

ORIGINAL

Decision 93438 AUG 15 1981

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application)
of GUERIN DRAYAGE CO., a California)
corporation, to extend its)
certificate of public convenience)
and necessity to operate in intra-)
state commerce, pursuant to the)
provisions of Sections 1063 and)
1064 of the Public Utilities Code)
of the State of California.)

Application 59898
(Filed August 22, 1980)

Kenny & Finan, by J. Donald Kenny, Attorney
at Law, and Eugene Q. Carmody, for Guerin
Drayage Co., Inc., applicant.
Raymond A. Greene, Jr., Attorney at Law, for
Triangle Trucking Co., protestant.
Dunne, Phelps, Mills & Jackson, by Marshall G.
Berol, Attorney at Law, for himself,
interested party.

O P I N I O N

Guerin Drayage Co., Inc. (Guerin), a California corporation,
operates as a highway common carrier under a certificate of
public convenience and necessity issued by this Commission in 1973.^{1/}
This certificate authorizes Guerin to transport general commodities,
with certain exceptions, to all points in an area described as the
San Francisco Territory. Guerin additionally holds a certificate of
registration issued by the Interstate Commerce Commission authorizing
operations in interstate and foreign commerce coextensive with its
intrastate authority. (Docket No. MC-125491 (Sub. No. 2).)

^{1/} This authority was granted in D.81785 (August 21, 1973), as
modified by D.81887 (September 14, 1973), in Application (A.) 53898.

On August 22, 1980, Guerin filed the present application seeking to extend its highway common carrier operations. Specifically, Guerin requests an in-lieu certificate of public convenience and necessity, under Public Utilities (PU) Code §§ 1063 and 1064. Guerin seeks to incorporate its present certificate with the additional authority to transport new furniture between all points and places in the San Francisco Territory, Santa Rosa, the City and County of Sacramento, Stockton, Manteca, Modesto, Monterey, Salinas, Santa Cruz, San Jose, and intermediate points identified in the application. Guerin proposes to perform this new service in intra-state, interstate, and foreign commerce on a daily basis, five days a week. Guerin's common carrier operations would continue to be conducted under tariffs issued by the Pacific Motor Tariff Bureau.

A copy of the application was served on the California Trucking Association, Triangle Trucking Co. (Triangle), and Eckdahl Warehouse Co. In addition, the filing was noticed in the Commission's Daily Calendar of August 28, 1980, and published in the Federal Register on September 29, 1980.

On October 10, 1980, Triangle wrote to the Commission protesting the application. This letter was followed on October 27, 1980, by a Motion to File a Late-Filed Protest. Opposition to the motion was filed by Guerin on October 30, 1980. Triangle's motion was granted by a ruling of the presiding administrative law judge (ALJ) on November 25, 1980. Public hearing was subsequently noticed and held on February 3, 1981; and the matter was submitted on that date.

Discussion

In its application, Guerin states that its intrastate and interstate transportation of new furniture has undergone a steady growth in the past few years. According to the application, the proposed service is in fact in response to many of Guerin's

warehouse customers who have urged Guerin to seek the required authority to extend its present highway common carrier operations to permit direct delivery of new furniture from the warehouse to points located beyond Guerin's present certificate.

This need for the extension of Guerin's operating authority as well as Guerin's willingness and ability to perform the service were not only detailed in the application, but fully developed during hearing. In particular, testimony was presented on behalf of Guerin by its president, Edward J. Ostrowski, and four of Guerin's present warehouse customers. The testimony of Ostrowski provided a complete explanation of Guerin's operations and the reason for the present application. As stated by Ostrowski, the additional authority would permit Guerin to distribute the new furniture of existing warehouse customers directly to the extended areas rather than using the services of other highway common carriers. The requested authority was designed to accommodate only existing customers, none of which, to Ostrowski's knowledge, has any present dealings with protestant, Triangle.

Guerin's customers who testified substantiated the testimony of Guerin's president and the statements made by Guerin in its application. Each indicated that to have Guerin perform the transportation of new furniture from Guerin's warehouse to the extended areas would provide better control over delivery time, reduce the damage which results from increased handling, and eliminate costs relating to warehouse handling. None of these customers used the services of Triangle.

While Triangle filed a formal protest in this application, in fact no protest ever materialized during hearing. When Guerin filed the instant application, the Commission had recently adopted new rules governing protests to applications and requests for hearing. (Rules of Practice and Procedure, Article 2.5, Rules 8.1-8.7.) These rules set forth formal requirements for protests including a filing

date for protests of 30 days after the filing of the application. Although Triangle had been served with a copy of the application on August 22, 1980, a letter protest, a previously accepted form of protest, was filed only 11 days after notice of the application appeared in the Federal Register. Triangle's lack of familiarity with the Commission's new rules formed an appropriate basis for the filing of its motion for a late-filed protest. A formal protest in compliance with the Commission's rules was appended to this motion.

Although Rule 8.2 provides that "[t]he filing of a protest does not insure that a public hearing will be held," Triangle's protest met a prerequisite of hearing by setting forth facts that if developed at hearing, could have resulted in a denial or modification of the application. (Rule 8.3(c).) In particular, the protest contained allegations challenging the need for the service and claiming that such an extension of Guerin's authority would result in a diversion of business from Triangle. Triangle concluded its protest by stating:

"Accordingly, Triangle would respectfully request that this matter be set for oral hearing so that it could be given full and ample opportunity to cross-examine any members of the public appearing in support of the application with respect to their actual need, if any need be, for the proposed service. Only through such oral cross-examination will Triangle be afforded its constitutionally protected right to protect its property from unwarranted and unjustified invasion by reason of diversion of traffic from its operation. Further, it would only be through the course of an oral hearing that Triangle would be given an opportunity to explain in particular its position to the Commission advising the Commission of the nature and extent of its own operation and the financial investment it has in such operation which would be necessarily jeopardized by the granting of this application."

Based on the clear and complete application filed by Guerin, we can state that, but for the filing of Triangle's protest, no public hearing would have been required. Because of Triangle's allegations, however, a properly noticed hearing was scheduled. Although Guerin was prepared to proceed and did in fact present its case at that time, counsel for Triangle was not in attendance at the commencement of the hearing and later presented the following statement of Triangle's intended participation:

"...[I]t has been my practice in proceedings such as this before this Commission where protestants have no advance knowledge of information respecting identity of public witnesses, that at the conclusion of the applicant's case...the hearings are adjourned for an appropriate period of time for the protestant to prepare and present their case."
(Transcript at page 25.)

The presiding ALJ stated that Triangle would be required to make its showing at the conclusion of Guerin's case within the time set for hearing. During the noon recess, just prior to the completion of Guerin's showing, Triangle withdrew its protest.

The purpose of adopting rules governing protests was not only to define that procedure, but also to ensure public hearings would be held only when facts would be developed which could result in a denial or modification of the application. In this case the application was clear as to the request being made and was the subject of further examination in both the protest and opposition to the protest. Based on the application, Guerin's testimony could have easily been anticipated and was in fact merely support for and repetition of its application. There was absolutely no basis for Triangle's understanding of the "practice" before the Commission relating to protests. It was Triangle's protest which resulted in

a hearing being set. It was at that time, no other, at which Triangle was to be given the opportunity to contribute to the record. Despite this Commission's effort to develop rules to ensure the legitimacy of a protest, Triangle failed to make the showing which both the Commission and Guerin had relied on in setting and appearing at the hearing. Triangle's showing need not have depended on the identity of Guerin's witnesses.

We conclude that Guerin has adequately shown that public convenience and necessity require its proposed additional service. Guerin is fit, willing, and financially able to perform this service. No facts altering this conclusion were ever presented. We further wish to express our desire that the rules established for protests be followed in good faith. We interpret these rules as requiring not only that a protest contain facts to be developed during hearing which could result in denial or modification of the application, but that a protestant be ready to proceed with that showing on the day set for public hearing.

Findings of Fact

1. Guerin has the experience, equipment, and financial resources to institute and maintain the proposed service.
2. Public convenience and necessity require that Guerin be authorized to engage in operations in intrastate commerce as proposed in the application and in interstate and foreign commerce within the scope of intrastate operations authorized by this decision.
3. Guerin's present and proposed authority should be consolidated as an "in-lieu" certificate.
4. It can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.
5. Triangle's protest to the application was withdrawn during hearing on the application.

6. The following order complies with the guidelines in the Commission's Energy Efficiency Plan.

Conclusions of Law

1. Guerin has demonstrated public convenience and necessity, and the application should be granted. The names of highways and roads in the certificate in Appendix A are those currently in use. The territory and routes of the certificate do not exceed the geographical scope of the proposed operations as published in the Federal Register.

2. A protestant to an application should be ready to proceed with his showing at the time and place set for hearing.

Only the amount paid to the State for operative rights may be used in rate fixing. The State may grant any number of rights and may cancel or modify the monopoly feature of these rights at any time.

O R D E R

IT IS ORDERED that:

1. A certificate of public convenience and necessity is granted to applicant Guerin Drayage Co., Inc., a corporation, authorizing it to operate as a highway common carrier, as defined in PU Code § 213, between the points and over the routes listed in Appendix A.

2. Applicant shall:

- a. File a written acceptance of this certificate within 30 days after this order is effective.
- b. Establish the authorized service and file tariffs within 120 days after this order is effective.
- c. State in its tariffs when service will start; allow at least 10 days' notice to the Commission; and make tariffs effective 10 or more days after this order is effective.

- d. Comply with General Orders Series
- 80, 100, and 104, and the California
- Highway Patrol safety rules.
- e. Maintain accounting records in
conformity with the Uniform System
of Accounts.
- f. Comply with General Order Series 84
(collect-on-delivery shipments).
If applicant elects not to transport
collect-on-delivery shipments, it
shall file the tariffs required by
that General Order.

3. The certificate of public convenience and necessity granted in Ordering Paragraph 1 of this order shall supersede that granted by D.81785 dated August 21, 1973 in A.53898. That certificate is revoked on the effective date of the tariff filings required by Ordering Paragraph 2.

This order becomes effective 30 days from today.

Dated AUG 18 1981, at San Francisco, California.

John E. Gaylor
President
Michael D. Gable
Francis W. Gammish
Walter Collins
Frank C. G...
Commissioners

Guerin Drayage Co., Inc., by the certificate of public convenience and necessity granted in the decision noted in the margin, is authorized to conduct operations as a highway common carrier as defined in Section 213 of the Public Utilities Code for the transportation of general commodities as follows:

- A. Between all points in San Francisco Territory as described in Note A.
- B. Between all points on the following routes.
 - 1. U.S. Highway 101 between San Francisco and Sausalito, inclusive.
 - 2. Interstate Highway 80 between San Pablo and Crockett, inclusive.
 - 3. Unnumbered road (Pomona Street) between Crockett and Martinez, inclusive.
 - 4. Unnumbered road (Waterfront Road, Port Chicago Highway, and Willow Pass Road) between Martinez and Pittsburg.
 - 5. Unnumbered Road (Willow Pass Road, East 14th Street, and West 10th Street) between Pittsburg and Antioch, inclusive.
 - 6. State Highway 4 between Antioch and its junction with State Highway 24, inclusive.

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7. Willow Pass Road between its junction with State Highway 4 west of Pittsburg and its junction with State Highway 24 in Concord, inclusive.
8. State Highway 24 between its junction with State Highway 4 in Concord and its junction with Interstate Highway 680 in Pleasant Hill, inclusive.
9. Interstate Highway 680 between its junction with State Highway 24 in Pleasant Hill and its junction with State Highway 238 at Mission San Jose, inclusive.
10. Bernal Avenue between its junction with Interstate Highway 680 and Pleasanton, inclusive.
11. All off-route points within the outer perimeter of routes designated in subparagraphs 1 through 10.

Except that under the authority granted, carrier shall not transport any shipments of:

1. Petroleum products in bulk in tank vehicles.
2. Livestock.
3. Fresh fruits and vegetables.
4. Commodities of unusual value.
5. Uncrated used household goods.

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Appendix A

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6. Commodities requiring mechanically refrigerated equipment.
7. Automobiles, trucks and buses.

C. Guerin Drayage Co., Inc., by the certificate of public convenience and necessity granted in the decision noted in the margin is authorized to conduct operations as a highway common carrier as defined in Section 213 of the Public Utilities Code for the transportation of NEW FURNITURE between all points in the San Francisco Territory as described in Note A, on the one hand, and, on the other hand, all points located on and within 10 statute miles laterally of the following routes.

1. U.S. Highway 101 between San Francisco and Santa Rosa, inclusive.
2. U.S. Highway 101 between San Francisco and Salinas, inclusive.
3. State Highway 1 between San Francisco and Carmel, inclusive, including the off-route point of Carmel Valley.
4. State Highway 17 between San Jose and Santa Cruz, inclusive.
5. State Highway 68 between Salinas and Monterey.

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Appendix A
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6. State Highway 152 between Gilroy and State Highway 1 at Watsonville, inclusive.
7. State Highway 156 between Watsonville and its intersection with U.S. Highway 101 south of Gilroy, inclusive.
8. Interstate Highway 80 between San Francisco and Sacramento.
9. Between all points and places in Sacramento County.
10. Interstate Highway 80 between San Francisco and its junction with State Highway 24 in Oakland; thence via State Highway 24 to its junction with Interstate Highway 680 in Walnut Creek; thence via Interstate Highway 680 to its junction with Interstate Highway 780 near Benicia; thence via Interstate Highway 780 to its junction with Interstate Highway 80 at Vallejo.
11. Interstate Highway 80 from San Francisco to its junction with Interstate Highway 580 in Oakland; thence via Interstate Highway 580 to its junction with Interstate Highway 205 near Mountain House; thence via Interstate Highway 205 to its junction with Interstate Highway 5 near Banta; thence via Interstate Highway 5 to its junction with State Highway 120 at Mossdale Wye; thence via State Highway 120 to Manteca.

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12. State Highway 99 between Sacramento and Modesto, inclusive.
 13. State Highway 17 between San Jose and its junction with Interstate Highway 80 near Richmond.
 14. Interstate Highway 680 between San Jose and its junction with Interstate Highway 80 near Cordelia.
 15. Interstate Highway 680 between San Jose and its junction with Interstate Highway 580 at Dublin.
 16. Interstate Highway 5 between Sacramento and its junction with State Highway 120 at Mossdale Wye; thence via State Highway 120 to Manteca, inclusive.

NOTE A

SAN FRANCISCO TERRITORY

San Francisco Territory includes all the City of San Jose and that area embraced by the following boundary: Beginning at the point the San Francisco-San Mateo County Line meets the Pacific Ocean; thence easterly along said County Line to a point one mile west of State Highway 82; southerly along an imaginary line one mile west of and paralleling State Highway 82 to its intersection with Southern Pacific Company right-of-way at Arastradero Road; southeasterly along the Southern Pacific Company right-of-way to Pollard Road, including industries served by the Southern Pacific Company spur line extending approximately two miles southwest from Simla to Permanente; easterly along Pollard Road to W. Parr Avenue; easterly along W. Parr Avenue to Capri Drive; southerly along Capri Drive to Division Street; easterly along Division Street to the Southern Pacific Company right-of-way; southerly along the Southern Pacific Company right-of-way to the

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NOTE A (Continued)

Campbell-Los Gatos City Limits; easterly along said limits and the prolongation thereof to South Bascom Avenue (formerly San Jose-Los Gatos Road); northeasterly along South Bascom Avenue to Foxworthy Avenue; easterly along Foxworthy Avenue to Almaden Road; southerly along Almaden Road to Hillsdale Avenue; easterly along Hillsdale Avenue to State Highway 82; northwesterly along State Highway 82 to Tully Road; northeasterly along Tully Road and the prolongation thereof to White Road; northwesterly along White Road to McKee Road; southwestly along McKee Road to Capitol Avenue; northwesterly along Capitol Avenue to State Highway 238 (Oakland Road); northerly along State Highway 238 to Warm Springs; northerly along State Highway 238 (Mission Blvd.) via Mission San Jose and Niles to Hayward; northerly along Foothill Blvd. and MacArthur Blvd. to Seminary Avenue; easterly along Seminary Avenue to Mountain Blvd.; northerly along Mountain Blvd. to Warren Blvd. (State Highway 13); northerly along Warren Blvd. to Broadway Terrace; westerly along Broadway Terrace to College Avenue; northerly along College Avenue to Dwight Way; easterly along Dwight Way to the Berkeley-Oakland Boundary Line; northerly along said boundary line to the campus boundary of the University of California; westerly, northerly and easterly along the campus boundary to Euclid Avenue; northerly along Euclid Avenue to Marin Avenue; westerly along Marin Avenue to Arlington Avenue; northerly along Arlington Avenue to San Pablo Avenue (State Highway 123); northerly along San Pablo Avenue to and including the City of Richmond to Point Richmond; southerly along an imaginary line from Point Richmond to the San Francisco waterfront at the foot of Market Street; westerly along said waterfront and shoreline to the Pacific Ocean; southerly along the shoreline of the Pacific Ocean to the point of beginning.

(END OF APPENDIX A)

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