GH

ORIGINAL

Decision No. 66695

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

THE RIVER LINES, INC., a corporation, Complainant, vs. SOUTHERN PACIFIC PIPE LINES, INC., a corporation, and SOUTHERN PACIFIC COMPANY, a corporation, Defendants.	Case No. 7238 (Amended)
THE J. C. FREESE COMPANY, INC., Complainant, vs. SOUTHERN PACIFIC COMPANY and SOUTHERN PACIFIC PIPE LINES, INC., Defendants.	Case No. 7239
THE HARBOR TUG AND BARGE COMPANY, Complainant, vs. SOUTHERN PACIFIC PIPE LINES, INC., and SOUTHERN PACIFIC COMPANY. Defendants.	Case No. 7241
In the Matter of the Petition of THE RIVER LINES, INC., J. C. FREESE COMPANY, INC., AND THE HARBOR TUG & BARGE COMPANY, for suspension of certain rates contained in Local Pipeline Tariff 6-A (Cal. P.U.C. No. 8) of SOUTHERN PACIFIC PIPE LINES, INC.	(I & S) Case No. 7539

Herbert A. Waterman, for Southern Pacific Company and Southern Pacific Pipe Lines, Inc.; Charles W. Burkett, Jr., and John MacDonald Smith, for Southern Pacific Company, defendants in Case No. 7238, 7239 and 7539.

McCutchen, Doyle, Brown, Trautman & Enersen by William W. Schwarzer and Craig McAtee, for The River Lines, Inc., complainant in Case No. 7238 and petitioner in Case No. 7539; Noel Dyer, for J. C. Freese Company, Inc., complainant in Case No. 7239 and petitioner in Case No. 7539; Frank Loughran, for The Harbor Tug and Barge Company, complainant in Case No. 7241 and petitioner in Case No. 7539.

Richard H. Zahm, Jr., for Mobil Oil Company, interested party.

O P I N I O N

Cases Nos. 7238, 7239 and 7241 are complaints filed by The River Lines, Inc. (hereinafter called River Lines), The J. C. Freese Company, Inc. (hereinafter called Freese) and The Harbor Tug and Barge Company (hereinafter called Harbor) against Southern Pacific Company (hereinafter called Southern Pacific) and Southern Pacific Pipe Lines, Inc. (hereinafter called Pipe Lines). The three complaints are similar. Each alleges that Pipe Lines is the alter ego of Southern Pacific; that Pipe Lines has established a pipeline between San Francisco Bay Area refining points and Stockton and is in the process of extending the pipeline to Chico; that Pipe Lines has established rates for the transportation of bulk oil between Bay Area refining points and Stockton which are less than those charged by complainants and that Pipe Lines will also establish lower rates to Chico when the pipeline is extended to that city; that the complainants cannot lower their rates to compete with Pipe Lines; that Pipe Lines is taking traffic away from the complainants, thereby jeopardizing their continued operations; and that the conduct of Pipe Lines contravenes certain policies alleged to have been established by the Legislature. Each complaint seeks from the Commission

an order (1) suspending or cancelling Pipe Lines' rates for transporting bulk oil between Bay Area refining points and Stockton, (2) ordering Pipe Lines to cease and desist from soliciting bulk oil traffic from Bay Area refining points to Sacramento and Chico, (3) ordering Pipe Lines to cease and desist from further extending its pipelines, (4) finding that the carriage of bulk oil by Pipe Lines between Bay Area refining points and Stockton, Chico and Sacramento is not necessary, and, in the alternative, (5) ordering Pipe Lines to establish rates to provide for a differential between its rates and those of complainants so that complainants will be able to fairly compete with Pipe Lines. Pipe Lines and Southern Pacific filed an answer which denied the material allegations of the complaints and contended that complainants were entitled to no relief in these proceedings.

On February 26, 1963, River Lines filed an amendment to its complaint which alleged that Pipe Lines was rendering service to Chico at a rate with which it could not compete. The amendment requested an order cancelling the Chico rate and requiring Pipe Lines to publish a higher rate with a differential in favor of River Lines. On March 8, 1963, Pipe Lines and Southern Pacific filed answers which admitted that Pipe Lines was rendering service to Chico at stated rates and denied all the other material allegations of the amendment to the complaint.

Case No. 7539 is an Investigation and Suspension proceeding. It was commenced by a Petition For Suspension of Rates filed by River Lines, Freese and Harbor. The petition alleged that on January 11, 1963, Pipe Lines filed with this Commission its Local Pipeline Tariff 6-A which was to be effective on February 12, 1963; that Tariff 6-A, in part, contained rates for a service not theretofore performed by Pipe Lines involving the transportation of

petroleum products in bulk from Richmond and Concord to Pipe Lines' terminal at Bradshaw Road, a point on the outskirts of the City of Sacramento; that the proposed Bradshaw rate is 10½ cents per barrel of 42 gallons with a minimum tender of 5,000 barrels; that the petitioners presently transport bulk petroleum from Richmond and Concord to Sacramento, under their tariffs, at rates of 10½ cents per barrel with a minimum tender of 24,000 barrels and 12.6 cents per barrel with a minimum tender of 12,000 barrels; that the Commission has found petitioners rates to be reasonable; that Pipe Lines by establishing a parity of charges but with lower minimum tenders has undercut the rates of the petitioners; that under Public Utilities Code Section 727, petitioners are entitled to a rate differential; that the petitioners could not survive the loss of traffic which would occur if the Bradshaw rate went into effect; and that the Bradshaw rate should be suspended pending a determination of its lawfulness. On February 5, 1963 the Commission, in Decision No. No. 64903, entered an Order of Investigation and Suspension which suspended the Bradshaw rate until June 12, 1963. On June 11, 1963 the Commission issued another order which continued the suspension of the Bradshaw rate until December 12, 1963. On June 19, 1963 Pipe Lines filed a petition which requested permission to establish a temporary Bradshaw rate of 12.6 cents per barrel with a minimum tender of 12,000 barrels. The rate was proposed without prejudice to Pipe Lines' position on the reasonableness and validity of the 10½ cents rate under suspension. The petition alleged that the suspended 10½ cents was published by Pipe Lines at the request of Mobil Oil Company; that Mobil's Sacramento terminal which had been located on the Sacramento River had been acquired by the State of California under threat of condemnation; that Pipe Lines and Mobil had invested substantial sums of money in tankage and other improvements at Bradshaw Road to meet Mobil's terminal requirements at

Sacramento; that these facilities would remain idle because no rate was available; and that unless Mobil could utilize the Bradshaw terminal it could not satisfactorily meet its obligations to supply users of its petroleum products in the area. On June 24, 1963 the Commission in Decision No. 65619, entered an order authorizing a 12.6 cents rate with a minimum tender of 12,000 barrels until December 11, 1963.

The suspended 10½ cents rate went into effect by operation of law on December 12, 1963. However, the issues relating to that rate are before the Commission in Case No. 7539, herein.

A duly noticed public hearing was held in these consolidated matters before Examiner Jarvis in San Francisco from May 7 to 16, 1963. Extensive depositions were taken by complainants prior to the hearing. It was necessary for the Commission to rule on questions dealing with the production of evidence with respect to the depositions. (Decision No. 64535 in Cases Nos. 7238, 7239 and 7241.) These consolidated matters were submitted subject to the filing of briefs which were filed on July 26, 1963.

River Lines, Freese and Harbor first contend that they are entitled, under Section 727 of the Public Utilities Code, to a rate differential under the rates published by Pipe Lines to Stockton, Sacramento, Chico and Bradshaw Road; that it is not economically possible for them to lower their rates and that Section 727 thus requires the Commission to order Pipe Lines to raise its rates to the points involved. Pipe Lines, Southern Pacific and Mobil Oil Company (hereinafter called Mobil), which appeared in these proceedings as an interested party, contend that Section 727 is not applicable to these matters. The section provides:

> "It is the policy of the State that the use of all waterways, ports, and harbors of this State shall be encouraged, and to that end the commission is directed in the establishment of rates for water carriers applying to business moving between points within this State to fix those rates at such a differential under the rates of competing land carriers that the water carriers shall be able fairly to compete for such business. In fixing the rates there shall be taken into consideration quality and regularity of service and class and speed of vessels. "Competing land carriers" includes all land carriers as defined in this part, and includes a highway contract carrier and a radial highway common carrier as defined in the Highway Carriers' Act."

The barge lines argue that Pipe Lines is a "competing land carrier"; that if Pipe Lines is not a "competing land carrier", Southern Pacific is, and the Commission should apply the doctrine of alter ego to the situation; that Section 727 requires the Commission to raise the rates of competing land carriers (even though these rates are reasonable) in order to create a differential to permit them to fairly compete for the business involved; and that the construction of Section 727 which they advocate is sustained by Investigation of Reduced Rates on Petroleum Products, Decision No. 58664 in Case No. 6147 (unreported).

Pipe Lines, Southern Pacific and Mobil argue that Pipe Lines is not a "competing land carrier" within the purview of Section 727 and that there are no facts in the record which would permit the Commission to invoke the doctrine of alter ego in these matters. They further contend that even if it be assumed for the sake of argument that Pipe Lines is a "competing land carrier", Section 727 does not apply to these matters. They argue that Section 727 only applies when a water carrier seeks to establish a lower rate than a competing land carrier; that Section 727 only applies to water to water points; that a construction of Section 727 which would require a competing land carrier to raise rates in order to create a differential would violate Sections 726 and 3663 of the Public Utilities Code; and that even if Section 727 be construed as contended for by the barge lines,

River Lines, Freese and Harbor have failed to establish, as a matter of fact, that they are not "able to fairly compete" for the business here involved. Pipe Lines, Southern Pacific and Mobil rely, in part, on John Byrne, Agent, etc., 40 C.R.C. 357 to sustain their construction of Section 727.

In John Byrne, Agent, etc., 40 C.R.C. 357, the Commission held, at page 390, that "Sections 34(a) and 32½ [of the Public Utilities Act , Section 34(a) is the predecessor of Section 727 of the Public Utilities Code] are silent as to the problem of fixing water rates at a differential under the land carriers' rates where there may be no corresponding differential in the cost of water vs. rail. An examination of these sections does not lead to the conclusion that land carrier rates should be raised above what would otherwise be considered a 'reasonable and sufficient' level in order that 'the use of all waterways, ports, and harbors of this State shall be encouraged,' especially when the requested differentials apply not only on the port-to-port rates, but on combination or joint water-rail rates to inland points." The Commission found the rail rates involved in the Byrne case to be not less than reasonable or sufficient and refused to order them raised to create a differential with water rates. In Investigation of Reduced Rates on Petroleum Products, Decision No. 58664 in Case No. 6147 (unreported) the Commission, by way of dictum, construed Section 727 to, in an appropriate case, require the Commission to raise the rates of competing land carriers (even though these rates are reasonable and sufficient) in order to create a differential to permit water carriers to fairly compete for the business involved. However, the Commission did not order the rates of land carriers raised in the Case because there was insufficient evidence to show that the water carriers were not able to compete fairly for the business. It is unnecessary herein to attempt

to resolve the conflict between these two decisions because the Commission is of the opinion, for the reasons hereafter stated, that Section 727 is not applicable to the facts of the matters here under consideration.[1/]

It should first be noted that Section 727 is not one which confers jurisdiction upon the Commission. It deals with the exercise of jurisdiction in a particular situation. If the prerequisites exist, Section 727 presents a legislative declaration concerning the treatment of particular rates. Section 727 deals with the rates of vessels and "competing land carriers." Section 727 further states that "'Competing land carriers' includes all land carriers as defined in this part [Part 1 of the Public Utilities Code, the Public Utilities Act], and includes a highway contract carrier and a radial highway common carrier as defined in the Highway Carriers' Act." However, nowhere in the Public Utilities Act or in the Public Utilities Code is there a definition of the term "land carrier." An

1/ It is also unnecessary to resolve certain subsidiary questions dealing with Section 727. For example, barge lines transporting petroleum in bulk are not required to secure certificates of public convenience and necessity before engaging in business. There is a serious question of whether, assuming for the sake of argument, the construction of Section 727 contended for by the barge lines, a rate differential can constitutionally be created by raising what would otherwise be the reasonable rates of competitors in order to protect the rates and business of a class of carriers which can enter the field without regard to the number of carriers already in the field and whether public convenience and necessity require their service. Another serious question that is not necessary to resolve is, again assuming the construction of Section 727 contended for by the barge lines, does Section 727 protect all existing barge lines? Supposing there are three barge lines serving certain points and a non-vessel competitor publishes a reasonable rate which, if left in effect, would result in one of the barge lines going out of business, but the remaining two could still compete with the non-vessel competitor. There is a serious question of whether Section 727 could be constitutionally invoked to protect the one barge line which would be forced out of existence.

extensive examination of the Interstate Commerce Act and legal and transportation treatises has failed to unearth a definition of the term "land carrier."

While the Public Utilities Act does not define the term "land carrier" it does define the term "common carrier" as well as the terms "highway common carrier" and "petroleum irregular route carrier." (Public Utilities Code §§ 211, 212, 213, 214.) A reasonable and common sense interpretation (Great Western, etc. v. J. A. Wathen D. Co., 10 Cal. 2d 442, 446) of the term "land carrier" as used in Section 727 is that it applies to any common carrier or carrier, defined in the Public Utilities Act, which operates primarily on land.

Pipe Lines is clearly not a highway common carrier, petroleum irregular route carrier, highway contract carrier or radial highway common carrier, as defined in the Public Utilities Code. Section 211 defines "common carriers" and the definition does not include pipe lines. The terms "pipe line" and "pipe line corporation" are defined in the Public Utilities Act. (Public Utilities Code §§ 227, 228.) Section 216 defines a "pipeline corporation" to be a "public utility." Section 216 also defines every "common carrier" to be a "public utility." However, the converse is not true. Nowhere does the Public Utilities Code define all "public utilities" to be "common carriers." Furthermore, pipe lines were, at one time defined as both "public utilities" and "common carriers." (Petroleum Pipeline Statutes of 1913, Stats. 1913, Ch. 286, p.532 and Ch. 327, p.657.) However, the definition of a pipe line to be a "common carrier" was repealed in 1953. (Stats. 1953, Ch. 596, p.1844.) It is apparent from the foregoing that the Legislature has indicated that pipe lines are "public utilities" which should be regulated as such and not "carriers" or "common carriers." We hold that Pipe Lines is not a "competing land carrier" within the meaning of Section 727. The foregoing construction is fortified by the Commission's long standing

interpretation of Section 726 of the Public Utilities Code. That section provides in part that "In any rate proceeding where more than one type or class of carrier, as defined in this part /Public Utilities Act/ or in the Highway Carriers' Act, is involved, the commission shall consider all such types or classes of carriers, and, pursuant to the provisions of this part or the Highway Carriers' Act, fix as minimum rates applicable to all such types or classes of carriers the lowest of the lawful rates so determined for any such type or class of carrier." The Commission has never considered petroleum pipeline rates in establishing minimum rates for the transportation of petroleum products, thereby construing pipelines not to be carriers within the purview of the Public Utilities Act.

The barge lines also contend that assuming Pipe Lines, itself, is not a "competing land carrier" it is a wholly-owned subsidiary of Southern Pacific, which is a "competing land carrier", and that the Commission should apply the doctrine of alter ego and hold Pipe Lines to be the alter ego of Southern Pacific and thus a "competing land carrier."

The following legal principles are applicable in determining whether the doctrine of alter ego applies to the facts of this case.

> "It is not true that any wholly owned subsidiary is necessarily the alter ego of the parent corporation. The corporate entity of the wholly owned subsidiary will be disregarded only when recognition of the separate entities would promote fraud and injustice." (Luis v. Orcutt Town Water Co., 204 Cal. App. 2d 433, 443.)

> ". . .'As a general rule a corporation and its stockholders are deemed separate entities, and this is true with respect to tax problems. . . .Ownership of capital stock in one corporation by another does not, itself, create an identity of corporate interest between the two companies, nor render the stockholding company the owner of the property of the other, nor create the relation of principal and agent, representative, or alter ego between the two. . . .Nor does the identity of officers of two corporations establish identity of the corporation . . .' " (Northwestern Pacific R.R. v. State Board of Equalization, 21 Cal. 2d 524, 530-31.)

This Commission has held that the alter ego principle will be invoked in a case where not to do so would frustrate the lawful operation of a regulatory statute.

The record discloses that Pipe Lines was incorporated in Delaware in 1955. It owns in its own name and operates with its own 215 employees 1,700 miles of pipelines in California, Arizona, New Mexico, Oregon and Texas. Pipe Lines has assets of over $80,000,000. On March 31, 1963, it had a long term debt of $39,000,000, for which it alone - and not Southern Pacific - is liable. Seven of Pipe Lines' nine officers are not officers of Southern Pacific.[2/] None of the directors of Pipe Lines is a director of Southern Pacific. Pipe Lines' board of directors meets monthly and has special meetings as warranted. It met 14 times in 1962. Pipe Lines' president presides at the directors' meeting, and he establishes company policy, subject to the approval of the directors. Pipe Lines' officers and directors establish its rate, traffic, operating and financial policies. In establishing pipeline rates, no consideration is given to the effect of these rates upon the railroad business of Southern Pacific or the business of its trucking subsidiaries. Pipe Lines files, in its own name, tariffs with state and federal regulatory agencies, and itself enters into joint rates with other pipelines. Pipe Lines has established its own rules and regulations which are patterned after those of pipeline and oil companies rather than those of Southern Pacific. The personnel policies and wage scales of Pipe Lines are not similar to those of Southern Pacific. Where a portion of its pipeline is located on right-of-way owned by Southern Pacific, Pipe

2/ At the time of hearing Pipe Lines' secretary, J. F. Ryan, was an assistant secretary of Southern Pacific and Pipe Lines' general auditor, Vernon Eaves, was an assistant general auditor of Southern Pacific.

Lines pays to Southern Pacific for easements an amount equal to six percent of the appraised value of the property, plus taxes, with a property re-evaluation every five years. This is the same amount Southern Pacific charges utility companies, oil companies and others for right-of-way easements. Pipe Lines, with its own personnel, issues its own freight bills and vouchers, prepares its own payrolls and pays its own bills. Southern Pacific performs certain administrative services for Pipe Lines including the keeping of general ledger books; claims investigations; legal services; certain paper work in connection with purchasing, real estate transfers and insurance policies; services of the corporate secretary's and treasurer's offices; and the printing of tariffs. These services are billed at cost by Southern Pacific to Pipe Lines. In 1962, Pipe Lines paid Southern Pacific $103,407 for these services.

On the basis of the foregoing evidence, Pipe Lines claims that it is not controlled by Southern Pacific. It cannot be denied, however, that the beneficial ownership of both corporations ultimately belongs to the stockholders of Southern Pacific and that Southern Pacific could readily change any of the directors (and, through them, any of the officers) of Pipe Lines. In the case of such a wholly owned subsidiary corporation, "control" is not the sole issue upon which the applicability of the alter ego doctrine turns; in the last analysis, the parent corporation exercises whatever control it deems appropriate.

The real issue is whether or not the creation of the subsidiary as a separate legal entity has frustrated the lawful operation of the regulatory statute here under consideration. We cannot find that it has. We have held, supra, that a pipeline is not a competing land carrier within the meaning of § 727; the fact that this particular

pipeline is owned by a railroad corporation does not make it any less a pipeline. The statute deals with rate relationships between railroads and highway carriers on the one hand and water carriers on the other; it simply does not apply to pipelines. There has been no showing that Southern Pacific's ownership of both railroad and pipeline property has affected the extent to which § 727 applies to Southern Pacific's railroad activities. Notwithstanding substantial identity of interest and control, therefore, the separate organization of the two corporations has not led to an inequitable result. (Automotriz etc. v. Resnick, 47 Cal. 2d 792.)

The barge lines next contend that, regardless of the applicability of Section 727 and the question of rate differentials, the rates established by Pipe Lines which are here under consideration are unjust and unreasonable. The following sections of the Public

Utilities Code are pertinent to this contention:

> "451. All charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful.
>
> "455. Whenever any schedule stating an individual or joint rate, classification, contract, practice, or rule, not increasing or resulting in an increase in any rate, is filed with the commission, it may, either upon complaint or upon its own initiative, at once and if it so orders without answer or other formal pleadings by the interested public utility or utilities, but upon reasonable notice, enter upon a hearing concerning the propriety of such rate, classification, contract, practice, or rule. Pending the hearing and the decision thereon such rate, classification, contract, practice or rule shall not go into effect. The period of suspension of such rate, classification, contract, practice, or rule shall not extend beyond 120 days beyond the time when it would otherwise go into effect unless the commission extends the period of suspension for a further period not exceeding six months. On such hearing the commission shall establish the rates, classifications, contracts, practices, or rules proposed, in whole or in part, or others in lieu thereof, which it finds to be just and reasonable.
>
> "All such rates, classifications, contracts, practices, or rules not so suspended shall become effective on the expiration of 30 days from the time of filing thereof with the commission or such lesser time as the commission may grant, subject to the power of the commission, after a hearing had on its own motion or upon complaint, to alter or modify them.
>
> "728. Whenever the commission, after a hearing, finds that the rates or classifications, demanded, observed, charged, or collected by any public utility for or in connection with any service, product, or commodity, or the rules, practices, or contracts affecting such rates or classifications are insufficient, unlawful, unjust, unreasonable, discriminatory, or preferential, the commission shall determine and fix, by order, the just, reasonable, or sufficient rates, classifications, rules, practices, or contracts to be thereafter observed and in force.
>
> "729. The commission may, upon a hearing, investigate a single rate classification, rule, contract, or practice, or any number thereof, or the entire schedule or schedules of rates, classifications, rules, contracts, and practices, or any thereof, of any public utility, and may establish new rates, classifications, rules, contracts, or practices or schedule or schedules in lieu thereof."

A competing utility is a proper party to challenge the reasonableness of its competitors' rates. (Lanz v. Railroad Commission, 2 Cal. 2d 550; Suspension of Reduced Carload Rates, 49 Cal. P.U.C. 763;

Investigation By The Commission on Its Own Motion, etc., 40 C.R.C. 221.) If Pipe Lines' rates are unreasonable, unlawful or unjust, the Commission may order that they be raised to just, reasonable or sufficient rates determined by the Commission.

The barge lines contend that Pipe Lines has embarked upon a course of conduct designed to take away their petroleum business and eliminate competition in the transportation of petroleum products. Pipe Lines argues that, where feasible, pipeline transportation of petroleum products is the most economical kind of transportation; that a products pipeline system in California is inevitable and that if Pipe Lines were not permitted to operate profitably at attractive rates, it would be replaced by oil company owned pipelines and the barge companies would not regain the business anyway.

Prior to the construction of Pipe Lines' north line the barge lines had a certain volume of nonmilitary intrastate petroleum traffic.[3/] The barge lines have lost some business to Pipe Lines. They are fearful of losing more. Pipe Lines is interested in obtaining more business. If Pipe Lines can attract business away from the barge lines with reasonable and sufficient rates which are lower than those of the barge lines, this may be an indication that the particular barge transportation involved has become outmoded and obsolete.

> "Rail carriers, truck carriers and water carriers now dominate and control the field of such business activity. Possibly within the comparatively near future another or other means of transportation may be evolved and developed, and in their respective operations the existence of the several agencies that represent present means of transportation may be seriously threatened or their destruction actually accomplished. They may be outmoded and become obsolete. . . .

3/ The barge lines allege that Pipe Lines has taken away from them volumes of traffic which move in interstate commerce or to military bases in California. It is conceded that this Commission has no jurisdiction over the rates of these movements. (California Commission v. United States, 355 U. S. 534.)

> "In other words, when the fact has been clearly established that by practical, efficient and satisfactory methods a financially reliable common carrier is not only ready, willing and able to lower the prevailing rate for freight transportation to a rate that is shown by the evidence to be not only within the limits of the "zone of reasonableness", but also that the proposed rate will yield a net profit,-- in its zeal to perform its conceived duty in the premises, the concern of the commission should not extend to the limit of "holding an umbrella" over either present or possibly future competitors, and thereupon, and by reason of its anxiety, in the interest of such competitors, deny the application to reduce the existing rate, lest by reason of their inability to meet such rate the said competitors be eliminated from the field of transportation, to the seeming detriment of the public interest." (Southern Pac. Co. v. Railroad Com. 13 Cal. 2d 89, 103-04.)

However, it is also true that "public interest demands that neither by 'cutthroat' nor by any other means or method should one type of common carrier /or public utility/ be now permitted, by means of a drastic reduction in rates for transportation below the 'zone of reasonableness', to work the business destruction of a competitor or competitors." (Southern Pac. Co. v. Railroad Com. supra, at page 102.)

A brief history of the development of Pipe Lines' north line is pertinent to the question of the reasonableness of the rates here under consideration. Construction of the first portions of the north line was completed in 1957 and 1958. The line originated in the Richmond-Concord areas, extended easterly from Concord past Stockton to Roseville, and thence over the Sierra to Reno, Sparks and the Fallon Naval Air Station. The original line had branches serving Mather and McClellan Air Force Bases in Sacramento. A terminal was established at Bradshaw Road in Sacramento in connection with the service rendered to the Air Force Bases. In 1960 the Air Force issued a public invitation seeking bids for a direct petroleum pipeline from the San Francisco Bay Area refining points to Castle Air Force Base (near Merced). The Air Force requirements included a proviso that the Stockton waterfront was to be an alternate point of origin, so that jet fuel, delivered by ocean going tankers, could be put into the pipeline. The Air Force also required construction of

sufficient storage (tankage) facilities at Stockton to take the entire discharge output of a T2 class ocean tanker. Pipe Lines won the bidding for the Castle pipeline. Construction commenced in 1960 and the pipeline was in service by 1961. In October, 1961, Pipe Lines was approached by representatives of Wilshire Oil Company, whose Stockton facilities are contiguous to Pipe Lines' Stockton facilities, and requested to connect the pipeline to the Wilshire facilities. Pipe Lines agreed to make a connection with the Wilshire facilities, and a connection was made. Pipe Lines published a Stockton rate on June 19, 1961 and thereafter commenced service to Wilshire.[4/] The Air Force also requested Pipe Lines to serve Beale Air Force Base (near Marysville) and Pipe Lines decided to accede to the request. A 30-mile line was built from Roseville to Beale Air Force Base. The Beale line connects with the first built segment of the north line at Roseville. It runs north from Roseville for a distance of 24 miles to Earl and thence east for 6 miles until it reaches Beale Air Force Base. Earl is 52 miles south of Chico. Pipe Lines management revived an earlier interest in extending the north line to Chico. A survey was made and it was concluded that extending the line to Chico would be a profitable venture. The extension of the north line from Earl to Chico was completed on May 1, 1962, and a rate was published on that date. In August, 1962, the State of California advised the Mobil Oil Company that its Sacramento terminal, which was adjacent to the Sacramento River, was in the path of a new freeway which was about to be constructed by the State. Negotiations, under the threat of eminent domain, were entered into between Mobil and the State contemplating acquisition of Mobil's Sacramento terminal for freeway purposes. The terminal was sold to the State, under

4/ Pipe Lines also has a service connection with the Time Oil Company's facilities in Stockton because of its Air Force contract. The Time Oil Company's facilities are an Air Force Strategic Storage depot. As of the date of hearing Pipe Lines had given no commercial service to Time Oil Company.

threat of eminent domain, in November 1962. After being apprised of the State's intention to acquire its terminal, Mobile sought to acquire other waterfront property, but Mobil abandoned these plans because it considered the cost of river frontage in Sacramento to be too high. In September 1962 Mobil approached Pipe Lines and inquired about commercial service at Bradshaw Road. Mobil and Pipe Lines entered into an agreement whereby Pipe Lines agreed to construct storage facilities for Mobil at Bradshaw Road, and Mobil was given an option to purchase these storage facilities and land upon which to erect office facilities. The subsequent events dealing with the Bradshaw rate have heretofore been detailed.

Before considering the specifics of the rates here under attack, certain preliminary matters must be noted.

At the hearing, the barge lines took the position that the so-called "terminaling" charges were part of the rates charged by Pipe Lines; that the Commission should receive evidence about these terminaling charges; that although the terminaling charges should not be considered in considering the reasonableness of the rates here involved, they should be considered, in the event of a decision favorable to the barge lines, to prevent circumvention of such decision. Pipe Lines contends that terminaling is warehousing; that Public Utilities Code Section 239(a) exempts from Commission regulation those engaged in storing, loading or unloading liquid petroleum commodities in bulk; that in Case No. 5486 (The River Lines, Inc. v. Thomas Crowley et al.) two of the barge lines (River Lines and Harbor) took the position that the 1955 amendment to Section 239 (which added the bulk petroleum exception) indicated the Legislature's intent to exclude the Commission from regulating the storage

of liquid petroleum in bulk;[5/] and that the record indicates terminaling is not an inherent part of the transportation of petroleum through the pipeline.

The presiding Examiner refused to admit in evidence testimoney relating to the rates charged for terminaling, although he did receive evidence, testimony and exhibits dealing with Pipe Lines' terminaling arrangements and the nature of the facilities in existence. The Examiner ruled correctly on these matters. The evidence respecting terminaling arrangements indicates that the use of terminaling facilities is not a requisite for service by Pipe Lines. Pipe Lines' customer at Stockton does not use any terminaling facilities. At Bradshaw Road, Mobil presently uses terminaling facilities, but it has an option to purchase these facilities. If the option is exercised, Mobil will not be using terminaling at Bradshaw Road. At Chico, Pipe Lines has a "tank farm" where the terminaling is accomplished. The pipeline rate to Chico is calculated to the manifold piping at Pipe Lines' terminal. The terminaling charge is for storage, withdrawal from storage, metering and loading into tank trucks. The Examiner's exclusion of evidence dealing with terminaling rates was correct without giving any consideration to the meaning of Section 239(a). As indicated, the barge lines do not contend that any of the terminaling charges should be included in determining the reasonableness of the pipeline transportation rates. Rather, introduction of evidence about the terminaling rates was sought on the ground that the barge lines would prevail, and, if this were so, Pipe Lines would lower its terminaling rates to defeat the Commission's order. The position of the barge lines rests upon the premise that Pipe Lines would, in the future, commit an illegal act. (Public Utilities Code § 2106 and 2110.) It is a fundamental

5/ While River Lines and Harbor construed the amendment to Section 239 similarly, River Lines took the position that the 1955 amendment was unconstitutional. Case No. 5486 was dismissed without prejudice at the complainant's request.

presumption of law "That a person is innocent of crime or wrong" until the contrary is established. (Code Civ. Proc. § 1963(1).) The evidence relating to terminaling charges was not relevant to these proceedings and was properly excluded.

The barge lines also contend that the loss allowance charged by Pipe Lines should not be included in determining the reasonableness of the rates here under consideration. Item 70 of each tariff here involved (Local Pipe Line Tariff 1-I and Local Pipe Line Tariff 6-A) prescribes a loss allowance in favor of Pipe Lines. The loss allowance is mandatory. It provides that a deduction of one-quarter of one percent in the case of traffic moving to Stockton and Bradshaw Road, and one-half of one percent, in the case of traffic moving to Chico, be made from the corrected temperature volume of oil received for transportation at the station of origin. Loss allowance provisions are common to pipeline tariffs throughout the United States. In practice, however, Pipe Lines does not usually experience a loss of product which is as great as the one-quarter or one-half of one percent loss allowance reduction. Thus when an extra product is delivered to a shipper, Pipe Lines collects from the shipper the value of the product. Shippers are billed monthly for overages. The value of the excess products delivered is obtained from Platts' Oilgram, the official price list of the oil industry. The gross revenue from the loss allowance tariff provisions amounts to 1.3 cents per barrel on movements to Stockton and Bradshaw Road, and 2.4 cents per barrel on movements to Chico. The actual average product loss experience for commercial traffic on the north line is 0.5 cents per barrel. The loss allowance provisions produce net revenues to Pipe Lines.

The barge lines contend that since the actual amount received by Pipe Lines from the loss allowance fluctuates with actual loss experience and market prices it should not be considered as part

of the rate charged by Pipe Lines. There is no merit in this contention. While the amount realized from the loss allowance may vary among shipments, it applies to every shipper and every shipment. The loss allowance establishes that for every barrel tendered only .9975 of a barrel is required to be delivered to Stockton and Bradshaw Road and .9950 of a barrel to Chico. The loss allowance is clearly a part of Pipe Lines' transportation charge structure. It is a part of the rate charged by Pipe Lines.[6/]

The rates per barrel here involved, not including the loss allowance, are as follows:

Chico, 25 cents; Stockton, 8.5 cents and Bradshaw Road 10.5 cents. Pipe Lines introduced evidence to indicate that the Chico rate was established on a basis which would maximize its net revenues and it was formulated on a "cut and try" basis where projected volumes at various rates were obtained from certain oil companies. Pipe Lines presented other evidence which indicates that in the Stockton and Bradshaw rates the local barge rate served as the floor and ceiling for the pipeline rate. It was, in Pipe Lines' opinion, a ceiling because the competitors of the prospective pipeline shipper had a barge rate available to them to move their products into the same area, and Pipe Lines could not exceed the barge rates and keep its shipper in competition with the shipper's competitors. It was also Pipe Lines' opinion that the barge rates served as a floor, because if the Stockton and Bradshaw rates went below the amount of the barge rates it might break down the rate structure to more distant points such as Reno and Chico.

6/ The Commission notes that the record discloses River Lines has a loss allowance provision as Item 65 of its Local Freight Tariff 3-A.

Pipe Lines introduced an exhibit comparing the rates under consideration with other local and joint line rates. The comparison is as follows:

SOUTHERN PACIFIC PIPE LINES, INC.

Comparison of Rates to Stockton, Bradshaw Road, and Chico With Other Local and Joint-Line Rates as Shown

From	To	Pipe Line Miles	Rate-Cents Per Barrel
Richmond, Calif.	Stockton, Calif.	66.5	8.5
Concord, Calif.	Stockton, Calif.	44.2	8.5
Average Mileage from Richmond-Concord Group To Stockton		55.3	8.5
Watson, Calif.	Colton, Calif.	61.6	7.5
Norwalk, Calif.	Colton, Calif.	49.4	7.5
Average Mileage from Watson-Norwalk Group To Colton		55.5	7.5
Portland, Ore.	Albany, Ore.	69.8	8.5
Richmond, Calif.	Bradshaw Road, Calif.	110.2	10.5
Concord, Calif.	Bradshaw Road, Calif.	87.9	10.5
Average Mileage from Richmond-Concord Group To Bradshaw Road		99.1	10.5
Norwalk, Calif.	Mission Valley, Calif.	110.0	12.0*
Watson, Calif.	Mission Valley, Calif.	122.2	12.0*
Norwalk, Calif.	San Diego, Calif.	118.0	12.0*
Watson, Calif.	San Diego, Calif.	130.2	12.0*
Average Mileage from Watson-Norwalk Group To Mission Valley-San Diego Group		120.1	12.0*
Richmond, Calif.	Chico, Calif.	204.8	25.0
Concord, Calif.	Chico, Calif.	182.5	25.0
Average Mileage from Richmond-Concord Group To Chico		193.6	25.0
Watson, Calif.	Niland, Calif.	191.1	26.0
Watson, Calif.	Barstow, Calif.	148.1	17.0*
Norwalk, Calif.	Barstow, Calif.	135.9	17.0*
Average Mileage from Watson-Norwalk Group To Barstow		142.0	17.0*

* Joint-line rates

Pipe Lines contends that this tabulation indicates that the Chico, Stockton and Bradshaw rates correspond closely to other local rates.

Pipe Lines takes the position that the reasonableness of its rates should be determined on the basis of its out-of-pocket costs for the transportation. Witnesses called on behalf of Pipe Lines expressed the opinion that the out-of-pocket costs should be determinitive because once fixed costs are incurred their aggregate burden cannot be affected by decisions dealing with how much to transport, and that production and price decisions are made with the object of making the excess of gross revenues over variable expenses as large as possible, thus yielding the greatest profit and greatest contribution to fixed expenses. While maintaining that out-of-pocket costs were determinitive, Pipe Lines introduced two extensive exhibits with supporting testimony; one exhibit dealt with out-of-pocket costs and the other with fully distributed costs. Pipe Lines, in its brief, tabulated certain information from these exhibits, and the tabulations are as follows:

SOUTHERN PACIFIC PIPE LINES, INC.

Revenues and Estimated Out-of-Pocket Expenses
For Handling Refined Petroleum Products
(Cents per Barrel)

Origin Station	Richmond			Concord		
Destination Station	Stockton	Bradshaw Road	Chico	Stockton	Bradshaw Road	Chico
Transportation Charge	8.5	10.5	25.0	8.5	10.5	25.0
Loss Allowance Revenue	1.3	1.3	2.4	1.3	1.3	2.4
Gross Revenue........	9.8	11.8	27.4	9.8	11.8	27.4
Estimated Out-of-pocket Transportation Expense	3.5	3.8	6.4	1.7	*	4.6
Product Loss	.5	.5	.4	.5	*	.4
Total Out-of-Pocket Expenses..............	4.0	4.3	6.8	2.2	*	5.0
Ratio of Out-of-Pocket Expenses to Gross Revenue..............	40.8%	36.4%	24.8%	22.5%	*	18.2%

* Bradshaw Road traffic was assumed to originate only at Richmond. To the extent it originated at Concord, costs would be reduced.

SOUTHERN PACIFIC PIPE LINES, INC.

Revenues and Fully Distributed Expenses for Handling Refined Petroleum Products Originating at Richmond and Concord, Calif. and Terminating at Stockton, Bradshaw Road and Chico, Calif.
(Cents per Barrel)

Origin	Richmond			Concord		
Destination	Stockton	Bradshaw Road	Chico	Stockton	Bradshaw Road	Chico
Transportation Rate	8.5	10.5	25.0	8.5	10.5	25.0
Loss Allowance Revenue	1.3	1.3	2.4	1.3	1.3	2.4
Gross Revenue........	9.8	11.8	27.4	9.8	11.8	27.4
Estimated Fully Distributed Transportation Expenses.............	8.5	10.4	19.1	4.5	*	15.0
Product Loss...........	.5	.5	.4	.5	*	.4
Total Fully Distributed Expenses.............	9.0	10.9	19.5	5.0	*	15.4
Ratio of Fully Distributed Expenses to Gross Revenue..............	92%	92%	71%	51%	*	56%

* Bradshaw Road traffic was assumed to originate only at Richmond. To the extent traffic originated at Concord, costs will be lower.

Pipe Lines contends that these tabulations show that the challenged rates are compensatory by either standard.

The barge lines take the position that the reasonableness of the rates should not be determined by out-of-pocket costs but by fully distributed costs. They try to cast doubt on some of the data supplied by Pipe Lines. For example, they contend that the amounts spent by Pipe Lines for legal and accounting services are bargains and in reality represent a subsidy by Southern Pacific. It is argued that greater sums should be used, but no evidence was introduced by the barge lines to support this position.

The barge lines contend that irrespective of the reasonableness of the overall level of the Chico, Stockton and Bradshaw rates, there is a lack of reasonable relationship between the rates. In support of this contention, the barge lines, in their consolidated brief, prepared an illustrative table which is as follows:

Pipe Line Segments	Mileage Weighted by Origin Ex. 39, pp. 2, 4-7	Rates (Cents)	Rate Per Mile (Cents)	Added Mileage from Last point Ex. 39, pp. pp. 4-7	Added Rate (Cents)	Rate Per Added Mile (Cents)
Richmond/Concord To Stockton	59.6	8.5	.142	--	--	--
Richmond/Concord To Bradshaw	110.2	10.5	.095	43.7	2.00	.045
Richmond/Concord To Chico	193.8	25.00	.129	83.6	14.5	.173

The barge lines also contend that Pipe Lines' military rates to Mather, McClellan and Beale Air Force bases are considerably in excess of the commercial rates here in question which shows that the commercial rates are unreasonable. Pipe Lines argues that its military contract rates should not be used as a basis of comparison for the commercial rates because there is a great dissimilarity in the transportation circumstances, conditions, and services provided. Pipe Lines introduced evidence to show that the military business

involves a high risk of sudden termination, because there is no assurance that the military bases involved will be kept in operation by the Defense Department, or, if kept in operation will continue to use any minimum amount of fuel; that the military contract rates include a charge for terminaling; that the military contracts have no loss allowance provisions and require higher quality product delivery; that Pipe Lines is required to perform quality control tests on fuel delivered under military contracts and has had to establish facilities therefor; and that the military products are delivered to the ultimate point of consumption.

The barge lines further contend that Pipe Lines furnishes gathering lines to shippers at origin points to enable them to get their products into the pipeline and that no charges are made to the shippers for these facilities. Pipe Lines responds that it has laid a system of gathering lines, ranging in size from one to thirteen miles, to connect all of the Bay Area refineries to its Richmond and Concord pump stations; that its rates are calculated from the pump station to point of destination; that the rates are the same from Richmond and Concord to all destination points; and that the effect of the gathering lines is to provide equality of rate treatment for all the refineries in the area. Pipe Lines argues that the barge lines, in their tariffs, have grouped all of the Bay Area refineries and apply a blanket rate from these refineries to Stockton and Sacramento, even though the loading and transit time between different refineries and Sacramento may vary as much as eight hours. Pipe Lines also argues that the Commission should take official notice of the fact that in Minimum Rate Tariff No. 6 (Transportation of Petroleum Products in bulk in tank truck, etc.) groupings are made using a mileage basing point as the basis for computing the rate, and that Group 2 in Item 42 covers the territory encompassed by the gathering lines.

In considering the various contentions of the parties in the present matters, it is not necessary to dwell at length on whether the legal yardstick for determining the reasonablness of the rates involved is that of out-of-pocket costs or fully distributed costs. The evidence establishes that the challenged rates are reasonable on either basis. The record discloses that Pipe Lines had a rate of return in 1962 of 9.6 percent on net investment, after deducting taxes, interest and charges. In considering the out-of-pocket expenses relating to the Chico, Stockton and Bradshaw rates, the record discloses that these rates produce an excess of revenue over out-of-pocket costs ranging from 59 to 82 percent of the rates. In the case where fully distributed costs are applied to the Chico, Stockton and Bradshaw rates, the record discloses that these rates yield an excess in revenue over fully distributed costs ranging from 8 to 49 percent.

The argument that, while each of the challenged rates may be reasonable there is an unreasonable relationship among them, is not persuasive. The barge lines, in making this argument, have not considered the question of long- and short-haul discrimination and the need for Pipe Lines to protect its most distant rates. In addition, the barge lines have excluded the question of competitive rates at the points here involved. In addition to the deficiencies in the arguments proffered by the barge lines on this point, the record clearly indicates that the rate per barrel per pipeline mile of the rates herein challenged is comparable to other similar local pipeline rates.

The Commission is of the opinion and finds that the services performed by Pipe Lines in connection with its military contracts are not comparable to the services furnished under Pipe Lines' commercial rates, and that comparisons between the two rates are not instructive. The Commission also finds no objection to the providing of gathering lines in order to provide a blanket rate for the movement of petroleum products from the Bay Area refining points.

No other points require discussion.

The Commission makes the following findings of fact and conclusions of law.

Findings of Fact

1. Pipe Lines is not, with respect to the facts presented in these cases, a "competing land carrier" within the meaning of Section 727 of the Public Utilities Code.

2. Under the facts presented in these consolidated cases, application of the doctrine of alter ego is not warranted, as between Pipe Lines and Southern Pacific.

3. The evidence fails to establish that River Lines, Freese and Harbor are entitled to relief under Section 727 of the Public Utilities Code.

4. The evidence fails to establish that Pipe Lines' rate (in its Tariff 1-I) from Bay Area refining points to Chico is unjust, unreasonable or insufficient.

5. The evidence fails to establish that Pipe Lines' rate (in its Tariff 6-A) from Bay Area refining points to Stockton is unjust, unreasonable or insufficient.

6. The evidence fails to establish that Pipe Lines' rate (in its Tariff 6-A) from Bay Area refining points to Bradshaw Road is unjust, unreasonable or insufficient.

7. The evidence fails to establish that River Lines, Freese and Harbor are entitled to any relief in Cases Nos. 7238, 7239, 7241 and 7539.

8. The assailed rates are neither unreasonable, unjust nor insufficient.

Conclusions of Law

1. An order should be entered denying River Lines any relief in Case No. 7238.

2. An order should be entered denying Freese any relief in Case No. 7239.

3. An order should be entered denying Harbor any relief in Case No. 7241.

4. An order should be entered discontinuing the investigation in Case No. 7539.

ORDER

IT IS ORDERED that:

1. The River Lines, Inc., complainant in Case No. 7238, is not entitled to any relief therein, and The River Lines, Inc. is denied any relief in Case No. 7238.

2. The J. C. Freese Company, Inc., complainant in Case No. 7239, is not entitled to any relief therein, and J. C. Freese Company,

Inc. is denied any relief in Case No. 7239.

3. The Harbor Tug and Barge Company, complainant in Case No. 7241, is not entitled to any relief therein, and The Harbor Tug and Barge Company is denied any relief in Case No. 7241.

4. The investigation in Case No. 7539 is hereby discontinued.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 21st day of JANUARY, 1964.

William M. Bennett
President

Everett C. McKeage

Commissioners

We concur in the findings and order. We also concur in the opinion except for that portion which concludes that Southern Pacific Pipe Lines is not a "competing land carrier" within the meaning of Section 727 of the Public Utilities Code. We deem it unnecessary to determine whether or not Southern Pacific Pipe Lines is a competing land carrier; Section 727, by its own terms, is applicable only to proceedings in which the Commission is called upon to establish "rates for water carriers," and this is not such a proceeding. Accordingly, upon a somewhat different view of Section 727 from that adopted in the opinion of Commissioners McKeage and Bennett, we have reached the same legal conclusion, namely, that that section is not applicable here.

George G. Grover

Frederick B. Holoboff

Commissioners

Case No. 7238 and Related Matters

COMMISSIONER PETER E. MITCHELL dissenting:

The proposed decision is irreconcilable with the policy of this State expressed in the first portion of Section 727: "It is the policy of this State that the use of all waterways, ports, and harbors of this State shall be encouraged....".

Obviously, this decision would discourage the use of our waterways, harbors and ports. It will virtually result in the elimination of all barge traffic in petroleum products and likely, in the extinction of the complainants, in business.

In the light of Article XII, Section 17 of the Constitution, which declares all transportation companies to be common carriers, and the Supreme Court decisions in People v. Western Air Lines,[1/] and the Richfield Oil Corporation v. P.U.C.,[2/] plus the admission of Southern Pacific Pipe Lines, Inc., that it is a common carrier, how can we maintain that it is not a common carrier? The Supreme Court has held that the statutory definition of common carrier (Section 211) which states it "includes" the corporations enumerated is not limited to the inclusions. (People v. Western Air Lines, supra.)

It would seem more logical to include Pipe Lines, Inc., as a common carrier and, again, just as cogent, since it operates on land, to find that it is a land carrier. This appears consistent and we are not torturing definitions all over the page in order to exclude Pipe Lines, Inc.

If we do not find Pipe Lines, Inc., to be a land carrier, certainly its founder and controller, Southern Pacific Company, is a land carrier. (The proposed decision omits mention of Southern

---

1/ 42 Cal 2d 621
2/ 54 Cal 2d 419

Pacific Company ownership of the stock of Pipe Lines, Inc.; that six of its seven directors are employees of Southern Pacific; that the seventh is a former 50-year employee of Southern Pacific, and other facts which show a regulative intertie.) Reviewing the history of the Southern Pacific Company and the barge lines in the petroleum transportation field in California, there are compelling reasons why we should apply the alter ego doctrine, if need be, and find Southern Pacific Company to be a land carrier and within Section 727.

> "Where a corporation is used by an individual or individuals, or by another corporation, to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, a court may disregard the corporate entity and treat the acts as if they were done by the individuals themselves or by the controlling corporation."[3/]

By the majority decision, the Southern Pacific Company, intentionally or not, by means of its subsidiary, Pipe Lines, Inc., is circumventing Section 727. The activities of the Southern Pacific Company through common ownership and operation as a rail carrier, trucking company, and pipe line company, which, by its latest mode nullifies barge competition in petroleum transportation, are inequitable on their face, and the corporate veil should be pierced.

The latest case before the Commission which discusses Section 727 is Case No. 6147, Decision No. 58664, dated June 23, 1959. Inasmuch as it is unreported and only referred to in passing in the proposed decision, I have attached a copy to my dissent. In

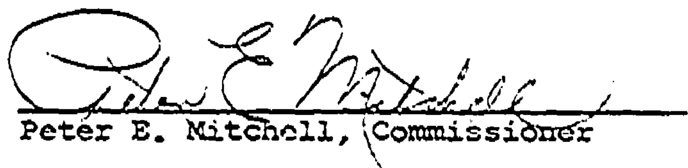
---

3/ Witkin, Summary of California Law 2303

that decision, the Commission stated that we may prohibit a land carrier from reducing its rates where the water carrier could not fairly compete for the affected business. This is the instant situation.

The record shows that the complainants were established in hauling petroleum products long before Pipe Lines, Inc., completed its pipeline and moved into the field. There should be, and there is, room in the California economy, as there is a need, for both methods of transportation. A function of this Commission is to promote freedom of movement by carriers not to impede it. Were every decision predicated upon only the lowest rate possible for each carrier, there soon would be no minimum rates, no competitive carriers and subsequently - higher rates. We should pause and take a perspicacious look before we disable any business enterprise by rate-cutting. As with the Commission's two-fuel economy, we should attempt to retain both the pipelines and the barges for transportation and allow the latter to assist in the development of our waterways, harbors and ports. There is no need to dwell on the millions of dollars already spent by the Federal and our State governments on preparing California waterways and ports for shipping.

I would suggest we consider the establishment of a reasonable rate under which the complainants and the defendants may operate, both participating in the growth of California.



Peter E. Mitchell, Commissioner

Attachment

ds

Decision No. 58664

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the matter of the investigation and suspension by the Commission on its own motion of reduced rates published in Pacific Southcoast Freight Bureau, Agent, Tariff No. 252-D, M. A. Nelson, Tariff Publishing Officer, for the transportation of petroleum and petroleum products from and to certain California points.	Case No. 6147

Charles W. Burkett, Jr., and John MacDonald Smith, for Southern Pacific Company, respondent.
Bertram S. Silver & Edward M. Berol, for Western Motor Tariff Bureau, Inc.; Gerald H. Trautman, for San Francisco Towboat Operators Association, Crowley Launch & Tugboat Company, Bay Cities Transportation Company, The Harbor Tug & Barge Company, LeBoeuf Dougherty Construction Company, The River Lines, Inc., United Towing Company, J. C. Freese Company and San Francisco Towing Company; C. J. Simpson and Raoul C. Vincilione, for Inland Boatmen's Union of the Pacific, protestants.
Eugene L. Gartland, for Marine Engineers Beneficial Association #97, Inc.; E. C. Hurley and J. M. Connors, for Tidewater Oil Company; A. D. Carleton and M. E. Neuberger, for Standard Oil Company of California; W. Y. Bell, for A. E. Patton of Richfield Oil Corporation; interested parties.

O P I N I O N

By order dated July 8, 1958, the Commission suspended until November 13, 1958, reduced carload rates for the transportation of refined petroleum products in tank cars between San Francisco Bay area refineries, on the one hand, and points on the lines of the Southern Pacific Company located north of Redding, on the other hand.[1/] This action was taken following receipt of protests from the Western Motor Tariff Bureau, Inc., the Inland Boatmen's Union of the Pacific, and

1/ The suspension was extended to May 13, 1959 by order dated November 3, 1958.

from the San Francisco Towboat Operators Association and its members. These protests alleged, among other things, that the proposed reduced rates are unjust and unreasonable in violation of Section 451 of the Public Utilities Code, are below the costs of competing carriers or of other means of transportation in violation of Section 452 of the Code, are unduly preferential and prejudicial in violation of Section 453 of the Code, and are otherwise unlawful within the meaning of Sections 728 and 731 of the Code.

Public hearings were held before Examiner William E. Turpen at San Francisco on October 1, 2, 3, 8 and 9, 1958. The filing of concurrent briefs, due 20 days after receipt of the transcript, was authorized. The matter was submitted upon filing of the briefs on November 28, 1958.

The general freight traffic manager of the Southern Pacific Company testified on behalf of his company as to the considerations that led to the publication of the reduced rates. He stated that since 1930 Southern Pacific Company has experienced a marked decline in the number of tank cars of refined petroleum products shipped intrastate over its lines despite an enormous increase in consumption of petroleum products in the State over the same period of time. Table I, below, shows the number of tank cars moved and the revenue received therefrom by Southern Pacific Company for representative years, as given by the witness:

TABLE I

REFINED PETROLEUM PRODUCTS TRANSPORTED BY SOUTHERN PACIFIC COMPANY

Year	Cars	Freight Revenue
1930	35,000	$3,135,428
1939	14,353	993,258
1940	13,156	922,110
1957	6,654	617,724

The witness explained that the railroads came to the conclusion that it would have to be in the longer-haul traffic that they could expect to be able to recover traffic. He said that they felt in the shorter hauls the convenience of truck service and relative cost levels between the two types of transportation presented a disadvantage to the rail lines which could not be overcome. As a result, according to the witness, the railroads decided to try to attract tonnage by reducing the rates applicable from the San Francisco Bay area oil refineries to the more distant points in northern California. He said that, following a study, it was determined to publish rates on the level of those established as minimum rates for common carriers by railroad by Decision No. 32608, in Cases Nos. 4246 and 4434 (1939). The reduced rates were also published to apply at certain intermediate points as maximum. The witness stated that these rates would provide a substantial return over out-of-pocket costs. The witness also said that the reduction in rates would amount to about one cent per gallon of gasoline.

A transportation analyst of Southern Pacific's Bureau of Transportation Research introduced in evidence a series of exhibits developing the out-of-pocket costs of providing the service.[2] Unit costs were first developed for various factors, such as maintenance of way and structures (not including depreciation), locomotive costs, both on the basis of mileage and fuel usage, and similar items. Most of these unit costs were developed on a system-wide average basis, and in many instances involve allocations from total expenses. From these unit costs as a basis, gross-ton-mile costs for through freight trains and local freight trains were developed for each engine district. In the development of the gross-ton-mile costs, specific costs were developed for the particular district involved, wherever such data could be secured. The use of system average costs included a

2/ "Out-of-pocket" costs was defined by the witness as those costs which vary with changes in the traffic handled.

weighting so as to give effect to the particular conditions existing in the district involved. Costs per carload were then developed by adding the various costs per thousand gross ton miles for each district traversed from point of origin to destination, and adding costs for switching, terminal costs, and loss and damage. When divided by the average weight of a tank car of refined petroleum products, the out-of-pocket cost per 100 pounds was obtained.

A comparison of the present rates and reduced rates, along with the costs developed by Southern Pacific, is shown in Table II:

TABLE II

PRESENT AND REDUCED RATES AND COSTS
(In Cents Per 100 Lbs.)

Destination	Present Rate	Reduced Rate	Cost
Dunsmuir	41½	34	19
Mount Shasta	44½	35	19
McCloud	47½	36	
Macdoel	51	39	
Dorris	55	39	24
Weed	47½	36	20
Montague	51	37	22
Yreka	51	37	

Respondent also pointed out that the present interstate rate to Medford, Oregon, is 41½ cents per 100 pounds, and that a tank car of gasoline destined from the Bay Area refineries to Medford moves along the same line of railroad through Montague (where the present rate is 51 cents) and a further distance of 67 miles.

Counsel for protestant Western Motor Tariff Bureau, Inc., took issue with the railroad's cost study in that it did not include provision for such items as overhead expense, ad valorem taxes, income taxes, passenger deficits, less-than-carload deficits, fixed charges, return on investment or dividends. It is clear, however, that the items enumerated by protestant are not a necessary part of the out-of-pocket costs, as used in a proceeding of this kind.

Before discussing the evidence of the various protestants, it will be best to dispose of an issue raised at the initial hearing. One of the protestants moved that the tariff filing here in issue be revoked and that this case then be dismissed. The other protestants joined in the motion. The grounds stated for this motion are that the reduced rates involved are lower than the minimum rates established by the Commission and that, therefore, respondent should have sought authority from the Commission prior to publication of the rates. Protestant stated that respondent followed such procedure in 1953 when it filed Application No. 34857 in which authority was sought to publish reduced rates (although higher than those involved in this proceeding) between some of the same points.[3/] Respondent states that at the time Application No. 34857 was filed, it was under the misapprehension that the minimum rates originally established in Decision No. 32608 for railroad transportation had been amended by subsequent decisions and that such authority was necessary. Upon subsequent examination of the various decisions of the Commission, respondent came to the conclusion that the minimum rates prescribed for the railroads in Decision No. 32608 are still in effect.

Decision No. 32608 established minimum rates applicable to common carriers by railroad in one appendix and minimum rates applicable to highway carriers in a separate appendix. Careful examination of subsequent decisions amending Decision No. 32608 shows that although the highway carrier scale has been amended many times, the railroad scale has not been changed. Therefore, the minimum rates set forth in Decision No. 32608 applicable to the railroads are still in effect. Accordingly, as the reduced rates filed by the railroads are not less than the minimum rates, the procedure followed was proper. Protestants' motion will be denied.

3/ Although hearings were held in Application No. 34857, and the matter submitted, a decision has not yet been issued.

Protestants also raised the point that the cost study introduced by Southern Pacific in Application No. 34857 showed costs slightly higher per 100 pounds than shown in the cost study introduced in this proceeding.[4/] Respondent argued that the two studies were made independently and that many conditions have changed during the five year interval between the two studies. Among the changed conditions cited were the exclusive use of diesel power now compared to steam power at that time, increases in the length of trains, and an increase in average weight in loading tank cars. Even if we were to accept the prior cost study, the rates involved in this proceeding are considerably above the level of costs shown in the 1953 study.

The common carriers by water operating on San Francisco Bay and its tributaries were some of the protestants in this proceeding.[5/] At the present time they barge some petroleum products from the different refineries to Sacramento and Colusa, from which points the petroleum products are transported to other destinations, including points involved in this proceeding. These protestants were fearful that the reduced rail rates would result in a substantial loss of their business. They presented evidence to show that their costs of operation would prevent them from reducing their present rates. The record does not show what proportion of the total petroleum products transported by the protestant common carriers by water is ultimately destined to the territory that would be affected by rates here involved.

4/ The previous study, Exhibit No. 4 in Application No. 34857, was incorporated by reference in the record in this proceeding.

5/ This group of protestants included the following: San Francisco Towboat Operators Association and its members, Crowley Launch and Tugboat Co., Bay Cities Transportation Company, The Harbor Tug and Barge Company, LeBoeuf Dougherty Construction Company, The River Lines, Inc., United Towing Co., J. C. Freese Company and San Francisco Towing Company.

Representatives of the unions of the employees of the barge lines also protested the reduced rates on the grounds that the resultant loss of business to the barge lines would deprive many of their members of work. Respondent moved that part of the testimony of one of the two union witnesses, where he stated that about 30 of the total of 60 employees would be thrown out of work, be stricken from the record as no foundation had been laid. As stated above, the evidence does not show how much traffic would be lost to the barge lines. The motion to strike will be granted.

Western Motor Tariff Bureau, Inc., represented highway common carriers and petroleum irregular route carriers operating in the territory here involved. This protestant contended that the highway carriers would be forced to meet the rail rates and consequently would perform the transportation at a loss. Several carriers presented operating result statements and studies showing hauls made into the territory involved. A careful study of the exhibits and testimony by the highway carrier witnesses indicates, however, that only a very minor part of their revenues are derived from the transportation of refined petroleum products into the area here involved, even to off-rail points.

A witness for this protestant introduced in evidence a study he had made of average truck costs for the transportation of petroleum products between the points here involved. This study showed that the cost of tank truck transportation as developed by the witness was considerably higher than the reduced rail rates. The cost and operating evidence was introduced by protestants in support of their position that Section 452 of the Public Utilities Code prohibits a common carrier from establishing a lower than a maximum reasonable rate which is less than the charges of competing carriers or the cost of transportation which might be incurred through other means of

transportation, except upon such showing as is required by the Commission and a finding by it that the rate is justified by transportation conditions.

A tariff expert testified for protestants that rates to points located off-rail would also be affected, as a lower combination rate would then be available for the shipper to use. This witness introduced exhibits comparing the reduced rates with refined petroleum rates between other points of comparable distance, both intrastate and interstate. However, the witness did not show that transportation and other conditions are the same for the comparisons he made and for the rates here in question. This witness also compared the proposed rates to those of black oils. The record does not support his contention that the black oil rates should always be lower than the rates for refined petroleum products.

Many other points were brought up by the various protestants. It would unduly lengthen this opinion to discuss them all in detail. All such points have been considered and carefully weighed in reaching our decision.

The first question to be settled is whether or not the reduced rates here in issue are unreasonable. It has long been recognized that there is a zone of reasonableness within which common carriers may exercise discretion in establishing their rates. The lower limits of that zone are fixed, generally, by the point at which the rates would fail to contribute revenue above the out-of-pocket cost of performing the service.[6] Table II, supra, shows that the reduced rates are above the costs developed by the Southern Pacific by a considerable margin. The question thus resolves itself into the acceptability of the railroad's cost estimates.

It may well be that some adjustments in the estimated costs might be justified. However, the Commission is of the opinion that

6/ See Investigation of Reduced Rates on Cement, 50 Cal. P.U.C. 662, 632 (1950).

the magnitude of such adjustments would not be sufficient to change our conclusion that the reduced rates would still be above the out-of-pocket costs of transporting petroleum by a comfortable margin. The Commission therefore finds and concludes that the rates under investigation in this proceeding are above a minimum reasonable level, and therefore are not unreasonable nor unjust.

The next point at issue is the contention of protestants that under Section 452 of the Public Utilities Code, the reduced railroad rates are unlawful because they are below the cost of transportation by other means of transportation. That section of the Code permits the authorization of such rates if, after a showing, the Commission finds that the rates are justified by transportation conditions. The evidence is clear that the Southern Pacific Company has lost ground in the competition for this traffic. The evidence plainly leads us to the conclusion that, under the rates in effect prior to those involved in this proceeding, the railroads have been unable to compete on an equal basis with other forms of transportation. It is also apparent that the reduced rail rates will provide the railroads an opportunity to halt the decline in traffic and probably increase the amount of its petroleum shipments. As the reduced rates are clearly above the out-of-pocket costs, no burden will fall on other traffic. In fact, any increase in tonnage will help contribute towards the rail overhead burden. The public may benefit from the lower cost of shipping gasoline.

In regard to assertion that the trucking costs are higher than the reduced rail rates, we have said before:

> "Although the statutory policy of this state is clearly against the continuation of destructive rate cutting practices, it is plainly not intended that this Commission should prevent the railroads from according the public the benefit of reduced rates when they have shown that they can operate

> more economically than other carriers; that the Commission should base rail rates upon truck costs; or that it should fix minimum rates for all carriers based upon the costs of the highest cost agency of transportation. Neither truck nor rail carriers are entitled to have an 'umbrella' held over them if it appears that their services do not fill an essential public need." (Re Alcoholic Liquors, 43, CRC 25, 36) 7/

Shippers and receivers usually can use either rail or truck service. Trucks are often preferred because of convenience, speed of transit, or other reasons. When the truck and rail rates are the same, these factors favor the truck. If the truck service is considered more desirable, the trucker may charge, and the shipper may pay, a higher rate. The highway carrier is not required to charge the same rates as the railroad. We therefore find and conclude that the reduced rail rates are justified by transportation conditions.

It was the contention of the barge lines that Section 727 of the Code prohibits the reduced rates proposed herein. 8/ This section of the Code which was enacted in 1933 and amended in 1939, has never been interpreted by the courts. There are no legislative materials to assist the Commission in construing this statute. This section is sui generis as water carriers are specifically excluded from the provisions of Section 726, which is the general policy declaration on rate regulation by the Legislature.

7/ See also Southern Pacific Co. v Railroad Commission, 13 Cal. 2d 89, 103.

8/ Section 727 provides:

> "It is the policy of the State that the use of all waterways, ports and harbors of this State shall be encouraged, and to that end the commission is directed in the establishment of rates for water carriers applying to business moving between points within this State to fix those rates at such a differential under the rates of competing land carriers that the water carriers shall be able fairly to compete for such business. In fixing the rates there shall be taken into consideration quality and regularity of service and class and speed of vessels. 'Competing land carriers' includes all land carriers as defined in this part, and includes a highway contract carrier and a radial highway common carrier as defined in the Highway Carriers' Act."

On its face, Section 727 is a clear mandate from the Legislature that it is in the public interest that this Commission give rate-making preference to water carriers.

It was the position of respondent that Section 727 was not applicable in a proceeding involving the rates of a land carrier and did not apply to water carriage in conjunction with the land carriage involved herein.

This section gives the Commission specific directions in the "establishment of rates for water carriers." Was it the Legislature's intent in using these words to thus narrowly circumscribe the authority of the Commission so that it would be powerless in a case where it is alleged that if the proposed rates of another carrier are allowed to go into effect, that water carriers will be unable fairly to compete. A literal interpretation of the clause above quoted would strongly suggest this, yet such an interpretation is completely incompatible with the expressed intention of the Legislature. Therefore, this Commission in carrying out the legislative mandate must imply the power to prohibit a "land carrier" from reducing its rates where the water carrier would be unable to establish a rate differential which would permit it fairly to compete for the affected business. To do otherwise would be a clear disregard of the intention of the Legislature as expressed in Section 727.

In Section 727 the Legislature directed the Commission to establish rates which would permit water carriers fairly to compete for "business moving between points within this State." What is the significance of the Legislature's choice of this particular language. If it is merely a statement of the Commission's jurisdiction, it would be superfluous. Since it is an elementary rule of statutory construction that idle acts will not be ascribed to the Legislature, it

obviously has an independent significance. The significance is this: the Legislature has not restricted the water carrier's preference only to the transportation of commodities originating or destined to points on water. If the Legislature had intended this it could have stated "business moving between on water points within this State." This the Legislature did not do, because to do so would be to deprive the water carriers of much of the value of the preference which the Legislature found to be in the public interest to give them. If it is reasonable to conclude that the Legislature intended that water carriers be extended a preference on all of their business, it necessarily follows that the Legislature was aware that other carriers would furnish ancillary services. Proprietary and for-hire land common carrier services are an integral part of a complete water carriage transportation service. It is ridiculous to suggest that the Legislature intended that water carriers be deprived of their preference because merchants bring their wares to the dock by truck and use trucks or rails to pick the goods up at dockside.

It is the Commission's conclusion that Section 727 is highly pertinent to the present proceeding. The critical question, however, is have the water carriers presented facts which would permit the Commission to conclude that the reduced rates will prohibit the water carriers from being able to fairly compete for the business?

The record in this proceeding is utterly devoid of probative evidence as to the economic impact of the proposed reduced rates on the business of the water carriers. Therefore, this Commission is unable to conclude that Section 727 prohibits the reduced rates proposed herein.

Several of the protestants objected to the same rates applying from Sacramento as from the refineries. Respondent offered to reduce the rates applicable from Sacramento to the levels prescribed in Decision No. 32608 if requested. Respondent will be expected to make such reductions promptly upon request of any shipper.

Upon careful consideration of all of the facts and circumstances of record, we hereby find and conclude that the reduced rail carload rates here involved are not unreasonable, discriminatory nor in any other respect unlawful, and that they are justified by transportation conditions. Our order of suspension will be vacated and the investigation discontinued.

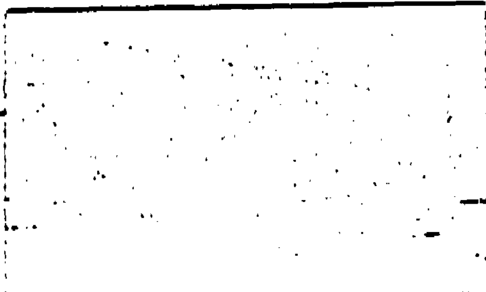
ORDER

Based upon the evidence of record and upon the findings and conclusions set forth in the preceding opinion,

IT IS ORDERED that the Order of Suspension in Case No. 6147, dated July 8, 1958, as extended by Order dated November 3, 1958, be and it is hereby vacated and set aside, and that Case No. 6147 be and it is hereby discontinued.

This order shall become effective twenty days after the date hereof.

Dated at San Francisco, California, this 23rd day of June, 1959.



President

PETER E. MITCHELL

THEODORE H. JENNER

EVERETT C. McKEAGE

Commissioners

I concur in the order but dissent as to the dicta on pages 11 and 12.

C. LYN FOX