

**ORIGINAL**

Decision No. 45783

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of )  
HILLS TRANSPORTATION CO., a corporation, )  
to transfer, and CONSOLIDATED FREIGHTWAYS, ) Application No. 32046  
INC., a corporation, to acquire operative )  
rights and certain personal property. )

Willard S. Johnson, for Hills Transportation Co., and  
Donald A. Schafer, for Consolidated Freightways, Inc.,  
applicants.

Gordon and Knapp, by Wyman C. Knapp and Sanford A. Waugh,  
for Pacific Freight Lines, Pacific Freight Lines  
Express, and Santa Fe Transportation Company; Lloyd R.  
Guerra, for Western Truck Lines, Ltd.; Douglas Brookman,  
for California Motor Transport Co., Ltd. and California  
Motor Express, Ltd.; Fred N. Bigelow and W. Wallace  
Wilhite, for Pacific Southwest Railroad Association;  
Edward M. Berol, for Los Angeles-Seattle Motor Express;  
and Robert W. Walker, for Santa Fe Transportation  
Company, protestants.

Arthur H. Glanz, for West Coast Fast Freight, Inc.,  
interested party.

O P I N I O N

Hills Transportation Co., a California corporation, and  
Consolidated Freightways, Inc., a Washington corporation, herein  
seek approval of a proposed sale of the highway common carrier  
operative rights and certain equipment and personal property of the  
former to the latter.

The application was protested by both intrastate and inter-  
state carriers, and public hearings were held in San Francisco and  
Los Angeles. The matter was submitted for decision after oral  
argument on May 4, 1951.

The certificate of public convenience and necessity  
proposed to be sold was granted to Hills by Decision No. 43003,

dated June 14, 1949, in Application No. 27226. It authorizes the transportation of general commodities between Los Angeles territory and San Francisco territory. The proposed transfer price is \$80,000, payable \$11,000 upon approval of the sale, \$11,000 each year thereafter for four years, and \$25,000 on the fifth year, all balances to bear interest at five per cent per annum until paid. All of Hills' operating equipment and personal property is proposed to be sold for cash at a price to be determined by a board of three appraisers, but not to exceed \$147,650. Hills reserved the right to retain all or any part of the equipment.

Consolidated is an interstate motor carrier operating in general from Seattle eastward to Chicago and southward to San Francisco. It also holds intrastate operating authority in Oregon, Washington, Idaho and Montana, and a radial highway common carrier permit issued from this Commission on November 24, 1950. Certified copies of its articles of incorporation have been filed with this Commission and the Secretary of State, and recorded in Alameda County.

Consolidated's balance sheet as of November 30, 1950, shows the following tabulation:

<u>Assets</u>	
Current	\$ 2,838,966
Tangible property	5,695,725
Investment and advances	754,721
Deferred debits	461,902
Total	\$ 9,997,363
<u>Liabilities</u>	
Current	\$ 2,205,972
Equipment	3,912,267
Long Term	108,958
Deferred Credits	5,099
Reserves	196,301
Capital Stock	1,605,550
Earned surplus	1,963,213
Total	\$ 9,997,363

In the first eleven months of 1950, Consolidated received \$22,006,095 gross operating revenue, \$1,224,669 net income before income taxes and \$710,246 net income after provision for income taxes.

The Hills balance sheet of November 30, 1950, shows assets of \$248,566 and earned surplus of \$94,566. Its profit and loss statement shows gross operating revenue for eleven months of 1950 amounting to \$561,616, \$24,298 net income, and \$17,330 net income after provisions for income taxes. In addition, E. A. Hills, the sole stockholder, was paid a salary at the rate of \$15,000 per annum. In 1948 the net profit of this corporation before income taxes was \$63,000, and in 1949 was \$28,000. (Other evidence indicated the net profit before taxes was \$1,700 higher in both 1949 and 1950).

About eight per cent of the Hills gross revenue in 1950 was derived from interstate commerce, although for the five previous years that figure was five per cent. Hills in 1944 acquired an interstate right between Los Angeles and San Francisco, with service authorized to the intermediate points of Oakland and San Jose, and the off-route point of Berkeley. Hills maintains leased terminals in San Francisco and Los Angeles, between which it operates five schedules daily each way in an overnight service. It maintains five pick up and delivery units in Los Angeles, and four in San Francisco, and uses local carriers at each place to supplement these units. The average weight of shipments transported by Hills is 5,000 pounds, so the line haul units are also used for pick up and delivery work.

Consolidated was organized in 1929 and has operated as a motor carrier since then. It now has terminals in San Francisco and Oakland from which it operates 25 interstate schedules. At these terminals it has 30 to 40 pick up and delivery units and 150 employees. If this application is granted, an affiliated corporation will spend between three and four hundred thousand dollars developing a terminal in Los Angeles which will be leased to Consolidated. The latter also plans to spend \$702,000 for 18 pick up units for Los Angeles and 30 line haul trucks and trailers. It is estimated that ten of these units will be used in intrastate service to accommodate the five daily schedules of Hills, and the balance will be used in interstate service. These new units will be of the same type as operated by Consolidated in the rest of its system - cab-over truck and full trailer, each with a 24-foot insulated van body. If Consolidated buys the Hills equipment (tractors and 35-foot semi-trailer vans) under the agreement, it will sell the same for its purchase price to the company from which it buys the new units, because it believes the Hills equipment cannot be efficiently coordinated with the rest of its fleet. If the application is granted, Consolidated proposes to adopt the Hills tariff and provide the same overnight service now being rendered.

The foregoing facts indicate that Consolidated is a large, experienced and financially sound operator, and fully capable of taking over the Hills operation and conducting it in a manner not detrimental to the public interest. The purchase price is not unreasonable in the light of the Hills earning position, and is easily within the financial means of Consolidated. On these facts alone, there would be little or no question raised as to the propriety of the approval of this transaction.

However, many other factors have been adduced which have a bearing upon such a conclusion.

The original agreement of applicants involved only the sale of the Hills interstate rights to Consolidated. Verbal discussions on this matter were held in the spring of 1949, and the first letter in evidence on the subject was dated May 18, 1949. In it Consolidated asked "Is the offer to sell your interstate rights between Los Angeles and San Francisco made contingent upon your first being granted intrastate common carrier rights, or will you take a chance and go ahead and make the same immediately?" The Hills reply, dated May 19, 1949, was "The offer to sell these operative rights as made to you at Sacramento is not contingent upon our first being granted intrastate operative rights, and we are prepared to proceed with negotiations and the necessary application without delay." On July 12, 1949, the parties executed an agreement to transfer the interstate rights for \$50,000. No personal property was involved. On July 29, 1949, they filed with the Interstate Commerce Commission their application seeking approval of such sale.

The Hills application for intrastate rights was submitted (along with others in the so-called Savage consolidated proceedings) with the filing of briefs on March 24, 1949. Decision No. 43003, granting those rights, was dated June 14, 1949, but its effective date was stayed by petitions for rehearing. These were denied on August 29, 1949, (Decision No. 43274) and Hills was authorized to file tariffs and commence operations within 90 days. It did so on November 25, 1949.

After the grant of intrastate rights to Hills became final, Consolidated reexamined its position under the July 12th agreement of sale. It concluded that the Interstate Commerce Commission probably would not approve the sale of the interstate rights in view of the grant of the new intrastate right between the same termini to Hills, and initiated discussions with Hills in October, 1949, on this subject. As the result of those discussions, Consolidated wrote a letter to Hills, dated November 10, 1949, confirming its understanding that if the Interstate Commerce Commission would not approve transfer of the interstate certificate unless it also purchased the intrastate certificate, then it agreed to buy and Hills agreed to sell the latter for \$80,000, and the Hills equipment at a price to be set by a board of three appraisers. On November 15, 1949, Hills replied, confirming that the letter of November 10th correctly set forth the agreement, but reserving the right to refuse all appraisals on the equipment "providing that our plans change and we would wish to retain any part of the equipment mentioned".

The parties on November 29, 1950, filed an amendment to their Interstate Commerce Commission application, setting forth the sale of both intrastate and interstate rights as an alternative plan to the sale of the interstate right alone. On December 27, 1950, Division 4, I.C.C., in No. MC-F 4264, refused to authorize the sale of the interstate right alone, on the ground that Hills had a statutory right to register its retained intrastate right and continue its interstate service, but it did approve and authorize the transfer of both rights and the equipment. The effective date of this order is May 18, 1951. A petition for rehearing has been filed with the full Commission and is pending at the present time.

Representatives of both applicants testified herein that originally only the interstate right was desired to be transferred. Hills wanted to stay in business intrastate, and Consolidated did not want such authority. After Hills received its intrastate certificate, Consolidated again appraised the intrastate transportation situation, and found it more attractive than before. It was still less attractive than the interstate, but it was not sufficiently unattractive to allow it to defeat acquisition of the interstate right. Consolidated therefore agreed to buy both, and would vigorously endeavor to increase the intrastate tonnage. At no time did either party agree to the transfer of the intrastate right alone, and there is no representation to this Commission that a sale of the intrastate right will be consummated if the sale of the interstate right is not approved by the Interstate Commerce Commission on rehearing. Hills possesses radial and contract permits, and has retained the right to keep all its equipment under the agreement of November 10, 1949. In neither of the agreements has it been provided that Hills shall not engage in similar intrastate transportation in the future. E. A. Hills has formed and is sole stockholder of Publishers Motor Transport. It was incorporated March 1, 1950, and secured radial and contract permits March 29, 1950. It has performed transportation services to points between Los Angeles and San Francisco.

From all of these facts protestants conclude (1) that Consolidated is only interested in interstate traffic and will neglect its duties as an intrastate common carrier; (2) that Consolidated is a reluctant buyer and the intrastate right will be an impediment to it; (3) that Hills is a reluctant intrastate seller and does not want to and will not retire from intrastate

business; (4) that Hills agreed to a sale ten days before commencing operations under its certificate and is therefore trafficking; (5) that this is a one package deal involving both rights, with no proposal to buy the intrastate right alone.

We perceive that the sale or purchase of highway common carrier operative rights may be sought for various reasons. If the prospective purchaser is an experienced and financially sound operator which proposes to fully meet its obligations as a highway common carrier under the sought certificate, the transfer of the latter will be authorized in the absence of a showing that the public interest would be adversely affected.

We have already found that Consolidated is experienced and well financed. The suggestion that it will neglect, or not develop, the intrastate right is completely unsupported by the record, and is contrary to the claims of other protestants which are fearful of loss of revenue if it enters the field - a point which will be discussed later.

The claims concerning Hills are also contradictory. The charge of trafficking raises no issue - the date of an agreement of sale is not material in the absence of fraud or deceit in connection with the original grant of the certificate. This record clearly shows that at all times Hills desired to keep its intrastate certificate, a state of mind which negatives fraud in the issuance. The claim that E. A. Hills through Hills and Publishers Motor Transport will continue in business as a permitted carrier is immaterial. The statutes do not prohibit such



operations, and it is not suggested that anything illegal or unlawful has occurred which would justify revocation of those permits.

Concerning the lack of an outright proposal to buy the intrastate right, it should be noted that the approval of this Commission in a transfer case is permissive. We do not determine the legality of the contract of sale, nor decide the obligations of the parties thereunder. The owner of a certificate is determined to be a qualified operator at the time of its issuance to him. The proposed vendee in a transfer case must also be found to be a qualified operator. If that is done and permission to transfer is granted, the remaining interest of the Commission is in ensuring that if the parties consummate the transfer, they do so within the time specified in the order, or such extensions thereof as may be granted on appropriate and timely request.

The protestants also contend (a) that Decision No. 43003 was in error in granting Hills an unlimited certificate when its evidence disclosed it was a truckload operator, and (b) this record shows Hills is a truckload operator (the average weight of its shipments is 5,000 pounds) and it is improper to transfer such a business to a carrier like Consolidated which will transform it into a smaller shipment, truly competitive highway common carrier.

With reference to the first point, Section 65 of the Public Utilities Act provides "In all collateral actions or proceedings, the orders and decisions of the Commission which have become final shall be conclusive." Concerning the second contention it is sufficient to say that no complaint can logically be made against a highway common carrier because it is performing its full duty to the public as a common carrier. The Hills certificate is

unrestricted as to weight of shipments to be transported, and this Commission would not authorize its transfer to a carrier proposing a weight limitation.

The protestants also contend that they will suffer loss of both interstate and intrastate revenues if this transfer is authorized, and that as a result they will have to raise their rates to compensate for their losses, and that such action would be adverse to the public interest. In this connection evidence was presented by all the protesting motor carriers, except Los Angeles-Seattle Motor Express and West Coast Fast Freight, Inc., which only operate interstate in California. The protesting carriers presenting evidence herein all operate both interstate and intrastate between San Francisco and Los Angeles except Santa Fe Transportation Company, which operates only intrastate between those points.

With reference to the transfer of the Hills interstate rights to Consolidated, and the consequent loss of interstate revenue to protestants as the result thereof, this Commission has no control or jurisdiction.

Concerning intrastate traffic, these protestants claimed that Consolidated would be more aggressive than Hills in securing new business, would not restrict its business to heavier shipments as Hills has done, and would secure more intrastate business from the additional interstate shippers it could serve directly over its vast system. They concluded that any loss of tonnage would reduce their schedules, increase their costs and impair other services rendered to the public. None of them claimed any specific loss of tonnage or revenue, nor made any claim that it would

actually be financially embarrassed. In this respect the record is not convincing that the entrance of Consolidated would impair the stability or services of these protestants.

Upon the record made we find that the public interest will not be adversely affected by approval of the transfer of the operative rights and property involved herein. We further find that the money, property or labor to be procured or paid for by Consolidated through the indebtedness herein authorized is reasonably required by it for the purposes herein stated. The application will therefore be granted. However, in taking this action we are making no finding of the value of the operative rights and property involved.

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

O R D E R

Application as above entitled having been filed, public hearings having been held thereon and based upon the evidence received and the conclusions and findings set forth in the opinion,

IT IS ORDERED:

(1) That Hills Transportation Co., a corporation, after the effective date hereof and on or before October 1, 1951, may sell and transfer to Consolidated Freightways, Inc., a corporation, and the latter may acquire and purchase, the certificate of public convenience and necessity granted to Hills Transportation Co. by Decision No. 43003, in Application No. 27226, and the equipment and other property referred to in this decision and described in the purchase agreement, a copy of which appears as Exhibit "B" attached to the application on file herein, such sale and transfer to be for the consideration set forth in such purchase agreement.

(2) That Consolidated Freightways, Inc., a corporation, be and it is hereby authorized on or before October 1, 1951, to incur indebtedness, for the purpose of acquiring the certificate of public convenience and necessity referred to in paragraph (1) of this order, in the principal sum of \$69,000, with interest at the rate of five per cent per annum, payable in installments of \$11,000 plus interest on the first, second, third and fourth anniversary dates of the effective date of this order, and \$25,000 plus interest on the fifth anniversary date thereof.

(3) That the authority herein granted to incur indebtedness will become effective when Consolidated Freightways, Inc. has paid the fee prescribed by Section 57 of the Public Utilities Act, which fee is \$69.

(4) That within 30 days after the execution thereof, Consolidated Freightways, Inc., shall file with the Commission a true copy of the promissory note and any bill of sale or other instrument of transfer executed pursuant to the authority herein granted.

(5) That applicants shall comply with the provisions of General Order No. 80 and Part IV of General Order No. 93-A by filing in triplicate and concurrently making effective, appropriate tariffs and time schedules on not less than five days' notice to the Commission and the public.

Except as herein otherwise expressly provided, the effective date of this order shall be twenty (20) days after the date hereof.

Dated at San Francisco, California, this 29th day of May, 1951.

[Signature]  
James F. Cramer  
Harold P. Kille  
[Signature]  
John E. Mitchell  
(COMMISSIONERS)

PUBLIC UTILITIES COMMISSION  
STATE OF CALIFORNIA  
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By [Signature]