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Decision No. 80385

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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the matter of the Petitions of California Trucking Association, Bekins Moving and Storage Co., Lyon Van and Storage Co., O.N.C. Motor Freight Systems, Western Gillette, Inc., California Moving and Storage Association, Morris Draying Co., Sheldon Transporation Co., Telfer Tank Lines, Inc., System 99, and Delta Lines, Inc., for (1)rehearing of Resolution A-4014, and (2) recision and cancellation of certain provisions of Resolution A-4014.	Case No. 9405

OPINION AND ORDER DENYING
REHEARING AND RECONSIDERATION

The Commission, by Resolution No. A-4014, adopted June 27, 1972, amended its Rules of Practice and Procedure to add Rule 23.1. This rule contains standards by which this Commission will evaluate filings for rate increases in order to determine whether such rate increases are in conformance with the criteria established by the Federal Price Commission under authority of the Economic Stabilization Act of 1970.

On July 25, 1972, the Commission adopted Resolution No. A-4020, which revised certain sections of the Rule, as hereinafter discussed.

Both resolutions were adopted as the result of the current Federal economic stabilization program instituted under the Economic Stabilization Act of 1970. Price Commission regulations 300.16 and 300.16a apply to public utilities. Under Section 300.16a(d) a state regulatory agency is authorized to submit to the Price Commission proposed rules which, if approved by the Price Commission and thereafter formally adopted by the regulatory agency, entitle that agency to a certificate of compliance.

When an agency obtains such a certificate, price increases approved by it need not be submitted to the Price Commission for further approval.

For public utility price increases, the rules must reflect, inter alia, the following requirements of Section 300.16a(c):

> "(c) General criteria for public utility price increases. The general criteria of the Price Commission for public utility price increases are:
>
> "(1) The increase is cost-justified and does not reflect future inflationary expectations.
>
> "(2) The increase is the minimum required to assure continued, adequate and safe service or to provide for necessary expansion to meet future requirements.
>
> "(3) The increase will achieve the minimum rate of return needed to attract capital at reasonable costs and not to impair the credit of the public utility.
>
> "(4) The increase does not reflect labor costs in excess of those allowed by Price Commission policies.
>
> "(5) The increase takes into account expected and obtainable productivity gains, as determined under Price Commission policies.
>
> "(6) The procedures of the regulatory agency provide for reasonable opportunity for participation by all interested persons, or their representatives, in its proceedings."

This Commission, in order to insure compliance with (c)(5) above, adopted as part of its new Rule 23.1 (pursuant to Commission Resolution No. A-4014 dated June 27, 1972) the following sections of Rule 23.1 [Sections (A)(5)(c) and (B)(5)(b) respectively]:

> "(c) To assure maximum benefits from productivity gains for common carriers and warehousemen where competitive conditions exist among utilities, increased rates will not be authorized unless it is clearly and convincingly established that other utilities are not willing or capable of providing the service at the existing rate or rates."

"(b) To assure the maximum benefits from productivity gains, which are encouraged by competition, minimum rate tariffs for the transportation of property will not be increased unless it is clearly and convincingly established that carriers are not available who are willing and capable of providing the service at the existing rate or rates."

The captioned petitioners filed petitions between July 7 and July 24, 1972. All of the petitions were directed against the requirements of the above-quoted sections.

On July 25, 1972, the Commission adopted Resolution No. A-4020, which amended Rule 23.1 so that Sections (A)(5)(c) and (B)(5)(b) would read, respectively, as follows:

"(c) To assure maximum benefits from productivity gains for common carriers and warehousemen where competitive conditions exist among utilities, increased rates will not be authorized if it is clearly and convincingly established that other utilities are willing and capable of providing the service at the existing rate or rates."

"(b) To assure the maximum benefits from productivity gains, which are encouraged by competition, minimum rate tariffs for the transportation of property will not be increased if it is clearly and convincingly established that carriers are available who are willing and capable of providing service at the existing rate or rates."

In a letter from the Commission Secretary to the Price Commission (approved for transmittal by this Commission) dated July 11, 1972, in explanation of these changes, it is stated:

"The changes set forth above are intended to eliminate the legally undesirable need of proving a negative and substituting the requirement of proving a positive."

The various petitions filed with the Commission were untimely as far as being considered either petitions to reopen under Commission Rule 84, or for a rehearing under Rule 85. Furthermore, as hereinafter discussed, no hearing is necessary for modification of the Commission Rules of Practice and Procedure;

therefore, the Commission is not bound to reopen or re-hear old cases which involved the Commission's rules generally, and which included a large number of parties, in order to dispose of the contentions of the petitioners herein. In view of the importance of the questions raised, however, the Commission chose to institute this proceeding to consider the contentions of the various petitioners.

The Commission, in this proceeding, considered the allegations of the various petitions against Rule 23.1, Sections (A)(5)(c) and (B)(5)(b) as amended by Resolution A-4020, and on July 26, 1972, issued Decision No. 80321 denying rehearing or reconsideration as to Rule 23.1 as amended by Resolution A-4020.

Additional petitions, addressed to the same grounds, were similarly denied by Decision No. 80344, issued August 1, 1972.

The Commission was issued its certificate of compliance by the Price Commission on August 2, 1972. 1/

Thereafter, some of the petitioners re-petitioned the Commission for rehearing, reconsideration, or recission and cancellation of the revised Rule 23.1 sections (A)(5)(c) and (B)(5)(b).

DISCUSSION

Before reaching the merits of the assailed sections (as revised) it is necessary to dispose of the procedural question raised by the petitions as to whether it was necessary to give notice and hold public hearings to adopt Rule 23.1. The answer is in the negative.

Petitioners first argue in this regard that the present rules were adopted pursuant to Decision No. 72329 (1967) as a result of Cases No. 4924 and No. 7234, and claim that a decision

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1/ California Trucking Association, Bekins Moving and Storage Co., Lyon Van & Storage Co., ONC Freight Systems, Western Gillette, Inc., and System 99.

which resulted from formal hearings cannot be amended by way of a resolution, at least without holding hearings. Petitioners further argue that the Commission customarily changes its rules by way of the decision making process.

This argument overlooks the fact that Public Utilities Code Section 1701[2/], concerning rules of practice and procedure, contains no hearing requirement. Furthermore, there is no state or federal constitutional requirement for such a hearing. The Commission, when adopting rules, is an administrative body performing legislative functions delegated to it and is not, in such a function, engaged in rendering quasi-judicial decisions requiring a public hearing for affected parties. Wood v. Public Utilities Commission (1971) 4 Cal.2d 288; cf. United States v. Merchants and Manufacturers Association of Sacramento (1916) 242 U.S. 178; 37 S.Ct. 24; F.C.C. v. Pottsville Broadcasting Company (1940) 309 U.S. 134; California Citizens Band Association v. U.S. (1967) 375 F.2d 43 [Cert. den., 389 U.S. 844].

Petitioners argue, however, that the Commission did not regularly pursue its authority because it was not simply adopting a rule but was attempting to change the substantive law of this state as to utility regulation. Regardless of whatever problems Sections (A)(5)(c) and (B)(5)(b) may have presented in this regard in their original form, the revisions adopted pursuant to Resolution A-4020 have eliminated them. In addition to eliminating proof of a negative fact, it should be obvious that the revised sections place the burden of proof elsewhere than upon an applicant's shoulders.

Petitioners further argue (regarding substantive law) that the "willing and capable" phrase in the two sections overlooks the

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2/ Code sections mentioned hereafter refer to sections of the Public Utilities Code, unless otherwise stated.

"just and reasonable" test for rates in Sections 451 and 3662. This argument presumes unlawful interpretations of the new sections of Rule 23.1 on the part of the Commission. Nothing in the language of the revised sections of the rule would compel the Commission to disregard the fact that any entity subject to rate regulation by this Commission is entitled to just and reasonable rates.

There is no conflict between these new sections and any code provision or case law of this State. The Commission has traditionally considered efficiency, and in so doing has in effect considered productivity gains. There is nothing novel about this concept. As was stated in California Manufacturers Association v. Public Utilities Commission (1954) 42 Cal. 2d 530, at 536:

> "In rate making it is settled that the commission need not accept cost figures that are unjustifiably high because of inefficient methods of operation. (Pacific Tel. & Tel. Co. v. Public Utilities Com., 34 Cal.2d 822, 826 [215 P.2d 441], and cases cited.) Accordingly, in fixing the lawful rate for any type of service by any type of carrier, the commission is entitled to consider the cost of providing the service efficiently, and section 726 expressly authorizes it to consider the available data from all types of carriers to determine what the cost of the most efficient service is."

In the opinion of the Commission, the assailed sections of Rule 23.1 simply emphasize the Commission's responsibility to measure efficiency. The Commission is mindful of its duties under Sections 726 and 3661-3665 as defined and approved in California Manufaturer's Association v. Public Utilities Commission, supra. The new Rule need not cause the Commission to ignore proper cost data, or the fact that minimum rates should be developed "for the type or class of carrier best suited economically to perform a particular service" (California Manufacturers Association v. Public Utilities Commission, supra, p. 534).

Thus there is no merit to petitioners' contentions that the Commission will abdicate its responsibility to establish minimum rates, that the Commission will not increase its minimum rates if any carrier simply objects, or that it will otherwise ignore applicable law.

The Commission is, however, of the opinion that Sections (A)(5)(c) and (B)(5)(b) of Rule 23.1 assist it in discharging its duties under Price Commission Regulation 300.16(a)(C)(5) since if, in fact, a showing were to be made that carriers of the "type or class of carrier best suited economically to perform a particular service" are willing and capable (at a fair return to themselves) of providing a reasonable quantity of such service at the existing rate or rates. This showing would tend to indicate substantial evidence of productivity gains.

At the same time that some petitioners express fear that the Commission will rely upon unsupported, bare allegations of "willingness" or "capability", they assert that should any such showing be made, cross-examination and rebuttal as to such showings would unduly prolong rate proceedings. The Commission rejects this contention. Mere claims or assertions would not "clearly and convincingly" establish gains in productivity.

In summary, the Commission is not compelled by the terms of Rule 23.1 to violate any constitutional, statutory or controlling case law in arriving at decisions pertaining to rate increases. The Commission has always had the responsibility to measure productivity in determining whether rate relief is justified.

In any case, none of the petitioners have been aggrieved. It is elementary that there is a strong presumption that the Commission will act lawfully. Market Street Railway Co. v. Railroad Commission (1944) 24 Cal.2d 378 [aff'd. 324 U.S. 548]; Western Canal Co. v. Railroad Commission (1932) 216 Cal. 639.

The remaining contentions of the petitioners have been reviewed and are found to be without merit.

FINDINGS OF FACT

Based upon the record in this proceeding, the Commission makes the following findings of fact:

1. Petitioners are persons, firms and corporations (or associations of such persons, firms and corporations) engaged in the transportation of property by motor vehicle as highway common carriers or highway permit carriers.

2. The Commission, by Resolution A-4014, adopted June 27, 1972, amended its Rules of Practice and Procedure to add Rule 23.1.

3. On July 25, 1972, the Commission adopted Resolution No. A-4020, which revised Sections (A)(5)(c) and (B)(5)(b) of Rule 23.1, as hereinabove discussed.

4. Both resolutions were adopted as the result of the current Federal Economic Stabilization Program instituted under the Economic Stabilization Act of 1970.

5. The Commission adopted both resolutions without notice and without holding a public hearing.

6. Sections (A)(5)(c) and (B)(5)(b) of Rule 23.1, as revised, were adopted for the purpose of assisting the Commission in measuring productivity gains.

CONCLUSIONS OF LAW

1. No hearing is required in order to modify the Commission Rules of Practice and Procedure.

2. The Commission changed no substantive law in adopting Rule 23.1, as revised.

3. Unlawful interpretations under Commission Rule 23.1 cannot be presumed. Nothing in the language of the revised Rule compels the Commission to disregard the fact that any entity subject to rate regulation by this Commission is entitled to a just return, or to ignore proper principles of determining lawful rates.

4. No conflict exists between Rule 23.1 and any Federal or

State constitutional provision, code section, or controlling case law.

5. Petitioners are not entitled to any relief in this proceeding.

ORDER

IT IS ORDERED that rehearing and reconsideration of Resolution No. A-4020 is denied.

IT IS FURTHER ORDERED that recission or cancellation of the requirements of Rule 23.1, Sections (A)(5)(c) and (B)(5)(b) is denied.

Dated at San Francisco, California, this 15th day of AUGUST, 1972.

Vernon L. Sturgeon
President

Commissioners

Commissioner D. W. Holmes, being necessarily absent, did not participate in the disposition of this proceeding.