

Decision 87 10 083      OCT 28 1987

**ORIGINAL**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of )  
Fincher & Sons for transfer of a )  
cement carrier certificate author- )  
izing service to and within the )  
County of San Joaquin. )

Application 87-08-001  
(Filed August 3, 1987)

OPINION

Donald Duane Fincher (Fincher) has applied to purchase a cement carrier certificate from Pyramid Commodities (Pyramid). Pyramid was incorporated as a California corporation on November 18, 1970. A copy of its Articles of Incorporation is on file with the Commission in File T-97258. Pyramid has applied to transfer its authority to operate as a cement certificated carrier in the County of San Joaquin to Fincher, doing business as Fincher and Sons. The operating authority to be transferred was granted to applicant by Commission Decision 86456, dated October 5, 1976, in Application 56291. Fincher will pay a purchase price of \$3,500 as soon as the transfer is authorized by Commission order. The application includes a copy of a freight bill showing that applicant has exercised the authority to be transferred within the 12 months immediately preceding the date of filing this application.

Fincher operates under a dump truck carrier permit, with 4 tractors, 4 semitrailers, and 3 pull trailers. Fincher's balance sheet dated December 31, 1986 shows total assets of \$476,466 and liabilities of \$448,804.

Fincher has certified that he has resided in the State of California continuously for not less than 90 days next preceding the filing of this application; that he will not lease equipment from employees and will not engage subhauliers.

# CORRECTION

THIS DOCUMENT HAS

BEEN REPHOTOGRAPHED

TO ASSURE

LEGIBILITY

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A protest was filed on July 28, 1987, prior to the filing of the formal application. An amended protest was filed on September 4, 1987, which requests that a hearing be held. Protestants identify themselves as United Ready Mix Concrete Company, Inc., United Premix Concrete, Inc., Mobile Concrete, Inc., and TTT, Inc. Only the last named is identified as a licensed cement carrier and the protest states that TTT, Inc. does not operate in San Joaquin County.

It is alleged on "information and belief" that Pyramid carried no cement for extended periods of 12 months or more from 1976 through August of 1982 and that Pyramid represented to the Commission that it was operating when the transportation was performed by other carriers. Protestants argue that Pyramid's cement carrier certificate thereby terminated and lapsed due to a lack of use or abandonment as provided in Public Utilities (PU) Code Section 1065.2.

Protestants cite two cases to support their position. The first is A. W. Hays Trucking, Inc. (1970) 71 CPUC 20. A. W. Hays Trucking, Inc. (Hays) applied for authority to sell 8 of 47 counties it was authorized to serve under its cement carrier certificate. Hays had not served these counties since its certificate was obtained in 1966. It was held that Hays had abandoned the 8 counties under the provisions of PU Code § 1065.2, even though it operated in all other counties. A rehearing was granted and the decision was rescinded and the findings and conclusions overruled at pages 614 and 615 of the same volume (71 CPUC). The latter decision held that a charge of abandonment must be applied to the entire certificate and not to segments thereof. The second case concerns a cement carrier certificate which was designated as abandoned after it was not exercised for a period of at least three consecutive years prior to the filing of the application requesting authority to transfer it. (Granzotto

Trucking Co., Inc. (1975) 79 CPUC 12.) Neither case is on point here. The protest should be rejected.

Applications are opposed because truckers strive to prevent competitors from moving into their territory. A protestant would ordinarily argue that a grant of the application will reduce his business and profit, and that another carrier is not needed in the area he serves. Three of the protestants herein are identified on page 2 of the Amended Protest as employers of cement certificated carriers. The fourth protestant is a cement carrier but does not operate in San Joaquin County. Further, Pyramid already serves San Joaquin County. This is not a case of a new carrier entering a territory. One carrier simply replaces the existing carrier. There is no allegation from protestants that customers or business will be lost if the application is granted and no statement that applicant's proposed service would be of no benefit to the public. There is no indication that protestants' business or operations will be affected if the application is granted.

Finally, protestants allege that the Pyramid certificate has terminated due to abandonment resulting from long periods of nonuse extending from 11 to 5 years ago. The period is so remote that transportation records may no longer be available and witness testimony will be blunted by the passage of time. The Commission has already adopted a position on the allegation of a cement certificate abandonment and the present facts and pleadings do not justify any change in the rule originally adopted. Cement has been transported under the certificate in 1986 as evidenced by a freight bill attached to the application.

The Commission has stated that:

"Protestants appear to be raising the old argument of abandonment in a transfer proceeding, along with the attendant argument that this, in effect, would constitute a new service, which can only be justified by a showing of public convenience and necessity.

The Commission has repeatedly rejected this argument and rejects it once again. (Readymix Concrete Co., Ltd. (1966) 65 Cal PUC 587, at 590.)

Further, we note that the protests were filed on information and belief. While protestants are permitted to do this under our rules, they must realize that such a protest does not carry the weight that a protest alleging specific facts and detailing the evidence to be presented at hearing carries. Rule 8.1 of the Commission's Rules of Practice and Procedure defines a protest as containing (a) an objection to the granting of the authority sought, (b) a request for a public hearing, and (c) an offer of the evidence which the protestant would sponsor or elicit at a public hearing. Rule 8.2 provides that the filing of a protest does not insure that a public hearing will be held; the content of the protest is determinative.

Protestants have filed a protest, a lengthy response to applicant's motion to dismiss the protest, and an amended protest. Nowhere do the protestants state what evidence they would elicit and, in fact, admit that they have not obtained much of the evidence they intend to produce. Even in the face of the motion to deny the protest, protestants have not offered anything more specific than "protestants are informed and believe that Pyramid carried no cement between July 1980 and at least January 1982." We do not find this persuasive.

Notice of the filing of the application was published in the Commission's Daily Calendar on August 3, 1987 and in the Daily Transportation Calendar on August 5, 1987. A letter dated August 31, 1987 was received from WMB Transportation, Inc. (WMB), a certified cement carrier. The letter identifies WMB as an interested party and requests that the Commission rule on the validity of the Pyramid certificate.

The request to participate in this proceeding, filed by WMB Transportation, Inc. should be denied.

Findings of Fact

1. Fincher has resided in the State of California continuously for not less than 90 days next preceding the filing of this application.

2. Fincher applied to serve San Joaquin County under authority of a cement carrier certificate to be purchased and transferred from Pyramid.

3. A protest was filed by a group of 3 non-carriers, plus a cement carrier who does not operate in San Joaquin County.

4. Protestants have not alleged that granting the application will reduce their business or customers.

5. It is alleged that protestants were informed that Pyramid Commodities abandoned its cement operating authority by not using it for 12 consecutive months and more during the period from 1976 through August of 1982.

6. Pyramid has provided a freight bill to prove operation as a cement carrier within the last 12 months.

7. There is no indication that Pyramid Commodities has not operated under the certificate in recent years.

8. Applicants seek to transfer an operating right where protestants have no right to serve. None of those who are objecting have sufficient interest to qualify as valid protestants.

9. The letter from WMB is not a protest, nor does it raise issues which would justify continuing this proceeding and scheduling a hearing.

10. The proposed transfer would not be adverse to the public interest.

11. A public hearing is not necessary.

Conclusions of Law

1. The argument of protestants that an operating right to be transferred has been abandoned by nonuse for a 12-month period, 5 or more years prior to the transfer proceeding, should be rejected (Readymix Concrete Co. Ltd.) (1966) 65 Cal PUC 587, 590.)

2. The application should be granted.

Only the amount paid to the State for operative rights may be used in rate fixing. The State may grant any number of rights and may cancel or modify the monopoly feature of these rights at any time.

ORDER

IT IS ORDERED that:

1. Pyramid Commodities may sell and transfer the operative rights and property specified in the application to Donald Duane Fincher. This authorization shall expire if not exercised by January 1, 1988, or within such additional time as the Commission may authorize.

2. Purchaser shall:

- a. File with the Transportation Division written acceptance of the certificate and a copy of the bill of sale or other transfer document within 30 days after transfer.
- b. Amend or reissue seller's tariffs. The tariffs shall not be effective before the date of transfer, nor before 5 days' notice is given to the Commission.
- c. Comply with General Orders Series 100, 117, and 123, and the California Highway Patrol safety rules.
- d. File an annual report of seller's operations for the period from the first day of the current year to the date of transfer.
- e. Maintain accounting records in conformity with the Uniform System of Accounts.
- f. File an annual report by April 30 of each year.
- g. Comply with General Order Series 84 (collect-on-delivery shipments). If



purchaser elects not to transport collect-on-delivery shipments, it shall file the tariff provisions required by that General Order.

3. When the transfer is completed, and on the effective date of the tariffs, a certificate of public convenience and necessity is granted to Donald D. Fincher authorizing him to operate as a cement carrier, as defined in PU Code § 214.1 between the points set forth in Appendix A.

4. The certificate of public convenience and necessity granted by Decision 86456 is revoked on the effective date of the tariffs.

5. The protest is dismissed.

6. The petition of WMB Transportation, Inc. to intervene as an interested party is denied.

This order becomes effective 30 days from today.

Dated     OCT 28 1987    , at San Francisco, California.

STANLEY W. HULETT  
President  
DONALD VIAL  
FREDERICK R. DUDA  
G. MITCHELL WILK  
JOHN B. OHANIAN  
Commissioners

I CERTIFY THAT THIS DECISION  
WAS APPROVED BY THE ABOVE  
COMMISSIONERS TODAY.

*Victor Weisser*  
Victor Weisser, Executive Director

*JB*

Appendix A

DONALD DUANE FINCHER  
(doing business as  
FINCHER AND SONS)

Original Page 1

Donald Duane Fincher, by the certificate of public convenience and necessity granted in 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 County of San Joaquin.

This certificate of public convenience and necessity shall lapse and terminate if not exercised for a period of 12 consecutive months, inclusive of all periods of suspension.

(END OF APPENDIX A)

Issued by California Public Utilities Commission.  
Decision 87 10 083, Application 87-08-001.

ALJ/EGF/tcg

Decision \_\_\_\_\_

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Dated \_\_\_\_\_, at San Francisco, California.

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