COMPANY OF COLORADO, A CORPORATION ORGANIZED AND EXISTING UNDER AND BY VIRTUE OF THE LAWS OF THE STATE OF COLORADO, ITS SUCCESSORS AND ASSIGNS, THE RIGHT, PRIVILEGE AND AUTHORITY TO ERECT, CONSTRUCT, MAINTAIN AND OPERATE A SUBSTATION OR SUBSTATIONS, ELECTRIC LIGHT AND POWER PLANTS, TRANSMISSION LINES, AND A DISTRIBUTION SYSTEM FOR THE DISTRIBUTION AND SALE OF ELECTRICITY WITHIN THE CORPORATE LIMITS OF THE TOWN OF OVID, SEDGWICK COUNTY, COLORADO."

This Commission on June 24, 1927, without Julesburg being named as or being a party to the record, made an order as follows:

"IT IS THEREFORE ORDERED, That the public convenience and necessity does now, and in the future will, require the exercise by the applicant of said franchise rights by ordinance granted to it by the town of Ovid, as aforesaid, 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 public convenience and necessity does now and in the future will require that the applicant be permitted to furnish electrical current for light, power and other purposes to whomsoever may desire the same and as it may be practicable along the route of its transmission lines situate in said county; and that the applicant be granted the privilege of extending its facility or line, plant or system, situate in said town of Ovid and said county of Sedgwick, into territory contiguous to said facility or line, plant or system, provided any extension is made before the territory into which the extension is to be made may be lawfully served by another public utility."

On the same date the Commission made a similar order granting authority to exercise similar franchise rights which had by ordinance been granted by the town of Sedgwick, the latter having sold its distribution system and transmission line to Public Service Company.

Public Service Company has continued to the present time to take from Julesburg at its town limits all energy which the former has distributed in Sedgwick and Ovid. It appears also that Julesburg is and has for some years been supplying electricity for distribution in Big Springs, Nebraska, and that Public Service Company has bought the distribution system there and the transmission line leading to Julesburg. Public Service Company, at the hearing, expressed its intention to continue to perform the said contract between Julesburg and Sedgwick until it expires.

Shortly before the filing of the petition herein by Julesburg a transmission line leading from Ogallala, Nebraska, to Big Springs has been constructed. Thus a transmission line extended from Ogallala to Julesburg. Public Service Company at the date of filing of the petition was in the course of constructing a connecting line between the Julesburg-Big Springs line and the Julesburg-Sedgwick line, the connection with the former being at a point about half a mile north of Julesburg and with the latter at a point about half a mile west of Julesburg. This connecting line runs west for a mile along the Colorado and Ne-

braska line and south for about a mile and a quarter in Colorado. The purpose of making this connection appears to be to enable Public Service Company to procure electric energy for Ovid and Sedgwick from a generating plant situated in Ogallala, from and after the date of the expiration of the contract between Julesburg and Sedgwick and, possibly, as stated in the answer of Public Service Company, to afford the latter an additional source of energy to be drawn on in case of breakdown in the Julesburg plant or other interruption of service therefrom.

The evidence shows that negotiations in the past were conducted by the Public Service Company and Julesburg for the sale of the Julesburg municipal plant to Public Service Company; that the matter was submitted at an election and the sale was rejected by the electors. Much of the evidence was devoted towards proof of an alleged conspiracy on the part of Public Service Company to force Julesburg to sell its plant. We are unable to see how a determination of this question has any bearing upon the issues now raised herein.

If Julesburg had been made a party to the original proceeding herein it might properly be argued that in view of the fact that Julesburg had a generating plant, and of the further fact that no evidence was introduced showing that the public convenience and necessity required the construction of another plant in Ovid, the Commission would not and should not have entered an order authorizing the exercise of that part of the franchise which authorized the construction of an electric light and power plant. We are of the opinion that the Commission went too far in authorizing the exercise of all the rights and privileges granted in that ordinance, particularly that portion which relates to the construction of a plant. We believe it is likewise true that we went too far in the order with respect to the franchise granted by the town of Sedgwick. It is true that the town of Sedgwick could, without any authority from this Commission, have constructed its own plant (People *ex rel.* Utilities Commission v. City of Loveland, 76 Colo. 188), but the mere fact that the town of Sedgwick could have constructed a plant without authority from this Commission does not mean

that the vendee of its distribution system could do the same. The reasons why a town needs no authority and a private corporation does need authority to construct a plant have been set forth in the cases decided by the Supreme Court of this State and need not be restated here. The reasons why the authority is needed in the case of a private corporation apply with the same force in the case of a utility whose property has been purchased from a municipality as in any other case. We are unable, therefore, to agree with the reasoning that since Sedgwick could have constructed a plant without a certificate the vendee of its distribution system may do the same. However, as the petition of the town of Julesburg was filed in this case only and not in the Sedgwick case, we will make no further order herein with reference to the exercise of the franchise rights granted by Sedgwick. It may be necessary to reopen the Sedgwick case and to modify the order therein in conformity with the views stated.

Even though the town of Julesburg had been a party to the original application herein, we are unable to see what further questions it then could properly have raised herein. We do not understand how the issues could have covered the question of Public Service Company making a new contract with the town of Julesburg by which the latter should furnish all of the electrical energy that might be distributed by the former in Sedgwick and Ovid and along the transmission line leading to said towns.

Neither do we understand how there could have been involved in this particular application the questions, (1) whether the construction of the connecting line in question is "an extension within or to territory already served by it (Public Service Company), necessary in the ordinary course of its business," and (2) whether the construction of said line is such interference "with the operation of the line, plant or system" of Julesburg as to require an "order prohibiting such construction or extension or prescribing such terms and conditions * * * as to it (this Commission) may seem just and reasonable."

Of course, the practice before this Commission is not very formal. However, on the second question, whether the con-

struction or extension is such an interference with the operation of Julesburg's plant as to warrant the Commission in prohibiting the same or making an order prescribing terms and conditions, the evidence is insufficient to warrant a determination. It is not every interference with another utility that should be prohibited. One important consideration which would have to enter into the decision of the question would be what the best interests of the consumers to be served by the extension are. In determining this question, the Commission would have to know, among other things, the comparative cost of energy that might be brought in over the extension and that to be furnished by the Julesburg plant.

We are not unmindful of the primary duty of a municipality to use the product of its plant for its own inhabitants, and that when the time comes that it has no surplus, it doubtless cannot be required to deliver energy, even though a contract for the furnishing thereof may not have expired. But in this case, it clearly appears not only that there is now, but that there will continue in the future to be, a surplus of electric energy produced by the Julesburg plant. In view, therefore, of the decision in the case of Lamar v. Wiley, 80 Colo. 18, the municipal plant in Julesburg has certain aspects of a public utility which entitles the municipality to invoke proper protection under the provision of the statute with reference to interference.

As the parties are desirous of having an early determination of the controversy, the Commission has concluded therefore, in order to expedite the matter, instead of giving leave to Julesburg to file another complaint, to enter immediately on its own motion an order on Public Service Company to show cause. This it is doing this date.

It would seem quite desirable and reasonable that the evidence already taken in this proceeding should be made a part of the record in the new case and that there is no need of duplicating the same.

ORDER.

IT IS THEREFORE ORDERED, That the order heretofore entered herein be, and the same is hereby, reopened.

IT IS FURTHER ORDERED, That the order heretofore entered herein on June 24, 1927, be, and the same is hereby, altered and amended so as to read as follows:

"IT IS THEREFORE ORDERED, That the public convenience and necessity does now and in the future will require the exercise by the applicant of said franchise rights by ordinance granted to it by the town of Ovid except as that relates to the erection, construction, maintenance and operation of an electric light and power plant, 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 public convenience and necessity does now and in the future will require that the applicant be permitted to distribute electric energy for light, power and other purposes to whomsoever may desire the same and as it may be practicable in territory contiguous to its present transmission line and distribution system situated in the county of Sedgwick, State of Colorado, and this order shall be taken, deemed and held to be a certificate of public convenience and necessity therefor."

RE PUBLIC SERVICE COMPANY OF COLORADO.

[Case No. 393. Decision No. 2247.]

Interstate commerce—Commission jurisdiction—Transmission of imported power.

1. The transmission of electric energy from a generating system outside of the State to a distribution system located within the State is interstate commerce and the State Commission has no power to refuse authority to connect such systems to the utility owning both of them.

Commissions—Jurisdiction—Constitutional questions.

2. It is the duty of the Commission to decide constitutional questions properly arising before it in accordance with principles established by decisions or statutes.

Interstate commerce—Distribution of imported power.

3. A utility lawfully distributing energy within the State cannot be prohibited from taking energy for that purpose from an interstate transmission line whether built by it or some other person.

[May 24, 1929.]

Appearances: Lee, Shaw and McCreery, Esqs., Denver, Colorado, attorneys for respondent, Public Service Company of Colorado; G. E. Hendricks, Esq., Julesburg, Colorado, attorney for town of Julesburg, intervener.

STATEMENT.

By the **Commission**: An order was entered by this Commission requiring the respondent, Public Service Company of Colorado, to show cause why before making a connection between its transmission line running from Julesburg, Colorado, to Big Springs, Nebraska, and its line running from Julesburg to Sedgwick, Colorado, it should not procure from this Commission a certificate of public convenience and necessity therefor and why in so constructing or extending its line it will not so interfere with the operation of the line, plant or system of the electric light plant or system of the town of Julesburg as to require this Commission to prohibit such construction or extension or to prescribe such terms and conditions as may be just and reasonable. The respondent filed a lengthy answer. The town of Julesburg filed a petition in intervention.

The case was submitted on the evidence heretofore taken in Application No. 765 after the same had been reopened and set for further hearing. The facts are stated in some detail in the order of the Commission issued in said application on January 30th of this year. Briefly, the facts are as follows: The town of Julesburg is now and for a number of years has been operating a municipal electric light plant. For some years there was in operation a municipal electric distribution system in the town of Sedgwick, Colorado. Under a contract between the town of Sedgwick and the town of Julesburg electric energy was delivered by the town of Julesburg to the town of Sedgwick at the corporate limits of the town of Julesburg, from which point it was conveyed over a transmission line built and owned by the town of Sedgwick. For some time the town of Sedgwick furnished electric energy from said transmission line to a private company which distributed the same in the town of Ovid, a point intermediate to Julesburg and Sedgwick.

For some years the town of Julesburg has been supplying electric energy at its corporate limits for distribution in Big Springs, Nebraska. Public Service Company has purchased the distribution systems in Sedgwick, Ovid and Big Springs, along with the transmission lines, one running west from Julesburg past Ovid to Sedgwick, the other running north across the State line and then west to Big Springs.

The contract between the towns of Sedgwick and Julesburg, which Public Service Company has been performing, expires early in June of this year. Public Service Company proposes at the termination of that contract to secure all of its energy from a privately owned plant situated in Ogallala, Nebraska.

It already has built the transmission line from Ogallala to Big Springs. At the time the matter first came before the Commission it was engaged in constructing a line from a point on the Colorado-Nebraska State line about one-half mile north, to a point about one-half mile west of Julesburg, thus forming a connecting link between the Big Springs and the Sedgwick-Ovid lines.

A number of questions have been raised by the answer of the respondent and the petition of the intervener. The evidence in the case consists wholly of that introduced by the intervener in Application No. 765, reopened on its motion. It has a modern generating plant producing quite a surplus of energy. Large expenditures on the plant were made recently with a view to continuing to sell energy to the respondent to be distributed in Sedgwick and Ovid. There was some evidence that the plant in Ogallala, from which the respondent expects in the future to procure its energy, is antiquated and of doubtful capacity. The respondent claims to have entered into an advantageous contract, and assumes the responsibility of giving adequate service thereunder.

One point made by the respondent seems to be so well taken and so decisive of the case, we believe it inadvisable to state any conclusion with respect to the other questions involving a construction of our statute.

The position of the respondent is that the transmission of electric energy from Ogallala to the distribution systems in Sedgwick and Ovid is interstate commerce. It cited in support of its contention:

Missouri v. Kansas Natural Gas Co., 265 U. S. 298, 44 Sup. Ct. 544;

Buck v. Kuykendall, 267 U. S. 307, 45 Sup. Ct. 324;

Bush & Sons Co. v. Maloy, 267 U. S. 317, 45 S. Ct. 326;

Peoples Natural Gas Co. v. Public Service Commission, 270 U. S. 560, 46 S. Ct. 371;

Public Utilities Commission v. Attleboro S. & E. Co., 273 U. S. 83, 47 S. Ct. 294;

Helson v. Commonwealth, 49 S. Ct. 279;

Washington Water Power Co. v. Montana Power Co. (Idaho Public Utilities Commission), P. U. R. 1916E, 144, at 169;

Re Idaho Power Company (Oregon Public Service Commission), P. U. R. 1928A, 113.

The cases seem so clearly to support the respondent's contention that we would not feel warranted in discussing the question at any length if it were not for the serious detailed argument of the attorney for the intervener. In the Attleboro case the court said: "The transmission of electric current from one state to another, like that of gas, is interstate commerce, Coal & Coke Co. v. Pub. Serv. Comm., 84 W. Va. 662, 669, 100 S. E. 557, 7 A. L. R. 108, and its essential character is not affected by a passing of custody and title at the state boundary not arresting the continuous transmission to the intended destination." In Public Utilities Commission v. Landon, 249 U. S. 236, the court held, 245, "That the transportation of gas through pipe lines from one state to another is interstate commerce may not be doubted. Also, it is clear that as part of such commerce the receivers might *sell* and *deliver* gas so transported to local distributing companies free from unreasonable interference by the state." (Italics ours.) In the Missouri-Kansas gas case it was held

that the State *into* which gas is brought and sold at wholesale cannot without violating the Commerce Clause of the Federal Constitution regulate the wholesale price thereof. In the Attleboro case it was held that the State *from* which electrical energy is transmitted is likewise forbidden by the Commerce Clause from fixing the wholesale rate thereof.

In the Buck case the Court held that the State of Washington, in denying an interstate certificate on the ground that the public convenience and necessity did not require any more interstate bus operations between the cities of Portland and Seattle, had violated the Commerce Clause.

Congress has not yet taken any action towards regulating the transmission interstate of electricity. There are certain cases wherein, in the absence of Congressional action, the state is authorized to act. There are others "wherein state action is precluded by mere force of the Commerce Clause of the (Federal) Constitution." A State may not directly burden interstate commerce. Neither may it cast upon such commerce an indirect burden which is unreasonable.

State laws designed to fetter or interfere with interstate commerce are, of course, invalid. However, in order that state action be a direct burden on interstate commerce, it is not necessary that the purpose of the action be to interfere with such commerce. "If as applied it directly interferes with or burdens appellant's interstate commerce, it cannot be sustained regardless of the purpose for which it was passed." Interstate Busses Corp. v. Holyoke Street Ry. Co., 273 U. S. 45, P. U. R. 1927B, 46, 48. "* * * the States cannot under any guise impose direct burdens upon interstate commerce * * * They have no power to prohibit interstate trade in legitimate articles of commerce * * *; or to discriminate against the products of other States * * *; or to exclude from the limits of the State corporations or others engaged in interstate commerce or to fetter by conditions their right to carry it on * * *." The Minnesota Rate Cases, 230 U. S. 352, 400-401.

We are of the opinion that the following language of the court in the Buck case applies with considerable force to the

situation here: "The provision here in question is of a different character. Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner. * * * Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the Commerce Clause."

Here we are asked to pursue a laudable purpose in compliance with our local statutory law. We might conceivably pay no attention to the Commerce Clause of the Federal Constitution and all of the cases decided by the Supreme Court of the United States defining the meaning of that provision. While this Commission is an administrative body whose duty does not extend to original determination of nice constitutional questions, we believe it is the practice and in accord with a due regard for propriety and a decent respect for established law that we observe well settled principles of law in arriving at our conclusions, even though those principles be based on constitutional provisions. To cite no other cases, we refer to the case of Moauro v. Wolf Creek Railroad Company, *et al.*, Case No. 321, decided by this Commission in December, 1928, in which we stated the effect of and that we were bound by a state constitutional provision of the State of Colorado which we believe, on the point in question, never had been construed by our Supreme Court.

It appears, therefore, and the Commission so concludes, that to prohibit respondent from making the connection in question not only would directly burden interstate commerce, but it would obstruct and prohibit it.

The intervener points out that the company generating the energy proposed to be brought into the State is not resisting the intervener's efforts. We are unable to understand what difference it makes that the subject of interstate commerce is transported by a purchaser thereof instead of the manufacturer.

It is admitted, in view of the decision in the Buck case, that if the purpose of the prohibition of the connection were to pro-

tect another company also transporting electrical energy interstate, the commerce provision would be violated. But it is argued that it is otherwise when the purpose of the prohibition is "to prevent competition by an interstate utility with a domestic utility." Insofar as the purpose of the action by the State, as distinguished from its effect, is concerned, it would seem that the thing we are asked to do, namely, to protect intrastate commerce by prohibiting interstate is the principal thing sought to be prevented by the constitutional provision.

It is admitted, in view of the Attleboro and Missouri-Kansas Gas cases, that this Commission would not have power over the rates at which energy brought across the State line may be sold at wholesale. But we are asked to go further and virtually prohibit the bringing of electricity into the State by saying to a company which is now lawfully engaged in distributing electricity under both municipal and state commission authority that it cannot receive into its distribution systems in Sedgwick and Ovid energy brought from another State. If this Commission could take the action herein urged upon it, it is obvious that we could prevent any manufacturer of electricity or any purchaser therefrom from bringing electricity across the State line and delivering it to respondent at the city limits of the two municipalities. As stated in the Missouri-Kansas Gas case (265 U. S. at 308): "But the *sale* and *delivery* here is an inseparable part of a transaction in interstate commerce—not local but essentially national in character." (Italics ours.) It is useless to bring the electricity across the State line if it cannot be sold when gotten here. In attempting to distinguish the Buck case, it is said that the transportation of passengers dealt with in that case wholly ceased when they reached their points of destination, and that when the electricity comes into the State, and reaches a point where it is proposed to be turned into a distribution system, it has reached what might be called its destination point and the Commission may say it shall not pass that point. It is true that from the point where the energy goes into the local distribution system, it becomes subject to regulation by the State in the absence of exertion of power by congress, as

was held in Pennsylvania Gas Co. v. Pub. Serv. Commission, 40 Sup. Ct. Rep. 279, P. U. R. 1920E, 18.

It was stated in the case just cited that after gas has entered the local distribution system, it is still "part of an interstate transmission," however, it was further stated that after such entry it becomes "local in its nature" and subject to regulation by the State, but "always subject to the exercise of authority by Congress, enabling it to exert its superior power under the commerce clause of the Constitution." As we have stated, it makes no difference whether the energy is distributed by a transporting company or an independent company. As was stated in the Missouri-Kansas case, "The transportation, sale and delivery (into the local distribution system) constitute an unbroken chain, fundamentally interstate from beginning to end." Likewise in the case before the Commission, the transportation and delivery of the electric energy into the distribution systems in Ovid and Sedgwick constitute one unbroken chain, fundamentally interstate from beginning to end and not of such a character as to be fettered or obstructed by state laws.

If in the Buck case it had appeared that the State, instead of preventing the transportation of the passengers into the State, had undertaken to allow them to be brought in, but to forbid their departure from the bus after arrival at their points of destination, the case would be similar to the one here. It could hardly be argued, in view of the decision in the Buck case, that the decision would have been any different in the supposititious case stated.

Of course, if Public Service Company, merely because it is transporting electric energy interstate, claimed the right to distribute the energy locally in Sedgwick and Ovid without a municipal franchise and authority from this Commission to exercise such franchise, we would have a wholly different case. But here the company is lawfully distributing energy in those towns. It cannot, therefore, be prevented from taking energy for that purpose from an interstate transmission line, whether built by it or some other person.

ORDER.

IT IS THEREFORE ORDERED, That this proceeding be, and the same is hereby, discontinued.

Chairman Bock dissenting:

I regret my inability to concur with my colleagues in the disposition of this case. I recognize, of course, that the issue herein is somewhat complicated and that there is some doubt as to whether the transmission of electric energy interstate as involved in this case is or is not a burden upon interstate commerce. Lack of time prevents me from a review of the cases involving this issue.

If the proposed tie-up of electric energy interstate by the Public Service Company is "interstate" and "commerce" within the meaning of the Federal Constitution, the question still remains whether the proposed regulation by this Commission constitutes a burden or interference with interstate commerce. In my opinion, if this Commission would sustain the contention of Julesburg, it would only be regulating the distribution of electric energy within the State of Colorado, which would be purely a local matter under the police power of the State. If the Public Service Company were prohibited from distributing electric energy interstate to territory already adequately supplied intrastate by others, we would not thereby prohibit the transmission of electric energy into a state, but only to regulate its distribution within the State. This regulation, being of a purely local character, concerning which Congress has not acted, it would seem to me that this Commission has jurisdiction to prevent the distribution of electric energy in a territory already adequately supplied, even though it would thereby indirectly prohibit the transmission of electric energy interstate. In other words, any regulation by this Commission under the circumstances would only indirectly affect interstate commerce and is necessary to protect or regulate matters of purely local interest. Since the Supreme Court of the United States has never directly passed on this exact question, I am constrained to dissent from the opinion of my colleagues.

This Commission being an administrative rather than a judicial body, and the question of whether the regulation involved

is or is not a burden upon interstate commerce being purely judicial, I prefer to wait for the interpretation and construction by the courts before committing this Commission to a policy that can only lead to a curtailment of regulation for the distribution of electric energy within a State by State authority.

RE ROBERT A. HAZELL.

[Case No. 392. Decision No. 2060.]

Common carriers—Number of customers—Payment of freight charges—Effect.

1. Commission expressed the opinion that in arriving at the number of customers served by a motor vehicle carrier, those who pay the freight charges on shipments must be included.

Common carriers—Test—Number served—Percentage—Capacity of equipment.

2. The question whether a given operator is a common or private carrier depends very largely upon two considerations, the number of the public served by the carrier and the relationship between the number of the public served and the capacity of his equipment.

Common carriers—Common law—Duty to serve beyond capacity of equipment.

3. At common law no common carrier owed any duty to serve the public beyond the capacity of his equipment.

[February 4, 1929.]

Appearances: Leo P. Kelly, Esq., Pueblo, Colorado, attorney for respondent; Jack Garrett Scott, Esq., Denver, Colorado, as amicus curiae.

STATEMENT.

By the **Commission**: On January 4 this Commission entered an order requiring Robert A. Hazell to show cause by written statement to be filed with the Commission why the Commission should not enter an order requiring him to cease and desist from operating as a motor vehicle carrier as defined in Chapter 134, Session Laws of 1927. The respondent in his answer filed alleges that he is not now, nor has he at any time heretofore been, operating as a motor vehicle carrier; that his operation is that

of a private carrier and that therefore the Commission has no jurisdiction thereof.

The evidence shows that the respondent is engaged in the transportation of freight regularly between Pueblo and Denver; that he is engaged also in transporting freight anywhere his customers in Pueblo direct, naming among other points, Trinidad and Montrose, and that his operating equipment consists of two trucks, one having a capacity of 1½ tons and the other 2 tons. The respondent testified that he keeps these trucks busy. He claims that all of the business done by him is under contracts which he holds with his various customers. At the hearing there was introduced as an exhibit a written statement filed by some twelve concerns reading as follows:

"This is to certify that we have a verbal contract with the Hazell Truck Line to do our hauling between Denver and Pueblo, Colo., and intermediate points; unless some other route is specified on order."

After the hearing, pursuant to an understanding had thereat, the attorney for the respondent submitted a copy of a list of respondent's customers which is kept upon the desk of the Morgan Transfer and Storage Company in Denver. This transfer company acts as the agent in Denver for respondent. Seventeen concerns are included in this list. The total number of customers appearing on the two lists is twenty-five. On cross-examination it appeared also that respondent had hauled freight for Libby, McNeill & Libby, Sherman Mercantile Company, Weicker Transfer and Storage Company and Piggly Wiggly, and that he had had a contract with Swift and Company.

Respondent was asked to submit his freight bills for the months of November and December. We have not sought to make an exhaustive check of these freight bills, but we do find from a hurried examination thereof a number of customers which were not previously named. The following are some of the shipments which we note. We state first the name of the consignor. On the same line and opposite the consignor's name is that of the consignee. Following the consignee's name is found either a P or a C. P means prepaid; C means that the ship-

ment was sent "collect." The names of the persons or concerns not having a contract are underscored (black type).

Goodyear Tire Company	**Bailey Bros**	C
Cowen Battery Co	**Klussmeyer**	C
Booth Fisheries	**Arapahoe Shop**	C
Orchard Products	**J. S. Brown**	C
Booth Fisheries	**Fruppenburg**	C
National Rubber Co.	**J. H. White**	C
Weicker Transfer & Storage Co.	**J. S. Brown**	C
Willard Storage Battery Co.	**Harley Battery Co.**	C
Mrs. C. E. Henderson	**Mrs. O. E. Henderson**	C
Bluebird Co.	**Piggly Wiggly**	C
Orchard Products	**Piggly Wiggly**	C
National Rubber Sup.	**John H. White**	C
United States Transfer	**Wiswall Wells**	C
Willard Battery Co.	**Trinidad Battery**	C
Liquid Carbonic	**Coca Cola**	P
Firestone Tire Co.	**Sasse Bros.**	C
C. R. Hurd	**Pressey Fruit Co.**	C
C. R. Hurd	**Colo. Supply Co**	C
Pitts Mfg. Co.	**Catherine Schlesinger**	C
Cowen Battery	**Western Battery Supply**	C

It will be noted that in some of the above shipments neither the consignor nor the consignee is a contract customer of the respondent. In other cases the consignor is, but the consignee paying the freight is not.

The question arose in this case whether or not customers are the many retail dealers who pay the freight and who probably have no so-called contract, or the wholesalers or jobbers who have the so-called contract and who ship the freight "collect." We are inclined to believe that in arriving at the number of customers served by a carrier the Commission must treat as customers those consignees who pay the charges on freight shipped to them. If the consignor is selling the goods f. o. b. the store or shop of his customers, then it is none of their concern or business, in the absence of some special contract to the contrary, how or by whom the freight is delivered. However, where the goods are sold f. o. b. the dock of the wholesaler or jobber, it seems to us that the receiving customer would have the right to insist that the goods be brought to him by a certain carrier and would also have the right to refuse said goods unless so brought.

However, we do not believe the case now before us necessarily

turns upon the answer to this question. As in many other like cases, the contracts seem to amount to very little if anything. A large percentage of the contracts are verbal. Apparently none of them purport to bind customers to give to respondent all shipments moving over his route. Some four formal written contracts were introduced in evidence. We note that they all provide with reference to the freight charges: "which said charge the party of the second part agrees to pay for said service." However, when we examine the freight bills we find that with rare exceptions the consignee pays the freight irrespective of the fact that the so-called customer who signed the contract may be the consignor. In fact, it appears rather obvious that the sole and only purpose of collecting the so-called contracts is to impress upon the respondent a character which he otherwise would not have.

As this Commission has pointed out repeatedly, the question whether a given operator is a common or private carrier depends very largely upon two considerations, the number of the public being served by the carrier and the relationship between the number of the public served and the capacity of his equipment. (Here follows an extended quotation from the decision in The Exhibitors Film Delivery & Service Company's case which refers to a number of cases cited in that decision.)

It appears clearly that respondent is serving as many of the public as his capacity permits, because he testified that he could not serve additional customers with the equipment which he possesses. At common law no common carrier owed any duty to serve the public beyond the capacity of his equipment. As is said by the Supreme Court of the United States in Pennsylvania Railroad v. Puritan Coal Co., 257 U. S. 121, 133, "The common law of old in requiring the carrier to receive all goods and passengers recognizes that 'if his coach be full' he was not liable for failing to transport more than he could carry * * *. The same principle is applicable to those who transport freight in cars drawn by steam locomotives."

In Michigan Public Utilities Commission, *et al.*, v. Duke, 266 U. S. 570, P. U. R. 1925C, 231, 234, the court said: "One bound

to furnish transportation to the public as a common carrier must serve all, up to the capacity of his facilities * * *."

After careful consideration of the evidence the Commission is of the opinion and so finds that the respondent is now, was at the time of the making of the order and previous thereto, operating as a motor vehicle carrier.

ORDER.

IT IS THEREFORE ORDERED, That Robert A. Hazell immediately cease and desist from operating as a motor vehicle carrier as defined in Section 1 (d) of Chapter 134 of the Session Laws of 1927, of the State of Colorado.

IT IS FURTHER ORDERED, That the respondent, Robert A. Hazell, be, and he is hereby, required to pay to the Secretary of this Commission within twenty days from this date the motor vehicle tax imposed by law on account of his operations from December 1, 1927.

IT IS FURTHER ORDERED, That the Secretary of the Commission be, and he is hereby, instructed to send a copy of this decision and order herein to the District Attorney at Pueblo, Colorado, and another to the District Attorney of the City and County of Denver.

RE C. E. SCHOFIELD, DOING BUSINESS AS SCHOFIELD TRUCKING COMPANY, *et al.*

[Applications Nos. 1169 and 1183. Decision No. 2071.]

Monopoly and competition—Automobiles.

1. "It is contrary to fundamental principles of utility regulation to authorize operation by a second carrier over a route over which another is adequately serving."

Monopoly and competition—Automobiles.

2. It is "contrary to sound regulation to start out with two (motor vehicle carriers) until experience has shown that the best interests of the territory require more than one."

Monopoly and competition—Automobiles—Certificates denied to both applicants—Consolidation.

Where two motor vehicle applicants sought authority to oper-

ate over same route from Pueblo to Alamosa and to serve different points beyond, Commission refused to issue certificate of convenience and necessity to either, and retained jurisdiction until applicants could combine and form one carrier.

[February 21, 1929.]

Appearances: R. L. Ellis, Esq., Pueblo, Colorado, attorney for applicant Schofield; C. H. Allen, Esq., Monte Vista, Colorado, attorney for applicant Watts; Thos. R. Woodrow, Esq., Denver, Colorado, attorney for The Denver and Rio Grande Western Railroad Company and American Railway Express Company, protestants; Todd C. Storer, Esq., Pueblo, Colorado, attorney for The Colorado and Southern Railway Company, protestant; William B. Stewart, Esq., Pueblo, Colorado, attorney for Jess Kenner, doing business as The White Truck Line Company, protestant.

STATEMENT.

By the **Commission**: The applicant, Schofield, seeks a certificate of public convenience and necessity authorizing the operation of a motor truck line for the transportation of freight "between Pueblo and Walsenburg, Colorado, on the one hand and the following towns on the other hand:

La Veta	Blanca	Antonito
Russell	Alamosa	Sanford
Ft. Garland	Romeo	Manassa."

The applicant, W. C. Watts, seeks a certificate authorizing the operation of a motor freight line "for the transportation of freight and express between Pueblo, Colorado, and Del Norte, Colorado, and intermediate points."

At the hearing the attorney for the applicant, Schofield, stated that the applicant does not desire to transport any freight to and from the points, Russell, Ft. Garland and Blanca, or from Pueblo to Walsenburg or from Walsenburg to Pueblo.

The applicant, Watts, stated that the intermediate points which he desires to serve are Alamosa, Center and Monte Vista, and Walsenburg on eastbound trips only.

After these statements were made the protestants, The Colo-

rado and Southern Railway Company and Jess Kenner, withdrew their protests.

We do understand, however, that Watts, and possibly Schofield, desire to transport household goods along their routes to all points.

The applicant, Schofield, resides in Antonito and proposes to use in the service two 2-ton International trucks of the market value of $5,500.00. He proposes to operate three round trips per week.

The applicant, Watts, resides in Monte Vista. He has two 2-ton trucks having a market value of $5,900.00 which he proposes to use in the service. His service is to be bi-weekly.

The evidence shows that there are wholesale fruit and grocery houses having branches in Alamosa; that these houses deliver merchandise to the merchants on the Antonito line south and the Del Norte line west without any freight charges; that, therefore, competing wholesale houses not having branches in Alamosa are unable to compete with those houses having the branches unless they avail themselves of the services of motor vehicle carriers. The evidence shows also that by using motor truck service for shipments of fresh meats the cost of from twenty-five to thirty dollars of preparing a railroad car for shipment is eliminated, and that meat shipped by truck at night is delivered in satisfactory condition.

The evidence shows also that the more fruit and meat is handled the less satisfactory is its condition. All freight shipped to points south and west of Alamosa by rail has to be transferred at Alamosa.

Schofield proposes to leave Pueblo at 4:00 o'clock p. m., arriving in Alamosa at midnight and at Antonito at 12:45 p. m., after passing through and delivering freight at the intermediate points of La Jara, Sanford, Manassa and Romeo.

The applicant, Watts, proposes to leave Pueblo at 6:00 p. m., delivering freight in Alamosa at 7:00 a. m., Monte Vista at 10:00 a. m. and Del Norte at 11:45 a. m.

Schofield's rates are based on five classifications termed—1,

2, 3, 4 and "Rule 10." The classifications 1 to 4, inclusive, are railroad classifications found in P. U. C. Colo. Western Classification No. 9. The rates on freight from Pueblo to Alamosa vary from $1.30 per cwt. on Class 1 freight to 60 cents on Rule 10 freight; and from Pueblo to Antonito from $1.38 on Class 1 to 60 cents on Rule 10. However, by exceptions made by applicant the rate on sugar from Pueblo to all points south of Alamosa is 60 cents, and the rate on cheese to Pueblo from Manassa, Sanford and La Veta is 50 cents. Rule 10 classification applies to fruits, vegetables, meats and groceries, except crackers.

Watt's rates also are based upon the same classifications, his rates from Pueblo to Alamosa varying from $1.90 on Class 1 commodities to 60 cents on those charged under Rule 10. The rates from Pueblo to Del Norte vary from $2.35 to 65 cents, from Alamosa to Monte Vista from 25 cents to 15 cents. However, what commodities his Rule 10 classification covers does not appear. In general his class rates so greatly exceed those of the railroad, that it would appear that in order to compete with the railroad he would be required to make the scope of Rule 10 very broad.

The rates of The Denver and Rio Grande Western Railroad Company from Pueblo on Classes 1, 2, 3, 4 and 5 are as follows:

Between Pueblo and	1	2	3	4	5
Alamosa	130½	112	94	72	53½
Monte Vista	144½	114	95½	72½	55
Del Norte	156½	123	103	78	61
Antonito	138	126	104	76	58

At the hearing the railroad company announced that it proposed immediately, and it has since, put into effect on Rule 10 shipments of all freight classified as 5th Class and lower, including also the following commodities or items, a rate of 40 cents from Denver to Alamosa:

Candy and confectionery
Cereals and Cereal Food preparations
Cheese
Cleaning compounds
Scouring and Washing Powders and Liquids
Crackers, including cheese crackers
Extracts, in boxes
Dried Fruits
Fruit Juices, including Grape Juice
Strained Honey
Edible Nuts
Olive Oil, in cases
Rope
Twine
Spices
Chocolate
Tea
Dry Yeast

A large number of groceries, fruit and fresh meat would not take the 40 cent rate even in Rule 10 cars. Both of the applicants' Rule 10 rates are as to many commodities much lower than the railroad rates. Schofield's rates on the first four classes of rates are substantially the same as those of the rail carrier.

There is no showing of any public convenience and necessity for the transportation of anything other than household goods and merchandise from Pueblo to Alamosa and the points east and west thereof, and merchandise received by rail in Alamosa to such points south and west.

The Commission is inclined to believe that the public convenience and necessity does not require the operation of two motor vehicle common carrier lines between Pueblo and Alamosa; that at the most the public convenience and necessity would require only one which could divide its shipments at Alamosa, using smaller trucks to deliver that part of the freight destined south and west therefrom. The public is interested in dependable service. It is contrary to fundamental principles of utility regulation to authorize operation by a second carrier over a route over which another is adequately serving. Likewise, it seems contrary to sound regulation to start out with two until experience has shown that the best interests of the territory require more than one. Certain economies often can be effected by confining the business to one utility. That economies need to be effected on the route in question leading over a mountain divide, sometimes rendered impassable by snow, is obvious when it appears that applicants propose to transport much high class freight for distances ranging from one hundred and thirty-

three to one hundred and sixty-four miles at the "Rule 10" rates of 60 and 65 cents.

While the routes of the applicants are the same to Alamosa, the greater part of the mileage of both routes, they are different to points beyond. We do not believe we can properly grant a certificate to either of the applicants because to grant one would leave some of the towns beyond Alamosa without motor vehicle service. So far as the Commission is advised there may be a possibility of combining these operations and thereby strengthening the financial dependability and service. We believe that under all the facts and circumstances an opportunity should be given to these operators to effect a consolidation of their interests. We, therefore, at this time conclude not to enter an order in this matter until after sixty days from the date of this opinion. In the meantime the Commission will retain jurisdiction over all the issues involved herein.

RE PUBLIC SERVICE COMPANY OF COLORADO.

[Application No. 1230. Decision No. 2085.]

Certificates of convenience and necessity—Electricity—Authority to make extensions authorized by statute—Readiness to serve.

Since Sec. 2946, C. L. Colo., 1921, expressly provides that no utility need secure a "certificate for an extension within any city and county or city or town within which it shall have heretofore lawfully commenced operations, or for an extension into territory, either within or without a city and county or city or town, contiguous to its facility, or line, plant or system, and not theretofore served by a public utility of like character, or for an extension within or to territory already served by it, necessary in the ordinary course of business," the Commission will not grant authority for such extensions, particularly when there is no evidence of any intention to make them.

[March 1, 1929.]

Appearances: D. Edgar Wilson, Esq., Denver, Colorado, attorney for applicant.

STATEMENT.

By the **Commission**: Public Service Company of Colorado, a corporation organized and existing and doing business as a pub-

lic utility under and by virtue of the laws of the State of Colorado, filed its application alleging, *inter alia*, that the applicant heretofore acquired by purchase, and has received conveyance from the trustees of The Summit County Power Company of, all the property and assets of every kind and nature heretofore owned by the latter, including a hydroelectric and an old stand-by steam plant situated near Dillon, and a distribution system located in Summit County and Park County. A very small portion of said distribution system extends over the Summit County line into Park County. The application further alleges that the amount of applicant's investment in the property so acquired is $418,827.00.

It is also alleged that the public convenience and necessity of the communities and territory in which said distribution system is located require the exercise of public utility rights through the use of the property so acquired by the applicant and the continued maintenance and operation thereof in order to furnish said communities and territory electrical current for light, heat, power and other purposes. The application concludes with a prayer for an order "authorizing applicant to exercise the rights hereinabove referred to, and granting to applicant a certificate of public convenience and necessity for the exercise of such rights and for the operations proposed to be carried on by it in the communities and territory located within the County of Summit, State of Colorado, hereinabove referred to, and for the extension, construction, erection, maintenance and operation of its power plants, stations, transmission lines and distribution systems for the generation and distribution of electrical energy in the territory generally described in the foregoing application."

At the hearing it developed that no other similar utility than the applicant and its predecessor is or has been serving in the territory in question; that the distribution system in question is now connected with and has become a part of what is known as applicant's central system, connected with applicant's Valmont steam plant and its Boulder canon hydro plant on the east and its hydro plant at Shoshone and its Leadville steam stand-by

plant on the west. The applicant proposes to make gradual improvements of the system so acquired and to reconstruct its Dillon hydro plant if it can acquire more water.

The town of Dillon filed a statement herein to the effect that before any certificate issues herein the matter of the new franchise should first be settled and that the contract under which the applicant sells to the town of Dillon should be agreed to. The question as to the repairs and changes in the distribution system were gone into at the time of the hearing, and the applicant's witnesses stated that they expect to make considerable repairs and improvements in the distribution system at Dillon. Section 2946 (c) provides 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." Before the Commission can issue a certificate authorizing the applicant to distribute electric energy in the town of Dillon said section should be complied with. This matter will be covered in the order to be entered herein.

After careful consideration of all the evidence, the Commission is of the opinion and so finds that the public convenience and necessity requires that Public Service Company of Colorado be granted a certificate of public convenience and necessity authorizing it to maintain and operate in the territory in question in Summit and Park counties the distribution system, transmission lines, power plants and stations so acquired from The Summit County Power Company, and the authority to transmit into and through said territory power generated at other points on its central system.

Section 2946, C. L. Colo. 1921, known as Section 35, expressly provides that said section shall not be construed to require any corporation to secure a "certificate for an extension within any city and county or city or town within which it shall have heretofore lawfully commenced operations, or for an extension into territory, either within or without a city and county or city or

town, contiguous to its facility, or line, plant or system, and not theretofore served by a public utility of like character, or for an extension within or to territory already served by it, necessary in the ordinary course of its business."

Authority to make such extensions as are specified in the proviso just quoted from obviously need not be given by this Commission. At the hearing there was no evidence of any intention to make or of any public need for any definite extensions of lines, construction or reconstruction of plants requiring authority from this Commission. Therefore, no authority with reference to any extensions, construction or reconstruction other than that granted by the statute should at this time be granted

ORDER.

IT IS THEREFORE ORDERED, That the public convenience and necessity requires that the applicant, Public Service Company of Colorado, be granted authority to maintain and operate in the territory in question, in Summit and Park counties, the distribution system, transmission lines, power plants and stations so acquired from The Summit County Power Company, and to transmit into and through said territory power generated at other points on its central system, 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 certificate of public convenience and necessity herein granted shall not become effective as to the town of Dillon until the applicant has filed with this Commission the required consent, franchise, permit or ordinance from said town, and a certificate has been issued authorizing exercise of the rights and privileges therein contained.

IT IS FURTHER ORDERED, That the applicant, Public Service Company of Colorado, shall file its tariffs, rate schedule and rules and regulations as required by this Commission within twenty days from the date hereof.

RE DAVID TROGLER, JR.

[Case No. 383. Decision No. 2095.]

Common carriers—Automobiles—Jurisdiction of Commission.

1. The Commission has jurisdiction over only those motor vehicle operations described and defined in Chapter 134, Session Laws, 1927.

Commissions—Jurisdiction—To administer and enforce Chap. 134, S. L. 1927.

2. The Commission has jurisdiction to administer and enforce any and all provisions of the act, Chapter 134, Session Laws, 1927.

Procedure—Informality.

3. Under the Public Utilities Act no informality shall invalidate any proceeding before or by the Commission.

Common carriers—Automobiles—Payment of fee under Chap. 135, S. L. 1927—Effect.

4. The fact that a tax or fee was paid under Chapter 135, Session Laws, 1927, does not give one the right to operate as a motor vehicle carrier, as defined in Chapter 134, Session Laws, 1927.

[March 12, 1929.]

Appearances: Joseph K. Bozard, Esq., Steamboat Springs, Colorado, for respondent; Elmer L. Brock, Esq., Denver, Colorado, for The Denver and Salt Lake Railway Company, protestant.

STATEMENT.

By the **Commission**: On September 13, 1928, the Commission on its own motion issued a citation requiring the respondent herein to show cause why an order should not be entered by this Commission requiring him to cease and desist from operating as a motor vehicle carrier as defined under our law. This matter was set down for hearing in the courthouse in Steamboat Springs, Colorado, on September 26, 1928. An answer was filed by the respondent which, in order to dispose of the legal questions raised, will be considered as a motion to dismiss. No evidence was taken except that it was admitted that the respondent

paid the tax under Chapter 135 of the Session Laws of Colorado for the year 1927.

The first question raised by the answer is that the statement and order does not state facts sufficient to constitute a cause of action, or upon which to base an order to show cause. This objection is good as to the first paragraph of the statement in which the respondent is only referred to as conducting motor vehicle operations for hire. The Commission has jurisdiction only over motor vehicle carriers as defined in Chapter 134, Session Laws, 1927.

The second paragraph of the statement, however, contains allegations sufficient to base thereon an order of citation to show cause. It is alleged that the respondent is unlawfully operating as a motor vehicle carrier between Steamboat Springs, Colorado, and Denver, Colorado, without a certificate of public convenience and necessity and without payment of the tax imposed upon motor vehicle carriers as provided by law in House Bill No. 430, which is Chapter 134, Session Laws, 1927.

The second point raised is that it does not appear from the order or from anything contained therein that this Commission has jurisdiction over any matters alleged in the order or statement. This Commission has jurisdiction to administer and enforce any and all provisions of the act. Furthermore, under the Public Utilities Act (Sec. 2947, C. L. Colo. 1921) no informality in any proceeding before the Commission shall invalidate any order approved or confirmed by the Commission. It is our opinion, therefore, that there is no merit in respondent's contention that this Commission has no jurisdiction over the matters involved.

The tax paid by the respondent under Chapter 135 of the Session Laws of 1927 is no defense to this citation. The requirement of payment of this tax does not apply to motor vehicle carriers as defined in Chapter 134, Session Laws of 1927.

Under these circumstances an order will be entered overruling respondent's motion to dismiss.

ORDER.

IT IS THEREFORE ORDERED, That respondent's motion to dismiss be, and the same is hereby, overruled.

IT IS FURTHER ORDERED, That respondent may have ten days from the date of this order to further answer the citation issued herein.

RE W. F. CONWAY, *et al.*, DOING BUSINESS AS CONWAY BROTHERS.

[Application No. 621B. Decision No. 2097.]

Monopoly and competition—Automobiles—Increase of equipment—Adequacy of service and equipment already afforded public.

1. The Commission will not issue additional motor vehicle certificates of convenience and necessity when evidence indicates that the services and equipment of other operators is adequate to serve the territory in question.

Monopoly and competition—Automobiles—Inability of one only of many carriers to serve patrons available—Purchase of hotel.

2. The mere fact that a firm having a sightseeing motor vehicle certificate has bought a hotel and has more business than it can take care of with its authorized equipment is no ground for authorizing it to increase equipment when evidence shows that total authorized equipment in the district is adequate to take care of all business available.

[March 12, 1929.]

Appearances: Frank R. Conway, Esq., Colorado Springs, Colorado, for Conway Brothers; F. C. Matthews, Esq., Colorado Springs, Colorado, for Pikes Peak Auto Company.

STATEMENT.

By the **Commission**: The applicants herein conduct a sightseeing motor vehicle carrier operation in the Pikes Peak region. The certificate issued to them limits their equipment to fifteen automobiles. They ask for an increase in this equipment from fifteen to thirty automobiles.

A public hearing was had on this matter at Colorado Springs on March 6, 1929. The applicants give as a reason for the application that they have purchased the Alamo Hotel and, there-

fore, will need the additional equipment. The applicants operate also the Alta Vista Hotel and conduct a sightseeing service from that place.

The Commission assumed jurisdiction over the sightseeing motor vehicle operations in the Pikes Peak region after the decision by the Supreme Court of this State in the case of Greeley Transportation Company v. People, 79 Colo. 307, and on March 29, 1927, issued a certificate of public convenience and necessity to practically all such motor vehicle operators who were then and for some time previously had been in this particular transportation business. The Commission in taking that view felt that under all the circumstances, as well as the record made in the hearings, that it would be fair and proper to issue a certificate to all sightseeing operators then engaged in the business, limiting them, however, to the equipment they were then using. In 1927 the Commission issued certificates for one year only in order that they would have the benefit of one year's experience before issuing unlimited certificates as to time.

In 1928 further hearings were held on all applications and in that hearing the testimony showed that the applicants were operating fifteen automobiles. Hence the Commission permitted them to use fifteen automobiles but as in all other similar applications limited them to the equipment they were then using.

There is no testimony in the record that the present automobile equipment available to the sightseeing public at Colorado Springs is not sufficient to meet all needs. In fact, the testimony indicates that there now is sufficient equipment, except perhaps during peak loads, which would only be several days during the season. If the Commission would authorize an increase in equipment solely for the reason that the applicants have purchased an hotel, that would open up the door to an increase in equipment by certain operators conducting hotels and place in idleness equipment of other operators. This, in our opinion, would create an unhealthy situation and would tend to affect the financial dependability of certain authorized operators. Moreover, this Commission has no jurisdiction over the hotel business, but is solely concerned with reasonable transportation conditions.

Only when the equipment available to the sightseeing public is not sufficient to meet their reasonable demands should this Commission grant an increase. In our opinion, the record does not disclose that the present available equipment for sightseeing operations is at this time insufficient and an order will, therefore, be entered denying the same.

ORDER.

IT IS THEREFORE ORDERED, That the application of W. F. Conway and Frank R. Conway, doing business as Conway Brothers, No. 621B, for an increase in equipment, be, and the same is hereby, denied.

RE COMBINATION TRIPS AND RATES.

[Case No. 389. Decision No. 2105.]

Commissions—Automobiles—Jurisdiction—Combination trips.

1. The Commission expressed doubt whether it has power to require motor vehicle operators serving the public by making certain trips to make any particular combination trip and rate.

Service—Automobiles—Requirement of combination trips.

2. The public convenience and necessity does not require that an order be made requiring all sightseeing motor vehicle operators to make a combination trip when the public will have ample opportunity to make such a trip with some 28 of the operators in the territory in question who desire voluntarily to offer such a trip to the sightseeing public.

[March 16, 1929.]

Appearances: David P. Strickler, Esq., Colorado Springs, Colorado, attorney for petitioners; Fred Matthews, Esq., Colorado Springs, Colorado, attorney for The Pikes Peak Automobile Company; J. C. Williams, Colorado Springs, Colorado, for The Buster and Williams Touring Company.

STATEMENT.

By the **Commission**: Some twenty-eight of the motor vehicle sightseeing operators of the Pikes Peak region filed a written instrument in the nature of a complaint and a petition. The sight-

seeing operators generally in that region have provided in their tariffs two trips as follows:

"5. CHEYENNE MOUNTAIN CIRCLE.....$3.00
Garden of the Gods, Manitou, So. Cheyenne Canon and Seven Falls, Broadmoor-Cheyenne Mountain Highway.

"13. COMBINATION TRIP.....$4.00
Garden of the Gods, Cave of the Winds, So. Cheyenne Canon and Seven Falls, Broadmoor-Cheyenne Mountain Highway."

It is generally understood and agreed that of the total fare for each of the said trips $1.00 is for that portion of the trip leading through Broadmoor up the Cheyenne Mountain Highway.

There is a highway from Colorado Springs to the Cripple Creek district which is constructed over the old right-of-way of the railroad line known as the Cripple Creek Short Line. This highway is known as the Corley Mountain Highway and is privately owned by The Corley Mountain Highway Company, which charges a toll for its use.

Seven Falls is located in South Cheyenne Canon. The entrance to the canon is near the entrance to North Cheyenne Canon. The latter canon leads up a comparatively short distance to the Corley Mountain highway. When descending from South Cheyenne Canon it is possible to turn up North Cheyenne Canon and return to Colorado Springs over the eastern portion of the Corley Mountain Highway instead of returning through the more level flat country to the east. The portion of the Corley highway thus traveled is called the "Short Corley," while the highway from end to end is called the "Long Corley."

The petition and complaint herein alleges that the rates specified for the two said trips "are unreasonable in that they do not permit the passengers to have the option of an additional trip over what is known as the 'Short Corley' upon the payment of an additional fare of $1.00 for each passenger." The prayer reads:

"WHEREFORE, Petitioners pray that all sightseeing operators in the Pikes Peak region, other than your petitioners, be severally required to answer the charges herein, and that after due

hearing and investigation an order be made requiring all operators in the Pikes Peak region to include what is known as the Short Corley trip in their trips specified in their schedules Nos. 5, Cheyenne Mountain Circle, and 6, Cave of the Winds Circle, at the option of the passenger for an additional compensation of $1.00 per passenger, and to make said order effective as soon as may be deemed advisable by your Honorable Commission."

In years past tourists who have been transported up South Cheyenne Canon, whether on a single trip to the canon or on a combination trip thereto, have had the privilege of returning over the Short Corley for $1.00 extra fare. The trip from South Cheyenne Canon to Colorado Springs via the Short Corley is only five and a fraction miles longer than over the plains road. If a car making a trip to South Cheyenne Canon includes a trip to the summit of Cheyenne Mountain, some eighteen miles more are traveled. For some reason or other the combination trip via the Short Corley has been abandoned and does not appear in the tariffs of the various operators, while a combination trip to Cheyenne Mountain apparently has been substituted.

While many of the operators have signed the complaint and petition herein, the moving spirit appears to be The Corley Mountain Highway Company. It showed that its toll revenue for travel over the Short Corley in 1928 was some 50 per cent less than when the Short Corley combination trip was offered.

There is provided in the various tariffs on file with the Commission a so-called Short Corley trip, the fare being $2.00. This trip leads to or near a point where passengers would come upon said highway after returning from South Cheyenne Canon.

It appeared in evidence that probably some of the operators had been returning to Colorado Springs from South Cheyenne Canon over the Short Corley, making an extra charge of $2.00, although they have on file no such combination route or tariff therefor. The Commission doubts whether any combination trip not provided for in the tariffs should be made. It is quite clear from the evidence that if such a combination trip is made, an extra fare of $2.00 is unreasonable, because $2.00 is thus charged

for only some five additional miles, while the mileage of the Short Corley trip alone is some three times as great.

The reason given why some operators do not want to make a combination trip over the Short Corley is that after passengers have traveled over a portion of the Corley Mountain Highway in returning from South Cheyenne Canon they do not desire to take the full trip over the Long Corley. These operators therefore prefer not to route any combination trips over the Short Corley.

This brings us to the most important question in the case, namely, whether the Commission has power or ought to require the carriers to make a certain trip which they do not desire to make. It is not merely a matter of rates.

Sec. 2934 (b), C. L. 1921, 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, or any number thereof, or the entire schedule or schedules of rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts, and practices, or any thereof, of any public utility, and to establish new rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts or practices, or schedule or schedules, in lieu thereof."

There is serious question whether the authority contained in the matter just quoted is broad enough to authorize this Commission to require operators serving the public on certain trips to make any particular combination trips. Assuming, without deciding, that the Commission has the power, we are of the opinion that the public convenience and necessity does not require the exercise thereof in this case. As was stated, twenty-eight operators desire to offer the combination trips to the public. The public will thus at all times have an opportunity of taking the trips. We see no reason why the operators, who desire to make the combination trips, may not do so, even though some of the other operators do not see fit to follow suit.

However, no operators will be permitted to make the com-

bination trips unless a tariff therefor is on file with the Commission.

The Commission finds that the extra fare charged for going to or returning from South Cheyenne Canon via the Short Corley should not exceed $1.00.

ORDER.

IT IS THEREFORE ORDERED, That all of those operators in the Pikes Peak region who are parties hereto may, if they so desire, file a tariff providing for combination trips by which in going to or returning from South Cheyenne Canon the route shall lead over the Short Corley; that the increase in the fare on any such trip by reason of traveling over the Short Corley shall not exceed $1.00.

IT IS FURTHER ORDERED, That no combination trips over said highway as aforesaid shall be made unless a tariff providing therefor is on file with this Commission.

IT IS FURTHER ORDERED, That the complaint insofar as it seeks an order requiring all said operators to make a combination trip by which sightseers going to or returning from South Cheyenne Canon shall be transported over the Corley Mountain Highway be, and the same is hereby, denied.

RE THE COLORADO & SOUTHERN RAILWAY COMPANY.

[Investigation and Suspension Docket No. 105. Decision No. 2108.]

Common carriers—Railroads—Efficient and economical management—Transportation Act of 1920.

1. The Transportation Act of 1920 requires of railroads engaged in interstate commerce "efficient and economical management."

Service—Railroads—Loss on passenger service—Abandonment.

2. The fact that a rail carrier is losing money on its passenger service is not controlling on the question of abandonment thereof.

Service—Railroads—Abandonment of passenger service—Real question—Reasonable necessity.

3. The real question, when a rail carrier desires authority to discontinue passenger service on a branch line, is whether such service is reasonably necessary in addition to other transportation facilities available.

Service—Railroads—Abandonment—Adequate service by bus.

4. When passenger transportation service offered by a bus line is reasonably sufficient to meet all the requirements of the public, to require a rail carrier to continue its passenger service conducted at a loss, would be arbitrary and in violation of the duty of the Commission.

[March 21, 1929.]

Appearances: J. Q. Dier, Esq., Denver, Colorado, for The Colorado and Southern Railway Company; Irwin M. Cunningham, Esq., Windsor, Colorado, and E. H. Houtchens, Esq., Greeley, Colorado, for the town of Windsor, *et al.*, protestants; Thomas Keeley, Esq., Denver, Colorado, for The Colorado Motor Way, Inc.

STATEMENT.

By the **Commission**: The Colorado and Southern Railway Company filed with the Commission a written instrument called a petition, in which it stated that it proposes to, and unless directed to the contrary by this Commission will, discontinue all its passenger service now being operated between Fort Collins and Greeley, Colorado, consisting "of two gasoline motor cars each way daily." The service for some time past has been rendered by one railroad motor car which has made two trips each way daily. The schedule has been as follows:

Leave Greeley 6:50 a. m.	Arrive Fort Collins 7:55 a. m.
Leave Fort Collins 11:00 a. m.	Arrive at Greeley 12:05 p. m.
Leave Greeley 2:05 p. m.	Arrive at Fort Collins 3:10 p. m.
Leave Fort Collins 5:45 p. m.	Arrive at Greeley 6:50 p. m.

The reasons alleged for said proposed discontinuance are that in 1923 this Commission granted to the Colorado Motor Way, Inc., a certificate authorizing the transportation by motor bus of passengers, parcels and small packages between Greeley and Fort Collins via Windsor; that at all times since said Motor Way has maintained motor bus operations between Greeley and Fort Collins in accordance with the conditions of the certificate

and the rules and regulations of the Commission, said operations consisting until April 1, 1926, of two round trips daily; that on or about April 1, 1926, said Motor Way increased its service and since has been and is now operating three round trips daily upon approximately the following schedule:

Greeley:	Windsor:	Fort Collins:
Lv. 7:30 a. m.	Lv. 8:05 a. m.	Ar. 8:50 a. m.
Lv. 1:10 p. m.	Lv. 1:45 p. m.	Ar. 2:30 p. m.
Lv. 4:55 p. m.	Lv. 5:30 p. m.	Ar. 6:15 p. m.
Fort Collins:	Windsor:	Greeley:
Lv. 9:15 a. m.	Lv. 10:00 a. m.	Ar. 10:30 a. m.
Lv. 2:40 p. m.	Lv. 3:25 p. m.	Ar. 4:00 p. m.
Lv. 6:25 p. m.	Lv. 7:10 p. m.	Ar. 7:45 p. m.

It is further alleged that the operation by the petitioner of said passenger service between Fort Collins and Greeley has been unremunerative and conducted at a loss for a great many years; that the loss has increased since the inauguration of said bus service, particularly since the operation of three round trips daily; that such loss will be increased still more when the Motor Way places in service new parlor-coach type of equipment on its Greeley-Fort Collins route, as publicly announced to be its intention.

It is alleged also that the existing rail passenger service in view of the very slight public use thereof, constitutes and is an unjustifiable and extravagant service, unwarranted and unnecessary so far as the public convenience and necessity is concerned and one which in the interest of honest, economical and efficient management should be discontinued; that there is not enough passenger traffic on the route in question to be divided between two common carriers; that the busses of the Motor Way can be operated much cheaper than the rail service of the petitioner, while three round trips by bus each day afford a much more convenient service than the two trips via the railroad; that it is therefore to the public interest, both from the standpoint of cost and convenience, that said passenger rail service be discontinued.

It is further stated that said Motor Way proposes, if said proposed passenger rail service is discontinued, to revise its

schedules and operate its busses between Greeley and Fort Collins as follows:

GREELEY TO FORT COLLINS

Leave Greeley	Arrive and Leave Windsor	Arrive Fort Collins
7:00 a. m.	7:40 a. m.	8:15 a. m.
10:00 a. m.	10:40 a. m.	11:15 a. m.
4:15 p. m.	4:55 p. m.	5:30 p. m.

FORT COLLINS TO GREELEY

Leave Fort Collins	Arrive and Leave Windsor	Arrive Greeley
8:30 a. m.	9:10 a. m.	9:45 a. m.
11:20 a. m.	12:00 Noon	12:35 p. m.
5:45 p. m.	6:25 p. m.	7:00 p. m.

that the Motor Way will also operate a truck for the transportation of heavy baggage, heavy express and bulky parcel post mail, leaving Greeley about 10:00 a. m. shortly after the arrival in Greeley at 9:45 a. m. of Union Pacific train No. 103 from Denver, and returning leaving Fort Collins at 5:50 p. m. or shortly after the arrival at Fort Collins at 5:40 p. m. of Colorado and Southern passenger train No. 23 from Denver, the running time in each direction of said truck to be about two hours; that light express, small parcels, newspapers and first class mail will be handled by the passenger busses.

Protests were filed by the Windsor Community Club, the Board of Trustees of the Town of Windsor by the Mayor of said town, the Chamber of Commerce of Fort Collins, and some 32 citizens of the town of Windsor.

An investigation and suspension order was issued and a hearing was had.

The protests state generally that the public convenience and necessity of the town of Windsor and its inhabitants require the continuance of the railroad passenger service; that the service of the Motor Way is not an adequate substitute for the rail service; that the financial strength of the Colorado and Southern is so much greater than that of the Motor Way and that the former's continued ability to serve is more certain; that the Motor Way is capable of making a sudden and complete with-

drawal from its service; that during severe storms it would often be impossible for the bus company to maintain its service, whereas storms would not hinder travel by rail to any substantial extent, and that the bus service offers a smaller degree of protection for valuable mail and express shipments than that afforded by the railroad company.

It is further alleged that so far as rail service is concerned, the abandonment of passenger service by the petitioner would make of Windsor an inland town which could not be reached by rail, resulting in the inability of persons outside of the State to find the name of Windsor on railroad guides and express rate books; that this would result in a decrease of the prestige of the town and in a decrease in value of the real estate of the town and a general business deflation therein, and more difficulty in attracting newcomers for business and residential purposes.

It is averred also that the petitioner having once established the service of a common carrier for the said town, thereby accepts the responsibility of continuing said service; that consistent earnings of the petitioner are sufficient to, and should be made to bear the loss of the particular passenger train service in question; that transfer from busses to the trains in Fort Collins and Greeley would be an inconvenience and would constitute a major deterrent to travelers planning trips to Windsor.

Further matter of a more or less argumentative nature is alleged, dealing with the greater taxes paid by the railroad company, the alleged insufficient taxes paid by the Motor Way, the damage to the highways caused by motor vehicles, the continued steady growth of the town of Windsor, the lack of responsibility on the part of the town for the loss suffered by the petitioner by reason of the operation of the motor busses, etc.

The following table shows a comparison of the passenger business done by the petitioner in the years 1923, 1927 and 1928:

	Total Number Passengers Carried	Average Number of Passengers Per Train	Average Revenue Per Day
1923	33,098	22 plus	$58.14
1927	10,048	7 plus	19.50
1928	7,038	4 plus	12.88

The Motor Way carried during the year 1928 11,456 passengers, as compared with 7,038 carried by the petitioner. However, the evidence shows that the Motor Way lost per trip in 1927 $2.58, in 1928 $2.94, and that its total net loss for 1927 was $5,646.16 and 1928 $6,445.21.

The highway traveled by the Motor Way busses between Greeley and Fort Collins parallels the railroad line, although the highway as it is at present laid out is at points some distance from the railroad line. However, there was no evidence showing that the stations of the railroad company are more convenient than the stopping places of the busses.

The Transportation Act of Congress, 1920, requires of railroads, such as the applicant, engaged in interstate commerce "efficient and economical management." The petitioner states that efficient and economical management requires the abandonment of the passenger service in question. The people of the town of Windsor, proceeding on the correct assumption that the abandonment of the passenger service can be made only if the public can reasonably well get along without the service, conclude to the contrary.

As we have heretofore pointed out, passenger transportation by rail has been and still is on a general decline in this State as well as in other parts of the country, especially as to short distances of travel. We have also expressed the opinion, which we still hold, that this decline is due principally to the use of privately owned automobiles. This is shown by the fact that in 1923 the total number of passengers carried by the petitioner on the branch line in question was 33,098, whereas the total number carried by it and the Motor Way, the only two common carriers operating in the territory in question, in 1928, was only 18,494, a total loss in five years of almost 60 per cent of the passenger business done in a territory with a growing population.

The fact that the carrier is losing money on its passenger service is not controlling. The real question is, is the passenger train service reasonably necessary in addition to other transportation facilites now offered. If there were no other passenger facilities, the Commission's problem would be simple. Passenger

service by rail doubtless would be held to be a necessity. However, if the transportation facilities offered by the Motor Way are reasonably sufficient to meet all the reasonable requirements of the public, then to require the railroad company to continue its passenger train service would be arbitrary and in violation of the duty of the Commission.

The railroad company has offered to carry Windsor in its passenger time table and to undertake to see that baggage and express are handled in the future, as they have been in the past, except only that transportation will be by bus instead of rail. The Motor Way undertakes to make desirable connections with the trains, both in Fort Collins and in Greeley.

The Motor Way is strong financially, and may not abandon service without authority from this Commission.

With respect to the fear of the Windsor people that snow will prevent regular operation by the Motor Way, the evidence shows that during the past winter up to February 14, the date of the hearing, there had been but one breakdown which caused a delay of forty minutes, and that only four times was a bus late. Moreover, while the Motor Way had been operating over the route in question between five and six years, there was no evidence of any serious interruption of service.

The Motor Way proposes, as is alleged in the petition, to operate a truck for the transportation of heavy baggage, parcel post and heavy express. The light baggage, express and parcel post will be carried in a compartment to be built in a 29-passenger bus, leaving 20 seats available for passengers.

After careful consideration of the evidence, the Commission is of the opinion and so finds that the transportation facilities of Colorado Motor Way, Inc., will meet all the requirements of the traveling public between Fort Collins and Greeley beginning May 1, 1929. Out of an abundance of caution it has concluded to retain jurisdiction over the case for one year and for such further time, if any, as shall be necessary to hear and dispose of any such application, as is hereinafter described, which may be filed asking for reinstatement of the passenger rail service.

It is of the opinion, however, that authority to abandon rail passenger service should be on conditions hereinafter imposed.

ORDER.

IT IS THEREFORE ORDERED, That the public convenience and necessity requires that The Colorado and Southern Railway Company be, and it is hereby, authorized to discontinue its passenger and express service on the Fort Collins-Greeley branch subject to the following conditions:

(a) The Railway Company shall cause to be maintained by Colorado Motor Way to and from all points on said Fort Collins-Greeley branch situated on the Fort Collins-Greeley highway substantially the same express and baggage service as is now in effect by rail.

(b) The Railway Company shall cause to be maintained such express and excess baggage rates as will not exceed those that would exist with the continuance of the rail passenger service.

(c) The Railway Company shall restore said passenger rail service if and when the operation of motor bus service shall for any reason be discontinued, or shall at any time be found by this Commission to be inadequate, unsafe and/or insufficient to serve the needs of the territory involved.

IT IS FURTHER ORDERED, That the Commission, and it does hereby, retain jurisdiction over this matter for a period of one year from May 1, 1929, and for such additional period, if any, as shall be required to hear and dispose of any such application or applications as may be filed herein within one year from May 1, 1929, by the town of Windsor, the Windsor Community Club, Fort Collins Chamber of Commerce, or any twenty citizens and taxpayers of the town of Windsor, asking for an order for the restoration of the rail passenger service.

RE HARVEY COX.

[Case No. 394. Decision No. 2116.]

Pleadings—Automobiles—Order to show cause and answer that respondent is private carrier—Issue raised.

1. An order requiring respondent to show cause why he should not be required to cease and desist from operating as a "motor vehicle carrier," and an answer alleging that he is a private carrier, raise the issue whether he is a common or private carrier.

Procedure—Automobiles—Absence of formal complaint—Effect on order to show cause.

2. The fact that no copy of a complaint, there being no formal complaint filed, was served upon the respondent is not fatal to an order, made on the Commission's own motion, requiring him to show cause why an order should not be made requiring him to cease and desist from operating as a motor vehicle carrier.

Automobiles—Power of State—Adoption of reasonable regulations—Use of highways for commercial purposes.

3. The State has the power to adopt reasonable regulations concerning the use of the public highways for commercial purposes.

[March 22, 1929.]

STATEMENT.

By the **Commission**: On February 16, 1929, this Commission entered and issued its "Statement" and "Order" herein (Decision No. 2067), a copy of which was duly served on the respondent, Harvey Cox.

Said "Statement" and "Order" is in words and figures as follows, to-wit:

"Complaint has been made to this Commission against Harvey Cox that he is operating as a motor vehicle carrier of freight between Denver, Colorado Springs and Pueblo, Colorado, and other points in those vicinities, and that he is holding himself out to the public as a motor vehicle carrier of freight at and between said named places without a certificate of public convenience and necessity from this Commission.

"The information submitted to this Commission as to his operations is such as to cause sufficient grounds to exist to make an investigation and for it to issue an order requiring the respond-

ent, Harvey Cox, to show cause why an order should not be entered by this Commission requiring him to cease and desist from operating as a motor vehicle carrier as defined in Chapter 134, Session Laws of 1927.

"ORDER.

"IT IS THEREFORE ORDERED, That Harvey Cox be, and he is hereby, ordered to show cause by written statement filed with the Commission within ten days from the date hereof, why this Commission should not enter an order requiring him to cease and desist from operating as a motor vehicle carrier as defined in Chapter 134, Session Laws of 1927.

"IT IS FURTHER ORDERED, That this matter be set down for hearing before the Public Utilities Commission of the State of Colorado at its Hearing Room, 305 State Office Building, Denver, Colorado, on February 27, 1929, at 10:00 a. m., at which time said respondent shall appear and give such testimony and introduce such evidence relating to his operations as may be proper."

On March 2, 1929, the respondent, through his attorneys, filed his answer thereto in writing. Said answer, although somewhat ambiguous and in many instances rather irrelevant, purports in the main to raise the following objections and questions, to-wit:

1. That the respondent operates as a private carrier by virtue of certain contracts, rather than as a motor vehicle carrier as defined by law.

2. That the respondent should be, and has not been, furnished with a copy of the complaint and the names of the complainants.

3. That the Public Utilities Commission lacks jurisdiction of this matter.

4. That said order be dismissed.

The first objection raised by the respondent is that he is a private carrier operating under certain alleged contracts and is not a motor vehicle carrier. The "Statement" and "Order" of the Commission cites the respondent before it to show cause why

it should not stop him from operating as a motor vehicle carrier unless and until he should obtain a certificate of public convenience and necessity for such operations. The respondent answered, alleging himself to be a private carrier. This answer squarely puts at issue the question of whether or not the respondent is or is not a motor vehicle carrier as defined in Chapter 134, Session Laws of Colorado, 1927. We think this question is properly determinable before the Commission.

The second objection of the respondent, that he has not been furnished with a copy of the complaint, is not a material objection, but we will discuss it for respondent's information. Section 2954, C. L. 1921, provides that:

"* * * Upon the filing of a complaint the Commission shall cause a copy thereof to be served on the corporation or person complained of."

Section 2947, C. L. 1921, provides that:

"* * * No informality in any proceeding or in the manner of taking testimony before the Commission or any commissioner shall invalidate any order, decision, rule or regulation made, approved or confirmed by the Commission."

In any event, this objection does not extend beyond an informality, which is not fatally defective, and does not entitle the respondent to a dismissal.

Reliance is placed on the word "complaint" as used in Section 2954, C. L. 1921 (*supra*) and obviously the term "complaint" in said Section 2954 is not used in the same sense as in said "Statement" of February 16, 1929. The statute evidently refers to a formal complaint and in this case no formal complaint was filed and hence no copy thereof is available for service on the respondent. The Commission's order to show cause sufficiently advises the respondent of the alleged illegal operations which are being investigated and alleges that the investigation is on the Commission's own motion.

We have no doubt but that the Commission has authority to order the respondent before it on the Commission's own motion without the filing of a formal complaint. Section 2947, C. L. 1921, provides:

"All hearings and investigations before the Commission or any commissioners shall be governed by this act and by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof neither the Commission nor any commissioner shall be bound by the technical rules of evidence. No informality in any proceeding or in the manner of taking testimony before the Commission or any commissioner shall invalidate any order, decision, rule or regulation made, approved or confirmed by the Commission."

In accordance therewith the Commission has adopted certain rules of procedure and Rule VIII, Section 5, thereof, entitled "Investigations on Commission's Own Motion," provides:

"The Commission may at any time, of its own motion, make investigations and order hearings into any act or thing done or omitted to be done by any public utility, which the Commission may believe is in violation of any provision of law or of any order or rule of the Commission. * * *"

Objection 3 attacks the Commission's jurisdiction. Section 14 of the Public Utilities Act, which is Section 2925, C. L. 1921, provides:

"The power and authority is hereby vested in the Public Utilities Commission of the State of Colorado, and it is hereby made its duty to adopt all necessary rates, charges, and regulations to govern and regulate all rates, charges and tariffs of every public utility of this State as herein defined, the power to correct abuses, and prevent unjust discriminations and extortions in the rates, charges and tariffs of such public utilities of this State and to generally supervise and regulate every public utility in this State and to do all things, whether herein specifically designated, or in addition thereto, which are necessary or convenient to the exercise of such power, and to enforce the same by the penalties provided in this act, through proper courts having jurisdiction."

Section 57 of the Public Utilities Act, which is Section 2966, C. L. 1921, provides:

"It is hereby made the duty of the Commission to see that the provisions of the constitution and statutes of this State affecting

public utilities, the enforcement of which is not specifically vested in some other officer or tribunal, are enforced and obeyed, and that violations thereof are promptly prosecuted and penalties due the State therefor recovered and collected, and to this end it may sue in the name of the people of the State of Colorado."

Section 18 of Chapter 134, Session Laws of Colorado, 1927, provides:

"The Commission shall supervise and regulate all motor vehicle carriers and shall promulgate such safety rules or regulations as it may deem wise or necessary to govern and control the operation of motor vehicles by them, and shall enforce the same as herein provided."

We do not think the objection as to the authority and jurisdiction of the Commission is good under the ruling of the Colorado Supreme Court in the case of Greeley Transportation Company v. People, 79 Colo. 307, 315, wherein the court said:

"Defendant stoutly maintains its constitutional right to engage in a lawful business and the invalidity of any statute prohibiting it. The general principle may be admitted, but when the business is affected with a public interest, as is that of a common carrier, the right of the public to say under what conditions it shall operate is beyond question. When the common carrier seeks to utilize public property, such as streets and highways, in the operation of that business, objection and authority become twofold. One may have an unquestionable constitutional right to engage in a legal mercantile business, but he has no right to establish that business in the corridors of the State House. Were the law otherwise the very citizens who build and maintain these avenues of travel might be entirely driven from them by usurpers."

In Packard v. Banton, 264 U. S. 140, 144; Interstate Busses Corp. v. Holyoke St. Ry. Co., 273 U. S. 45, 52; Clark v. Poor, 274 U. S. 554, it is held that the right of the State to adopt reasonable regulations concerning the use of the public highways for commercial purposes such as the operation of busses or truck lines for hire is no longer open to question.

Respondent's motion to dismiss deserves little consideration here because on all the points it appears to raise we have already decided contrary to his contentions. However, inasmuch as this case must be reset for another hearing, we will dismiss the present case and issue a new order causing the respondent to show cause, if any he have, why he should not be ordered to cease and desist from operating as a motor vehicle carrier as provided by law, unless and until he shall be authorized to so operate.

ORDER.

IT IS THEREFORE ORDERED, That Case No. 394, entitled "*In Re* Motor Vehicle Operations of Harvey Cox," be, and the same is hereby, dismissed without prejudice.

RE PUBLIC SERVICE COMPANY OF COLORADO.

[Application No. 1219. Decision No. 2120.]

Commissions—Jurisdiction—Public utilities—Rates—Home-rule cities.

1. It is now elementary in Colorado that, except in home-rule cities, the power to regulate rates of public utilities is vested exclusively in the Commission.

Rates—Commission—Jurisdiction—Franchise—Gas.

2. The Commission will take no action purporting to validate provisions of an ordinance fixing rates to be charged by a utility, particularly when the hearing had no rate aspect whatever.

Franchises—Gas plant—Construction or purchase—Evidence of convenience and necessity.

3. A franchise right granted by a municipality authorizing the construction, purchase, etc., of a gas plant may not be exercised in the absence of any showing as to public convenience and necessity.

[March 30, 1929.]

Appearances: George H. Shaw, Esq., Denver, Colorado, attorney for applicant.

STATEMENT.

By the **Commission**: Public Service Company of Colorado, a corporation, filed with the Commission an application alleging:

"That there is now pending before the Board of Trustees of

said town of Littleton the application of this petitioner for a franchise, and the ordinance introduced on said application was passed on October 17, 1928, which ordinance is entitled:

"'An Ordinance granting a Franchise to Public Service Company of Colorado, its successors and assigns, to construct, purchase, maintain and operate a plant or plants and works for the purchase, manufacture, generation, transmission and distribution of artificial and natural gas and to furnish, sell and distribute said products to the said town of Littleton and the inhabitants thereof for heat, power or other purposes by means of pipes, mains and conduits or therwise, over, under, along, across and through all streets, alleys, viaducts, bridges, roads, lanes, public ways and places in said town of Littleton, subject to the vote of the qualified taxpaying electors thereof and fixing the terms and conditions thereof and providing for rates, and calling a special election to determine whether or not such franchise shall be approved.'

and which franchise so applied for is to have a term of twenty (20) years from and after the passage, approval and publication of said ordinance, and approval by the qualified taxpaying electors at a special election to be held for such purpose, in said town, on the 27th day of November, 1928."

The application further alleged that the applicant desires to exercise the rights and privileges under the aforesaid franchise which it contemplates securing, but which has not yet been granted it, and sought an order from this Commission preliminary to the issuance of the certificate of convenience and necessity, as provided by Section 2946, C. L. Colo., 1921.

When the case came on for hearing, the evidence showed that the said ordinance had been submitted to a vote of the qualified taxpaying electors and that it had been approved by said electors by a vote of 284 to 3.

At the hearing it also developed that the applicant had not obtained a certificate of public convenience and necessity to construct and operate a system for the distribution of gas in the town of Littleton, and at its suggestion the Commission granted

leave to it to file an amended application so that that matter also could be determined at the same hearing.

No other utility is or has been engaged in the distribution of gas in said town. The applicant proposes to furnish gas to be purchased by it from Colorado Interstate Gas Company, which will deliver the gas to the applicant at or near the north boundary of said town.

The capital investment of the applicant in the town of Littleton during the first year of the exercise of the said franchise rights will be some $27,000.00.

There was no evidence that the public convenience and necessity requires the applicant to construct, purchase, maintain and operate a plant or plants for the manufacture or generation of gas. Neither was there any evidence of any desire on the part of the applicant so to do.

Immediately following the title of the ordinance in question appears the following:

"WHEREAS, Public Service Company of Colorado has perfected arrangements for supplying artificial and natural gas to the people of the town of Littleton, provided a franchise be granted to said Company and provided a schedule of rates which would justify its expenditures on this account be established for a term of twenty (20) years, and

"WHEREAS, said Public Service Company of Colorado must construct a distributing system to provide for natural gas and must agree to pay a fixed and unchanging price for such natural gas throughout said period of twenty (20) years."

It is now elementary in Colorado that, except in home-rule cities, "the power to regulate the rates of" public utilities "is vested * * * exclusively in the Public Utilities Commission." Denver & South Platte Ry. Co. v. Englewood, 62 Colo. 229, 241. It may be argued that as "between parties" the said ordinance in fixing rates "constituted a valid contract," (Denver & South Platte Ry. Co. v. Englewood, *supra*) and that, therefore, this Commission should determine whether authority should be granted to exercise that part of the ordinance fixing rates. However, no evidence was introduced herein as to the cost of dis-

tributing gas. Generally, no such evidence as should be introduced in a rate case was offered. In fact, the hearing had no rate aspect whatever. Therefore, the Commission is compelled to refrain from taking any action herein which would make the rates for natural gas, which are the only ones stated in the ordinance, binding for twenty years or any other fixed period.

The applicant, in serving the town and its inhabitants, is entitled, under the Constitution of the State of Colorado and that of the United States, to a reasonable return. It is not necessary or advisable at this time to try to freeze the rate structure of the town of Littleton for twenty years. A greater or lesser volume of gas than is anticipated may be sold, value of equipment, taxes, etc., may change.

Moreover, the ordinance obviously contemplates that while it is the expectation of the applicant and the town that natural gas will be furnished during the twenty years the ordinance is to be effective, some unforeseen contingency may happen making it necessary to distribute artificial gas. No attempt has been made by way of a rate structure to meet such a contingency.

After careful consideration of the evidence, the Commission is of the opinion and so finds that the public convenience and necessity requires the applicant to exercise the franchise rights granted to it in and by virtue of the terms of Ordinance No. 258, passed and ordered published by the Board of Trustees of the town of Littleton, and signed by its mayor on October 17, 1928, and thereafter approved by a vote of the qualified taxpaying electors, to the extent that the applicant may sell, transmit and distribute in the town of Littleton gas for heat, power and other proper purposes. The Commission further finds that the public convenience and necessity requires the construction and operation of a distribution system for the distribution of gas to the town of Littleton and the inhabitants thereof.

ORDER.

It Is Therefore Ordered, That the public convenience and necessity requires the applicant to exercise the franchise rights granted to it in and by virtue of the terms of Ordinance No. 258,

passed and ordered published by the Board of Trustees of the town of Littleton, and signed by its mayor on October 17, 1928, and thereafter approved by a vote of the qualified taxpaying electors, to the extent that the applicant may sell, transmit and distribute in the town of Littleton gas for heat, power and other proper purposes, and this order shall be taken, deemed and held to be a certificate of public convenience and necessity therefor.

IT IS FURTHER ORDERED, That insofar as the application seeks authority to construct, purchase, maintain and operate a plant or plants for the manufacture or generation of gas, the same be, and it is at this time, hereby denied.

IT IS FURTHER ORDERED, That insofar as said application seeks authority to exercise for a period of twenty years or any other fixed time the right or purported authority to charge any particular rates for gas, the same be, and it is hereby, denied.

IT IS FURTHER ORDERED, That the public convenience and necessity requires the construction and operation by the applicant of a distribution system of gas to the town of Littleton, Colorado, and the inhabitants thereof, and this order shall be taken and held to be a certificate of public convenience and necessity therefor.

IT IS FURTHER ORDERED, That the applicant shall file with this Commission his schedule of rates, rules and regulations applicable to the proposed distribution of gas to the inhabitants of the town of Littleton within twenty days of the date hereof.

RE KELLEY TRUCK LINE.

[Application No. 1108. Decision No. 2130.]

Common carriers — Automobiles — Contracts — Payment of freight charges by those having no contracts.

A motor vehicle operator having eighteen contracts in Pueblo, three in Aguilar and one in Trinidad, and transporting freight to a number of consignees having no contracts but paying the freight charges, held to be a motor vehicle carrier as defined by statute.

[April 3, 1929.]

Appearances: Leo P. Kelly, Esq., Pueblo, Colorado, for applicant; D. Edgar Chenoweth, Esq., Trinidad, Colorado, for the Berry Truck Line; William B. Stewart, Esq., Pueblo, Colorado, for Jess B. Kenner; Colin A. Smith, Esq., Denver, Colorado, as *amicus curiae*.

STATEMENT.

By the **Commission**: This is an application for a certificate of public convenience and necessity authorizing the operation of a motor vehicle system for the transportation of freight between Pueblo and Trinidad, Colorado, and intermediate points.

Protests were filed against this application by the Berry Truck Line, The Denver and Rio Grande Western Railroad Company, Jess Kenner, The Colorado and Southern Railway Company and the American Railway Express Company.

An amended application was filed, which alleges, among other facts, that since the filing of the application W. L. Ekstrom has purchased and acquired the interest of said C. H. Kelley in this transportation business, and is now prosecuting this application in his own behalf.

This matter was heard in Denver on March 11, 1929. The application herein is supported only by the testimony of the applicant and a former truck driver in his employ. We deem it unnecessary to detail the testimony of these two persons. Suffice it to say that it is insufficient to warrant this Commission in making a finding of public convenience and necessity.

The Commission heretofore authorized a truck service between Pueblo and Walsenburg to Jess Kenner, and between Walsenburg and Trinidad to the Berry Truck Line. The testimony shows that their service has been satisfactory, and that their operations have been conducted in a cooperative way on freight destined to each other's territory.

In view of the present authorized truck service, and the service of the rail carriers, this Commission is constrained to hold that the record does not warrant a finding of public convenience and necessity.

The applicant claims that he is operating as a private carrier under contract. He has eighteen contracts in Pueblo, three in Aguilar and one in Trinidad. His freight bills, however, from February 1, 1929, to March 8, 1929, indicate that he is transporting considerable freight to Walsenburg, Trinidad and Aguilar on which the consignee is paying the freight, and that the same is not prepaid by the contract holder. A careful consideration of this testimony leads us to the conclusion that the applicant is in fact conducting a motor vehicle carrier operation as defined in Chapter 134, Session Laws, 1927, without obtaining from this Commission a certificate of public convenience and necessity therefor.

After a careful consideration of the testimony the Commission is of the opinion, and so finds, that the public convenience and necessity does not require the proposed motor vehicle system of the applicant herein.

ORDER.

IT IS THEREFORE ORDERED, That the application of W. L. Ekstrom be, and the same is hereby, denied.

IT IS FURTHER ORDERED, That said W. L. Ekstrom be, and he is hereby, ordered to immediately cease and desist from operating as a motor vehicle carrier as defined in Chapter 134, Session Laws 1927.

IT IS FURTHER ORDERED, That a copy of this order be certified by the Secretary of this Commission and filed with the District Attorneys of Pueblo County and Las Animas County, Colorado.

RE E. V. MORRISON, DOING BUSINESS AS THE INTER-CITY TRUCK LINE.

[Application No. 1211. Decision No. 2142.]

Automobiles—Desire of public for service—Movement of freight by public or private carriers.

When the public within a reasonable distance of a wholesale and jobbing center wants freight moved therefrom by motor truck, it will move by private carriers if no certificate of convenience and necessity is granted.

[April 20, 1929.]

Appearances: A. P. Anderson, Esq., Denver, Colorado, attorney for applicant; J. Q. Dier, Esq., Denver, Colorado, attorney for The Colorado and Southern Railway Company, protestant.

STATEMENT.

By the **Commission**: E. V. Morrison, doing business as The Inter-City Truck Line, filed his application for a certificate of public convenience and necessity, authorizing the operation by him of a motor vehicle system for the transportation of freight between Denver and Windsor and Severance, all in Colorado. The Colorado and Southern Railway Company and the Great Western Railway Company filed their written answers protesting the granting of the certificate. The Colorado and Southern serves Windsor, the Great Western both Windsor and Severance.

On January 4, 1928, the Commission entered an order requiring the applicant to cease and desist from his operations over the route in question. The attorney then representing him advised him that he might lawfully operate in spite of the Commission's said order if he would make contracts with his customers. The evidence shows that he thereupon did visit his customers and made informal, indefinite, oral agreements with them for the continued transportation of their freight. As a matter of fact, the service after the order was entered differed in no respect from that rendered prior to the date of the order.

The Commission, on February 25, 1929, made another order requiring the applicant to show cause why he should not be required again to cease and desist. He thereupon appeared on March 21, 1929, with another attorney, who frankly admitted that the applicant had been violating the law and the previous order of the Commission to cease and desist and stated that the applicant immediately would cease all operations. He has not operated since.

It is urged that in view of the violation of the Commission's order, a certificate should be denied without any regard to the question of public convenience and necessity for such an operation as the applicant has conducted and seeks authority to re-

sume and continue. However, in view of the applicant's testimony that he believed that in following the advice of his first attorney he was not violating the law, and of the further fact of the general ignorance on the part of laymen of what constitutes a common carrier operation and what conduct is impotent to change one from the status of a common carrier to that of a private carrier, we are disposed to and do give the applicant the benefit of the doubt.

The testimony, except that given by employes of the Colorado and Southern, was all in support of the application. The Windsor Community Club, whose membership is made up of the business and professional men of that town, passed unanimously a resolution in favor of the granting of the certificate herein. A large number of witnesses from Windsor and Severance also testified for the applicant.

The testimony as to the applicant's mode of operation and the advantages thereof is typical of that in other cases of this kind. He takes orders to Denver for his various customers, telephoning them in to wholesale and jobbing houses; accepts freight in Denver up to about six o'clock or later in the afternoon and leaves Denver between 6:00 and 6:30 in the evening. His deliveries are made in the stores and places of business in Windsor as soon as the doors are opened in the morning. In case of an emergency, a customer can get his freight in the evening at about 9:00 o'clock. Deliveries are made in Severance at about 9:15 A. M.

The evidence shows also that the service of the applicant has been more expeditious than that of the railroad. The Colorado and Southern freight train from Denver arrives in Windsor between 10:00 and 11:30 A. M. The superintendent testified that he proposes in the immediate future to have the train arrive in Windsor an hour and a half earlier.

Heretofore freight by rail has gone to Severance from Denver, by the Union Pacific to Eaton and the Great Western from the latter point. Since the applicant quit operating in March, fresh meat shipped in that manner has spoiled. Just recently, however, plans have been made by which freight destined to

Severance and carried to Windsor by the Colorado and Southern will immediately be transferred at the Great Western depot to a Great Western train proceeding forthwith to Severance.

Without question, the business men of the two towns in question could get along without motor vehicle service. However, the fact that people today can get along without a service, does not mean that the public convenience and necessity does not require it. That the public in towns and cities within a reasonable distance from wholesale and jobbing centers in the past few years almost unanimously have come to demand motor vehicle transportation, cannot be doubted. It has become increasingly clear to the Commission that when the public within such reasonable distance wants motor vehicle transportation, traffic will move in trucks even though a certificate of public convenience and necessity is not granted. A number of private carriers will divide up the business public and operate in such a manner that the State receives no revenue therefrom and the public is denied the benefit of regulation. We think there is much truth in a statement attributed to President Ralph Budd of the Great Northern Railway, "that traffic will always move where it can be handled with the most satisfaction to the public, and the railways must live on such traffic as is left to them after meeting this test." The Commission, therefore, is dealing with an economic fact and condition which it cannot alter or control.

Of course this unyielding, irrepressible evolution in transportation "will of necessity be attended with some economic disturbances and result for a time at least in financial losses" to the rail carriers. As the Utah Commission recently said in *Re* Ogden Gas Company, not yet fully reported, "Such is always the price of progress." The principal duty resting upon the Commission with respect to the matter is to prevent unnecessary and injurious competition, and to regulate the rates and service of the certificate holders.

After careful consideration of the evidence, the Commission is of the opinion and so finds that the public convenience and necessity requires the proposed motor vehicle operation of the applicant for the transportation of freight between the City of

Denver and the towns of Windsor and Severance, Colorado, but not to or from intermediate points.

ORDER.

IT IS THEREFORE ORDERED, That the public convenience and necessity requires the proposed motor vehicle operation of the applicant for the transportation of freight between the city of Denver and the towns of Windsor and Severance, Colorado, but not to or from intermediate points, 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 applicant shall file tariffs of rates, rules and regulations and time and distance 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 schedule filed with this Commission except when prevented from so doing by the Act of God, the public enemy or unusual or 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 STEAMBOAT TRANSFER AND STORAGE COMPANY.

[Application No. 1208. Decision No. 2149.]

Automobiles—Desire of public—Effective prohibition of service by motor vehicles.

The evolution of motor truck operations is such that the Commission cannot effectively prohibit motor truck transportation demanded by the public.

[April 20, 1929.]

Appearances: A. P. Anderson, Esq., Denver, Colorado, and Joseph K. Bozard, Esq., Steamboat Springs, Colorado, attor-

neys for applicant; Elmer L. Brock, Esq., Denver, Colorado, attorney for The Denver and Salt Lake Railway Company, protestant.

STATEMENT.

By the **Commission**: The applicant, Steamboat Transfer and Storage Company, a corporation, having its place of business in Steamboat Springs, Colorado, seeks a certificate of public convenience and necessity authorizing the transportation of (a) freight between Denver and Steamboat Springs and a territory within a radius of 50 miles thereof and from point to point in said territory, (b) household goods between points in said territory and all other points in the State of Colorado, and (c) fruit from western Colorado to points within said territory.

No evidence was introduced in opposition to the application. Nobody appeared in opposition in Steamboat Springs, where the principal hearing was held. At the continued hearing held in Denver the attorney for The Denver and Salt Lake Railway Company appeared in support of his client's protest.

The applicant does not desire to operate on any regular schedule. The president of the applicant stated that the greater part of the merchandise, consisting of fruits, meats, vegetables, staple groceries, etc., transported into the Steamboat Springs district, moves by rail in Rule 10 and pool cars at lower rates than a truck operator can afford to handle them. There was no evidence showing that as to regular transportation between rail points the railroad service is inadequate.

The freight which applicant expects to haul from Denver consists largely of machinery, transformers and other commodities which either have to be handled with particular care or have to be brought in an emergency. Many of such commodities have to be delivered at points off the railroad. The manager of the electric light company operating in the district testified that unless his company could secure the services of the applicant it would be compelled to buy its own truck, as it has occasion to have transformers, which have to be handled with the greatest of care, brought from Denver by truck, and to have them and

poles and other materials taken to the points on its lines where they are to be put in service. The local manager of the telephone company also has to avail himself of the use of applicant's trucks. Saw mills and equipment therefor have to be hauled to the country. Potatoes are hauled from the ranches to the railroad. Household goods have to be hauled out of and into the district, and fruit brought in from the Western Slope of Colorado.

A large number of business men testified as to the public convenience and necessity of the proposed service. The Steamboat Springs Commercial Club by resolution asked the Commission to give the community truck transportation by a motor vehicle carrier.

In another application, No. 879, filed by Stanley L. Larson, the president of the applicant herein, the Commission said, in issuing a limited certificate:

"What, therefore, might be considered to be required by public convenience and necessity in other communities being served by a more prosperous railroad (than the protestant herein) might very well not be a public convenience and necessity in this case. Many transcontinental lines can and are required to operate certain branches at a loss, provided the railroads as a whole are earning a profit. This railroad, however, is not, unfortunately for it and the community it serves, in such a favorable position. The railroad has to effect every economy. We feel, irrespective of any consideration of the railroad, that the Commission must protect its earnings as far as possible for the benefit of the community which it serves, as the railroad is indispensable to the community."

The situation is very largely the same today as it was then except that the railroad company is now operating through the Moffat Tunnel. How the economies effected by reason of the elimination of the haul over the mountain compare with the rental cost of the tunnel the record does not show.

However, during the past two years it has become increasingly clear to the Commission that the evolution of the truck industry has caused an economic condition which cannot effectively be

controlled by attempted prohibition of motor vehicle service demanded by the public. The Commission is of the opinion that the statement recently attributed to President Budd of The Great Northern Railway Company, "that traffic will always move where it can be handled with the most satisfaction to the public, and the railways must live on such traffic as is left to them after meeting this test," is very largely true. The Commission has no jurisdiction over private automobile carriers. Therefore, each of them may serve a certain percentage of the public without becoming a common or motor vehicle carrier. That this irresistible, unyielding, economic evolution in transportation is attended with some financial losses to the rail carriers is obvious, but the Commission has found that if the people in a community, as they do in the Steamboat Springs community, unanimously demand truck transportation, they are going to get it by private carriers if not permitted to be served by a common carrier. When service is rendered by private carriers, competition is unrestrained and service and rates are not regulated.

After careful consideration of the evidence, the Commission is of the opinion and so finds that the public convenience and necessity requires the proposed motor vehicle operations of the applicant for the transportation of (a) freight between Denver and Steamboat Springs and a territory within a radius of 50 miles thereof and from point to point in said territory, (b) household goods between points in said territory and all other points in the State of Colorado, and (c) fruit from western Colorado to points within said territory; provided, however, and subject to the following conditions: (1) that the service to be rendered by the applicant shall not be on schedule, (2) that in transporting freight to and from Denver and fruit from western Colorado, no intermediate points be served, and (3) that on all commodities except household goods the rates of the applicant for transportation between 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.

GENERAL IRON WORKS

v.

THE COLORADO & SOUTHERN RAILWAY COMPANY.

[Case No. 347. Decision No. 2152.]

Rates—Railroad—Transfer of sand from narrow gauge to standard gauge cars.

Charges of 23½ cents per ton plus $3.04 per car for transfer of sand originating at Silica destined to complainant's Denver plant from narrow gauge to standard gauge cars found not unreasonable or otherwise unlawful.

[April 29, 1929.]

Appearances: Fred L. Emerson, City Auditorium, Denver, Colorado, for complainant; J. Q. Dier, Denver, Colorado, for defendant.

STATEMENT.

By the **Commission**: By complaint filed February 14, 1928, General Iron Works, complainant, a company manufacturing general machinery, at Denver, Colorado, alleges that The Colorado and Southern Railway Company's transfer charges, in connection with the transfer of sand and clay from narrow gauge to standard gauge equipment at Denver were, and are, unreasonable.

A reasonable charge for the future and reparation is sought. Charges will be stated in cents per ton of 2,000 pounds, unless otherwise stated.

Complainant is interested chiefly in, and its evidence relates only to, the transfer charges on sand. The sand shipped by it originates in Silica, Colorado, a point on the narrow gauge line of the defendant, between Denver and Leadville, 24.1 miles west of Denver. Complainant's plant is located approximately seven miles south of defendant's narrow gauge terminal on its broad gauge line.

Shipments of sand from Silica to the plant of complainant requires a transfer from narrow gauge to standard gauge equipment at the Denver terminal before delivery can be made.

Defendant publishes a provision in its tariff governing the transfer of lading, to and from stations on its narrow gauge line, which is as follows: Rates published between Denver, Colo., and stations named in Item No. 5 (except Leadville, Colo.), Sheridan Jct., Colo., Index No. 250 to Bird's Eye, Colo., Index No. 348, both inclusive; also between Denver, Colo., and stations named in Item No. 4, Chimney Gulch, Colo., Index No. 217, to Silver Plume, Colo., Index No. 235, both inclusive, apply only from or to the narrow gauge Denver terminals of the C. & S. Ry., except that such rates will apply to the broad gauge terminals of the C. & S. Ry., plus the transfer charge shown below. In all instances, where, in the interchange of carload narrow gauge traffic at Denver, Colo., between the C. & S. Ry., and its connections and to and from the broad gauge terminals of the C. & S. Ry., the transfer of freight from broad to narrow gauge and vice versa, becomes necessary, the following charge will be assessed (except where provided to the contrary in lawfully published tariffs on file with the Interstate Commerce Commission), viz: 23½ cents per ton plus $3.04 per car (See Note). *Note:* Shipments of Lime Rock between Denver, Colorado, and stations named in Item No. 5 (except Leadville, Colo.), Sheridan Jct., Colo., Index No. 250, to Bird's Eye, Colo., Index No. 348, both inclusive, the transfer charge will be 17½ cents per ton, plus $2.25 per car."

Complainant contends that 15 cents for such transfer would be a reasonable charge, and in support of its contention, testified that it was able to get this sand unloaded at its plant for 40 cents per hour, that it takes one man from 1½ to 2 days (8 hours per day) to unload a car of approximately 50 tons, which figures out about 12½ cents.

Another witness for complainant, who is in the coal business, testified that he paid from 10 to 15 cents for unloading coal, depending on the size and grade, 10 cents on slack or steam, and 15 cents on lump and/or nut, and one man could unload from 30 to 45 tons in eight hours.

The cost of labor employed in loading this sand at Silica ranges from 40 to 50 cents per hour and they load between 25

and 30 tons in 8 hours. The conditions surrounding the loading at Silica are somewhat similar to those surrounding the transferring from narrow to broad gauge equipment at Denver.

A comparison of the transfer charge at Denver with those applicable on coal at Salida, Colorado, on the D. & R. G. W. R. R., when hand transfer is requested by the shipper, is as follows:

Salida, when moving into Salida, Colorado, in open narrow gauge equipment, and there transferred into open standard gauge equipment, 22 cents.

When moving into Salida, Colorado, in open narrow gauge equipment, and there transferred into closed standard gauge equipment, 30 cents.

Denver, 23½ cents plus $3.04 per car.

Defendant's exhibits of record show the average weight of 10 cars of sand transferred at Denver as being 52.6 tons, the average time of transfer, 22.6 hours, the rate of pay, labor, 48 cents per hour, foreman 56.25 cents per hour, the average delay to broad gauge car (including time held at transfer point and by complainant in unloading at plant) 4.7 days, an average cost of 22.7 cents per ton, and an average cost of 26.4 cents per ton on all commodities during the year 1927.

The rates of pay are items which are fixed by agreement between the railroads and their employes and are supervised by the Labor Board, so that the defendant is not in a position to hire labor at 40 cents per hour, even if such labor were available.

In the transfer of sand from narrow to broad gauge equipment, the defendant is required to maintain a special layout of tracks in its Denver yards whereby the top of the broad gauge car is about 18 inches higher than the narrow gauge car, with the bottom of each car being on a level. The sand is there shoveled by hand from the narrow to the broad gauge car, two narrow gauge cars being transferred into one standard gauge car.

On shipments of sand from Silica to complainant's plant, the line haul rate of 70c also includes the service of switching a distance of approximately 7 miles. Defendant's witness testified that the cost of handling a 50-ton car from 15th and Bassett

Streets, Denver, to complainant's plant would be $18.00, which is undisputed.

The $3.04 charge is the outcome of a $2.25 charge which was assessed to take care of per diem charges, based on 5 days' delay at 45 cents per day. The present per diem charge is $1.00 per day. Defendant contends that on account of the extra delay to its standard gauge equipment in transferring from narrow to standard gauge and vice versa, it is entitled to a so-called "car service" or "car rental" charge, and in support of such contentions testified that where they are using their own standard gauge equipment they may, and often do, find it necessary to obtain foreign line equipment for other loading, thus facing an actual out-of-pocket cost of $1.00 per day for the use of such equipment.

Regarding the charge of 17½ cents, plus $2.25 per car on shipments of lime rock shown in tariff, defendant states that same is only a paper rate, as there are no movements of lime rock under same.

Upon the record the Commission finds that a charge of 23½ cents, plus $3.04 per car applicable for the transfer of sand from narrow gauge to broad gauge equipment at Denver, on shipments originating at Silica, Colorado, destined to the plant of the General Iron Works (Bates and South Elati Streets), Denver, Colorado, was not and is not unreasonable or otherwise unlawful. The complaint will be dismissed.

ORDER.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had;

IT IS ORDERED, That the complaint be, and the same is hereby, dismissed.

RE THE PIKES PEAK AIR COMMERCE, INC.

[Application No. 1331. Decision No. 2155.]

Certificates of convenience and necessity — Airplanes — Pikes Peak region—Colorado.

Certificate of convenience and necessity issued authorizing motor vehicle transportation of passengers by airplane within Pikes Peak region, and on chartered trips to points within and beyond the State of Colorado.

[April 27, 1929.]

Appearance: David P. Strickler, Esq., Colorado Springs, Colorado, attorney for applicant.

STATEMENT.

By the **Commission**: This is an application for a certificate of public convenience and necessity authorizing operation of a motor airplane system for the transportation of passengers for hire on regular routes within what is commonly known as the Pikes Peak region, and for chartered trips to various points within and without the State of Colorado. No protest was filed against this application. At a public hearing held on this application, testimony was introduced to show that the Pikes Peak Air Commerce, Inc., is a Colorado corporation; that the value of the equipment to be used in the commercial air service is approximately $60,500; that the General Manager of the Company has been in the air plane service for approximately twelve years and has had considerable experience in the operation of air transportation. There is no public carrier by airplane operation within the Pikes Peak region at this time.

The City of Colorado Springs is one of the best tourist centers of the United States, and during what is commonly known as the tourist season thousands of people from all over the United States come to the Pikes Peak region for the purpose of recreation and to view the scenery. Under the proposed operation, tourists would be able to view the scenery in another and different way, by use of airplane, than they could do by any other common carrier. The use of airplanes for viewing scenery is being increasingly adopted in other centers and the records of

the Chamber of Commerce of the City of Colorado Springs show that an average of 90,000 tourists spend but one day in the Pikes Peak region during the tourist season. The points of interest adjacent to Colorado Springs are so great that it would be impossible for such tourists to see all the scenery within a 24-hour period except by the use of an airplane. The evidence shows that a demand exists for such service and has heretofore been requested by various public bodies in the region. The applicant's financial and business ability and resources are such as to make the industry sought to be established a permanent one.

After careful consideration of all the evidence introduced herein, the Commission is of the opinion and so finds that the present and future public convenience and necessity requires the proposed motor airplane system of the applicants for the transportation of passengers on regular routes within what is commonly known as the Pikes Peak region and for chartered trips within and without the State of Colorado.

ORDER.

It Is Therefore Ordered, That the public convenience and necessity requires the motor airplane system of the Pikes Peak Air Commerce, Inc., for the transportation of passengers within what is commonly known as the Pikes Peak region and for chartered trips within and without the State of Colorado, and this order shall be taken, deemed and held to be a certificate of public convenience and necessity therefor, subject to the following conditions, which in our opinion the public convenience and necessity requires:

(a) The applicant shall file with this Commission a certified copy of its articles of incorporation.

(b) The equipment (including airports) operated by the Pikes Peak Air Commerce, Inc., and its pilots and employes shall at all times be such as to conform to the standards prescribed by the Department of Commerce of the United States and the Colorado Commission of Aeronautics and certificate of such con-

formity at the present time shall be filed with the Commission within twenty days.

(c) The Pikes Peak Air Commerce, Inc., shall carry all available liability insurance covering the passengers and the public.

(d) The Pikes Peak Air Commerce, Inc., shall file semi-annual statements of the number of passengers carried and service furnished.

IT IS FURTHER ORDERED, That the applicant shall file tariffs of rates, rules and regulations within twenty days of the date of this order.

IT IS FURTHER ORDERED, That this order is made subject to compliance by the applicant with the rules and regulations now in force or to be hereafter adopted by this Commission and the Colorado Commission of Aeronautics with respect to airplane common carriers and also subject to any future legislative action that may be taken with respect thereto.

RE AMICK TRANSFER & STORAGE.

[Application No. 1288. Decision No. 2156.]

Certificate of convenience and necessity issued authorizing motor vehicle transportation of freight throughout the State of Colorado, subject to conditions stated.

[May 3, 1929.]

Appearances: Lee, Shaw and McCreery, Esqs., Denver, Colorado, attorneys for applicant; Thos. R. Woodrow, Esq., Denver, Colorado, attorney for The Denver and Rio Grande Western Railroad Company, Western Slope Motor Way, Inc., and Rio Grande Motor Way, Inc.; Andrew C. Scott, Esq., Denver, Colorado, attorney for Chicago, Burlington & Quincy Railroad Company and The Colorado and Southern Railway Company; Montgomery Dorsey, Esq., Denver, Colorado, attorney for Union Pacific Railroad Company; D. A. Maloney, Esq., Denver, Colorado, attorney for The Northern Transportation Company, White Motor Express Company and The Camel Truck Line; J.

Edgar Chenoweth, Esq., Trinidad, Colorado, attorney for The Berry Truck Lines.

STATEMENT.

By the **Commission**: Amick Transfer & Storage Company, a partnership, filed its application alleging that it is and for many years last past has been engaged in the transfer, moving and general cartage business regularly in the City and County of Denver and the counties of Adams, Arapahoe and Jefferson, in the State of Colorado, and also is and for many years last past has been engaged in affording occasional service as a part of its said business throughout the State of Colorado, and each of the counties thereof. The application concludes with a prayer for an order authorizing the applicant to continue to carry on its said business in the manner heretofore conducted. This case and some twenty-odd similar ones were consolidated for hearing. A hearing was had on two different dates, the continuance to the second date being largely for the purpose of arriving at some more definite understanding with reference to rates to be charged for the transportation of general merchandise and other commodities ordinarily hauled by common carriers, both by rail and motor vehicle, operating over regular routes and between fixed termini.

The capital to be invested in applicant's transportation business is $2,500.00.

The business of the applicant consists largely of the transportation of household goods, including furniture, dishes, etc. In addition, it transports heavy machinery and other commodities, some of which require special equipment and more or less skill. It was generally admitted that the various applicants, as their business heretofore has been carried on, have not to any appreciable extent come in competition with the motor vehicle and rail carriers operating on schedules over regular routes. It appeared clearly also that there is no desire on the part of the applicants to branch out in competition with those carriers. However, the latter, out of an abundance of caution, have contended that some very definite conditions and limitations should be imposed in certificates granted, so as to prevent any appli-

cant, who might in the future conclude to broaden the scope of its business in such a manner as to compete with the protestants, from using the certificate issued by this Commission as authority therefor. The applicants, while not objecting to any reasonable limitation, do not want to be unduly restricted.

There was no attempt made to show that the service as ordinarily rendered by the protestants is inadequate or that the public convenience and necessity requires that the applicants be granted authority to enter such business. The evidence tended to show and it was freely admitted that in the transportation of household goods and other commodities such, for instance, as heavy machinery, the public convenience and necessity does require the operations of the applicants. It showed also that in rare instances, for some reason or other, some commodities which ordinarily are carried by the protestants are required to be shipped with a good deal more expedition than may be afforded by a scheduled operator.

At the second hearing there was introduced in evidence a tariff proposed to be filed by this and all of the other applicants. Schedule C thereof contains "minimum rates for occasional hauling, other than household goods, not including loading and unloading." The schedule occasioned some rather strenuous objections, it being pointed out that in many cases the applicants by charging these minimum rates would be transporting freight for less than it is transported by protestants. The president of Weicker Transfer and Storage Company, one of the applicants, testified that in hypothetical cases stated to him his company would not haul freight at the minimum rates. The detailed tariff filed evidences considerable work and study. It is natural that the applicants who have been conducting a very elastic sort of business would not find the first tariff prepared by them to be perfect. Tariff making is an evolutionary process which seems never to be completed even by carriers who have been making tariffs for many years. One reason given why the minimum rates in the tariffs submitted are as low as they are is that some of the applicants are doing business in smaller cities and towns than Denver and find operating conditions different from and

less expensive than those carried on from headquarters in Denver.

Methods of doing business change and develop rapidly. While reasonable precaution properly should be taken to prevent any one of the applicants from unduly competing with scheduled carriers, it would be unwise to attempt to put the applicants in a straightjacket and prescribe rigid limitations upon their methods and modes of rendering service. The Commission believes it advisable in the public interest to retain jurisdiction of the application herein to the end that if and as occasion may arise, appropriate orders may be rendered to prevent improper encroachment by the applicants upon the field of business occupied by the scheduled carriers and at the same time to allow the applicants reasonable latitude in the carrying on of their business as it may develop in the future.

The Commission is of the opinion and so finds that at the present time for the transportation of commodities other than household goods, between points served singly or in combination by scheduled carriers, the applicant should file a schedule of rates which shall be substantially higher in all cases than those charged by scheduled carriers.

So far as the evidence shows, the applicant has no branch office or agent in any other cities or towns than Denver. The Commission is of the opinion that while authority should be granted to the various applicants to originate business at various points in the State, they should not be permitted, without showing public convenience and necessity therefor, to establish branch offices or to have agents employed at other points than the town or city in which their offices are now located, and from which alone they heretofore have conducted their operations.

After careful consideration of the evidence, the Commission is of the opinion and so finds that the public convenience and necessity requires the proposed motor vehicle operations of the applicant for the conduct of the transfer, moving and general cartage business in the City and County of Denver and in the counties of Adams, Arapahoe and Jefferson, in the State of Colorado, and for occasional service throughout the State of Colo-

rado, and in each of the counties thereof, subject to the terms and conditions hereinafter named, which the Commission finds the public convenience and necessity require.

ORDER.

It Is Therefore Ordered, That the public convenience and necessity requires the proposed motor vehicle operations of the applicant, Amick Transfer & Storage Company, a partnership, for the conduct of the transfer, moving and general cartage business in the City and County of Denver and in the counties of Adams, Arapahoe and Jefferson, in the State of Colorado, and for occasional service throughout the State of Colorado, and in each of the counties thereof, subject to the terms and conditions hereinafter stated, and this order shall be taken, deemed and held to be a certificate of public convenience and necessity therefor.

For the transportation of commodities other than household goods between points served singly or in combination by scheduled carriers the applicant shall charge rates which shall be as much as twenty per cent higher in all cases than those charged by scheduled carriers.

The applicant shall not operate on schedule between any points.

The applicant shall not be permitted without further authority from the Commission to establish a branch office or to have an agent employed in any other town or city than Denver for the purpose of developing business.

Jurisdiction of the application herein shall be, and the same is hereby, retained, to the end that if and as occasion may arise appropriate orders may be made to prevent improper encroachment by the applicant upon the field of business occupied by the scheduled carriers and at the same time to allow the applicant reasonable latitude in the carrying on of its business as it may develop in the future.

It Is Further Ordered, That the applicant shall file tariffs of rates, rules and regulations, as required by the Rules and Regulations of this Commission governing motor vehicle car-

riers, 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 tariffs of rates, rules and regulations filed with this Commission, except when prevented from so doing by the Act of God, the public enemy or unusual or 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.

In the following applications substantially the same certificates of convenience and necessity were issued as in the Amick application, the base of operations in some applications being in other cities than Denver:

T. P. Duffy, doing business as Duffy Storage and Moving Co. Application No. 1289, Decision No. 2157.

Logan Moving and Storage Co. Application No. 1290, Decision No. 1290.

Johnson Storage & Moving Co. Application No. 1291, Decision No. 2159.

The Ferrin Van and Storage Co. Application No. 1292, Decision No. 2160.

Kennicott-Patterson Warehouse Corporation. Application No. 1293, Decision No. 2161.

Turner Denver Moving and Storage Co. Application No. 1294, Decision No. 2162.

Swift Moving & Storage Co. Application No. 1295, Decision No. 2163.

Buehler Transfer Co. Application No. 1296, Decision No. 2164.

Weicker Transfer and Storage Co. Application No. 1297, Decision No. 2165.

The Wandell & Lowe Transfer and Storage Co. (Colorado Springs). Application No. 1298, Decision No. 2166.

The Pikes Peak Warehousing Co. (Colorado Springs). Application No. 1299, Decision No. 2167.

J. W. Milne, doing business as J. W. Milne Transfer & Storage Co. (Grand Junction). Application No. 1300, Decision No. 2168.

E. W. Terrill, doing business as E. W. Terrill Transfer & Storage Co. (Grand Junction). Application No. 1301, Decision No. 2169.

A. R. McCune, doing business as McCune Transfer Co. (La Junta). Application No. 1302, Decision No. 2170.

Wood and Morgan (Durango). Application No. 1303, Decision No. 2171.

Pople Brothers Construction Co. (Trinidad). Application No. 1304, Decision No. 2172.

W. L. Coney, doing business as Coney Storage and Transfer (Trinidad). Application No. 1305, Decision No. 2173.

The McMillan Transfer, Coal & Storage Co. (Fort Collins). Application No. 1306, Decision No. 2174.

Jellison Transfer and Storage Co. (Walsenburg). Application No. 1307, Decision No. 2175.

W. S. Craghead (Boulder). Application No. 1308, Decision No. 2176.

W. A. Jones, doing business as W. A. Jones Transfer Co. (Alamosa). Application No. 1309, Decision No. 2177.

The Union Delivery Co. (Greeley). Application No. 1310, Decision No. 2178.

George W. Dalton (Greeley). Application No. 1012, Decision No. 2334.

RE N. J. FITZMORRIS.

[Case No. 396. Decision No. 2184.]

Common carriers—Automobiles—Sixty-odd written contracts.

1. Motor vehicle carrier who, after being ordered to cease and desist, continued to operate as before, but with some sixty-odd written contracts with customers in Eaton, Ault and Lucerne, found to be operating as a motor vehicle carrier as defined by statute.

Common carriers—Automobiles—"Contract carrier"—Real question.

2. The question whether one is a contract carrier is immaterial. The real question is whether he is a common or private carrier.

Common carriers—Automobiles—Change of status by contract.

3. If one is a common carrier, he cannot by any contract change his status.

Common carriers—Automobiles—Service of all the public.

4. In order for a carrier to be a common carrier, it is not necessary that he serve all the public.

Common carriers—Automobiles—Number of customers—Facts in each case.

5. Just how many customers a carrier may serve without becoming a common or motor vehicle carrier cannot be answered in the abstract. It depends on the facts in each particular case.

[May 4, 1929.]

Appearances: A. P. Anderson, Esq., Denver, Colorado, attorney for respondent; Colin A. Smith, Esq., Denver, Colorado,

Assistant Attorney General, as *amicus curiae;* Jack Garrett Scott, Esq., Denver, Colorado, as *amicus curiae.*

STATEMENT.

By the **Commission**: This Commission in February of this year entered an order reciting that on November 15, 1927, N. J. Fitzmorris, doing business as The Fitzmorris Transportation Company, filed his application for a certificate of public convenience and necessity; that on January 4, 1928, the Commission ordered the respondent to cease and desist from operating as a motor vehicle carrier; that the certificate applied for was denied on April 9, 1928; that thereafter said Fitzmorris had a writ of certiorari issued out of the District Court of Weld County, and that on July 17, 1928, a decree of that court was entered upholding the findings and order of this Commission in the matter of said application and the denial thereof; that on September 13, 1928, respondent filed another application with the Commission for authority to operate over the route which he has heretofore operated for a number of years. After the recitals above referred to, the Commission proceeded to order Fitzmorris to show cause why an order requiring him to cease and desist from operating as a motor vehicle carrier, as defined in Chapter 134, Session Laws of 1927, should not be made.

The respondent filed his answer, denying that he is operating as a motor vehicle carrier and alleging that, on the contrary, "he is operating solely as a private carrier and in this connection alleges that he is not under the supervision of your honorable body." The answer then proceeds to inform the Commission why it had heretofore refused to issue a certificate to the respondent and alleged that the public convenience and necessity now requires the issuance thereof.

Since the statute makes it unlawful to operate as a common carrier without first having obtained a certificate of public convenience and necessity, evidence in this case relating to the public convenience and necessity is obviously immaterial and improper. This is true without regard to the further fact that the applicant twice has been denied a certificate and in a sep-

arate case ordered to cease and desist. Therefore, the Commission refused to receive at the hearing any evidence relating to public convenience and necessity.

The applicant admitted that he continued operating as a common carrier up and until about the first of September of last year in spite of the fact that on January 4 he had been ordered to cease and desist, and on April 9 his second application had been denied, and on July 17 the District Court of Weld County had sustained said order of denial.

The applicant produced some sixty-odd contracts which he made, beginning about September 1. The towns he is serving are Eaton and Ault. In addition, he has one customer in each of the small towns of Pierce and Nunn and one customer in the settlement of Lucerne. The population of Eaton is some 2,500 and that of Ault some 1,600 or 1,800. The total number of merchants in the towns mentioned was not shown.

The applicant himself is actively engaged in the business. In addition, he has two employes operating trucks for him. He runs regularly between Denver and the points named. When asked whether he has in mind any limit which he intends to fix on the number of contracts, he answered in the negative. He later stated that he has enough contracts "for the present time." There was no evidence that he had given up any of the customers whom he was serving prior to the time when he made the written contracts.

Contracts do not bind the shippers to ship all or any certain proportion of their freight over respondent's line. Respondent has been making the reports and paying the tax required to be made and paid by common carriers only.

Some people seem to entertain the idea that a common carrier may convert himself into a private carrier by the mere expedient of having any and all persons desiring service by him sign a contract such as appears to have been signed by the respondent's customers. They then say that he is a private carrier or possibly a contract carrier. At this point it is well to recall again that in determining whether or not one is operating unlawfully, because of having no certificate of public conven-

ience and necessity, the question is not whether he is a common carrier or a contract carrier; the question is whether he is a common carrier or private carrier. Practically all common carriers, particularly railroads and express companies, haul freight and express under contracts limiting liability, etc.

In determining whether or not a given operator is a common carrier, the test is not whether he has separate written or other kind of formal contracts with each and every one of his customers. The test is whether he is serving a sufficiently large portion of the public. As is stated in Campbell v. A. B. C. Storage and Van Company, 187 Mo. App. 565, 174 S. W. 140, "For if the defendant, by reason of the circumstances, is a common carrier as to the goods in question, it cannot by any special contract change its status as such or exempt itself from the responsibilities growing out of that relationship." In Goldsworthy, *et al.*, v. Maloy, *et al.*, 141 Md. 674, 119 Atl. 693, P. U. R. 1923C, 626, the court said in sustaining an injunction secured by the Maryland Commission, "The owners certainly should not too readily be permitted to enter into contracts or adopt measures which will enable them to readily evade the law or the spirit of the statutes intended to govern them."

As we have heretofore pointed out, it is not necessary that a common carrier serve all the public. We quote as follows from the decision of this Commission in *Re* The Exhibitors Film Delivery and Service Company, Application No. 1009:

"In order that a carrier be a common carrier, it is not necessary that he serve the whole public. No common carrier does. In Terminal Taxicab Co. v. Dist. of Col., 241 U. S. 252, it appears that the company was 'under contracts with hotels by which it agreed to furnish taxicabs and automobiles within certain hours reasonably to meet the needs of the hotel, receiving the exclusive right to solicit in and about the hotel, but limiting itself to serve guests of the hotel.' The court, speaking through Mr. Justice Holmes, held, 'We do not perceive that this limitation removes the public character of the service, or takes it out of the definition in the act. No carrier serves all the public. His customers are limited by place, requirements, ability to pay

and other facts. But the public generally is free to go to hotels if it can afford to, as it is free to travel by rail, and through the hotel door to call on the plaintiff for a taxicab * * *. The service affects so considerable a fraction of the public that it is public in the same sense in which any other may be called so. German Alliance Ins. Co. v. Kansas, 233 U. S. 369. The public does not mean everybody all of the time.' This case was cited and quoted from with approval in Davis v. People, *ex rel.*, 79 Colo. 642, 644."

Just how many customers a carrier may serve without becoming a common or motor vehicle carrier doubtless cannot be answered in the abstract. It depends on the facts in each particular case. While the statutory definition of a motor vehicle carrier contains the language, "who indiscriminately accept, discharge and lay down," etc., it undoubtedly is not necessary to show that a particular carrier is serving every possible shipper in the territory in which he operates. Let us assume that there are in the city of Denver only a half dozen wholesale grocery concerns and that all of them employ one carrier to deliver their foods and products, freight prepaid, to the stores of their retail customers. It might very well be said that in such a case the carrier is a common carrier, as he is serving all of the wholesale grocery public in that city. On the other hand, the carrier might be serving five miscellaneous retail merchants in a town or city in which there are some two or three hundred business concerns. In the latter case it is quite doubtful whether the carrier is a common carrier.

In Smitherman and McDonald, Inc., *et al.*, v. Mansfield Hardwood Lbr. Co., 6 Fed (2d) 29, it appears that the lumber company extended its private railroad line some three miles to carry oil for one party who for a time was the only shipper. Later it made contracts with four other shippers of oil and held itself willing and ready to haul oil and oil supplies for any others under private contract only, although it professed not to be a common carrier. It was held to be a common carrier of oil and oil equipment.

The case of Wayne Transportation Company v. Leopold, *et al.*, P. U. R. 1924C, 382, is interesting because it deals with the effect of private contracts and the restriction of business to a limited few. Two men, both working in a mill, one owning a five-passenger car, the other a seven-passenger car, making morning trips from home to the mill and evening trips in return, carrying on these trips with them eleven other workmen who resided in the same place and were also employed at the mill or in the town in which it was located, were held by the Pennsylvania Public Service Commission to be common carriers. The contention of the operators was practically the same as in this one. According to the Pennsylvania Commission, "They sustained this contention mainly upon the allegation that they do not hold themselves out as carriers for the public at large, or for passengers indiscriminately, inasmuch as the passengers they carry, practically speaking, are the same persons every day. In effect, the contention of respondents is that their passengers are carried under private contract." The Commission, continuing, said: "With this contention the Commission cannot agree. Courts and commissions have repeatedly held that the distinction between common and private carriers *does not* necessarily *depend upon whether written or oral contracts have been entered into* but rather upon the nature and character of the carriage or service rendered and upon actual conditions of service as disclosed by testimony." (Italics ours.)

In Barbour, *et al.*, v. Walker, *et al.*, 259 Pac. (Okla.) 552, the court held that the defendants operating a motor truck line between Oklahoma City and Shawnee under separate contracts with five individuals and firms in Oklahoma City, were common carriers. It appeared that the concerns and individuals with which the defendants had contracts "were of the principal business houses engaged in their respective line of commodities in Oklahoma City."

There was much equivocation on the part of the respondent as to how he secured all of the sixty-odd contracts. While admitting that the customers did not come to him, he contended that he did not solicit them, but, on the contrary, they met

"half-way." It is obvious to the Commission that the respondent, in a desire to continue his unlawful operations as a common carrier, went to his customers and secured their signatures to the contracts in question. For all that appears he got them all and, except for the immediate present, he is ready to take on any and all others who will sign the form contract.

After careful consideration of the evidence, the Commission is of the opinion and so finds that the respondent still is operating as, and is, a common or motor vehicle carrier, and that his plan of having his customers sign the contract is a mere scheme to evade law, and that, as was stated by the Supreme Court of this State in Davis v. People, *ex rel.* Public Utilities Commission, 79 Colo. 642, 644, "Contrary to popular opinion, mere schemes to evade the law, once their true character is established, are impotent for the purpose intended. Courts sweep them aside as so much rubbish."

ORDER.

IT IS THEREFORE ORDERED AGAIN, That the respondent, N. J. Fitzmorris, immediately cease and desist from operating as a motor vehicle carrier as defined in Chapter 134, Session Laws of Colorado.

RE JAMES W. CAREY, DOING BUSINESS AS JIM CAREY AUTO SERVICE.

[Case No. 374. Decision No. 2187.]

Tariffs—Automobiles—Absence of restriction as to hours or minimum number of passengers.

Where motor vehicle carrier's tariff contains no provision for making trips at certain hours or requiring a definite minimum number of passengers, he must transport passengers, irrespective of number, at any business hour of the day, and at per passenger rates if no agreement be made for a private car.

[May 11, 1929.]

Appearances: John D. Dingell, Esq., Colorado Springs, Colorado, attorney for James W. Carey, respondent.

STATEMENT.

By the **Commission**: The Commission entered an order requiring James W. Carey, doing business as Jim Carey Auto Service, to show cause by written statement filed with the Commission why this Commission should not revoke and cancel its certificate of public convenience and necessity heretofore issued to him. It was further ordered that the matter be set down for hearing in the Hearing Room of the Commission, at which time the respondent was required to appear and give such testimony and make such showing as he might deem proper and at which time such other evidence as should be proper might be introduced in support of the complaint.

The Commission received a written statement from the respondent in which at some length he stated the facts and his position with reference thereto. At the request of respondent, and in order to permit a material witness to leave the State, the testimony of one Blaine, an employe during the past sightseeing season of the respondent, was taken in the Hearing Room of the Commission prior to the date of the hearing.

The order to show cause stated that complaint had been made to the Commission that on August 6, 1928, the respondent, a motor vehicle operator doing sightseeing passenger business in the Pikes Peak region under a certificate issued by this Commission, had transported two passengers in an automobile from his office in Colorado Springs to the Garden of the Gods at rates less than those named in his tariff on file with the Commission and effective at that time. The respondent stated that on August 6, the date in question, at about 12:00 o'clock noon, one of his drivers, one R. F. Blaine, was standing in the doorway of the respondent's office soliciting business; that two gentlemen stopped and asked what it would cost them to go through the Garden of the Gods, stating that their time was limited as they had to catch a train at 1:10 that afternoon; that the solicitor, said Blaine, told them that it would cost them $6.00, which was the private car rate, but that the individual rate was $1.50 per passenger, "but that they had no other passengers for this particular trip at that time and that they could not make any

money with only two passengers at the per passenger rate." The gentlemen informed the solicitor that they had a five dollar bill which they would be willing to pay for the trip and that was all they could pay. The driver again told them that they would be compelled to charge them either $6.00 or $3.00 for the trip, based on the per passenger rate and the gentlemen in going said, "No, we will pay you $5.00 for the trip." The driver again said "No, but if you are that anxious to give up your money you can give me the $2.00."

The said statement further recites that all of the foregoing facts came to his knowledge through the information later given him by his said employe.

The statement continues that at that point the solicitor stepped inside of the office and in the presence of a lady employe in the office and the two gentlemen in question, who were standing in the doorway thereof, asked the respondent if he wanted to send the gentlemen to the Garden of the Gods at the party rate, informing him that the gentlemen had to catch a train at 1:10 o'clock as stated; that the respondent informed the driver "That we would not lose anything and we would not make anything, but to go ahead and take them, that will be $1.50 apiece or $3.00 for the two. The man, as I recall, then gave the driver a $5.00 bill which he passed to me, and I gave one of the men back $2.00 in change and told the driver to be back by 1:15 p. m. * * * The two passengers and driver hurried out to the car." The statement further alleges that after the order herein was served upon the respondent the said driver told him that as he was putting the passengers into the car one of them offered the driver $2.00; that the driver said he did not want the money and was only joking, but the gentlemen insisted that the driver take the money, which he did, considering it as a tip to him.

He further states in the said statement that there was no collusion between him and his driver and that he knew nothing whatever about the said passenger giving the driver $2.00.

He further stated that he and other sightseeing operators were all of the opinion that he was and is entitled at any time to take one or more passengers on the trip in question at a rate

of $1.50 each, provided there is no agreement that the number of passengers would be limited.

The Commission received also a letter from Mr. H. D. Harper, Chief of Police at Colorado Springs, stating that in his opinion Mr. Carey undoubtedly was guilty of cutting rates but that Mr. Carey and other operators were following the practice stated in the belief that it is permitted by their tariffs. He further stated that the respondent has been in the business of transporting passengers on sightseeing trips for twenty-one years and has a reputation for honesty and fair dealing. The testimony showed that the sightseeing operators in the Pikes Peak region have a practice of sending out cars on various tours at about 2:00 o'clock in the afternoon at which time an effort is made to have a number of passengers for the various trips that are taken.

Robert Blaine, the said employe of the respondent, testified that he told the two passengers in question that the private car rate was $6.00 and that it would be impossible to charge $5.00; that he would have to charge $1.50 each or $6.00; that he then told them that he would see the respondent and that if they were so anxious to get rid of their $5.00 they could pay the $2.00 to him. He further testified that the respondent told him it would be all right to take the two passengers if Blaine would hurry back with the car. He testified also that the $2.00 was handed to him at the gutter or curb and that the passengers stated, "That was the bargain." He further testified that the respondent consulted his rate sheet or tariff before agreeing to transport the men for $3.00 and that the respondent did not know until he received a copy of the order to show cause that Blaine had taken the $2.00 which was kept by the latter.

The respondent testified that he knew nothing about the payment of the $2.00 until after the order herein had been issued; that he asked the bookkeeper to check the tariffs before agreeing to the rate of $1.50 per passenger. A Mrs. Kennedy, an office attendant of the respondent, testified that the respondent stated when he was first asked by Blaine whether the two passengers could be transported at the per passenger rate of $1.50 that he didn't know whether they had time.

The two passengers in question, one Mayberry and one Field, employes of a detective agency who had been engaged by some other operators in Colorado Springs, testified that when they first asked Blaine about the trip he told them that if they could wait until 2:00 o'clock they could get the $1.50 per passenger rate on the regular bus; that they then told Blaine that they had to have a private car and didn't have but $5.00 and that Carey then said to Blaine—"Get the five." They further testified that the respondent was just inside of the office when the conversation at the door was had with Blaine; that when Carey stated to Blaine, "Get the five," the agent turned to the passengers and remarked that they would take the two passengers for $3.00 and that they could give him (the driver) the other two; that they handed the respondent a $10.00 bill, who changed it and returned the change to the driver, who held out his hand to one of the passengers with a $5.00 bill and two $1.00 bills; that one of the passengers then removed the $5.00 bill from the driver's hand, leaving the remaining two $1.00 bills in the driver's hand; that the driver then slipped the two bills into his pocket, whereupon the passengers and Blaine went out to the car and proceeded on their trip.

Mrs. Kennedy, the office attendant, heard, according to her testimony, nothing said about the $2.00 in her presence and did not see Blaine take the same from either of the passengers.

The per passenger rate on the trip in question is $1.50. The tariff contains the provision reading as follows: "Private car rates for all other trips to be the sum of four individual rates of the various trips, subject to Rule 9, unless otherwise shown." Rule 9 reads as follows:

"9. PRIVATE CARS:

Private cars are available for the exclusive use of parties desiring same at the private car rates herein published; except, that when such a private car rate is less than the total amount that would accrue if the passengers in such a party were sold at the per capita fare, the per capita fare must be used."

The question arises whether fewer than four passengers present themselves for transportation on a particular trip and there are no others desiring to take the trip at the time the operator

is warranted in taking them at the per passenger rate which, in this case, would amount to a total of $3.00, provided there is no agreement that they are to have a private car. It seems that while the larger operators make an attempt to start their tours at a certain hour in the morning and at 2:00 o'clock in the afternoon, many of them believe that if there is no agreement that no other passengers will be carried they may at any hour in the day take two or three passengers in an automobile without charging the private car rate, which would be greater than the total amount received for two passengers at the per passenger rate. Moreover, the Rate Expert of this Commission testified that in his opinion under the tariff in question this practice of a number of the operators is not a violation of the tariff on file.

However, there is quite a little evidence both on the part of Carey and his employe, Blaine, which indicated that in the minds of both of them they were not obliged to take the passengers on the trip in question unless the private car rate was paid. Even though the practice of the operators is warranted in view of their tariffs, there is quite a little indication in this case that the applicant and his employes were not dealing properly with the two passengers. If, under the respondent's tariff, there is no limitation as to the time when the various trips will be taken and he may transport fewer than four passengers on a trip at the per passenger rate then when one or more passengers present themselves they are entitled to go as a matter of right and not as a matter of favor to be granted by the operator. If the tariffs are not changed we shall expect this operator and others at any hour during which they operate to take one or more passengers on any trip at any time the passenger presents himself or herself without waiting for other passengers, provided only all of the equipment is not then in actual use.

Moreover, the public convenience and necessity requires that the operators and their employes should be familiar with their tariffs. A lack of knowledge of the tariff rates makes the operator undesirable.

In view of the testimony of the respondent and his two employes, we are compelled to conclude that it has not been estab-

lished that the respondent knew anything about the payment of the $2.00 to the driver or that he in any manner received the same or any part thereof.

ORDER.

IT IS THEREFORE ORDERED, That this case be, and the same is hereby, dismissed.

RE THE DENVER & SALT LAKE RAILWAY COMPANY.

[Investigation and Suspension Dockets Nos. 98, 99, 100 and 101. Decision No. 2230.]

Rates—Railroads—Cream rates—Passenger fares—Constructive mileage—Moffat tunnel.

Milk and cream rates and passenger fares between points situated on different sides of the Moffat tunnel based on a constructive mileage over the Continental Divide instead of through the tunnel found not justified, and carrier ordered to make effective new schedules based upon actual mileage.

[May 24, 1929.]

Appearances: Elmer L. Brock, Esq., attorney for The Denver and Salt Lake Railway Company; A. L. Vogl, Esq., attorney for Routt County Shippers; T. S. Wood, Rate Expert, for the Public Utilities Commission of the State of Colorado; Harry S. Dickinson, Commissioner, Transportation Department, Denver Chamber of Commerce.

STATEMENT.

By the **Commission**: This cause is before the Commission as a result of schedules filed February 23, March 10, and March 12, 1928, to become effective March 23, and April 20, 1928, by The Denver and Salt Lake Railway Company, wherein it proposes to add 22.84 constructive miles to its distance tariff of class rates and passenger fares, and 23 constructive miles to its milk and cream rates.

The tariff governing classes and commodities between stations on The Denver and Salt Lake Railway is constructed in three "alternative" sections. Section One naming specific class rates

between Denver on the one hand and all other stations on the other hand. Section Two naming specific commodity rates, and Section Three naming distance class rates, and distance commodity rates on water, plain (not flavored or phosphated), other than carbonated, in carloads, also petroleum and petroleum products, carloads, classified as taking 5th class in Current Western Classification.

Paragraph C, in Section Three of this tariff provides: "Rates between any station located in Group A and any station located in Group B will be ascertained by adding 22.84 miles to the distance between such stations computed by use of mileages shown on page 19 herein." Group A names all stations on the east side of the tunnel (except Denver), and Group B names all stations on the west side of the tunnel.

Paragraph C, in Section Three was suspended by I. & S. Docket Number 98.

The tariff governing passenger one-way fares names the specific fare applicable between all stations; it makes no provision for the addition of constructive mileage as does the freight tariff, but the fares named between points east of the tunnel and points west of the tunnel are predicated upon the addition of 22.84 constructive miles.

The tariff was suspended by I. & S. Docket Number 99.

The tariff governing milk and cream in cans, between stations on The Denver and Salt Lake Railway, is in three sections, Section One naming the application of rates, Section Two naming the rules and regulations, and Section Three naming the rates on five, eight and ten gallon cans on a distance basis. Under Section One, the following paragraph is published: "Rates between any station located in Group A, and any station located in Group B, will be ascertained by adding 23 miles to the distance between such stations computed by use of mileages shown below." This section also shows the mileage table to be used in computing charges on milk and cream, and the stations in Groups A and B.

This tariff was suspended by I. & S. Docket Number 100. On account of the operation of The Denver and Salt Lake Railway

through the Moffat tunnel, which created the stations of East Portal and West Portal, it was necessary to reissue this tariff. This new tariff was suspended by I. & S. Docket Number 101.

These schedules were suspended by the Commission, upon its own motion, and the cases were heard on Friday, November 30, 1928, in the Hearing Room of the Commission, 305 State Office Building, Denver, Colorado, at 10:00 o'clock a. m. The four cases were consolidated at the time of hearing on one record. The effective date of the schedules was voluntarily postponed by respondent until the final order of the Commission.

February 26, 1928, The Denver and Salt Lake Railway Company began operation through the Moffat tunnel, thereby reducing the mileage between points east of the tunnel and points west of the tunnel 22.84 miles.

In order to maintain the same distance freight rates, milk and cream rates, and passenger fares between points east of the tunnel and points west of the tunnel, the respondent provided a rule for ascertaining rates, based upon a constructive mileage of 22.84 miles, to be added to the actual mileage. This rule was published in the freight tariff and the milk and cream tariff. The passenger fares named in the tariff were published out specifically. However, they were predicated upon the same constructive mileage as the other rates.

The issue, therefore, as we view it, is whether the operation through the tunnel justifies the addition of 22.84 miles to the actual mileage in determining the reasonableness of the rates and fares involved.

A. L. Vogl, representing Routt County shippers; T. S. Wood, Rate Expert of this Commission, and Harry S. Dickinson, Commissioner of Transportation, Denver Chamber of Commerce, entered appearances, but introduced no evidence.

Prior to the operation of The Denver and Salt Lake Railway Company through the Moffat tunnel, its operation was over the Continental Divide, encountering a very heavy grade of 4 per cent from East Junction to Corona on the east side of the divide and from Fraser River to Corona on the west side of the divide, the total distance with such grade being 26.89 miles.

Exhibits of record, introduced by respondent, compare its rates on milk and cream, based on actual and constructive mileage, with rates prescribed by the Interstate Commerce Commission in Dockets 14552, 14689, 15564 and 18955, various express rates throughout the country and intrastate rates in Colorado. A review of the above numbered dockets reveals the fact that these rates are joint line rates and, as such, are entitled to an additional charge to cover the terminal services. In Docket 14552, 100 I. C. C. 37, the Commission says: "* * * On interline traffic of the character here under consideration each of the connecting carriers renders a terminal service similar to that rendered on movements local to their lines, and a charge of 15 cents for these two terminal services does not appear excessive. That amount added to the present rate of 30 cents for 25 miles under the Beatrice scale would produce a rate of 45 cents for a joint-line movement of 10-gallon cans for that distance * * *."

The rates shown in this exhibit as being the applicable rates on the lines of the Grand River Valley Railway, Great Western Railway and San Luis Southern Railway, the interstate rates in Arizona, California, Colorado, Idaho, Kansas, Missouri, Nevada, New Mexico, Oklahoma, Oregon, Texas, Utah and Washington, the rates in Maryland, North Carolina, Ohio, Virginia and West Virginia on the Norfolk and Western Railway, in Connecticut, Delaware, Indiana, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Vermont and West Virginia, and rates between states named and the Dominion of Canada, in Illinois and Kentucky, and those applying between stations in Colorado and stations in other states between the Rocky Mountains and the Mississippi River, are all express rates, the traffic being handled by the American Railway Express Company and not by the railroads in baggage car service.

In *Re* Proposed Increase in Rates on Milk and Cream Between Points in Colorado on the Missouri Pacific Railroad Company, I. & S. Docket No. 81, Decision No. 1081, this Commission said: "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." It naturally follows, therefore, that these rates would be higher than those applying on the line of the respondent, where the traffic is handled exclusively in baggage car service.

A comparison of the milk and cream rates computed on the basis of actual mileage via the Denver and Salt Lake and the present applicable rates on Class I railroads in Colorado reveals the fact that the Denver and Salt Lake rates would be on an average 18.19 per cent higher.

Respondent's exhibit of record shows that the intrastate rates on cream in Utah, Wyoming and Nebraska are higher than the Denver and Salt Lake actual mileage rates. This exhibit is in error insofar as the Wyoming intrastate rates are concerned, as an examination of the governing tariffs reveals lower rates than those shown in the exhibit. In Utah and Nebraska there are two scales of rates, one scale applying on milk and the other on cream, the milk scale being considerably lower than the cream scale. For example, the Utah milk rate for a distance of 50 miles is 31 cents and the Nebraska rate is 35 cents, while the cream rates are 41 and 37 cents, respectively. The rates involved in these proceedings apply to both milk and cream on the same basis. Following the decision of the Interstate Commerce Commission in *Ex Parte* 74, this Commission authorized the Denver and Salt Lake to increase its milk and cream rates 20 per cent, without authorizing any other Colorado carrier to make a similar increase. The Commission at that time recognized the fact that the Denver and Salt Lake needed revenue. Under its present proposed plan of constructive mileage the 20 per cent increase would be further increased as follows:

For distances not exceeding 50 miles.....33%
For distances not exceeding 100 miles.....28%
For distances not exceeding 160 miles.....27%
For distances not exceeding 220 miles.....26.3%
For distances not exceeding 235 miles.....24.5%

Passenger fares on the Denver and Salt Lake have been considered previously by this Commission. On July 1, 1915, in Case Number 11, passenger fares were reduced from five cents to four and one-half cents per mile. In Case Number 126, decided December 25, 1917, the five cent per mile basis was restored. In 1920, this basis was increased 20 per cent, following the increases granted by the Interstate Commerce Commission in *Ex Parte* 74. Upon the basis proposed here, that basic fare would be increased to 6.59 cents per mile between Denver and Craig, and 31 cents per mile between East Portal and West Portal.

One of the respondent's exhibits shows that if the distance class rates at actual mileage were used they would reduce the specific rates between Denver and stations, West Portal to Haybro, inclusive, the following amounts:

CLASS RATES

	1	2	3	4	5	A	B	C	D	E
West Portal	19	15½	15	20	11½	11½	6½	10	3	6½
Wood Spur	19	15½	13½	19	10	10	3½	6½	0	3½
Fraser	10	9	8½	13½	7	7	1½	4½	0	2
Tabernash	7½	6½	6½	10	3½	3½	0	8½	0	0
Elkdale	15½	13½	11½	12	0	0	0	0	0	0
Granby	9	3½	3½	5½	0	0	0	12½	0	0
Wasatch	17	12	10	6½	0	0	0	0	0	0
Sulphur Springs	15½	0	2	0	0	0	0	5½	0	0
Parshall	7	0	0	0	0	0	0	0	0	0
Troublesome	15½	5	7	0	0	0	0	0	0	0
Kremmling	25	13½	7	0	0	0	0	0	0	0
Azure	25	23½	0	0	0	0	0	0	0	0
Radium	17	18	0	0	0	0	0	0	0	0
Yarmony	8	13½	0	0	0	0	0	0	0	0
State Bridge	0	4½	0	0	0	0	0	0	0	0
Orestod	0	4½	0	0	0	0	0	0	0	0
Volcano	8½	8	0	0	0	0	0	0	0	0
Egeria	13½	12½	0	0	0	0	0	0	0	0
Toponas	5	5½	0	0	0	0	0	0	0	0
Trapper	5	3	0	0	0	0	0	0	0	0
Haybro	1½	1½	0	0	0	0	0	0	0	0

To and from points west of Haybro the freight rates would not be affected. The territory covered by the above named stations is the least populated section of respondent's line.

Owing to the fact that the use of actual mileage rates to a large majority of these stations would only affect the less than

carload rates, respondent argues that no change should be made in these rates for the reason that a reduction in less than carload rates from Denver to points on its line without a corresponding reduction in carload rates, would adversely affect the local merchants in its territory, because the spread between less than carload and carload rates should be sufficient to preclude the sale of merchandise by large mail order houses to the consumer direct.

Owing to the numerous commodity rates, classification exceptions, and mixtures permitted in what are known as rule 10 cars, published by the defendant, the Commission is of the opinion that the changes in rates which would be affected by the use of actual mileage would have very little effect, if any at all, upon the local merchants of this territory.

The practice of adding either an allowance of constructive mileage or fixed arbitraries to rates for each section of line where construction or operating costs are high is not sound in principle. The tunnel rental charge should be taken care of out of the line haul rates in the same manner as is the expense of any piece of expensive track, bridge, trestle or tunnel along the carrier's line. The tunnel itself is a facility for safer and more expeditious service between the eastern and western slope. In such a case it is not the usual practice to add an extra charge to the line haul rates. Many instances of unusual and expensive construction could be given where, as a rule, no extra charge is made. If it is proper for the carriers to make separate charges here, the same principle would permit them to assess additional charges elsewhere for an unusual expense in construction or operation. Such a principle carried to its logical conclusion would result in the rates being divided into sections to accord with each variation in costs of construction or operation. This would result in an illogical and impractical rate adjustment.

The Denver and Salt Lake "Exhibit No. 5" is a summary of operations from March 1, 1928, to September 30, 1928, compared with the same period of 1927. It shows that the gross operating revenues for the period March 1, 1928, to September 30, 1928, were $194,537.25 less than for the same period in 1927. It fur-

ther shows that the net railway operating income after paying the rental for the Moffat Tunnel and the Northwestern Terminal and taxes was more than 100% greater for the seven months in 1928 than it was for the same months in 1927, the figures being as follows:

1927	1928	Increase
$226,550.98	$487,403.29	$260,852.31

This exhibit further shows that the operating ratio of the respondent for these seven months in 1928 was under 67%, as compared with 89.73% for the same period in 1927. An operating ratio of 67% is considered low for roads in the western district. It is apparent to us from these figures that the financial results of operation of the road do not justify these proposed increased rates and fares based upon constructive mileage.

After careful consideration of all the evidence introduced in support of the proposed schedules, the Commission is of the opinion and so finds that the rates and fares based upon the constructive mileage are not justified. An order will be entered requiring the cancellation of same and requiring the respondent to use actual mileages in figuring rates and fares in all cases where the same are based upon mileage.

ORDER.

IT APPEARING, That by orders dated March 14 and 16, 1928, the Commission entered upon a hearing concerning the lawfulness of the rates, charges, regulations, and practices stated in the schedules enumerated and described in said orders, and suspended the operation of said schedules until the 12th day of January, 1929, and which were voluntarily further suspended by respondent until the first day of July, 1929;

IT FURTHER APPEARING, That a full investigation of the matters and things involved has been had and the Commission, on the date hereof, has made and filed its decision containing its findings of fact and conclusions thereon, which said decision is hereby referred to and made a part hereof;

IT IS ORDERED, That the respondent herein be, and it is hereby, notified and required to cancel said schedules on or before

July 1, 1929, and that new schedules be prepared eliminating the constructive mileage from the freight and milk and cream tariffs, and the passenger tariff fares be constructed upon a basis of actual mileage, on the same per mile basis in effect prior to the operation through the tunnel, upon notice to this Commission and to the general public not less than fifteen days prior to July 1, 1929, in the manner prescribed in Section 16 of the Public Utilities Act, and that this proceeding be discontinued.

RE HOME GAS & ELECTRIC COMPANY.

[Application No. 1232. Decision No. 2241.]

Certificates of convenience and necessity—Conditions—Construction prior to the exercise of right.

1. The Commission may not authorize the exercise, by an applicant for a certificate of convenience and necessity, of a right granted by its franchise to construct and operate a generating plant where the applicant signifies no present desire or intention to construct such a plant and there is no evidence of public convenience and necessity therefor.

Franchises—Proper taxation—Electricity.

2. Payment by a utility to a city in return for franchise authority to operate therein is warranted only where the money paid is to meet some expense which the city has in connection with the passage of the franchise and the operation of the utility; but it is not warranted where it is merely a sort of consideration for granting the franchise.

Franchises—Gross receipts—Electricity.

3. While the Commission could not put its stamp of approval upon a discriminatory franchise provision requiring the utility to pay to the city a percentage of its gross income, it took no action with respect thereto in view of a further provision of the ordinance that the said payment was to be in lieu of any pole and wire license fees, and the fact that no customers had protested.

Discrimination—Free service—Franchise tax.

Statement that there is no difference in principle between giving free service to a city and the payment of money to a city merely as a consideration for granting a franchise.

[May 24, 1929.]

Appearance: Walter E. Bliss, Esq., Greeley, Colorado, attorney for applicant.

STATEMENT.

By the **Commission**: This is an application by The Home Gas and Electric Company for a certificate of public convenience and necessity, authorizing exercise by the applicant of the franchise rights granted to it by the City Council of the City of Greeley, Colorado.

On March 4, 1924, the City Council of the City of Greeley passed an ordinance granting to the applicant, its successors and assigns, "the right, privilege and authority to erect, construct, maintain and operate a substation or substations, an electric light and power plant and a distribution system for the transmission, distribution and sale of electrical energy within the corporate limits of the City of Greeley, and any additions thereto, Weld County, Colorado, and repealing all ordinances or parts of ordinances in conflict herewith."

The applicant first sought authority from this Commission to exercise the said franchise rights by filing its application herein on November 27, 1928. The evidence showed, however, that the failure of the applicant to seek authority sooner was not due to any contemptuous disregard of the jurisdiction of the Commission, but was due to its lack of knowledge that the law compelled it to secure such authority. It appeared also that as soon as it learned of the necessity of securing a certificate from this Commission, it immediately filed its application.

The applicant is, and has been ever since prior to the granting of the franchise in question, engaged merely in the distribution of electrical energy. It does not at this time desire or intend to construct a plant for the generation thereof. Since the showing that public convenience and necessity requires the construction of a generating plant as a condition precedent to the making of an order authorizing such construction, the Commission cannot at this time authorize the exercise by the applicant of the right granted by the franchise to construct and operate a plant.

The capital to be invested by the applicant is $478,464.74.

No other utility is engaged in either the generation or distribution of electrical energy in the City of Greeley or surrounding territory.

The first paragraph of Article V of the ordinance granting the franchise reads as follows:

"The Company shall pay to the City One per cent (1%) of its gross earnings within the City of Greeley, including in the computation of such gross earnings all amounts paid by the City to the Company for electricity or electrical energy, but in no event shall said payment be less than Six Hundred Dollars ($600.00) per annum, which amount per annum the Company agrees to pay as the minimum."

If the amount of money required to be paid to the city by the utility is only enough to compensate the city for the expense it incurs in connection with the franchise, such as a study and investigation preceding the granting thereof, and the occupancy of the streets with the wires and poles of the company, the payment is warranted. However, if the money paid to the city is not to meet any expense which the city has in connection with the passage of the franchise and the operation of the utility, but merely as a sort of consideration for granting the franchise, then we believe the payment is not warranted.

There are numerous cases holding that it is improper for a municipality to receive free service from a public utility. The reason for that position is that the utility collects enough from its customers to pay for the cost of free service to the city, resulting in the customers of the utility being compelled to contribute money which should be raised from the taxpayers generally.

We see no difference in the principle between giving free service to a city and the payment of money to a city merely as a consideration for granting a franchise, because in the latter case the city obtains money to defray the municipal expenses which should come from all the taxpayers and not merely those who are customers of the utility. A municipality has been given by the legislature certain powers respecting public utilities, including the power to grant franchise rights in the streets. These powers are to be exercised for the benefit of the citizens, the municipality acting as a sort of trustee. Since the customers of the utility in the end pay whatever consideration the city re-

ceives for issuing the franchise, the effect of the requirement of the payment of the consideration is to force the customers of the utility to pay the taxpayers in general for the privilege of securing service of the utility. We cannot see any justification for the requirement of such a payment.

A general statement of the situation is found in Spurr's Guiding Principles of Public Service Regulation, Volume 1, page 3:

"Another objection to these local franchise contracts was the discriminatory provisions which almost always existed against the ratepayers of the utility in favor of taxpayers who were not users of the utility service. The municipalities, for example, invariably provided for free service for themselves. This was a species of special taxation which discriminated against a particular group of taxpayers. Another type of discrimination much in favor during the days of home rule consisted of the putting of certain burdens upon the "company" as a condition of granting the local franchise. These obligations were probably imposed upon the theory that it was the corporation which would have to bear them. The patrons of the company no doubt joined in the view that the harder the bargain for the company, the greater the benefit to its consumers, overlooking the fact that it is the consumers—not the company—who have to pay. If the companies were to render service under the conditions imposed, these demands of the home authorities, whether in the form of taxation or spcial services required by the companies, really amounted to a discrimination against the consumers of the particular utility service in favor of non-consumers."

However, we note from said Article that this payment to the city is intended to be in lieu of pole and wire license fees which might lawfully be required by the city to be paid by the applicant. Therefore, while the Commission cannot properly put its stamp of approval upon the requirement of the payment of a fixed sum or percentage of the gross earnings to the city in view of the absence of any showing justifying the same, we do not feel warranted at this time without any protest on the part of

any of the customers of the applicant in taking any action with respect to the said payment.

After a careful consideration of the evidence, the Commission is of the opinion and so finds that the public convenience and necessity requires the exercise by the applicant of those rights and privileges granted by said ordinance authorizing the construction and operation in the City of Greeley, Colorado, of a substation or substations, and a distribution system for the transmission, distribution and sale of electrical energy in said city and any additions thereto.

ORDER.

IT IS THEREFORE ORDERED, That the public convenience and necessity requires the exercise by the applicant of those rights and privileges granted by said ordinance, authorizing the construction and operation in the City of Greeley, Colorado, of a substation or substations, and a distribution system for the transmission, distribution and sale of electrical energy in said city and any additions thereto, and this order shall be taken, deemed and held to be a certificate of public convenience and necessity therefor.

RE PUBLIC SERVICE COMPANY OF COLORADO.

[Investigation and Suspension Docket No. 115. Decision No. 2248.]

Discrimination—Unlawful discrimination generally.

1. Unless discrimination in utility rates is unreasonable it is not unlawful.

Discrimination—Low rates to large users.

2. There is a limit beyond which a public utility should not be allowed to go in the making of low rates to large consumers.

Discrimination—Classification in rates—Large users.

3. The Commission held that the legislature did not intend to prohibit the making by utilities of reasonable classifications of consumers and reasonable differences in rates to such classes to the extent of allowing certain large consumers a special rate in order to maintain their service, with consequent revenues for the good of all patrons generally.

Discrimination—Inadequate return.

4. If there is no basis for a proper classification in giving a lower rate to one consumer than to another in the same class it is an unlawful preference and discrimination, irrespective of the question of the return that would be realized if no concession were made.

[May 24, 1929.]

Appearances: George H. Shaw, Esq., Denver, Colorado, attorney for Public Service Company; Barney L. Whatley, Esq., Denver, Colorado, attorney for Climax Molybdenum Company; John A. Ewing, Esq., Denver, Colorado, attorney for Leadville Deep Mines Company, Penrose Mines, Inc., Evans-Wallower Lead Company and The American Smelting and Refining Company.

STATEMENT.

By the **Commission**: Public Service Company of Colorado made a general overhauling of its power rates for energy served to mining companies and others dealing with the products thereof. One of the provisions of the new tariff filed reads as follows:

"SPECIAL CONDITIONS.—When fifty per cent (50%) or more of the total energy is used for mine unwatering, and/or smelter operations, and customer provides suitable submetering, approved by and free of cost to the Company, the energy charge of the rate schedule shall be subject to a discount determined as follows: Ten per cent (10%) of the percentage obtained by dividing the kilowatt hours measured by the submetering by the total kilowatt hours used."

Climax Molybdenum Company, engaged at or near the summit of Fremont Pass in the mining of molybdenum, protested against said provision in the new tariff. The Commission thereupon suspended the tariff and held a hearing thereon.

The evidence shows that at the present time the company owning and operating the smelter in Leadville, and two mining companies, the Leadville Deep Mines Company and Evans-Wallower Lead Company, would benefit by the provision in question, and that a third company, Penrose Mines, Inc., is contemplating operations to which also the provision in question would apply.

Deep Mines Company's mine is located at a depth of some 1,400 feet below the surface of the ground and covers an area of some 220 acres. It was once abandoned before the present operations began, and it was necessary for the company to spend some $460,000 over a period of about two years in pumping water out of the mine, before resuming any mining operations proper. At the present time it is pumping 1,500 gallons of water per minute. Eighty-three per cent of its total energy consumption is required for pumping alone. Two hours' interruption in pumping would flood the pumps and cause great damage. The company, in order to continue operations in the future, must, if it is to avoid such a heavy outlay as it was compelled to make in unwatering the mine some three years ago, continue its pumping operations irrespective of the price level of the metal markets. Other mines which are so situated as to have no substantial amount of water or are at a sufficiently high elevation to permit of drainage by tunnel, not only do not have the heavy expense of pumping but may wholly cease operations during a period when metal prices are low.

The mine of Penrose Mines, Inc., is a large one having formerly been abandoned because of operations becoming unprofitable. It is contemplating an expensive unwatering program so as to resume operations in the future.

There are at the present time only two mine smelters in Colorado. One is situated in Leadville, the center of the district in which all of the parties hereto are operating. Another is in Durango, which is situated in the extreme southwestern corner of the State. If ores are shipped to that smelter they must be shipped over a long, circuitous route leading through northern New Mexico, and when refined or smelted the products of the smelter must come back over the same route. Many other smelters formerly in operation in Colorado have ceased operations and have been dismantled. It is obvious that if the smelter in Leadville cannot operate profitably it will go the route of many others, leaving the greater portion of the mining territory in Colorado unserved except by the smelter at Durango and

another situated near Salt Lake City. It is quite a question how many of the ores could profitably be shipped to those smelters.

It is likewise obvious that if the mines having to pump water and being called "wet mines" cannot purchase their energy at sufficiently low rates, those that are now operating will be compelled to cease and those that are contemplating resumption of operations will abandon their plans therefor.

While Public Service Company assumed an attitude of neutrality, its rate engineer took the stand and made what we consider a *prima facie* justification of the classification in question. He testified in substance that in view of the company's "past history with that class of business," it was necessary to make the classification in order to insure that "these customers could keep on operating."

There is no contention that the cost of serving the smelter and the wet mines is any greater than that of serving the Climax and other mines. The load factor and other attributes of the Climax Company's consumption compare favorably with those of the companies benefited by the provision. The attorney for the Climax Company, in opening his brief, says:

"The so-called 'Special Conditions' contained in the schedule seem to us to present two questions of major importance. (1) May a public utility grant special favors, or rates, or rebates, or discounts, or other gratuities, to such of its patrons as it may choose to favor? and (2) the service of the utility being the same in each instance, may it discriminate as between two mining companies on the sole ground of a physical operating condition found in one mine and not in the other?"

After reading his brief we understand his contention to be that rates may not be made less to one class than to another unless there exist differences in conditions affecting the expense or difficulty of performing the service which fairly justify difference in rates. Two statutory provisions found in the Public Utilities Act read as follows:

"Except as in this section otherwise provided, no public utility shall charge, demand, collect or receive a greater or less or different compensation for any product or commodity furnished

or to be furnished, or for any service rendered or to be rendered, than the rates, tolls, rentals, and charges applicable to such product or commodity or service as specified in its schedules on file and in effect at the time, nor shall any such public utility refund or remit, directly or indirectly, in any manner or by any device, any portion of the rates, tolls, rentals and charges so specified, nor extend to any corporation or person any form of contract or agreement or rule or regulation or any facility or privilege except such as are regularly and uniformly extended to all corporations and persons; provided, that the Commission may by rule or order establish such exceptions from the operation of this prohibition as it may consider just and reasonable as to each public utility.

"No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any respect, either between localities or as between any class of service. The Commission shall have the power to determine any question of fact arising under this section." Sections 2928 and 2929, C. L. of Colo., 1921.

We find that the utilities acts generally throughout the United States, as did the common law, prohibit *unreasonable* or *undue* discrimination and preference. Unless the discrimination or preference is unreasonable, it is not unlawful. The following are some of the statements found on this subject:

"Should our investigation have disclosed the proposed classification to be in fact *unduly* discriminatory, we would have been required to relieve any locality or class of subscribers upon whom the burden bore unduly, as the wording of the statute is clear, the principle of decision plain, and the Commission's path of duty straight." *Re* Chesapeake & Potomac Telephone Co., P. U. R. 1920F, 417, 447.

"Where discriminations are in the interest of the public, and benefit the people generally, they are usually favored by the

courts. The beneficiaries thereof do not come into competition with any class of business, and no injustice is done to anyone unless the discrimination increases the cost of the service to the public generally; and where the discrimination does not inure to the *undue* advantage of one man in consequence of some injustice imposed on another, the same is upheld where not prohibited by statute or some rule of public policy.'' Guthrie Gas, Light, Fuel & Improvement Company and Oklahoma Natural Gas Company v. Board of Education of the City of Guthrie, State of Oklahoma, *et al.*, 64 Okla. 157, P. U. R. 1917E, 200, 205, 166 Pac. 128, L. R. A. 1918D, 900.

''This rule requiring those engaged in a 'public business' to render service to the public without discrimination does not mean a uniformity of rates or prices for services rendered to the public. A 'public business' cannot be required to charge the same rate for services rendered to different classes, or those people differently situated. The discrimination that is prohibited must be an arbitrary or unjust discrimination. A mere difference in prices for a commodity furnished to different classes would not constitute an unjust discrimination. As said by Fletcher on Corporations, vol. 7, p. 7815:

''* * * It is only arbitrary discriminations that are unjust. If the difference in rates is based upon a reasonable or fair difference in conditions, which equitably and logically justifies a different rate, it is not an unjust discrimination. In fact, this question of discrimination narrows itself to a determination of whether discrimination, conceding it to exist, is just; i. e., based on reasonable grounds, or is unjust; i. e., merely arbitrary. There is no unjust discrimination if all persons similarly situated affected by like conditions and subject to like circumstances are given the same rate. * * *

''In other words, one engaged in a 'public business' may classify his customers and charge different rates to persons dissimilarly situated, or in different classes.'' Consumers' Light & Power Company v. James Phipps, P. U. R. 1927C, 216, 220-221, 251 Pac. 63.

"The Constitution requires that unjust discriminations, as well as excessive charges, by common carriers be prevented." State *ex rel.* State Railroad Commissioners v. Jacksonville Terminal Co., P. U. R. 1926C, 115, 133, 106 So. 576.

In Postal Telegraph-Cable Co. v. Associated Press, 127 N. E. 256, P. U. R. 1920E, 1, 4, the Justice who wrote the opinion stated:

"I do not mean, of course, that equality must be absolute. * * * Division into classes is not the same thing as division into strata."

Of course perfect equality in form or operation cannot be attained by any scheme of rates. As was said by the New Jersey Board of Public Utilities Commissioners in Sullivan v. Rockland Electric Co., P. U. R. 1928B, 201, 203:

"In any revision of rate schedules, especially when such schedule effects the consolidation of two or more classes of service into one schedule, there may be some customers who suffer prejudice thereby, but if this prejudice be not *unreasonable* and the greatest good is afforded to the greatest number, such prejudice should not stand in the way of an otherwise desirable form of rate schedule."

We are at once reminded of the analogy of railroad rates. It is fundamental that one of the important considerations entering into the making of railroad rates is the value of the service to the shipper, which is largely influenced by the value of the articles shipped. The Interstate Commerce Commission stated in Hafey v. St. L. & S. F. R. R. Co., 15 I. C. C. 245, 246:

"An element of importance in fixing of rates is the value of the articles shipped, for that affects the value of the service to the shipper, and within certain limits it is not only proper but necessary that the carrier should consider the value of the article offered for transportation."

A similar statement is found in Rates on Grain, Grain Products and Hay. 64 I. C. C. 85, 98:

"Section 1 requires that no more than just and reasonable rates for transportation be exacted, and in determining what is just and reasonable it has always been recognized that, among

other factors, not only the cost of the service, but its value to the user must be considered."

A number of commissions have held that irrespective of the question of the cost of serving the consumer and the question whether his energy is taken during off-peak or on-peak periods, one consideration that is important is whether it is necessary to make a low rate to large consumers in order to prevent them from generating their own energy. It is pointed out that there are certain fixed charges which a utility has and that if the large customers are lost the remaining consumers will have to bear not only all of the fixed charges but also the small profit that the utility may earn in serving the large customers; that, therefore, the smaller customers, instead of suffering from the lower rates to the larger ones, are benefited thereby. We quote briefly from some of the cases bearing on this point:

"We do not now feel that we can abrogate the contract under consideration, due to the almost certain loss of the business which would follow the increasing of rates. Inasmuch as this particular company at times has consumed more than one-third of the entire sales of the utility, such a loss would materially affect the operating expenses so as to result in necessary increases in rates to the remaining consumers. Where such a condition is the result of loss of business, the allowance of a rate differential in order to retain the same may be justified." Wisconsin Railroad Commission in *Re* Burlington Electric Light & Power Company, P. U. R. 1915B, 117, 133.

"In order to maintain this utility in the most economical way it is necessary to give consideration to large users of light and power. The ability of such users to install private plants for the production of electricity for their own use creates a competitive condition that must be reckoned with. * * * If the large business houses and factories of the city were to abandon the existing plants and install private ones, the cost to private consumers would be greatly increased." Peck v. Indianapolis Light & H. Co., P. U. R. 1916B, 445, 487.

We appreciate that there is a limit beyond which a public utility should not be allowed to go in the making of low rates to

large consumers and that such a policy could be carried to excess, as is stated by the Massachusetts Commission in Consumers v. Edison Electric Illuminating Co., P. U. R. 1926A, 525, 531:

"We believe, however, that this policy may be carried to excess and when so carried to excess does not result in the lowering of the cost to those paying the maximum price."

The low rates to large consumers have been called the "additional business basis" rates:

"The Commission has authorized in a number of cases 'additional business basis' rates as a means of securing business which would otherwise be lost to the utility. An electric utility when once constructed and put in operation has a comparatively large proportion of its expenses which are more or less fixed. That is, these expenses are independent of the output or its variations and depend largely upon the capacity of the plant or the investment represented therein. If, then, with an existing investment or outlay, additional large consumers can be served who will bear their full share of the output costs and at the same time bear a part, at least, of the fixed costs, it will be readily seen that the remaining fixed expenses which must be borne by the other consumers will be lessened. The 'additional business basis' rate which combines the output and a part of the fixed costs cannot be considered unreasonably discriminatory because the other consumers are not only no worse off than if such business were not secured, but the increased output will help to decrease unit costs, benefiting all consumers." *Re* Coleman-Pound Light & P. Co., P. U. R. 1920A, 105, 107.

While in the instant case the contingency sought to be avoided may not be the generation of energy by the customers in question, the principle is the same whether the customer ceases operation or discontinues purchasing from the utility and generates his own energy.

Lower cooking rates have been justified on the ground that unless the rates are made low, other means of cooking will be employed. In Devils Lake Steam Laundry, *et al.*, v. Otter Tail Power Co., P. U. R. 1928C, 83, it appears that the utility made a rate of 4c net for kilowatt hour for all current consumed in

cooking, and that the general lighting rates began with 12.2c and scaled down to 5.55c. The North Dakota Commission approved the cooking rate, saying:

"It was early recognized that power consumers might properly constitute another classification and become entitled to a lower rate because of the demand and the time the service was required. With the advent of the electric stove, a new problem is presented. One of the fundamental principles of rate making is that consideration must be given to the ability of the consumer to pay—or in other words, what the traffic will bear. It is common knowledge that few, if any, electric stoves would be used if the consumer was required to pay the general power rate. It has, therefore, become recognized as a principle that a utility is justified in taking on a cooking load at a lower rate, provided such rate is sufficient to cover fixed costs and some return on the investment." (88)

Of course, it is appreciated that such a classification as is attempted here to be made does not rest on any such basis as the classification of charitable and public institutions. In making the latter classification the purpose usually is not to make a rate that will insure the getting of business, but merely to be generous to certain institutions. It is also clear that doubtless it would not be practicable and lawful to attempt further classification of wet mines and smelters by making various gradations, based upon nice distinctions and shades of difference in costs of operations, etc. It is quite possible that some mines having to pump water could much more easily stand a high rate for energy than others. However, in making classifications, the rate must apply to all in the class without any attempt being made to choose and pick from a class.

An analogy that might be referred to is that of the so-called class legislation. We do not mean to say that the same consideration and finality should be given to a rate structure as is given to a legislative act. But it is doubtless true, as in the case of a classification made by the Legislature, that "the classification is not invalid because not depending on scientific or marked differences in things or persons or in their relations, provided it

is based on a practical distinction." 12 C. J. 1131. See also Imboden v. People, 40 Colo. 142, 187.

After careful consideration of the case, we are of the opinion in view of the common law, the general statutory and constitutional provisions of other States and the context of the Public Utilities Act of Colorado that the Legislature did not intend to prohibit the making of reasonable classifications of consumers and reasonable differences in rates to the classes.

The attorney for Public Service Company stated at the hearing that even without allowing a special discount to smelters and the so-called wet mines, the company would not be earning what it is entitled to earn under the law, and that, therefore, it feels that it has a right to make a voluntary concession to certain of its customers. With this contention the Commission is unable to agree. If there is no basis for a proper classification, we are of the opinion that the giving of a lower rate to one consumer than to another in the same class is an unlawful preference and discrimination, irrespective of the question of the return that would be realized if no concession were made.

After careful consideration of the evidence the Commission is of the opinion and so finds that the provision in question entitled "Special Conditions" does not constitute an unreasonable and unlawful preference.

ORDER.

It Is Therefore Ordered, That the order of suspension herein be, and the same is hereby, set aside, and that this proceeding be, and the same is hereby, discontinued.

Dissenting Opinion of Chairman Bock:

The protest of the Climax Company alleges that the so-called "Special Conditions" contained in the proposed schedule would, if they became effective, constitute an unfair, unreasonable, unlawful and discriminatory difference in rates prejudicial to it, and set forth several reasons why this discrimination would exist.

The burden rests upon the Public Service Company to justify the "Special Conditions" in said proposed schedule. It elected,

however, to take a noncommittal and neutral stand in the controversy, leaving it to the protestants as well as the mining industries who benefit by the proposed change to contest the matter.

"After the reasonableness of rates as a whole has been determined, it becomes necessary to find out what portion of the return is to be obtained from the various classes of consumers if there is to be no unlawful discrimination; and this can be learned only after a careful analysis of the cost of each class of service." Spurr's Guiding Principles of Public Service Regulation, vol. 1, p. 62.

The record is silent as to whether the proposed schedule would be a burden upon the so-called dry mining industries as against the wet mining industries. The economics of the situation are such that if a private utility sells its service to one class of consumers for less than actual cost of production and delivery, it must make good the loss by overcharging other classes of consumers or go into bankruptcy. Furthermore, any electric schedule which recognizes only the quantity of current consumed and neglects the factors of active connected load and hours, and daily use of the connected load, must necessarily fail equitably to distribute the costs. Only after the various classes of consumers have been graduated in accordance with the cost can there be an avoidance of arbitrary discrimination.

After careful consideration of the evidence, I am of the opinion that the Public Service Company, upon the record made, has failed to justify the provision in its schedule entitled "Special Conditions." I am therefore constrained to dissent.

RE JACK D. GERST, *et al.*

[Application No. 578A. Decision No. 2254.]

Certificates of convenience and necessity—Transfer—Principal issue.

1. "The principal issue in the case of the transfer of a certificate is ability, moral reputation and financial standing of the proposed transferee."

Certificates of convenience and necessity—Transfer—Issue—Convenience and necessity of operation.

2. The question of public convenience and necessity, having been disposed of when the certificate was granted, is not in issue on an application to transfer.

[June 4, 1929.]

Appearances: G. J. Ornauer, Esq., Denver, Colorado, attorney for applicants; D. Edgar Wilson, Esq., Denver, Colorado, attorney for Rocky Mountain Motor Company, Rocky Mountain Parks Transportation Company, and the Denver Cab Company. Sam Feldman, Esq., Denver, Colorado, attorney for the Denver Auto Livery Association.

STATEMENT.

By the **Commission**: The Commission on March 12, 1927, issued a certificate of public convenience and necessity to Jack D. Gerst, doing business as Jack's Auto Sightseeing Company, authorizing the operation of a motor vehicle system for the transportation of passengers on sightseeing trips specified in said order. The operating equipment of the applicant was by the order limited to three automobiles.

Another certificate was issued to the other applicant, Arthur Bawden. His certificate likewise was limited by the Commission as to equipment.

The applicants, Gerst and Bawden, have filed an application for authority from this Commission to said Gerst to transfer his certificate to the applicant, Bawden. The consideration agreed upon by the parties, subject to the order of approval of this Commission, is $150. The consideration for the $150 is certificate, office equipment and good will. The office equipment consists principally of pictures of scenic points which have a very low cash value, owing to the fact that duplicates of most of the pictures can be procured free of charge. It appeared rather clearly that the principal reason for Bawden's desire to secure a transfer of Gerst's certificate is in order to increase his equipment by three automobiles, being the number Gerst has authority to operate. Gerst has disposed of his automobiles and proposes to sell none to Bawden. It was objected by the protesting

companies that the right to transfer a certificate is conditional upon, and passes as a sort of incident with, the transfer of the operating equipment, and that if there is no sale of equipment by the operator, there can be no transfer of his certificate. With this contention the Commission is unable to agree. The Commission heretofore has authorized a number of transfers of certificates, although for some reason or other no equipment was sold by the operator to his transferee. An operator's rights do not expire when the equipment he may happen to have on hand at the time of procuring his certificate is worn out or sold. While equipment is necessary in order to exercise the privileges and perform the duties inhering in the certificate, it is a mere means to an end. Section 6 of Chapter 134, Session Laws of Colorado, 1927, provides:

"Any certificate of public convenience and necessity, or rights obtained under any such certificate held, owned or obtained by any motor vehicle carrier, may be sold, assigned, leased, encumbered or transferred as other property, only upon authorization by the commission."

It will be noted that the subject matter of the transfer is the certificate and the rights thereunder, and not the equipment.

The principal issue in the case of the transfer of a certificate is ability, moral reputation and financial standing of the proposed transferee. The question of public convenience and necessity having been disposed of in the original application for the certificate is not raised again on an application to transfer.

The Commission is of the opinion and so finds that the public convenience and necessity requires that authority be granted to Jack D. Gerst to transfer the certificate of public convenience and necessity heretofore issued to him to Arthur Bawden.

ORDER.

IT IS THEREFORE ORDERED, That authority be, and the same is hereby, granted to Jack D. Gerst, doing business as Jack's Auto Sightseeing Company, to transfer the certificate of public convenience and necessity heretofore issued to him to Arthur Bawden.

RE PROPOSED INCREASE OF RATES ON VEGETABLES FROM WESTERN SLOPE POINTS TO COLORADO COMMON POINTS.

[Investigation and Suspension Docket No. 95. Decision No. 2274.]

Rates—Railroads—Potatoes and vegetables from Western Slope points to Colorado common points.

1. Increase of rate on potatoes and vegetables from 35½ cents to 40 cents from large number of points, called Western Slope points, to large number of points east of the Rockies, called Colorado common points, found justified.

Rates—Railroads—Grouping—Wide area—Possible effect on reasonableness.

2. Statement made that it is possible that the grouping of originating points over such a large area on the Western Slope of Colorado results in an unreasonable rate on potatoes and vegetables from the nearer points and a subnormal rate from the farther points.

[May 24, 1929.]

Appearances: J. A. Gallaher, for The Denver and Rio Grande Western Railroad Company; Burgess & Adams, for Associated Chambers of Commerce of Western Colorado and for Grand Junction Chamber of Commerce; T. S. Wood, Rate Expert, The Public Utilities Commission of the State of Colorado.

STATEMENT.

By the **Commission**: By schedules filed to become effective October 22, 1927, The Denver and Rio Grande Western Railroad Company, hereinafter referred to as the D. & R. G. W., proposed to increase the rates on potatoes and vegetables from 35½ to 40 cents per 100 pounds from Aspen, Brown's Canon, Buena Vista, Carbondale, De Beque, Delta, Doyle, Eagle, Frosts, Fruita, Glenwood Springs, Gunnison, Gypsum, Hay Spur, Hotchkiss, Lake City, Loma, Mack, Minturn, Montrose, New Castle, Ohio City, Olathe, Ouray, Paonia, Pitkin, Ridgway, Rifle, Ruby, Shale and Utaline, hereinafter called the Western Slope points, to Alamo, Barnes, Black Canon, Blende, Canon City, Champion, Chandler, Chicosa Junction, Colorado Springs, Consol, Cuchara Junction, Denver, El Moro, Florence, Ft. Logan, Fremont, Gordon, Gordon Junction, Hezron, Jansen, Kebler No. 1, Kebler No. 2, Loma

Junction, Maitland, Manitou, McNally, Minnequa, Orman, Pictou, Pryor, Pueblo, Rouse, Rouse Junction, Shumway, Strong, Sunshine, Trinidad, and Walsenburg, hereafter called the Colorado common points. Upon protests of the Associated Chambers of Commerce of Western Colorado, the operation of these schedules was suspended until February 19, 1928, and on February 16, 1928, they were further suspended until August 19, 1928. The case was set down for hearing before the Commission in Denver on July 13, 1928. Prior to the commencement of the hearing it developed that the Associated Chambers of Commerce of Western Colorado had not received notice of same. They, therefore, through a representative of the Colorado Manufacturers Association, requested a continuance. After some discussion, the D. & R. G. W. agreed voluntarily to extend the tariffs then in effect as applying to vegetable traffic until such time as this investigation could be disposed of.

On July 30, 1928, the Commission set the case for hearing in the Grand Junction Court House on August 21, 1928, at 10:00 o'clock A. M., at which time the hearing was held.

While the tariff, as filed, embraces rates on vegetables including potatoes, the evidence in the proceedings is practically confined to the potato traffic and rates.

The first commodity rate established for carload shipments of potatoes was 25 cents per 100 pounds and became effective January 10, 1907, from Grand Junction to Denver, and effective May 13, 1907, from Montrose to Denver. This rate of 25 cents was established to enable the growers and shipers of potatoes from Western Slope points to reach the Denver market (being the principal market served by the D. & R. G. W.) in competition with potatoes from the Greeley district. At the time the 25 cent rate was established from Western Colorado to Denver, the rate from Greeley to Denver was 12 cents.

Under the general advances and reductions the 25 cent and 12 cent rates are at present 35½ and 18 cents respectively.

The D. & R. G. W. contends that even the proposed rates are subnormal rates, and in support of its contention introduced numerous comparisons with rates on other lines in western terri-

tory for similar distances, and with rates fixed by the Interstate Commerce Commission, hereinafter referred to as the I. C. C., on like traffic in other sections of the country.

Exhibits of record show the average distance from Western Slope points to Denver as 451 miles and the average rate per ton mile on the present 35½-cent and proposed 40-cent rates as being 1.57 cents and 1.77 cents respectively, while the earnings from the Alamosa district for an average distance of 267 miles are 2.66 cents per ton mile, while traffic moves on the same rate as the Western Slope points, viz.: 35½ cents per 100 pounds.

During the period June 1, 1927, to May 31, 1928, there were shipped from Western Slope points 4,001 cars of vegetables, including potatoes, of which 3,024 cars were potatoes. From the Alamosa district during the same period there were shipped 12,195 cars of vegetables, of which 10,399 cars were potatoes.

During the period July 1, 1927, to April 30, 1928, there were shipped from points in Colorado 16,405 cars of potatoes, and during the period August 31, 1927, to May 18, 1928, there were unloaded at principal Colorado points, viz: Denver, Pueblo, Trinidad, Walsenburg, Greeley, Leadville and Lamar, 1,844 cars.

During the period July, 1927, to May 31, 1928, there was a total of 22,932 diversions made on perishable traffic which originated on the D. & R. G. W., of which 1,293 shipments were diverted four times, 509 shipments five times, 173 shipments six times, etc., and one shipment 12 times.

It is estimated that 80 per cent of these shipments were vegetables and 90 to 95 per cent of the vegetables were potatoes.

Witness for the D. & R. G. W. testified that it is conservatively estimated that not more than 5 per cent of the potatoes now shipped from the Western Colorado district are sold in the Denver market.

In Railroad Commission of Louisiana v. A. H. T. Ry. Co., 48 I. C. C. 354, and in Natchez Chamber of Commerce v. L. & A. Ry. Co., 58 I. C. C. 643, 63 I. C. C. 293, the I. C. C. prescribed class "C" rates on vegetables other than potatoes and 85 per cent of class "C" rates on potatoes.

In Docket 13535, Consolidated Southwestern Cases, 123 I. C. C. 203, 139 I. C. C. 535, 147 I. C. C. 165, 148 I. C. C. 282 and 613, the I. C. C. prescribed 38 per cent of the first class rate on vegetables taking fifth class rating, 30 per cent of the first class rate on vegetables taking class "C" rates and 27½ per cent of the first class rate on potatoes.

The average class "C" rate from Western Colorado points to Denver is 65 cents, and 85 per cent of this rate would produce a rate of approximately 55 cents. We are not, however, passing upon the reasonableness of the class "C" rate or any other class rates in this proceeding, but are using them only in a comparative way, as has been done in other proceedings before the I. C. C. Taking 27½ per cent of the first class rate prescribed in Docket 13535, *supra*, and applying it to the average distance of 451 miles from Western Slope points to Denver it would produce a rate of 46.3 cents.

The average distance from the Idaho potato producing district to Salt Lake City and Ogden, Utah, is 415 miles and the average potato rate is 44.8 cents, as against a proposed rate of 40 cents for an average haul of 451 miles.

Protestants' exhibit of record shows rates of 53½ cents per 100 pounds from Kansas City to Denver and Pueblo for distances of 742 and 604 miles respectively, and 52 cents from Lawrence, Kansas, to Denver and Pueblo for distances of 683 and 564 miles respectively, although its witness admitted on cross-examination that these were not the distances of the short lines to Denver, which would be the rate making lines. The rate from Utah common points to Denver is 56 cents, which, with the proposed rate of 40 cents, would give the Western Slope points a differential of 16 cents in marketing their products at Colorado common points, while in Docket 17166, 139 I. C. C. 4, Grand Junction was given a differential of 6 cents under Utah points to points in the Southwest.

A witness for protestants testified that the estimated cost of producing potatoes was about $71.25 per acre; that the average production is about 65 sacks to the acre and the average price about $1.25 per cwt., and that the average price in 1928 was 65

cents per cwt., although on his farm his average yield was between 100 and 125 sacks to the acre. He further testified that the farmer must get at least $1.25 per cwt. in order to make any profit; that potatoes are sold on an f. o. b. shipping point basis, and any increase in rates will have the effect of cutting the f. o. b. price just that much.

The Western Slope group extends from Buena Vista on the east to Mack, Colorado, on the main line on the west, thence to Montrose on the standard gauge running south from Grand Junction, and to Ridgway on the narrow gauge line, and east of Montrose on the narrow gauge to Mears Junction, perhaps the most extensive blanket to be found anywhere from which a common or group rate applies on vegetables. It is possible that such a method of blanketing so large a territory does not reflect a proper or reasonable rate from some of the closer points to the market and a subnormal rate from the extreme points. However, that question is not before us in this proceeding.

On the record we find that the proposed rate of 40 cents per 100 pounds is justified and an order will be entered discontinuing this proceeding.

The order entered herein is without prejudice to any findings in Case No. 343, General Investigation of Vegetable Rates Within the State of Colorado, now pending before us.

ORDER.

It Appearing, That by orders dated October 13, 1927, and February 16, 1928, the Commission entered upon a hearing concerning the lawfulness of the rates, charges, regulations and practices stated in the schedules enumerated and described in said orders, and suspended the operation of said schedules until August 19, 1928;

It Further Appearing, That subsequently the schedules were voluntarily deferred until June 15, 1929, and

It Further Appearing, That a full investigation of the matters and things involved has been had, and that the Commission, on the date hereof, has made a decision containing its findings of fact and conclusions thereon,

IT IS ORDERED, That the orders heretofore entered in this proceeding, suspending the operation of the schedule designated therein, be, and they are hereby, vacated and set aside as of June 15, 1929, and that this proceeding be discontinued.

Dissenting Opinion of Commissioner Jones:

Applicant, The Denver and Rio Grande Western Railroad Company, asks permission for an increase of 4½ cents per cwt. in freight rates on potatoes and vegetables from a district extending east from the Colorado-Utah State line to Buena Vista on its main line to points east thereof, including Colorado common points, of which Denver is the outstanding market for these products.

The evidence disclosed that there is practically no movement of these products of late years from this large producing territory into Denver, which is fully supplied by outlying and adjacent farm lands which have developed an excellent quality of potatoes, now being delivered by the use of the farm truck to the exclusion of the rail carriers almost entirely.

A distance scale of rates would appear to justify an increase, but the route of the Denver and Rio Grande Western Railroad is a circuitous one to this principal market and the rate now in use would seem to be prohibitive, as indicated by the non-movement, as well as by the evidence. A more direct route such as via Leadville, thence by the Colorado and Southern Railway to Denver or via the Dotsero Cut-off and Moffat tunnel, now contemplated, would make a mileage which would compare favorably with that from Alamosa points and from which the rate is now identical, viz.: 35½ cents per cwt.

The decision of the majority of the Commission allowing the increased rate to go into effect would seem, at this time, to be inopportune on account of the depressed conditions existing in the producing district, caused by the low market price of potatoes, and the probable construction of a shorter through-line arrangement between these points in the near future.

The Denver and Rio Grande Western Railroad Company has reconstructed, and is now operating, a road of which any community through which it passes may well be proud and it is

justly entitled to any and all traffic it may develop along its line at a fair and compensatory rate, but when an existing rate proves to be prohibitive or non-productive of traffic in a commodity which is largely produced over practically its entire territory, it would seem to be inexpedient for it to seek to make a rate increase, which would only cause a feeling of antagonism to arise among its patrons and would be useless to the railroad itself, insofar as any additional revenue is concerned.

I dislike very much to disagree with my associates in this matter but I trust that The Denver and Rio Grande Western Railroad Company will hesitate before publishing this new rate.

RE HARVEY COX.

[Case No. 406. Decision No. 2295.]

Procedure — Automobiles — Formal written complaint — Summons — Necessity.

1. Neither formal written complaint nor the issuance and service of a summons is necessary to validate a proceeding concerning the lawfulness of motor vehicle operations.

Commissions—Jurisdiction—Statute under which acting—Constitutionality.

2. Whether a statute under which the Commission is acting is constitutional is not for it to judge.

Automobiles—Motor vehicle carriers—Subject to regulation.

3. The business of operating as a motor vehicle carrier on the highways of the State is subject to regulation.

Common carriers—Automobiles—Forty-three contracts—Willing to make more indefinitely—Capacity of equipment.

4. A motor vehicle operator having some forty-three contracts, and willing to make others without limit, and serving up to the limit of the capacity of his equipment found to be a motor vehicle carrier, as defined by statute.

[June 14, 1929.]

Appearances: M. W. Spaulding and James H. Brown, Esqs., Denver, Colorado, attorneys for respondent; J. G. Scott, Esq., Denver, Colorado, attorney for White Motor Express; Colin A. Smith, Esq., Denver, Colorado, Assistant Attorney General,

amicus curiae; D. A. Maloney, Esq., Denver, Colorado, attorney for Camel Truck Line.

STATEMENT.

By the **Commission**: The Commission on its own motion instituted an investigation of the motor vehicle operations of Harvey Cox and on March 22, 1929, entered an order, Decision No. 2115, alleging that sufficient information had come to its attention to warrant it in concluding that he might be operating as a motor vehicle carrier without a certificate of public convenience and necessity between Denver and Pueblo. The order concluded with a requirement that respondent show cause why an order should not be entered requiring him to cease and desist. In compliance with this order respondent filed a written answer in which he alleges substantially the following, to-wit:

1. Lack of express statutory authorization for the present procedure instituted by the Commission on its own motion.

2. That this proceeding is void for failure of the Commission to file a written complaint and to issue a summons.

3. That the respondent here, as in courts of record, is entitled to twenty days to answer.

4. That a judicial question is presented which is wholly beyond the jurisdiction of the Commission.

5. That respondent's business is a lawful business which he is entitled to maintain upon the highways of this State without interference by this Commission.

6. That respondent does not operate as a motor vehicle carrier, but as a private carrier by virtue of certain contracts.

With the first of these contentions we disagree. Section 14 of the Public Utilities Act, which is Section 2925, C. L. 1921, provides:

"The power and authority is hereby vested in the Public Utilities Commission of the State of Colorado, and it is hereby made its duty * * * to generally supervise and regulate every public utility in this State and to do all things, whether herein specifically designated, or in addition thereto, which are necessary or convenient in the exercise of such power, and to enforce the

same by the penalties provided in this act, through proper courts having jurisdiction."

Section 57 of the Public Utilities Act, which is Section 2966, C. L. 1921, provides:

"It is hereby made the duty of the Commission to see that the provisions of the constitution and statutes of this State affecting public utilities, the enforcement of which is not specifically vested in some other officer or tribunal, are enforced and obeyed, and that violations thereof are promptly prosecuted and penalties due the State therefor recovered and collected, and to this end it may sue in the name of the people of the State of Colorado."

Section 18, Chapter 134, Session Laws of Colorado, 1927, provides:

"The Commission shall supervise and regulate all motor vehicle carriers and shall promulgate such safety rules or regulations as it may deem wise or necessary to govern and control the operations of motor vehicles by them, and shall enforce the same as herein provided."

Section 38 of the Public Utilities Act, which is Section 2947, C. L. 1921, provides:

"All hearings and investigations before the Commission or any commissioner shall be governed by this act and by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof neither the Commission or any commissioner shall be bound by the technical rules of evidence. No informality in any proceeding or in the manner of taking testimony before the Commission or any commissioner shall invalidate any order, decision, rule or regulation made, approved or confirmed by the Commission."

In accordance therewith the Commission has adopted certain rules of procedure, Rule VIII, Section 5, of its published rules and regulations provides:

"The Commission may at any time, of its own motion, make investigations and order hearings into any act or thing done or omitted to be done by any public utility, which the Commission

may believe is in violation of any provision of law or any order or rules of the Commission. * * *."

It appears that the Commission has acted properly and that neither a formal written complaint, other than the order herein employed, nor a summons are required.

Respondent's contention that he is entitled to twenty days within which to answer, as in a court of record, needs no further consideration here. At the hearing the Commission asked respondent if he desired additional time and he answered in the negative. We believe the record discloses this fact.

Many times the Commission has been defined as a fact-finding body authorized to perform *quasi* judicial functions. The statutes provide that a motor vehicle operator is a public utility subject to regulation and control by the Commission, and provide the Commission with certain means of enforcing such regulation and control. We feel that the Commission has acted well within the powers expressly authorized by statute. Whether or not these statutes are constitutional we are not permitted to judge. It is our duty to accept them and administer the functions delegated by them.

Respondent contends that he maintains a lawful business which he can continue in as a citizen of the United States without interference from us. We cannot agree with this proposition. In Greeley Transportation Company v. People, 79 Colo. 307, 315, our Supreme Court said:

"Defendant stoutly maintains its constitutional right to engage in a lawful business and the invalidity of any statute prohibiting it. The general principle may be admitted, but when the business is affected with the public interest, as is that of a common carrier, the right of the public to say under what conditions it shall operate is beyond question. When the common carrier seeks to utilize public property, such as streets and highways, in the operation of the business, obligation and authority become twofold. One may have an unquestionable constitutional right to engage in a legitimate mercantile business, but he has no right to establish that business in the corridors of the State House. Were the law otherwise, the very citizens who build and

maintain these avenues of travel might be entirely driven from them by usurpers."

Having disposed of the other objections raised by the respondent, there remains the question whether or not he is a private carrier by virtue of certain contracts, as he contends, or a motor vehicle carrier as defined by the statute.

The evidence adduced at the hearing discloses that the respondent has been engaged in the trucking business about one and one-half years; that he owns a Graham two-ton truck and operates as the business requires, which is about five days a week, between Denver and Colorado Springs; that on a few occasions he has had too much freight for one truck, and used an additional truck belonging to his father; that he maintains dock facilities in Colorado Springs and in Denver; that he hauls for persons and firms with whom he has contracts but that he does not know for how many he hauls. He submitted his contracts, of which there were forty-three. They are dated from January 20, 1928, to March 23, 1929. Eleven of these are dated from January 30, 1929, to March 22, 1929. This evidence indicates respondent was continuing to enter into contracts up to the date of the order herein. The respondent testified that he has fixed no definite number of contracts which he proposes to make, but that his present business fills the capacity of his trucks.

He is evidently furnishing trucking facilities to as much of the public as his truck capacity permits. It is immaterial that he may require written contracts with his customers for this. Nor does he merit the characterization of a private carrier merely because he provides carrier service only up to the capacity of his one truck. At common law one was required to accept freight only up to the capacity of his equipment. The United States Supreme Court in the case of Michigan Public Utilities Commission, *et al.*, v. Duke, 266 U. S. 570, P. U. R. 1925C, 231, 234, said:

"One bound to furnish transportation to the public as a common carrier must serve all up to the capacity of his facilities without discrimination and for reasonable pay."

Respondent submitted his bills of lading for the month of March, 1929, which he says was a representative month as regards his business. Our examination of them disclosed that there were 356 bills of lading and that they name fifty-one persons and firms as consignees and seventy-seven as consignors. Of the fifty-one consignees, respondent has written contracts with twenty, and of the seventy-seven consignors, he has written contracts with fifteen. In twenty-five instances neither the consignor nor the consignee is a person with whom he has a contract, while in ten other instances of unprepaid shipments he has no contract with the consignees. In the case of ninety-four consignments the freight charges have been prepaid by the consignors although the respondent has no contract with eighteen of them.

It is clear that the respondent does have some forty-three written contracts. It is equally as clear that he has entered into written contracts with such persons as have requested his service. The nature of his operations is substantially the same with the contracts as it would be without them. We would not hesitate to define his operations as those of a common or motor vehicle carrier if there were no contracts and we see no reason why these contracts by themselves should change our determination. The nature of the service here is identical with what it would be if he had no contracts. In Transportation Co. v. Leopold, P. U. R. 1924C, 382, the Pennsylvania Commission says:

"Courts and commissions have repeatedly held that the distinction between common and private carriage does not necessarily depend upon whether written or oral contracts have been entered into, but rather upon the nature and character of the carriage and service rendered, and upon actual conditions of service as disclosed by testimony."

The respondent herein makes his trucking operations his business and is holding himself out to the public to be engaging in that business. In Cushing v. White, 101 Wash. 172, 172 Pac. 229, the Supreme Court of Washington, in distinguishing between a private carrier and a common carrier, says:

"* * * the true test being whether the given undertaking is a part of the business engaged in by the carrier * * * rather than the quantity or extent of the business actually transacted or the number and make of the conveyances used in the employment. If the undertaking be a single transaction, not a part of the general business or occupation engaged in * * * then the company furnishing such service is a private and not a common carrier * * * while the more frequent carriage of goods does make the transporter a common carrier."

We are convinced that respondent's operations are those of a common carrier. We find that he is operating unlawfully as a motor vehicle carrier over the public highways of the State without a certificate of public convenience and necessity, as required by law, and we deem it our duty to order him to discontinue such operations until he shall have legal authority to so operate.

ORDER.

IT IS THEREFORE ORDERED, That respondent cease and desist within fifteen days from operating as a motor vehicle carrier unless and until he shall obtain a certificate of public convenience and necessity authorizing him to so operate.

RE JOHN GRANT.

[Application No. 884. Decision No. 2302.]

Monopoly and competition—Automobiles—Scheduled carriers—Protection—Consistent position of Commission.

"The Commission has consistently taken the position that it should protect scheduled carriers who go in fair weather and foul, when business is good and when it is poor."

[June 18, 1929.]

Appearances: Frank L. Moorehead, Esq., Boulder, Colorado, attorney for applicant; A. W. Fitzgerald, Esq., Boulder, Colorado, attorney for The Glacier Route, Inc., protestant.

STATEMENT.

By the **Commission**: John Grant, who has a certificate authorizing him to conduct round-trip sightseeing operations out

of Boulder, filed an application for authority to transport passengers between Camp Newaka, located about four miles from Ward, Colorado, and Boulder, and for authority to render sightseeing transportation service to the guests at said camp. The application alleges that he has received a request from the owners of the camp that he render all such service, which he has done for several years. The camp is a recreation camp for girls. There are in attendance from July 1 to September 1 of each year approximately 50 guests. The Glacier Route, Inc., protestant, is engaged, under certificate issued by this Commission, in rendering a scheduled service in the glacier or mountain region in Boulder County and a sightseeing service to people located on and near said route. The camp in question formerly was served by the protestant. The present general manager of the Glacier Route helped to get the camp established. While in recent years the protestant has lost the transportation between Boulder and the camp of the guests and operators of the camp on their arrival in the beginning of the season and on their departure at the end thereof, it is still compelled through the season to make the run in and out of the camp, which is situated some distance from the route proper, in order to serve one or two persons at a time.

The Commission has consistently taken the position that it should protect scheduled carriers who go in fair weather and foul, when business is good and when it is poor. The protesting operator has assumed quite a burden in rendering scheduled service on the route in question. The applicant herein does not propose to render any scheduled service between the city of Boulder and the camp. He plans to take the cream of the business and leave the balance to the scheduled operator.

After careful consideration of the evidence, we are of the opinion and so find that the public convenience and necessity does not require, but prohibits the issuance of a certificate of public convenience and necessity to the applicant herein for the transportation of passengers between Camp Newaka and Boulder and for the rendition of a sightseeing service out of the said camp.

ORDER.

IT IS THEREFORE ORDERED, That the application herein be, and the same is hereby, denied.

RE FRANK FRITZ.

[Case No. 440. Decision No. 2309.]

Common carriers—Automobiles—"Chiefly engaged in farming"—Commodities transported.

The Commission found that the respondent was not "chiefly engaged in farming" and that he was hauling commodities other than farm products and farm supplies.

[June 21, 1929.]

Appearance: Mr. Frank Fritz, New Raymer, Colorado, *pro se.*

STATEMENT.

By the **Commission:** An order was entered by the Commission requiring the respondent, Frank Fritz, to show cause why an order should not be entered requiring him to cease and desist from operating as a motor vehicle carrier unless and until a certificate of public convenience and necessity should be issued to him and why an order should not be entered requiring him to file highway compensation tax reports and to pay highway compensation taxes.

The respondent resides on a farm near New Raymer, Colorado. His sons, with whom he resides, have a large amount of land rented. The respondent himself has one-quarter section rented. Practically all of the work done on the land rented by the sons and the respondent is done by the sons. However, the respondent claims that his chief occupation is that of farming and that he has been engaged only intermittently in the transportation of freight for others. In support of his contention as to his occupation, he stated that his farming work consists of the planning of the farming operations. The Commission finds from the evidence that the respondent is not chiefly

engaged in farming, and that, on the other hand, he is chiefly engaged in trucking operations.

Moreover, the exception in our act relating to motor vehicle operations requires not only that the transportation be done by one "chiefly engaged in farming" but also that the freight transported be "farm products to market or supplies to the farm." In this case it appears that respondent has not confined himself to hauling farm products and supplies. He has been hauling oil regularly from Pueblo to a dealer in New Raymer and seed, flour, etc., somewhat irregularly from Denver and possibly other places, to elevators situated in New Raymer. It appears also that he has been engaged in hauling grain and livestock for any and everybody who might call on him.

After careful consideration of the evidence the Commission is of the opinion and so finds that the respondent, Frank Fritz, is now and has been operating as a motor vehicle carrier without a certificate of public convenience and necessity and, therefore, unlawfully.

The Commission further finds that the respondent has made no highway compensation tax reports and has paid no such taxes.

ORDER.

IT IS THEREFORE ORDERED, That the respondent cease and desist from operating as a motor vehicle carrier unless and until he should have procured a certificate of public convenience and necessity therefor.

IT IS FURTHER ORDERED, That the respondent within fifteen days from this date file with the Commission highway compensation tax reports in the manner required by the Commission's Rules and Regulations, showing freight hauled in ton miles since August 1, 1927, and that within fifteen days after being notified by this Commission of the amount of such tax due he make payment thereof to this Commission.

RE ARTHUR PIPER, *et al.*

[Case No. 441. Decision No. 2310.]

Common carriers—Automobiles—"Chiefly engaged in farming"—Residence on farm leased to another.

One of respondents found to be chiefly engaged in farming and transporting farm products to market; the other, while renting land on which he had planted corn and wheat, was not chiefly engaged in farming.

[June 21, 1929.]

Appearances: Arthur Piper and Kenneth Piper, New Raymer, Colorado, *pro se.*

STATEMENT.

By the **Commission:** An order was entered by the Commission requiring the respondents, Arthur Piper and Kenneth Piper, to show cause why an order should not be entered requiring them to cease and desist from operating as a motor vehicle carrier unless and until a certificate of public convenience and necessity should be issued to them and why an order should not be entered requiring them to file highway compensation tax reports and to pay highway compensation taxes.

The testimony of the respondent, Arthur Piper, shows he is chiefly engaged in farming and that such transportation of freight for others as has been done by him was intermittently and of farm products to market. Therefore, he comes within the section of the statute relating to motor vehicle operations containing the exemption.

While Kenneth Piper has a section and a quarter of land rented and has planted thereon corn and wheat he is not chiefly engaged in farming. The evidence shows quite clearly that his chief occupation has been trucking.

After careful consideration of the evidence the Commission is of the opinion and so finds that Kenneth Piper has been operating as a motor vehicle carrier without a certificate of public convenience and necessity and, therefore, unlawfully, and that he has filed no highway compensation tax reports and has paid no such taxes.

ORDER.

IT IS THEREFORE ORDERED, That this proceeding be, and the same is hereby, discontinued as to Arthur Piper.

IT IS FURTHER ORDERED, That Kenneth Piper forthwith cease and desist from operating as a motor vehicle carrier until and unless he shall have procured a certificate of public convenience and necessity from this Commission.

IT IS FURTHER ORDERED, That said Kenneth Piper within fifteen days from this date file with this Commission in the manner required by its Rules and Regulations, reports showing in ton miles the freight hauled by him since August 1, 1927, and that within fifteen days of being notified by this Commission of the amount of said tax due, he make payment thereof to this Commission.

RE LINDLEY N. WHITE.

[Case No. 399. Decision No. 2328.]

Common carriers—Automobiles—Serving 66 of total of possible 100 customers—Loose contracts.

Motor vehicle freight operator serving some 66 of about 100 business men in a town of approximately 3,800 population under loose form contracts found to be a motor vehicle carrier as defined by statute.

[June 27, 1929.]

Appearances: Mr. Lindley N. White, Brighton, Colorado, *pro se;* J. G. Scott, Esq., Denver, Colorado, for Northern Transportation Company; Colin A. Smith, Assistant Attorney General, *amicus curiae.*

STATEMENT.

By the **Commission:** The Commission entered an order stating that a complaint had been made to it that Lindley N. White is operating as a motor vehicle carrier between Brighton and Denver; that the respondent filed on October 2, 1926, an application for a certificate of public convenience and necessity and that on March 21 the same was denied. The said White was required to show cause, if any he might have, why the Commis-

sion should not enter an order requiring him to cease and desist from operating as a motor vehicle carrier as defined in Chapter 134, Session Laws of Colorado, 1927.

The respondent filed a short answer in which he stated that he was not operating as a motor vehicle carrier and had not been so operating since about April, 1927. The answer concluded with a prayer that the Commission "cease and desist from proceeding with any hearing, and from interfering with this respondent in his conduct as such private or contract carrier."

At the hearing it appeared that the population of Brighton is approximately 3,800; that the number of business concerns in said town is about 100; that the applicant's patrons all have contracts with him, the total number of patrons being sixty-six. Three of the form contracts prepared by the respondent were used for the signing up of the customers. Two copies were used for the signatures of sixty-four of the customers, the third copy was used for two others. The form contract used in signing up the customers obligates the carrier to transport freight "at such time or times, as shall be particularly specified." The shippers agree to pay the carrier "according to.....Mutual agreement between carrier and each of the Shippers herein." It gives the right to the carrier to refuse any shipment. While the contract provides that the carrier agrees not to transport freight "for any other parties," apparently no one shipper knew how many parties there were to be to the contract. None of the shippers' names appear in the body of the contract. Apparently the carrier signed up as many as he desired, some signing one copy and others signing another. Later, on January 1, 1929, being almost two years after the date of the first two contracts, he used exactly the same form of contract to sign up two additional customers. Moreover, the contract dated January 1, 1929, was not produced for examination by the Commission until after the other two contracts had been submitted.

The Commission has so often gone into consideration of cases of this sort that we feel we are not warranted in discussing at length the questions involved or the authorities bearing thereon.

We refer generally to the decisions in *Re* Exhibitors Film Delivery & Service Company, Application No. 1009, and *Re* Motor Vehicle Operations of F. W. Sullivan, Case No. 398.

It appears quite clear, and the Commission so finds, that the respondent is operating as a motor vehicle carrier contrary to law.

ORDER.

IT IS THEREFORE ORDERED, That the respondent within twenty days from this date cease and desist from operating between Brighton and Denver, Colorado, as a motor vehicle carrier.

RE FAY ELLIOTT, *et al.*

[Case No. 402. Decision No. 2329.]

Common carriers—Automobiles—Evasions of law.

1. Utility operators have a right to take steps to avoid coming within provisions of the statute defining a utility status, but they may not engage in the operation of a common carriage system by calling it something else or by resorting to an evasion or subterfuge.

Common carriers—Automobiles—Transportation association—Evasions of law.

2. An association of merchants formed for the purpose of obtaining equal transportation of their goods, and purporting to hire the trucks and services of an unsuccessful applicant for a certificate of convenience and necessity, was held to be engaged in common carriage and to be evading regulation in that the business was in fact really carried on by and for the sole benefit of said individual.

Common carriers—Automobiles—Contract carriers—Third party.

3. The interposition of some third party, whether it be an individual, an organization of some sort, or a government, in the making of a contract between the operator and his customers, cannot change the fundamental status of the service involved.

[June 27, 1929.]

Appearances: Crump and Riley, Esqs., Denver, Colorado, attorneys for respondents; Jack Garrett Scott, Esq., Denver, Colorado, *amicus curiae.*

STATEMENT.

By the **Commission**: The Commission entered an order requiring Fay Elliott, the members of the Fort Lupton Merchants Association, B. F. Brown, M. A. Devereaux and Mrs. Fay Elliott to show cause why the Commission should not enter an order requiring them to cease and desist from operating as a motor vehicle carrier as defined in Chapter 134, Session Laws of Colorado, 1927. They all denied that they were engaged in the operation of common carrier system but claimed, on the contrary, that the said association had employed the said Fay Elliott to operate the association's truck business for it.

At the hearing it appeared that the said Fay Elliott, hereinafter referred to as Elliott, twice had been denied the certificate of public convenience and necessity by this Commission; that as the second application had been denied, certain proceedings were conducted by Elliott, his wife and the members of the so-called association. An instrument bearing date September 10, 1928, was circulated among the merchants of Fort Lupton. Fifty-six of them signed. This instrument provides that the parties shall buy or lease one or more trucks, employ some suitable individual or individuals to operate the truck or trucks, and pay a reasonable amount for the performance of such duties. It further provides for the appointment of three persons, naming them, with power to sign, execute and deliver all necessary contracts to make purchase of such truck or trucks, and generally to carry out the terms and conditions of "this plan." The committee is given authority to appoint a secretary and treasurer. The funds in the treasury are to be used (1) for the payment of salaries of truck drivers, (2) for the payment "of a reasonable sum per month for the services of such secretary and treasurer, provided that a reasonable amount to be determined by said committee shall be retained in the treasury for the purpose of repairs and incidental expenses, and to create a sinking fund to be used later for the purchase of any truck or trucks which the association through its said committee may deem desirable." The instrument further provides that the members shall pay such charges for the transportation of their

freight that shall be fixed by the said committee with the proviso that such charges shall in no event exceed those made by public carriers doing business over the same line. The parties agree that the contract shall be in force and effect for two years and that all of their goods, wares and merchandise shall be transported by the truck or trucks "owned or leased by the parties hereto." On the 14th of the same month a meeting was held at which ten of the signers of the said agreement were present. At this meeting the three men who had been appointed as a committee by the contract were further "selected to act as a committee, with full power to lease or purchase in the name of and for the use and benefit of" the members of the association, one or more trucks. At this meeting they were further authorized to employ some person to operate any truck or trucks owned or controlled by the association and to select a secretary and treasurer.

At the said meeting it was further voted "that after the wages of any person or persons employed to drive and operate a truck or trucks of said association, and the payment of any salary agreed upon for such secretary and treasurer that all moneys received from the members of this association shall be kept by said secretary and treasurer and deposited in some reliable bank to be used, first, for the expenses of operating any truck or trucks and for any necessary repairs thereof, and that all other moneys paid into the treasury be retained as a fund, for the sole and only purpose of purchasing in the future any truck or trucks which said association may need in the operation of the business of its said members."

On the same date as the last mentioned meeting was held the executive committee met and voted to purchase from Elliott a two-ton truck for consideration of $1,000.00, "and to make payment by the issuance of a promissory note for $1,000.00 for a period of two years, with interest at 6 per cent pear year." At the same meeting it was voted to elect Elliott's wife as secretary and treasurer "to serve as long as satisfactory to the committee at a salary of $25.00 per month." Six days thereafter an agreement was entered into by and between the association

and Elliott. It purports to engage him to do the trucking and to agree to pay him $225.00 per month "out of the funds in the treasury of said association." In the agreement the association undertakes to furnish for Elliott's use one or more trucks and to pay all necessary charges for repairs on such truck or trucks, and all expenses incurred in the operation thereof, including gas and oil. At a meeting of the executive committee held on December 1, it was voted to make a payment of $40.00 on the $1,000.00 truck note on or before January 1, 1929. When the case was heard on March 12, it appeared that this $40.00 was the only payment which had been made.

At a meeting of the committee held on February 1 it was voted "to lay away each month in a separate bank account $15.00 to be used as a sinking fund for repair and replacement on the truck, and for rental on substitute truck."

The evidence showed that there are some fifty-eight or sixty merchants of one kind or another in Fort Lupton. One witness for the respondents testified that two Fort Lupton merchants only were not members of the association. Another testified that there were six such merchants, however, the latter could recall only two. It developed also that Elliott had been using, without any charge made for such use, a second truck in hauling freight to the members of the association.

The question which the Commission has to decide is whether the parties are engaged in the operation of a motor vehicle carrier system or a common carrier business. We take it that they have a perfect right, under the law, to take steps to avoid coming within the provisions of the statute. On the other hand, it is equally clear that they cannot engage in the operation of a common carrier system by calling it something else or by resorting to an evasion or subterfuge.

At the date of the hearing there was very little money in the treasury. After some four or five months' operations, the returns from the business had been sufficient only to pay the operating costs, including the salaries of Elliott and his wife, and to make one payment of $40.00 on the $1,000.00 note. It is evident that the parties in fixing the salaries of Elliott and his

wife hit upon a total amount for the two of them which very nearly equalled the gross returns of the business after deducting such operating expenses as gas, oil, etc. No money had been paid Elliott for the use of the truck, which he did not sell the association. It is evident that at the rate the association was paying for the truck which it purported to buy, at the end of two years the note would be far from paid. It appears obvious also that the $15.00 a month voted to be laid away as a sinking fund for the repair and replacement on the truck and for rental of a substitute truck would be wholly inadequate for the purposes stated.

Another very important consideration in the opinion of the Commission is that the contract with Elliott does not obligate the members of the association to pay him except "out of the funds in the treasury." In other words, if the returns from the freight operations were not sufficient to make payment of the salary named, it would not be paid. It is also of some significance that Elliott's wife is to be paid $25.00 per month "only as long as satisfactory to the committee."

Was the purpose of creating the situation to keep Elliott in business, or, we may ask, when all forms and formalities are laid aside and we look, as we must, to the substance of things, whose transportation business is this, Elliott's or that of the Fort Lupton merchants. It is well established that the substance of the situation is controlling. As was stated by our Supreme Court in Davis v. People, *ex rel.*, 79 Colo. 642, "Contrary to popular opinion, mere schemes to evade law, once their true character is established, are impotent for the purpose intended. Courts sweep them aside as so much rubbish."

In Jacksonville-Springfield Transportation Co. v. Beeley, P. U. R. 1926E, 742, it appears that after Beeley had been denied a certificate, an association called "The Morgan-Sangamon Dealers' Association," which had a constitution, by-laws and a membership rostrum, was organized. Each member paid a fee of $1.00. Beeley received directly all freight revenue. The Illinois Commission, in disposing of the case, said:

"It is the substance, and not the mere form of a transaction, which the law regards as essential. Neither courts nor commissions will be blinded or deceived by mere forms of law, but regardless of fictions will deal with the substance of the transaction. The instances in which courts have swept aside mere forms in order to get to the substance of transactions where attempts have been made to evade the operation of some law by subterfuge, are too numerous and too common to require citation, and the evidence in this case shows conclusively that the Morgan-Sangamon Dealers' Association was organized as a mere subterfuge to evade the operation of the statute and to avoid the effect of the Commission's previous order entered herein, and such evasion cannot be countenanced by courts or commissions."

Another somewhat similar case is Ft. Lee Transportation Co. v. Edgewater, 133 Atl. (N. J.) 424. The Ft. Lee Company made a contract with a West Ft. Lee Workers' Club for the transportation of workers between West Ft. Lee and Edgewater. Each member was required to pay ten cents per month for dues and ninety cents a week for twelve rides. Although the service was to be rendered primarily for the members of the club and their families, the membership was entitled to extend service privileges to any person residing or being employed within the county who should pay the dues and weekly tax. The court, in deciding the case, said:

"That this complainant is comprehended within the definition must be obvious, if we apply the equitable consideration that the substance of the thing, and not the mere color or form which it assumes or invokes for the manifest purpose of evading regulation, must be kept conspicuously in view.

"So impressed was the learned Vice Chancellor with the artificial character of the 'club' device that he declared: 'I am inclined to the belief that the organization of a "club" is merely for the purpose of defeating the application of the borough ordinance,' thus furnishing, one might say, a sufficiently cogent basis for declaring the complainant a joint adventurer in an

enterprise avowedly designed to transgress the law, in which light it cannot be said to possess hands entirely immaculate."

Other cases somewhat the same in effect are:

Restivo v. West, *et al.*, P. U. R. 1926A, 639, 129 Atl. (Md.) 884;

Goldsworthy, *et al.*, v. Maloy, *et al.*, 141 Md. 674, 119 Atl. 693, P. U. R. 1923C, 626;

Franchise Motor Freight Association v. California Shippers, P U. R. 1925C, 382.

We are, therefore, compelled to and do conclude and find that in substance the business in question is that of Elliott's and that although the action of the members of the association is not *maulum per se*, it was taken for the purpose of evading the law and to make possible Elliott's continuance in business.

Assuming then that the business is in substance that of Elliott's, the next question is whether or not the operation is that of a common carrier. That it is such an operation, we think, admits of little, if any, doubt. As we stated, the membership of the so-called association includes practically every merchant and business man in the town of Fort Lupton. As we have often pointed out in other cases, no common carrier can or does serve the whole public. On this point we quote again from the Davis case, *supra*:

"In determining whether a business is that of a common carrier 'the important thing is what it does, not what its charter says.' Terminal Taxicab Co. v. Kutz, *et al.*, 241 U. S. 252, 36 Sup. Ct. 583, 60 L. Ed. 984, Ann. Cas. 1916D, 765. A service may effect 'so considerable a fraction of the public that it is public in the same sense in which any other may be called so. * * *.' The public does not mean everybody all the time." *Id.*

"Had defendant made all, save one, of the shippers of freight in that territory, or all purchasers of postage at any postoffice therein, members of the association, and claimed that such limitation converted an otherwise public into a private carrier, the contention would be so absurd as to be instantly rejected. But the reasons for that rejection would be the identical reasons

which demand rejection of defendant's contention in the instant case: (a) The proportion of the public served is so large as to be the public; (b) the limitation is a mere device to hoodwink the law."

We quote as follows from our decision in the Exhibitors Film Delivery and Service Company's application:

"The Pennsylvania Public Service Commission in Wayne Transportation Company v. Leopold, *et al.*, P. U. R. 1924C, 382, held that two men, both working in a mill, one owning a five-passenger car, the other a seven-passenger car, making morning trips from home to the mill and evening trips in return, carrying on these trips with them eleven other workmen who resided in the same place and were also employed at the mill, or in the town in which it was located, were common carriers. The contention of the operators in that case was much the same as that in this one. According to the Commission, 'They sustained this contention mainly upon the allegation that they do not hold themselves out as carriers for the public at large, or for passengers indiscriminately, inasmuch as the passengers they carry, practically speaking, are the same persons every day. In effect, the contention of respondents is that their passengers are carried under private contract.' The Commission, continuing, said: 'With this contention the Commission cannot agree. Courts and commissions have repeatedly held that the distinction between common and private carriage *does not necessarily depend upon whether written or oral contracts have been entered into,* but, rather upon the nature and character of the carriage or service rendered and upon actual conditions of service as disclosed by testimony.' (Italics ours.) The Commission quoted from another case decided by it, one significant sentence of the quoted matter being: 'There are numerous acts which tend to establish common carriage; that all of them must exist in a particular case in order to establish common as distinguished from private carriage, is not the law.'

"The California Railroad Commission, which probably has done more work than any other State Commission in the field of regulation of automobile carriers, held in Forsythe v. San

Joaquin Light and Power Corp., P. U. R. 1926C, 344, that a corporation in transporting its employes and their families by auto stage on public highways between a city and its construction camps for definite fares fixed by written instructions to its labor agent and noted on employment contracts for deduction from wages, is a transportation company as defined by the auto stage and truck transportation act of 1917."

In *Re* Will Thome, P. U. R. 1927A, 860, it was held that the carrier in question who did enter into written contracts with about 65 shippers in three communities was a common carrier.

We quote as follows from the decision of the Pennsylvania decision in Wilkes-Barre Railroad Corporation v. Hartman, P. U. R. 1925E, 810:

"The undisputed facts are that the mill employes who ride on the Hartman busses were former riders on the cars of the Wilkes-Barre Railway Company; that they pay for their rides on the busses with 7 cent tickets, and that the service performed is essentially a service of public transportation. It is true that the respondent submitted a form of agreement or a lease made with the manager of the silk mill, for the daily operation of the busses. Clearly under the circumstances existing, the agreement or lease has no effect whatever in divesting the service rendered from its attributes of common carriage, or of investing the service with any of the features of private carriage. The agreement in question and the roundabout method of collecting fares from the passengers are transparent subterfuges. The Commission is called upon not infrequently to deal with forms of subterfuge under which violators of the law seek to evade its provisions or to disregard orders of the Commission. In Lehigh Valley Transit Co. v. Bauder, 10 P. C. R. 105, and in York R. Co. v. Longstreet, 13 P. C. R. 27, the Commission was called upon to deal with comparable cases, although the subterfuges employed were not the same as in the present instance."

The Oklahoma Commission has even gone so far as to hold that the defendants transporting freight and merchandise under separate contracts with five individuals and firms who "were

the principal business houses engaged in their respective line of commodities in Oklahoma City'' were common carriers.

As we pointed out in *Re* Motor Vehicle Operations of F. W. Sullivan, Case No. 398, courts and commissions generally do not adopt a strict construction of the common law definition of a common carrier. The definition laid down by our Supreme Court in Schloss v. Wood, 11 Colorado 287, 290, is substantially the same as all other abstract definitions with which we are familiar. See 10, Corpus Juris, 39-40.

We pointed out also in that case that in our opinion the legislature did not intend, in making its definition of a motor vehicle or common carrier, to change the common law definition.

The case of Terminal Taxicab Co. v. Kutz, *et al.*, 241 U. S. 252, was followed by the Illinois Commission in Chicago Motor Coach Co. v. Edgewater Beach Hotel Co., P. U. R. 1926D, 167.

It is obvious that the percentage of passenger business done in Washington by the Terminal Taxicab Co., and in Chicago by the Edgewater Beach Hotel Co., which was serving the guests of certain hotels only, was much smaller than the percentage of the total Fort Lupton freight business which is handled by Elliott. We believe, as we have said before, that in determining whether or not a given carrier is operating as a common carrier, the test is to what extent he is serving the public in his field of operations.

Of course, it is fully appreciated by the Commission that the legislature has not attempted nor authorized this Commission to attempt to convert a private carrier into a common carrier. In one of the cases cited by the respondents' attorneys, Mich. P. U. C., *et al.*, v. Duke, 266 U. S. 570, it was stated that the operator was serving three customers. It is true they were being served under a written contract. But the important point was not that the customers being served had written contracts; it was that the customers were limited to three. The question is not whether one is a contract or common carrier; it is whether he is a common or private carrier. One hauling for a sufficiently large portion of the public so as to be classed as a common carrier cannot, by the simple expedient of having his customers

sign a uniform written contract, convert himself into a private carrier. As was said by the Pennsylvania Commission in Wayne Transportation Company v. Leopold, *supra*, "the distinction between common and private carriage does not necessarily depend upon whether written or oral contracts have been entered into."

A case commented on by this Commission in the decision in the Exhibitors Film case is Hissem v. Guran, *et al.*, 146, N. E. (Ohio) 808, discussed and quoted from by the attorneys for the respondents. The court said in that case (809, Col. 2), "The authorities are equally uniform in holding that, if the carrier is employed by one or a definite number of person by special contract * * * he is only a private carrier." We cannot, as we stated in the Exhibitors Film case, agree with this position taken by that court "because without question, taken literally, it is wholly out of line with the authorities in the country bearing on the point." If the statement were literally true, a man could haul for all of the dairy farmers in a county or the State if he went to the trouble of having each one of them subscribe his name to a formal contract.

It may be stated in passing, however, with reference to the Hissem case that the contract before the court was one with a branch of a trade organization which doubtless was created for some other purpose than to enable one man to do its trucking. Here the membership of the Fort Lupton organization consists generally of all kinds of business men in the town, organized for the sole purpose of securing transportation.

The interposition of some third party, whether it be an individual, an organization of some sort, or a government, in the making of a contract between the operator and his customers cannot change the fundamental nature of the situation. We quote as follows from our decision in the Exhibitors Film case:

"The port of Seattle, which was operating a ferry, entered into a contract with a bus company by which the latter agreed to transport passengers going to or from the ferry. The bus company was held to be a common carrier. State v. Ferry Line Auto Bus Company, 161 Pac. (Wash.) 467. In Textile Alliance,

Inc., v. Keahon, Inc., 211 N. Y. S. (Sup. Ct.) 205, it appears that the trucker had a contract with the United States for the exclusive transportation of imported merchandise from the steamship docks to certain places of appraisal. The United States restricted this service to one operator and paid him his certain charges. However, the importers reimbursed the Government. The operator was held to be a common carrier."

The Commission therefore finds that Fay Elliott, his wife, Ruby B. Elliott, the so-called Fort Lupton Merchants Association and the component members of the same, are engaged and participating in the unlawful operation of a motor vehicle carrier system.

ORDER.

IT IS THEREFORE ORDERED, That Fay Elliott, his wife, Ruby B. Elliott, the so-called Fort Lupton Merchants Association and the component members of the same, and each of them, within twenty days from this date cease and desist from their operation of a motor vehicle system for the transportation of freight for Fort Lupton business concerns between Denver and Fort Lupton.

RE THE TRAVEL AIRWAYS, INC.

[Application No. 1387. Decision No. 2333.]

Certificates of convenience and necessity—Airplanes—Pikes Peak region—Colorado.

Certificate of convenience and necessity issued authorizing motor airplane transportation of passengers, freight and express over regular routes within the Pikes Peak region and for chartered trips to all points within and without the State, subject to conditions stated.

[June 27, 1929.]

Appearance: Chester B. Horn, Esq., Colorado Springs, Colorado, attorney for the applicant.

STATEMENT.

By the **Commission**: The Travel Airways, Inc., a Colorado corporation, filed an application for authority to establish an airplane service for the transportation of passengers, freight and

express for hire on regular routes within what is commonly known as the Pikes Peak region and for chartered trips to all points within and without the State of Colorado. No protest was filed. The applicant intends to use in the proposed service four airplanes of the value of $41,000. The operations will be from the municipal airport in Colorado Springs. The company is in a good financial condition and appears to be well and safely managed.

After careful consideration of the evidence the Commission is of the opinion and so finds that the public convenience and necessity requires the proposed airplane system of the applicant for the transportation of passengers, freight and express for hire on regular routes within what is commonly known as the Pikes Peak region and for chartered trips to all points within and without the State of Colorado, subject to the conditions hereinafter stated, which in the opinion of the Commission the public convenience and necessity requires.

ORDER.

IT IS THEREFORE ORDERED, That the public convenience and necessity requires the motor airplane system of the applicant, The Travel Airways, Inc., for the transportation of passengers, freight and express on regular routes within what is commonly known as the Pikes Peak region and for chartered trips to all points within and without the State of Colorado, and this order shall be taken, deemed and held to be a certificate of public convenience and necessity therefor, subject to the following conditions:

(a) The equipment, including airports in Colorado, used by it and its pilots and employes shall at all times be such as to conform to the standards prescribed by the Department of Commerce of the United States and the Colorado Commission of Aeronautics, and certificates of such conformity at the present time shall be filed with the Commission within twenty days.

(b) The applicant shall carry all available liability insurance covering the passengers and the baggage.

(c) The applicant shall file semi-annual statements of the number of passengers carried and the service furnished.

IT IS FURTHER ORDERED, That the applicant shall file tariffs of rates, rules and regulations within twenty days of this order.

IT IS FURTHER ORDERED, That this order is made subject to compliance by the applicant with the rules and regulations now in force or to be hereafter adopted by this Commission and the Colorado Commission of Aeronautics with respect to airplane common carriers and subject also to any further legislative action that may be taken with respect thereto.

JOHN J. BROSKA
v.
HENRY HAYHURST, DOING BUSINESS AS THE LAS ANIMAS TRANSFER COMPANY.

[Case No. 397. Decision No. 2343.]

Common carriers—Automobiles—Right of common carrier to operate as private carrier.

1. One operating as a motor vehicle carrier under a certificate of convenience and necessity may not operate as a private carrier.

Common carriers—Automobiles—Contract between common carrier and shipper—Effect.

2. The making of a contract by a common carrier with a shipper does not make him a private carrier as to business done pursuant to contract.

Common carriers—Automobiles—Contract made with shipper before certificate issued—Status.

3. The fact that a motor vehicle carrier made a contract with a shipper prior to date of issuance of certificate of convenience does not justify his thereafter departing from his rate schedule as to freight hauled for that shipper.

[July 3, 1929.]

Appearances: Clyde T. Davis, Esq., La Junta, Colorado, attorney for complainant; A. C. Johnson, Esq., Las Animas, Colorado, and D. A. Maloney, Esq., Denver, Colorado, attorneys for defendant.

STATEMENT.

By the **Commission**: This is a complaint against the defendant charging him, while holding a certificate as a common carrier from this Commission, with being engaged also as a contract carrier in the operation of his trucking equipment. The answer filed by the defendant admits that he has a contract with the United States Veterans Bureau for the hauling of coal from the Fort Lyon Station at the United States Veterans Bureau Hospital No. 80; that the route traveled in hauling coal between said points is wholly within the territory covered by the defendant's certificate; that respondent has filed with this Commission a statement or tariff of his charges for the services to be rendered and that in no way does he operate under private contract for the hauling of coal between said points which would in any way exceed the rates specified in his said tariff. This matter was heard at Lamar, Colorado, on May 22, 1929.

This Commission has heretofore taken the position that it is wholly inconsistent with the theory of regulation for a common carrier at the same time to conduct a business as a private carrier. If a common carrier were permitted to conduct a business as a private carrier it would tend to demoralize all common carrier motor vehicle regulation and, furthermore, permit unlawful and unjust discriminations by the shipper, which was one of the main evils that regulation attempted to eliminate.

The testimony shows that on February 29, 1928, the Commission issued a certificate of public convenience and necessity to defendant, authorizing him to operate as a motor vehicle carrier between Las Animas and Pueblo, Colorado, on a regular schedule and as an irregular carrier of freight within the city of Las Animas and within a radius of fifteen miles from and to the city of Las Animas. He was not authorized to operate from and to any intermediate point between Las Animas and Pueblo except such as came within the fifteen-mile radius of Las Animas. On February 23, 1928, the defendant entered into a contract with the United States Veterans Hospital No. 80 at Fort Lyon, Colorado, to unload, haul and store coal. The price agreed upon

was 88c per ton of 2,000 pounds. The certificate issued to the defendant on February 29, 1928, required him to file tariffs of rates with this Commission within a period not to exceed twenty days from the date thereof. This the defendant neglected to do until February 24, 1929, when a tariff was filed. Defendant's excuse for not filing the tariff within the time required by the order of the Commission was that he relied upon his attorney to look after this matter for him, and thought it was attended to. His counsel also admits that it was his error in overlooking this matter.

The tariff filed on February 24, 1929, contains a rate in cents per ton of 2,000 pounds on coal at 65c. The contract entered into by the defendant with the United States Veterans Bureau was prior to the issuance of our certificate. The period in which the defendant was to render service under the contract was from July 1, 1928, to June 30, 1929. The mere fact that a common carrier enters into a contract with a shipper does not constitute him a private carrier if he has a tariff on file with this Commission covering such service. The rate, however, that is charged in such contract must be reflected in the tariff on file with this Commission. In the instant case the testimony shows that the contract was on a basis of 88c per ton of 2,000 pounds, while the rate in the tariff was 65c. This undoubtedly constitutes an overcharge by the carrier and should be treated as such. The fact that this contract was entered into prior to the issuance of our certificate lends a mitigating circumstance but does not justify a continuance of an operation under a contract upon rates not reflected in the tariff after the certificate was issued. Since the hearing the defendant has filed another tariff with this Commission, giving a rate on coal at 88c per ton from July 1, 1928, to June 30, 1929, and at 67c per ton from July 1, 1929, to June 30, 1930, subject to a 2 per cent discount if paid within ten days. This tariff, however, has not been properly prepared, because it does not cancel the prior tariff nor does it give the thirty days' intervening space between date of issue and date effective. Tariffs must be filed with the Commission thirty days prior to their effective date. Defendant should immediately take such neces-

sary steps to see that this tariff is properly prepared and filed in accordance with the rules and regulations governing motor vehicle carriers.

We are convinced from the testimony that there was no willful intention on the part of the defendant to violate the laws or the rules and regulations governing motor vehicle carriers, and since this is the first violation of this defendant, the Commission is not disposed to penalize him. It should be fully understood, however, that hereafter defendant should carefully study the rules and regulations of the Commission governing motor vehicle carriers and take all proper and necessary steps to comply with the same. An order will be entered dismissing the complaint.

ORDER.

IT IS THEREFORE ORDERED, That the complaint herein be, and the same is hereby, dismissed.

RE J. A. PARO.

[Case No. 452. Decision No. 2363.]

Common carriers—Automobiles—Truck for own use—Transportation for others in rare instances.

Transportation of freight for others in rare instances by one having a truck for the transportation of his own goods does not make him a common carrier.

[July 8, 1929.]

Appearance: J. A. Paro, Esq., Boulder, Colorado, *pro se*.

STATEMENT.

By the **Commission**: An order was entered requiring the respondent, J. A. Paro, to show cause why an order should not be entered requiring him to cease and desist from operating as a motor vehicle carrier. The matter was set for hearing and was heard in the Hearing Room of the Commission in Denver. The evidence shows that the respondent is in the fruit business and that he and another man engaged in the same business in the

same town frequently come to Denver and buy at wholesale their fruit and transport the same to Boulder, first on the truck of one and then on the truck of the other, and that on one occasion the respondent hauled some theater seats from Boulder to Rocky Ford somewhat as a matter of accommodation, although compensation was received.

The purpose of the respondent and his competitor in the fruit business alternating in the use of trucks is obvious. It saves the use of a second truck at those times when one truck is sufficient to transport the fruit purchased by both. No charge is made by either to the other.

While, as we have repeatedly held, it is not necessary in order that one be a common or motor vehicle carrier, that he operate on schedule or serve all of the public, on the other hand it is necessary that he make somewhat of a business of transporting freight for others for hire. Transportation of freight for others in rare instances by one having a truck for the transportation of his own goods does not make him a common carrier.

ORDER.

IT IS THEREFORE ORDERED, That this proceeding be, and the same is hereby, discontinued.

RE N. J. FITZMORRIS.

[Application No. 1210. Decision No. 2385.]

Certificates of convenience and necessity—Record—Finding.

1. Before issuing a certificate of convenience and necessity the Commission must find from the record that the public convenience requires the proposed operation.

Monopoly and competition—Competition not prohibited by statute—Curtailed.

2. While competition between motor vehicle operators has not been prohibited or eliminated by statute, it has been curtailed so as to avoid injurious competition.

Monopoly and competition—Increased number of utilities—Effect on power to lower rates.

3. Increasing the number of public utilities serving in a given field tends to deprive the Commission of its power to lower rates.

Service—Freight outside doors—No receipt.

4. It is not reasonable to require a motor vehicle carrier to leave freight without a receipt at the doors of business houses before they are opened in the morning.

[July 20, 1929.]

Appearances: A. P. Anderson, Esq., Denver, Colorado, attorney for applicant; D. A. Maloney, Esq., Denver, Colorado, and E. H. Houtchens, Esq., Greeley, Colorado, attorneys for The Northern Transportation Company.

STATEMENT.

By the **Commission**: N. J. Fitzmorris filed on October 2 his application for a certificate of public convenience and necessity authorizing the transportation of freight interstate between Denver, Colorado and Cheyenne, Wyoming and intermediate points, and intrastate between Denver and all points intermediate to Greeley and the Wyoming-Colorado State line. Protests were filed by The Northern Transportation Company now engaged in motor vehicle freight transportation between Denver and Ault and intermediate points and Union Pacific Railroad Company. The latter did not appear, however, at the hearing which was held in Eaton on the 17th of June.

The applicant produced a large number of witnesses who testified that the public convenience and necessity required the proposed intrastate operations of the applicant. However, as to the points Lucerne, Eaton and Ault, served by The Northern Transportation Company, their main ground for so thinking is that in their opinion there should be competition. Moreover, most of them have patronized the applicant over a course of many years and have formed strong personal attachments to him. Of course, the statute requires us, as we have repeatedly stated, to find from the record that public convenience and necessity requires the issuance of a certificate. While competition has not

been prohibited or eliminated by the statute, it has been curtailed so as to avoid injurious competition. We do not need to state at any length that public utilities, as distinguished from private business concerns, have their rates and service limited and controlled by this Commission. It is not, therefore, necessary in the ordinary case to have unlimited public utility competition in order that the public may be properly served at reasonable rates. As we have pointed out before, increasing the number of public utilities serving in a given field tends to deprive the Commission of its power to lower rates, because, under the Constitution of the State of Colorado and of the United States, all utilities are entitled to charge such rates as will result in a reasonable return on the investment after all costs of operation, etc., are paid.

One complaint against the service of The Northern Transportation Company is that it does not make deliveries as early as they have been made by the applicant. However, it appeared that while the applicant's main place of business is Greeley, it has a representative residing in Eaton, and that the freight destined to Eaton and Ault, the two main Colorado points proposed to be served by the applicant, is not transferred in Greeley but is hauled direct to Eaton, at which point deliveries are made in the morning as soon as the places of business are open, and that the truck or trucks then proceed to Ault. The applicant has to some extent made a practice of leaving freight at the doors of the business houses before they are opened. We do not believe it reasonable to require business to be done in any such manner. A common carrier is entitled to receive a receipt for freight delivered. We believe it unreasonable to expect such carrier to leave freight in the alleys or at the front doors with the possibility that it may be stolen or otherwise interfered with. The Northern Transportation Company offers to make delivery in Eaton at any hour when the stores are opened and to deliver there in the evening ice cream shipped that afternoon or evening from Denver.

The Commission, after careful consideration of the evidence, is of the opinion and so finds that the public convenience and

necessity does not require the transportation by the applicant of freight between Denver and Ault and points intermediate to Greeley and Ault.

The Commission is of the opinion and so finds that the public convenience and necessity requires applicant's motor vehicle system for the transportation of freight between Denver and the points intermediate to Ault and the Colorado-Wyoming State line.

The Commission finds also that it is required by the Constitution of the United States and the laws of Colorado, to issue a certificate to the applicant authorizing the transportation of freight in interstate commerce only between Denver and the Colorado-Wyoming State line.

ORDER.

IT IS THEREFORE ORDERED, That in accordance with the Constitution of the United States and the laws of the State of Colorado, a certificate of public convenience and necessity should be, and the same is hereby, issued to the applicant, N. J. Fitzmorris, authorizing the transportation of freight in intrastate commerce between Denver and all points intermediate to Ault and the Colorado-Wyoming State line and interstate commerce only between Denver, Colorado, and the Colorado-Wyoming State line.

IT IS FURTHER ORDERED, That the applicant shall file tariffs of rates, rules and regulations and time and distance 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 schedule filed with this Commission except when prevented from so doing by the Act of God, the public enemy or unusual or 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 JAMES A. BAIRD, JR.

[Application No. 1368. Decision No. 2390.]

Monopoly and competition—Automobiles—Duplication of freight service on call and demand—Strong desire of public.

Strong desire of witnesses principal reason for issuing a certificate of convenience and necessity authorizing duplication of freight service on call and demand, although certificate for scheduled operations denied.

[July 20, 1929.]

Appearances: James A. Pullium, Esq., Durango, Colorado, attorney for applicant; Benj. B. Russell, Esq., Durango, Colorado, attorney for S. G. Dunger, protestant.

STATEMENT.

By the **Commission**: On June 5 of this year the Commission made a joint decision and order in this application and Application No. 1351, being that of S. G. Dunger, in which it granted a certificate of public convenience and necessity to S. G. Dunger for the transportation on schedule of freight between Durango, Red Mesa and Marvel, Colorado, and in which it denied the application of the applicant herein. In that decision we found both applicants to be dependable. The reasons why a certificate was granted to one and not to the other were because it was admitted that there was not enough business on the route in question to warrant two regular scheduled operations, and Dunger offered to conduct a scheduled operation and Baird did not. Moreover, Dunger took the position that if another certificate, even for irregular operations, were granted, there would not be enough business left to warrant his operating regularly. A petition for rehearing was filed by Baird. Rehearing was granted and held.

At the last hearing a large number of witnesses appeared in behalf of Baird and testified to the effect that since the Red Mesa-Marvel territory is not served by any railroad, one certificate holder cannot adequately serve the public. It was quite evident from the number of witnesses produced that most of the people in the territory in question desire not to be limited to the

service of Dunger. Some evidence was given for the purpose of showing the inadequacy of Dunger's service. It was shown that on one trip the end gate of the truck came loose and that a hog fell out and was killed. However, it was further shown that Dunger had paid for the hog. One witness had testified that he had asked Dunger to transport certain freight for him and that it was never brought. Dunger's explanation was that the request, if made, was given to him on the street in Durango and the request not being made in the ordinary course of business as conducted by him, he must have overlooked the matter. For the most part we are of the opinion that the evidence as to the unsatisfactory nature of the service rendered by Dunger was not very strong.

Dunger proposed at the hearing that a certificate be granted to the applicant herein conditioned that he should haul no freight from any points on or within one mile of the route traveled by Dunger. This was wholly inacceptable to the applicant herein.

If it were not for the very strong desire of the witnesses that their country be served by the applicant herein, we would not change our order. However, after giving due consideration to all the evidence, including the pronounced wishes of a large number of inhabitants of the territory in question, we have concluded that the public convenience and necessity requires the motor vehicle operations of the applicant, James A. Baird, Jr., for the transportation on call and demand of freight and passengers between Durango and the Colorado-New Mexico State line where the La Plata River crosses the same, Red Mesa and Marvel and tributary territory, but not to or from the intermediate points of Breen, Hesperus and other points on the Rio Grande Southern Railroad; provided, however, that no freight shall be hauled from any points or farms situated on the route from Red Mesa to Durango.

We have concluded, for the time being at least, not to authorize Baird to serve people living on Dunger's route, although we have not barred him from hauling freight to or from points situated off of said route. Our intention, however, is not at the

present time to allow Baird to pick up any freight to or for any farmers whose farms border on Dunger's route.

If in the future the public convenience and necessity requires this restriction be removed, the Commission will be governed accordingly. It is true that Dunger has no authority to transport passengers on his truck, although the evidence shows that frequently some person in the Red Mesa-Marvel country desires to go to or come from Durango riding on the freight truck. It would seem that Dunger should seek authority from the Commission to carry passengers in connection with his freight operations. If Baird is not making a trip on his truck it will be very expensive for a passenger to travel in a private car operated solely for the purpose of transporting him. As we have pointed out before, it is worth a great deal to a territory to have dependable service rendered on schedule. Frequently it is very important that small packages of express or freight be transported. If there is no scheduled operator to call upon for the service, it will be necessary to do without the freight or hire someone specially at a very substantial expense to transport it.

While, strictly speaking, no further hearing was had in the Dunger case, the Commission feels that it is in a position to and should, without further proof, authorize the said Dunger to discontinue his scheduled service upon filing application for authority therefor if the operations to be conducted by Baird make scheduled operations by him unprofitable. In the event the said Dunger is authorized to discontinue operations, the Commission will, upon application of the applicant herein, without further proof, eliminate the restrictions herein imposed on Baird's operations.

ORDER.

It Is Therefore Ordered, That the public convenience and necessity requires the motor vehicle operations of the applicant, James A. Baird, Jr., for the transportation on call and demand of freight and passengers between Durango and the Colorado-New Mexico State line where the La Plata River crosses the same, Red Mesa and Marvel and tributary territory, but not to

or from the intermediate points of Breen, Hesperus and other points on the Rio Grande Southern Railroad Company, provided, however, that no freight shall be hauled from any points or farms situated on the route from Red Mesa to Durango, and this order shall be deemed and held to be a certificate of public convenience and necessity therefor.

IT IS FURTHER ORDERED, That the applicant 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 the applicant shall operate such motor vehicle carrier system according to the schedule filed with this Commission except when prevented from so doing by the Act of God, the public enemy or unusual or 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 JOHN ABEL.

[Case No. 443. Decision No. 2391.]

Statutes—Section 23 of motor vehicle act—Liberal construction—Farm products.

1. Section 23 of statute relating to motor vehicle carriers should be construed liberally so as to permit free movement of farm products.

Common carriers—One engaged chiefly in farming—Holding out as being in transportation business.

2. One engaged chiefly in farming may not hold himself out as being in the business of transporting freight, by solicitation, advertising or otherwise.

Common carriers—Intermittent operations—Three times a week during period of year.

3. The mere fact that during a period of the year respondent transports livestock three times a week does not prevent his operations from being intermittent.

[July 20, 1929.]

Appearance: Albert Dakan, Esq., Denver, Colorado, attorney for respondent.

STATEMENT.

By the **Commission**: This is an investigation on the Commission's own motion into the operations of the respondent as a motor vehicle carrier without a certificate of public convenience and necessity, as required by law. A public hearing was had on this matter at Denver, Colorado, on July 2, 1929.

The respondent resides approximately nine miles from Hugo, Colorado, and is chiefly engaged in farming. He is the owner of a truck, and has transported for his neighbors livestock to the Denver market and other places, and has also transported products of agriculture to Hugo. On one occasion he did transport household goods from the town of Hugo to Denver. Most of his livestock hauling is during the winter months, when the work on the farm does not take all of his time. He testified that without having kept a record he estimated during that period he hauled livestock on an average of two or three times a week. Section 23 of House Bill No. 430 reads as follows:

"Nothing in this act shall be construed as prohibiting the *intermittent* transportation of farm produce to market or supplies to the farm by any person chiefly engaged in farming, * * *."

The difficult question that the Commission has to determine in the matter is the construction of the word "intermittent." Webster's New International Dictionary defines the word "intermittent" as follows: "Coming and going at intervals; alternating; recurring; periodic." In our opinion a liberal rule of construction should be applied to the above section. It was evidently the intention of the legislature to permit the free movement of farm products by motor vehicle within the limitations of said Section 23 so that where a farmer, whose entire time is not taken up with his farm, if he is the owner of a truck, may transport for hire farm produce, including livestock, from the farm to the market and supplies to the farm. This does not mean, however, that one engaged chiefly in farming may hold himself out to the public as being in the business of transport-

ing property by solicitation, advertising or otherwise, or to actually conduct a general business of transportation for hire. Any person who is in the business of transporting, and who holds himself out for such purpose, and actually does a transportation business cannot rely upon said Section 23 for protection or exemption. While the testimony of the applicant may give some indication that he actually was in the business of transporting property, yet we believe that the sole fact that for a certain period during the year he did transport livestock as often as three times a week does not necessarily mean that that was not an intermittent transportation. The only transportation act of the respondent that does not come within the meaning of Section 23 was the transporting of furniture from Hugo to Denver, but the circumstances there were not such as to definitely state that that one transaction was a common carrier operation. Under any circumstances, however, the respondent should hereafter so conduct the operations of his truck that the same may be bona fide transactions within the meaning of Section 23.

After a careful consideration of the evidence herein, the Commission is of the opinion, upon the record made, that the complaint herein should be dismissed.

ORDER.

IT IS THEREFORE ORDERED, That Case No. 443 be, and the same is hereby, dismissed.

Commissioner Allen dissenting:

I am compelled respectfully to dissent from the decision made herein by my brother commissioners. A "motor vehicle carrier" is defined by statute to mean and include every corporation, person, etc., owning, operating, etc., a motor vehicle used in serving the public in the business of transporting persons or property for compensation over the highways of the State, "who indiscriminately accept, discharge and lay down either passengers, freight or express, or who hold themselves out for such purpose by advertising or otherwise." It will be noted that one who is indiscriminately accepting, discharging and laying down

freight is a common carrier without the necessity of holding himself out for such purpose by advertising or otherwise. The statutory definition by reason of the use of the word "or" is in the alternative.

The provision of the statute pertaining to the exemption of farmers is quoted in the majority opinion. It is obvious that the exemption section requires (a) that the transportation of farm produce be intermittent, and (b) that it be done by a "person chiefly engaged in farming." The evidence of the respondent was to the effect that throughout the year he holds himself ready "whenever there is any business" to haul livestock from the farms to the market in Denver; that the only reason he does not do any more hauling, particularly in the summer time, is "because there isn't the stock to move;" that during the months of December to April, inclusive, there is no farm work to be done and that his children take care of the livestock. It appears then that the respondent throughout the whole year subordinates any possible farm work that he may ever do to his trucking business. He will come to Denver any and every day stock is offered to him. The only reason he doesn't come oftener is that he hasn't the freight to haul.

The adjective "chief" is defined in Webster's New International Dictionary as "Highest in office or rank; principal; * * * Principal or most eminent in any quality or action; * * * having most or leading influence; most or leadingly important." The word "chiefly" is defined as, "In the first place; principally; preeminently; above all; especially."

It seems to me that the respondent, while residing on a farm, is "chiefly" engaged in trucking, and that the conclusion reached by the other commissioners is contrary to the decision in *Re* Frank Fritz, Case No. 440.

The evidence does not show from what source most of the respondent's income is derived. I am inclined to believe that it is from his trucking operations. However, whether from one source or another is immaterial. A man might be engaged solely in farming and have enough investments in various industrial

enterprises to bring in many times his income from his farming operations.

It is my opinion that the provision in question in the statute was intended to apply to those not infrequent cases where a farmer, who actually is subordinating everything else to his farming operations, now and then has a day to spare which may be devoted to trucking for his neighbors.

Of course, nothing that I have said relates in any manner to the question whether or not the public convenience and necessity requires the motor vehicle operations of the respondent. The Commission has been quite liberal in granting certificates authorizing the transportation of livestock from the farms. It may quite possibly be that the public convenience and necessity would require the operations of the respondent as a motor vehicle carrier. However, he has not seen fit to ask for such a certificate.

It is my opinion that if the respondent in this case is not a motor vehicle carrier, a very large part of the ever-increasing transportation of livestock by motor vehicle will be done by non-certificated carriers residing on farms and doing little if anything else than trucking.

RE CHARLES H. SMITH, DOING BUSINESS AS SMITH TRUCK LINE.

[Application No. 1341. Decision No. 2406.]

Monopoly and competition—Mere preference by customers of one—Weight.

Mere preference of one motor vehicle operator over another by patrons of motor truck service is entitled to serious consideration in determining to which one of two applicants a certificate of convenience and necessity should be issued, but to very little when the question of granting a second certificate is involved.

[July 25, 1929.]

Appearances: Clyde T. Davis, Esq., La Junta, Colorado, attorney for applicant; D. A. Maloney, Esq., Denver, Colorado, attorney for The Camel Truck Line, Vaughn Transfer and

Transportation Co., Jackson Transfer Company and Dallas Transfer and Storage Company.

STATEMENT.

By the **Commission**: Charles H. Smith, doing business as Smith Truck Line, filed an application for a certificate of public convenience and necessity authorizing the operation of a motor vehicle system for the transportation of freight between Pueblo and Lamar, Colorado, and intermediate points "except the carrying of freight and express from Pueblo, Colorado, to Fowler and Las Animas, Colorado, and from these points to Pueblo; also as an irregular motor vehicle carrier of freight and express to and from any points within the city of La Junta and from any place within ten miles of the city of La Junta to any point between Pueblo and Lamar."

The Commission has considered the evidence in this case with much care. It finds that while quite a few of the people who enjoyed the services of the applicant during the time when he was operating unlawfully without a certificate of public convenience and necessity, prefer his service to that of any other truck line, there are no serious complaints against the service of The Camel Truck Line which is operating under a certificate over the route in question. The evidence further shows that the public convenience and necessity does not require, but forbids, the operation of two certificate holders over this route, for the reason that there is not enough business properly to support two lines and, therefore, to give the public the adequate, dependable service it requires. If the Commission had not long ago issued a certificate to The Camel Truck Line, and the applicant and that line were both before the Commission with clean hands and records, the wishes of the business concerns served would be entitled to very serious consideration.

After careful consideration of the evidence, the Commission is of the opinion and so finds that the public convenience and necessity does not require the proposed motor vehicle operations by the applicant on the route between Pueblo, Colorado, and Lamar, Colorado, and intermediate points.

The Commission is of the opinion and so finds that the public convenience and necessity requires the proposed motor vehicle operations of the applicant for the transportation of freight and express from one point to another within the city of La Junta and the territory within a radius of ten miles thereof.

ORDER.

IT IS THEREFORE ORDERED, That the public convenience and necessity does not require the proposed motor vehicle operations by the applicant, Charles H. Smith, doing business as Smith Truck Line, on the route between Pueblo, Colorado, and Lamar, Colorado, and intermediate points, and this portion of the application is, therefore, denied.

IT IS FURTHER ORDERED, That the public convenience and necessity requires the proposed motor vehicle operations of the applicant, Charles H. Smith, doing business as Smith Truck Line, for the transportation of freight and express from one point to another within the city of La Junta and the territory within a radius of ten miles thereof, 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 applicant shall file tariffs of rates, rules and regulations, 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 schedule filed with this Commission except when prevented from so doing by the Act of God, the public enemy or unusual or 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.

IT IS FURTHER ORDERED, That the applicant, if he desires to accept the limited certificate granted to him, file a written acceptance thereof within twenty days from this date.

RE F. S. ROBBINS, SR.

[Case No. 466. Decision No. 2414.]

Common carriers—Automobiles—Definite number of regular customers—Serving anybody—Agreement upon rates—Contracts.

Motor vehicle operator having a definite number of regular customers and transporting freight from time to time for anybody with whom he can agree on rates held to be a motor vehicle carrier, as defined by statute, as the making of what the respondent calls a contract in each case has no bearing on question whether he is serving the public.

[August 2, 1929.]

Appearances: Harry S. Class, Esq., Denver, Colorado, attorney for respondent; J. Q. Dier, Esq, Denver, Colorado, attorney for Chicago, Burlington & Quincy Railroad Company; Colin A. Smith, Esq., Denver, Colorado, as *amicus curiae*.

STATEMENT.

By the **Commission**: An order was entered by the Commission on its own motion providing for an investigation and hearing to be held for the purpose of determining whether or not the respondent, F. S. Robbins, Sr., is operating as a motor vehicle carrier without a certificate of public convenience and necessity, and that said respondent show cause, if any he has, by written answer filed with the Commission why the Commission should not enter an order commanding him to cease and desist from operating as a motor vehicle carrier. The said order set the matter for hearing on July 25, 1929. On July 23, the respondent, by his attorney, filed what he designated as a plea in abatement. The instrument asks the Commission to abate the hearing for the reason that the respondent heretofore on or about January 9 of this year filed a "motion to reopen and reconsider Application No. 547." The instrument further alleges that the applicant has not been operating as a common or motor vehicle carrier.

When the case was called for hearing, the respondent's attorney orally moved that the hearing be vacated because of the pendency of said motion. Application No. 547 was heard and

was denied on June 17, 1927. The Commission therefore denied the motion to vacate the hearing.

The evidence shows that the respondent formerly was doing a very general business; that he had some seventy-five or eighty customers; that in the past year and a half or more he has materially limited the extent of these operations; that he now has some ten customers, consisting principally of wholesale concerns. The evidence was not as clear as desirable on the question of whether he might not have more regular customers than the number stated, by reason of the possible fact that the purchasers from the ten customers may themselves be customers of the respondent as a result of their paying the transportation charges on goods delivered to them.

After the respondent had detailed the number of his customers and the nature and extent of his operations it appeared on cross-examination that his son is operating to points beyond Sterling and that occasionally, once a month he stated, he carries from Denver to Sterling merchandise destined to Holyoke, the same being turned over to his son in Sterling. In addition to the regular customers which the respondent admitted having, he testified that he hauls for anybody and everybody whenever he can make a satisfactory agreement for the transportation of any particular freight offered to him.

Without at this time passing on the question whether the respondent is a common or motor vehicle carrier without respect to the so-called special contracts he makes and performs, the Commission is of the opinion and so finds that by the inclusion of such business the respondent is operating as a motor vehicle carrier as defined by statute. We have frequently pointed out before that the question is not whether one is a common carrier or contract carrier but it is whether he is a common or a private carrier. One who holds himself out to serve the public in those cases in which they agree to his terms is a common carrier. The making of what the respondent calls a contract in each case has nothing to do with the question. All carriage for hire is done under contracts, express or implied.

ORDER.

IT IS THEREFORE ORDERED, That the respondent, F. S. Robbins, Sr., within twenty days from the date hereof, cease and desist from operating as a motor vehicle carrier.

Commissioner Bock did not participate in the disposition of this case.

RE BARNEY BAIRD.

[Case No. 461. Decision No. 2415.]

Common carriers—Automobiles—Delivery of merchandise sold—No charge—Nothing added to price of merchandise.

One delivering by motor truck merchandise sold by him found not to be a motor vehicle carrier where no direct charge was made for the delivery and nothing was added to the price of the merchandise to cover transportation.

[August 2, 1929.]

Appearances: L. H. Drath, Esq., Denver, Colorado, attorney for respondent; A. T. Monson, Esq., Denver, Colorado, attorney for H. L. Mikelson, doing business as Franktown Truck Line; J. Q. Dier, Esq., Denver, Colorado, attorney for The Colorado and Southern Railway Company; Colin A. Smith, Esq., Denver, Colorado, *amicus curiae*.

STATEMENT.

By the **Commission**: The Commission entered an order for an investigation and hearing for the purpose of determining whether or not the respondent, Barney Baird, is operating as a motor vehicle carrier and requiring him to file an answer to the Commission showing why an order should not be entered requiring him to cease and desist from such operations if he is engaged therein.

The evidence shows that the applicant is operating a general store in Parker; that he delivers many articles of merchandise to his customers without making charge for said service, either by making direct charge therefor or by increasing the price for

the merchandise; that in some cases he buys the goods in Denver and delivers them direct to the customers. It is well known that not infrequently an operator who is really a common carrier, attempts to evade the law by claiming to be selling merchandise or other freight which, as a matter of fact, he is merely transporting for others. However, in this case the evidence shows with reasonable satisfaction that the respondent is not evading or attempting to evade the law in the conduct of his business. One commodity which the respondent is hauling lent some color to the charge that he is a common or motor vehicle carrier. He never carries ice in stock in his store. It is always transported from Denver. However, we have many cases in this State in which various people in good faith buy commodities such as potatoes, coal, etc., at the point of production or manufacture and then sell the same to various individual customers.

Viewing the respondent's operations as a whole, we are of the opinion and so find that he has not been operating as a motor vehicle carrier.

ORDER.

IT IS THEREFORE ORDERED, That this proceeding be, and the same is hereby, discontinued.

RE HERBERT HENRIKSON.

[Case No. 467. Decision No. 2418.]

Common carriers—Automobiles—Three customers.

Motor operator serving only three customers found not to be a motor vehicle carrier.

[August 2, 1929.]

Appearances: A. P. Anderson, Esq., Denver, Colorado, attorney for respondent; Colin A. Smith, Esq., Denver, Colorado, Assistant Attorney General, *amicus curiae*.

STATEMENT.

By the **Commission**: The Commission entered an order requiring an investigation and hearing for the purpose of determining whether or not the respondent, Herbert Henrikson, is operating as a motor vehicle carrier without a certificate of public convenience and necessity. At the hearing it developed that the respondent is engaged in transporting freight for three concerns only, being Skaggs Safeway Grocery Company, Snodgrass Food Company and Merchants Biscuit Company. It is obvious that the respondent in serving these three customers only is not a motor vehicle carrier as defined by our statute. Some of the certificate holders seem to be of the opinion that this Commission can and should stop all operations carried on for hire by persons who do not hold certificates of public convenience and necessity. The legislature has seen fit to limit our jurisdiction to those carriers who transport freight for the general public or a sufficiently large part thereof so that they in fact are common carriers. It is not, therefore, every operation for hire that we may take steps to stop.

ORDER.

IT IS THEREFORE ORDERED, That this proceeding be, and the same is hereby, discontinued.

RE H. A. DIXON.

[Case No. 451. Decision No. 2420.]

Common carriers—Automobiles—Three customers.

1. Motor operator serving only three customers found not to be a motor vehicle carrier.

Common carriers—Automobiles—Oil equipment—Transportation for all who desire service.

2. One engaged in transporting, by motor truck, oil well equipment for all who desire to employ him is a motor vehicle carrier.

[August 2, 1929.]

Appearances: H. A. Dixon, Grand Junction, Colorado, *pro se;* Colin A. Smith, Esq., Denver, Colorado, Assistant Attorney General, *amicus curiae.*

STATEMENT.

By the **Commission:** An order was entered by the Commission providing for an investigation and hearing for the purpose of determining whether or not respondent is operating as a motor vehicle carrier. The evidence shows that the respondent is regularly engaged in transporting freight for three concerns, being Skaggs Safeway Grocery Company, Independent Lumber Company and Big Skirts, a wholesale house, situated in Grand Junction. The only other hauling which he has done has been of heavy oil well supplies to and from some two or three fields. This latter business was practically concluded some time ago.

The transportation of freight for the three concerns mentioned obviously does not make the operator a common or motor vehicle carrier as defined by our statute. While a general transportation of oil well equipment for all who desire to employ the operator would make him a carrier, in view of the fact that he is no longer engaged in such operations the Commission has concluded to discontinue the case.

ORDER.

It Is Therefore Ordered, That this proceeding be, and the same is hereby, discontinued.

RE GEORGE KOEPKE, *et al.*

[Applications Nos. 1321 and 1332. Decision No. 2423.]

Service — Automobiles — Different stockholders operating different trucks—Division of profits according to business done by each.

The Commission expressed disapproval of a plan by which a corporation would hold a motor vehicle certificate of convenience and necessity, and several stockholders would operate different trucks and share in the profits of the corporation according to the amount of business done by each.

[August 2, 1929.]

Appearances: David F. How, Esq., Denver, Colorado, attorney for applicant, George Koepke; Clarence Werthan, Esq., Denver, Colorado, attorney for applicant, C. M. Dinius; Elmer L. Brock and D. W. Oyler, Esqs., Denver, Colorado, attorneys for The Denver and Salt Lake Railway Company, protestant; J. S. Habenicht, Esq., Denver, Colorado, attorney for Railway Express Agency, Inc., protestant; J. K. Bozard, Esq., Steamboat Springs, Colorado, and A. P. Anderson, Esq., Denver, Colorado, attorneys for Steamboat Transfer and Storage Company.

STATEMENT.

By the **Commission**: George Koepke, doing business as Steamboat-Denver Truck Line, filed his application for a certificate of public convenience and necessity authorizing the transportation of freight and express between Steamboat Springs, Colorado, and Denver, Colorado, and intermediate points, including Kremmling, Hot Sulphur Springs, Granby and Idaho Springs.

C. M. Dinius and A. C. Dinius, copartners, doing business as the C. M. Dinius Motor Company, filed their application for a certificate of public convenience and necessity authorizing the transportation of freight between Craig, Colorado, and Denver, Colorado, and the intermediate points, including Hayden, Steamboat Springs, Yampa and Oak Creek. This application was amended by A. C. Dinius withdrawing and leaving the application in the name of C. M. Dinius.

The Commission has heretofore granted a certificate of public convenience and necessity to Steamboat Transfer and Storage Company authorizing the transportation of freight between Denver and Steamboat Springs and points within a radius of fifty miles thereof, which includes Craig, Hayden, Oak Creek and Yampa. No witnesses in support of Koepke's application appeared from Kremmling, Hot Sulphur Springs, Granby or Idaho Springs. Motor vehicle service is now being rendered on schedule between Craig and Steamboat Springs by Stanley Larson. No complaint was made as to the inadequacy of said service.

The Dinius application was a rather unusual one. While the details have not been worked out, it was stated at the hearing

that the applicant, if, and when, he procures a certificate, proposes to organize a corporation, the stock in which is to be taken by several men who are now operating trucks from various points on the proposed route. In addition, it was stated that the compensation of these men would be based on the volume of business each one would procure. This situation might lead to very serious and unsatisfactory results. While all of the men would work for the corporation to which Dinius would seek authority to transfer his certificate, there might be a tendency for each to be working somewhat against the interests of the other. Assuming, however, that Dinius should procure a certificate, and that the same should be transferred with the consent of this Commission to a corporation, and that said corporation should do business in a satisfactory manner, we are still of the opinion and so find that public convenience and necessity was not shown to require any operations in addition to those to be rendered by Steamboat Transfer and Storage Company.

ORDER.

IT IS THEREFORE ORDERED, That the applications of George Koepke, doing business under the name of Steamboat-Denver Truck Line, and C. M. Dinius be, and the same are hereby, denied.

CHARLES DAILEY, SR., COMPLAINANT,

v.

THE ROARING FORK WATER, LIGHT AND POWER COMPANY.

[Case No. 348. Decision No. 2424.]

Rates—Overcharges.

Respondent ordered to pay to complainant $1,557.20, being the amount of principal and interest due on account of unlawful overcharges.

[August 2, 1929.]

STATEMENT.

By the **Commission**: On January 8 of this year the Commission made a written decision in which was contained findings

and conclusions arrived at. In the last paragraph thereof the Commission stated that the evidence with reference to the payments made and the date thereof is not as clear as it might and should be. The complainant was given thirty days in which to file a definite statement. We concluded with the statement that the Commission would retain jurisdiction over the entire case, "as the Commission is desirous that both parties may have the unquestioned and untrammeled right to review when this Commission has finished with the case." Thereafter there was filed a motion by the complainant for an order suspending the force and effect of its said decision for reasons therein stated. The complainant filed also a motion for rehearing. Thereafter the Commission made an order, dated January 26, providing that the effective date of the findings and conclusions made by the Commission on January 8, 1929, be suspended until such date as the Commission should hereafter by order fix. The order contained other provisions which speak for themselves. On February 28 a stipulation by and between the attorneys for the complainant and respondent was filed. Time for filing the statement concerning payments made and the dates thereof was extended on March 2. On April 11 a statement of payments was filed. On April 30 a supplemental statement was filed. On May 18 the respondent filed its objections to the statement of payments, etc.

The Commission is now ready to make its final order in the matter. We have, with the aid and advice of the Commission's auditor, carefully studied the said statement of payments, etc. While the interest due the complainant on payments is probably greatly in excess of what we are able to find as a certainty is due him, it has been necessary for the Commission to, and it has, resolved in favor of the respondent every possible doubt and uncertainty. It would serve no useful purpose to enumerate all of them. After such consideration and examination the Commission is of the opinion, and so finds, that, based on its findings heretofore made on January 8, the principal amount due the complainant on account of excessive charges made by the respondent is $1,007.20, being $691.27 for the period June

1, 1909, to July 12, 1913, and $315.93 for the period February 4, 1926, to January 1, 1928; that after resolving all debts and uncertainties in favor of the complainant, the interest on the principal amount is $550.00.

ORDER.

IT IS THEREFORE ORDERED, That the respondent, The Roaring Fork Water, Light and Power Company, pay to the complainant, Charles Dailey, Sr., $1,557.20, being the principal amount and interest thereon due the complainant, on account of unreasonable, unlawful and excessive charges made by the respondent and its predecessor against, and paid by, the complainant.

IT IS FURTHER ORDERED, That the application for rehearing heretofore filed by the complainant be, and the same is hereby, denied without prejudice to his filing within the time allowed by law such other motion or application for rehearing as he may be advised.

IT IS FURTHER ORDERED, That the effective date of the order and the whole decision herein be, and it is hereby made, August 22, 1929, being twenty days hereafter.

RE THE WESTERN COLORADO POWER COMPANY.

[Application No. 1337. Decision No. 2468.]

Certificates of convenience and necessity—Electricity—Extension into contiguous territory—Expiration of franchise—Submission to voters matter of franchise to third party.

Public convenience and necessity held to require issuance of certificate of convenience and necessity authorizing the extension of applicant's electric distribution system into territory found to be contiguous to a city in which applicant was serving after expiration of its franchise rights, although there was evidence of an intention to submit to the voters a second time the proposition of granting a franchise to a third party.

[September 6, 1929.]

Appearances: Moynihan, Hughes and Knous, Esqs., Montrose, Colorado, attorneys for applicant; Pershing, Nye, Tall-

madge and Bosworth, Esqs., Denver, Colorado, attorneys for Charles Viestenz, *et al.*

STATEMENT.

By the **Commission**: The Western Colorado Power Company, a corporation, under and by virtue of the laws of the State of Colorado, which for some years has been engaged in the distribution of electrical energy in Delta, Colorado, on April 25 of this year filed an application for authority to construct "a service line and distribution system for the purpose of carrying and distributing electrical energy from the city limits of the city of Delta, Colorado, to and through the agricultural areas known as 'Garnet Mesa' and 'North Delta,' and to furnish all available consumers residing in said territory and within reasonable connecting distances therefrom electricity for heat, light and power purposes." The Board of County Commissioners of Delta County filed their protest in which it is alleged, among other things, that the applicant has been denied a franchise in the city of Delta, near which the two mesas are located, and that the people of the city of Delta will soon vote upon a franchise to another party with the ultimate view of making the plant a city plant.

There was filed also an application by Charles Viestenz, the city of Delta and the Electric Light Committee of Delta for an order authorizing intervention and for an order continuing the hearing on such application. They alleged in support thereof that the said Charles Viestenz in February of this year entered into a written contract with the city of Delta, wherein said Viestenz agreed to construct and maintain an electric lighting system in said city under a plan whereby the said city ultimately should become the owner of said system; that in April the city council of Delta introduced an ordinance, No. 1-1929, granting to said Viestenz, his successors and assigns, an electric light, heat and power franchise; that in due course the city proposed to submit to the qualified electors of the city the question of granting the franchise to said Viestenz, and that the petitioners believed that a majority of the qualified electors voting

on said question to be submitted would vote in favor thereof, and that such a franchise would be granted to said Viestenz; that in the event of the granting of said franchise the said Viestenz proposes to apply to this Commission for a certificate of convenience and necessity under which he would extend electric light and power lines to the unincorporated territory known as North Delta and to other property contiguous and adjacent to said city not now served with electric light and power. They further alleged that they believed that public convenience and necessity would be promoted by such proposed extensions and that the residents of North Delta had petitioned the said Viestenz that in connection with the building of an electric plant and system in the city of Delta an extension of the lines be made into North Delta. The application concluded with a prayer that the application of the power company be continued and extended to a time subsequent to June 22, 1929, pending the proceedings hereinbefore mentioned.

The application of Viestenz, *et al.*, was filed on the day on which the Commission had previously set the original application for hearing. The power company and Viestenz, *et al.*, filed briefs in which the matter of the delay of a decision on the hearing held on May 9 was discussed and argued. The Commission concluded to and did postpone decision of the matter, and set the original application for further hearing on the 15th day of July in the courthouse in Delta. This setting was vacated and the matter was again set for hearing in the Hearing Room of the Commission in Denver on August 24. On the latter date, the attorneys for Viestenz, *et al.*, advised us that the municipal election had been held and that the electors of the city of Delta had voted in the negative on the question of granting the franchise to said Viestenz, but that it was proposed to submit the question, or a similar one, to the voters again in November, and that pending the outcome of that election no further action be taken herein. The power company resisted this motion, claiming that it now has 57 contracts signed by residents of North Delta and submitted a petition signed by some 54 people claiming to be residents of North Delta, stating that

they object to further delay and that they desire to get immediate service from the power company.

According to the evidence, the capital expenditure for the construction of the transmission and distribution lines on the two mesas in question is $4,000.00. However, this figure shall not be binding upon the Commission in any hearing held for the purpose of fixing or passing upon rates.

No objection was made to the granting of a certificate authorizing construction and operation of the distribution system on Garnet Mesa, it being admitted that the applicant is already either partially serving the residents of said mesa or in such close proximity to the mesa with its lines that it should proceed to render extensive service thereon.

The evidence showed fairly clearly, and we so find, that as to North Delta it is territory which is contiguous to that in which the applicant is already serving and that it is not now served by any other like utility.

Moreover, we are of the opinion under all the circumstances that further delay in rendering a decision on the application herein so far as it relates to North Delta would not be proper. The applicant has filed its application and made its proof. In spite of that, we postponed final disposition of the case until after the first election was held. The granting of a franchise to Viestenz having been rejected by the electors of the city of Delta, and the residents of North Delta being desirous of early institution of service by the applicant, we are of the opinion that the only proper course to pursue is to grant the certificate without further delay.

After careful consideration of the evidence, the Commission is of the opinion and so finds that the public convenience and necessity requires that The Western Colorado Power Company extend its transmission and distribution lines and system into and upon Garnet Mesa and North Delta for the purpose of selling and distributing thereon electrical energy for light, heat and power purposes.

Chairman Bock concurring in part:

I agree with the conclusions of the Commission reached herein except as to the finding that North Delta is territory which is contiguous to that in which the applicant is already serving, because this finding is unnecessary and not within the issues in the instant application.

ORDER.

IT IS THEREFORE ORDERED, That public convenience and necessity requires that The Western Colorado Power Company extend its transmission and distribution lines and system into and upon Garnet Mesa and North Delta for the purpose of selling and distributing electrical energy thereon for light, heat and power purposes, 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 applicant shall file its tariffs, rate schedules and rules and regulations as required by this Commission within twenty days from the date hereof.

RE W. R. HOUSLEY.

[Case No. 464. Decision No. 2470.]

Procedure—Appearance at hearing by complainant—Duty.

1. One making a complaint against the adequacy of service of a motor vehicle carrier should appear at the hearing had pursuant to the complaint.

Monopoly and competition — Failure to render adequate service — Issuance of another certificate.

2. If one holding a motor vehicle certificate of convenience and necessity fails to render such service, particularly as to his personal relations with the public, as is possible under all the circumstances, the Commission may be compelled to issue another certificate.

[September 10, 1929.]

Appearance: Mr. Fred P. Heintz, complainant, *pro se.*

STATEMENT.

By the **Commission**: F. P. Heintz filed a written complaint against the respondent, W. R. Housley, operating between Craig

and Great Divide, Colorado, under a certificate of this Commission charging inadequacy of service. At the hearing the respondent did not appear, although the Commission had set for hearing, and actually heard on that day, a complaint filed by Housley against the said Heintz.

The evidence is to the effect that the equipment of the respondent is in such poor condition that it is out of service a considerable portion of the time, and that the service rendered is otherwise inadequate and inefficient. The respondent is carrying U. S. mail between the two points in question. Without doubt the operating difficulties are very serious. On the other hand, the respondent holding the certificate issued by this Commission should have appeared in Steamboat Springs on the day the case was heard as he received due notice thereof. Moreover, the filing of a complaint by the respondent against Heintz, which was heard at the same time and place, and the failure to appear and give evidence in support of the complaint seems as though he is ignoring the Commission.

But when the situation is viewed from all angles it appears that about all the Commission can do at the present time is to warn the respondent, Housley, that his service, particularly his personal relations with the public, should be made all that, under the circumstances, is possible and that if he fails properly to perform his duty the Commission may later be compelled to issue a certificate to some other person authorizing operation over the route in question. At the present time there is no other application on file. Not only would it be unfortunate to take drastic action with respect to the respondent, when we have not heard his side of the case, but it would be a hardship on the public to deprive them of the services of a common carrier without being able to put another in his place immediately.

ORDER.

IT IS THEREFORE ORDERED, That this proceeding be, and the same is hereby, discontinued.

RE J. A. JOHNSON.

[Case No. 457. Decision No. 2481.]

Common carriers—Automobiles—Forty-one customers.

One transporting freight for some twenty-one shippers in Colorado Springs and twenty in Denver found to be a motor vehicle carrier, and ordered to cease and desist.

[September 12, 1929.]

Appearances: M. W. Spaulding and James H. Brown, Denver, Colorado, for respondent; J. A. Johnson, J. G. Scott, Denver, Colorado, for White Motor Express Company; Colin A. Smith, Assistant Attorney General, *amicus curiae.*

STATEMENT.

By the **Commission**: On July 5, 1929, this Commission issued an order on its own motion, instituting an investigation for the purpose of determining whether or not J. A. Johnson, respondent herein, is operating as a motor vehicle carrier without a certificate of public convenience and necessity, as required by law.

Two hearings were held in this matter, one on July 25, 1929, and the other on August 12, 1929. Considerable testimony was taken. The testimony shows that some time previous to the hearing herein this Commission denied a certificate of public convenience and necessity to The Honeyman Transportation Company to operate as a motor vehicle carrier between Colorado Springs and Denver, whose depot at Colorado Springs was located at 22 South Nevada Avenue. The respondent herein has his depot at that place. The telephone directory issued for the fall of 1929 continues to carry the name of the Honeyman Transportation Company at that address. These circumstances indicate clearly that the respondent, after the denial of a certificate to the Honeyman Transportation Company, continued to conduct a motor vehicle transportation operation at that place and received freight for shipment to Denver. The respondent at Colorado Springs operated three trucks, the registration license

of one of which was in the name of William J. Honeyman, formerly connected with the Honeyman Transportation Company.

Exhibit A consists of carbon copies of billings made by the said respondent. The heading of the billing reads as follows: "J. A. Johnson, General Trucking, Colorado Springs Office 32 South Nevada Avenue, Main 348." This "Main 348" is the same telephone number that appears in the telephone directory as the phone of the Honeyman Transportation Company.

Evidence was also introduced showing ten shipments by the State Highway Department by the respondent. The purpose of this testimony was to show that the respondent was not a private carrier, but was transporting freight for such as did not have any contract with him. Twenty-one shippers at Colorado Springs were using respondent's operation to transport goods to Denver, while the testimony of the Inspectors of this Commission indicates that approximately twenty shippers at Denver were transporting goods via the equipment of the respondent.

The respondent did not appear at the first hearing. At the second hearing he appeared, was sworn as a witness, but refused to answer practically all of the questions on the ground that his answers might incriminate him.

Without any further detailed statement of the testimony, it clearly indicates to us, and we so find, that the respondent has been operating as a motor vehicle carrier between Denver and Colorado Springs without a certificate of public convenience and necessity authorizing the same, as required by law.

ORDER.

IT IS THEREFORE ORDERED, That J. A. Johnson, respondent herein, be, and he is hereby, commanded to forthwith cease and desist from operating as a motor vehicle carrier as defined in Chapter 134, Colorado Session Laws 1927.

RE EDWARD E. HULS.

[Case No. 490. Decision No. 2514.]

Procedure—Investigation on Commission's own motion—Notice by registered mail—Motion to quash.

Motion to quash "special statutory proceeding," being an investigation instituted on the Commission's own motion to determine whether respondent was operating as a motor vehicle carrier, because service by registered letter sent by U. S. mail is insufficient to confer service, denied.

Evidence found to show that respondent was operating as a motor vehicle carrier.

[September 16, 1929.]

Appearance: Colin A. Smith, Esq., Denver, Colorado, Assistant Attorney General.

STATEMENT.

By the **Commission**: This case is an investigation instituted on the Commission's own motion for the purpose of determining whether or not the respondent, Edward E. Huls, is operating as a motor vehicle carrier without a certificate of public convenience and necessity as required by law. Respondent was required to file with this Commission an answer within ten days of the date hereof why the Commission should not enter an order commanding him to cease and desist from operating as a motor vehicle carrier. No answer was filed. This matter was set down for hearing at the Hearing Room of the Commission Denver, Colorado, on September 16, 1929. Counsel for respondent filed with this Commission a motion to quash in which it is alleged that the attempted service through registered letter by U. S. mail to the respondent was not and is not authorized by any statute conferring jurisdiction in this Commission over the respondent in the premises and that, therefore, there is a lack of jurisdiction over respondent's person as well as over the subject matter herein. Counsel for the respondent did not appear personally to press this motion. The statute, however, authorizes serving by mail in a sealed envelope, registered, postage prepaid. Under these circumstances the motion to quash will be denied.

The testimony shows the respondent has been operating intertate between Denver, Colorado, and Wheatland, Wyoming, regularly twice a week; that he received his shipments at the Morgan docks in Denver and from most of the wholesale houses located there. On July 9 the respondent's truck was loading at the Morgan docks, 1925 Blake Street, Denver, at which time he had thereon for shipment freight from eleven Denver firms consigned to firms in Wheatland and Chugwater, Wyoming. The three-ton truck was loaded to capacity on this trip. Other shipments on different dates were also placed in evidence. Without a further recital of the testimony, the Commission is of the opinion that the same clearly indicates that the respondent is operating as a motor vehicle carrier in interstate commerce without first having received a certificate of public convenience and necessity therefor. The Commission understands, of course, that an operator in interstate commerce is not required to make a showing of public convenience and necessity in order to obtain a certificate for an operation as is conducted by the respondent. It is, however, necessary, according to the opinions of the Supreme Court of the United States, that the respondent first receive a certificate from this Commission to operate, and that the respondent pay the tax for the use of the highway as provided by Chapter 134, Session Laws of Colorado, of 1927.

ORDER.

IT IS THEREFORE ORDERED, That the respondent, Edward E. Huls, be, and he is hereby, commanded to cease and desist from operating as a motor vehicle carrier as defined in Chapter 134, Session Laws of Colorado, 1927, unless and until he shall obtain a certificate of public convenience and necessity therefor.

RE THE MIDWEST REFINING COMPANY.

[Application No. 1357. Decision No. 2521.]

Certificates of convenience and necessity—Oil pipeline.

Certificate of convenience and necessity issued authorizing construction and operation of an oil pipeline as a common carrier from Iles field to town of Craig.

[September 19, 1929.]

Appearance: Kent S. Whitford, Esq., Denver, Colorado, attorney for applicant.

STATEMENT.

By the **Commission:** This is an application by The Midwest Refining Company, a corporation, for authority to utilize, maintain and operate an oil pipeline owned by it, situated in the County of Moffat, in the State of Colorado, as a common carrier. The applicant has constructed a pipeline between what is known as the Iles oil field in Moffat County, Colorado, and the town of Craig, which is the county seat of said county, for the transportation of oil to said town of Craig. Said line is now being used by the applicant only. However, as a condition of the granting of a right of way over part of the public domain, the United States of America required the applicant to agree to operate said pipeline as a common carrier in order that others having oil in the territory might use the said line. There is no other common carrier pipeline operating in the particular territory.

The cost of the construction of said line is $180,000. However, this figure shall not be binding upon the Commission in any hearing held for the purpose of fixing or determining fair rates.

After careful consideration of the evidence, the Commission is of the opinion and so finds that the public convenience and necessity requires that the applicant construct, maintain and operate an oil pipeline as a common carrier in the county of Moffat, State of Colorado, running from the Iles oil field to the town of Craig, as more fully appears from a map on file with this Commission.

ORDER.

IT IS THEREFORE ORDERED, That the public convenience and necessity requires that the applicant herein construct, maintain and operate an oil pipeline as a common carrier in the County of Moffat, State of Colorado, running from the Iles oil field to the town of Craig, as more fully appears from a map on file with this Commission, 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 applicant shall file its tariffs, rate schedule and rules and regulations as required by this Commission within twenty days from the date hereof.

RE AGENCIES TRANSPORTATION COMPANY.

[Application No. 1322. Decision No. 2523.]

Certificates of convenience and necessity—Automobiles—Laborers.

Certificate of convenience and necessity issued authorizing motor vehicle transportation from Denver to any point in State of laborers for whom applicant has secured employment.

[September 19, 1929.]

Appearances: Jack Garrett Scott, Esq., Denver, Colorado, attorney for Agencies Transportation Company, applicant; J. V. Rhoades, Denver, Colorado, applicant, *pro se;* Elmer L. Brock and D. W. Oyler, Esqs., Denver, Colorado, attorneys for The Denver & Salt Lake Ry. Co., protestant; Todd C. Storer, Esq., Pueblo, Colorado, attorney for Missouri Pacific Railroad Co.; D. Edgar Wilson, Esq., Denver, Colorado, attorney for Chicago, Rock Island & Pacific Railway Co., Rocky Mountain Parks Transportation Co. and Colorado Motor Way, Inc.; E. C. Knowles, Esq., Denver, Colorado, attorney for Union Pacific Railway Co.; J. Q. Dier, Esq., Denver, Colorado, attorney for Colorado and Southern Ry. Co. and Chicago, Burlington & Quincy Railroad Co.

STATEMENT.

By the **Commission**: Two applications were filed, one by Agencies Transportation Company, a corporation, the other by J. V. Rhoades, doing business as J. V. Rhoades Employment Agency, for a certificate of public convenience and necessity authorizing the transportation by motor vehicle of laborers to various ranches, road camps and other places of employment in Colorado and adjoining states. The said Rhoades desires to transport only those laborers for whom he secures employment. The other applicant desires to transport laborers whose employment has been secured by any and all employment agencies in Denver.

The evidence showed that the laborers sought to be transported are usually those who are to work on hay ranches, although some of them are to be engaged in road construction work, other farm work, etc.; that with rare exceptions the final destination of the laborers going to their employment is considerably removed from railroad stations; that the laborers are of the class who ordinarily do not have money with which to pay railroad transportation to their places of employment; that frequently after money has been advanced by prospective employers for the payment of their transportation, the laborers take the money and go somewhere else.

In some cases the employers pay the transportation charges, in others the agency transporting them has to credit the laborers until they have earned enough money to pay for the transportation.

Neither of the applicants desires to transport laborers back from their places of employment. The service proposed to be rendered is a one-way service from Denver to the places of employment.

The service proposed to be rendered by the applicants is of a substantially different nature from any other service now being rendered in the State by a common carrier. It is confined to the transportation of a particular class of people. Moreover, from the very nature of the case, credit must frequently be extended.

The applicant, Rhoades, proposes to devote to the servie two Cadillac automobiles and one Dodge Speed Wagon, the three having a total value of $4,000. The applicant, Agencies Transportation Company, proposes to operate six automobiles of the value of $3,000.

After careful consideration of the evidence, the Commission is of the opinion and so finds that the public convenience and necessity requires the proposed motor vehicle operation of the applicants for the transportation of laborers for whom employment has been secured from Denver to any point within the State, but not from places of employment to Denver or to any other points.

ORDER.

IT IS THEREFORE ORDERED, That the public convenience and necessity requires the proposed motor vehicle operations of the applicant, J. V. Rhoades, doing business as J. V. Rhoades Employment Agency, for the transportation of laborers for whom he has secured employment to any point within the State of Colorado and adjoining states, but not from any place to Denver or any other points, 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 public convenience and necessity requires the motor vehicle operations of the applicant, Agencies Transportation Company, a corporation, for the transportation of laborers for whom employment has been secured by Denver employment agencies, from Denver to any point within the State of Colorado or adjoining states, but not from any place to Denver or any other points, 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 tariffs of rates, rules and regulations and distance schedules as required by the Rules and Regulations governing motor vehicle carriers, within a period not to exceed twenty days from the date hereof.

IT IS FURTHER ORDERED, That the applicants shall operate such motor vehicle carrier systems according to the schedules filed with this Commission except when prevented from so doing by the Act of God, the public enemy or unusual or 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 C. E. MARTIN.

[Application No. 1401. Decision No. 2536.]

Automobiles—Public wanting motor transportation will have it.

1. When the public wants motor truck transportation, it will get it through private carriers if common carriers are not permitted to operate.

Monopoly and competition—Automobiles—Inadequateness fundamental—Another operation.

2. Where inadequacy of motor vehicle service is fundamental and deep-seated, the Commission will authorize another operation between the points served.

[September 25, 1929.]

Appearances: C. E. Robison, Esq., Fort Morgan, Colorado, attorney for applicant; J. Q. Dier, Esq., Denver, Colorado, attorney for Chicago, Burlington & Quincy Railroad Company; E. H. Houtchens, Esq., Greeley, Colorado, attorney for Raymer Transportation Company.

STATEMENT.

By the **Commission**: This is an application by C. E. Martin for a certificate of public convenience and necessity authorizing the operation of a motor vehicle system for the transportation of freight between Denver and Buckingham, New Raymer and the farming territory around said towns, but not to or from intermediate points.

Both the towns of Buckingham and New Raymer are served by a branch line of the Chicago, Burlington & Quincy Railroad Company running between Sterling and Cheyenne, Wyoming. It was pointed out in some detail in the application of the partnership doing business as Raymer Transportation Company, being Application No. 1259, why public convenience and necessity requires the transportation by motor truck of livestock from the new Raymer territory to Denver. It is not necessary, therefore, to go again into the consideration of the public convenience and necessity therefor. The said firm was not allowed to haul merchandise from Denver to New Raymer. The partners of that firm now take the position that their service is adequate and that if authority should be granted for the transportation of merchandise to New Raymer, such authority should be given to them.

The Commission is of the opinion that it satisfactorily appears in this case that the public convenience and necessity does require the transportation of merchandise from Denver to New Raymer and Buckingham. We are quite as mindful as we have been of the fact that the railroad's volume of freight on this line is very low and that revenues therefrom are consequently meager. We are mindful also of the possibility that the railroad may be warranted in making curtailment of service because of the decreasing revenues. However, as we have frequently pointed out in the past, when the public wants truck transportation, it will have it through the operation of private carriers who serve a limited number of customers, by the operation of trucks by business men and farmers who will haul their own commodities, or by motor vehicle or common carriers.

It has been the policy of the Commission, based on what it deems to be the best interests of the public, to place some limit on competition and not to duplicate operations unless the public convenience and necessity requires. However, after careful consideration of the evidence in this case, we are of the opinion that the public will not be satisfactorily served by the partnership doing business as the Raymer Transportation Company. The difficulties seem to be fundamental and not merely superfi-

cial. The evidence shows that Dounay, who takes the lead in the operations of the partnership, has been engaging in many lines of activity, and that his credit is poor. The result is deep-seated antagonism towards him on the part of business men of New Raymer, which the Commission cannot say on the record is not well founded. It may be unfortunate that the showing made in this application was not made in the application of the partnership.

After careful consideration of the evidence, the Commission is of the opinion and so finds that the public convenience and necessity requires the motor vehicle system of the applicant, Clarence Martin, for the transportation of freight between Denver and Buckingham, New Raymer and the farming territory between and around said towns, as hereinafter stated, but not to or from intermediate points.

ORDER.

IT IS THEREFORE ORDERED, That the public convenience and necessity requires the motor vehicle system of the applicant, C. E. Martin, for the transportation of freight between Denver and Buckingham, New Raymer and the farming territory between and around said towns, as hereinafter stated, but not to or from intermediate points, and this order shall be taken, deemed and held to be a certificate of public convenience and necessity therefor.

The territory around said towns which the applicant is herein authorized to serve extends ten miles north of New Raymer, five miles east thereof and eight miles south thereof; ten miles north of Buckingham, five miles west thereof and eight miles south thereof.

IT IS FURTHER ORDERED, That the applicant shall file tariffs of rates, rules and regulations and time and distance 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 schedule filed with

this Commission except when prevented from so doing by the Act of God, the public enemy or unusual or 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 MORRIS KOSCOVE, *et al.*, DOING BUSINESS AS KOSCOVE BROTHERS.

[Case No. 462. Decision No. 2571.]

Common carriers—Automobiles—Contract each customer—Test—Uniform rates.

1. The making of a contract with each separate customer does not prevent a motor truck operator from being a common carrier, the duty to make rates to customers uniform not being a test but an obligation imposed upon common carriers.

Common carriers—Automobiles—Readiness to make contracts—Furniture.

2. One standing ready to make contracts with the public for the transportation by truck of furniture is a common or motor vehicle carrier.

[October 2, 1929.]

Appearances: Clarence Werthan, Esq., Denver, Colorado, attorney for respondents; T. Lee Witcher, Esq., Canon City, Colorado, attorney for F. G. Stegall.

STATEMENT.

By the **Commission**: The Commission made an order on its own motion providing for an investigation and hearing for the purpose of determining whether or not the respondents are operating as motor vehicle carriers, and requiring them to show cause why the Commission should not enter an order commanding them to cease and desist from so operating until they should obtain a certificate of public convenience and necessity therefor. A verified answer was filed on August 2 by both of the respondents alleging themselves to be "doing business as Koscove Broth-

ers,'' the name of their attorney appearing thereon as such. At the hearing only Morris Koscove appeared. He testified that he is the sole owner of the business and that his brother Samuel is merely an employe of his.

The evidence showed that the respondent, Morris Koscove, is engaged in the junk business and that of wrecking automobiles and selling the parts thereof as junk; that at the present time he is transporting freight principally to Canon City for three concerns, Hardy Hardware Company, Skoglund Oil Company and the Midwest Oil Company. The Commission is not sure of the correct names of the three concerns and is simply using those given in the testimony. However, the said Morris Koscove testified that he is prepared at any time to make special contracts for the transportation of household goods.

The evidence further showed that previous or up to July 8, 1929, the date on which the order herein was made, the respondents had been more extensively engaged in transportation operations for hire. It was admitted that a number of other concerns had been served. We are inclined to believe that in the past the respondent has been engaged in operating as a motor vehicle carrier. The fact that he may have made separate individual contracts with the various customers did not, as we have heretofore pointed out a number of times, prevent his being a common carrier, as the duty to offer uniform rates to the public is not a test, but an obligation which the law and commissions generally impose upon one operating as a common carrier.

If the applicant stands ready to and does make contracts, even though they be termed special or private ones, for the transportation of furniture for such persons as may be able to come to terms with the respondent, he undoubtedly would be a common or motor vehicle carrier, and in the carrying out of such contracts without a certificate of public convenience and necessity he would be violating the law of this State.

The respondent testified not only that he is not now hauling for any other persons than the three customers named, but that he would not in the future serve any other customers except, as stated, in the rendition of service transporting household goods.

In view of the respondent's more extensive operations, somewhat prior if not continuing up to the date of the order herein, and particularly of his statement that he proposes to transport household goods in the future for miscellaneous persons, the Commission feels warranted without finding, which we could not on the record, that his operation at the present time, without the household goods transportation, is that of a common carrier, in ordering him to cease and desist from operating as a common or motor vehicle carrier.

Chairman Bock absent.

ORDER.

IT IS THEREFORE ORDERED, That the respondents, Morris Koscove and Samuel Koscove, and each of them individually, cease and desist from operating as a common or motor vehicle carrier until and unless they shall have procured a certificate of public convenience and necessity therefor.

RE VIRGIL F. VANCE.

[Application No. 1410. Decision No. 2584.]

Monopoly and competition—Duplication of service—Showing of inadequacy.

The Commission will not permit duplication of service unless it is shown that the service being rendered is substantially insufficient and inadequate for the needs of the public.

[October 9, 1929.]

Appearances: C. D. Robison, Esq., Fort Morgan, Colorado, attorney for applicant; B. A. Woodcock, Esq., Greeley, Colorado, attorney for H. L. Sloan; A. C. Scott, Esq., Denver, Colorado, attorney for Chicago, Burlington & Quincy Railroad Company.

STATEMENT.

By the **Commission**: This is an application by Virgil F. Vance for a certificate of public convenience and necessity authorizing the operation of a motor vehicle system for the trans-

portation, not on schedule, of freight between Wiggins, Roggen, Keenesburg, Prospect and Denver. The applicant proposes to devote to the service two trucks, one 2-ton White truck and one 1¾-ton White truck, of the market value of some $4,500. The applicant's reputation as an operator was shown to be excellent. His financial condition is good. He has a large number of customers in the towns of Wiggins, Roggen and Prospect. He has only a few customers in Keenesburg, the home of the protestant, H. L. Sloan. Wiggins has a population of some 300 people, Keenesburg some 400 or 500, Roggen some 90. Prospect has fewer inhabitants than any of the other towns. It appears that the applicant has a larger volume of business and that possibly he has been engaged longer in the rendition of a scheduled serice than Sloan. However, the applicant was operating contrary to law, because he did not have any certificate of public convenience and necessity. The protestant Sloan filed his application a considerable time prior to the date on which the applicant filed his. A certificate heretofore has been issued to Sloan, authorizing him to render scheduled service to the towns of Roggen, Keenesburg and Prospect. The applicant Vance, having continued to operate without a certificate and in violation of the law until after the protestant Sloan had procured his certificate, the question arises whether the public convenience and necessity now requires that the said Vance be authorized to duplicate the service of Sloan so far as the towns of Roggen, Keenesburg and Prospect are concerned. As we have repeatedly stated, the needs and interests of the public are entitled to paramount consideration.

As we have stated again and again (see *Re* Fay Elliott, Case No. 402), the Commission will not permit the duplication of service unless it is shown that the service being rendered is substantially insufficient and inadequate for the needs of the public. The Commission already has granted Sloan's certificate. If another certificate should be issued to Vance, the public in Keenesburg, Roggen and Prospect would have to support or help support two operators instead of one. This would tend to prevent Sloan from reducing, either voluntarily or involuntarily as

a result of an order of the Commission, the rates charged his patrons.

There was no evidence of any substantial character that the service rendered by Sloan since his certificate was issued, or at any recent period prior thereto, has been inadequate or insufficient. His present schedule calls for semi-weekly service. He offers to render service more frequently if and when business permits. If the applicant, Vance, is not allowed to serve the three towns served by Sloan, the latter doubtless could at an early date put his service on a tri-weekly or daily-except-Sunday basis. There was some evidence on the part of the witnesses for Vance that Sloan could not adequately render the service. However, there was no ground shown by the evidence for any such conclusion. It was actuated merely by a natural desire for continued service by Vance. While the two trucks owned by the applicant have a total capacity of 2¾ tons, the two by Sloan have a total capacity of 3½ tons. In the brief filed by the applicant's attorney the point is made, with some justification, that the evidence introduced in support of Sloan's application, particularly as it related to the towns of Roggen and Prospect, was very meager. However, we are of the opinion that the evidence, which consisted solely of that introduced in behalf of the applicant in that application, did show and justify the Commission in finding that the public convenience and necessity requires motor vehicle service between all of the points served by Sloan and Denver, and that Sloan is a fit person to render such service. If the evidence did show those two facts the Commission was warranted in issuing the certificate to Sloan.

It was argued also that the applicant Vance had no notice of the hearing in the Sloan application. That is true. The Commission has never felt it incumbent upon it to attempt to notify subsequent applicants of the hearing of applications previously filed.

The applicant stated that he could not profitably serve Wiggins unless authorized to serve the other towns. However, he did not state that he would not accept a certificate authorizing service between Wiggins and Denver, but not any intermediate

points. It is possible, although we do not now decide the point, that if Wiggins cannot be otherwise served, the Commission might order Sloan to extend his service to said town. If Vance cannot profitably serve Wiggins alone, and Sloan should refuse to serve that town, we might later upon application grant authority to Vance to serve one or more towns now authorized to be served by Sloan.

After careful consideration of the evidence, the Commission is of the opinion and so finds that the public convenience and necessity does not require the motor vehicle system of the applicant for the transportation of freight between Denver and Roggen, Keenesburg and Prospect. The Commission does find, however, that the public convenience and necessity does require the motor vehicle system of the applicant for the transportation of freight between Wiggins and Denver, but not intermediate points.

Chairman Bock absent.

ORDER.

IT IS THEREFORE ORDERED, That the public convenience and necessity requires the motor vehicle system of the applicant, Virgil F. Vance, for the transportation of freight between Denver and Wiggins, but not intermediate points, 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 application be, and the same is hereby, denied in so far as the applicant seeks authority to serve the towns of Roggen, Keenesburg and Prospect.

IT IS FURTHER ORDERED, That if the applicant desires to accept this certificate, he shall file his written acceptance thereof within fifteen days of this date.

IT IS FURTHER ORDERED, That the applicant shall file tariffs of rates, rules and regulations and distance 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 schedule filed with

this Commission except when prevented from so doing by the Act of God, the public enemy or unusual or 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 CHARLES P. BLAKLEY.

[Application No. 1404.]

RE P. C. McKEE, DOING BUSINESS AS THE STOCKYARDS LIVESTOCK HAULING COMPANY.

[Application No. 1405.]

RE GEORGE W. STOCKTON, *et al.*, DOING BUSINESS AS STOCKTON BROTHERS.

[Application No. 1407. Decision No. 2593.]

Certificates of convenience and necessity—Livestock all points in State. Certificate of convenience and necessity issued authorizing motor vehicle transportation of livestock between Denver and all points in the State, subject to conditions stated.

[October 21, 1929.]

Appearances: David F. How, Esq., Denver, Colorado, attorney for Charles P. Blakley; Arthur E. Aldrich, Esq., Denver, Colorado, attorney for P. C. McKee, doing business as The Stockyards Livestock Hauling Company, and George W. Stockton and H. O. Stockton, doing business as Stockton Brothers; J. Q. Dier, Esq., Denver, Colorado, attorney for The Colorado and Southern Railway Company and Chicago, Burlington & Quincy Railroad Company; D. Edgar Wilson, Esq., Denver, Colorado, attorney for The Chicago, Rock Island and Pacific Railway Company; Chadwick J. Perry, Esq., Denver, Colorado, attorney for Lon H. Kellogg and F. C. Merrick; E. G. Knowles Esq., Denver, Colorado, attorney for Union Pacific Railroad Company.

STATEMENT.

By the **Commission**: Charles P. Blakley, P. C. McKee, doing business as The Stockyards Livestock Hauling Company, and George W. Stockton and H. O. Stockton, co-partners, doing business as Stockton Brothers, filed their separate applications for a certificate of public convenience and necessity authorizing the transportation of livestock between all points in Colorado and the Denver Union Stockyards in Denver. They desire authority to transport both to and from the stockyards, although the greater part of the service rendered will be the transportation of stock from Denver.

A large number of witnesses, including commission men and cattle buyers, appeared and testified in behalf of the applications. The evidence shows that without exception livestock shipped to or from Denver in carload lots moves by rail at a lower rate than that offered by the motor vehicle carriers and in general in a more satisfactory manner; that for years the Denver Union Stockyards Company has been engaged in a campaign to induce the ranchers and farmers operating on a small scale to produce or feed livestock; that those people who do produce livestock in small numbers would not and cannot continue in business without the aid and service of the truck operators, and in many cases they are situated at a considerable distance from the railroad stations, and that where near these stations it is impracticable to ship a few head of livestock by rail.

The evidence somewhat indicated also that in the end the railroads have not lost traffic as a result of the transportation of livestock in trucks, one reason being as stated, that many small operators never raised or fed livestock before the advent of the trucks. Another is that much of the livestock produced or fed by the small operators at one time or another is hauled by rail both before and after slaughter.

Objection was made by the rail carriers that some of the certificate holders authorized to transport livestock by truck had not been notified of the hearing. A large number had been notified. It was difficult to notify each and every one. The inter-

ests of the certificate holders in general were well presented by those truck carriers who were represented at the hearing.

It was argued that the rates tentatively proposed by the applicants would in some cases be lower than those charged by those carriers who transport merchandise on schedule and livestock more or less incidentally on call and demand, and that the continuance of operations by such scheduled carriers would be impossible if their livestock business is lost. However, the evidence shows that in some cases the said tentative rates proposed by the applicants would be higher than those charged by the other truck operators. On the other hand, there was evidence to indicate that those certificate holders who are transporting merchandise on a schedule subordinate their livestock hauling to the merchandise hauling and that at times the livestock operators would not secure adequate service without continuance of operations by such persons as the applicants herein. The rates of the operators are to an extent under the control and supervision of this Commission. It will take such action in the future with reference thereto as is warranted and in the public interest.

There has been a question in the minds of the Commission whether the truck carriers operating out of Denver should be restricted as to territory and whether they should be authorized to transport stock from all over the State to Denver as well as from Denver to points outside. The unanimous opinion of the witnesses from the Denver stockyards was to the effect that there should be no restriction with reference to the territory served and that they should be allowed to transport livestock into as well as out from Denver.

After careful consideration of the evidence the Commission is of the opinion and so finds that the public convenience and necessity requires the proposed motor vehicle systems of the applicants for the transportation of livestock between Denver and all points in the State of Colorado, subject to the terms and conditions hereinafter imposed, which in the opinion of the Commission the public convenience and necessity requires.

ORDER.

IT IS THEREFORE ORDERED, That the public convenience and necessity requires the proposed motor vehicle systems of the applicants, Charles P. Blakley, P. C. McKee, doing business as The Stockyards Livestock Hauling Company, and George W. Stockton and H. O. Stockton, co-partners, doing business as Stockton Brothers, for the transportation of livestock between Denver and all points in the State of Colorado, 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 none of the applicants shall have any branch office, agencies or agents outside of the city of Denver for the solicitation and conduct of their business.

(b) That the applicants shall file tariffs of rates, rules and regulations and distance 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.

(c) That the applicants shall operate such motor vehicle carrier systems according to the schedules filed with this Commission except when prevented from so doing 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 respect to motor vehicle carriers, and also subject to any future legislative action that may be taken with respect thereto.

RE ALBERT SCHWILKE.

[Case No. 400. Decision No. 2596.]

Common carriers—Serving the whole public.

1. One does not need to serve the whole public in order to be a common carrier.

Common carriers—Contracts—All carriage under contract.

2. In determining whether one is a common carrier, the question is not whether he is a contract carrier, as all carriage is under contract, express or implied.

Common carriers—Law looks at substance, not color.

3. In determining whether one is a common carrier, the law looks at the substance of a thing, not the mere color which it assumes or invokes.

Common carriers—Contracts—Nature and character of service.

4. The distinction between common and private carriage does not necessarily depend upon whether written or oral contracts have been entered into, but rather upon the nature and character of the carriage or service rendered and upon actual conditions of service.

[October 24, 1929.]

Appearances: Norton Montgomery, Esq., Denver, Colorado, attorney for respondent, Albert Schwilke; D. Edgar Wilson, Esq., Denver, Colorado, for the Rocky Mountain Parks Transportation Company, Rocky Mountain Motor Company and the Colorado Motor Way, Inc.; Colin A. Smith, Esq., Denver, Colorado, for the Attorney General and the Commission.

STATEMENT.

By the **Commission**: On February 25 of this year the Commission made an order requiring the respondent, Albert Schwilke, to show cause why an order should not be made requiring him to cease and desist from operating as a motor vehicle carrier as defined in Chapter 134, Session Laws of 1927. The respondent filed his answer denying that he is operating as a motor vehicle carrier contrary to the provisions of the laws of the State of Colorado, etc. A hearing was had. The only evidence taken was the testimony of respondent. While there are one or two inconsistencies in the testimony, the following facts rather appear clearly:

The respondent is and for a number of years has been engaged in the coal business, buying and selling, and conducting a wholesale produce business. Moreover, he operates with regularity in the summer between Estes Park and Denver and Greeley. Most, if not all, of the hauling from Greeley is for Hickman and Lunbeck Grocery Company, a wholesale concern shipping groceries into Estes Park from both Greeley and Denver. He submitted after the hearing on the order of the Commission written contracts with six concerns, being Morey Mercantile Company, a

wholesale grocery house of Denver; N. B. Boyd, an Estes Park merchant; Lewiston Hotel of Estes Park, Stanley Hotels of Estes Park, and Hickman and Lunbeck Grocery Company. He testified also that he has written contracts with J. S. Brown Mercantile Company and Bourk-Donaldson-Taylor, Inc., both wholesale concerns of Denver, although no written contracts with either of those concerns were presented to the Commission.

The evidence shows that he advertises in the newspaper as follows:

"Express and Freighting" and "Contract Freighting,"

the last advertisement submitted being one dated August 30th. He testified also that he hauls for "trays" and for anyone who brings freight to the dock maintained by him in Denver. He further testified that he hauls up to the capacity of his truck or trucks.

The question is, in view of all of the evidence, whether or not the respondent is a motor vehicle or common carrier. We have stated in detail so frequently the considerations which we believe enter into the determination of this question that we shall not state them at length again.

As we pointed out in the matter of the application of the Exhibitors Film and Delivery Service Company, Application No. 1009, in order that a carrier be a common carrier, it is not necessary that he serve the whole public. No common carrier does or can. Terminal Taxi Cab Co. v. District of Columbia, 241 U. S. 252.

As we further pointed out in the Exhibitors Film case, the question is not whether one is a contract carrier or not, it is whether he is a common carrier or private carrier. All carriage is under contract, whether expressed or implied.

Of course the law looks at the substance of a thing, and not the mere color or form which it assumes or invokes, particularly if the latter be for the manifest purpose of evading regulation. The following is the statement by our Supreme Court of an elemental proposition: "In determining whether the business is that of a common carrier 'the important thing is what it does,

not what its charter says.' " Davis v. People, *ex. rel.*, 79 Colo. 642, 644.

"Courts and Commissions have repeatedly held that the distinction between common and private carriage does not necessarily depend upon whether written or oral contracts have been entered into, but rather upon the nature and character of the carriage or service rendered and upon actual conditions of service as disclosed by testimony." Wayne Tpn. Co. v. Leopold, *et al.*, P. U. R. 1924C (Pa.) 382. As was stated in Restivo v. West, *et al.*, 129 Atlantic (Mo.) 884: "* * * the courts have not been inclined to excuse the increasing number of those who earn their livelihood by transporting persons or groups for hire in motor vehicles from the responsibilities of common carriers simply on technical grounds * * *."

At common law a common carrier is required to transport freight only up to the capacity of his equipment. The respondent testifies that he does haul up to the capacity of his truck or trucks.

It is obvious that the respondent having current contracts which he is constantly performing does not need to run advertisements in the paper that he hauls express and freight and does contract freighting. It is rather patent that the purpose of said advertisements is to get freight from the general public.

In view of all the facts and circumstances, the Commission finds that the respondent is operating as a motor vehicle carrier contrary to the laws of the State of Colorado.

ORDER.

IT IS THEREFORE ORDERED, That the respondent within twenty days from this date cease and desist from operating as a motor vehicle carrier as defined by the statutes until and unless he shall have secured a certificate of public convenience and necessity therefor.

RE J. F. HOPKINS.

[Application No. 1434. Decision No. 2606.]

Common carriers—Automobiles—Milk and cream from many farms—Two consigners who pay freight.

A motor vehicle operator receiving compensation from two dairies for transportation to them of milk and cream from numerous farmers is not a motor vehicle carrier, as defined by statute.

[November 4, 1929.]

Appearances: James D. Lewis, Esq., Boulder, Colorado, for applicant; V. G. Garnet, Esq., Denver, Colorado, for Austin & Austin.

STATEMENT.

By the **Commission**: This is an application for a certificate of public convenience and necessity to transport cream and milk from Niwot and vicinity to Denver. The testimony shows that the applicant hauls milk and cream for thirty-two producers at the point of production to Denver to two creameries, The Equity Union Creamery and The Garden Farm Creamery. Twenty-five of the producers ship their cream and milk to The Equity Union Creamery, of which they are members, and in which they share the profit, if any. Seven of the producers ship their cream and milk to The Garden Farm Creamery. The applicant is paid for this transportation by the two creameries. The producers of the milk and cream receive for their commodity payment direct from the creameries. The applicant receives his compensation for the transportation of this cream every fifteen days from one creamery and every seven days from the other.

In our opinion the evidence of the applicant, who alone testified, shows a private carrier operation and not a common carrier operation. He does not hold himself out to the public to haul indiscriminately for any producers of milk and cream, or for any creameries. He confines his operations solely to these two creameries.

The application does not allege facts, nor did the applicant produce any testimony upon which to base a finding of public

convenience and necessity as a common carrier. Under the circumstances the Commission will enter an order denying the application.

ORDER.

IT IS THEREFORE ORDERED, That the application herein be and the same is hereby dismissed.

DENVER-COLORADO SPRINGS-PUEBLO MOTOR WAY

v.

MASTERSON.

[Case No. 469. Decision No. 2616.]

Automobiles—Illegal operation—Responsibility for acts of agent.

1. Any improper and unlawful conduct in the operation of a bus utility by an agent after the principal has knowledge of such conduct will be imputed to the principal.

Automobiles—Illegal operation—Employes.

2. The operator of a motor carrier service should exercise care in selecting agents, and should instruct them properly as to any refunds or rebates which are unlawful.

[November 6, 1929.]

Appearances: Thos. R. Woodrow, Esq., Denver, Colorado, attorney for applicant; Elson S. Whitney, Esq., Denver, Colorado, for respondent; Colin A. Smith, Esq., *amicus curiae.*

STATEMENT.

By the **Commission**: This is an application to cancel and revoke certificate of public convenience and necessity of Michael P. Masterson, doing business as The Masterson Auto Service Company, for improper conduct in this that the authorized operator sold transportation at rates lower than specified in his tariffs on file with this Commission. The evidence briefly is that arrangements had been made for transportation of a party of ten by the applicant on a motor sightseeing trip from Denver to Pikes Peak and return. The tariff rate is $10.00 per person. Somewhat prior to the time of departure the applicant was ad-

vised that this party of ten could not make this journey because it was required to leave Denver for another destination that morning. The manager for the applicant company thereupon made investigation and found that that was not true. The investigation showed one Wm. Gould, Agent at the Loma Hotel for the respondent, sold the same party of ten transportation to Pikes Peak and refunded $20.00, thereby making the rate $8.00 per person instead of the legal tariff rate of $10.00 per person. Agent Gould testified that he returned $20.00 of the $100.00 to persons representing the party, but did not advise his principal, the respondent herein, of this transaction; that he was entitled to 20 per cent as his commission for the sale of these tickets, but waived this commission because of some hotel business that was brought to him by this party; that the respondent was not advised of this transaction and that it was done without his knowledge or consent. Respondent also testified that he did not have any knowledge of this transaction; that he received $80.00, which was his share of the transportation charge, and did not learn of this transaction until some time after it was being investigated. There is nothing in the record from which the Commission can find that the respondent had knowledge of this transaction. The Commission is not satisfied, however, with the conduct of the respondent after ascertaining these facts. He should have immediately discharged this agent. The retention of the agent tends to show his conduct was agreeable to the principal. Any improper and unlawful conduct by an agent after the principal has knowledge of such former conduct will be imputed to the principal. Moreover, the respondent should exercise considerably more care in selecting his agents and instructing them properly as to any refunds or rebates which are unlawful. The Commission will expect the respondent in the future to instruct emphatically all of his agents against such unlawful practices as are herein involved and not to have the said Gould act as agent again for him.

Upon the record as made the Commission will not cancel the certificate of the respondent, but will reserve the right in any

further complaint of a similar nature to make the record herein a part of such proceedings.

ORDER.

IT IS THEREFORE ORDERED, That this case be, and the same is hereby, dismissed.

RE IRVING H. HANES, *et al.*, DOING BUSINESS AS MUTUAL AUTO TRAVEL SERVICE.

[Case No. 503. Decision No. 2652.]

Public utilities—Automobile touring brokers.

A partnership engaged in securing, for private parties contemplating motor tours, other parties desiring to take such trips as paying guests, was held not to be functioning as a public utility so as to warrant regulation by the Commission.

[December 2, 1929.]

Appearances: F. D. Taggart, Esq., Denver, Colorado, attorney for respondent; Colin A. Smith, Esq., Denver, Colorado, *amicus curiae;* D. Edgar Wilson, Esq., Denver, Colorado, attorney for Rocky Mountain Motor Company and associated companies; E. G. Knowles, Esq., Denver, Colorado, attorney for Union Pacific Railroad Company.

STATEMENT.

By the **Commission:** The evidence in this case showed that the respondents, Irving H. Hanes and Gilbert C. Hanes, copartners, doing business as the Mutual Auto Travel Service, some weeks ago began running advertisements in daily papers published and circulated in the city of Denver. One of said advertisements reads as follows:

"DO YOU wish passengers? Do you wish cheap transportation? In either case, register with us. Mutual Auto Travel Service, 425 Charles Building, Ph. Main 5521."

The evidence further showed that in the future they propose to run in said papers advertisements reading substantially as follows:

"Do you wish passengers? Do you wish to travel, share expenses? Register with us. Mutual Auto Travel Service, 425 Charles Building. Main 5521."

Immediately after the advertisements first began appearing, the Commission made an order for an investigation, requiring the respondents to file an answer with the Commission showing cause why the Commission should not make an order requiring them to cease and desist from continuing to render such services and to engage in such practices and operations.

They immediately ceased offering their service to the public. The only transportation which was effected through their operations was the carrying of two passengers to Kansas City and one to Oklahoma. The respondents propose to make it possible for some person desiring to make a trip to some certain city to ride in an automobile with some other person who happens to be motoring to that city at the time in question. They state positively that it is not their intention to and that they will not put people desiring transportation in touch with any person or persons who may be operating unlawfully as common carriers. Of course, the respondents expect to receive compensation for their services in getting the parties together, which may, according to their testimony, be paid by either the passengers or the carrier.

The Motor Vehicle Act, the enforcement of which has been committed to this Commission by the Legislature, simply prohibits the operation, without a certificate, of motor vehicle carriers or motor vehicle common carriers. If Brown happens to be making a pleasure or business trip from Denver to Chicago in his automobile and his neighbor Smith goes with him, paying compensation for the transportation, and Brown does not make a business of transporting passengers, it is obvious that he does not violate the law by taking his neighbor Smith with him. If Brown is making the trip and knows of no other person to afford him companionship on the trip and to pay a part of the expense thereof, we cannot understand how an intermediate agency, such as that offered by the respondents, violates the law in putting Brown and Smith in touch with each other. If Brown

were making repeated trips on which he carried passengers for hire, whether over a particular route or otherwise, he would be violating the law, and the respondents in aiding him in so doing would likewise be violating the law. But if the one doing the carrying is not, under our statute, a common carrier, one aiding him in carrying on the business, which is not that of a common carrier, cannot be violating the law.

ORDER.

IT IS THEREFORE ORDERED, That this proceeding be, and the same is hereby, dismissed.

Chairman Bock concurring:

It is my understanding that the respondents herein have no intention to, and that they will not, act as an agency to obtain passengers to be transported by anyone operating unlawfully as a common carrier. If the respondents are in good faith in their purpose to only bring together persons who may desire to travel with persons who desire to go to a certain place in their own vehicle for a purpose other than the transportation of passengers, then the advertisement published by the respondents should indicate that viewpoint. In my opinion, the advertisement heretofore published, as well as the one proposed, is objectionable in that it does not so indicate.

RE ARKANSAS VALLEY NATURAL GAS COMPANY.

[Applications Nos. 1505 and 1506. Decision No. 2661.]

Interstate commerce—Commission regulation—Wholesale gas supply.

1. The Commission has no jurisdiction over the rates of an interstate wholesale natural gas supply company for service to a local distributing company.

Certificates—Conditions—Wholesale supply company—Natural gas.

2. The Commission granted a certificate to a natural gas distributing utility to do business upon condition that, notwithstanding its existing contract for a wholesale supply at a specified rate for twenty-five years with an interstate supply company, it would be required to obtain a substitute source of supply, if at

any time a substitute source could be obtained at lower rates and on condition that it would keep itself informed as to the availability of such other possible sources.

[December 16, 1929.]

Appearance: Elmer L. Brock, Esq., Denver, Colorado, attorney for applicant.

STATEMENT.

By the **Commission**: The Arkansas Valley Natural Gas Company, a corporation organized under the laws of the State of Colorado, has filed the above two applications with this Commission, one of which is for the construction and operation of a gas plant for the distribution of natural gas within the city of Las Animas, Colorado, and the other is for a certificate of public convenience and necessity authorizing the exercise of certain franchise rights granted in Ordinance No. 267 by the city of Las Animas on January 7, 1929, relative to the distribution of natural gas. No protests were filed against these applications. The applications were heard on one joint record.

Las Animas is a city of approximately 4,500 people located in the Arkansas Valley. It is not now being served with any gas, natural or artificial. For some time past, La Junta, Swink and Rocky Ford, cities in the same general territory, have been served with natural gas by the Public Utilities Consolidated Corporation. Sometime in January, 1929, H. F. Benson and Edgar G. Hill were granted by the city council of the city of Las Animas a franchise to construct, lay, maintain and operate a system of pipelines for the purpose of selling and distributing gas to the city of Las Animas and its inhabitants. This franchise is known as Ordinance No. 267. Subsequent to the granting of the franchise to Benson and Hill, an arrangement was made for the assignment thereof to the said Public Utilities Consolidated Corporation. The pipeline in question was constructed and completed several months ago. The Public Utilities Consolidated Corporation some time ago passed into the hands of receivers, and therefore the arrangement by Benson and Hill to transfer the same to it became abortive. Thereupon Benson

and Hill caused to be incorporated the Arkansas Valley Natural Gas Company, applicant herein. The testimony shows that Benson and Hill each hold 8,000 shares of no par value stock and that there is only one additional share outstanding in order to qualify a third director in the corporation.

The franchise granted by Ordinance No. 267 has been assigned by Benson and Hill to the Arkansas Valley Natural Gas Company and it has become the owner of the pipe line system heretofore constructed. There is no intention by the applicant and the evidence does not show any convenience to construct a plant for the manufacture of any artificial gas.

The applicant entered into a contract with the Colorado Interstate Gas Company, a Delaware corporation, on November 27, 1929, whereby the Colorado Interstate Gas Company agreed to sell and deliver, and the Arkansas Valley Natural Gas Company agreed to purchase all of the natural gas requisite for the supply of the consumers in the city of Las Animas subject to certain conditions set forth in said contract. The Colorado Interstate Gas Company obtains its supply of natural gas from the Amarillo field and transports it interstate to Colorado, where it now sells to certain utilities which serve a number of communities with natural gas. The contract provides that the vendee shall pay the vendor for natural gas purchased and taken 40c per thousand cubic feet for the first two years, and for the remaining period of the contract, which expires on June 23, 1948, the price shall be 45c per thousand cubic feet, said 45c not to apply under certain circumstances; that for natural gas purchased by the vendee from the vendor for resale under commercial or industrial contracts, the price paid to the vendor shall be 85 per cent of the price chargeable by the vendee to such commercial or industrial consumers.

The investment in the construction of the pipeline system by the applicant is approximately $33,000, with additional investment of approximately $6,000 for meters.

The only reference as to rates in the ordinance is that the applicant "agrees to supply and distribute natural gas to the city and its inhabitants at fair and reasonable rates, which rates shall

be subject to regulation as provided by law." As already stated, the source of supply of natural gas is by interstate through the pipes of the Colorado Interstate Gas Company with a basic rate of 40c per thousand cubic feet for domestic consumers and for commercial and industrial consumers under special contracts approved by the Colorado Interstate Company. The only regulation "provided by law" over the rates involved in the instant case are those filed with us by the distributing agency. As we understand the authorities, this Commission has no jurisdiction whatsoever, because of their interstate character, over the rates charged by the Colorado Interstate Gas Company to the Arkansas Valley Natural Gas Company, nor is there any Federal regulation over such rates. The ordinance granted by the city of Las Animas is for a period of twenty-five years. The contract between the Colorado Interstate Gas Company and the Arkansas Valley Natural Gas Company does not expire until June 23, 1948. Any investigation and hearing that this Commission may have as to the reasonableness of the rates of the consumers in Las Animas would require it to take as the basic rates the charges contained in this contract. Under the legal set-up, therefore, as we understand it, this rate structure for natural gas would practically be frozen and unchangeable for approximately twenty years. If the applicant should at any time during these twenty years be able to obtain natural gas at materially lower charges than those required by the contract, it would be unable to put the same into effect unless this Commission in some manner would protect the public in the certificates herein to be granted. To authorize a certificate that would practically require the same rates for natural gas for a period of twenty years would, in our opinion, be contrary to the public interest. In our opinion, if at any time the applicant could obtain natural gas of the same quality at a materially lower charge, it should be required to do so in order that the consumers at Las Animas may obtain the benefit of a lower rate.

The authorities we have in mind determinative of our jurisdiction over the rates charged by the Colorado Interstate Gas Company are the cases of Missouri v. Kansas Natural Gas Co.,

265 U. S. 298, and Public Utilities Commission of Rhode Island, *et al.*, v. Attleboro Steam and Electric Company, 273 U. S. 83.

After careful consideration of the evidence, the Commission is of the opinion and so finds that the public convenience and necessity requires the construction and operation of a system of pipelines for the distribution of natural gas within the city of Las Animas, Colorado, and the exercise of the franchise rights contained in Ordinance No. 267 granted to the applicant by the city council of the city of Las Animas, Colorado, subject to the terms and conditions contained in our order which, in our opinion, the public convenience and necessity requires.

Commissioner Allen, though absent on the date of this order, has given his concurrence herein.

ORDER.

IT IS THEREFORE ORDERED, That the public convenience and necessity requires the construction and operation of a system of pipelines for the distribution of natural gas within the city of Las Animas, Colorado, and the exercise of certain of the rights and privileges granted in a certain ordinance, No. 267, by the city council of the city of Las Animas, Colorado, to the Arkansas Valley Natural Gas Company, applicant herein, and this order shall be deemed and held to be a certificate of public convenience and necessity therefor, subject to the terms and conditions hereinafter stated, which, in our opinion, the public convenience and necessity requires:

(a) If and when the applicant can obtain a sufficient quantity of natural gas of the same quality from any other source than now available, at materially lower rates than provided for in a contract between the Colorado Interstate Gas Company and the Arkansas Valley Natural Gas Company, dated November 27, 1929, that it then will be required to do so and to give the consumers the benefit of such a materially lower rate.

(b) That the applicant shall be required to keep itself informed as to the availability of natural gas from other sources from which it may obtain natural gas at materially lower rates.

IT IS FURTHER ORDERED, That the applicant shall be required to file its rules, regulations and tariffs containing the charges for natural gas to consumers of the city of Las Animas, Colorado, within twenty days from the date hereof.

RE FRANK BARCROFT, *et al.*, DOING BUSINESS AS THE BROWN AND WHITE CAB COMPANY.

[Case No. 493. Decision No. 2666.]

Tariffs—Violation—Suspension of certificate.

Motor vehicle certificate of convenience and necessity suspended on account of violation of rule prohibiting the charging of a lower fare for transporting passengers than that specified in respondent's tariff.

[December 27, 1929.]

Appearances: J. W. Kelley, Esq., Denver, Colorado, attorney for respondents; Colin A. Smith, Esq., Assistant Attorney General, Denver, Colorado, as *amicus curiae*.

STATEMENT.

By the **Commission**: An order was made by the Commission providing for an investigation and hearing for the purpose of determining whether or not the respondents, Frank Barcroft and Edith Barcroft, doing business as The Brown and White Cab Company, had violated the law and and Rules and Regulations of this Commission in transporting a party of four passengers on or about August 15, 1929, on the Mountain Park Circle Trip at a fare other than that on file with the Commission, and requiring respondents to file their written answer showing cause, if any they have, why an order should not be made revoking and cancelling their certificate of public convenience and necessity, or otherwise penalizing them for such violation.

At the hearing respondents admitted, and the Commission so finds, that they had transported four passengers on or about the date in question on said trip at a rate or fare less than that fixed by their tariff which was on file with this Commission and effective on the date the trip was made.

The Motor Vehicle Act, to the provisions of which respondent is subject, provides (Sec. 19):

"The Commission may at any time, by order duly entered, after hearing had upon notice to the holder of any certificate of public convenience and necessity hereunder, and when it shall be established to the satisfaction of the Commission that such holder has violated any of the provisions of this act, or violated or refused to observe any of the proper orders, rules or regulations of the Commission, suspend, revoke, alter or amend any such certificate issued under the provisions of this act * * *."

Section 18 of the same act provides:

"The Commission shall supervise and regulate all motor vehicle carriers and shall promulgate such safety rules or regulations as it may deem wise or necessary to govern and control the operation of motor vehicles by them, and shall enforce the same as herein provided."

Rules and Regulations Governing Motor Vehicle Carriers which had been duly adopted and promulgated by this Commission were then effective. Rule 8 (a) thereof provides in part:

"No motor vehicle carrier shall charge, demand, collect or receive a greater or less or different compensation for any product or commodity furnished, or to be furnished, or for any service rendered, or to be rendered, than the rates and charges applicable to such product or commodity or service as specified in its schedule on file and in effect at the time, nor shall any such motor vehicle carrier refund or remit, directly or indirectly, in any manner or by any device, any portion of the rates and charges so specified, nor extend to any corporation or person any form of contract or agreement or rule or regulation, or any facility or privilege, except such as are regularly and uniformly extended to all corporations and persons."

Moreover, the said Motor Vehicle Act, in Section 27, provides that:

"All provisions of the Public Utilities Act of the State of Colorado, Chapter 127, Laws of 1913, and all acts amendatory thereof or supplemental thereto, shall, insofar as applicable,

apply to all motor vehicle carriers subject to the provisions of this act."

One of the provisions of said Public Utilities Act, Sec. 2928, C. L. 1921, is substantially the same as the rule and regulation which we have quoted. Section 2929 also is in point.

Rule 36, applying to motor vehicle operators, provides for the furnishing by the Commission of a copy of the Rules and Regulations and the said Motor Vehicle Act, and requires each motor vehicle carrier to carefully read and familiarize himself with the same. Another rule specifically requires motor vehicle carriers to comply with each and every rule or regulation governing in any way the operations of motor vehicles or the conduct of the business of such.

Rule 35 provides:

"Failure of any motor vehicle carrier to comply with the provisions of these rules and regulations, of the laws of the State of Colorado, and all of the terms and conditions in his certificate of public convenience and necessity, shall be full and sufficient cause for the Commission to suspend any certificate of public convenience and necessity issued to such motor vehicle carrier and to proceed, according to law, to cancel and revoke the same."

If there is any one thing the sightseeing operators in Denver know full well and have had repeatedly impressed upon them it is that the cutting of and discrimination in rates is a serious offense, which may be followed by serious consequences. Cutting of rates to some passengers, while charging others the tariff rates, is unfair to those who pay the latter. Moreover, it is grossly unfair to competing operators who are complying with the law and the Rules and Regulations of the Commission.

While the Commission finds no particularly extenuating circumstances in the case, and the respondents really deserve to have their certificate revoked and rescinded, we have concluded to attach a condition to the order which may result in the respondents being able to resume business under their certificate, beginning on July 16, 1930.

ORDER.

IT IS THEREFORE ORDERED, That the respondents' certificate of public convenience and necessity heretofore issued to them by this Commission in Application No. 544, Decision 1114, be, and the same is hereby, suspended to and including July 15, 1930.

IT IS FURTHER ORDERED, That the respondent shall not, prior to July 16, 1930, engage directly or indirectly in the sightseeing transporation business.

RE E. B. FAUS.

[Application No. 1419. Decision No. 2669.]

Monopoly and competition—Duplication—New carrier—Differential of 20 per cent.

Where motor vehicle freight service is being efficiently rendered on regular schedule and there is no substantial complaint against rates or service, public convenience and necessity does not require duplication of said service, and any other person rendering service over the same route, when not on schedule, should be required to charge a differential of 20 per cent over the scheduled operator's rate.

[December 30, 1929.]

Appearances: D. F. How, Esq., Denver, Colorado, attorney for applicant; C. H. Allen, Esq., Monte Vista, Colorado, attorney for Pueblo-San Luis Valley Transportation Company; T. A. White, Esq., Denver, Colorado, Western Railroad Company and Rio Grande Motor Way, Inc.

STATEMENT.

By the **Commission**: This is an application by E. B. Faus, of Monte Vista, Colorado, for a certificate of public convenience and necessity authorizing the operation of a motor vehicle system for the transportation of freight generally to or from any point within a radius of 20 miles of Monte Vista, Colorado, and any and all other towns within the State of Colorado.

The applicant's business has consisted principally of the transportation of potatoes and other farm products to various rail

shipping points in the vicinity of Monte Vista, and household goods to or from said vicinity, and groceries from Pueblo to points in the San Luis Valley, particularly Monte Vista. He has not operated in the past and does not propose in the future to operate on schedule, although the evidence shows that he has been transporting groceries from Pueblo once a week with more or less regularity. The applicant has been engaged in such transportation business for a number of years, having carried on his business by the use of horses prior to the advent of automobiles. His reputation appears to be of the very highest. In the general transportation of farm products in the vicinity of Monte Vista he seems to have no serious competition.

However, the Commission in July of this year issued a certificate to Pueblo-San Luis Valley Transportation Company, authorizing the transportation by it of freight from Pueblo and Walsenburg to La Veta, Alamosa, Monte Vista, Center, Del Norte, Romeo, Antonito, Manassa and Sanford. This certificate has been enlarged so as to include the town of La Jara. That certificate holder is operating a tri-weekly service into Monte Vista, arriving there and making deliveries early in the mornings of Tuesday, Wednesday and Friday. The company has provided itself at an expense of some twenty-five thousand dollars with a number of large trucks and is able financially to furnish all the equipment necessary. There was no substantial evidence of any inadequacy of service on the part of that company. One witness, a grocer, testified that once some freight that was being transported by that company to him arrived at the store on Saturday instead of Friday. However, it appeared that said witness now is using the service of said company in shipping practically all of his fruit and fresh vegetables, and that the delay on the one occasion of which he spoke was due to a breakdown.

The law expressly requires the Commission to find as a condition precedent to the issuance of a certificate that the public convenience and necessity requires the proposed operation. The Commission has consistently taken the position that where freight service is being efficiently rendered on regular schedule

and there is no substantial complaint against rates or service, the public convenience and necessity does not require a duplication of said service, and that any other person rendering service over the same route, when it is not on schedule, should be required to charge a differential of 20 per cent over the rate charged by the scheduled operator. Therefore, in spite of the good reputation enjoyed by the applicant herein, and his long service to the community in which he resides, we cannot find any reason for deviating from the course heretofore followed. He had ample time in which to secure the certificate which only recently was granted to the Pueblo-San Luis Valley Transportation Company. His application was not filed until some days after the issuance of the certificate to that company pursuant to applications which had been filed last year.

W. A. Jones Transfer Company of Alamosa has a certificate authorizing the transportation of household goods. No complaint has been made against its rates or service.

After careful consideration of the evidence, the Commission is of the opinion and so finds that the public convenience and necessity requires the motor vehicle system of the applicant, E. F. Faus, for the transportation, not on schedule, of freight generally between points situated within a radius of 20 miles of Monte Vista, Colorado, and any and all other points within the State of Colorado, subject to the conditions hereinafter stated.

ORDER.

It Is Therefore Ordered, That the public convenience and necessity requires the motor vehicle system of the applicant, E. B. Faus, for the transportation not on schedule of freight generally between points situated within a radius of 20 miles of Monte Vista, Colorado, and any and all other points within the State of Colorado, subject to the terms and conditions hereinafter stated, and said order shall be taken, deemed and held to be a certificate of public convenience and necessity therefor.

For the transportation of any and all commodities except household goods and the products of agriculture, including live-

stock, between points served singly or in combination by scheduled carriers, the applicant shall charge rates at least 20 per cent higher than those charged by scheduled carriers.

The applicant shall not operate on schedule between any points.

The applicant shall not be permitted without further authority from this Commission to establish a branch office or to have an agent employed in any other town or city than Monte Vista for the purpose of developing business.

IT IS FURTHER ORDERED, That the applicant shall file tariffs of rates and rules and regulations substantially the same as filed by the Colorado Transfer and Warehousemen's Association, designated as Joint Freight Tariff No. One, except as herein otherwise ordered, within a period not to exceed twenty days from the date hereof.

IT IS FURTHER ORDERED, That 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 subject also to any past or future legislative action taken with respect thereto.

CONNECTICUT STATE LIBRARY
HARTFORD