November 3, 1978

JOHN A. WADDINGTON, *Director*
Division of Motor Vehicles
Department of Law and Public Safety
25 South Montgomery Street
Trenton, New Jersey

FORMAL OPINION NO. 12—1978

Dear Director Waddington:

The Division of Motor Vehicles has requested an interpretation of the so-called "grandfather" provision of the recently-enacted "Bulk Commodities Transportation Act," N.J.S.A. 39:5E-1 *et seq.* [L. 1977, c. 259]. Specifically, the Division has inquired as to whether or not, or to what extent, applicants who qualify for grandfather status under N.J.S.A. 39:5E-8 are exempt from the requirements set forth in N.J.S.A. 39:5E-7 for issuance of a certificate of public convenience and necessity authorizing operations within this State. Where it has been determined that such a certificate shall issue, the Division has further inquired as to the permissible extent of operations to be authorized thereby. For the following reasons, it is our opinion that once an applicant satisfies the conditions contained in N.J.S.A. 39:5E-8, he is thereby entitled to be issued a certificate of public convenience and necessity, which certificate shall authorize the applicant only to continue those operations in which he was engaged one year prior to the effective date of this act, or on April 10, 1977.

N.J.S.A. 39:5E-7 provides in pertinent part that all intra-state carriers of bulk commodities must obtain a "certificate of public convenience and necessity" from the Division of Motor Vehicles authorizing operations within this State. Said certificate is to be issued by the Division upon written application therefor and a finding that:

> the applicant is fit, willing and able to properly perform the function of a bulk commodities hauler and to conform to the provisions of this act . . . and that the proposed service . . . is in the public interest and consistent with the transportation policy declared in this act,[1] is or will be required by public convenience and necessity;[2] otherwise said application shall be denied. [N.J.S.A. 39:5E-7.]

Application for said certificate pursuant to N.J.S.A. 39:5E-7 is however only one of two statutory methods whereby said certificate can be

1. Factors to be considered in determining whether the proposed service is "in the public interest and consistent with the transportation policy declared in this act" include the applicant's financial responsibility, business reputation, moral character and observance of motor vehicle laws in the operation of his business. N.J.S.A. 39:5E-7(b)(1).

2. The applicant has the burden of proving the need for the proposed service and the inadequacy of existing service. N.J.S.A. 39:5E-7(c).

obtained. The other method is set forth in N.J.S.A. 39:5E-8, the Act's so-called "grandfather clause," which instructs that:

> The director shall issue a certificate . . . to any hauler of bulk commodities . . . who was in operation as such within this State 1 year prior to the effective date of this act provided that:
> a. the operation was continuous since that date . . .
> b. the applicant . . . had a permanent place of business within this State on or before [that date] . . .
> c. the applicant owned or operated under lease at least one motor vehicle registered in this State used in the transportation of bulk commodities on or before [that date] . . . .

The question thus presented is whether bulk haulers who meet the qualifications set forth in N.J.S.A. 39:5E-8 are entitled to a certificate authorizing operations without showing that they are "fit, willing and able" to provide the proposed service and/or that the service is consistent with the transportation policy of the act and/or is required by public convenience and necessity. Clearly, the answer to this question must be in the affirmative.

In this regard, it must be initially recognized that N.J.S.A. 39:5E-8 expresses no intention to require more than what is actually delineated therein. The language is explicit. If the listed qualifications are satisfied, the Director "shall issue" the certificate. Since the Legislature in drafting the act could easily have attached other qualifications onto this provision if it had so desired, it must be concluded that the qualifications actually set forth therein were all that were deemed necessary.

Such reading, moreover, coincides with that attached to a similar provision of the federal transportation code; namely, 49 U.S.C.A. §306,[3] after which various state regulatory schemes (including apparently this one) have been modeled. This provision has consistently been viewed as an exception to the normal requirement of proof of public convenience and necessity, *Gregg Cartage Co. v. United States,* 316 U.S. 74, 83, 62 S. Ct. 932, 86 L. Ed. 1283 (1942); *McDonald v. Thompson,* 305 U.S. 263, 59 S. Ct. 176, 83 L. Ed. 164 (1939), and where its conditions have been met, the applicant's "fitness" has also been seen as not in issue, *Alton R. Co. v. United States,* 315 U.S. 15, 62 S. Ct. 432, 86 L. Ed. 586 (1942); *Winter Garden Company v. United States,* 211 F. Supp. 280, 291 (D.C. Tenn. 1962). *See also Puhl v. Pennsylvania Public Utilities Com'n,* 11 A. 2d 508, 511

3. This provision states that:
> [N]o common carrier by motor vehicle . . . shall engage in any interstate or foreign operations on any public highway . . . unless there is in force . . . a certificate of public convenience and necessity issued by the Commission authorizing such operations: Provided, however, that, . . ., if any such carrier or predecessor in interest was in bona fide operation . . . on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time . . ., the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation. . .

(Pa. 1940), interpreting a similar state statute as dispensing with any need to establish public convenience and necessity or fitness or ability to perform the service to be rendered. Rather, the inquiry has always been limited to whether in fact the grandfather conditions have been satisfied and if so, what authority should be granted. A similarly restricted inquiry would appear to be all that should be conducted here.

The question thus remains as to how much authority can and should be granted to the applicant who qualifies for grandfather status under N.J.S.A. 39:5E-8. On the one hand, the Division has indicated that it views as its duty under the statute to limit the authority so granted to only those operations actually conducted by the grandfather applicant on the critical date—a view believed to be fully consistent with the intent and purposes of this act. On the other hand, there is the language, appearing in N.J.S.A. 39:5E-13 of the act which seems to suggest a less restrictive approach:

> Certificates or permits issued pursuant to section 8 [the grandfather provision] . . . shall authorize operations over irregular routes between all points within the State.

After a careful review of the general framework of the statute and its legislative purposes, it is concluded that the authority granted by the statute to a grandfathered applicant refers only to the actual operations conducted by it at the designated time.

Initially, it should be noted that this interpretation of the statute is in accord with the great weight of judicial authority interpreting similar statutes. *See Alton R. Co. v. United States, supra* at 315 U.S. 22; *Loving v. United States,* 32 F. Supp. 464 (D.C. Okla. 1940), aff'd 310 U.S. 609 (1940); *Santini Bros. v. Maltbie,* 23 N.Y.S. 2d 566, 260 App. Div. 545 (1940); *Puhl v. Pennsylvania Public Utilities Com'n, supra;* and other cases cited at 4 A.L.R. 2nd 700. Such statutes have variously been viewed as having as their purpose to assure "substantial parity" between future and prior operations, *Alton R. Co. v. United States, supra,* to recognize and preserve prior "vested" rights, *Crescent Express Lines v. United States,* 49 F. Supp. 92 (D.C. S.D.N.Y. 1943), *aff'd* 320 U.S. 401 (1943), and to avoid any disruption of settled lawful motor carrier service, *A.E. McDonald Motor Freight Lines v. United States,* 35 F. Supp. 132 (D.C. Tex. 1940). These purposes are clearly not served by an interpretation which would afford grandfather applicants a special privilege to conduct more expansive operations than they had conducted before.

To so interpret the "grandfather" provision, moreover, would infect the act with a serious constitutional infirmity, in that any grant of authority to grandfather applicants beyond the scope of their prior operations without a showing of public convenience and necessity or fitness or ability to provide such service would appear to discriminate against non-grandfather applicants and deny them the equal protection of the law to which they are constitutionally entitled. *See Morey v. Dowd,* 354 U.S. 457, 77 S. Ct. 1344, 1 L. Ed. 2d 1485 (1957). The test, as set forth therein, is whether the classification under examination is rationally related to a legitimate state purpose. If so, there is no denial of equal protection. Grandfather authorization limited to the prior operations alone satisfies this criteria,

since it furthers the above-stated purposes of the act and stems from a rational distinction, namely, that the existence of such service itself evidences its future justification in terms of public convenience and necessity, and that the grandfather's prior experience in rendering such service evidences his fitness and ability to continue to do so in the future. Extension of the grandfather preference into operations not heretofore provided, however, serves no such purpose and has no such rational justification. In such a situation, the status quo would not be maintained and the grandfather's prior experience would no longer appear evidential, either as to the public convenience and necessity for the new service or as to his fitness and ability to provide such service.[4] Lacking either a legitimate purpose or a rational justification, it appears doubtful whether such a preference could withstand constitutional challenge.

Additionally, such preference appears at apparent odds with the avowed purposes of the act as a whole. By permitting grandfather haulers to automatically expand their operations to include different commodities or to cover different territories would effectively disable the Division from ascertaining with any degree of certainty whether a particular service is or is not necessary and convenient. *See Grove v. United States,* 40 F. Supp. 503, 505 (D.C. Pa. 1941); *Santini Bros. v. Maltbie, supra* at 568. Once necessary, who could say that it might not later become redundant and vice-versa. Furthermore, the legislative recognition that previously people were "able to engage in this business without having to demonstrate any knowledge of how to safely handle the cargo or the vehicle" (Assembly Transportation and Communications Committee Statement accompanying the bill, L. 1977, c. 259, p. 702) would remain uncorrected in those situations where the grandfather applicant seeks to provide a service for which he has no prior experience. These conflicts thus serve to validate an implicit legislative intent to preclude the extension of the grandfather preference into operations not heretofore provided. To whatever extent the quoted language in N.J.S.A. 39:5E-13 appears contrary to such reading of the statute, the spirit and reason of the legislation must prevail over the literal sense of the terms used. *In re Roche's Estate,* 16 N.J. 579 (1954).[5]

For the reasons expressed above, you are therefore advised that once applicants for a certificate under N.J.S.A. 39:5E-8 satisfy the conditions set forth therein, they are entitled to such a certificate, regardless as to whether or not they might fail to meet one or more of the qualifications contained in N.J.S.A. 39:5E-7. You are further advised that such certificates should only authorize the applicant to continue those operations in which he was engaged one year prior to the effective date of the

4. A hauler of dirt, for example, cannot automatically be considered capable of hauling hazardous materials. Likewise, a rural hauler cannot automatically be presumed to have acquired any familiarity with the problems associated with hauling in a populous, metropolitan area.

5. With this in mind, it is concluded that the quoted language should be construed as no more than a legislative directive to the effect that authorization to grandfather haulers shall not be restricted to specific routes. Rather, it shall be over irregular routes between whatever points or within whatever territory in this State such hauler had operated on the critical date.

act, or on April 10, 1977. If additional authority is requested, either as to use or as to expansion of territory, the same should be viewed and treated as an application for authority under N.J.S.A. 39:5E-7.

Very truly yours,
JOHN J. DEGNAN
Attorney General
By: ROBERT M. JAWORSKI
Deputy Attorney General

January 29, 1979

GEORGE H. BARBOUR, *Commissioner*
EDWARD H. HYNES, *Commissioner*
RICHARD B. McGLYNN, *Commissioner*
Board of Public Utilities
1100 Raymond Boulevard
Newark, New Jersey 07102

FORMAL OPINION NO. 1—1979

Gentlemen:

The State Board of Public Utilities has submitted to the Joint Legislative Committee on Transportation and Communications a report entitled "In the Matter of the Board's Investigation of Lifeline Electric and Gas Rates." You have asked for our opinion as to whether the lifeline rates mentioned in such report will become effective if the Legislature does not take action within 60 days of the submission of the rate and schedule to the legislative committee. You are advised that the rates set forth in the report of the Board of Public Utilities will not become effective if the Legislature fails to take any action with respect to those rates, since the report submitted by the Board of Public Utilities to the Legislature does not contain a "proposed lifeline rate" within the meaning of the Act.

In 1977 the Legislature enacted legislation to authorize the then Public Utilities Commission to adopt schedules of reduced electric and gas utility rates applicable to certain designated consumer income groups. Laws of 1977, c. 440, N.J.S.A. 48:2-29.6 *et seq.* This legislation, commonly referred to as the "Lifeline Law," authorizes the Board to establish a rate for the minimum amount of gas and electricity necessary to supply the minimum energy needs of the average residential user. The Board was also authorized to establish a rate for the minimum amount of gas and electricity to be designated by the Board. On November 28, 1978 the Board of Public Utilities, as a result of its investigation into lifeline rates and a schedule of eligible utility customers, submitted a report to the Joint Senate and Assembly Standing Committee on Transportation and Communications. There has been no official legislative resolution passed or any other action with respect to such report at this time.