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ORIGINAL

Decision No. 68397

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of KENNETH D. FRANCISCO, an individual, of Covina, California for a permit to operate as a Cement Contract Carrier (Application No. 19-57131-CC), 150 mile radius of Irwindale, (File No. T-75,946).	Application No. 46118 (Filed December 3, 1963)
In the Matter of the Application of EDWARD W. MEADERS, an individual, of Pico Rivera, California, for a permit to operate as a Cement Contract Carrier (Application No. 19-57130-CC), 150 mile radius of Irwindale, California, (File No. T-77,377).	Application No. 46119 (Filed December 3, 1963)
In the Matter of the Application of HERMAN G. CLARY, JR., an individual, of West Covina, California, for a permit to operate as a Cement Contract Carrier (Application No. 19-57136-CC), 150 mile radius of Irwindale, (File No. T-75,943).	Application No. 46120 (Filed December 4, 1963)
In the Matter of the Application of DONALD J. ALPERT, an individual, of Arcadia, California, for a permit to operate as a Cement Contract Carrier (Application No. 19-57234-CC), 150 mile radius of Irwindale, (File No. T-77,537).	Application No. 46124 (Filed December 30, 1963)
In the Matter of the Application of ROBERT A. HOWARD, an individual, of West Covina, California, for a permit to operate as a Cement Contract Carrier (Application No. 19-57240-CC), 150 mile radius of Irwindale, (File No. T-56,589).	Application No. 46134 (Filed January 3, 1964)

In the Matter of the Application of ROY E. FORSMAN, deceased by MARY L. FORSMAN his survivor, an individual, of Monrovia, California, for a permit to operate as a Cement Contract Carrier (Application No. 19-57089-CC), within 150 mile radius of Irwindale, (File No. T-77,257).	Application No. 46196 (Filed November 14, 1963)
In the Matter of the Application of WM. H. SHATTO, INC., a corporation of Irwindale, for a certificate to operate as a cement carrier (Application No. T-61,836 CMT-C), San Bernardino County, et al., (File No. T-61,836).	Application No. 46378 (Filed December 13, 1963)

Murchison & Stebbins, by Donald Murchison, for all applicants except Roy E. Forsman.
Ralph E. Heath and Mary L. Forsman, for applicant Roy E. Forsman, deceased.

Russell & Schureman, by R. Y. Schureman, for Max Binswanger Trucking, Matich Transportation Co., Daniel Lohnes Trucking Co., Valley Transportation Co., Phillips Trucking, Joshua Desert Service, Inc., and More Truck Lines; James J. Trabuco, for Southern Pacific Company and Pacific Electric Railway; Berol, Loughran & Geernaert, by Marshall G. Berol, for Miles & Sons Trucking Service; protestants.

S. A. Moore and David K. Graham, for Permanente Cement Company; C. R. Boyer and G. B. Shannon, for Southwestern Portland Cement Company; O'Melveny & Myers, by Lauren M. Wright, for Riverside Cement Company; Wallace K. Downey, for California Portland Cement Company; Enright, Elliott & Betz, by Joseph T. Enright and Michael J. Fitzpatrick; Waldo A. Gillette, for Monolith Portland Cement Company; Fred Imhoff, for Southern California Rock Products Association; interested parties.

H. L. Farmer, for the Commission staff.

O P I N I O N

These applications were heard before Commissioner Grover and/or Examiner Gravelle at Los Angeles on April 30; May 1, 25; June 1, 18, 19 and July 8, 1964. They were submitted after oral argument at

San Francisco before Commissioners Grover, Mitchell and McKeage and Examiner Gravelle on July 10, 1964. The matters were duly noticed. There were several protests.

The applications stem from legislation enacted by the California Legislature in 1963, regulating the carriage of cement on the public highways of this State. The pertinent sections of the Public Utilities Code are Sections 1063 and 1064, which are concerned with "cement carriers," and Sections 3620-3625, which are concerned with "cement contract carriers". The basic distinction between the two types of carriers is that the former are common carriers and public utilities and require certificates of public convenience and necessity, while the latter are permitted carriers and do not require such certificates.

The Legislature, in enacting the various provisions of the Public Utilities Code relating to the carriage of cement, has made it clear that it considers such carriage to be of a highly specialized nature. (Public Utilities Code, Sections 1068.1 and 3620.) The Legislature in creating the common carrier known as a "cement carrier" has utilized the concept of public convenience and necessity, which has been applied in the past to other types of public utility carriers. Where a "cement contract carrier" is concerned, however, the Legislature has set forth certain other standards in Section 3623. They are: (1) ability; (2) reasonable financial responsibility; (3) protection of the safety of the public; (4) protection from interference with public use of the public highways; (5) protection of the condition and maintenance of the public highways; (6) protection of the service of previously authorized cement haulers; and (7) that the applicant be a fit and proper person to operate as a cement contract carrier. Even if all the aforementioned elements are found by the

Commission, Section 3623 does not make the granting of a permit mandatory but rather leaves its issuance to the discretion of the Commission. The clear result of this legislation is to give to the Commission the authority to limit entry into this "specialized type of transportation". Because of the discretion which the Commission is given in its findings as to public convenience and necessity, the right of entry into the entire field of cement transportation is thus left very largely to the Commission.

The Legislature has seen fit, however, to establish an exception to that broad authority in the provision, as to both certificated and permitted cement haulers, that persons engaged in such business in good faith during the period June 1, 1962 to May 31, 1963 and continuously thereafter shall be granted what is commonly termed "grandfather" rights.

The applications in the instant proceedings fall into two categories and involve several issues of interpretation of this recent legislation as well as matters of Commission policy. Applicant Wm. H. Shatto, Inc. is seeking authority under the "grandfather" provisions of Public Utilities Code Sections 1063 and 1064. Each of the other applicants is seeking new authority under the provisions of Public Utilities Code Sections 3620-3625. The various applications were consolidated for the reason that each of the permit applicants is seeking authority to operate within a 150-mile radius of Irwindale exclusively as a sub-hauler for Wm. H. Shatto, Inc.; all the applications taken together present a picture of one integrated cement hauling operation.

New Permit Applicants

The applicants for cement contract carrier authority in these proceedings do not all stand in the same position financially

or as to present operating authority, ownership of equipment or experience. They are alike, however, in that they will all operate exclusively as subhaulers for Wm. H. Shatto, Inc. if granted the sought operating authority. They are all directly connected with Wm. H. Shatto, Inc. at the present time, in one way or another.

The argument on their behalf is that certain of the statutory requirements of Section 3623 require affirmative proof which they have submitted, while other of the requirements call for negative findings by the Commission; they contend they should not be made to prove these negatives. Each applicant testified as to his desire to go into business for himself rather than to work as an employee for applicant Shatto. Their counsel pointed out that there will be no additional competition with any other carriers or additional use of the highways if the requested authority is granted since these applicants will be limited to a portion of the business of applicant Shatto, which will have that business whether or not the subhaul applications are granted.

Protestants have attempted to show through cross-examination of the subhaul applicants that each of them would be in a better finantial position if he were to remain an employee of Shatto rather than to operate in the manner proposed by the respective applications. Protestants have also attempted to show through direct testimony that there is an overabundance of available cement haulers represented by those seeking "grandfather" rights, that any new entry will dilute this traffic, that rates for cement hauling might be pushed upward, that the public highways will be overburdened, that if subhaulers can operate economically at rates less than the minimum, then said minimum rates are excessive, and that the subhaul applicants are being taken advantage of by Shatto to their detriment and the detriment of the cement hauling industry.

We find that each of the subhaul applicants (except Ray E. Forsman, deceased, by Mary L. Forsman, his survivor) has shown the ability and reasonable financial responsibility to initiate the proposed operations. (Neither Ray E. Forsman nor his survivor offered any evidence in support of Application No. 46196.) However, the subhaul applicants have failed to establish that the proposed operations will not endanger the safety of the public, interfere with the public use of the public highways, impair the condition or maintenance thereof, or impair the service of other cement carriers or cement contract carriers. It is unnecessary to determine whether or not these applicants have the burden of proving such "negative" facts, for the evidence justifies a positive finding concerning the effect which granting their permits would have on other carriers.

While it is true that at the time of hearing there were no "previously certificated cement carriers or permitted cement contract carriers" (see Section 3623), it is equally true that there were at that time a large number of applicants for "grandfather" rights in each category. We are satisfied that the Legislature intended to include such "grandfather" applicants as among those "previously" authorized. To hold otherwise would render that portion of Section 3623 meaningless until after the Commission had acted on the "grandfather" applications. It would mean also that the Legislature had made a distinction between applicants for new authority applying prior to Commission action on the "grandfather" applications and those applying later. Such a construction of the statute is at variance with its purpose and is not justified. Moreover, the Legislature, in Sections 1068.1 and 3620 of the Public Utilities Code, has addressed itself to the special problem of transportation of cement and has given the Commission broad authority to stabilize that portion of the transportation industry;

the Commission would be remiss in its duty were it to approve applications for cement contract carrier permits without analyzing the effect on such transportation of the operation of those who qualify under the "grandfather" provisions.

The evidence in this proceeding shows that Wm. H. Shatto, Inc., through the use of the subhauler applicants (who would operate only by hauling trailers leased from Shatto for 37 percent of the minimum rate), would gain an unreasonable competitive advantage over other cement carriers whose use of subhaulers is, in contrast, at reasonable rates. We find that such a competitive advantage would impair the service of other cement carriers and cement contract carriers, many of whom had proper "grandfather" applications on file at the time of the hearings herein.[1/]

The "Grandfather" Applicant

Wm. H. Shatto, Inc., as the applicant for certificated "grandfather" authority, presents questions for the Commission which are different from those posed by the subhaul applicants. As we have indicated earlier in this opinion, applicant Shatto falls into that category which the Legislature has excepted from the broad discretion of the Commission. Sections 1063 and 1064 of the Public Utilities Code (which prior to 1963 dealt solely with highway common carriers and petroleum irregular route carriers, each of which is a public utility carrier requiring a certificate of public convenience and necessity) have been amended to include "cement carrier" and to provide for granting of "grandfather" authority upon "adequate proof of such prior operations".

Section 1063 also contains a provision for "grandfather" authority for highway common carriers actually operating in "good

1/ A number of these "grandfather" rights have since been approved by the Commission.

faith" on July 26, 1917, but that portion of Section 1063 sheds little light on the newer cement legislation, for it does not include a standard of proof either for "actually operating" or for "in good faith continuously thereafter". Section 1052 of the Public Utilities Code deals with warehousemen who must be certificated by this Commission, and it too contains a "grandfather" provision: "No such certificate shall be required by any warehouseman as to storage or warehouse space actually operated in good faith on September 1, 1959, under tariffs and schedules of such warehouseman lawfully on file with the commission." Here again, the section does not set out a standard of proof for "actually operated in good faith," nor did its predecessor (Section 50½ of the Public Utilities Act), which contained identical language with the exception of the date.

It is the contention of applicant Shatto that the statutory requirements are satisfied upon the submission of the proof required by Section 1063 and that the Commission is under legislative mandate pursuant to Section 1064 to issue the certificate. The standard of proof set out in Section 1063 is as follows: "The delivery of one or more loads of cement either in bulk or in packages to a point in a particular county shall constitute adequate proof of such prior operations and shall entitle the applicant to authority to serve all points in said county from any and all points of origin." There is no question that applicant Shatto made a timely application, nor that it submitted evidence of delivery of at least one load of cement to each county for which it seeks authority.

Protestants, who are all haulers of cement, argue that applicant Shatto should not be given the sought authority because it has not operated "in good faith"; they claim Shatto has in fact been operating in bad faith in that it has engaged in unlawful buy and sell devices with various consignors of cement, rock and sand, and

has engaged in other devices such as purchase and lease of equipment which have provided rebates and refunds to shippers and damaged the minimum rate structure through the improper use of subhaulers. Protestants by means of a subpoena duces tecum brought into evidence many of the business records of applicant Shatto in an attempt to prove that said applicant was violating the provisions of the Public Utilities Code and the Commission's minimum rate tariffs. They also conducted exhaustive cross-examination of applicant's witness, William M. Shatto. We have concluded, however, that any such unlawful activity would have no bearing on the granting of the certificate herein requested. Protestants have misinterpreted the language of the statute.

Protestants have referred the Commission to other codes for a definition and interpretation of the words "in good faith" and have stressed that the phrase means "in fact done honestly, whether it be done negligently or not". While we do not question said definition with reference to the codes in which it is employed, we do not adopt it with reference to the Public Utilities Code sections here involved. This Commission, in discussing those very words as applied to a highway common carrier, has said: "We believe that what was intended by the expression 'operated in good faith' was actual operation as a transportation company as distinguished from a mere colorable operation to avoid the necessity of obtaining a certificate of public convenience and necessity from this Commission." (18 CRC 339,344.) (In the cited case the protestants had contended that the applicant had failed to comply with certain county ordinances in the counties in which it operated.) Later, in a complaint proceeding involving the claimed "good faith" operation of a warehouseman prior to the "grandfather" date, the Commission applied the same test and concluded that applicant should have its tariff stricken from the Commission's files for the reason that it had filed said tariff on the eve of the

critical date but had not performed the acts of a warehouseman. (37 CRC 133.) We find that the words "in good faith" standing alone in Section 1063 mean only that the operation which is the basis for qualification pursuant to said section shall not have been merely an illusory creation of the applicant to avoid the necessity of applying for a new certificate. Whether or not the applicant is in other respects a law violator, financially irresponsible, morally unfit or deviously motivated has no bearing on the question of its right to a certificate; it need meet only the specific and exclusive standards which the Legislature has set.

Protestants object to the application of Wm. H. Shatto, Inc. on yet another ground. They contend, and it is admitted, that two of the movements on which applicant relies for its requested operating authority were handled as a subhauler for another carrier, Harrison Nichols, and that Harrison Nichols, who is also an applicant for "grandfather" authority, is relying on the same movements in his application. Protestants argue that the Commission should not grant authority to one who subhauls only. The counties in question are San Diego and Santa Barbara. Of course, the argument may be made as to Harrison Nichols that since it did not make "delivery" of the two

loads as required by the statute, that having been accomplished by Wm. H. Shatto, Inc., it too should be denied operating authority as to such movements. We think such a restrictive interpretation of Section 1063 is wholly unrealistic, especially since it deals with "grandfather" rights. We are of the opinion that since the Legislature has made no distinction between prime carriage or subhauling as to movements which qualify an applicant for cement carrier authority, we should liberally interpret the language used. We find that it is immaterial whether an applicant has acted as a prime carrier or as a subhauler as to a movement used to qualify such applicant for cement carrier authority, and that if one movement is so employed by both the prime carrier and the subhauler then each should receive operating authority based upon such movement.

We find that applicant Wm. H. Shatto, Inc. actually transported loads of cement to the Counties of San Diego and Santa Barbara within the prescribed period and is entitled to a certificate as a cement carrier as to those counties.

After consideration, the Commission finds that:

1. Wm. H. Shatto, Inc. has filed a timely application for a cement carrier certificate pursuant to Public Utilities Code Section 1063.

2. Wm. H. Shatto, Inc. has filed proof that it was actually transporting cement as a cement carrier in good faith within one year prior to June 1, 1963 by submitting evidence of delivery of at least

one load of cement to the Counties of San Bernardino, Kern, Riverside, Los Angeles, Orange, San Diego, Santa Barbara and Ventura.

3. The applicants for cement contract carrier permits would, if said permits were issued, impair the service of previously certified cement carriers or permitted cement contract carriers.

Based on the foregoing findings of fact the Commission concludes that:

1. The applications for cement contract carrier permits filed by Kenneth D. Francisco, Edward W. Meaders, Herman G. Clary, Jr., Donald J. Alpert, Robert A. Howard and Mary L. Forsman should be denied.

2. The application for a cement carrier certificate filed by Wm. H. Shatto, Inc. should be granted.

Wm. H. Shatto, Inc. is hereby placed on notice that operative rights, as such, do not constitute a class of property which may be capitalized or used as an element of value in rate fixing for any amount of money in excess of that originally paid to the State as the consideration for the grant of such rights. Aside from their purely permissive aspect, such rights extend to the holder a full or partial monopoly of a class of business over a particular route. This monopoly feature may be modified or canceled at any time by the State, which is not in any respect limited as to the number of rights which may be given.

O R D E R

IT IS ORDERED that:

1. The applications for cement contract carrier permits filed by Kenneth D. Francisco, Edward W. Meaders, Herman G. Clary, Jr., Donald J. Alpert, Robert A. Howard and Mary L. Forsman are hereby denied.

2. A certificate of public convenience and necessity is hereby granted to Wm. H. Shatto, Inc., a corporation, authorizing it to operate as a cement carrier, as defined in Section 214.1 of the Public Utilities Code, between any and all points of origin and all points in the Counties of San Bernardino, Kern, Riverside, Los Angeles, Orange, San Diego, Santa Barbara and Ventura.

3. In providing service pursuant to the certificate herein granted, applicant shall comply with and observe the following service regulations:

(a) Within thirty days after the effective date hereof, applicant shall file a written acceptance of the certificate herein granted. By accepting the certificate of public convenience and necessity herein granted, applicant is placed on notice that it will be required, among other things, to file annual reports of its operations and to comply with and observe the safety rules of the California Highway Patrol and the insurance requirements of the Commission's General Order No. 100-C. Failure to file such reports, in such form and at such time as the Commission may direct, or to comply with and observe the provisions of General Order No. 100-C may result in a cancellation of the operating authority granted by this decision.

(b) On or before December 31, 1964, applicant shall file tariffs in triplicate in the Commission's office, said tariffs to comply with the regulations governing the construction and filing of tariffs set forth in General Order No. 117 and to be made effective not earlier than ten days after the effective date of the authority herein granted on not less than ten days' notice to the Commission and the public.

The effective date of this order shall be ten days after the date hereof.

Dated at San Francisco, California, this 22nd day of DECEMBER, 1964.

Frederick B. Holoboff
President

Commissioners

I concur in the order. I also concur in the opinion, except for the dictum therein that a prime carrier is entitled to a "grandfather" right; in my view the statutory reference to the carrier who has "actually" transported cement makes it clear that the subhauler (but not the prime carrier) is to be given a grandfather certificate.

George G. Grover

I dissent.

The instant opinion to which I dissent is a so-called "policy" decision which sets down the interpretation by this Commission of its duties under those statutes dealing with cement carriers. Today's opinion is erroneous but it is the view of the majority of the Commission. Such being the case one can only conclude that permits in this field are now either impossible to obtain or at best exceedingly difficult.

The Legislature intended that additional Cement Contract Carrier Permits should be issued. Existing carriers generally were given authority by so-called grandfather legislation. Other carriers are entitled to permits in the manner specified by law. Section 3620 of the Public Utilities Act creates that type of State privilege denominated a Cement Contract Carrier Permit. Such authority is obtained pursuant to the provisions of Section 3622 and 3623 of the Public Utilities Act.

An application accompanied by filing fee then makes it incumbent upon the applicant to meet the two mandatory conditions. In the words of the statute "the Commission shall require the applicant to establish ability and reasonable financial responsibility to initiate the proposed operation." (Section 3623 Public Utilities Act). If applicant conforms to the mandatory showing imposed by the phrase "shall require the applicant" then the Commission is compelled to find that such applicant possesses such ability and such financial responsibility as entitles him to initiate operations as a cement contract carrier.

The other negative criteria are not the obligation of the applicant. As a matter of law and as a matter of fact no single applicant possesses the resources to prove among other things that his proposal "will not endanger the safety of the public or interfere with the public use of the public highways or impair the condition or maintenance of them...or impair the service of previously certificated cement carriers or

permitted cement contract carriers..." These negative matters by the order in which they appear in the statute are incumbent upon the Commission to determine from its array of experts, by official notice or through staff testimony if warranted or as a possible alternative upon others - but certainly not an applicant. It is safe to say that coming from the presumption that the law is obeyed that absent affirmative evidence to the contrary this Commission must conclude as a matter of law that applicants do not impair the public safety or interfere with the condition of State highways or intrude upon the service of other carriers.

Turning to the instant opinion I note that at page 6 thereon that the majority makes the specific finding that all of the subhaulers save one have shown "the ability and reasonable financial responsibility to initiate the proposed operations." The opinion notes that applicants have failed to establish anything with regard to public safety or public highways or service of other cement carriers. The opinion then blandly states that it is unnecessary to determine where the burden rests as to such "negative" facts but leaps to the unjustified conclusion absent any support from the record as to the effect of the granting of these permits upon other carriers.

Since this is the first decision and the so-called "policy decision" dealing with this type of privilege it is incumbent upon the Commission to promulgate standards so that applicants may know what is required of them in order to insure the issuance of permits. The failure to promulgate such standards is most unfair in light of the fact that applications accompanied by $150.00 by way of filing fees are received. It is manifestly unfair for the Commission to indulge in the bare conclusion of law that existing service is affected when such evidence is absent in the record. And most importantly when the Commission does not spell out what type of authority will be held to impair the service of existing carriers. It seems

most evident that since these subhaulers will render service to Wm. H. Shatto, Inc. for whom they already render service as employees that in no possible way could this intrude upon the service of other carriers. There simply are no other carriers presently performing services for Wm. H. Shatto, Inc.

The Commission here is confusing the private but understandable desire of the cement industry and the carriers therein to be exempt from additional competition. This private desire is not tantamount to the intention of the Legislature of this State. Logic compels one to the conclusion that since the Legislature provided for Cement Contract Carrier Permits and set forth the showing incumbent upon the applicant that they clearly meant additional permits to issue. Is there any other way that the growing transportation needs of a growing State can be met or is all future business to be handled only by carriers presently authorized?

A hearing was held herein in which Commission staff appeared and voiced no objection as to any deficiency in proof upon the part of these applicants and made no recommendation to the Commission that such applications were to be denied. Nonetheless the majority arbitrarily and contrary to the terms of the statute deny such applications out of hand and do not inform these applicants where they were deficient in any wise.

I conclude then that it is now Commission policy that no further permits are to issue unless of course future opinions are to be inconsistent with the instant opinion. It is ironic that in other types of operating cases the standards are generally known to the persons affected who participated in proceedings involving such rights. Here unlike other cases involving carriage we seem to be placing the burden upon the applicants to prove that the service of other existing carriers will not be affected. Realistically this is incumbent upon the staff of this Commission with its resources or upon such protestants who are able to meet such burden but it is not fairly imposed upon

an individual applicant. We should note carefully as well that the Legislature did not talk about impairment of the financial condition of other carriers it only talked about "service" of other carriers and again it is most difficult if not impossible to imagine any applicant demonstrating the impact of his requested authority upon every other licensed cement carrier in the State of California. The presumption is of course that there is no adverse effect upon "service" unless some party other than the applicant makes such a showing.

Reference is made to Application No. 46126, in the matter of the application of Arthur Milano etc., wherein the Commission unanimously issued a Cement Contract Carrier Permit to applicant and specifically found that the proposed operations would neither endanger the safety of the public nor adversely affect the highways and further they found no impairment of service simply because all protests were withdrawn. It is most difficult to reconcile the quick brush treatment in that proceeding and the lack of difficulty in making the appropriate findings with the self-created obstacles which confront us in the instant case.

In fairness to applicants who are presently before us but not heard and in fairness to those who may be entertaining the filing of applications it is simple fairness to reject such rather than to accept filing fees upon the common notion that these matters are to be decided upon the records made before the examiners of this Commission.

The failure to apprise applicants as to whether or not it is necessary that they have the burden of proof the so-called "negative" facts leaves everything up in the air. I suppose caution would dictate that applicants would undertake to prove such facts since the next decision might use the failure to prove one of the negative facts as the basis for denial. And I would suggest to applicants that they bring forth all of the expert knowledge that reposes in the Department of Motor Vehicles, the State Division of Highways and this Commission, as well as

other relevant agencies whose names escape me presently wherein might rest data concerning the condition of the public highways. The same is true as to the public safety and so far as the service of other carriers is concerned I suggest that all of the information, reports and other material which rests with this Commission be brought forth to show the effect upon the service of other carriers.

In short, the Commission is perverting the meaning of the statute. It is creating an economically secure position for existing carriers and it is denying the right of this and future applicants to a privilege issued by the State of California. Were this type of situation to result outside of regulation it would clearly be in violation of the monopoly laws of the United States of America.

WILLIAM M. BENNETT
Commissioner

San Francisco, California
December 22, 1964