OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable James E. Kilday, Director
Motor Transportation Division
Railroad Commission of Texas
Austin, Texas

Dear Sir:

Opinion No. O-3973
Re: Issuance of certificate to use State highways to holder of interstate certificate over irregular routes.

We are in receipt of your request for our opinion of September 13th in which the following questions are submitted:

"1. Where a motor carrier has a certificate of public convenience and necessity issued by the Interstate Commerce Commission under the Interstate Commerce Act authorizing operation as a common carrier by motor vehicle from a place or places outside the State of Texas to points and places in the State of Texas to engage in the handling of interstate commerce, such certificate particularly specifying that such operation shall be conducted over irregular routes, may the Railroad Commission of Texas grant such carrier the right to use the highways of the State of Texas in the carrying on of such operation over irregular routes in conformity with its interstate certificate?

"2. Furthermore, is such carrier obligated by the Texas Motor Carrier Act to perform on regular schedules the service authorized by such interstate certificate?

"3. Regardless of the answer to question number 1 above, where the Railroad Commission,

after due notice and hearing, has heretofore granted such a carrier a certificate to use the highways of the State of Texas in carrying on its operations in interstate commerce over irregular routes in conformity with the authority of such certificate issued by the Interstate Commerce Commission, and no appeal has been taken by any interested party from such order of the Railroad Commission, is it necessary for such carrier to obtain any other type of authority under the Texas Motor Carrier Act in order to use the highways of the State of Texas in operating in interstate commerce?"

Under the Texas Motor Carrier Act, (Article 911b, Vernon's Texas Civil Statutes) the Railroad Commission is not authorized to grant a certificate of convenience and necessity over irregular routes, that is, over routes which are not fixed and where the roads traveled and communities served may vary from time to time. In Opinion No. O-2608, heretofore rendered to the Commission, it was reasoned:

"In our opinion the requirement that the application describe the route or routes over which the applicant desires to operate may not be dispensed with. Unless such be done it would be impossible to determine whether existing services are sufficient, whether there is any need of the new service. Without the route is fixed in the application no one could tell who are the existing transportation facilities serving such territory to whom notice must be given. Without such description of the route in the application for an order granting the certificate a court could hardly tell who would be an interested party entitled to prosecute an appeal, unless it should hold all carriers in Texas to be such.

"In Railroad Commission vs. Red Arrow Freight Lines, 96 S. W. (2d) 735, by the Austin Court of Civil Appeals, it was held that a new common carrier motor carrier service cannot be granted except upon a showing and commission finding of convenience and necessity. Manifestly there can be no such showing and finding unless the route is

definitely identified, so as to permit inquiry on the issue of convenience and necessity as applied to that particular route."

It appears from your letter, however, that the Interstate Commerce Commission grants such certificates for operation in interstate commerce. 49 U.S.C.A. § 308.

Since the enactment of the Federal Motor Carrier Act of 1935, 49 U.S.C.A., Sec. 301, et seq., the Railroad Commission of Texas does not have jurisdiction to pass upon questions of public convenience and necessity with respect to purely interstate motor carriers, however, the Railroad Commission still has jurisdiction to consider questions concerning the preservation of the highways and safety of the traveling public, and may still deny the use of the highways to an interstate carrier when it is sufficiently shown that the preservation of the highways and safety of the traveling public would be endangered by the added traffic burden. Thompson v. McDonald, 95 Fed. (2d) 937, certiorari denied; Winton v. Thompson, 123 S. W. (2d) 95, writ refused; Opinions Nos. O-1843 and O-3107. A number of other decisions by the Courts of Civil Appeals have followed the above holding in the McDonald case.

A certificate of convenience and necessity having been granted by competent federal authority for operation over irregular routes to and from points within the State of Texas and other states, the issues concerning public convenience and necessity have been settled and there is presented to the Railroad Commission for determination, upon proper application, the question of whether the safety of the traveling public and the preservation of the highways will permit such additional burdens. Upon proper showing before the Railroad Commission, the Commission might find that operations over any and all routes within the territory to be served by the carrier under its interstate certificate would not adversely affect the highways subject to the use, or the public safety, in which event it is our opinion that the Commission would be authorized to issue its certificate in accordance with such finding. It might be that the evidence before the Commission would show that only certain of the available routes within the territory could bear the additional burden, or that the volume of traffic or other circumstances would require that the operations of a carrier holding such a certificate in interstate commerce should be prorated or divided

between several available routes and excluded as to others. Although the Texas Motor Carrier Act does not authorize the issuance of a certificate of convenience and necessity over irregular routes in purely interstate commerce, the validity of the interstate certificate issued by the Interstate Commerce Commission pursuant to an Act of Congress must be recognized. It is only in this way that the respective jurisdictions may properly function within the scope of the authority committed to each.

In this connection it should be pointed out that Section 10 of the Texas Motor Carrier Act requires the application to show the "complete route or routes over which applicant desires to operate" and accompany same with "a plat or map showing the route or routes over which applicant desires to operate." There would seem to be no reason why an applicant holding an interstate certificate of this character should not be required to designate in its application the various irregular routes which it proposes to use under its interstate certificate, in order that the Commission may be fully informed and may hear and determine the questions arising concerning the use of all or any particular highway affected.

Your first question is answered in the affirmative.

The second question is answered in the negative. Matters pertaining to public convenience and necessity and the service to be performed in interstate commerce under an interstate certificate issued by the Interstate Commerce Commission are governed by the Federal Motor Carrier Act of 1935 and the rules and regulations of the Interstate Commerce Commission.

In answer to your third question it is our opinion that under the situation presented no additional certificate or authority would be necessary under the Texas Motor Carrier Act in order to use the highways of the State of Texas to operate in interstate commerce under a valid interstate certificate. The Railroad Commission having issued its certificate to use the highways and no appeal having been taken therefrom it would be presumed that the Commission had found that each highway within the territory covered by the inter-

state certificate could bear the additional burden of traffic.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By Cecil C. Cammack
Cecil C. Cammack
Assistant

CCC:LM

APPROVED SEP 23, 1941
Gerald C. Mann
ATTORNEY GENERAL OF TEXAS