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ORIGINAL

Decision 88 11 035

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of:

TTT, INC., a California corporation,
Complainant,

vs.

DONALD D. FINCHER, dba FINCHER & SONS, PYRAMID COMMODITIES, INC. a California corporation, and LEE GALE,
Defendants.

Case No. 87-12-053
(Filed December 30, 1987)

In the Matter of:

TTT, INC., a California corporation,
Complainant,

vs.

CHARLES R. BAKER and MARILYN BAKER, PYRAMID COMMODITIES, INC. a California corporation, and LEE GALE,
Defendants.

Case No. 87-12-054
(Filed December 30, 1987)

(Motion to Dismiss
filed April 5, 1988)

ORDER DENYING REHEARING
AND MODIFYING DECISION 88-08-031

TTT, Inc. (TTT) has filed an application for rehearing of Decision (D.) 88-08-031. We have considered all the allegations of error in the application and are of the opinion that good cause for rehearing has not been shown.

However, we are of the opinion that we erred in failing to make an explicit conclusion of law as to the issue of res

judicata as applied to this proceeding from our D.87-10-083 and D.87-11-056, in Applications (A.) 87-08-001 and 87-08-002, respectively.

Therefore,

IT IS ORDERED that:

1. Rehearing of D.88-08-031 is hereby denied.
2. Decision 88-08-031 is hereby retitled "Opinion Granting Motion to Dismiss Cases 87-12-053 and 87-12-054 and Denying Request for Imposition of Monetary Sanction."
3. Decision 88-08-031 is hereby modified as follows:
 - a. After the third full sentence of the first full paragraph of page 7, the remainder of the paragraph is deleted and the following language substituted:

We note in addition that, if Complainants believed that our decisions in the transfer proceedings were founded on an incorrect interpretation of the law, their proper course would have been to appeal the decisions within 30 days as provided by Public Utilities Code § 1756, not to bring new actions on the same issues.

However, our decisions were based on quite different considerations. First, as we said in Granzotto Trucking Co., Inc. (1975) 79 CPUC 12:

The primary purpose of carrier regulation, whether it be cement or other commodity carrier, is to secure adequacy, regularity, and reliability of service, together with a reasonable charge for the service (Morel v. Railroad Commission (1938) 11 C 2d 488), and such regulation is for the benefit of the producing and consuming public (Franchise Motor Freight Association v. Seavey (1925) 196 C. 77), not those regulated. It is inescapable that Section 1065.2 is obviously intended to purge the ranks of certificate holders of defunct and/or inoperative authorities.

79 CPUC 12, 19. Clearly, neither Pyramid nor its transferees is "defunct and/or inoperative" at the present time nor has been for some years. The purpose of 1065.2 would not be served by our retraction of operating authority which has been used regularly.

Second, and far more important, is the delay in bringing the alleged lapse to our attention. While Section 1065.2 provides that lapse may occur without

our knowledge, we are still the body charged with the determination of whether or not such a lapse has taken place. In order to make such a determination, we require evidence, presented within a reasonable period of time so that the party against whom the charges are made will be able to defend itself from its own records, and so that we will be in a position to use our own back files to cross-check allegations and defenses where necessary.

In the present case, six years passed between the alleged lapse and TTT's bringing of charges before us. By the Declaration of Glenn E. Walker, whose relationship to TTT is unstated, submitted as an attachment to TTT's Opposition to the Motion to Dismiss herein, we learn that the evidence on which TTT seeks to found its proof has been in Walker's hands since the beginning of 1982. In a similarly-titled Declaration attached to the Applications for Rehearing in the transfer proceedings, Walker attested that he first learned of the alleged lapse in 1985.

Neither document pretends to explain why Walker kept the records for three years before "learning" of the alleged lapse, or why he waited for two years after that to bring it to our attention. Nor does he explain why TTT did not make any offer of proof based on these documents until the protests were denied in the transfer proceedings. He has not explained his relationship to TTT, or told us when or under what circumstances his information became available to TTT. We have not been given any explanation for TTT's and Walker's joint failure to bring this now-stale evidence before us in a timely manner. None of these things has been made clear.

What is clear is that there has been a great delay in making the charge of lapse, and that this delay prejudiced Pyramid's ability, in the transfer proceedings, to defend itself from its own records. While the current defendants are different in name from Pyramid, they are in privity with Pyramid as its successors in interest; they must defend themselves with the same records and after an even longer delay. Thus, our earlier decision that the alleged lapse is too remote in time to be litigable now (see, e.g., D.87-11-056, p. 4) operates as res judicata with respect to allegations of this lapse against Pyramid's successors in interest.

b. Finding of Facts Nos. 8 through 10 are added as follows:

8. TTT has submitted sworn declarations to the effect that Glenn E. Walker, whose relationship to TTT is unclear, came into possession of evidence of the alleged lapse as early as January, 1982, and learned of the alleged lapse in 1985.

9. Neither TTT nor Walker has explained the delay in bringing the alleged lapse to our attention.

10. The delay in bringing the charges against Pyramid and against its successors in interest has prejudiced the ability of those parties to defend themselves by means of their own records.

c. Conclusion of Law No. 1 is renumbered 1a, and a new Conclusion of Law No. 1 is added as follows:

1. Our earlier decision that the alleged lapse is too remote in time to be litigable now operates as res iudicata with respect to allegations of this lapse against Pyramid's successors in interest.

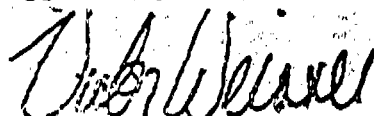
This order is effective today.

Dated NOV 9 1988, 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 Weissner, Executive Director