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FACTORS IN GRANTING MOTOR CARRIER CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY

JOHN J. GEORGE*

Public motor transportation today has assumed enormous proportions. Evidence of this is found in the fact that seven thousand companies are operating 35,000 vehicles over 233,000 miles of route, carrying 2½ billion passengers a year, at a revenue of over 300 millions dollars.

This form of public service enterprise is authorized by a certificate of public convenience and necessity, issued by the state utility commission (or similar agency). The many and varied factors affecting the granting of this certificate are revealed in the voluminous decisions of the commissions and courts.

In a general sense the only factor involved is public convenience and necessity and on this ground, as was expressed in the Washington Railway and Electric case,1 there is an accepted standard among commissions of allowing certificates when public convenience and necessity justifies.

Before taking up the question of what factors determine the granting of certificates of "public convenience and necessity," let us consider the meaning of the phrase, whether it is to be construed as a unit, and whether qualified or absolute public convenience and necessity must exist. Here we have a phrase which lends itself to vagueness, obscureness, indefiniteness and uncertainty. While it has been current not so long or widely as "police power," "due process" or "equal protection," it has proved itself no less mystic, exact or tangible.

What is the meaning of public, the first word of the phrase? The Colorado supreme court interpreted it to mean "not all the

* See p. 280 for biographical note.
1 P. U. R., 1922C, 757.
people all the time," but said that a service affecting a sufficient part of the public as is affected by any other service known as public is to be dealt with as a public service.2

Thus a standard of comparing the unknown quality with the known quality determines the recognizable quality of the unknown. This definition of what is public may serve in practical situations; however, the risk of great error arises in choosing that with which the comparison is to be made, and especially so in deciding upon the degree of similarity which must exist before the satisfactory resemblance can be established. A broader and more inclusive meaning was given by the Oklahoma supreme court: "Public pertains to the people of a nation, state or community at large, the general body, indefinitely, or as a whole or entirety."3

The Oklahoma interpretation is as comprehensive as the Colorado is involved. Neither is precise; both are inexact. These decisions can be taken as illustrative of the impossibility of prescribing definite limits to the term public; they show also the inevitability of having to determine each case as it arises. Sometimes there is a tendency to interpret the term narrowly, even in a particular case, it having been declared that the wish of the applicant is not the wish of the public, does not amount to public convenience and necessity, and therefore does not constitute sufficient grounds for granting certificate.4

Likewise, a good deal of doubt has arisen as to the meaning of "convenience and necessity." "Convenient" is not "handy," nor does it mean easily accessible, said the Rhode Island supreme court,5 though "ease and access may enter into" convenience. A service is convenient when it is "necessary for public accommodation." It was here held that a commission in granting a certificate must be convinced that the proposed service will accommodate the public and that a reasonable public demand exists. The same case exhibits the view of the court that "necessity" does not mean absolutely indispensable, but reasonably indispensable. This interpretation is much in accord with that expressed in the Rock Island case, where "necessity" did not mean "essential or absolutely indispensable," but the resulting condition where the proposed service would be such an improvement in

2 Davis v. Colorado, 247 Pacific 801.
the existing mode of transportation as to justify the expense of making the improvement.\textsuperscript{6}

Is the expression "convenience and necessity" to be construed as a unit or are the two words to be construed separately? An early opinion in the matter was rendered by the New York public service commission to the effect that the phrase as used in the statute is not to be divided; that "if an enterprise is necessary, it is certainly convenient, so that if it be required that a general necessity be established, the word convenience would be superfluous." "Convenience is connected with the word 'necessity' not as an additional requirement, but to modify what otherwise might be taken as the significance of necessity." \textsuperscript{7} The commission parallels the interpretation of "convenience and necessity" to Marshall's interpretation of "necessary and proper" in the \textit{McCulloch} case, stating that to analyze each word separately and to give a separate meaning to each would be a marked departure from the ordinary process of the human mind. Six years later this commission reiterated its former view that the words must be considered as an entity and not separately.\textsuperscript{8} The New York interpretation has been accepted in Colorado, Kentucky, Missouri, and Montana.\textsuperscript{9} In 1926 the Oklahoma supreme court leaned heavily towards the New York view,\textsuperscript{10} which found acceptance by the Utah commission in 1927.\textsuperscript{11} This agency admitted that while public convenience would be served by granting the certificate sought, public necessity did not so demand, and accordingly denied the certificate.

The evident conclusion therefore is that the phrase "convenience and necessity" must be taken together, and that the words are not to be construed separately. Also that both convenience and necessity must exist from the standpoint of the public before the issuance of the certificate is warranted.

Is the convenience and necessity provided for in the statutes interpreted by the commissions to mean absolute or qualified con-
Convenience and necessity? The New York commission in 1917 dealt with this question. Here the view was taken that public convenience and necessity exists "when the proposed facility will meet a reasonable want of the public, and supply a need, if existing facilities while in some sense sufficient do not adequately supply that need." The Colorado commission has had extensive experience on this point. In 1920 it was decided that as the applicant who had secured the first certificate to operate a motor truck line between Denver and Boulder had not been required to prove the existence of absolute necessity, the applicant for a second and competing certificate was entitled to receive it on establishing reasonable necessity. Although there were two railways and one motor truck line doing freight and express business between the two points, the commission granted a certificate for a second truck line, witnesses for applicant testifying that such would improve the service. Not indispensability to public demand, but only a reasonable need is required to justify the increasing of public convenience, ruled this commission in 1921. Two years later the commission stated that the needs justifying the issue of a certificate are not required to be an absolute demand from the public, but only such as will be reasonably convenient to the public. In a further case, it was likewise held that reasonable convenience and necessity is sufficient, but reasonable convenience and necessity of the public in general, and not of any particular locality; such is the contemplation of the Colorado statute. "Necessity" can be read to mean only "reasonably indispensable," declared the Oklahoma supreme court in the Rock Island case.

In the light of administrative practice "convenience and necessity" has been interpreted to possess a qualified meaning only. The statutes, it is safe to conclude, meant to require no absolute necessity and convenience; and had they aimed otherwise, it would be difficult to see how they could be applied in practice.

We now turn to a consideration of the factors which determine the existence of public convenience and necessity justifying the granting of a motor carrier certificate.

12 Note 7.
13 Note 9.
14 Re Donovan (Colorado), P. U. R., 1921D, 493.
17 Note 3.
1. **ABSENCE OF TRANSPORTATION FACILITIES**

In the Middle and Far West has appeared emphatically the absence of transportation facilities as a factor in determining the issuance of certificates. As might be expected, this condition serves as an evident justification for authorizing motor carrier service.

The fact that one community has become accustomed to the advantages of motor carrier service suffices as proper basis for granting a certificate to serve a nearby community hitherto without service, although in so doing the commission will be creating competition with another operator on part of the proposed route. In the absence of transportation service for a community newly built up, public convenience and necessity justifies the authorization of service by motor carrier, ruled the Colorado commission, and the same body has declared that where railway service has been abandoned between two towns, the daily average of mail, freight, and express being 600 pounds and a monthly average of 300 passengers, convenience and necessity demanded the authorization of motor carrier operation.

Furnishing cross-country service and supplying connections to railways are adequate grounds for issuing a certificate in South Dakota. Here not urban, but rural needs are recognized. Similarly, in the same state the absence of other transportation facilities for inland towns makes them dependent on motor carrier service, and a certificate will issue. The South Dakota Commission has further concluded that where the railway distance is 700 miles, reaching the point by a proposed bus route of 120 miles is easily within the meaning of public convenience and necessity.

The importance of motor service to communities not served by rail lines has been pointed out by an assistant Secretary of

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18 Re Shepard (Ind. P. S. Com.), 590-M, February 5, 1926.
19 Re Denver & South Platte Transportation Co., Decision 976, May 7, 1926.
20 Re Heck (Colorado P. U. Com.), Decision 986, May 13, 1925.
21 Re Heaton, Order 878, June 9, 1926.
22 Re Linden, P. U. R., 1926D, 782.
23 Re Buffalo Motor Co., P. U. R., 1927C, 398-400. Where certificate of operator who gave inadequate service had been canceled, an applicant whose petition was endorsed by such bodies as chambers of commerce along the route secured the certificate. Ex Parte Vincent (La. P. S. Com.), P. U. R., 1928C, 180.
Commerce, who states that 45,000 such communities have been put into touch with rail transportation by means of the motor carrier.

2. ADEQUACY OF SERVICE

Commissions often take the existing means of transportation as the index; Ohio furnishes an excellent example in Eager v. Public Utilities Commission. In 1925 several states, chiefly in the northeast, enacted statutes authorizing railroads to engage in the motor carrier business. Adequacy and frequency of service have been emphasized by the Illinois supreme court in Egyptian Transportation Co. v. L. & N. Ry. Demands and requests from the public generally that transportation service be furnished by applicant, and the inability of existing agencies to supply necessary service or that these agencies do not supply it are in Pennsylvania satisfactory evidence that public convenience and necessity exists. "Sustained and growing patronage" suffices in Indiana. Inconvenience to the public resulting from the lack of the proposed service is a proper standard of measurement in Oklahoma. The development of bus transportation to large proportions in a short time is distinct and ample evidence that public convenience and necessity demands motor transportation, the Missouri commission ruled recently. A county ordinance seeking to bar motor service from the county is satisfactory evidence of the need for such service, it has been held in California. Positive, affirmative testimony is essential to the establishing of public convenience and necessity in Arizona, and while the testimony of county commissioners in

26 149 N. E. 865.
27 Note 25.
28 152 N. E. 510; 321 Ill. 580.
31 Note 3. Because the manufacture of explosives is an economic benefit to a community, Arizona has granted a certificate to haul them. Re Apache Truck Line, P. U. R., 1923A, 220.
33 Jerome-Union Stage Line, P. U. R., 1922E, 850. Same year California stressed indispensability of clear evidence on adequacy of existing service, P. U. R., 1922D, 495.
Colorado is weighty, it is not determinative in establishing public need.\textsuperscript{34}

The Indiana commission has denied a certificate where applicant failed to have representatives of the towns on proposed route introduce evidence that public convenience and necessity demanded motor service.\textsuperscript{35} But where only a petition signed by inhabitants along a proposed route merely stated that public convenience and necessity would be served and averred no inadequacy of existing service, the certificate was denied in Montana.\textsuperscript{36} An applicant in Missouri has secured a certificate in the absence of evidence convincing the commission that the other applicant would furnish better service.\textsuperscript{37} The fact that the commission records show that service previously authorized on the route had proved a failure, and the failure of the evidence offered in the application at hand to show sufficiently improved conditions, warranted the denial of the certificate in Washington.\textsuperscript{38}

Many considerations have been ruled out as insufficient factors. An occasional request to establish service or an opinion that such would be justified will not suffice in Pennsylvania.\textsuperscript{39} Nor will simply stating in application that public convenience warrants without supporting facts in Colorado\textsuperscript{40} or Arizona.\textsuperscript{41} Merely stating that present service is inadequate cannot be considered as proper evidence in Arizona,\textsuperscript{42} and the same view was expressed in Colorado.\textsuperscript{43} The business realized the first day or week is not a sufficient basis to determine the granting of a certificate in Indiana.\textsuperscript{44}

Testimony offered by witnesses at hearings will not be considered sufficient in Ohio,\textsuperscript{45} and in Illinois the ability of a railway to furnish the service which is needed precludes the granting of a certificate to a non-rail carrier.\textsuperscript{46} And the testimony of two passengers who rode in a particular vehicle that public con-

\textsuperscript{34} Re Frurip Bros. Bus Line, P. U. R., 1927C, 398.
\textsuperscript{35} Re Townsend, P. U. R., 1928A, 175.
\textsuperscript{36} Billings-Sheridan Bus Line (Mont.), P. U. R., 1928B, 816.
\textsuperscript{38} Re Olympia-Tacoma Auto Freight Line, P. U. R., 1928C, 117.
\textsuperscript{39} Note 22.
\textsuperscript{40} Re Walker (Col. P. S. Com.), decided December 2, 1926.
\textsuperscript{41} Note 33.
\textsuperscript{42} Note 33.
\textsuperscript{43} Note 40.
\textsuperscript{44} Note 30.
\textsuperscript{45} Note 26.
\textsuperscript{46} Note 28.
convenience and necessity demanded the operation of factory-built cars in the motor service was deemed invalid by the California commission on the ground, it seems, that these witnesses were not acquainted with regular stage equipment.\textsuperscript{47}

Does the element of futurity enter into determining whether public convenience and necessity shall warrant a certificate? At least one statute has recognized this element in providing for the issuance of certificates which will take care of future needs.\textsuperscript{48} This provision in anticipating future needs marks itself as decidedly progressive.

A few of the commission decisions reveal a recognition of the element of futurity. In California, a certificate has been denied where the applicant failed to show among other things merely the inadequacy of existing facilities to take care of more than present traffic.\textsuperscript{49} Arizona\textsuperscript{50} has recognized futurity and Wyoming has emphasized it.\textsuperscript{51}

In Indiana, a thinly populated area bordering on a highway does not constitute necessity for motor carrier service, although there are prospects for building up some of the communities in the area. Perhaps the strongest emphasis has been put on futurity by the authorities in Washington.\textsuperscript{52} To decide whether a certificate shall be granted or not the commission of that state has authority to look to the future as well as to the present. Such is not unfair or arbitrary action, the state supreme court has held, because the motor carrier offers a service which the rail carrier cannot furnish. The recent Missouri act authorizes the certificate on basis of either present or future needs.

It is significant that the weight of evidence in favor of recognizing the element of futurity comes from the Far West, areas in which the transportation systems are not so fixedly developed, and areas which consequently look to the further needs and means of transportation.

\textsuperscript{47} Re Hempstead, 1922D, 489.
\textsuperscript{48} Utah Public Utilities Act of 1917, as amended 1919, Sec. 4818.
\textsuperscript{49} Note 47. Italics are mine.
\textsuperscript{50} Re Phoenix Motor Coach, P. U. R., 1925E, 344.
\textsuperscript{51} Salt Creek Transportation Co. v. Apgar, P. U. R., 1926A, 120.
3. INADEQUACY OF EXISTING SERVICE

Frequently the statutes direct or authorize the commission to grant certificates only when existing service is inadequate. Inadequacy of existing transportation service as grounds for a certificate has been passed upon in sixteen states. Thirty-three cases have been decided, in fourteen of which the certificate has issued; it has been denied in nineteen. For the purpose of considering the transportation agencies involved, these cases can be divided into several classes.

In the first class we have the applicant seeking a certificate to operate motor service in competition with a rail carrier. A railroad schedule so designed as not even to encourage short hauls between intermediate small towns entitled the applicant to a motor carrier certificate to serve those towns, ruled the Illinois commission. The commission here contrasted the frequency of proposed service to the infrequency of existing rail service.

The failure of a railroad to operate efficiently the facilities it has is proper grounds for granting a motor carrier a competitive certificate, especially where the motor service will be practically equivalent to express service. Railway service of only two trains a day warrants authorizing motor service, which however must not interfere with traffic of the railway in those areas which are properly served. Time saved by eliminating rehandling of goods, and the failure of the rail carrier to furnish adequate refrigeration and heated-car facilities were adjudged valid grounds for granting a competitive motor carrier certificate in South Dakota.

Discontinuance of service by an interurban electric line properly results in granting a certificate to a motor carrier, although he will compete with a railroad.

53 For example, Ohio General Code, 614-87; Kentucky Act of March 5, 1926, Sec. 3; Indiana, Moorhead Bus Act of 1925, Sec. 2; Minnesota, Laws of 1925, Ch. 185, Sec. 8; and Texas, Laws of 1927, Ch. 270, Sec. 7.
55 Re Cannon Ball Coach Line, Decision 14589, December 8, 1926.
56 Re Rex (Calif.), P. U. R., 1920B, 675.
59 Re Gold Star Line (Ill.), decided March 9, 1927.
A railway in discontinuing some of its trains creates thereby a condition warranting motor carrier service in competition therewith, concluded the Indiana commission.\(^6\)

Proof that trucks and passenger vehicles can furnish adequate service more economically than can the railway has constituted sufficient reason to authorize motor service in New Hampshire.\(^6\)

In this decision, it seemed that the commission looked upon the adequacy and cost of service to be furnished as the measure of the extent to which such service will be authorized.

The Ohio supreme court has taken the ground that under the statute the commission must allow existing utilities the opportunity to make adequate the inadequate existing service, and only when they cannot or do not, may the commission grant a certificate to someone else.\(^6\)

Here the commission order allowing addition of equipment, and change in time and rate schedule was protested as not justified by necessity and the court sustaining this protest, reversed the commission order.

But he who seeks a certificate to compete with an established transportation agency assumes the burden of proving the inadequacy of existing service, ruled the Oklahoma supreme court in 1926,\(^6\) and the same view was stressed by the Ohio commission early in 1927.\(^6\)

What constitutes adequate service? In Pennsylvania, an electric line offering a ten-minute schedule from 5:50 A. M. to 7:30 P. M., with slightly greater intervals thereafter, was adjudged furnishing an adequate service;\(^6\) and a railway schedule of six trains daily has been considered ample service in Montana.\(^6\)

But where there were eighteen trains daily each way, the New York commission has authorized bus service, the applicant admitting that train service was adequate for those who wanted to use it.\(^6\)

\(^{60}\) Re Indiana Motor Transport Co., 653-M, April 9, 1926.

\(^{61}\) Boston & Maine Transportation Co. (N. H.), Order 1719, July 20, 1925.


\(^{63}\) Note 3.

\(^{64}\) Salisbury Transportation Co., P. U. R., 1927C, 611.


\(^{66}\) Re Bennett, P. U. R., 1927C, 595.

\(^{67}\) Re International Bus Corp., P. U. R., 1927A, 346. Italics are mine.
The satisfaction of shippers with existing railway service, and the inability to maintain the present sufficient train service were motor carrier operation authorized, are considered indices to adequate service in North Dakota and Rhode Island respectively.

Secondly, we have the applicant seeking a certificate to compete with both railroad and existing motor carriers. The California experience furnishes an illustration. Where three stage lines and a railway were operating between Oceanside and Los Angeles, the commission refused a certificate to one Hoxie, who held a contract for carrying the mail, concluding that convenience and necessity did not demand the establishing of a passenger and baggage service in connection with mail transportation.

Iowa has refused a certificate to operate motor carrier service because to do so would interfere indirectly with rail carrier and motor carrier. Proposed route would not be directly competitive with either carrier, but inasmuch as the applicant would lessen the business of the established carriers his application was denied.

In class three is placed the railway seeking a certificate to operate motor service. Insufficient facilities for transporting passengers between Normal and Bloomington, and the desire for transfers between the lines constitute convenience and necessity and justify the granting of a certificate to a street railway in Illinois. But public safety and economy in operation demand that a railway "stick to its rails" and not embark in motor carrier service, declared the New Hampshire commission.

In class four appears the applicant for motor carrier certificate to operate in competition with existent motor carrier service. Time was when his task was a relatively easy one. Recently,

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69 Re Aselton, P. U. R., 1926E, 370.
70 P. U. R., 1920B, 674. See also Colorado commission decision in Re Elliott, P. U. R., 1926A, 380, where a certificate was denied because existing service as furnished by motor carrier and train were considered adequate.
73 Re B. & M. Bus Application, N. A. R. & U. Com. Bulletin 65, 1926. A statute of 1925 allows street railways to enter motor service. This decision indicates a rigid interpretation, the steam road being denied a certificate.
multiplicity of operators over the same route was particularly noticeable in states like Kentucky and Ohio. Perhaps as little difficulty existed in Indiana in regard to securing a competing certificate, as in any of the states with a motor carrier problem.

Between Indianapolis and Terre Haute two steam lines operate, and also an electric line; yet the commission has authorized two motor carrier lines between the same two cities. Competing certificates will issue in Kentucky, the burden of proof being decidedly on the applicant. Consolidation in Kentucky is rapidly imposing practical checks on granting of competing certificates.

In Illinois the statute guards against a monopoly in the motor carrier business. Competing certificates will issue where it can be shown that the public will be greatly conveinced thereby. Competing certificates will issue in Arizona if the existing utility does not furnish proper service.

Under the statute and the decisions it is practically impossible for an applicant to secure a competing certificate in Ohio unless the established carrier cares so little for his interests as not to keep or make the service adequate. In the last two years quite a few of the states of the Northeast have enacted statutes favoring railway procuring of certificates for motor service and some of the states of the West and South have passed acts protecting existing railroads in the privilege of furnishing transportation service. Examples are Minnesota and North Dakota, both legislating in 1925, and Mississippi the same year. There seems to be a decided trend toward the Ohio stand that competing certificates shall be reduced to an absolute minimum if not eliminated altogether. While these statutes aim to protect railroads primarily, to do so the commissions must also protect existing bus lines, which may be paralleling rail lines by checking the granting of competing certificates.

But whether the statutes provide for the protection of existing facilities, there appears in the commission decisions as early as 1919 a tendency to check the issuance of competing certifi-

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74 Illinois Commerce Commission Law 1921, Sec. 55.
77 General Code, 614-87, and decisions in Notes 62 and 64.
78 But see the Texas Act (Ch. 270, General Laws of 1927, Sec. 7) denying the commission power to refuse a certificate on the ground that existing steam and electric lines are sufficient to serve the needs. Here is an interesting example of the frontier distrust of railroads.
cates. In that year the California commission refused to grant such a certificate where it was shown that the operator occasion-ally had to refuse service to some because of too small equip-

ment; a period of sixty days was given the carrier in which to improve the service, and until the end of that period the request for a competing certificate was dismissed without prejudice.79

Three years later the policy of the commission relative to com-

peting certificates was becoming more rigid as revealed in the ruling that a certificate will not issue where the applicant fails to prove not only inadequacy of existing service but that new business will be created by the issuance of the competing cer-

tificate.80

Where livery and taxi service were sufficient and the proposed rates for motor service would be greater, the Utah commission refused to issue the desired certificate.81 Motor carrier service and train service combined being ample, no competing certificate will issue in Colorado.82


A fourth factor affecting the issuance of certificates is the financial effect which would probably result from such granting. This effect on the applicant has not been overlooked by the commissions; on the contrary, they have often sought to protect his interest against financial loss.

In Indiana and Montana, it has been held that no certificate can be granted where applicant’s traffic would be light,83 and in the former state, the commission view that insufficient business to pay operating expenses and a return on investment constituted adequate grounds for denial.84 A fair guarantee of ample business to justify establishing the service was considered an essential basis in Illinois.85

Failure of applicant to show that new business would be created along the route was valid ground for refusal in Cal-

80 Re Hempstead, P. U. R., 1922D, 490-91. A similar but less exacting ruling appears in Re Starkey (California). Decision 15778, Dec. 21, 1925.
81 Re Frost, P. U. R., 1919E, 662.
83 Re Gary Co. (Ind.), Decision 620-M; Re Leslie J. Weir (Mont.), P. U. R., 1926B, 357.
84 Re Zent, P. U. R., 1927C, XI. Similarly in Re Tilley (Colorado), P. U. R., 1928A, 184.
To the same effect runs a decision in Utah where the business of an applicant would not justify the expense of furnishing liability insurance. But no authorization will be given an applicant to extend his operation merely to make the line as a whole profitable, said the California commission. Granting a certificate to compete with existing carrier whose service is ample would be confiscatory, the traffic being insufficient to warrant two carriers; such commission action was illegal, concluded the Illinois supreme court.

The effect of granting a certificate on financial interests of existent motor carriers has been up for decision in a few instances. The Utah supreme court reversed the commission in its refusal to allow a long-established operator to use more equipment so as to starve out a more recently certified competitor. Thus was the commission checked in its denial of authority to the prior operator to protect its interests even at the sacrifice of its young competitor. Increased traffic resulting from rerouting of freight justified granting the applicant a competing certificate, but existing operator was to be protected in its intermediate-point business. Priority of operation justified the conditional permit, ruled the Arizona commission. But public needs outweigh financial interests of the established carrier, and certificates have been issued for additional service in Indiana.

In California, a rate of 21.09 per cent. return on depreciated valuation, as shown by existing carrier's own accounts, was excessively high, and applicant was granted a competing certificate for tourist service.

The effect of granting a certificate on the financial status of both the existing and proposed carriers has been considered in New York. Application for competing certificate was denied where the business would mean ruin for applicant and existing

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86 Re Hempstead, P. U. R., 1922D, 490-91.
87 Re Marchant, P. U. R., 1927C, 398-400.
carrier. The view was stressed by the same agency a year later.

Relatively little concern has been manifested by the commissions in regard to the financial effect the granting of a certificate would have on the public. Only a few instances have arisen. Service and not rates, is of prime importance to the public.

Arizona has ruled that a proposed motor service should not be admitted to a community unless it will be equal to or better than existing railway service, and cost less. One of the grounds for granting a certificate to compete with a railway which had neglected to make its service adequate was the applicant's showing that he would charge no more, probably less, than the railway. The same commission allowed a certificate to compete with a railway partly because the applicant's rates would be lower than those of the American Railway Express. A certificate was granted in New York where the applicant would charge higher than the railway, and would require longer time for the trip, the railway station being some two miles distant, while the motor carrier practically delivered the passengers to their door. But Utah has denied a motor carrier certificate where rates would be higher than those charged by livery and taxis.

5. FINANCIAL ABILITY OF APPLICANT

Financial ability of the applicant to furnish proper service is taken into account in granting a certificate. Sometimes statutes specify this factor; more often the matter enters into what the commission considers the demand of public necessity. The test of financial ability is stressed by commissions generally. Illustrative cases have arisen in New York, Indiana, Illinois, Iowa, and Colorado.

55 Re Blevins, P. U. R., 1919F, 58.
56 Re Turner, P. U. R., 1922B, 760. But assurance that fares will be cheaper is insufficient evidence on which to base a competitive certificate in Colorado. Re Townsend, P. U. R., 1928A, 181.
57 Re Rex (Calif.), P. U. R., 1920B, 675.
58 Re Oakland San Jose Transportation Co., P. U. R., 1920A, 925.
100 Re Frost (Utah), P. U. R., 1919E, 662.
101 For example, Ohio General Code, 614-690; Oregon, Laws, 1925, Ch. 380, Sec. 5.
In the first state the lack of sufficient funds to finance the proposed operation caused the denial of the certificate, and uncertainty of financial ability led to the same conclusion in another state. Financial ability of applicant showing his dependability to furnish proper service has again convinced the New York commission. Reasonable requirements in Illinois include financial ability of applicant. Financial weakness has proved an influential factor in determining an application in Indiana. The established financial ability of a railroad has been considered valid basis for granting a certificate to its subsidiary in Iowa and in other states especially of the Northeast. Failure to show financial standing sufficient to furnish dependable service was grounds for denial in Colorado. The commission in this state has also ruled that the financial responsibility of a motor carrier subsidiary of a railroad must be guaranteed by the railroad company, and the commission incorporated into the certificate a provision for revocation for failure of parent company to so guarantee.

Public convenience and necessity demands that the applicant be financially able to furnish service and the commissions are observing that demand.

6. POPULAR PREFERENCE FOR MOTOR SERVICE

Popular preference for motor service has proved an effective factor in commission decisions interpreting public convenience and necessity: This popular preference, which can be observed anywhere, rests upon a multifold basis.

Advantages enjoyed by motor passenger service over rail service are primarily these: (1) More flexibility and frequency of service; (2) a nearer completion of the trip; (3) deconcentration of population by easily extending to suburban, residential

103 Last case in Note 102.
108 Re Denver & Interurban Motor Co. (Colorado), Dec., 1338, June 24, 1927.
areas; (4) fact that the bus often goes through more attractive sections of the country and city than does the railway; (5) ability to do much to satisfy the present day craze to ride on rubber.\footnote{109}

The evidence of the above points is so clear as to require no discussion to establish them as the basis of popular preference for passenger service. Add to these the advantages offered by the motor truck, such as pick-up loading and door delivery; and prompt and speedy service for delivering perishable products and emergency orders, and you have established the unassailable bulwark of popular preference for motor service so characteristic of the present time.

While it cannot be said that popular preference has become the chief factor actuating commissions in granting certificates, it has nevertheless proved an important one. As early as 1917 the New York commission, in a city case in which the bus had carried 770,000 passengers in fifteen months, concluded that most of those would ride the street car were no motor carrier service offered.\footnote{110} Greater convenience of passengers in boarding and alighting from motor vehicles than from boats, and the greater convenience afforded by near-home unloading of passengers as against the railway with its station far from the center of town was accepted by the New York commission as powerful elements in popular preference for motor service.\footnote{111} A petitioner's offering ample evidence that popular preference demands motor transportation proved sufficient basis for a certificate for motor service on a route already adequately served by two railways.\footnote{112}

Perhaps the most extreme case of popular preference is that decided in New York, September 1, 1926. A certificate was granted for motor passenger service competing with the New York Central and the Lehigh Valley, the former furnishing twelve trains daily each way and the latter six daily each way.\footnote{113}


\footnote{110} \textit{Re Troy Auto Car Co.}, P. U. R., 1917A, 700. One commissioner, in a lengthy opinion, dissented, contending that the street railway should not be forced to submit to loss of revenue which would result from competing motor carrier.

\footnote{111} \textit{Re Gaiser}, P. U. R., 1920B, 246.

\footnote{112} \textit{Re Denver-Colorado Springs-Pueblo Motorway} (Colorado), Dec., 963, April 21, 1926.

\footnote{113} \textit{Re International Bus Corporation}, P. U. R., 1927A, 346.
Community need for sending and receiving goods the same day has justified establishing a motor truck service in Colorado.114

Sometimes, however, popular preference as introduced has been set aside by the commission in favor of other factors. This happened in Arizona in 1922 where the applicant based his claim on the fact that his proposed through service would eliminate the necessity of passengers getting out of one vehicle and into another at a junction point, the commission holding that passengers would both welcome and benefit by an opportunity to "stretch out" for a few minutes.115 Substantially the same conclusion was reached by the California commission.116

Early in 1927 the New York commission refused a certificate where to grant it would seriously affect revenues of the rail carrier, although there existed strong popular preference for motor service.117

7. MISCELLANEOUS FACTORS

That experience and skill in transportation service are of particular value in determining applications is attested by rulings in several states, notably Maine,118 Illinois,119 California,120 Colorado,121 and Iowa.122 In a majority of the cases in these states, railroads were involved, and the decisions protected them.

Other miscellaneous factors influencing decisions on applications for certificate include the residence of applicant beyond the boundaries of the state in which he seeks authority to operate, congestion of traffic on thoroughfares, and social and educational benefits resulting.

Indiana has refused a certificate to one Howard, a citizen of

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114 Curnow Livery and Transfer Co., Decision 873, May 6, 1926.
116 Re Auto Transit Co., Decision 16609 (Cal. R. R. Com.), May 3, 1926.
120 Re Balish, P. U. R., 1928E, 136.
121 Re Wood (Colorado), Ibid.
Kentucky, on the grounds that the statute limited the issuance of licenses and permits for public utilities to "corporations organized under the laws of Indiana or to a citizen of such state." In the same state the fact that a highway is already heavily congested served as basis for denial of certificate to operate in a thinly settled region along the way. Here public necessity enters in in both a negative and a positive sense. But Arizona has cast aside the congestion of traffic on a city street as insufficient grounds for denial of certificate, and Massachusetts has reached the same conclusion.

Benefits of a general social nature will result from attracting tourists to different parts of the state, and a certificate to provide the necessary transportation service has been issued in New Hampshire. Circulation of news bears sufficient relation to general welfare to justify a certificate for service to deliver newspapers in Arizona.

Illegal operation after effective date of regulatory law has served as a factor in determining application made later by the illegal operator. In Montana it has been declared that repeated violations of the law requiring certificates are sufficient grounds for denying applicant when he does apply. In this case the applicant did not seek a certificate till another party had secured one for the route. Applicant before the commission testified that he had been unable to find the commission inspector with whom to file application. The commission in this case frowned upon an effort to seek protection of the regulatory law which applicant had so recently flouted.

The applicant cannot secure a certificate on the plea that while he has been observing the law others have been violating it, according to the Colorado commission. Nor can an illegal oper-

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124 Re Gary Ry. Co. (Ind.), Dec., 587-M.

125 Re Phoenix Motor Couch, P. U. R., 1925E, 343.


127 Re B. & M. Transportation Co., Order 1712, July 17, 1925.


ator neglectful of public needs secure a certificate in the state of Washington.\textsuperscript{131}

A position much to be emulated by commissions in dealing with recalcitrant illegal operators has been taken by the California commission.\textsuperscript{132} An illegal operator, finally before the commission, pleaded that his disregard of the commission order to cease operation was due to the advice of a fellow truckman that he (the petitioner) was not within the scope of the order. In rejecting this plea and denying a certificate to the petitioner, the commission admonished him in substantially these words: "It is by far better to do as the commission orders, since it is busy interpreting the law and is therefore more capable of giving advice than is a fellow truckman or other person with ulterior motives or interested reasons for giving erroneous advice. It ought to be common knowledge that operation without a certificate is illegal, for the act has been in operation four years, and the maxim of 'Ignorance of the law excuses no one' should be applied."

But there are sometimes mitigating circumstances. This fact is recognized by the Colorado commission in granting a certificate to an applicant who before the time he applied had begun carrying passengers during the inability of a railway to supply normal service. The railway did not object at the time the applicant began supplementing the impaired railway service, and the commission ruled that the railway protest against the granting of a certificate to make permanent the motor service so begun could not stand.\textsuperscript{133} It has been decided in Montana that where discontinuance of illegally begun service will hurt shippers, the applicant must be granted a certificate.\textsuperscript{134} Thus was recognized the ultimate primary consideration of public convenience and not private gain.

In case there are two or more applicants for a certificate over the same route, what factors guide the commission in making a choice? Statutes frequently specify elements to be considered by the commission in deciding to grant or refuse a certificate, but they are conspicuously silent on instructions governing selec-

\textsuperscript{131} Re Knulhman (Wash. Dept. of P. W.), P. U. R., 1921E, 842.
\textsuperscript{132} Re L. A. Jones, P. U. R., 1921D, 684.
\textsuperscript{133} Re Carver, P. U. R., 1923B, 242.
\textsuperscript{134} Montana Bd. of Railroad Commissioners, Report and Order 1450, July 21, 1926; P. U. R., 1927A, 94.
tion between applicants. However, the South Dakota act of 1925 does prescribe in some detail directions for such a case.

On December 31, 1927, a commission selected the widow of a deceased certificate holder on grounds of length of time the service had been in operation, character of the service furnished, and amount of capital invested.\(^{135}\)

Some commissions have shown a marked preference for the railway applicant where two or more applicants seek the certificate for motor service over the same route. While this question of the relation between the motor carrier and the rail carrier is of tremendous practical importance,\(^ {136}\) it is proper to state here that the evidence accumulating in the last twelve months shows a much more definite trend than ever toward favoring the rail line.\(^ {137}\)

Frequently priority in filing application for certificate has appeared as a factor. A widely varying attitude has been taken in different states toward this element. It has proved the determining factor in Indiana, where the certificate went to the applicant who had observed the law by not beginning operation contrary to the law.\(^ {138}\) Where both applicants are morally fit and financially able, the Colorado commission has awarded the certificate to him who filed first.\(^ {139}\) Other considerations being equal, priority in filing has secured the certificate in California,\(^ {140}\) and a similar ruling was made in Washington early in 1928.\(^ {141}\) Financial ability being equal, the Colorado commission awarded the certificate to the applicant who filed first.\(^ {142}\) In Kentucky it is primarily a matter of filing first which determines the selection between applicants, so long as each is capable of performing the stipulations of the certificate.\(^ {143}\) The South Dakota commission

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\(^{135}\) Re Transportation Co., P. U. R., 1928C, 110.

\(^{136}\) See George, Motor Carrier Regulation in the United States, chapter on Motor Carriers and Rail Carriers.

\(^{137}\) The most instructive illustration of this trend recently is to be found in California, Re Balish, P. U. R., 1928E, 136; Re Pacific Electric Railway Co., ibid.; and Re United Stages, P. U. R., 1928E, 137. In the last case the certificate was awarded the motor applicant. Rates figured prominently in these last two cases.

\(^{138}\) Re Smallwood (Ind. P. S. Com.). Decided August 14, 1925.

\(^{139}\) Re Armentrout, P. U. R., 1927C, XII-XIII.

\(^{140}\) Re Gibson, P. U. R., 1926A, 833.

\(^{141}\) Re Krakenberger, P. U. R., 1928C, 233.

\(^{142}\) Re Armentrout, P. U. R., 1927E, 728.

\(^{143}\) See my article in National Municipal Review, Sept., 1927, 568-71.
has repeatedly put emphasis on priority in filing as the determining factor.\footnote{144}

A non-committal attitude toward priority in filing has been taken by the Nevada commission. Reliance should be put on this factor only in case of last resort, especially where the applications were filed about the same time.\footnote{145} Since in this case one application had been filed by letter and two by telegraph all the same day, the letter being posted before the telegrams were dispatched, the commission might have found no little technical difficulty in determining which really had priority. Later this commission rated priority in filing not higher than of secondary importance.\footnote{146}

The trend in some sections, however, is definitely against viewing priority in filing as the determining factor. Indirectly the New York commission thus inclined in 1919.\footnote{147} Similarly the Washington agency passed over this element, chose the second applicant in order of filing, and the state supreme court upheld this action.\footnote{148} In Ohio the commission is under no obligation to consider priority in filing,\footnote{149} and the supreme court in that state has ruled that priority in filing confers no right to secure the certificate.\footnote{150}

Where two carriers have established service prior to the regulatory act, the priority in beginning that service has come up in deciding between the applicants for the certificate. The South Dakota statute stresses priority in establishing service;\footnote{151} in Nevada this factor rates higher than priority in filing application for certificate.\footnote{152} Priority in establishing service is recognized as important in New York.\footnote{153} Priority in commission investigation of the merits of the respective applications has been ruled out as a factor in California.\footnote{154}

\footnote{144}{Re McMurray, P. U. R., 1926D, 785; Re Black Hills Bus Co., decided June 1, 1926; Re Winner-Hot Springs Transit Co., same day; likewise Re Lewis, P. U. R., 1928A, 246.}

\footnote{145}{Re Morris, P. U. R., 1922B, 461.}

\footnote{146}{P. U. R., 1922C, 734.}

\footnote{147}{Re Joseph Carlacci, P. U. R., 1919F, 704.}

\footnote{148}{Auto Freight Case, 214 Pacific 164.}

\footnote{149}{Cincinnati Law Review, May, 1927, 311.}


\footnote{151}{Laws of 1925, H. B. 118, Sec. 14.}

\footnote{152}{Note 145.}

\footnote{153}{Note 147.}

\footnote{154}{Note 140.}
Thus the claim of priority as brought before the regulatory bodies has involved three different meanings, relating to filing of application, establishment of service, and commission investigation of applications.

Public convenience and public service in that more of the traffic was destined to the terminus of one applicant served as the decisive factor in Arizona. The applicant offering service at the lower cost has been selected in Nevada, and in the same state more ample facilities proposed and financial ability to furnish that service have secured the certificate. Illinois also has recognized the greater financial ability of one applicant as a ground for awarding the certificate. Cost of the service has played a part in Colorado.

Experience and skill in transporting service, even in operating a motor truck under private contract, the Utah commission admits as valuable in deciding between applicants. Experience, skill and business ability are powerful factors in Illinois.

Character and standing of the applicants have appeared as influential factors in selecting between applicants. The fact that one applicant had observed the legal requirements relative to beginning the service was recognized as a strong point in his favor by the Indiana commission. Illegal operation so stamped the character of the applicant in Washington that he was denied the certificate, and where the commission questioned seriously whether the applicant meant to operate the proposed service himself he was denied the certificate in Colorado.

Derogatory suggestions as to the character of the applicant cannot be considered by the Montana commission when those suggestions are handed in secretly or whispered to the commission. Mere charges that the applicant is guilty of reckless driving and of violating the prohibition laws do not disqualify

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155 P. U. R., 1926D, 571.
156 P. U. R., 1922C, 734.
157 Ibid.
159 Re King, P. U. R., 1919F, 377.
160 Re Russel, P. U. R., 1927C, 400.
161 Note 158. See also P. U. R., 1928A, 107.
162 Note 138.
163 Note 141.
164 Re Hall, P. U. R., 1928A, 655.
165 Re Butte-Anaconda Freight Express Service, P. U. R., 1926C, 495.
him from receiving the certificate in Missouri. The commission here ruled that the court decisions evidencing the guilt of applicant are necessary to disqualify him thus. Where the applicant's manner of testifying was such as to create doubt that he would observe the law, he was denied the certificate. The applicant preferred by the community has been selected by the Ohio commission in preference to the applicant who was antagonistic to the community. The authority of the commission to select between applicants and an order choosing one of two applicants have been affirmed by the supreme court of Ohio.

167 Re Davis, Case 5479, December 19, 1927.