Decision No. 20361

ORIGINAL

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

In the Matter of the Application of SOUTHERN PACIFIC MOTOR TRANSPORT COMPANY, for certificate of public convenience and necessity to operate passenger service between Santa Cruz and Watsonville Junction, between Santa Cruz and Davenport; between Asilomar and Del Monte Junction, and between Del Monte Junction and Salinas; and of Southern Pacific Company to withdraw certain passenger trains now operated upon the routes aforesaid.	Application No. 13775.

E. J. Foulds, H. W. Hobbs and George Smith for Applicants.
Rittenhouse & Snyder, by Bert B. Snyder, for Coast Dairies and Land Company, Seaside Ranch; Marina Ranch; Davenport Cash Store, Bella Brothers, and others in the general Coast section.
Sands & Hudson, by R. H. Hudson, for the Chamber of Commerce of Watsonville and Pajaro Valley, and petitioners from southern end of Santa Cruz County.
Stanford G. Smith, District Attorney, for County of Santa Cruz.
Fred W. Swanton, for the City of Santa Cruz.
Warren E. Libby, for Protestant. Pickwick Stages System.
Earl A. Bagby and Warren E. Libby, for Protestant Motor Carriers Association.
Sanborn & Roehl and DeLancey C. Smith, by Arthur B. Roehl, for Protestants Auto Transit Company, Beverly Gibson and the River Auto Stages.
Harry A. Encell and Morgan A. Sanborn, for Protestants Coastside Transportation Co., Peerless Stages, Inc., Sierra Transit Co., Sacramento-Reno Stages and Mount Lassen Transit Company.

LOUTTIT, COMMISSIONER:

OPINION

In this proceeding, the Southern Pacific Company petitions for authorization of this Commission to withdraw from operation the following train service, to-wit:

On the Santa Cruz-Watsonville Junction Branch:

From Santa Cruz	From Watsonville Junction
Train No. 122	Train No. 121
" " 124	" " 125
" " 126	" " 127

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On the Santa Cruz-Davenport Branch:

From Santa Cruz	From Davenport
Train No. 406	Train No. 401

On the Del Monte Junction, Pacific Grove, Asilomar Branch:

From Del Monte Junction	From Pacific Grove
Train No. 210	Train No. 207
" " 212	" " 209
" " 214	" " 213

Del Monte Junction to Salinas:

From Del Monte Junction	From Salinas
Train No. 30	Train No. 29
" " 32	" " 31
" " 106	" " 105

The proceeding also involves an application by the Southern Pacific Motor Transport Company, a California corporation, the capital stock of which (except three (3) shares issued to employees or officers of the Southern Pacific Company for the purpose of qualifying directors) is owned in its entirety by the Southern Pacific Company.

The applicant, Southern Pacific Motor Transport Company, proposes a service and applies for a certificate of convenience and necessity to operate motor coaches for the transportation of passengers and their baggage as follows:

Between Santa Cruz and Watsonville Junction, serving as intermediate points Casino, Seabright, Capitola, Aptos, Watsonville and Watsonville Junction;

Between Del Monte Junction and Pacific Grove and (when demand exists therefor) to Asilomar, and also all intermediate points now served by the Southern Pacific Company;

Between Del Monte Junction and Salinas and all intermediate points now served by the Southern Pacific Company;

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Between Santa Cruz and Davenport and all intermediate points now served by Southern Pacific Company.

The schedules offered in support of the application indicate that the Southern Pacific Motor Transport Company proposes, upon institution of the service, to adopt time schedules which will take the place of the trains above mentioned and, in some instances, making closer connection than those at present made by the trains. One trip additional from Pacific Grove to Del Monte Junction, and one round trip additional between Santa Cruz and Watsonville Junction is also proposed, and one trip less from Salinas to Del Monte Junction will be operated.

The fares, baggage rules, including free allowance, excess baggage charges, etc., are, with one or two minor exceptions relating to fares, the same as the fares, baggage rules and regulations of the Southern Pacific Company. It also proposes to honor all forms of Southern Pacific tickets, including one way, round trip and commutation tickets.

The application of the Southern Pacific Company to abandon train service, as well as the application of the Southern Pacific Motor Transport Company for a certificate of convenience and necessity to operate motor coaches for the carrying of passengers, is protested by the Pickwick Stages System, the Motor Carriers Association, the Motor Transit Company, Auto Transit Company, Beverly Gibson, River Auto Stages, Coast Side Transportation Company, Peerless Stages, Sierra Transit Company, Sacramento-Reno Stages and Mt. Lassen Transit Company.

All protestants join in the general objection to the proposed service on the ground that the Railroad Company should not, either directly or through its subsidiary the Southern Pacific Motor Transport Company, be permitted to operate busses

over the highways for the transportation of passengers and their baggage; that a monopoly of this form of transportation should be preserved to the auto bus transportation companies because they have developed the business and, as expressed by them,"It is our business and should be preserved to us"; and, further, that the railroad lines should be "compelled to stick to the rails".

The Auto Transit Company serves the same general territory proposed to be served by the Southern Pacific Motor Transport Company (except the proposed Santa Cruz-Davenport Service). It further protests the granting of any certificate to the applicant, Southern Pacific Motor Transport Company, upon the ground (1) that applicant has made no affirmative showing of public convenience and necessity for the proposed service; (2) that it has made no showing that the service may be profitably operated; (3) that the cases in which the Commission has heretofore authorized railroad lines to operate busses differ from the instant case; and, (4) that the Auto Transit Company is now operating in this territory an adequate service at reasonable rates and that, for that reason, no new service is necessary. The Auto Transit Company also offers to contract with the Southern Pacific Company on the same terms as is proposed by the contracts introduced in evidence between the Southern Pacific Company and the Southern Pacific Motor Transport Company.

The Coastside Transportation Company interposes similar objections on its behalf to the granting of a certificate to the Southern Pacific Motor Transport Company authorizing the Santa Cruz-Davenport service.

The Southern Pacific Company is a corporation chartered under the laws of the State of Kentucky.

The protestants, during the course of the proceeding, moved dismissal of the proceeding upon the ground that the Southern Pacific Motor Transport Company was not authorized, under the laws of the State of California, to receive from this Commission a certificate of convenience and necessity authorizing it to operate motor busses for the carrying of passengers for hire. In support of this motion, it is contended that, as the capital stock of the Southern Pacific Motor Transport Company is owned in its entirety by the Southern Pacific Company, a foreign corporation, the Southern Pacific Motor Transport Company is, in fact, a mere agency of the Southern Pacific Company, a foreign corporation, and should not be recognized as a separate and distinct entity by this Commission, and that any certificate issued to the Southern Pacific Motor Transport Company would be, in effect, a certificate issued to the Southern Pacific Company, a foreign corporation, to which, under the provisions of the Public Utility Act, the Commission is not empowered to issue a certificate of convenience and necessity authorizing the performance of the public utility service herein sought.

The general rule is that a corporation, duly organized and existing, is an entity, separate and distinct from its stockholders, with separate and distinct liabilities, obligations, rights and powers, and should be recognized as such.

Wenden Estate v. Hewlitt, 193 Cal. 697.

It is only when rights of third persons are involved and it is necessary either to prevent fraud or when the results of so holding will do an injustice that the courts will disregard the corporate existence as a separate entity.

In the proceeding pending, it is the Southern Pacific Motor Transport Company, a domestic corporation, which makes the application and it is entitled, if authorized by the Commission, to operate as a public utility in this state. No fraud is committed by recognizing the Southern Pacific Motor Transport Company as an entity, separate and distinct from the owner of its capital stock, neither does such recognition, in the instant case, result in any injustice to any party to this proceeding.

The motion of the protestants to dismiss should be denied.

The protestants further contend that highway transportation has been developed by the present bus operators and is their business, and that they should be protected in it by refusal of certificates to railroad companies, or their subsidiaries, even though the effect of the issuance of a certificate to such an applicant may be only the preservation to the railroad company of its present business. To such a doctrine I am unable to subscribe. Certificates of convenience and necessity, issued by the Commission, are not certificates irrevocably creating a monopoly. So well has this become established with this Commission that in the issuance of certificates of convenience and necessity, and by the very terms of the certificates themselves, grantees are notified that certificates of convenience and necessity for the operation of motor busses create a purely permissive monopoly of "a class of business over a particular route. This monopoly feature may be changed or destroyed at any time by the state, which is not in any respect limited to the number of rights which may be given."

It is urged that the granting of a certificate to the Southern Pacific Motor Transport Company will result in the operation on the highways of an additional line of busses and for this reason the application should be denied. This contention involves the policing of the highways. The question of the purposes of the Auto Truck and Transportation Act, which has now been, so far as passenger transportation is concerned, included in the Public Utilities Act, received the consideration of the Supreme Court of the State of California in the cases of

Frost v. Railroad Commission, 197 Cal. 230;

Franchise M. F. Company v. Seavey, 196 Cal. 77.

In each of these cases the contention was made that the purpose of the act was the policing of the highways, but the Court held that the primary purpose of regulation is to secure the adequacy, regularity and reliability of service and reasonableness of rates and charges therefor and that the act is in no sense a regulation of the use of public highways. It is a regulation of the business of those who are engaged in the use of them and its primary purpose is to protect the business of those who are common carriers by controlling competitive conditions. Protection or conservation of the highways is not involved.

No general principle may be announced which, under all conditions and circumstances and under every possible set of facts, may measure the rights of every applicant for a certificate of convenience to operate busses upon the highways. Each case must be determined by the facts presented for consideration; yet, when it appears that there is a material number of the public to be served, that the service, so far as applicant is concerned, will be a compensatory one or has a reasonable assurance of becoming so; that there are people in great number desirous of and who will

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patronize the service; that the service will better serve the public than that offered by any other carrier then in the field; and, that the proposed service will not result in injury to any existing utility then operating, a certificate should issue even though as a result there will be added to the lines already operating on the highways another line of busses.

The evidence offered in support of the application of the Southern Pacific Company shows that the revenues derived from the operation of the trains sought to be abandoned are considerably less than the cost of operating the trains and that authority to abandon the trains should be granted provided an adequate substitute, which can be economically justified, is offered.

The evidence further shows that, during the month of August, 1927, the trains to be discontinued severally carried passengers as follows:

Train Number		Passengers Carried
29	Del Monte and Salinas	25
30	" " " "	62
31	" " " "	449
32	" " " "	47
106	" " " "	381
401	Santa Cruz and Davenport	872
406	" " " "	607
207	Del Monte Junction and Pacific Grove	221
209	" " " " " "	615
210	Del Monte and Pacific Grove	1,563
212	" " " " "	562
213	" " " " "	1,168
214	" " " " "	518
122	Santa Cruz and Watsonville	341
121	" " " "	399
124	" " " "	500
125	" " " "	332
126	" " " "	491
127	" " " "	288

From the foregoing tabulation it becomes quite apparent that there is a considerable number of passengers who

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have heretofore presented themselves to the Southern Pacific Company for transportation and who have been transported between the points involved in the application. It is conceded that August is not a typical month and it is probably true that the number of passengers carried during the month of August is more than one-twelfth of the total passengers annually transported between the points involved. If we assume, however, that 75 per cent of twelve times the number of passengers carried during the month of August represents the passengers who now present themselves for transportation and will present themselves in the future, there will be passengers in sufficient number available for transportation to justify substituted service for the trains sought to be discontinued. To my mind there is no question as to the absolute necessity of a substituted service in the event the Southern Pacific Company is permitted to cease operation of the trains involved in this application. It is safe to estimate that in the past between seventy-five and one hundred thousand passengers per annum have been carried by the trains involved and that as many, if not more in number, will hereafter present themselves for transportation. This circumstance alone is sufficient justification for the issuance of a certificate of convenience and necessity for the performance of the service applied for.

Many witnesses were called from Watsonville, Santa Cruz, Pacific Grove, Monterey and Salinas, all of whom testified that they believed the service proposed by the Southern Pacific Motor Transport Company was a necessary service and that they would patronize that service in preference to a similar service to be performed by any existing motor coach carrier now serving in the respective territories above mentioned.

It is urged that the proposed service of the Southern Pacific Motor Transport Company should be denied for the additional reason that the service proposed will not be a compensatory one to the Southern Pacific Motor Transport Company. It is shown that in the month of August, 1927, there were carried on the trains, the discontinuance of which are sought, 9,941 passengers and that the total revenues realized therefrom were $3,872.00. According to the exhibits of the protestants in this case, if this service had been performed by the Southern Pacific Motor Transport Company and it received for the performance compensation according to its proposed tariffs, the gross annual revenue would have been a minimum of $65,000.00, or a maximum of $72,200.00. The estimated cost to the Southern Pacific Motor Transport Company of the proposed service is estimated at $61,358.00 minimum, or a maximum of $67,650.00. It appears, therefore, that the bus company, though the estimated revenue is small, will earn something over and above its operating expenses. Such a showing, particularly where it is apparent from the record that the new service to be instituted is in a rapidly growing community and the probabilities are that revenues realized from the increased traffic will, in a reasonable time, result in profit to the utility, is sufficient to justify the granting of a certificate so far as the financial results are concerned.

It is contended by the Auto Transit Company that it is now in the field with ample facilities for the performance of any service necessary to be performed in transporting these passengers and that, therefore, no certificate should be issued to the Southern Pacific Motor Transport Company.

The record, however, discloses that the protestants are not in position at the present time to perform all of the proposed

service absolutely necessary and essential as a substitution for the train service, discontinuance of which is herein authorized.

The protestants call to our attention many cases in which the Commission has held that, where a territory is amply supplied with adequate service at reasonable rates, competition will not be permitted. I have no quarrel with this doctrine but deem it inapplicable here for the reason that here we have two carriers, both of whom have dedicated property to public use for a transportation service and both of whom have been in the field for many years in the past, each, so far as the record is concerned, serving practically the same communities and each in its own field performing a reasonable, adequate, satisfactory service at reasonable rates. The railroad company now desires, because some of the property which it now operates in the service no longer returns to it any remuneration, to withdraw that property and, through its subsidiary, perform an identical service by dedication of other facilities to the performance of that service.

Where the situation developed before this Commission in an application seeking substitution by a railroad company of branch line passenger service with auto transportation on practically paralleling highways discloses that there is no carrier operating in the same general territory performing the identical service applied for; that the service, as proposed by the applicant will be adequate, satisfactory and at reasonable rates; that the residents in the community are desirous of and will patronize the proposed service; that the rates proposed will make the operation a self-sustaining one; that the service, as it is proposed to be rendered, will not in any way increase the competitive situation theretofore existing between the railroad company and auto carriers then operating in the same general territory, and that the result

of such proposed service will be merely to permit the railroad company, either by itself or through its subsidiary, to continue to perform a necessary service without financial loss to any carrier operating in the territory, a sufficient showing has been made to justify the issuance of a certificate of convenience and necessity. The applicant in this proceeding has fully met these requirements and I recommend that a certificate be granted.

Southern Pacific Motor Transport Company is hereby placed upon notice that "operative rights" do not constitute a class of property which should be capitalized or used as an element of value in determining reasonable rates. Aside from their purely permissive aspect, they extend to the holder a full or partial monopoly of a class of business over a particular route. This monopoly feature may be changed or destroyed at any time by the state which is not in any respect limited to the number of rights which may be given.

I also recommend that the following form of order be entered herein.

O R D E R

An application having been filed with the Railroad Commission, public hearings having been held, the matter having been duly submitted and the Commission being fully advised,

IT IS HEREBY ORDERED that protestants' motion for dismissal of this proceeding, upon the ground that Southern Pacific Motor Transport Company is not authorized, under the laws of the State of California, to receive from this Commission the proposed certificate of convenience and necessity, be and the same is hereby denied.

IT IS HEREBY FURTHER ORDERED that Southern Pacific Company be permitted and authorized to discontinue from operation the trains, application for which abandonment is herein made, as follows:

Between Santa Cruz and Watsonville Junction, trains numbered 121, 122, 124, 125, 126 and 127;

Between Santa Cruz and Davenport, trains numbered 401 and 406;

Between Del Monte Junction and Pacific Grove, trains numbered 207, 209, 210, 212, 213 and 214;

Between Del Monte Junction and Salinas, trains numbered 29, 30, 31, 32, 105 and 106;

subject, however, to the conditions that upon the abandonment of said trains, a substitute bus service will be provided to the public, as set forth hereinafter, and that the public be given at least five (5) days' notice of such changes by posting notices on trains and in stations effected.

THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA HEREBY DECLARES that public convenience and necessity require the operation by Southern Pacific Motor Transport Company, a corporation, of an automotive passenger stage service for the transportation of passengers and baggage between:

Santa Cruz and Watsonville Junction and the intermediate points of Casino, Seabright, Capitola, Aptos and Watsonville.

Santa Cruz and Davenport and the intermediate points of Park Street, Orby, Wilder Spur, Cordola and Majors.

Del Monte Junction and Asilomar and the intermediate points of Nashua, Neponset, Lapis, Bardin, Marina, Gigling, Workfield, Prattco, Seaside, Del Monte, Monterey, Hoffman Ave., and Pacific Grove.

Del Monte Junction and Salinas and the intermediate points of Cooper and Graves.

provided that the service authorized herein shall be rendered to and from the depots or stations of the Southern Pacific Company at all points named and operated in coordination with the rail service of said company.

IT IS HEREBY FURTHER ORDERED that a certificate of public convenience and necessity for such a service be and the same is hereby granted to Southern Pacific Motor Transport Company, a corporation, subject to the following conditions:

1- The order herein shall not be construed as authorization for the Southern Pacific Motor Transport Company to link up, join or consolidate the operating right herein granted with its existing rights.

2- The four routes named herein are not to be operated as separate operating rights, but as a unified right. Service to Asilomar shall be in accordance with traffic demands.

3- Applicant shall file its written acceptance of the certificate herein granted within a period of not to exceed ten (10) days from date hereof.

4- Applicant shall file, in duplicate, within a period of not to exceed twenty (20) days from the date hereof, tariff of rates and time schedules, such tariffs of rates and time schedules to be identical with those attached to the application herein, or rates and time schedules satisfactory to the Railroad Commission, and shall commence operation of said service within a period of not to exceed sixty (60) days from the date hereof.

5- The rights and privileges herein authorized may not be discontinued, sold, leased, transferred nor assigned unless the written consent of the Railroad Commission to such discontinuance, sale, lease, transfer or assignment has first been secured.

6- No vehicle may be operated by applicant herein unless such vehicle is owned by said applicant or is leased by it under a contract or agreement on a basis satisfactory to the Railroad Commission.

For all other purposes the effective date of this order shall be twenty (20) days from the date hereof.

The opinion and order herein are hereby declared to be the opinion and order of the Railroad Commission of the State of California.

Dated at San Francisco, California, this 23rd day of October, 1928.

Leon Whitsell
C. L. Seavey
Emmet Scott
Thos. S. Louttit

COMMISSIONERS.

DISSENTING OPINION

The result expressed in the order, under the record, might well be reached without a departure from clearly established policies of the Commission.(1) Indeed, if certification were granted upon the finding contained in the majority opinion that the existing stage lines were "not in a position at the present time to perform all of the proposed service absolutely necessary and essential as a substitution for the train service, discontinuance of which is herein authorized" I could assent to the order as one in harmony with previous decisions of this body.

The order, however, when read with the opinion which precedes it, lays down a general policy to govern substitution of rail service by stage service which, in my opinion, represents a departure from previous policies of this Commission.

The new policy laid down is expressed as follows in the opinion, the numbering being inserted for convenience:

> "Where the situation developed before this Commission in an application seeking substitution by a railroad company of branch line passenger service with auto transportation on practically paralleling highways discloses (1) that there is no carrier operating in the same general territory performing the identical service applied for; (2) that the service, as proposed by the applicant will be adequate, satisfactory and at reasonable rates; (3) thatthe

(1) The evidence justifies the withdrawal of the train service as proposed by the Southern Pacific Company. As to the main routes for which stage certification is sought, the evidence fully justifies a finding that the stage service existing at the time the application was filed did not measure up to the high character of service to which the Monterey peninsular, under all the circumstances, was justly entitled. With such a finding certification would logically follow. In respect to the Santa Cruz-Davenport route, the train proposed to be taken off almost exclusively serves night shift workers at the cement plant at Davenport. These are cared for at present under commutation rates which seem to be reasonably adapted to this character of business. The existing stage carrier does not run schedules at night and was unwilling to undertake the transportation of these workers on present commutation rates. Public convenience and necessity under these circumstances would clearly call for certification of a stage operation which would accommodate these passengers at reasonable commutation fares.

residents
/in the community are desirous of and will patronize the proposed service; (4) that the rates proposed will make the operation a self-sustaining one; (5) that the service, as it is proposed to be rendered, will not in any way increase the competitive situation theretofore existing between the railroad company and auto carriers then operating in the same general territory, and (6) that the result of such proposed service will be merely to permit the railroad company, either by itself or through its subsidiary, to continue to perform a necessary service without financial loss to any carrier operating in the territory, a sufficient showing has been made to justify the issuance of a certificate of convenience and necessity."

Under this pronouncement, authorization for the substitution by the rail carriers of rail transportation by stage transportation will be a mere matter of routine and presumably the requested authority will be granted by _ex parte_ order, as no real need will exist for a public hearing.[2]

In this class of applications three interests are involved. The Railroad Company desires to reduce its loss from unprofitable train operation by substituting stages and to hold what it terms its own business, even though in itself unprofitable.[3]

(2) The only specifications which would occasion a public hearing are ones which are unsound and will doubtless soon disappear. Specification (4), for instance, that the rates proposed will make the operation a self-sustaining one, is not sound. If substitution should be allowed and if it is less expensive than the existing rail service it should not be necessary that the operation be a self-sustaining one. Specifications (5) and (6) are equally unsound. If there is public necessity for the service the fact that it increases "the competitive situation" would be no ground for denying it. In few, if any, applications would it appear that any carrier is performing "the identical service applied for." Existing stage lines are not performing a station to station service even though serving the very same communities in which the stations are located. If the proposed service is a substitution at prevailing rail rates the Commission could hardly conclude otherwise than that it will "be adequate, satisfactory and at reasonable rates." Existence of patronage for rail transportation proposed to be discontinued would in itself lead to the conclusion that there would be patronage of the new service.

(3) If the proposed new operation would in itself be a profitable one it would in most cases appear that traffic was sufficient to justify and require more than one stage line.

The existing stage company naturally wishes to avoid the competition certain to result from a new stage line and desires to augment its business by the business handled by the trains proposed to be withdrawn. The third interest is that of the public, and the real question is whether the convenience and necessity of the public require the certification of additional stage service on the highways.

Prior to 1917 there was no restriction on the use of the highways for public motor transportation except for local permits, but in that year the Legislature, by enacting the Auto Stage and Truck Transportation Act, established a new policy, namely, that no new use of the highways for motor transportation between fixed termini should be had unless the public convenience and necessity so required, committing to the Railroad Commission the determination of whether such public convenience and necessity existed. In 1919 this Act was amended by withdrawing the requirement which appeared in the original act that local permits must be secured before the Commission could certificate an applicant. Thereafter the granting of a certificate by the Railroad Commission has been accepted as carrying with it the right to use the highways for the transportation authorized - at least in the absence of local regulations requiring permits. Certificated carriers are commonly spoken of as "franchise carriers."

I am not unmindful of the decisions of the State Supreme Court referred to in the majority opinion emphasizing that the primary purpose of the Act was to secure the adequacy, regularity and reliability of service rather than to regulate the use of the highways. I do not read these decisions as

holding that it was not a purpose of the Legislature to control the use of the highways.(4) I am unable to see how the Court could so hold in view of the fact that certification is in effect the grant of a permit or franchise to use the highways. A study of the legislative history of acts dealing with motor transportation leads me to the conclusion that what the Legislature had in mind was to secure adequate transportation with the least possible congestion of the public highways.(5) The effect of certification of a new stage line on congestion of the highways is an element which is entitled to some consideration.

Immediately upon the enactment of the legislation of 1917 there commenced a bitter struggle over the application of the certification feature of the law. This necessarily brought to the front its meaning and scope. Requests for new stage lines were almost invariably vigorously contested by rail carriers.

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(4) While the Supreme Court in Frost v. Railroad Commission, 197 Cal. 230, held the legislation not to be "a regulation of the use of the highways", it is significant that the decision was grounded upon the theory that certification was a special privilege to which conditions might be attached, and in the opinion appear, many references to the right to use the highways for a private business as a special privilege. Thus it is said "By the Auto Stage and Truck Transportation Act the State offers the special privilege of using the public highways for the transaction of a private business, a privilege to which no one is entitled as of right." While the act may not be in a strict sense a regulation of the "use of the highways" it does, in fact, in its certification feature provide a scheme for determining who may and may not use them. In effect the certification of a carrier is the extending to that carrier of a right in the nature of special permit or franchise or, as expressed by the Supreme Court, "a special privilege" without which the use of the highways for this private business is unlawful.

(5) The writer of this opinion was a member of the Legislature at the time and took a somewhat active part in the enactment of this legislation. Some control over the indiscriminate and uncontrolled use of the highways for public transportation was undoubtedly one of the objects the Legislature had in view.

Rather quickly the Commission attached a definite meaning to the certification requirement and has with great uniformity adhered to the construction thus adopted. The leading decision of the Commission is re Santa Clara Valley Auto Line, 14 C.R.C. 112, in which the opinion was written by Messrs. Thelen and Gordon, Commissioners, and concurred in by the remaining members of the Commission. There it was said:

> "Accordingly, when application is made to the Railroad Commission for an order authorizing automobile stages to operate, the sole test which the Railroad Commission may apply is whether or not the convenience and necessity of the public require that the service as contemplated by petitioner shall be rendered. This is not a question as to whether the public authorities shall extend a favor to existing operators by refusing to permit newcomers to enter the field or whether they shall extend a favor to the newcomer by permitting him to compete with existing companies. No person has a vested right to engage in a public utility service. *The law looks not to the operator but to the convenience and necessity of the public and clearly contemplates that applications of this character shall be decided on the basis of this test alone and not on the basis of the desires or necessities of the operators.* Operators may be permitted to enter the field only at such times and in such places and under such conditions as will best subserve the convenience and necessity of the public." (Italics ours.)

This decision has been frequently cited with approval and, in terms at least, has never been departed from, although a reading of some of the decisions of this body indicate that possibly more attention has been paid to conflicting equities between applicant and protestant than to the basic question of the interest and necessity of the public.

As I read the decisions and orders of this Commission, it has never certificated a new stage line without a holding, expressed or implied, that existing transportation facilities were absent or inadequate. The rule laid down in the majority opinion dispenses with the necessity for any such finding.

The meaning attached by the Commission over a period of years to the expression "public convenience and necessity" becomes especially important in view of the fact that the Legislature in 1927 saw fit to amend the Public Utilities Act so as to place auto stages under that Act instead of under the Auto Stage and Truck Transportation Act of 1917. In making this change it employed the identical language of the earlier act respecting certification, language which had been given a definite meaning by repeated orders and decisions of the Commission. It is a well settled rule of statutory construction that when the Legislature passes an act, using language which has already been given judicial construction, it is deemed to have used the language with that meaning attached to it. Whether this rule applies to the case of the construction placed upon the adopted language by an administrative body like the Railroad Commission, charged with the administration of the act from which the language is taken, it is unnecessary to decide because it is clear that this Commission should not now change its long established policy upon a reversal of position taking place as between the parties.

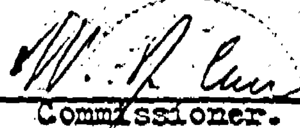
If this whole matter of stage transportation were new there would be most convincing arguments in favor of allowing the ordinary forces of competition free reign. But it is not that. The Legislature has laid down a general policy of certification. It applies to the use of the highways for stage transportation whether conducted by an independent stage operator or by a railroad, and this Commission should apply to the applicant here, as nearly as it can, precisely the same rules it has heretofore applied, when, as it happened, the stage operators were applying for certification

and rail carriers were protesting.[6]

Clearly, if stage transportation existing at the time the proposed substitution is sought does not measure up to a high degree of adequacy substitution should be authorized and a new stage service certificated. If, however, there is an existing stage service that is adequate, it seems to me that at least an attempt should be made to fit this in to the transportation system of the State and make it fill its greatest measure of usefulness. After all, the public is not particularly interested in this railroad or that stage operator. What the public wants, needs and is entitled to is good transportation. If this can be served by one stage line occupying the public highways the public is better served than if there are two or three or four stage lines congesting the roads. If the stage line refuses or fails to properly coordinate its facilities with the rail facilities and seeks to gain a competitive or other advantage, it could well be held that the existing service does not measure up to the standard of adequacy the public is entitled to and the rail carrier be permitted to put on its own stage line.

(6) There is nothing in the legislation dealing with certification which suggests that the legislative intent was that railroads when desiring to go into the stage business should receive any other or different treatment than that accorded an independent stage operator. There is strong evidence to the contrary. Although it is a matter of common knowledge that the principal rail carriers are foreign corporations, the Legislature in 1927 amended Sec. 5 of the Auto Stage & Truck Transportation Act so as to provide that no certificate should be granted to a foreign corporation. In 1927 the definition of "street railway corporation" in the Public Utilities Act was amended so as to include bus operations. If the Legislature had intended that railroads should be extended special treatment in the matter of stage operations it is most strange that in 1927 it forbade certification to foreign corporations (the Public Utilities Act under which passenger stage operations were placed in 1927 had a similar provision) and in 1927 legislated specially for street railways respecting stage operations but not for the steam roads.

With such a general formula or policy in effect this Commission would be fully consistent with its prior decisions. If the policy as expressed in those decisions is wrong it should be changed by the Legislature by legislating specifically respecting the substitution of stage for rail transportation by the rail carriers.



Commissioner.