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ORIGINAL

Decision No. 79740

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of  
ENID HARDESTY, now known as ENID  
FORTIER, an individual, doing busi-  
ness as HARDESTY TRANSPORTATION, to  
transfer, and LIVINGSTON-GRAHAM, INC.,  
a corporation, to acquire a Cement  
Carrier Certificate and Property.

Application No. 52713  
(Filed June 24, 1971)

Thomas M. Comparet, Attorney at Law,  
for applicant.  
Russell & Schureman by R. Y. Schureman,  
Attorney at Law, for L. R. Denney, Inc.,  
Leroy Harrington, dba Antelope Valley  
Trucking, George Sack, Jr., and Louis  
R. Gomez, protestants.  
Joe S. Tedesco, for T.T.T., Inc., interested  
party.

### O P I N I O N

By this application, "Enid Hardesty, now known as Enid Fortier, an individual, doing business as Hardesty Transportation," requests authority to sell and transfer her certificate of public convenience and necessity as a cement carrier and other property referred to in the application to Livingston-Graham, Inc., a corporation.

Public hearing was held before Examiner DeWolf at Los Angeles on August 25 and 26, 1971. The matter was submitted upon receipt of concurrent briefs which have been filed.

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The seller's certificate of public convenience and necessity was issued by the Public Utilities Commission of the State of California by Resolution No. 13821, Sub. No. 67, dated June 23, 1964, in Application No. 46353, (T-69,429) and authorizes the transportation of cement from any and all points of origin in California to all points and places within the Counties of Kern, Los Angeles, Orange, Riverside, San Bernardino, San Diego, Santa Barbara, and Ventura. All of said authority is proposed to be transferred for the agreed cash consideration of \$48,571.43; \$20,000.00 for the certificate and \$28,571.43 for personal property pursuant to a written agreement entered into between the parties dated June 9, 1971. The personal property is described as follows:

1. 1970 Kenworth tractor, engine number 118229, DMV license plate number Y54812.
2. 1965 Fruehauf semi trailer, number FRF268801, (pneumatic) DMV license plate number WP5639.
3. 1965 Fruehauf pull trailer, serial number FRF268901, (pneumatic) DMV license plate number WP5638.

Transferor participates in the rates set forth in Western Motor Tariff Bureau, Inc., Agent, Local Freight Tariff No. 17 (Cal. P.U.C. No. 21). It is the plan and purpose of the transferee to adopt such tariff; transferor is not a party to through routes or joint rates with any other carrier.

Applicants allege that the proposal herein made is consistent with the public interest and will promote the same for the following reasons, among others:

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1. Transferee is adequately financed and possesses the necessary experience and equipment to carry on and conduct the common carrier activities heretofore carried on by transferor.

2. There will be no adverse effect upon any other carrier, nor upon the shipping public, resulting from the transfer of the instant certificate. Transferor merely intends to retire from certificated cement common carrier activities, and transferee seeks to carry on such cement common carrier activity in the future.

3. The purchaser, Transferee, is now and will continue to be staffed by experienced and trained personnel, having full knowledge of the technicalities of the physical transportation of the commodities described in the certificate to be transferred and they have a full knowledge of the Commission's safety rules and regulations, and with respect to the other requirements of this Commission respecting for-hire transportation of cement, in bulk or in sacks.

A copy of the agreement of sale is attached to the application.

Purchaser presently is a permit carrier under file No. T-77,490, with radial and dump truck permits.

A balance sheet and income statement of the purchaser dated December 31, 1970, is attached to the application and shows total assets of \$16,703,911.00, and annual net earnings in 1969 and 1970 over \$1 million each year.

One witness testified for applicant seller and another witness testified for the buyer.

The protestants contend, among other things, that "I don't think that anyone is contending that Livingston-Graham is not operationally qualified to conduct the proposed transaction. What this goes to are the antitrust laws of this state as well as Section 453 on discrimination. So, the issues are, as far as I am concerned, No. 1, the stock ownership of Livingston-Graham and whether any cement mill owns the stock in Livingston-Graham and if so what percentage of the stock; secondly, any purchases that Livingston-Graham makes for its own account from any mills."

The protestants called four witnesses for cross-examination under Section 776 of the Evidence Code of California and these testified concerning the business operations of the applicant buyer.

The operations manager for Livingston-Graham testified that his company owns and operates a fleet of 153 transit mix trucks, 55 cement trains, has 70 mechanics, owns and operates six rock plants, 14 batch plants, serves about 500 customers, and that it is not the largest but maybe the second largest in the sand and gravel business in California. The witness testified that nine percent of the stock of Livingston-Graham is owned by American Cement Corporation and that none of the officers or employees of American Cement are on the board of directors of Livingston-Graham. The witness testified that the carriers which are called by Livingston-Graham to haul cement are selected on the basis of availability and that several named independents are used to haul cement, and that almost every intermediate ready-mix company is a cement hauler and a customer of Livingston-Graham. The witness testified that his company's policy to the public is, first come, first served.

The head dispatcher for Livingston-Graham testified that he dispatches about 35 to 40 loads of cement a day and that he calls about 4 or 5 for-hire carriers to make deliveries of cement and that most of the rest is handled by carriers who are customers of Livingston-Graham.

The marketing manager for Riverside Division of American Cement Corporation, testified that "We sell to the ready-mix industry, to the material dealers, to masonry material dealers, to concrete block manufacturers such as block manufacturers or concrete pipe producers, and in certain cases to large direct sales jobs such as freeways, dams, etc." There are five other major cement producers; California Portland Cement Company, Southwestern (sometimes known as Victor), Kaiser, Pacific Western, and Monolith. The Northern California companies are: Ideal Cement Company, Calaveras Cement Company, and Lone Star Cement Company. This witness testified that his company tries to help its customers who have hauling equipment, wherever it can, to keep their equipment busy.

The traffic manager of Riverside Division of American Cement Corporation, testified that he oversees the routing of the loads of cement. These are timed deliveries; he has received no complaints from independent carriers about the cement hauling, and at peak load times there is an equipment shortage.

Four witnesses testified that they are engaged in the for-hire trucking business and that each holds a cement certificate covering up to 15 counties in California and engage in the hauling of cement with up to 98 percent of their traffic in that business; with about 45 percent being for Riverside Cement. All four of these witnesses testified that they do not own or operate ready-mix plants or other cement business.

One witness testified that he handled 48 loads this year for Livingston-Graham which were mostly on an emergency basis; he gets the overflow and the amount of cement traffic is decreasing. This witness testified: "Well, this is, just supposing that Ready Mix A purchases sand and gravel from a company; he is then given certain, many loads into their ready-mix. Now if this rock company, whoever it may be, puts on his equipment, this ready-mix customer isn't going to be hauling there anymore, he is going to be looking elsewhere to put his truck to work because his own batch plant cannot keep that truck busy. ...It will put him in competition with the other mills. All I have to offer is a service. I have nothing else to offer."

Two witnesses testified for the protestants, all in the same vein, in an attempt to show unfair competition and discrimination presently existing in the transportation of cement by all of the producers, many common carriers and proprietary carriers. None of these, although charged with unfair competition, have been made parties to this proceeding. In fact, this proceeding should not be enlarged to take in these parties. The seller herein has not been charged by any witness with unfair competition and the buyer is not a common carrier and it is not claimed that the activities of the buyer, as a proprietary hauler, are the subject of any unfair competition which might be under the control of this Commission.

Exhibits Nos. 1 and 2 are copies of the Reporter's Transcript in the hearing of Application No. 51241 on October 7 and 9, 1969 containing testimony of witnesses who testified in that matter.

In Reporter's Transcript in Application No. 51241, the witnesses refer to producers in the cement industry who hold operating authority from this Commission and numerous carriers and producers are mentioned and accused of unfair competition but none of these are parties to this proceeding.

The witnesses claim that the tremendous purchasing power and the potential reciprocal demand position of Livingston-Graham poses a threat to the for-hire trucking in the cement industry, and that the independent carrier without cement consumer interests cannot effectively meet that type of competition.

The position of protestants is stated in their brief as follows:

"Stated bluntly, the basis upon which the industry operates throughout California is one of reciprocity in which cement mill customers holding cement operating authority, either directly or through an affiliate corporation, enter into arrangements with the mills whereby they obtain cement hauling in exchange for purchases of cement. Quite obviously, this system has caused a degeneration of truly independent cement transportation by carriers who are not customers of the mills. Certain of the truly independent cement carriers sought to raise the question of public interest in 1969 with respect to such industry practices in re A. W. Hays Trucking, Inc.--Transfer--Transmix Corporation, Application No. 51241."

Applicant-seller, in its brief, contends that to deny this application, and to find that the proposed transfer would be adverse to the public interest because the transferee is a consumer of cement, would work a substantial interference with the right of transferor to freely contract for the transfer of her certificated authority,

and that a purported unilateral, intra-corporate practice of cement manufacturers to which applicant-seller is not, nor will it be a party, should not be the basis for the denial of this application.

After consideration, the Commission finds and concludes that:

1. There is no evidence in this record that seller has engaged in any unlawful or unfair competition.
2. The applicant buyer does not now hold any certificate of public convenience and necessity as a cement carrier from this Commission.
3. The evidence of record does not establish that the transfer of this certificate to the buyer will have the effect claimed by the independent carriers who testified in this case.
4. The issues of this case should not be broadened to include charges of any violations of law against the other cement carriers in the industry.

After consideration the Commission finds that the proposed transfer would not be adverse to the public interest and concludes that it should be authorized. The order which follows will provide for, in the event the transfer is consummated, the revocation of the certificate presently held by Enid Hardesty, now known as Enid Fortier, and the issuance of a certificate in appendix form to Livingston-Graham, Inc.



Livingston-Graham, Inc., is hereby placed on 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, these rights extend to the holder a full or partial monopoly of a class of business. This monopoly feature may be modified or canceled at any time by the State, which is not in any respect limited as to the number of rights which may be given.

O R D E R

IT IS ORDERED that:

1. On or before June 1, 1972, Enid Hardesty, now known as Enid Fortier, may sell and transfer, and Livingston-Graham, Inc., may purchase and acquire, the operative rights and other property referred to in the application.
2. Within thirty days after the consummation of the transfer herein authorized, purchaser shall notify the Commission, in writing, of that fact and within said period shall file with the Commission a true copy of any bill of sale or other instrument of transfer which may be executed to effect said transfer.
3. Purchaser shall amend or reissue the tariffs on file with the Commission, naming rates and rules governing the common carrier operations herein to show that it has adopted or established, as its own, said rates and rules. The tariff filings shall be made effective not earlier than five days after the effective date of this order on not less than five days' notice to the Commission and the public, and the effective date of the tariff filings shall be concurrent with the consummation of the transfer herein authorized.

The tariff filings made pursuant to this order shall comply in all respects with the regulations governing the construction and filing of tariffs set forth in the Commission's General Order No. 117. Failure to comply with and observe the provisions of General Order No. 117 may result in a cancellation of the operating authority granted by this decision.

4. On or before the end of the third month after the consummation of the transfer as herein authorized, purchaser shall cause to be filed with the Commission, in such form as the Commission may prescribe, an annual report, or reports, related to the operations of the seller for the period commencing with the first day of the current year to and including the effective date of the transfer.

5. In the event the transfer authorized in paragraph 1 hereof is consummated, a certificate of public convenience and necessity is granted to Livingston-Graham, Inc., authorizing it to operate as a cement carrier, as defined in Section 214.1 of the Public Utilities Code, between the points particularly set forth in Appendix A, attached hereto and made a part hereof.

6. The certificate of public convenience and necessity granted in paragraph 5 of this order shall supersede the certificate of public convenience and necessity set forth in Resolution No. 13821, Sub No. 67, dated June 23, 1964, in Application No. 46353, which certificate is revoked effective concurrently with the effective date of the tariff filings required by paragraph 3 hereof.

7. Within thirty days after the transfer herein authorized is consummated, purchaser shall file a written acceptance of the certificate herein granted. Purchaser is placed on notice that, if it accepts the certificate of public convenience and necessity herein granted, it will be required, among other things, to comply with and observe the safety rules of the California Highway Patrol, and insurance requirements of the Commission's General Order No. 100-Series.

8. Purchaser shall maintain its accounting records on a calendar year basis in conformance with the applicable Uniform System of Accounts or Chart of Accounts as prescribed or adopted by this Commission and shall file with the Commission, on or before March 31 of each year, an annual report of its operations in such form, content, and number of copies as the Commission, from time to time, shall prescribe.

9. Purchaser shall comply with the requirements of the Commission's General Order No. 84-Series for the transportation of collect on delivery shipments. If purchaser elects not to transport collect on delivery shipments, it shall make the appropriate tariff filings as required by the General Order.

The effective date of this order shall be the date hereof.

Dated at San Francisco, California, this 23rd  
day of FEBRUARY, 1972.

William J. Stinson, Jr. Chairman  
James L. Stinson  
James L. Stinson  
James L. Stinson Commissioners

Commissioner J. P. Vukasin, Jr., being necessarily absent, did not participate  
-1 in the disposition of this proceeding.

Livingston-Graham, Inc., by the certificate of public convenience and necessity granted by the decision noted in the margin, is authorized to conduct operations as a cement carrier as defined in Section 214.1 of the Public Utilities Code, from any and all points of origin to all points and places within the following Counties: Kern, Los Angeles, Orange, Riverside, San Bernardino, San Diego, Santa Barbara and Ventura, subject to the following restrictions:

RESTRICTIONS:

1. Whenever Livingston-Graham, Inc., a corporation, engages other carriers for the transportation of property of Livingston-Graham, Inc. or Tri-City Concrete or customers or suppliers of said corporations, Livingston-Graham, Inc. shall not pay such other carriers rates and charges less than the rates and charges published in Livingston-Graham, Inc.'s tariffs on file with the Commission for the transportation actually performed by such other carriers.
2. This certificate of public convenience and necessity shall lapse and terminate if not exercised for a period of one year.

(End of Appendix A)

Issued by California Public Utilities Commission.

Decision No. 79740, Application No. 52713.