L/JTP/rys/bjk\*

Decision 89 09 204 SEP 27 1989 BEFORE THE PUBLIC UTILITIES COMMISSION C	DF THE STATE OF CALIFORNIA
In the Matter of the Investigation for the purposes of considering and determining minimum rates for transportation of sand, rock, gravel and related items in bulk, in dump truck equipment between points in California as provided in Minimum Rate Tariff 7-A and the revisions or reissues thereof.	Case 5437, OSH 325 (Filed April 17, 1985) Case 5437, OSH 323 (Filed October 1, 1984) Case 5437, Pet. 329 (Filed June 6, 1985)
And Related Matters.	) Case 9819, OSH 75 Case 9820, OSH 25 ) (Filed April 17, 1985) Case 9819, OSH 76- Case 9820, OSH 27- ) (Filed May 1, 1985) Case 9819, Pet. 79- Case 9820, Pet. 29- ) Case 5432, Pet. 1060- ) (Filed June 6, 1985) )

## ORDER MODIFYING DECISION 89-04-086 AND DENYING REHEARING

California Dump Truck Owners Association and California Carriers Association (CDTOA/CCA) and California Trucking Association (CTA) have filed applications for rehearing of D.89-04-086 (the Decision), in which the Commission adopted deviation procedures for dump truck carriers. In D.89-07-065, we stayed these new deviation procedures, to preserve the status quo pending Commission action on CDTOA/CCA's application for rehearing. Having considered the applications for rehearing, we will now modify the Decision, deny rehearing, and lift the stay.

CTA attached an affidavit to its application for rehearing. However, it is generally inappropriate to attach an affidavit or declaration to an application for rehearing; an application for rehearing is not a proper means for introducing

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new evidence into the record. Since, CTA's affidavit does not particularly try to introduce any new facts, but mostly just makes legal arguments, we have treated the affidavit as if it were a brief.

CDTOA/CCA objects that the adopted procedures do not permit protests relying on allegations of "price fixing. . . . restraint of trade, [or] the creation of a monopoly in a certain territory" or on allegations "that subhaulers are being forced to work at a significant loss." However, there is something implausible about the kinds of protests that CDTOA/CCA wishes to file. First, as pointed out in our modified decision, subhaulers, like other dump truck carriers, cannot be forced to accept money-losing hauls and are free to reject deviated-rate hauls that do not pay enough. (Moreover, our adopted procedures contain provisions that protect subhaulers, such as their division of revenue requirements and the "50%" rule.) Second, CDTOA/CCA does not explain how the adopted procedures will lead to "price fixing" or other anti-competitive results. To the contrary, because the adopted deviation procedures allow a greater degree of pricing flexibility, and therefore a greater degree of competition, we believe these deviations are unlikely to cause such anti-competitive effects. We believe it more likely that competitors would use such protests to delay requested deviations and inhibit competition. We therefore conclude that it is more reasonable to allow deviated rates that meet our adopted guidelines to go into effect than to allow competitors to delay requested deviations just by filing protests making allegations of anti-competitive behavior. A would-be protestant who genuinely believes that there is an anticompetitive problem can still file a complaint and obtain Commission review of its grievance.

In its application for rehearing CDTOA/CCA says it expects "that virtually every contractor in the State will insist on a simplified deviated rate when these deviation procedures become effective." Subsequent events have failed to confirm

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CDTOA/CCA's expectations. The Decision was issued at the end of April, and the new deviation procedures became effective on July first. However, despite this considerable lead time in which carriers could have been preparing deviation applications, carriers filed <u>only two</u> Simplified Deviation applications during the more than half month period from July 1 until the new procedures were stayed by D.89-07-065.

We have carefully considered each of the issues and arguments raised in the applications for rehearing and are of the opinion that sufficient grounds for granting rehearing have not been shown. We are, however, of the view that the Decision should be modified in several respects. More particularly, we wish to take this opportunity to better explain why we have adopted these deviation procedures and to make some fine-tuning changes in the procedures themselves. Conclusion of Law

1. It is more reasonable to allow deviated rates that meet our adopted guidelines to go into effect than to allow competitors to delay requested deviations just by filing protests making allegations of anti-competitive behavior.

Therefore, good cause appearing,

IT IS ORDERED that D.89-04-086 is modified as follows:

1. D.89-04-086 is replaced by Modified D.89-04-086, Attachment 1 hereto. More specifically, Pages 1 through 38 are replaced by Revised Pages 1 through 47 and Appendices A, A-1, B, C, and D are replaced by Revised Appendices A, A-1, B, C, and D. Supplement 29 to Minimum Rate Tariff 7-A is unchanged. Attachment 1 hereto is a complete version of the Modified D.89-04-086.

IT IS FURTHER ORDERED that:

2. Rehearing of D.89-04-086 as modified herein is denied.

3. The stay ordered by D.89-07-065 is hereby lifted.

4. For applications that were filed prior to the stay, Staff shall, in computing time periods under the new deviation procedures, include the time from the date of filing until the

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date of the stay, and exclude the time during which the stay was in effect.

5. The Executive Director shall serve a copy of this decision on each subscriber to MRTs 7-A, 17-A, and 20.

This order is effective today.

Dated <u>SEP 2 7 1989</u>, at San Francisco, California.

G. MITCHELL WILK President STANLEY W. HULETT JOHN B. OHANIAN PATRICIA M. ECKERT Commissioners

Commissioner Frederick R. Duda, being necessarily absent, did not participate.

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

WESLEY FRANKLIN, Acting Executive Director

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# ATTACHMENT

D.89-04-086 as modified by Decision 89 09 104

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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In the Matter of the Investigation for the purposes of considering and determining minimum rates for transportation of sand, rock, gravel and related items in bulk, in dump truck equipment between points in California as provided in Minimum Rate Tariff 7-A and the revisions or reissues thereof.

And Related Matters.

case 5437, OSH 325 (Filed April 17, 1985) Case 5437, OSH 323 (Filed October 1, 1984) Case 5437, Pet. 329 (Filed June 6, 1985)

Case 9819, OSH 75 Case 9820, OSH 25 (Filed April 17, 1985) Case 9819, OSH 76 Case 9820, OSH 27 (Filed May 1, 1985) Case 9819, Pet. 79 Case 9820, Pet. 29 Case 5432, Pet. 1060 (Filed June 6, 1985)

(For appearances see Decisions 86-08-030 and 87-05-036.)

## INTERIM OPINION

This consolidated proceeding is being conducted for the purpose of considering methods and procedures through which effective dump truck minimum rate policy can be established, administered, and tested in practice.

This decision will consider two related matters in this proceeding: the proposed interim rate increase for dump truck minimum rates, and the proposals for expedited procedures for securing authority to deviate from established minimum rates for the dump truck transportation. We have consolidated these matters for decision because they represent a unified solution to the problems now faced by the industry and its consumers. The rate increase will address the concerns of many carriers regarding the

adequacy of the minimum rates while we complete our task of updating those rates. An improved deviation process will address the concerns of some carriers and many shippers regarding the need to meet competitive market conditions and to permit deviations to be granted expeditiously.

#### 1. INTERIM RATE INCREASE

On March 9, 1988, California Dump Truck Owners Association/California Carriers Association (CDTOA/CCA) filed its Motion For An Interim Decision Granting Rate Increases In The Dump Truck Minimum Rate Tariffs To Reflect The Increased Cost Of Doing Business (the motion).

#### Background

By Decision (D.) 86-08-030 dated August 6, 1986, we adopted cost methodologies for cost gathering and ratemaking purposes, except for those commodities described in Items 40, 50, and 60 of Minimum Rate Tariff (MRT) 7-A. The adopted methodologies are to be used, in other words, in connection with cost gathering and ratemaking of construction related commodities named in Item 30 of MRT 7-A, for which rates are named in MRTS 7-A, 17-A, and 20. (MRT 7-A names statewide hourly and distance rates, as well as certain zone rates; MRT 17-A names zone rates in southern California; and MRT 20 names zone rates and certain distance rates in the San Francisco Bay Area.)

By its motion CDTOA/CCA sought 5% interim increases in all hourly, distance, and zone rates in MRT 7-A, and in all zone and distance rates in MRTs 17-A and 20. They later amended their motion and now request increases only in those rates in the three MRTs which apply to the transportation of construction related commodities described in Item 30 of MRT 7-A.

Protests to the proposed increases were filed by Yuba Trucking, Inc. (Yuba), by Californians For Safe & Competitive Dump Truck Transportation/Syar Industries, Inc. (CSCDTT/Syar), and by the Commission's Transportation Division staff (staff). Evidence on the proposed increases was heard before Administrative Law Judge (ALJ) John Lemke in San Francisco on July 6, 1988 after which the matter was submitted.

The petitioners assert generally as follows in their written motion:

1. The Commission is statutorily obliged to keep its minimum rate program current. In <u>Minimum Rate Tariff No. 7</u> (1965) 65 CPUC 167, 172, the Commission stated, in discussing its duty to regulate the rates of dump truck carriers, "It is incumbent upon the Commission, therefore, to keep its minimum rate program responsive to current transportation conditions." The current rates are not responsive to current transportation conditions; some upward adjustment is needed to offset increased costs of doing business.

2. Current rates result in a large number of carriers providing dump truck transportation at unprofitable levels.

While under current ratemaking methodology rates are designed to return an 8% profit, the results of a survey show that a large majority of carriers are operating at break-even or unprofitable levels (Exhibits 78 and 79). For example, in 12 Bay Area counties, 32.6% of the carriers report profitable operations, 17.4% report break-even operations, and 46.3% report unprofitable operations. 56% of carriers in southern California and 63.2% of carriers in the remainder of the state are operating at the breakeven point, or are losing money in performing dump truck services.

3. Exhibits of record are the principal source of evidence relied upon for the requested increases. Exhibits 54, 55, 56, and 57, Revised Exhibits 59, 83, 84, and 92, and related testimony, provide this evidence. D.86-08-030 adopted cost methodologies to be used in OSH 325 for cost gathering and ratemaking purposes for

construction related commodities. The staff has used these methodologies in gathering costs contained in some of the abovementioned exhibits. While the staff has designated its cost data as "preliminary" data, pending the results of the en banc hearings conducted by the Commission regarding the regulatory policies to be pursued in connection with the trucking industry, nevertheless, the evidence contained in these exhibits is the best and most current evidence of dump truck carrier costs available. Further, no other cost evidence is contemplated for presentation and no new studies are in progress. Therefore, the Commission should use this most current information as the basis for maintaining rates in the three MRTs at currently reasonable levels.

4. Exhibits 83 and 84 demonstrate the need for and justify the sought increases. Except for a 1986 increase of less than 3%, dump truck rates have not been increased since the decision in Petitions 328, et al. in Case (C.) 5437. Increases are warranted based on a comparison of Petition 328 costs with those contained in Exhibits 83 and 84. Indicated increases range from 6% to 34% in connection with hourly rates named in MRT 7-A, even before the introduction of Exhibit 92, which corrected historical vehicle costs by increasing the cost of a 2-axle tractor by approximately \$4,000. Exhibit data pertaining to MRTs 17-A and 20 also indicate the need for larger increases than the proposed 5%.

CDTOA/CCA originally believed the labor cost data contained in revised Exhibits 59 and 60 to be adequate and representative for use in establishing labor cost levels to premise interim adjustments in the rates in MRTs 7-A, 17-A, and 20. (However, during the hearing on July 6 their witness, James Martens, stated that in preparing Exhibit 94, which is an update of earlier cost presentations, the labor cost from Petition 328 is being used because of the uncertainty surrounding Exhibits 59 and 60, due to the appeal by the Center For Public Interest Law from a

ruling of the ALJ denying its motion to exclude data based on a labor cost survey conducted by the staff.)

CDTOA/CCA assert that it is in the area of fixed costs, i.e., vehicle, tax and license, and insurance that the greatest increases have occurred. For example, vehicle historical costs are up by 40% due to the inclusion in Exhibit 92 of the costs of 1985, 1986, and 1987 vehicles. In 1986 dump truck carriers received an increase of between 2% and 3% to recover increased costs of insurance premiums; but the increase was based on a premium of approximately \$6,000, while current premiums average \$9,873.

With respect to running costs, which include costs for fuel, oil, tire, and repair and maintenance expenses, CDTOA/CCA are willing to accept the staff developed figure of 10.8 cents per mile, shown in Exhibit 54, except that they believe the fuel cost to be used should be the most current price developed from the 521 Report.

The petitioners state that Exhibit 92, containing updated vehicle historical costs, is the most current and accurate information for the determination of fixed costs, including calculations for investment, depreciation, taxes and licenses, and insurance. They urge the use of Exhibit 92 information for purposes of this motion.

The motion was filed March 9, 1988 and was served on all parties of record. On May 20, 1988, the ALJ issued a ruling to all appearances in this consolidated proceeding stating that hearings on the motion would be conducted in San Francisco during the week of July 5. In addition to the protests filed by Yuba, CSCDTT/Syar, and the staff, the increases were opposed by the Associated General Contractors of California and by California Asphalt Pavement Association. The motion was supported by California Trucking Association.

In justification of its motion, CDTOA/CCA state that there is precedent for this method of seeking rate adjustments

found in the Commission's reregulation proceeding involving used household goods (C.5330, OSH 100). There, in circumstances very similar to those occurring in this proceeding, a need for rate increases was indicated. The carrier association requested interim increases of 10% and 15%, while the staff recommended increases of 5% and 10%. In D.86-04-062 the Commission found that increases in operating costs, including insurance premiums, historical vehicle costs, etc. had increased to the extent that increases in rates were necessary to provide just and reasonable rates for the transportation of used household goods until a complete record could be developed.

CSCDTT/Syar in their protest assert that the motion is beyond the scope of issues contemplated by this proceeding, since OSH 325 was issued for the purpose of considering methods and procedures through which more effective dump truck minimum rate policy could be established and tested in practice. Further, these protestants maintain that Petition 329, et al. of the Ad Hoc Committee in this consolidated proceeding was to consider issues such as tariff simplification, cost and rate gathering methodologies, deviation procedures, etc.; that nothing in the OSH or petitions suggests that a rate increase request should be considered in this proceeding. These protestants also argue that the proposed rate increases are based upon unreliable, outdated, and misleading cost information, would be premature, are based on speculative, unsupported hearsay evidence, and would have a substantial adverse impact upon their interests. They requested that the motion be dismissed, or, alternatively, be set for hearing.

Yuba also insists that the increases are beyond the scope of OSH 325, and that a rate increase is inappropriate at this time since the cost gathering methodologies are the subject of petitions for modification. Yuba also maintains, inter alia, that the cost evidence admitted thus far is preliminary, not final; further, that

the request for increases violates the Commission's Rules of Practice and Procedure since no rule allows a motion for a rate increase.

Staff emphasizes that its labor cost survey has been performed for the limited purpose of establishing territorial boundaries, and not for ratemaking purposes. Staff notes that while rates have been increased by only 2%-3% over the last three years, increases in excess of 25% have been ordered in the three MRTs naming rates for transportation performed in dump truck equipment since 1979. Staff contends that since the petitioners have not established an emergency need for an interim decision granting an increase, and have received rate increases in excess of 25% since 1979, the motion should be denied.

The ALJ informed the parties that he would take official notice of recent information relating to operating ratios contained in the annual reports of dump truck carriers.

During the evidentiary hearing conducted on July 6, 1988, the witness for CDTOA/CCA, James Martens, sponsored Exhibit 94, an update of costs in all categories necessary to calculate increases in total costs for transportation performed under MRT 7-A. Similar cost developments are contained in Exhibits 95 and 96, which contain costs for transportation performed under MRTs 17-A and 20, respectively.

In Exhibit 94 Martens has used revenue hours adopted in D.86-08-030 for developing equipment fixed costs, which represents a reduction of 100 hours per year for all vehicles from the annual use hours formerly used. The historical vehicle costs were taken from Exhibit 92, developed by the staff, which includes costs through 1987. Running costs are those contained in Exhibit 55 in this proceeding.

Martens calculated total costs at 100 operating ratio (O.R.) for the various regions described in MRT 7-A, and compared those costs with those premising the increases ordered in the

Petition 328 proceeding. The comparisons shown in Exhibit 94 indicate that costs at 100 O.R. have increased as follows:

S. F. Bay Area Region	-	6.4%	to	17.3%
Northern Region	-	8-4%	to	22.38
Southern Region	-	5.7%	to	17-6%
San Diego Region	-	6.78	to	16.2%

Increases in hourly rates in MRT 7-A based upon the same cost developments but calculated at O.R. 92 would range from 6.90% to 19.9% in the Northern Region, and 3.5% to 18.4% in the Southern Region.

Costs developed for transportation performed under MRT 17-A by the petitioners using the same methodology employed in the development of those for MRT 7-A indicate increases are warranted in rates for the transportation of rock, sand and gravel for sample hauls of 5, 25, and 50 miles ranging from 11.9% to 16.0%; for the transportation of asphaltic concrete increases range from 17.8% to 18.2%; and for asphalt the increases amount to about 8.7%. For the hauling under MRT 20 increases so measured range from 16.2% to 20.3%.

Increases in the historical cost for 2-axle and 3-axle units have significantly exceeded those for 5-axle units; hence, costs developed for the 2-axle and 3-axle units are substantially higher than those developed for 5-axle units.

Martens testified that information set forth in other exhibits shows that the industry appears to be losing money. He was referring to the petitioners' analysis contained in Exhibit 79, which contains information derived from the demographic survey.

Martens testified that the Commission will soon consider adoption of a streamlined deviation procedure; that if such procedure is adopted, the rates to be deviated from should be as current as possible, from the standpoint of being cost based. He also asserted that within the CDTOA membership are the largest and

smallest fleet owners of dump trucks in the state, and the vast majority of the membership is losing money.

Martens stated that while there have been decreases in labor expense, as well as in the cost of maintenance and repairs, the fixed costs underlying the rate structure, i.e., vehicle historical and depreciation costs, as well as insurance premiums have risen so greatly that rate relief is required. He conceded that if labor costs were to be reduced from the Petition 328 level, the result would be to offset some of the increases in fixed costs. He further commented that, based upon the labor cost survey performed by the staff (revised Exhibits 59 and 60) labor costs in the Northern California Region have increased a little over the levels used in Petition 328, while they have decreased slightly in southern California and decreased about \$5 per hour in the counties in the San Francisco Bay Area. However, he emphasized that in Petition 328 CDTOA proposed a substantially lesser increase than the labor factor indicated for the Bay Area. Martens maintained "We don't think that a 5% increase today is going to be greater than the total cost when it's all put together six months down the road."

In summary, petitioners used the labor cost from Petition 328 for purposes of their motion. All other expenses are those developed thus far by the staff, which in turn are based upon the methodologies adopted pursuant to D.86-08-030 in this proceeding. The Petition 328 labor cost levels were those measured early in 1985.

### Discussion

Many of the rates calculated by CDTOA/CCA indicate that increases well into double digits are warranted, based upon the cost methodology employed by the staff as well as petitioners. Except for increases of 2.2% to 3.0% ordered in April 1987 to offset increased insurance premiums, the rates contained in the three involved MRTs have not been increased since November 1985.

At that time rates in MRT 7-A were increased by varying amounts ranging from 2% to 4% for hourly rates named in Item 390. Other rates in MRT 7-A were increased by 4 percentage points, which constituted increases close to 3% because the rates were then already subject to surcharges of about 25% in many cases. Increases in MRTs 17-A and 20 were increased by varying amounts ranging from 2-1/2 to 5 percentage points, which also represented lesser percentage increases because of the already applicable large surcharge levels.

The request of 5% is conservative, in that it is based upon 1985 fuel costs of 86 cents per gallon. The fuel cost measured by the staff in the most recent 521 Report is approximately 94 cents. We are committed to maintaining minimum rates at compensatory levels while this proceeding is in progress. The cost data utilized by the petitioners is the most current information available. We are now three years into this investigation, and while there has been much progress in the way of formulating cost methodologies, and many new rules have been adopted, there is no definite end to the proceeding in sight at this time. As the assigned ALJ was preparing his proposed decision, hearings were scheduled for the receipt of evidence on expedited deviation procedures. The petitioners argue that if we are to adopt such procedures immediately, prior to completion of the entire OSH 325 proceeding, it would be appropriate that rates subject to deviation procedures be as current as possible.

The demographic study relied on by the petitioners contains information which appears to corroborate the costs contained in CDTOA/CCA's Exhibit 94. Question 5.9 of the information request used in the demographic study is: "After paying all expenses of operation (including a reasonable salary for the owner), is your present dump truck business very profitable (), profitable (), break-even (), or unprofitable ()?" The

information requests were sent out in October 1987 to dump truck carriers earning \$25,000 or more under the dump truck MRTs. It shows that in the CDTOA/CCA proposed Central Coastal Territory, of 592 dump truck carriers 46.3% reported unprofitable operations, 17.40% were at break-even, 31.42% were profitable and 1.18% were very profitable. In the Southern Territory, of 1,270 carriers 44.80% reported unprofitable operations, 12.13% reported break-even operations, 38.74% reported profitable operations and 2.05% reported very profitable operations. Of 535 carriers in the Northern Territory, 48.60% reported unprofitable operations, 14.58% reported break-even operations, 32.34% reported profitable operations, and 1.31% reported very profitable operations. On a statewide basis, 61.3% of the carriers either make no profit or are unprofitable, with 46.6% reporting that they are unprofitable.

Exhibit 79 also contains information concerning hours worked during the years 1984, 1985, and 1986. Based upon this data, the number of hours worked in Central Coastal Territory in those years were, respectively, 1,595, 1,585 and 1,613; in Southern Territory, 1,567, 1,630 and 1,684; and in Northern Territory, 1,610, 1,614, and 1,614 for the three years. The data tends to show that while the amount of work for the industry increased or at least held constant, nevertheless, based upon the results of the profitability question discussed supra, as well as the data contained in Exhibit 94, the industry as a whole has not been able to earn the traditional profit of approximately 8% which has been deemed by the Commission to be appropriate for this particular segment of the transportation industry.

The operating ratio information which the ALJ informed the parties he would take official notice of is stated below. It is a weighted average of 37 representative carriers who have been included in similar analyses in other proceedings involving requests for rate increases, e.g., C.5437, Petitions 314 and 321. In those cases, the operating results of 60 carriers were analyzed. The annual reports for 1987 for all 60 of those same carriers are

not available in our Auditing and Compliance Branch. The representative data indicate a weighted average cost-rate relationship of 97.8%, before allowances for interest and income tax expenses.

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1987	

#### ANNUAL REPORTS

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## OF

DUMP TRUCK CARRIERS 

Line No.	Carrier	Revenue	Expense	Weighted
	(1)	(2)	(3)	(4) [(3)/(2)] x 100
1	ASTA CONSTRUCTION CO. \$	1,580,372	\$ 1,358,686	86.0 %
2	BAILEY, WAYNE TRUCKING, INC.	1,105,768	945,675	85.5 8
3	BARNARD TRUCKING SERVICE, INC.	2,202,824	2,163,919	98.2 3
4	BRINK & MARINI, INC.	935,148	800,959	85.7 %
5	BYERS, A. C.	4,958,367	4,830,614	97.4 %
6	CERINI TRUCKING	2,192,674	1,951,982	89-0 8
7	D & K TRUCKING	783,820	843,941	107.7 %
8	DALTON TRUCKING, INC.	13,485,799	12,919,091	95.8 %
9	DINEEN TRUCKING, INC.	1,504,070	1,423,330	94.6 %
10	DISPATCH TRUCKING	4,919,009	4,765,536	96.9 %
11	FLETCHER, K.A. INC.	2,192,407	2,205,787	100.6 %
12	HANNAH TRUCKING SERVICE, INC.	2,175,524	2,024,772	93.1 %
13	HARKRADER, ROBERT TRUCKING	1,594,957	1,414,403	88-7 8
14	HARRISON-NICHOLS COMPANY, LTD.	5,583,415	5,477,547	98.1 %
15	HARRISON TRUCKING, INC.	4,439,573	4,512,643	101-6 %
16	HARTWICK & HAND. INC.	3,081,347	3,186,829	103.4 % 99.5 %
17	HILDEBRAND & SONS TRUCKING, INC.		4,868,028	95.3 8
18	INGLETT EQUIPMENT, INC.	2,055,529	1,958,065	101.6 %
19	JOHNSON BROS. TRUCKING, INC. KISHIDA, GEORGE INC.	3,960,724	3,821,639	96.5 %
20	KISHIDA, GEORGE INC. LINDEMAN BROS., INC.	5,475,730	5,362,955	97.9 4
21 22	MARTENS, HENRY E. TRANSPORT	5,309,568	5,011,652	94.4 %
23	MORE TRUCK LINES	2,547,845	2,507,462	98.4 8
23	NICHOLLS TRUCKING, INC.	1,364,603	1,391,936	102.0 %
25	NORDIC TRUCKING, INC.	2,817,373	2,690,531	95.5 1
26	R & B & SONS, INC.	3,209,605	3,239,497	100.9 %
20	RICHMOND, LINK & SONS, INC.	8,515,984	8,353,854	98.1 8
28	ROADWAY CONSTRUCTION CO., INC.	7,828,732	7,371,608	94.2 %
29	ROGERS TRUCKS & EQUIPMENT, INC.	9,709,861	9,416,486	97.0 1
30	SALAMONI, BEN TRKG. SER., INC.	3,798,185	3,954,578	104.1 8
31	SAND TRANSPORTATION SER., INC.	2,763,050	2,745,800	99.4 8
32	SKOFF TRUCKING	1,763,449		99.0 1
33	TOUCHATT TRUCKING	6,757,481	6,702,166	99.2 1
34	TRI-COUNTY TRUCK CO.	13,193,215		98.6 1
35	VAN METRE, C.H. & SON	327,560	326,461	99.7 8
36	WALTER, R. D. TRUCKING, INC.	314,456	294,127	93.5 %
37	W.S.P. TRUCKING, INC.	3,553,705	3,765,935	106.0 %
		-,,	-,,	

TOTAL \$143,373,177 \$140,274,983 97.8 %

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We have never considered the development of costs and rates for any segment of the trucking industry to be an exact science. In order to formulate rates which are reasonable for every carrier operating under a particular minimum rate tariff, many judgment decisions must be made. In this subproceeding we have four separate pieces of information which tend to support the petitioners' rate proposal, at least in part. These are (1) their Exhibit 94, which relies upon the 1985 labor cost factor combined with current staff measured equipment costs, and would justify an increase of 5% in all rates, even when using the old fuel cost of 87 cents per gallon; (2) the operating ratio data based upon the results of operations of 37 representative dump truck carriers during 1987; (3) the demographic data presented by CDTOA/CCA in their Exhibit 79; and (4) the labor cost information contained in Revised Exhibit 59. This last data, staff insists, should not be used for ratemaking purposes. It was not gathered for that purpose; rather, staff intends to use these costs in its recommendation concerning the establishment of territorial descriptions. Neither is CDTOA/CCA using Exhibit 59 in its cost/rate development. However, for purposes of this request we may exercise our ratemaking judgment by considering the data in Exhibit 59 for the sole purpose of ensuring that the Petition 328 labor costs used by the petitioners in assembling their total costs, are "in the ballpark" with respect to currently experienced labor costs.

Revised Exhibit 59 shows that 1987 labor costs paid in the various counties are both over and under the Petition 328 levels. Similarly, the Petition 328 cost levels are averages of labor costs experienced in various counties. In the circumstances it is reasonable to use Petition 328 labor cost levels for interim rate offsetting purposes. With respect to equipment fixed and running, insurance, gross revenue, and indirect expenses, the costs contained in the staff exhibits may also be used for interim

ratemaking. If we were to grant the motion as proposed and amended, there would likely be sufficient cushion in the conservative total cost development of petitioners so that no such rate increase would be more than justified because of reduced labor cost measured in some counties as shown in Revised Exhibit 59. This is partly because of the use by the petitioners of the fuel cost of 86 cents, rather than the later 94 cents cost level contained in the last 521 Fuel Report. However, for the sake of those instances where such reduced labor costs may result in lower total costs than might be offset by the other cost increases, we will feel more comfortable, acting on this interim request, in granting an increase of 4 percentage points rather than the full amount requested. This will result in a theoretical industrywide cost-rate relationship of approximately 94%, based upon the 1987 operating results of the 37 representative carriers shown above.

We will place the industry on notice that when rates are ultimately developed for efficient dump truck carriers the Commission may decide to base such rates on costs other than the industry average costs traditionally used for ratemaking purposes. If so, such rates may be, at least in some instances, lower than industry average cost based rates.

Protestants object to the method of notice of the request for rate increases. Notice of filing of the motion appeared in the Commission's Daily Transportation Calendar of March 16, 1988. The ALJ's ruling of May 20 contained notice of the evidentiary hearing to be held on the motion. All appearances and parties had sufficient notice and opportunity to prepare responses to the motion and to present evidence in opposition thereto at the hearing held on July 6. A similar procedure was observed in connection with an interim increase request in our proceeding on used household goods (C.5330, OSH 100). In the circumstances, we find that the parties have had ample notice and opportunity to oppose the increase requests.

## II. MINIMUM RATE DEVIATION PROCEDURES

## Background

Public Utilities (PU) Code § 3666 provides that upon a finding by the Commission that a proposed rate is reasonable, dump truck carriers may perform transportation at a rate lower than the established minimum rate. Resolution TS-682 sets forth the procedure for filing deviation requests. It requires generally that such rates cover a carrier's fully allocated costs. Initial applications are reviewed by the Transportation Division (TD) staff and an administrative law judge (ALJ) prior to their approval by the Commission. The time between filing and granting such initial requests can take three months or more, depending on how complete the justification is when filed, and on whether public hearing is required because of protest. Applications for renewals of deviations are handled much faster under the Special Deviation Docket procedure.

Decision (D.) 85-04-095, which initiated Order Setting Hearing 325, et al. directed that hearings should be held to consider developing a "procedure under which an individual dump truck carrier can be readily permitted to charge less than the established minimum rate level when actual circumstances warrant such action."

Six days of public hearing were held during August 1988 in San Francisco. This phase of the consolidated proceeding was submitted upon the filing of briefs November 7, 1988. Recommendations were received from TD staff, Yuba Trucking (Yuba), California Dump Truck Owners Association/California Carrier Association (CDTOA/CCA), and by the Coalition For Safe, Sensible and Nondiscriminatory Dump Truck Rates (Coalition). Each proposal is discussed as follows:

# TD\_Staff

TD staff asserts that dump trucking is characterized by abruptly changing seasonal and cyclical patterns peculiar to the construction industry. It believes that if carriers had the opportunity to establish less-than-minimum rates on the basis of their short run marginal (variable) costs, they might be able to gain additional business during slow times when their equipment and drivers would normally remain idle. Also, TD staff maintains that carriers would be able to seek loads for trucks that would otherwise be traveling empty to or from a point of pickup or delivery. TD staff maintains it has the experience to process rate filings of this type; that if deviation requests were reviewed by TD staff rather than handled as formal matters, rate deviations could become effective more quickly.

TD staff proposes establishing an expedited two-tier deviation procedure that would offer a choice to applicants of making either a full cost or a variable cost showing. Either showing would be processed by the TD staff, and would become involved in a formal process only if a valid protest were received.

### Full Cost Procedure

This procedure is similar to the existing procedure. Three major differences are: (1) the applicant will not be required to make a showing of special circumstances; (2) the proposed rate, if uncontested, automatically becomes effective 30 days after notice of the filing is published in the Daily Transportation Calendar (DTC); and (3) the Special Deviation Docket procedure now used in connection with renewals will no longer be required, because renewals will also be processed under the informal procedure. Renewal applications will be listed on the DTC and processed in the same manner as initial applications. The full

cost procedure will, as at present, require a showing that the proposed rate will produce a reasonable profit over the carrier's fully allocated costs.

## Variable (Marginal) Cost Procedure

This procedure allows profitable carriers or carriers who possess sufficient working capital to quickly establish rates with certain shippers at or above the carrier's variable cost of providing the service. There are restrictions on who can engage in Variable Cost Deviations, and on the length of time (six months) such deviations can be in effect without a new filing by the carrier. Variable costs are listed in the TD staff proposal, and include the following elements: driver labor, fuel/oil, maintenance and repair, gross revenue expenses, and "other" variable costs. If an input is used specifically for the job in question, and would not be used or paid for otherwise, the input is considered variable under the TD staff proposal.

Carriers must submit a showing that they are either profitable or have sufficient working capital to cover any loss that could result from using the variable cost rate. A balance sheet and income statement for the most recent year will be submitted for analysis.

The applicant would also furnish a simple cost analysis proving that the proposed rate is at least 105% of its variable costs, accompanied by a statement under penalty of perjury confirming the accuracy of the analysis. The carrier and shipper must sign an agreement describing the transportation and proposed rate, and stating that the shipper has examined the carrier's cost data and accepts it. The shipper commits to pay and the carrier to collect any difference between the deviated rate and the minimum rate if, by formal order, the Commission determines that the deviated rate will not cover 105% of the carrier's variable costs

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incurred in the performance of the service. Amounts thus collected will be considered undercharges and paid to the Commission as a fine by the carrier.

Subhaulers engaged by prime carriers to provide transportation under the deviated rate must submit to the prime carrier a simple cost analysis proving that the compensation received from the deviated rate is at least 105% of the subhauler's variable costs incurred under the subject transportation. Subhaulers would also be required to submit a copy of their most recent Internal Revenue Service (IRS) Forms 1065, 1120, 1120-A or 1040, Schedule C, to prove that the subhauler's overall operations are profitable. New subhaulers would submit a balance sheet, working capital worksheet and a projected profit and loss statement. Subhaulers thus engaged must be paid not less than 95% of the deviated rate, 75% when they provide tractor (pulling service) only.

Carriers filing variable cost deviations must submit new applications every six months to continue using the rate, i.e. no renewal process would be available in connection with variable cost filings.

TD staff recommends that both procedures be adopted, and that Resolution TS-682 and Rule 42 series of the Commission's Rules of Practice and Procedure be amended as necessary to implement the procedures. TD staff has furnished both Full Cost and Variable Cost deviation application forms to be used in connection with its proposal. TD staff urges that the procedures be implemented as soon as possible, maintaining that downward pricing flexibility is needed and should be made available for use by carriers and shippers at the earliest possible date. Yuba

Yuba's proposal, set forth in its Proposal For A Streamlined Rate Deviation Procedure (Exhibit 98), has the virtue of simplicity. It recommends that a carrier seeking to assess less

than an established minimum rate be allowed to file an application showing (A) the carrier's safety program and overall safety record, (B) its overall financial condition, indicated primarily by the information contained in the carrier's current balance sheet, and (C) specific information set forth in the application relating to the transportation to be performed, the present and proposed rates, etc. The proposed rate would have to be at least 80% of the established minimum rate. This is because, Yuba alleges, variable costs associated with the dump trucking industry, plus insurance costs, typically are about 80% of total costs. The breakdown of these costs, as contained in Yuba's proposal, is as follows: Labor, 40%; Fuel/Oil, 15.0%; Repairs & Maintenance, 12.5%; Tires, 05.0%; Insurance, 07.5%.

Yuba also alleges that if its procedure were adopted the administrative lag time and the filing costs now faced by carriers seeking deviations would be materially reduced. Since the construction hauling jobs Yuba secures each tend to produce less than \$100,000 in annual revenues, it believes that a deviation procedure that minimizes the costs associated with obtaining authority to charge less than minimums is particularly desirable. Such a procedure makes it cost effective for Yuba and many other carriers to participate in reduced rate hauling, in Yuba's opinion.

Upon finding that the carrier's financial condition and safety record are satisfactory, a proposed rate that is no less than 80% of the established minimum rate would be approved under Yuba's proposal.

#### CDTOA/CCA

The CDTOA/CCA proposal is set forth in Revised Exhibit 100. It consists of a proposed general order (GO) governing rate deviation procedures. The proposal contains two procedures. The first is contained in Rule 5 of the proposed GO, and relates to those situations where dump truck carriers desire to assess less than established minimum rates on a cost justified

basis. A showing must be made of circumstances or conditions involved in the subject transportation, not present in usual or ordinary circumstances, which allow cost savings. Examples of such conditions include:

- a. Equipment use factors greater than those underlying the minimum rates;
- b. Use of lightweight equipment allowing greater than average loads;
- c. Favorable loading/unloading circumstances;
- d. More fuel-efficient power equipment;
- e. Greater volume of traffic and scheduling opportunity, resulting in less administrative supervision.

Applications for such reductions must show that revenue generated from proposed rates is sufficient to contribute to a carrier's profitability. Applications must also include a favorable current California Highway Patrol Terminal Evaluation Report, and a certification that the applicant and subhaulers are in compliance with all safety regulations applicable to their operations. Applications meeting specified requirements would be deemed reasonable and become effective 30 days after Calendar publication date, unless protested. Renewals of rate deviations would require the same revenue and cost data evidence required in the initial application.

The Rule 5 applications would apply to the transportation of all commodities transported under rates in Minimum Rate Tariffs (MRTs) 7-A, 17-A, and 20.

The second CDTOA/CCA proposal is set forth in Rule 6 of the proposed GO. It relates to deviations for the transportation only of construction commodities, defined as those listed in Item 30 of MRT 7-A, Item 60 of MRT 20, and Items 60, 65, 70, and 75 of MRT 17-A. This second proposal would apply in connection with the

transportation of these commodities to or from a construction project. "Construction Project" is defined as follows:

> "A project involving the transportation of construction commodities in bulk in dump truck equipment and where the differential between the established minimum distance or zone rates for the involved transportation and the proposed less than than the established minimum rate for application to distance or zone rated shipments will produce projected transportation cost savings totaling \$10,000 or more for the shipper (debtor)."

CDTOA/CCA's purpose in connection with Rule 6 deviations is contained in Rule 6.2, and states in part:

> "The rationale for Rule 6 deviation procedures is a binding transportation contract between the dump truck carrier and the shipper (debtor), the payment and performance of which is guaranteed by the posting of a bond by the shipper (debtor). Rule 6 deviations from established rates in the dump truck minimum rate tariffs are to be supported by a detailed demonstration of performance factors by the shipper and/or carrier which are more efficient than those which have been used by the Commission in establishing dump truck minimum rates for construction commodities."

Several performance factors underlying current dump truck minimum rates are listed in Appendix B to the proposed GO. These include revenue hours, loading/unloading times, average loads, equipment hours per round trip, etc.

Paragraph D of Rule 6.3 of this proposal requires that at the time of filing of the application for use of the less than established minimum rate, a bond must be furnished by the shipper. The bond would guarantee payment to the carrier and any subhaulers used in the subject transportation of the full minimum rates, should the performance factors and efficiency standards set forth in the application not be achieved, on average, during the performance of the transportation.

There are a number of restrictions, and more than a few procedures which must be followed in connection with the CDTOA/CCA Rule 6 proposal. For example, Rule 6 deviations apply only on the transportation of construction commodities, to or from construction projects. They would not be allowed on the transportation of the Item 40, 50 or 60 commodities named in MRT 7-A, nor on interplant hauling. Nor would they be allowed on hourly rate transportation. A filing fee of \$500 would be required. Known subhaulers must cosign the application; those added to the project later would also have to enroll in the deviation process. If carriers, including subhaulers, are not paid promptly in accordance with Item 130 of MRT 7-A, the deviation authority would be canceled. Complete documentation must be kept for each unit of equipment, showing the computation of productivity factors and efficiencies, summarized daily. This information must be accumulated and summarized in a monthly report to the Commission.

The required bond would not be cancellable until 120 days after completion of the construction project transportation, and not until the results achieved under the transportation had been audited by the Commission's TD staff and found to be consistent with the performance factors underlying the authorized rate. If the audit reveals that those performance factors were not attained, the carrier would be required to collect all "undercharges" in accordance with PU Code § 3800, pay this amount to the Commission, perhaps pay a penalty to the Commission in addition, and be barred from performing Rule 6 type deviations for one year.

The proposed GO contains a provision that the Commission would have to assign sufficient personnel to review, analyze, monitor and audit Rule 6 deviations, and increase the amount to be paid into the Transportation Rate Fund by dump truckers to pay for this additional regulation. Under the proposed GO, protests to Rule 6 applications would be "required to meet a high standard of merit". The proposed GO then would permit either the Commission or staff, acting under delegated authority, to authorize Rule 6 deviations.

California Trucking Association (CTA) indicated its support of the CDTOA/CCA proposal for an interim period of two years subject to review at the expiration of that period. CDTOA/CCA have no objection to adoption of their proposal, contained in Revised Exhibit 100, for an interim two-year period.

# <u>Coalition</u>

The Coalition's proposal is the easiest to state of the four proposals. It recommends simply that Resolution TS-682 be modified, by providing that if no protest is filed to a sought deviation, and neither the Commission's TD staff nor an assigned ALJ has any objection to its authorization, the ALJ shall within 20 days after expiration of the protest period prepare a proposed decision, which shall be considered by the Commission at its first meeting thereafter.

#### Discussion

For several decades we have developed and maintained minimum rates for the transportation of commodities in dump truck equipment. Costs have been developed based upon industrywide, average performance data. While many deviations have been authorized for the interplant transportation of dump truck commodities, few have been granted in connection with the transportation of rock, sand and gravel when involved in construction activity. Resolution TS-682 has required that deviations be based upon favorable circumstances attendant to the transportation, such as a return load opportunity. Opportunities for backhauls are seldom involved in construction activity. To the extent that construction haulers such as Yuba may find it infeasible to incur the present level of expense associated with obtaining authority to charge less than minimums on much of their traffic because of job size, present procedures further diminish deviation opportunities in this area.

When rail freight transportation was subject to the economic jurisdiction of this Commission, prior to its deregulation

by federal decree in 1980 (Staggers Act, PL 96-448), rail rates were often available and could be assessed by dump truckers under the provisions of FU Code § 3663. However, such rail rate opportunities are no longer available, leaving the minimum rates as the lowest available rates in most circumstances. Greater downward pricing flexibility is required to meet the needs of the industry. For example, Yuba's witness Lindeman testified that flexibility would always be needed because of the extreme variability in the amount of time required for hauls of under 50 miles to construction sites. Because minimum rates are based on average requirements they are always unable to take account of such variability in costs. Furthermore, some hauling now done by proprietary carriers may shift to for-hire carriage if greater downward pricing flexibility is available.

The CDTOA/CCA proposals, supported by CTA, could be granted quickly, and they provide a great deal of opportunity for the introduction of individual carrier operating experience into the industry pricing structure. The CDTOA/CCA Rule 5 proposal would provide an expedited method for achieving authority to deviate, based upon a showing similar to the one presently required under Resolution TS-682, and would allow such cost justified requests to become effective 30 days after being calendared, if unprotested. However, the CDTOA/CCA Rule 6 proposal, while innovative, would impose a number of control and oversight requirements which we do not believe are necessary in order to inject the downward pricing flexibility desired. The complex and paperwork intensive set of recommendations contained in the proposed Rule 6, coupled with the increased Commission TD staffing admittedly necessary to examine, monitor and audit such requests and the performances realized thereunder, should be undertaken only if there were no other viable method available for adoption.

The TD staff's proposals, in the main, appear to offer a greater degree of pricing flexibility than now exists under present

procedures. They do so with a minimum of oversight. Staff's Full Cost Procedure would afford carriers and shippers the expedited procedure we have desired. It would also allow carriers the opportunity to assess less than minimum rates based upon individual operating experience, thereby achieving the departure from average costs and rates which have been the principal targets of critics of minimum rate regulation.

The TD staff's Variable Cost Procedure offers further opportunity to carriers in situations described by the TD staff witness in his exhibit - those where they might be able to gain additional business during slow times when equipment and drivers are idle, or to carriers with the ability to achieve further savings as when they may be traveling empty to or from a point of pickup or delivery. The TD staff proposal provides adequate protection for the viability of the industry by requiring the showing of profitability or working capital adequacy every six months in order to initiate and continue Variable Cost deviations.

However, we believe that the TD staff Variable Cost Procedure would be more reasonable if amended to include the cost for insurance, as recommended by Yuba in its proposal. Insurance costs have often been treated by cost experts as variable, rather than fixed costs, as in those cases where insurance is paid as a percentage of gross revenue, or on a mileage basis. These costs have been increasing disproportionately to other costs in recent years. They should be included in variable cost presentations of all carriers; otherwise, carriers who do not incur such expenses as variable costs could exclude them from their cost presentations, while those who do pay for their insurance as a variable cost would have to include them. These latter carriers could not compete on the same basis with the first group. This unfair result would best be resolved by requiring the inclusion of insurance by all carriers wishing to use the TD staff's Variable Cost Procedure in bidding for transportation. Insurance is an expense mandated by Commission

order. It is more reasonable in these circumstances to require reimbursement for such expense when it is mandated.

The Yuba proposal is concise and simple. Of all the proposals advanced, it appears to offer the most pricing flexibility in an expedited fashion. Because deviation applicants would not be required to incur the expense of providing a complex and detailed showing to obtain authority to engage in some degree of downward pricing activity, Yuba's proposal also helps to ensure that no traffic a carrier has an economic desire to handle under deviated rates would be generally barred from moving at less than minimums because of excessive filing costs. Under the Yuba proposal, even the smallest and most unsophisticated carrier would likely find the procedures it need follow to obtain a deviation manageable. Uniform access to deviations would be maximized. The proposal's major flaw is that it may allow a degree of downward pricing that is too great in the absence of a mechanism through which we could review individual carrier costs and engage in more carrier specific oversight.

Based on its own experience and on information from other carriers, Yuba alleges that the variable costs plus insurance costs incurred to operate a unit of dump truck equipment that are typically experienced in the industry amount to about 80% of total costs. As a result, it concludes that a proposed rate that is no less than 80% of the established minimum rate can be automatically considered reasonable. Although we do not rely on the percentage relationships contained in Yuba's Exhibit 98, we do agree that about 80% of the minimum rate should generally cover the variable and insurance costs of reasonably efficient carrier operations.<sup>1</sup>

<sup>1</sup> The term "reasonably efficient carrier operations" refers to the operations that underlie the minimum rates. The Commission is currently considering new approaches for determining who is a truly efficient carrier.

We acknowledged on page 5 of D.86-08-030 issued in this proceeding that the variable and insurance costs upon which dump truck minimum rates are based amount to about 85% of total operating costs.<sup>2</sup> In addition to operating costs, the minimum rates approved in this decision incorporate a 6% profit factor. Accordingly, approximately 80% of the minimum rate should return variable and insurance costs to a reasonably efficient operator.

Over the normal one year duration that a deviation is authorized, however, we believe that a carrier should be required to more fully cover its total costs of performing a specific hauling job. We are concerned that 80% of the minimum rate would fail to adequately cover the costs of even an efficient carrier over the year long term of the deviation if that carrier's entire business was comprised of only the deviated rate traffic.

If Yuba's proposal were tied to a rate that was no less than 90% of the established minimum, we would consider it a more viable proposal. The existence of the 6% profit factor in the current minimum rates would then tend to ensure that a reasonably efficient operator who used this procedure always covered nearly its entire (fully allocated) operating costs. In its comments to the ALJ's proposed decision in this matter, even Yuba tacitly acknowledged the propriety of a more restricted downward pricing window by suggesting the substitution of a 90% minimum rate factor in connection with its proposal as a potential alternative to its original 80% recommendation.

While we believe that approximately 80% of the minimum rate will cover variable and insurance costs, we will adopt a 90% figure for the Simplified Deviation Procedure. Even if the percentage relationships have changed somewhat since those reported

2 D.86-08-030 shows depreciation, tax, license, and overhead as amounting to 15% of total costs.

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in D.86-08-030, and even though some overhead costs may be variable rather than fixed, we remain confident that the reasonably efficient carrier's variable and insurance costs comprise less than 90% of the minimum rate. The current minimum rates incorporate a 6% profit factor, and we are certain that fixed overhead and other fixed costs such as depreciation, taxes, and license fees total far more than 4% of the minimum rate. Today's increase in minimum rates gives us further confidence that 90% of this new level is substantially above variable and insurance costs and will in fact cover nearly all of the reasonably efficient carrier's operating costs.

The Coalition's proposal would allow virtually no new pricing flexibility beyond what exists today. Rather, it would perpetuate the present Resolution TS-682 requirements, but would expedite the process in those cases where there are no protests. Such a proposal does not go far enough.

None of the proposals except CDTOA/CCA's contained specific recommendations concerning labor expense. Over the years the Commission has authorized many rate deviations in dump truck transportation, the labor portion of which has been based on the actual labor cost experienced, rather than the cost underlying the minimum rate. Use of actual labor cost experienced seems preferable, given the nature of the problem that a minimum rate deviation addresses. Therefore, we will continue the existing treatment of labor costs in cases handled under the new deviation procedure.

After consideration, we will adopt new dump truck deviation procedures that combine what we believe to be the desirable elements of the Yuba and the TD staff proposals. Under our adopted procedures, a carrier seeking to assess no less than 90% of the established minimum rate will be allowed to do so by filing a simplified rate deviation application form similar to the one contained in Appendix A to Yuba's Exhibit 98. An applicant

will be required to submit evidence of its overall financial condition, a proper safety report, plus a certification that all subhaulers are in compliance with applicable safety regulations.

A carrier seeking to assess less than 90% of the established minimum rate will be required to comply with the provisions of the TD staff's proposal. We will require applicants to show that insurance costs, as well as other costs that are clearly variable in nature, are covered under the Variable Cost Procedure.

Both Yuba and CDTOA/CCA recommend that the deviation procedures we adopt require an applicant to submit a favorable California Highway Patrol (CHP) report and to certify that all subhaulers are in compliance with applicable safety regulations. In his proposed decision adopting the deviation procedures proposed by TD staff, the ALJ integrated these recommended safety procedures into TD staff's proposed procedures.

We support the principle that underlies the Yuba and CDTOA/CCA proposed safety requirements. A review of the record, however, indicates little evidence on whether CHP can expeditiously issue such reports. We note that Assembly Bill (AB) 2706 (1988) requires the CHP to begin a program of inspecting all trucks biennially. It appears unrealistic, given the burden of performing its AB 2706 related tasks, to expect that the CHP could respond expeditiously to requests for safety inspection reports beyond those required by AB 2706.

We believe that the next best alternative to the recommended requirements of Yuba and CDTOA/CCA is to require deviation applicants to: 1) show they have applied for a CHP Biennial Inspection of Terminals (BIT); 2) submit a Requestor Code number assigned them by the Department of Motor Vehicles (DMV) to evidence participation in that agency's Pull Notice Program; and 3) certify that any subhaulers used to perform transportation under the proposed deviation have also paid the fees required to apply

for a CHP BIT inspection and are participating in the DMV's Pull Notice Program. In keeping with our working relationship with the CHP, we will forward the names of deviation applicants to the CHP. These requirements will provide the safety check that Yuba and CDTOA/CCA recommended.

The Simplified and Variable Cost Procedures we are adopting include a requirement that subhaulers be paid not less than 95% of the deviated rate, or 75% when they are providing the tractor (pulling services) only. The Full Cost Procedure will require that subhaulers either receive the full deviated rate or else that each subhauler be paid enough to cover its full costs for providing the service and produce a profit as well. These requirements will serve to protect subhaulers. The complete details of our adopted procedures are contained in the Appendixes to this decision.

We believe TD staff has the expertise to check-off compliance with the relatively straightforward filing requirements we adopt today for deviation requests. It has administered GO 147-A, which underlies the existing general freight program, and, of course, TD staff's conclusions and actions in the course of processing rate requests under our new program are subject to challenge: a protestant, if his protest is not found by TD staff to fit our adopted guidelines, may file a formal complaint concerning the rates in issue, and an applicant in a similar position can pursue formal processing of his application (which will be referred to an administrative law judge). In summary, this carefully defined and prescribed delegation to TD staff entails its processing requests by checking-off compliance with clear requirements, and a carrier or protestant who takes legitimate issue with staff's processing of a request may, as noted above, pursue formal review with a complaint or application.

PU Code § 3666 states: "If any highway carrier other than a highway common carrier desires to perform any transportation

or accessorial service at a lesser rate than the minimum established rates, the commission shall, upon finding that the proposed rate is reasonable, authorize the lesser rate for not more than one year."

As the Commission has previously stated: "The term 'reasonable' used in the context of Section 3666 has not been defined succinctly and it is doubtful that such can be done." (<u>Major Truck Lines</u>, 71 Cal. Pub. Util. Comm. 447, 451 (1970).) Nevertheless, in prior cases the Commission required that deviated rates cover the fully allocated costs of the transportation involved. We now conclude that such a requirement is too limiting.

The Simplified and Variable Cost Procedures we hereby adopt are based on recovery of something in excess of variable costs, not on recovery of the fully allocated costs. Still, as explained in greater detail below, such deviated rates are also reasonable.

When the Commission required deviated rates to cover the fully allocated costs of the transportation, it required the deviated-rate job to pay its full proportional share of the carrier's fixed costs. However, where no more remunerative work is available, a rational business person will take on additional work if the revenue from the job exceeds the variable costs of performing the job and makes <u>some</u> contribution to the business's fixed costs. Indeed, TD staff's witness, Burgess, testified that that had been his practice in his own business. The alternative is to let equipment or workers sit idle and generate no contribution to fixed costs.

Thus, for example, when a dump truck carrier has idle capacity it is rational for the carrier to take on work that pays something more than the additional (or "variable") cost of performing the transportation, even though the job does not pay its full share of the carrier's fixed costs. Where no better paying work is available, accepting work at such a price is of net benefit

to the carrier, because it covers at least some of the carrier's fixed costs, which have to be paid in any event. However, the prior requirement that a deviated rate cover a job's fully allocated cost would generally have prevented the carrier from taking such work at those prices. Thus, the fully-allocated-cost requirement forced carriers to behave irrationally, that is, unreasonably. Accordingly, we conclude that a requirement that rates <u>always</u> cover a job's fully allocated costs is <u>un</u>reasonable and that deviated rates based on recovery of something in excess of variable costs are reasonable.

This conclusion is not without precedent. In construing PU Code § 451 (relating to common carrier rates), we have previously concluded that a rate is "reasonable" if it contributes revenues above the out-of-pocket (or "variable") costs of performing the service. <u>See</u> D.58664, <u>Investigation of Reduced</u> <u>Rates</u>, mimeo at 3, 4, 8 (June 23, 1959) (headnoted at 57 Cal. Pub. Util. Comm. 229, reprinted at 62 Cal. Pub. Util. Comm. 259, 260-62). <u>See also</u>, D.45770, <u>Investigation of Reduced Rates for</u> <u>Transportation of Bulk Cement</u>, 50 Cal. Pub. Util. Comm. 622, 628, 632 (1951); D.76718, <u>Western Motor Tariff Bureau</u>, mimeo at 8 (Jan. 27, 1970) (headnoted at 70 Cal. Pub. Util. Comm. 643); D.82645, <u>BBD</u> <u>Transportation Co., Inc. v. Pacific Southcoast Frieght Bureau</u>, 76 Cal. Pub. Util. Comm. 485, 501-02, 509-11 (1974) (and cases there cited).

The Commission in prior cases required that deviated rates be based on "unusual" or "special" circumstances. We now conclude that that requirement is also too limiting.

In <u>William E. Daniel</u>, 63 Cal. Pub. Util. Comm. 147, 149 (1964), the Commission said: "in a Section 3666 proceeding the principal cost consideration is the cost savings directly attributable to the [unusual circumstances and conditions in the] transportation involved and not to the ability of an individual carrier to operate at lower costs than other carriers similarly

situated". This restriction made it more difficult for carriers and shippers to take advantage of a particular carrier's ability to operate more efficiently than other carriers. This restriction thus forced shippers and the public to pay more than necessary for transportation services and eliminated incentives that would otherwise encourage carriers to become more efficient. In short, we conclude that the requirement of unusual or special circumstances is not necessary to ensure that deviated rates are reasonable, and we have eliminated this prior requirement from our adopted deviation procedures.

We further conclude that the rates resulting from application of our adopted deviation procedures will be reasonable, as required by PU Code § 3666, even though the adopted procedures no longer require special circumstances nor that deviated rates always cover the carrier's fully allocated costs. We find nothing in the language of § 3666 that would require us to continue those prior restrictions. As shown by the preceding discussion, those prior restrictions were too limiting.

Turning to policies enunciated in other relevant sections of the PU Code, we likewise find that the adopted deviation procedures are reasonable. Among the purposes of the Highway Carriers' Act, according to PU Code § 3502, are the provision of adequate and dependable service by highway carriers at just and reasonable rates. CDTOA/CCA argues that the Variable Cost and Simplified Procedures will, contrary to this goal, "totally destroy the dump truck carrier industry" and that subhaulers will be especially hurt. We are not persuaded by CDTOA/CCA's arguments.

CDTOA/CCA's witness Lautze testified that he was familiar with the operations of rate-exempt agricultural carriers and that their total exemption from rate regulation had not caused the agricultural carrier industry to self-destruct. (This testimony is consistent with the December 1988 report to the CPUC monitoring the bulk agricultural industry after deregulation.) In fact, Lautze

testified that the current carriers are more well-financed and better qualified, while there has been a dropout of carriers who haven't been able to keep up with modern equipment, etc. This evidence concerning rate exempt agricultural carriers makes it implausible that the granting of a much lesser degree of rate flexibility to dump truck carriers will destroy the dump truck carrier industry.

Furthermore, we are not aware of any regulated trucking industry in California where increased flexibility has lead to ruin as carriers all price themselves below cost and fail. Moreover, we are persuaded by the evidence that that will not happen here either. Dump truck carriers, like other business people, are by and large rational; as several witnesses testified, they endeavor to know their own costs. Accordingly, they will choose those hauls that maximize the revenues they receive from the use of their equipment and endeavor to meet those costs.

The testimony of Yuba's witness further supports these conclusions. He testified that he did not believe the deviated rate he proposed would become the going rate in the industry. "[Y]ou are not going to find people just cutting rates to go to work. They want to make money. . . And so the common sense element is much stronger than some kind of herd mentality to cut rates in some kind of a desperate effort to meet the competition." (Tr. at 4598.)

Moreover, because dump truck carriers are rational they cannot be forced to accept money-losing hauls, no matter how large a shipper may be. The same reasoning applies to subhaulers, who are similarly free to reject deviated-rate hauls that do not pay enough. As Yuba's witness, who employs many subhaulers, testified: subhaulers can choose between different prime carriers who pay at different rates, and subhaulers don't stick around long if the rate isn't good enough.

Of course, the limited rate flexibility introduced by the adopted deviation procedures will increase competition and impose some pressure on the less efficient carriers or those who provide poor service. We know that carriers differ in the efficiency of their operations and the quality of their service; any change in the terms of regulation will inevitably affect the marginal carriers disproportionately. Indeed, more innovative and efficient carriers may take business away from others that are less so. However, we do not view this as a negative development. Rather, such a development bodes well for the health of the industry in terms of its ability to provide quality service at the lowest possible reasonable rates.

Even if some carriers with higher than average costs should fail, other existing carriers with lower costs will be able to expand. Moreover, under California's open entry policy for dump truck carriers, established by the Legislature's amendment of P.U. Code § 3613 in 1984, new carriers will be able to enter the business.

Thus, in light of the evidence demonstrating that the industry will not destroy itself by reducing all its prices below cost, we believe that the industry as a whole will be able to meet reasonable demands for service and that adequate and dependable dump truck service will continue to be available after implementation of the adopted deviation procedures. Moreover, we believe that the adopted procedures will not decrease the safety of trucking operations. TD staff's witness testified that the Commission staff had conducted a study in connection with the California Highway Patrol and that there was no causal relationship between safety and price levels. In any event, we stand ready to correct any unforeseen problems with the adopted procedures and will order our Transportation Division to prepare a monitoring report on the first year of the two-year limited period for which we are now authorizing these new procedures.

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In sum, we reject CDTOA/CCA's contention that these procedures will destroy the dump truck industry. Instead, we are persuaded by the evidence that the adopted deviation procedures will not cause prime carriers or subhaulers to cut their rates without regard to their costs in a desperate effort to meet competition, and will not cause a shortage of supply or a deterioration in truck safety. Moreover the adopted deviation procedures contain a number of protections for subhaulers and will benefit shippers through lower rates.

CDTOA/CCA also argues that these procedures will permit a carrier to reduce rates to one of its customers without offering similar reductions to its other customers, thus giving the favored shipper a competitive advantage over its competitors. However, CDTOA/CCA's own witness Lautze testified that a carrier could not grant a deviation to one of its customers without doing the same for its other customers, because the deviation proposals become public information. Accordingly, we do not believe that carriers will use these procedures to bestow advantages on favored customers. Rather, we believe carriers will use them in circumstances like those outlined by the witnesses: as TD staff witness Burgess testified, when a carrier has idle capacity, or as Yuba's witness Lindeman testified, when the deviated rate will in fact cover all of the carrier's costs but the job is relatively small or needs to be done so quickly that the time and expense of filing a full-cost deviation and defending it against protests is not worthwhile.

We expect that the revised deviation procedures adopted herein will afford carriers new opportunities to pursue deviations, especially for construction-related jobs. However, we will need to monitor these revised procedures carefully to ensure that they have the results we intend. A period of two years will be reasonable to implement the changes and monitor their effect upon the industry and its consumers. We will order our Transportation Division to

produce a monitoring report assessing the first year's experience under these revised procedures. With this report, as well as other communications we may receive from the industry and its consumers, we will be able to make any needed revisions prior to making the new procedures permanent. In this regard, we will issue a further decision during 1990. This schedule will permit needed changes to be made before the experimental program expires in early 1991.

This is an interim decision. We think it is premature to amend Resolution TS-682 and our Rules of Practice and Procedure, and the Special Deviation Docket relating to deviations and renewals from minimum rates. Therefore, under Rule 87, this decision will temporarily supersede the provisions of Resolution TS-682, as well as those of Rule 42.1 and 42.2 (b) of our Rules of Practice and Procedure, and the Special Deviation Docket, insofar as they relate to transportation subject to MRTs 7-A, 17-A, and 20. We supersede these procedures only because we could not otherwise implement this new process for a two-year experimental period. We believe that this is the minimum supersedure that is necessary to permit this. Applicants and potential protestants should note that we are superseding only Rule 42.2 (b) while leaving Rule 42.2 (a) in place for this purpose. Protests to applications for deviation shall not be considered unless they satisfy the full requirements of Rule 42.2 (a). In addition to any other reasons for filing a protest, we recognize that a protest may convey a competitive advantage to the protestant merely through the administrative delay that may thereby be caused to an applicant. Should we detect a pattern of protests that appear to be filed for this purpose and that do not meet the requirements of Rule 42.2 (a), we may consider appropriate remedies either through amendments to the Rules of Practice and Procedure or through other means available to us.

Accordingly, we refer to Rule 87 of our Rules of Practice and Procedure in finding that good cause exists to order the deviations from our Rules described above for the purpose of

adopting this program during the two-year experimental period. At or before the end of the experimental period contemplated by this decision, consideration will be given to amendment of Resolution TS-682, Rules 42.1 and 42.2 (b), and the Special Deviation Docket.

In accordance with PU Code § 311, the ALJ's proposed decision was mailed to appearances on November 10, 1988. Comments were received from CDTOA/CCA, Yuba, AGC, T&T Trucking, Inc. (T&T), and from the Coalition. We have reviewed and considered these comments, and note again that those of Yuba contain a recommendation that we adopt a deviation procedure substantially similar to the one we are adopting by this decision. AGC also urged adoption of a modified version of the Yuba proposal. We note that the comments of T&T, and certain of the comments of AGC, are particularly persuasive.

In the proposed decision, Appendix A, Subsection A, Subsection (d) on Page A-2, Appendix B-7(b) on Page B-2, and Appendix C-3(B) on Page C-2, Internal Revenue Service Income Tax Forms 1065, 1120, 1120-A or 1040, Schedule C are to be filed with the application if authority is sought utilizing subhaulers to transport the involved commodity. T&T believes subhaulers will be extremely reluctant to provide their income tax returns for a filing which then becomes public record, considering such information to be confidential between the filing party and the Internal Revenue Service. T&T believes the recommended deviation procedures in this respect to be of questionable legality, and inhibitive to the effective implementation of the procedure. It urges the elimination of these tax forms should the ALJ's proposed decision be adopted.

As an alternative, T&T suggests that the Commission consider protection of subhauler interests through adoption of "50%" requirements as set forth in the CDTOA/CCA Exhibit 100 Revised deviation proposal (e.g. Rule 5.2-D), or a similar provision in GO 147-A, Rule 7.1(e). Under that requirement, if

subhaulers are to be used to provide less than 50% of the actual transportation under the proposed rate, no subhauler costs or financial information need be submitted. However, when subhaulers are to be used to provide more than 50% of the transportation, then subhauler costs must be submitted with the application. In T&T's view, this rule would provide adequate protection against abuse of subhaulers and is far preferable to the required submission of income tax returns.

Appendix A, Paragraph (b)6 on Page A-2, and Appendix C on Page C-5 of the proposed decision requires that an involved shipper enter into a written agreement with the applicant for a Variable Cost Procedure deviation to evidence that it commits to pay - and that applicant commits to collect - any difference between the deviated rate and the minimum rate (undercharges) if we determine that the former will not cover 105% of applicants variable costs. AGC believes that such a requirement will effectively preclude use of this procedure. In AGC's words: "No shipper would knowingly expose himself to this potential liability." It recommends that this requirement be eliminated.

We concur with T&T's concern about the confidentiality of tax forms. We agree that adoption of the "50%" rule would be adequate for purposes of this proceeding in lieu of the forms referred to above, and would be consistent with our rules in the general freight program. Moreover, the "50%" rule will serve to protect subhaulers, as subhauler costs will have to be included in Full or Variable Cost applications whenever subhaulers provide more than half of the actual transportation. When subhaulers provide less than 50% of the actual transportation, they are protected by the fact that the prime carrier is willing to provide the majority of the actual transportation at the deviated rate.

We also share AGC's concern that the Variable Cost Procedure be constructed in a way that will not inappropriately inhibit its use. We recognize that the carrier/shipper agreement

could well have a chilling effect on shipper willingness to use deviated rates, especially as the meaning of the agreement is unclear. The agreement refers to undercharges that might be assessed should the deviated rate later be found unreasonable by the Commission. However, a properly-supported and duly approved deviation will by definition be a reasonable rate, and therefore not properly the subject of any undercharges; by contrast, the use by a carrier of a deviation for which the carrier did not have proper authority could lead to an assessment of undercharges. We will not include the carrier/shipper agreement in the Variable Cost Procedure.

Our adopted Full Cost and Variable Cost Procedures incorporate both T&T's recommended "50%" rule and AGC's recommendation to eliminate the carrier/shipper agreement contained in Appendixes A and C of the proposed decision.

#### Findings of Fact

1. CDTOA/CCA have filed a motion for an interim 5% increase in rates in MRTs 7-A, 17-A, and 20 for commodities named in Item 30 of MRT 7-A.

2. The equipment costs contained in the various staff exhibits, and the labor costs used in Petition 328, are the best and most current evidence for measuring costs for dump truck carriers.

3. Except for increases of 2.2% to 3.0% ordered in 1987, rates named in MRTs 7-A, 17-A, and 20 have not been increased since 1985.

4. Since the last rate increases ordered in these MRTs, the industry has experienced further increases in total costs. These costs have been measured by CDTOA/CCA, and indicate that increases in rates for the transportation of construction related commodities of 4 percentage points will allow the industry to earn revenues which are reasonable and necessary.

5. The operating ratio and demographic information discussed in the decision tends to confirm the need for increases as measured by the petitioners, although not necessarily in the same amounts proposed.

6. The filing of petitioners' motion, publication thereof in the Daily Transportation Calendar, and the ALJ's ruling of May 20 advising all parties of the July 6 hearing provide adequate notice.

7. FU Code § 3666 states: "If any highway carrier other than a highway common carrier desires to perform any transportation or accessorial service at a lesser rate than the minimum established rates, the commission shall, upon finding that the proposed rate is reasonable, authorize the lesser rate for not more than one year."

8. D.85-04-095, which initiated OSH 325, et al. directed that hearings should be held to consider developing a "procedure under which an individual dump truck carrier can be readily permitted to charge less than the established minimum rate level when actual circumstances warrant such action."

9. While many deviations have been authorized from minimum rates in connection with the interplant transportation of commodities in dump truck equipment, virtually none have been authorized in connection with dump truck construction activity. Furthermore, those deviations which have been authorized have often not become effective until several months after filing, even if unprotested, because of the current administrative procedure.

10. Greater downward pricing flexibility is required to meet the needs of the industry.

11. If an input is used specifically for the job in question, and would not be used or paid for otherwise, the cost of the input is a variable cost.

12. Approximately eighty percent of the minimum rate will generally cover the variable and insurance costs of reasonably efficient carrier operations. Thus, if Yuba's proposal were tied

to a rate not less than 90% of the established minimum (allowing a 6% profit factor), the resulting minimum rate deviation procedure would ensure that a reasonably efficient carrier using this procedure would be able to cover nearly its entire operating costs.

13. Where no more remunerative work is available, a rational business person will take on additional work if the revenue from the job exceeds the variable costs of performing the job and makes some contribution to the business's fixed costs. The prior requirement that a deviated rate <u>always</u> cover the fully allocated costs of providing the transportation prevented carriers from behaving in this rational manner, and therefore was <u>un</u>reasonable.

14. The adopted Simplified and Variable Cost Procedures are based on recovery of something in excess of variable costs and therefore are reasonable.

15. The prior requirement that deviated rates be based on "unusual" or "special" circumstances made it difficult for a carrier to offer lower rates based on its ability to operate more efficiently than other carriers. The requirement thus forced shippers and the public to pay more than necessary for transportation services and eliminated incentives that otherwise would encourage carriers to become more efficient.

16. The total exemption from rate regulation of certain agricultural carriers has not caused the agricultural carrier industry to self-destruct.

17. Dump truck carriers cannot be forced to accept moneylosing hauls, no matter how large a shipper may be. Moreover, dump truck carriers endeavor to know their own costs and to make a profit. Accordingly, the dump truck industry will not cut rates without regard to costs in a desperate effort to meet competition and obtain work. Therefore, adoption of the Simplified Deviation Procedure should not cause such deviated rates to become the going rate in the industry.

18. Because deviation proposals become public information, carriers will be unable to use these procedures to unfairly bestow advantages on favored customers. Rather, carriers will use the Variable Cost and Simplified Procedures in circumstances like those outlined by the witnesses, for example, when a carrier has idle capacity, or when the deviated rate will in fact cover all of the carrier's costs but the job is relatively small or needs to be done so quickly that the time and expense of filing a full-cost deviation and defending it against protests is not worthwhile.

19. The adopted procedures will not destroy the dump truck carrier industry. The dump truck industry should be able to meet reasonable demands for service, and adequate and dependable dump truck service should continue to be available after implementation of the adopted deviation procedures.

20. The adopted deviation procedures will benefit shippers through lower rates.

21. Subhaulers, like other dump truck carriers, cannot be forced to accept money-losing hauls and are free to reject deviated-rate hauls that do not pay enough. Subhaulers are further protected by the division of revenue requirements included in each of the adopted procedures. Subhaulers are also protected by the "50%" rule included in the Full and Variable Cost Procedures.

22. The adopted deviation procedures should not decrease the safety of trucking operations.

23. The procedures set forth in Appendixes A through D to this decision will provide reasonable, workable, expedited procedures for processing initial and renewed requests for deviations from rates in MRTs 7-A, 17-A, and 20.

24. The TD staff has the expertise to perform the check-off compliance review of applications for authority to deviate from minimum rates, in the manner set forth in Appendix A to this decision, after such applications are calendared. This will provide an expeditious and reasonable procedure for such requests.

### Conclusions of Law

1. MRTs 7-A, 17-A, and 20 should be amended to conform to our findings above. The resultant rates will be just and reasonable.

2. MRTs 17-A and 20 should be amended by separate orders to avoid duplication of tariff distribution.

3. Due to the needs of dump truck carriers performing transportation under rates in MRTs 7-A, 17-A, and 20 for rate relief, the effective date of this decision should be today.

4. The rates resulting from application of the adopted deviation procedures will be reasonable, as required by PU Code § 3666, even though the adopted procedures no longer require special circumstances nor that deviated rates always cover the carrier's fully allocated costs. These prior restrictions on the availability of deviations are too limiting and not required by statute.

5. In construing PU Code § 451 the Commission previously concluded that a common carrier rate is "reasonable" if it contributes revenues above the variable costs of performing the service.

6. The evidence concerning rate exempt agricultural carriers makes it implausible that the granting of a much lesser degree of rate flexibility to dump truck carriers will destroy the dump truck carrier industry.

7. The provisions included in this decision as Appendixes A through D, should be adopted for an interim period of two years.

8. The Transportation Division should produce a monitoring report on the first year's experience under these revised procedures so that the Commission can make any further revisions that may be needed.

9. The need to proceed with revisions to the Commission's procedures for authorizing deviations from minimum rates for dump truck transportation for an experimental period of two years constitutes good cause for deviating from Rules 42.1 and 42.2 (b) of the Commission's Rules of Practice and Procedure.

10. This decision should provide the bases for achieving deviations from rates in MRTs 7-A, 17-A, and 20, and should supersede Resolution TS-682 and Rules 42.1 and 42.2 (b) of the Commission's Rules of Practice and Procedure, and the Special Deviation Docket, in connection with transportation performed under those tariffs. Such supersedure is appropriate under Rule 87 of the Rules of Practice and Procedure.

11. The Commission should authorize TD staff to perform the check-off compliance review, as provided in Appendix A of today's decision, of applications for authority to deviate from rates in MRT's 7-A, 17-A, or 20.

#### INTERIM\_ORDER

#### IT IS ORDERED that:

1. MRT 7-A (Appendix B to D.82061, as amended) is further amended by incorporating the attached Supplement 29, effective July 1, 1989.

2. In all other respects, D.82061, as amended, shall remain in full force and effect.

3. The Executive Director shall serve a copy of the tariff amendment on each subscriber to MRT 7-A.

4. Resolution TS-682 and Rules 42.1 and 42.2 (b) of the Commission's Rules of Practice and Procedure, and the rules contained in the Special Deviation Docket, are superseded by the rules contained in Appendixes A through D, attached, in connection with transportation performed under MRTs 7-A, 17-A, and 20, effective July 1, 1989.

5. The authority contained in Ordering Paragraph 4 will expire June 30, 1991 unless sooner canceled, modified, or extended by further order of the Commission.

6. The Executive Director shall serve a copy of this decision on each subscriber to MRTs 7-A, 17-A, and 20.

7. On or before October 1, 1990, the Transportation Division ( shall present the Commission with a report describing the experience under the first year of these revised deviation procedures.

> This order is effective today. Dated \_\_\_\_\_, at San Francisco, California.

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SURCHARGE SUPPLEMENT

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SUPPLEMENT 29

(Cancels Supplement 28)

(Supplements 9 and 29 Contain All Changes)

#### TO

MINIMUM RATE TARIFF 7-A

#### NAMING

MINIMUM RATES AND RULES

#### FOR THE

TRANSPORTATION OF PROPERTY IN DUMP TRUCK

EQUIPMENT BETWEEN POINTS IN CALIFORNIA

BY

HIGHWAY CONTRACT CARRIERS

AGRICULTURAL CARRIERS

AND

. .

EFFECTIVE JUL 1 1989

DUMP TRUCK CARRIERS

Decision

89 04 086

Issued by the PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA Governor Edmund G. "Pat" Brown Building 505 Van Ness Avenue San Francisco, California 94102

SUPPLEMENT 29 TO MINIMUM BATE TARTER 7-A

#### #APPLICATION OF SURCHARGE

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Except as otherwise provided, compute the amount of charges in accordance with the rates and rules of this tariff and increase the amount so computed by the following: (See Exception)

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	Transportation of Commonities Described in Item 30	Transportation of Commodities Not <u>Described in Item 30</u>		
Moving at rates named in Item 390 (hourly rates)	\$7%	3%		
Moving at rates named in all other items.	-	2+2*		

For purposes of disposing of fractions under provisions hereof, fractions of less than one-half (1/2) cent shall be dropped and fractions of one-half (1/2) cent or greater shall be increased to the next higher whole cent.

EXCEPTION: The surcharge herein shall not apply to:

1. Items 100 and 110 (Railhead-to-railhead charges only);

- 2. Item 120 Bridge and Perry Tolls; and
- 3. Itom 260 Additional charge for service.

THE END

ø Change ♦ Increase

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## REVISED APPENDIX A

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### PROCEDURES AND CRITERIA FOR FILING DEVIATION APPLICATIONS

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A carrier seeking to assess less than an established minimum rate can select one of the following deviation procedures:

- 1. <u>SIMPLIFIED RATE DEVIATION APPLICATIONS (for rates that are no less</u> than 90% of the applicable minimum rates)
- a. A Simplified Rate Deviation Procedure will be available only to carriers proposing a rate that is 90% or more of the applicable minimum rate. A proposed rate at that level is presumed to be reasonable and no cost showing is required. Staff will handle these deviation requests as informal matters and those that are not contested will become effective 30 days after calendar notice.
- b. Use of this procedure will require that carriers submit:

1. A proposed rate that is no less than 90% of the applicable minimum rate.

2. Their latest available balance sheet and an income statement from the most current fiscal year.

3. Their identity and the identities, signatures and telephone numbers of the shipper and any subhaulers involved in the transportation.

4. A description of the transportation.

5. The applicable minimum rate and the proposed rate, using the same unit of measurement as that shown in the applicable minimum rate tariff.

6. A copy of their application for a Biennial Inspection of Terminals (BIT) inspection by the California Highway Patrol along with evidence of payment of the fees for that inspection; their Requestor Code Number assigned by the Department of Motor Vehicles as part of their participation in the DMV's Pull Notice Program; and certification that all subhaulers to be used in performing the deviated transportation have also applied for a BIT inspection and are participating in the Pull Notice Program.

7. A letter of support from the shipper.

- c. Subhaulers engaged by prime carriers to provide transportation under the deviated rate must be paid not less than 95% of the deviated rate, 75% when they are providing the tractor (pulling services) only.
- d. Carriers wishing to continue use of the Simplified Rate Deviation should file an application for renewal at least six weeks in advance of the current deviation's expiration date.



# II. FULL COST DEVIATION APPLICATIONS (for rates that are less than 90% of the applicable minimum rate)

- a. Applicants for Full Cost Deviations will adhere to the same requirements as those contained in Resolution TS-682, except that:
  - 1. It will no longer be necessary to show that the transportation in question is performed under favorable operating conditions that differ from those used in establishing minimum rates.
  - 2. Staff will process these deviation requests, to ensure compliance with these guidelines, as informal matters and, if they are not contested, will become effective 30 days after calendar notice.

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- 3. Renewal applications will no longer be handled under the Special Deviation Docket Procedure. All renewals, as with initial applications, will be processed under the informal expedited procedure.
- 4. They shall declare that subhaulers will not be used to provide more than half of the actual transportation (as evidenced, for example, by the subhaulers providing less than half of the power units to be used), or if subhaulers are to be used on more than half of the transportation, the costs of the subhaulers employed in the transportation shall be included. The costs of subhaulers employed in the transportation shall also be included whenever subhaulers will be paid a lesser rate or charge than that sought by the applicant.
- 5. All prime carrier applicants must submit a copy of their application for a Biennial Inspection of Terminals (BIT) inspection by the California Highway Patrol along with evidence of payment of the fees for that inspection; their Requestor Code Number assigned by the Department of Motor Vehicles as part of their participation in the DMV's Pull Notice Program; and certification that all subhaulers to be used in performing the deviated transportation have also applied for a BIT inspection and are participating in the Pull Notice Program.
- b. Full Cost applications, based on the carrier's actual cost, will continue to require a showing that the proposed rate will cover the applicant's full cost for providing the service and will produce a profit. Where financial information about subhaulers is submitted (either because they will be paid a lesser rate than that sought by the applicant or because they will provide more than half of the transportation), each subhauler must be paid enough to cover its full cost for providing the service and produce a profit as well.

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### III. <u>VARIABLE (MARGINAL) COST DEVIATION APPLICATIONS (for rates that</u> are less than 90% of the applicable minimum rate)

- a. A variable cost procedure, also based on the carrier's actual costs, will only be available to either <u>profitable carriers</u> or those with sufficient working capital. Staff will handle these deviation requests as informal matters and those that are not contested will become effective 30 days after calendar notice.
- b. Use of this procedure will require that carriers submit:
  - 1. A showing that they are either profitable or have sufficient working capital to cover any loss that could result from using the variable cost rate. More specifically, "sufficient working capital" requires: Cash or other liquid assets sufficient, over the life of the deviation, to cover: (1) the carrier's ordinary working capital requirements; plus (2) the difference between revenues that would be received under (a) the applicable minimum rate excluding the profit factor incorporated into the minimum rate, and (b) the deviated rate requested. (If a carrier wishes, it may substitute for item (2) (a) the fully allocated cost of the particular transportation.) Applicants will submit a balance sheet and income statement from the most current fiscal year. New carriers and applicants who show a loss on their income statements who show a loss on their income statement will also be required to sign release forms authorizing the Commission to obtain financial information from the applicant's bank records. These forms are contained in Appendix D.
  - 2. Their identity and the identity of the shipper and any subhaulers involved in providing the transportation.
  - 3. A letter of support from the shipper.
  - 4. A description of the transportation.
  - 5. The existing rate and the proposed rate, using an appropriate unit of measurement.
  - 6. A simple cost analysis proving that the proposed rate is at least 105% of the total of variable costs and insurance, accompanied by a statement under penalty of perjury confirming the accuracy of this analysis.
  - 7. Either a declaration that subhaulers will not be used to provide more than half of the actual transportation under the proposed rates (as evidenced, for example, by the subhaulers providing less than half of the power units to be used), or the inclusion of the costs of the subhaulers employed in the transportation.
  - 8. A copy of their application for a Biennial Inspection of Terminals (BIT) inspection by the California Highway Patrol along with evidence of payment of the fees for that inspection; their Requestor Code Number assigned by the Department of Motor Vehicles as part of their participation in the DMV's Pull Notice

Program; and certification that all subhaulers to be used in performing the deviated transportation have also applied for a BIT inspection and are participating in the Pull Notice Program.

- c. Subhaulers engaged by prime carriers to provide transportation under the deviated rate:
  - 1. must, if providing more than half of the transportation under the deviated rate, submit to the prime carrier, for joining with the filing of the application, a simple cost analysis proving that the compensation received from the deviated rate is at least 105% of the total of variable costs and insurance to be incurred under the subject transportation. When subhaulers provide more than half of the transportation: each subhauler must make the same showing of profitability or sufficient working capital as the prime carrier; each subhauler must submit a balance sheet and income statement for the most current fiscal year, except that new subhaulers and subhaulers who show a loss on their income statement must submit a balance sheet, working capital worksheet, and projected profit and loss statement; and new subhaulers and subhaulers who show a loss on their income statement will also be required to sign a release form (found in Appendix D) authorizing the Commission to obtain financial information from the subhauler's bank records.
  - 2. must be paid not less than 95% of the deviated rate, 75% when they are providing the tractor (pulling services) only.
  - 3. must certify, under penalty of perjury, that the compensation to be received from the deviated rate will cover 105% of the total of their variable costs plus insurance. The verification form is contained in Appendix C.
- d. <u>No renewal process will be available</u>. Carriers filing variable cost deviations must submit new applications every 6 months to continue using the rate. Carriers wishing to continue use of the variable cost rate should file at least 6 weeks in advance of the current deviation's expiration date.



# FILING THE DUMP TRUCK DEVIATION APPLICATIONS UNDER EXPEDITED PROCEDURE

a. Two copies of all applications to deviate from MRT's 7-A, 17-A and 20, including any supplements or amendments, shall be delivered or mailed to:

California Public Utilities Commission Truck Tariff Section-2nd Floor 505 Van Ness Avenue San Francisco, CA 94102

- b. If a receipt for the filings is desired, the application shall be sent in triplicate with a self-addressed stamped envelope. One copy will be date stamped and returned as a receipt.
- c. Rejected applications will be returned to the applicant with an explanation of why the application was not accepted.
- d. All applications filed will be available for public inspection at the Commission's office in San Francisco.

### PROCEDURES FOR REVIEW OF DEVIATION APPLICATIONS UNDER EXPEDITED PROCEDURE

- a. The deviation filing will be noted immediately in the Commission's Transportation Calendar. Renewals of simplified and full cost deviations will be labeled as such in the calendar notice. The deviated rate will become effective 30 days after the calendar notice date, unless rejected or suspended prior to that date by the Commission staff.
- b. The Commission staff will review the proposed deviations for compliance during the 30 day notice period.
- c. Staff may reject a filing within the 30 day notice period. All rejections will be noted in the Daily Transportation Calendar and applicants will be notified by mail of the reasons for rejection.
- d. Staff will reject any application that is incomplete or fails to comply with the requirements the Commission has promulgated, including the following:
  - i. If a simplified rate deviation application, the proposed rate must be no less than 90% of the applicable minimum rate.
  - ii. If a full cost application, the proposed rate must provide an operating ratio of less than 100.
  - iii. If a variable cost application, the proposed rate must cover at least 105% of the total of variable cost and insurance.

- iv. Submit a copy of their application for a Biennial Inspection of Terminals (BIT) inspection by the California Highway Patrol along with evidence of payment of the fees for that inspection; their Requestor Code Number assigned by the Department of Motor Vehicles as part of their participation in the DMV's Pull Notice Program; and certification that all subhaulers to be used in performing the deviated transportation have also applied for a BIT inspection and are participating in the Pull Notice Program.
- e. Any party may protest a proposed rate deviation. The protest must be in writing and specifically indicate in what manner the application for a deviated rate is defective. It must be received no later than 10 days before the deviated rate is scheduled to become effective. The protestant shall serve a copy of the protest on the applicant on the same date it is either forwarded or delivered to the Commission. All protests will be noted in the Commission's Transportation Calendar.
- f. Commission staff shall reject the protest if it does not allege a failure to comply with the deviation requirements the Commission has promulgated or if the protest is frivolous. (A "frivolous" protest is one that provides no basis for its objection to the proposed deviation.) Otherwise, staff shall evaluate the substance of the protest based on conformity with the guidelines for filing the application. Based on this review of the protest and application, staff may reject the filing before the effective date of the rate. The staff may also temporarily suspend the rate for a period of time not to exceed 45 days beyond the date of suspension, during which time it will either reject the protest or the rate, or request the Commission to further suspend the rate and set the matter for hearing. Protests may raise questions about the costs (including the underlying performance factors) that a carrier has relied on in its deviation application. Staff may try to get the protestant and applicant to resolve their differences about such costs. However, where a protest raises a non-frivolous question of fact about such costs (that is, where the protest provides some basis for its objection to the costs contained in the application), if Staff is unable to resolve the protest such that the protest is withdrawn, then Staff will suspend the rate, if it has not already been suspended, and request that the Commission docket the matter and set it for hearing. The Commission will further suspend the rate and schedule a hearing if, based on review of the application, the protest, and Staff's recommendation, the Commission concludes that there is a material issue of fact bearing on the reasonableness of the deviated rate.
- g. Notice of any rejection or rate suspension, and any vacation of such suspension, will appear in the Commission's Transportation Calendar.
- h. If a protest results in the Commission setting the matter for hearing, the burden of proof rests with the proponent of the deviated rate.

- i. Commission review of any rate which is in effect may be initiated by filing a formal complaint. A formal complaint may also be filed by a protestant whose protest has been rejected, or by a would-be protestant, before the deviated rate goes into effect. The burden of proof in a complaint shall be upon the complainant. The complainant will send a copy of the complaint to the defendant (carrier), shipper and any subhaulers who are parties to the transportation agreement.

# REVISED APPENDIX A-1

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### SIMPLIFIED RATE DEVIATION APPLICATION FORM

### SIMPLIFIED RATE DEVIATION APPLICATION FORM

1. APPLICANT INFORMATION
 Application No: (Commission will insert number)
 Is this a renewal application? \_\_\_\_yes \_\_\_\_no
 Cal T-No:
 Name:
 Address:
 Telephone:
 Person to contact:
 If a corporation, attach articles of incorporation or
 reference a previous filing that contained the articles:
 Signature of owner or officer:

2. SAFETY INFORMATION

Attach your copy of your application for a Biennial Inspection of Terminals (BIT) inspection by the California Highway Patrol along with evidence of payment of the fees for that inspection; your Requestor Code Number assigned by the Department of Motor Vehicles as part of participation in the DMV's Pull Notice Program; and certification that all subhaulers to be used in performing the deviated transportation have also applied for a BIT inspection and are participating in the Pull Notice Program.

3. FINANCIAL INFORMATION Attach latest available balance sheet, dated \_\_\_\_\_, 19\_\_\_\_ Attach income statement for the latest fiscal year ending \_\_\_\_\_\_, 19\_\_\_\_.

4. SHIPPER INFORMATION Attach a letter of support from the shipper, including the shipper's name, address, telephone number, person to contact, and signature of the owner or officer.

5. TRANSPORTATION DETAILS Job location: Point of origin: Point of Destination: Haul distance: Commodity: Quantity: Applicable tariff: Applicable tariff rate: Proposed rate: Effective date of proposed rate: Termination date of proposed rate\*:

\*Note: All rate deviations must be renewed after one year. The renewal application should be submitted at least six weeks prior to expiration.

Revised Page A-1-1

6. SUBHAULER INFORMATION Attach separate pages with information on items 1 and 2 (on page A-1-1).

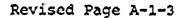
### CARRIER VERIFICATION

I am the applicant in the above-entitled matter; the statements in the foregoing document are true of my own knowledge, except as to matters which are therein stated on information or belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed	on	at			 California.
		(Date)	(Name o	)I	

(Applicant)



### CARRIER VERIFICATION

### (Where Applicant Is a Corporation)

I am an officer of the applicant corporation herein, and am authorized to make this verification on its behalf. The statements in the foregoing document are true of my own knowledge except as to the matters which are therein stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on \_\_\_\_\_\_at \_\_\_\_, California. (Name of City)

(Signature and Title of Corporate Officer

### CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing application has been served by <u>(specify method of service)</u> upon each of the following:

(List names and addresses of parties served.)

	Dated at	/	California,	this	
		(Name of City)	·		(Day)
of		, 19			
	(Month)				

(Signature of Person Responsible for Service

Revised Page A-1-5 (End of Revised Appendix A-1)

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### REVISED APPENDIX B

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### FULL COST DEVIATION APPLICATION FORM

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APPLICATION TO DEVIATE FROM THE MINIMUM RATES FOR TRANSPORTATION OF COMMODITIES IN DUMP TRUCK EQUIPMENT

FULL COST DEVIATION APPLICATION

Is this a renewal application? \_\_\_\_yes \_\_\_\_no
Full cost deviation application # (Commission will insert\_number)
Name of carrier \_\_\_\_\_(Exact Legal Name)
Cal T-No. of carrier \_\_\_\_\_\_
Principal place of business \_\_\_\_\_(Street Address and City)
If applicant is a corporation, attach articles of incorporation or
make reference to a previous filing that contained the articles.
Carrier is authorized to transport \_\_\_\_\_\_(Show Operating Authority)
Contact person regarding this application(Name, Title, Address\_\_\_\_\_\_\_\_
and Telephone Number)
Commodity description and form \_\_\_\_\_\_\_\_

Deviation from Minimum Rate Tariff (Tariff Number)

Origin\_\_\_\_\_

Destination\_\_\_\_\_

Shipper\_\_\_\_

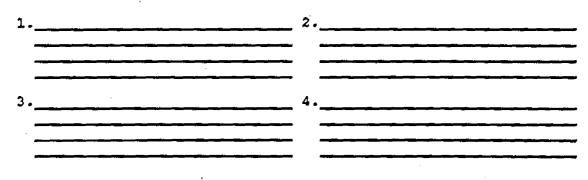
Present Rate (express in unit of measure) min. wt., unless hourly

Proposed Rate (express in unit of measure) min. wt. unless hourly

- 1. Describe the transportation to be performed. (The description should cover all particulars of the transportation to include but not be limited to: Loading and unloading, loadweights and anticipated volume per day or other time period, and whether the transportation is part of a backhaul or fronthaul.)
- 2. Show the estimated cost of performing the transportation under the proposed rate. Include the development of labor costs, vehicle fixed costs and mileage costs, other direct costs and allocations of administrative and other indirect costs. Overall cost should be expressed in terms of cost per 100 pounds, cost per load, or other appropriate unit of measure.

- 3. Show expected revenue from the transportation under the proposed rate in terms of revenue per 100 pounds, revenue per load or other appropriate unit of measure that will permit evaluation of the profitability of the service at the proposed rates. Explain the methods used in developing the revenue figures.
- 4. Attach a letter of support from the shipper.
- 5. Identify any carrier(s) presently providing the specific service sought by the applicant.
- 6. Attach applicant's latest available balance sheet, dated \_\_\_\_\_, 19\_\_. and an income statement for the latest fiscal year ending \_\_\_\_\_, 19\_\_.
- 7. Subhaulers will be used to perform less than half\_\_\_\_, more than half\_\_\_\_, or none\_\_\_\_ of the transportation.
- 8. If subhaulers are engaged to perform the service, they must either be paid the full proposed rate or, if the subhaulers will be paid a lesser rate or charge than that sought by the applicant, or if in any case more than half of the transportation under the deviated rate is to be provided by subhaulers, the following facts and statements must be submitted and joined with the filing of the application:
  - A. Name of Subhauler Permit Number Current Address

LIST SUBHAULERS BELOW:



B. A profit and loss (income) statement and a balance sheet.



C. A detailed financial statement from each subhauler showing its total revenues and expenses in performing the transportation for the prime carrier for the last fiscal year and the subhauler's projected revenues and expenses for the specific transportation sought under this application.

Where financial information about subhaulers is submitted (either because they will be paid a lesser rate than that sought by the applicant or because they will provide more than half of the transportation), each subhauler must be paid enough to cover its full cost for providing the service and produce a profit as well.

- 9. Other facts relied upon to support the reasonableness of the proposed rate.
- 10. Attach a copy of your application for a Biennial Inspection of Terminals (BIT) inspection by the California Highway Patrol along with evidence of payment of the fees for that inspection; your Requestor Code Number assigned by the Department of Motor Vehicles as part of participation in the DMV's Pull Notice Program; and certification that all subhaulers to be used in performing the deviated transportation have also applied for a BIT inspection and are participating in the Pull Notice Program.
- 11. This rate shall become effective 30 days after the date that notice of the filing appears in the Commission's Transportation Calendar.
- 12. This rate shall expire <u>(show date)</u> (no later than one year from the effective date).
- 13. In all other respects the rates and rules in MRT\_\_\_\_\_ shall apply.
- 14. Applicant will furnish a copy of this application to any interested party either upon their written request or that of the Commission. Renewal applications must be served upon the parties who were served a copy of the preceding application.

Dated at	. <u> </u>	California,	this	_
day of	, 19			
Signature: Title:				
Address:				
Telephone Number:				

Revised Page B-3

### CARRIER VERIFICATION

I am the applicant in the above-entitled matter; the statements in the foregoing document are true of my own knowledge, except as to matters which are therein stated on information or belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on \_\_\_\_\_\_at \_\_\_\_\_, California. (Name of City)

(Applicant)

#### CARRIER VERIFICATION

(Where Applicant Is a Corporation)

I am an officer of the applicant corporation herein, and am authorized to make this verification on its behalf. The statements in the foregoing document are true of my own knowledge except as to the matters which are therein stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on \_\_\_\_\_\_at \_\_\_\_, California. (Name of City)

(Signature and Title of Corporate Officer

#### CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing application has been served by <u>(specify method of service)</u> upon each of the following:

(List names and addresses of parties served.)

Dated at		_, California,	this		
	(Name of City)		·	(Day)	
of		_, 19			
	(Month)				

(Signature of Person Responsible for Service

Revised Page B-6 (End of Revised Appendix B)

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# REVISED APPENDIX C

### VARIABLE COST DEVIATION APPLICATION FORM

#### APPLICATION TO DEVIATE FROM THE MINIMUM RATES FOR TRANSPORTATION OF COMMODITIES IN DUMP TRUCK EQUIPMENT

#### VARIABLE COST DEVIATION APPLICATION

Carrier applicant qualifies to file a deviation under the variable cost deviation procedure by demonstrating profitability or working capital availability. A showing of sufficient working capital requires a showing of cash or other liquid assets sufficient, over the life of the deviation, to cover: (1) the carrier's ordinary working capital requirements; plus (2) the difference between revenues that would be received under (a) the applicable minimum rate excluding the profit factor incorporated into the minimum rate, and (b) the deviated rate requested. (If a carrier wishes, it may substitute for item (2)(a) the fully allocated cost of the particular transportation.)

Applicants will submit a balance sheet and income statement from the most current fiscal year. New dump truck carriers and those applicants who show a loss on their income statements must submit a balance sheet, a working capital worksheet, and a projected profit and loss statement. New carriers and those applicants who show a loss on their profit and loss (income) statement will also be required to sign a release form (Appendix D) authorizing the Commission to obtain financial information from the applicant's bank records.

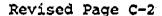
If subhaulers are to be used, the cost justification shall either contain a declaration that subhaulers will not provide more than half of the actual transportation under the proposed rates (as evidenced, for example, by the subhaulers providing less than half of the power units), or include the costs of the subhaulers. When subhaulers provide more than half of the transportation: each subhauler must make the same showing of profitability or sufficient working capital as the prime carrier; each subhauler must submit a balance sheet and income statement for the most current fiscal year, except that new subhaulers and subhaulers who show a loss on their income statement must submit a balance sheet, working capital worksheet, and projected profit and loss statement; and new subhaulers and subhaulers who show a loss on their income statement will also be required to sign a release form (Appendix D) authorizing the Commission to obtain financial information from the subhauler's bank records.

Variable cost deviation application #(Commission will insert number)
Name of carrier (Exact Legal Name)
Cal T-No. of carrier
Principal place of business(Street Address and City)
If applicant is a corporation, attach articles of incorporation or make reference to a previous filing that contained the articles.
Carrier is authorized to transport (Show Operating Authority)
Contact person regarding this application <u>(Name, Title, Address</u> and Telephone Number)
Description of commodity
Deviation from Minimum Rate Tariff (Tariff Number)
Origin
Destination
Shipper
Present Rate (express in unit of measure) min. wt. (unless hourly)
Proposed Rate (express in unit of measure) min. wt. (unless hourly)

1. Describe the transportation that will be performed under this rate. (The description should cover all particulars of the transportation to include but not be limited to: Loading and unloading, loadweights and anticipated volume per day or other time period, and whether the transportation is part of a backhaul or fronthaul.)

2. In the event that subhaulers are engaged to perform this transportation, they shall be paid no less than 95% of the revenue earned from the deviated rate. If the subhaulers are only providing "pulling" services, (tractor and driver only) they shall be paid no less than 75% of the revenue earned from the deviated rate. The difference between the deviated rate and the amount paid to the subhauler will cover any brokerage fee normally paid to the prime carrier.

3. Subhaulers will be used to perform less than half\_\_\_, more than half\_\_\_, or none\_\_\_ of the transportation.



4. If authority is sought utilizing subhaulers, submit the following:

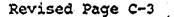
Name	01	Subhauler
		lumber
Curre	ent	Address

LIST SUBHAULERS BELOW:

		2. <u></u>	
		• • • • • • • • • • • • • • • • • • •	
•		•	
<u>ے د</u>	 4	4	
		4 •	

5. Attach a copy of your application for a Biennial Inspection of Terminals (BIT) inspection by the California Highway Patrol along with evidence of payment of the fees for that inspection; your Requestor Code Number assigned by the Department of Motor Vehicles as part of participation in the DMV's Pull Notice Program; and certification that all subhaulers to be used in performing the deviated transportation have also applied for a BIT inspection and are participating in the Pull Notice Program.

6. Revenue/Cost Comparisons--The rate/cost information can be stated per trip, per mile, per ton, per hour or other appropriate unit of measure. Please be consistent throughout your presentation. If the proposal contains different origin/destination combinations or different weights, please give appropriate examples. (Additional sheets may be used for subhauler data). ALL CARRIERS (and subhaulers, if subhaulers are providing more than 50% of the transportation) MUST SUBMIT REVENUE/COST COMPARISON STATEMENTS. The format on the next page can be followed or can serve as a quide:



PROPOSED RATE:				
INSURANCE COSTS:	<del></del>	<u> </u>		<u></u>
VARIABLE COSTS:				
Driver Labor				
Fuel/Oil	- <u></u>			
Tires				
Maintenance and Repair		. <u></u>		
Gross Revenue Expenses	. <u></u>			
Other variable costs (Please specify. If none, write "none")'	v	<u></u>	<u> </u>	
TOTAL VARIABLE COST				
INSURANCE PLUS VARIABLE COSTS			<u></u>	
DIFFERENCE				

(Rate minus Costs)

\*If an input is used specifically for the job in question, and would not be used or paid for otherwise, the input is variable.

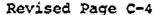
7. Submit a letter of support from the shipper.

8. Attached are the carrier verification and the subhauler verification forms. ALL VARIABLE COST DEVIATION PROPOSALS MUST INCLUDE THE CARRIER VERIFICATION FORM. If subhaulers will be performing transportation the SUBHAULER VERIFICATION form must be submitted as well.

9. This rate shall become effective 30 days after the date that notice of the filing appears in the Commission's Transportation Calendar.

10. This rate shall expire <u>(show date)</u> (no later than six months from effective date).

11. In all other respects the rates and rules in MRT\_\_\_\_\_ shall apply.



12. Applicant will furnish a copy of this application to any interested party upon either their written request or that of the Commission.

Dated at \_\_\_\_\_, California, this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

Signature:	<u> </u>	 Tit:	le:		
Address: _		 			
Telephone	Number:			 	

Revised Page C-5

#### CARRIER VERIFICATION

I am the applicant in the above-entitled matter; the statements in the foregoing document are true of my own knowledge, except as to matters which are therein stated on information or belief, and as to those matters I believe them to be true.

I certify that the rates contained in Variable Cost Deviation Application #(Commission will insert number) will cover 105% of the total of all variable costs and insurance incurred in providing the transportation.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on \_\_\_\_\_\_ at \_\_\_\_\_California (Date) (Name of City)

Carrier Applicant

#### CARRIER VERIFICATION

#### (Where Applicant is a Corporation)

I am an officer of the applicant corporation herein, and am authorized to make this verification on its behalf. The statements in the foregoing document are true of my own knowledge except as to the matters which are therein stated on information and belief, and as to those matters I believe them to be true.

I certify that the rates contained in the Variable Cost Deviation Application #<u>(Commission will insert number)</u> will cover 105% of the total of all variable costs and insurance incurred in providing the transportation.

I declare under penalty of perjury that the foregoing is true and correct.

Executed	on	a1	t				California.
		(Date)	(Na	ame	of	City)	

(Signature and Title of Corporate Officer

#### SUBHAULER VERIFICATION

I am the subhauler applicant in the above-entitled matter; the statements in the foregoing document concerning this subhauler applicant are true of my own knowledge, except as to matters which are therein stated on information or belief, and as to those matters I believe them to be true.

I certify that 95\*\* of the rate contained in Variable Cost Deviation Application #\_\_\_\_\_\_ will cover 105% of the total of all variable costs and insurance incurred by this subhauler applicant in providing the transportation.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on\_\_\_\_\_\_at \_\_\_\_\_, California. (Date) (Name of City)

(Subhauler Applicant)

\*75% for "pullers" furnishing a driver and tractor only.

### CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing application has been served by <u>(specify method of service)</u> upon each of the following:

(List names and addresses of parties served.)

	Dated at			,	California,	this	
		(Name	of	City)			(Day)
of		<b>,</b>		, 19			
•••	(Month)						

(Signature of Person Responsible for Service)

Revised Page C-9 (End of Revised Appendix C) . ,

# REVISED APPENDIX D

# RELEASE OF INFORMATION FORMS REFERRED TO IN APPENDIX C

#### PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA RELEASE OF INFORMATION AUTHORIZATION

The undersigned authorizes the California Public Utilities Commission to obtain such verification or further information as it may require concerning information on financial condition set forth in the application for deviation authority, as submitted by the undersigned.

Regarding the verification of bank records, such verification shall be limited to the particular accounts and/or items listed below by the applicant and shall be limited to a period of time commencing on the date of the signing of the application and ending on the date of the granting or rejection of the application; but in no event shall the period for the verification of bank records extend beyond the date of the final disposition of the application.

The applicant has the right to revoke this authorization at any time, and agrees that any documents submitted for the purpose of demonstrating financial condition shall remain with the Commission.

Date

Signature of Applicant(S)

BANK RECORDS:

NAME AND LOCATION OF BANK TYPE OF ACCOUNT ACCT. NO. AMOUNT

Revised Page D-1

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA CONSENT TO OBTAIN INFORMATION (To be signed by non-applicant spouse of married applicant)

I authorize the California Public Utilities Commission to obtain whatever information about my financial condition it considers necessary and appropriate for the purposes of evaluating the financial condition of my spouse as an applicant for deviation authority.

Regarding the verification of bank records, my authorization is limited to the accounts and/or items listed below and is limited to a period of time commencing on the date of the signing of the application and ending on the date of the granting or rejection of the application; but in no event shall the period for the verification of bank records extend beyond the date of the final disposition of the application.

I understand that I have the right to revoke this authorization at any time.

Date	Signature of Sp	ouse			
BANK RECORDS:					
NAME AND LOCATION OF BANK	TYPE OF ACCOUNT	ACCT. NO.	AMOUNI		
<u>ماكى مەرەمىي مەرەمىيە ئەمەرەمە ئەمەرەمە يەرەمەرەمەرەمەرەمەرەمەرەمەرەمەرەمەرەمەرە</u>			<u></u>		
		·	<u>-</u>		
	<del>سرمیں جی میں پر این کر اگری ہیں۔ یک</del> ی ک				

Revised Page D-2 (End of Revised Appendix D) L/JTP/rys

#### Decision

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA In the Matter of the Investigation Case 5437, OSH 325 (Filed April 17, 1985) for the purposes of considering ) and determining minimum rates for transportation of sand, rock, Case 5437, OSH 323 gravel and related items in bulk, (Efled October 1, 1984) in dump truck equipment between Case 5437, Pet. 329 (Filed June 6, 1985) points in California as provided in Minimum Rate Tariff 7-A and the revisions or reissues thereof. Case 9819, OSH 75 Case 9820, OSH 25 (Filed April 17, 1985) Case 9819, Pet. 79 Case 9820, Pet. 29 Case 5432, Pet. 1060 And Related Matters (Filed June 6, 1985) ORDER MODIFYING DECISION 89-04-086 AND DENYING REHEARING

California Dump Truck Owners Association and California Carriers Association (CDTOA/CCA) and California Trucking Association (CTA) have filed applications for rehearing of D.89-04-086 (the Decision), in which the Commission adopted deviation procedures for dump truck carriers. In D.89-07-065, we stayed these new deviation procedures, to preserve the status quo pending Commission action on CDTOA/CCA's application for rehearing. Having considered the applications for rehearing, we will now modify the Decision, deny rehearing, and lift the stay.

CTA attached an affidavit to its application for rehearing. However, it is generally inappropriate to attach an affidavit or declaration to an application for rehearing; an application for rehearing is not a proper means for introducing new evidence into the record. Since, CTA's affidavit does not particularly try to introduce any new facts, but mostly just

makes legal arguments, we have treated the affidavit as if it were a brief.

CDTOA/CCA objects that the adopted procedures do not permit protests relying on allegations of "price fixing, . . . restraint of trade, [or] the creation of a monopoly in a certain, territory" or on allegations "that subhaulers are being forced to work at a significant loss." However, there is something implausible about the kinds of protests that CDTOA/CCA wishes to file. First, as pointed out in our modified decision, subhaulers, like other dump truck carriers, cannot be forced to accept money-losing hauls and are free to reject deviated-rate hauls that do not pay enough. (Moreover, /our adopted procedures contain provisions that protect subhaulers, such as their division of revenue requirements and the "50%" rule.) Second, CDTOA/CCA does not explain how the adopted procedures will lead to "price fixing" or other anti-competitive results. To the contrary, because the adopted déviation procedures allow a greater degree of pricing flexibility, and therefore a greater degree of competition, we believe these deviations are unlikely to cause such anti-competitive effects. We believe it more likely that competitors would use such protests to delay requested deviations and inhibit competition. We therefore conclude that it is more reasonable to allow deviated rates that meet our adopted guidelines to go into effect than to allow competitors to delay requested deviations just by filing protests making allegations of anti-competitive behavior. A would-be protestant who genuinely believes that there is an anticompetitive problem can still file a complaint and obtain Commission réview of its grievance.

In its application for rehearing CDTOA/CCA says it expects "that virtually every contractor in the State will insist on a simplified deviated rate when these deviation procedures become effective." Subsequent events have failed to confirm CDTOA/CCA's expectations. The Decision was issued at the end of April, and the new deviation procedures became effective on July

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first. However, despite this considerable lead time in which carriers could have been preparing deviation applications, carriers filed <u>only two</u> Simplified Deviation applications during the more than half month period from July 1 until the new procedures were stayed by D.89-07-065.

We have carefully considered each of the issues and arguments raised in the applications for rehearing and are of the opinion that sufficient grounds for granting rehearing have not been shown. We are, however, of the view that the Decision should be modified in several respects. More particularly, we wish to take this opportunity to better explain why we have adopted these deviation procedures and to make some fine-tuning changes in the procedures themselves. <u>Conclusion of Law</u>

1. It is more reasonable to allow deviated rates that meet our adopted guidelines to go into effect than to allow competitors to delay requested deviations just by filing protests making allegations of anti-competitive behavior.

Therefore, good cause appearing,

IT IS ORDERED that D.89-04-086 is modified as follows:

1. The first sentence in the second full paragraph on page 18 is modified to read:

Carriers must submit a showing that they are either profitable, or have sufficient working capital to cover any loss that could result from using the variable cost rate.

2. The following material is added at the end of the last paragraph on page 23:

Under the proposed GO, protests to Rule 6 applications would be "required to meet a high standard of merit". The proposed GO then would permit either the Commission or staff, acting under delegated authority, to authorize Rule 6 deviations.

California Trucking Association (CTA) indicated its support of the CDTOA/CCA proposal for an interim period of two years subject to review at the expiration of that period. CDTOA/CCA have no objection to adoption of their proposal, contained in Revised Exhibit 100, for an interim two-year period.

#### <u>Coalition</u>

The Coalition's proposal is the easiest to state of the four proposals. It recommends simply that Resolution TS-682 be modified, by providing that if no protest is filed to a sought deviation, and neither the Commission's TD staff nor an assigned ALJ has any objection to its authorization, the ALJ shall within 20 days after expiration of the protest period prepare a proposed decision, which shall be considered by the Commission at its first meeting thereafter.

#### Discussion

For several decades we have developed and maintained minimum rates for the transportation of commodities in dump truck equipment. Costs have been developed based upon industrywide, average performance data. While many deviations have been authorized for the interplant transportation of dump truck commodities, few have been granted in connection with the transportation of rock, sand and gravel when involved in construction activity. Resolution TS-682 has required that deviations be/based upon favorable circumstances attendant to the transportation, such as a return load opportunity. Opportunities for backhauls are seldom involved in construction activity. To the extent that construction haulers such as Yuba may find it infeasible to incur the present level of expense associated with obtaining authority to charge less than minimums on much of their traffic because of job size, present procedures further diminish deviation opportunities in this area.

When rail freight transportation was subject to the economic jurisdiction of this Commission, prior to its deregulation

by federal decree in 1980 (Staggers Act, PL 96-448), rail rates were often available and could be assessed by dump truckers under the provisions of PU Code § 3663. However, such rail rate opportunities are no longer available, leaving the minimum rates as the lowest available rates in most circumstances. Greater downward pricing flexibility is required to meet the needs of the industry. For example, Yuba's witness Lindeman testified that flexibility would always be needed because of the extreme variability in the amount of time required for hauls of under 50 miles to construction sites. Because minimum rates are based on average requirements they are always unable to take account of such variability in costs. Furthermore, some hauling now done by proprietary carriers may shift to for-hire carriage if greater downward pricing flexibility is available.

The CDTOA/CCA proposals, supported by CTA, could be granted quickly, and they provide a great deal of opportunity for the introduction of individual carrier operating experience into the industry pricing structure. The CDTOA/CCA Rule 5 proposal would provide an expedited method for achieving authority to deviate, based upon a showing similar to the one presently required under Resolution TS-682, and would allow such cost justified requests to become /effective 30 days after being calendared. if unprotested. However, the CDTOA/CCA Rule 6 proposal, while innovative, would impose a number of control and oversight requirements which we do not believe are necessary in order to inject the downward pricing flexibility desired. The complex and paperwork inténsive set of recommendations contained in the proposed Rule 6, coupled with the increased Commission TD staffing admittedly /necessary to examine, monitor and audit such requests and the performances realized thereunder, should be undertaken only if there were no other viable method available for adoption.

The TD staff's proposals, in the main, appear to offer a greater degree of pricing flexibility than now exists under present

procedures. They do so with a minimum of oversight. Staff's Full Cost Procedure would afford carriers and shippers the expedited procedure we have desired. It would also allow carriers the opportunity to assess less than minimum rates based upon individual operating experience, thereby achieving the departure from average costs and rates which have been the principal targets of critics of minimum rate regulation.

The TD staff's Variable Cost Procedure offers further opportunity to carriers in situations described by the TD staff witness in his exhibit - those where they might be able to gain additional business during slow times when equipment and drivers are idle, or to carriers with the ability to achieve further savings as when they may be traveling empty to or from a point of pickup or delivery. The TD staff proposal provides adequate protection for the viability of the industry by requiring the showing of profitability or working capital adequacy every six months in order to initiate and continue Variable Cost deviations.

However, we believe that the TD staff Variable Cost Procedure would be/more reasonable if amended to include the cost for insurance, as/recommended by Yuba in its proposal. Insurance costs have often been treated by cost experts as variable, rather than fixed costs, as in those cases where insurance is paid as a percentage of/gross revenue, or on a mileage basis. These costs have been increasing disproportionately to other costs in recent years. They should be included in variable cost presentations of all carriers; otherwise, carriers who do not incur such expenses as variable costs could exclude them from their cost presentations, while those who do pay for their insurance as a variable cost would have to/include them. These latter carriers could not compete on the same basis with the first group. This unfair result would best be resolved by requiring the inclusion of insurance by all carriers wishing to use the TD staff's Variable Cost Procedure in bidding for transportation. Insurance is an expense mandated by Commission

order. It is more reasonable in these circumstances to require reimbursement for such expense when it is mandated.

The Yuba proposal is concise and simple. Of all the proposals advanced, it appears to offer the most pricing flexibility in an expedited fashion. Because deviation applicants would not be required to incur the expense of providing a complex and detailed showing to obtain authority to engage in some degree of downward pricing activity, Yuba's proposal also helps to ensure that no traffic a carrier has an economic desire to handle under deviated rates would be generally barred from moving at less than minimums because of excessive filing costs. Under the Yuba proposal, even the smallest and most unsophisticated carrier would likely find the procedures it need follow to obtain a deviation manageable. Uniform access to deviations would be maximized. The proposal's major flaw is that it may allow a degree of downward pricing that is too great in the Absence of a mechanism through which we could review individual carrier costs and engage in more carrier specific oversight.

Based on its own experience and on information from other carriers, Yuba alleges that the variable costs plus insurance costs incurred to operate a unit of dump truck equipment that are typically experienced in the industry amount to about 80% of total costs. As a result it concludes that a proposed rate that is no less than 80% of the established minimum rate can be automatically considered reasonable. Although we do not rely on the percentage relationships contained in Yuba's Exhibit 98, we do agree that about 80% of the minimum rate should generally cover the variable and insurance costs of reasonably efficient carrier operations.<sup>1</sup>

1 The term "reasonably efficient carrier operations" refers to the operations that underlie the minimum rates. The Commission is currently considering new approaches for determining who is a truly efficient carrier.

Revised page 27

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We acknowledged on page 5 of D.86-08-030 issued in this proceeding that the variable and insurance costs upon which dump truck minimum rates are based amount to about 85% of total operating costs.<sup>2</sup> In addition to operating costs, the minimum rates approved in this decision incorporate a 6% profit factor. Accordingly, approximately 80% of the minimum rate should return variable and insurance costs to a reasonably efficient operator.

Over the normal one year duration that a deviation is authorized, however, we believe that a carrier should be required to more fully cover its total costs of performing a specific hauling job. We are concerned that 80% of the minimum rate would fail to adequately cover the costs of even an efficient carrier over the year long term of the deviation if that carrier's entire business was comprised of only the deviated rate traffic.

If Yuba's proposal were tied to a rate that was no less than 90% of the established minimum, we would consider it a more viable proposal. The existence of the 6% profit factor in the current minimum rates would then tend to ensure that a reasonably efficient operator who used this procedure always covered nearly its entire (fully allocated) operating costs. In its comments to the ALJ's proposed decision in this matter, even Yuba tacitly acknowledged the propriety of a more restricted downward pricing window by suggesting the substitution of a 90% minimum rate factor in connection with its proposal as a potential alternative to its original 80% recommendation.

While we believe that approximately 80% of the minimum rate will cover variable and insurance costs, we will adopt a 90% figure for the Simplified Deviation Procedure. Even if the percentage relationships have changed somewhat since those reported

2 D.86 $\pm$ 08-030 shows depreciation, tax, license, and overhead as amounting to 15% of total costs.

in D.86-08-030, and even though some overhead costs may be variable rather than fixed, we remain confident that the reasonably efficient carrier's variable and insurance costs comprise less than 90% of the minimum rate. The current minimum rates incorporate a 6% profit factor, and we are certain that fixed overhead and other fixed costs such as depreciation, taxes, and license fees total far more than 4% of the minimum rate. Today's increase in minimum rates gives us further confidence that 90% of this new level is substantially above variable and insurance costs and will in fact cover nearly all of the reasonably efficient carrier's operating costs.

The Coalition's proposal would allow virtually no new pricing flexibility beyond what exists today. Rather, it would perpetuate the present Resolution TS-682 requirements, but would expedite the process in those cases where there are no protests. Such a proposal does not go far enough.

None of the proposals except CDTOA/CCA's contained specific recommendations concerning labor expense. Over the years the Commission has authorized many rate deviations in dump truck transportation, the labor portion of which has been based on the actual labor cost experienced, rather than the cost underlying the minimum rate. Use of actual labor cost experienced seems preferable, given the nature of the problem that a minimum rate deviation addresses. Therefore, we will continue the existing treatment of labor costs in cases handled under the new deviation procedure.

After consideration, we will adopt new dump truck deviation procedures that combine what we believe to be the desirable elements of the Yuba and the TD staff proposals. Under our adopted procedures, a carrier seeking to assess no less than 90% of the established minimum rate will be allowed to do so by filing a simplified rate deviation application form similar to the one contained in Appendix A to Yuba's Exhibit 98. An applicant

will be required to submit evidence of its overall financial condition, a proper safety report, plus a certification that all subhaulers are in compliance with applicable safety regulations.

A carrier seeking to assess less than 90% of the established minimum rate will be required to comply with the provisions of the TD staff's proposal. We will require applicants to show that insurance costs, as well as other costs that are clearly variable in nature, are covered under the Variable Cost Procedure.

Both Yuba and CDTOA/CCA recommend that the deviation procedures we adopt require an applicant to submit a favorable California Highway Patrol (CHP) report and to certify that all subhaulers are in compliance with applicable safety regulations. In his proposed decision adopting the deviation procedures proposed by TD staff, the ALJ integrated these recommended safety procedures into TD staff's proposed procedures.

We support the principle that underlies the Yuba and CDTOA/CCA proposed safety requirements. A review of the record, however, indicates little evidence on whether CHP can expeditiously issue such reports. We note that Assembly Bill (AB) 2706 (1988) requires the CHP to begin a program of inspecting all trucks biennially. It appears unrealistic, given the burden of performing its AB 2706 related tasks, to expect that the CHP could respond expeditiously to requests for safety inspection reports beyond those required by AB 2706.

We/believe that the next best alternative to the recommended requirements of Yuba and CDTOA/CCA is to require deviation applicants to: 1) show they have applied for a CHP Biennial Inspection of Terminals (BIT); 2) submit a Requestor Code number assigned them by the Department of Motor Vehicles (DMV) to evidence participation in that agency's Pull Notice Program; and 3) certify that any subhaulers used to perform transportation under the proposed deviation have also paid the fees required to apply

for a CHP BIT inspection and are participating in the DMV's Pull Notice Program. In keeping with our working relationship with the CHP, we will forward the names of deviation applicants to the CHP. These requirements will provide the safety check that Yuba and CDTOA/CCA recommended.

The Simplified and Variable Cost Procedures we are adopting include a requirement that subhaulers be paid not less than 95% of the deviated rate, or 75% when they are providing the tractor (pulling services) only. The Full Cost Procedure will require that subhaulers either receive the full deviated rate or else that each subhauler be paid enough to cover its full costs for providing the service and produce a profit as well. These requirements will serve to protect subhaulers. The complete details of our adopted procedures are contained in the Appendixes to this decision.

We believe TD staff has the expertise to check-off compliance with the relatively straightforward filing requirements we adopt today for deviation requests. It has administered GO 147-A, which underlies the existing general freight program, and, of course, TD staff's conclusions and actions in the course of processing rate requests under our new program are subject to challenge: a protestant, if his protest is not found by TD staff to fit our adopted guidelines, may file a formal complaint concerning the rates in issué, and an applicant in a similar position can pursue formal processing of his application (which will be referred to an administrative law judge). In summary, this carefully defined and prescribed delegation to TD staff entails its processing requests by checking-off compliance with clear requirements, and a carrier or protestant who takes legitimate issue with staff's processing of a request may, as noted above, pursue formal review with a complaint or application.

PU Code § 3666 states: "If any highway carrier other than a highway common carrier desires to perform any transportation

or accessorial service at a lesser rate than the minimum established rates, the commission shall, upon finding that the proposed rate is reasonable, authorize the lesser rate for not more than one year."

As the Commission has previously stated: "The term 'reasonable' used in the context of Section 3666 has not been defined succinctly and it is doubtful that such can be done." (<u>Major Truck Lines</u>, 71 Cal. Pub. Util. Comm. 447, 451 (1970).) Nevertheless, in prior cases the Commission required that deviated rates cover the fully allocated costs of the transportation involved. We now conclude that such a requirement is too limiting.

The Simplified and Variable Cost Procedures we hereby adopt are based on recovery of something in excess of variable costs, not on recovery of the fully allocated costs. Still, as explained in greater detail below, such deviated rates are also reasonable.

When the Commission required deviated rates to cover the fully allocated costs of the transportation, it required the deviated-rate job to pay its full proportional share of the carrier's fixed costs. However, where no more remunerative work is available, a rational business person will take on additional work if the revenue from the job exceeds the variable costs of performing the job and makes <u>some</u> contribution to the business's fixed costs. Indeed, TD staff's witness, Burgess, testified that that had been his practice in his own business. The alternative is to let equipment or workers sit idle and generate no contribution to fixed costs.

Thus, for example, when a dump truck carrier has idle capacity it is rational for the carrier to take on work that pays something more than the additional (or "variable") cost of performing the transportation, even though the job does not pay its full share of the carrier's fixed costs. Where no better paying work is available, accepting work at such a price is of net benefit

to the carrier, because it covers at least some of the carrier's fixed costs, which have to be paid in any event. However, the prior requirement that a deviated rate cover a job's fully allocated cost would generally have prevented the carrier from taking such work at those prices. Thus, the fully-allocated-cost requirement forced carriers to behave irrationally, that is, unreasonably. Accordingly, we conclude that a requirement that rates <u>always</u> cover a job's fully allocated costs is <u>un</u>reasonable and that deviated rates based on recovery of something in excess of variable costs are reasonable.

This conclusion is not without precedent. In construing PU Code § 451 (relating to common carrier rates), we have previously concluded that a rate is "reasonable" if it contributes revenues above the out-of-pocket (or "variable") costs of performing the service. <u>See</u> D.58664, <u>Investigation of Reduced</u> <u>Rates</u>, mimeo at 3, 4, 8 (June 23, 1959) (headnoted at 57 Cal. Pub. Util. Comm. 229, reprinted at 62 Cal. Pub. Util. Comm. 259, 260-62). <u>See also</u>, D.45770, <u>Investigation of Reduced Rates for</u> <u>Transportation of Bulk Cement</u>, 50 Cal. Pub. Util. Comm. 622, 628, 632 (1951); D.76718, <u>Western Motor Tariff Bureau</u>, mimeo at 8 (Jan. 27, 1970) (headnoted at 70 Cal. Pub. Util. Comm. 643); D.82645, <u>BBD</u> <u>Transportation Co., Inc. v. Pacific Southcoast Frieght Bureau</u>, 76 Cal. Pub. Util. Comm. 485, 501-02, 509-11 (1974) (and cases there cited).

The Commission in prior cases required that deviated rates be based on "unusual" or "special" circumstances. We now conclude that that requirement is also too limiting.

In William E. Daniel, 63 Cal. Pub. Util. Comm. 147, 149 (1964), the Commission said: "in a Section 3666 proceeding the principal cost consideration is the cost savings directly attributable to the [unusual circumstances and conditions in the] transportation involved and not to the ability of an individual carrier to operate at lower costs than other carriers similarly

situated". This restriction made it more difficult for carriers and shippers to take advantage of a particular carrier's ability to operate more efficiently than other carriers. This restriction thus forced shippers and the public to pay more than necessary for transportation services and eliminated incentives that would otherwise encourage carriers to become more efficient. In short, we conclude that the requirement of unusual or special circumstances is not necessary to ensure that deviated rates are reasonable, and we have eliminated this prior requirement from our adopted deviation procedures.

We further conclude that the rates resulting from application of our adopted deviation procedures will be reasonable, as required by PU Code § 3666, even though the adopted procedures no longer require special circumstances nor that deviated rates always cover the carrier's fully allocated costs. We find nothing in the language of § 3666 that would require us to continue those prior restrictions. As shown by the preceding discussion, those prior restrictions were too limiting.

Turning to policies enunciated in other relevant sections of the PU Code, we likewise find that the adopted deviation procedures are reasonable. Among the purposes of the Highway Carriers' Act, according to PU Code § 3502, are the provision of adequate and dependable service by highway carriers at just and reasonable rates. CDTOA/CCA argues that the Variable Cost and Simplified Procedures will, contrary to this goal, "totally destroy the dump truck carrier industry" and that subhaulers will be especially hurt. We are not persuaded by CDTOA/CCA's arguments.

CDTOA/CCA's witness Lautze testified that he was familiar with the operations of rate-exempt agricultural carriers and that their total exemption from rate regulation had not caused the agricultural carrier industry to self-destruct. (This testimony is consistent with the December 1988 report to the CPUC monitoring the bulk agricultural industry after deregulation.) In fact, Lautze

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testified that the current carriers are more well-financed and better qualified, while there has been a dropout of carriers who haven't been able to keep up with modern equipment, etc. This evidence concerning rate exempt agricultural carriers makes it implausible that the granting of a much lesser degree of rate flexibility to dump truck carriers will destroy the dump truck carrier industry.

Furthermore, we are not aware of any regulated trucking industry in California where increased tlexibility has lead to ruin as carriers all price themselves below cost and fail. Moreover, we are persuaded by the evidence that that will not happen here either. Dump truck carriers, like other business people, are by and large rational; as several witnesses testified, they endeavor to know their own costs. Accordingly, they will choose those hauls that maximize the revenues they receive from the use of their equipment and endeavor to meet those costs.

The testimony of Yuba's witness further supports these conclusions. He testified that he did not believe the deviated rate he proposed would become the going rate in the industry. "[Y]ou are not going to find people just cutting rates to go to work. They want to make money. . . And so the common sense element is much stronger than some kind of herd mentality to cut rates in some kind of a desperate effort to meet the competition." (Tr. at 4598.)

Moreover, because dump truck carriers are rational they cannot be forced to accept money-losing hauls, no matter how large a shipper may be. The same reasoning applies to subhaulers, who are similarly free to reject deviated-rate hauls that do not pay enough. As Yuba's witness, who employs many subhaulers, testified: subhaulers can choose between different prime carriers who pay at different rates, and subhaulers don't stick around long if the rate isn't good enough.

Of course, the limited rate flexibility introduced by the adopted deviation procedures will increase competition and impose some pressure on the less efficient carriers or those who provide poor service. We know that carriers differ in the efficiency of their operations and the quality of their service; any change in the terms of regulation will inevitably affect the marginal carriers disproportionately. Indeed, more innovative and efficient carriers may take business away from others that are less so. However, we do not view this as a negative development. Rather, such a development bodes well for the health of the industry in terms of its ability to provide quality service at the lowest possible reasonable rates.

Even if some carriers with higher than average costs should fail, other existing carriers with lower costs will be able to expand. Moreover, under California's open entry policy for dump truck carriers, established by the Legislature's amendment of P.U. Code § 3613 in 1984, new carriers will be able to enter the business.

Thus, in light of the evidence demonstrating that the industry will not destroy itself by reducing all its prices below cost, we believe that the industry as a whole will be able to meet reasonable demands for service and that adequate and dependable dump truck service will continue to be available after implementation of the adopted deviation procedures. Moreover, we believe that the adopted procedures will not decrease the safety of trucking operations. TD staff's witness testified that the Commission staff had conducted a study in connection with the California Highway Patrol and that there was no causal relationship between safety and price levels. In any event, we stand ready to correct any unforeseen problems with the adopted procedures and will order our Transportation Division to prepare a monitoring report on the first year of the two-year limited period for which we are now authorizing these new procedures.

In sum, we reject CDTOA/CCA's contention that these procedures will destroy the dump truck industry. Instead, we are persuaded by the evidence that the adopted deviation procedures will not cause prime carriers or subhaulers to cut their rates without regard to their costs in a desperate effort to meet competition, and will not cause a shortage of supply or a deterioration in truck safety. Moreover the adopted deviation procedures contain a number of protections for subhaulers and will benefit shippers through lower rates.

CDTOA/CCA also argues that these procedures will permit a carrier to reduce rates to one of its customers without offering similar reductions to its other customers, thus giving the favored shipper a competitive advantage over its competitors. However, CDTOA/CCA's own witness Laufze testified that a carrier could not grant a deviation to one of its customers without doing the same for its other customers / because the deviation proposals become public information. Accordingly, we do not believe that carriers will use these procedures to bestow advantages on favored customers. Rather, we believe carriers will use them in circumstances like those outlined by the witnesses: as TD staff witness Burgess testified, when a carrier has idle capacity, or as Yuba's witness Lindeman testified, when the deviated rate will in fact cover all of the carrier's costs but the job is relatively small or needs to be done so quickly that the time and expense of filing a full-dost deviation and defending it against protests is not worthwhile.

We expect that the revised deviation procedures adopted herein will afford carriers new opportunities to pursue deviations, especially for construction-related jobs. However, we will need to monitor these revised procedures carefully to ensure that they have the results we intend. A period of two years will be reasonable to implement the changes and monitor their effect upon the industry and its consumers. We will order our Transportation Division to

produce a monitoring report assessing the first year's experience under these revised procedures. With this report, as well as other communications we may receive from the industry and its consumers, we will be able to make any needed revisions prior to making the new procedures permanent. In this regard, we will issue a further decision during 1990. This schedule will permit needed changes to be made before the experimental program expires in early 1991.

This is an interim decision. We think it is premature to amend Resolution TS-682 and our Rules of Practice and Procedure, and the Special Deviation Docket relating to deviations and renewals from minimum rates. Therefore, under Rule 87, this decision will temporarily supersede the provisions of Resolution TS-682, as well as those of Rule 42.1 and 42.2 (b) of our Rules of Practice and Procedure, and the Special Deviation Docket, insofar as they relate to transportation subject to MRTs 7-A, 17-A, and 20. We supersede these procedures only because we could not otherwise implement this new process for a two-year experimental period. We believe that this is the minimum supersedure that is necessary to permit this. Applicants and potential protestants should note that we are superseding only Rule 42.2 (b) while leaving Rule 42.2 (a) in place for this purpose. Protests to applications for deviation shall not be considered unless they satisfy the full requirements of Rule 42.2 (a) / In addition to any other reasons for filing a protest, we recognize that a protest may convey a competitive advantage to the protestant merely through the administrative delay that may thereby be caused to an applicant. Should we detect a pattern of protests that appear to be filed for this purpose and that do not meet the requirements of Rule 42.2 (a), we may consider appropriate remedies either through amendments to the Rules of Practice and Procedure or through other means available to us.

Accordingly, we refer to Rule 87 of our Rules of Practice and Procedure in finding that good cause exists to order the deviations from our Rules described above for the purpose of

adopting this program during the two-year experimental period. At or before the end of the experimental period contemplated by this decision, consideration will be given to amendment of Resolution TS-682, Rules 42.1 and 42.2 (b), and the Special Deviation Docket.

In accordance with FU Code § 311, the ALJ's proposed decision was mailed to appearances on November 10, 1988. Comments were received from CDTOA/CCA, Yuba, AGC, T&T Trucking, Inc. (T&T), and from the Coalition. We have reviewed and considered these comments, and note again that those of Yuba contain a recommendation that we adopt a deviation procedure substantially similar to the one we are adopting by this decision. AGC also urged adoption of a modified version of the Yuba proposal. We note that the comments of T&T, and certain of the comments of AGC, are particularly persuasive.

In the proposed decision, Appendix A, Subsection A, Subsection (d) on Page A-2 Appendix B-7(b) on Page B-2, and Appendix C-3(B) on Page C-2, Internal Revenue Service Income Tax Forms 1065, 1120, 1120-A or 1040, Schedule C are to be filed with the application if authority is sought utilizing subhaulers to transport the involved commodity. T&T believes subhaulers will be extremely reluctant to provide their income tax returns for a filing which then becomes public record, considering such information to be confidential between the filing party and the Internal Revenue Service. T&T believes the recommended deviation procedures in this respect to be of questionable legality, and inhibitive to the effective implementation of the procedure. It urges the elimination of these tax forms should the ALJ's proposed decision be adopted.

As an alternative, T&T suggests that the Commission consider protection of subhauler interests through adoption of "50%" requirements as set forth in the CDTOA/CCA Exhibit 100 Revised deviation proposal (e.g. Rule 5.2-D), or a similar provision in GO 147-A, Rule 7.1(e). Under that requirement, if

subhaulers are to be used to provide less than 50% of the actual transportation under the proposed rate, no subhauler costs or financial information need be submitted. However, when subhaulers are to be used to provide more than 50% of the transportation, then subhauler costs must be submitted with the application. In T&T's view, this rule would provide adequate protection against abuse of subhaulers and is far preferable to the required submission of income tax returns.

Appendix A, Paragraph (b)6 on Page A-2, and Appendix C on Page C-5 of the proposed decision requires that an involved shipper enter into a written agreement with the applicant for a Variable Cost Procedure deviation to evidence that it commits to pay - and that applicant commits to collect - any difference between the deviated rate and the minimum rate (undercharges) if we determine that the former will not cover 105% of applicants variable costs. AGC believes that such a requirement will effectively preclude use of this procedure. In AGC's words: "No shipper would knowingly expose himself to this potential liability." It recommends that this requirement be eliminated.

We concur with T&T's concern about the confidentiality of tax forms. We agree that adoption of the "50%" rule would be adequate for purposes of this proceeding in lieu of the forms referred to above, and would be consistent with our rules in the general freight program. Moreover, the "50%" rule will serve to protect subhaulers, as subhauler costs will have to be included in Full or Variable Cost applications whenever subhaulers provide more than half of the actual transportation. When subhaulers provide less than 50% of the actual transportation, they are protected by the fact that the prime carrier is willing to provide the majority of the actual transportation at the deviated rate.

We also share AGC's concern that the Variable Cost Procedure be constructed in a way that will not inappropriately inhibit its use. We recognize that the carrier/shipper agreement

could well have a chilling effect on shipper willingness to use deviated rates, especially as the meaning of the agreement is unclear. The agreement refers to undercharges that might be assessed should the deviated rate later be found unreasonable by the Commission. However, a properly-supported and duly approved deviation will by definition be a reasonable rate, and therefore not properly the subject of any undercharges; by contrast, the use by a carrier of a deviation for which the carrier did not have proper authority could lead to an assessment of undercharges. We will not include the carrier/shipper agreement in the Variable Cost Procedure.

Our adopted Full Cost and Variable Cost Procedures incorporate both T&T's recommended "50%" rule and AGC's recommendation to eliminate the carrier/shipper agreement contained in Appendixes A and C of the proposed decision.

#### Findings of Fact

1. CDTOA/CCA have filed a motion for an interim 5% increase in rates in MRTs 7-A/17-A, and 20 for commodities named in Item 30 of MRT 7-A.

2. The equipment costs contained in the various staff exhibits, and the labor costs used in Petition 328, are the best and most current evidence for measuring costs for dump truck carriers.

3. Except for increases of 2.2% to 3.0% ordered in 1987, rates named in MRTs 7-A, 17-A, and 20 have not been increased since 1985.

4. Since the last rate increases ordered in these MRTs, the industry has experienced further increases in total costs. These costs have been measured by CDTOA/CCA, and indicate that increases in rates for the transportation of construction related commodities of 4 percentage points will allow the industry to earn revenues which are reasonable and necessary.

5. The operating ratio and demographic information discussed in the decision tends to confirm the need for increases as measured by the petitioners, although not necessarily in the same amounts proposed.

6. The filing of petitioners' motion, publication thereof in the Daily Transportation Calendar, and the ALJ's ruling of May 20 advising all parties of the July 6 hearing provide adequate notice.

7. PU Code § 3666 states: "If any highway carrier other than a highway common carrier desires to perform any transportation or accessorial service at a lesser rate than the minimum established rates, the commission shall, upon finding that the proposed rate is reasonable, authorize the lesser rate for not more than one year."

8. D.85-04-095, which initiated OSH 325, et al. directed that hearings should be held to consider developing a "procedure under which an individual dump truck carrier can be readily permitted to charge less than the established minimum rate level when actual circumstances warrant such action."

9. While many deviations have been authorized from minimum rates in connection with the interplant transportation of commodities in dump truck equipment, virtually none have been authorized in connection with dump truck construction activity. Furthermore, those deviations which have been authorized have often not become effective until several months after filing, even if unprotested, because of the current administrative procedure.

10. Greater downward pricing flexibility is required to meet the needs of the industry.

11. If an input is used specifically for the job in question, and would not be used or paid for otherwise, the cost of the input is a variable cost.

12. Approximately eighty percent of the minimum rate will generally cover the variable and insurance costs of reasonably efficient carrier operations. Thus, if Yuba's proposal were tied

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to a rate not less than 90% of the established minimum (allowing a 6% profit factor), the resulting minimum rate deviation procedure would ensure that a reasonably efficient carrier using this procedure would be able to cover nearly its entire operating costs.

13. Where no more remunerative work is available, a rational business person will take on additional work if the revenue from the job exceeds the variable costs of performing the job and makes some contribution to the business's fixed costs. The prior requirement that a deviated rate <u>always</u> cover the fully allocated costs of providing the transportation prevented carriers from behaving in this rational manner, and therefore was <u>un</u>reasonable.

14. The adopted Simplified and Variable Cost Procedures are based on recovery of something in excess of variable costs and therefore are reasonable.

15. The prior requirement that deviated rates be based on "unusual" or "special" circumstances made it difficult for a carrier to offer lower rates based on its ability to operate more efficiently than other carriers. The requirement thus forced shippers and the public to pay more than necessary for transportation services and eliminated incentives that otherwise would encourage carriers to become more efficient.

16. The total exemption from rate regulation of certain agricultural carriers has not caused the agricultural carrier industry to self-destruct.

17. Dump truck carriers cannot be forced to accept moneylosing hauls, no matter how large a shipper may be. Moreover, dump truck carriers endeavor to know their own costs and to make a profit. Accordingly, the dump truck industry will not cut rates without regard to costs in a desperate effort to meet competition and obtain work. Therefore, adoption of the Simplified Deviation Procedure should not cause such deviated rates to become the going rate in the industry.

18. Because deviation proposals become public information, carriers will be unable to use these procedures to unfairly bestow advantages on favored customers. Rather, carriers will use the Variable Cost and Simplified Procedures in circumstances like those outlined by the witnesses, for example, when a carrier has idle capacity, or when the deviated rate will in fact cover all of the carrier's costs but the job is relatively small or needs to be done so quickly that the time and expense of filing a full-cost deviation and defending it against protests is not worthwhile.

19. The adopted procedures will not destroy the dump truck carrier industry. The dump truck industry should be able to meet reasonable demands for service, and adequate and dependable dump truck service should continue to be available after implementation of the adopted deviation procedures.

20. The adopted deviation procedures will benefit shippers through lower rates.

21. Subhaulers, like other dump truck carriers, cannot be forced to accept money-losing hauls and are free to reject deviated-rate hauls that do not pay enough. Subhaulers are further protected by the division of revenue requirements included in each of the adopted procedures. Subhaulers are also protected by the "50%" rule included in the Full and Variable Cost Procedures.

22. The adopted deviation procedures should not decrease the safety of trucking operations.

23. The procedures set forth in Appendixes A through D to this decision/will provide reasonable, workable, expedited procedures for processing initial and renewed requests for deviations from rates in MRTs 7-A, 17-A, and 20.

24. The TD staff has the expertise to perform the check-off compliance review of applications for authority to deviate from minimum rates, in the manner set forth in Appendix A to this decision, after such applications are calendared. This will provide an expeditious and reasonable procedure for such requests.

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## Conclusions of Law

1. MRTs 7-A, 17-A, and 20 should be amended to conform to our findings above. The resultant rates will be just and reasonable.

2. MRTs 17-A and 20 should be amended by separate orders to avoid duplication of tariff distribution.

3. Due to the needs of dump truck carriers performing transportation under rates in MRTs 7-A, 17-A, and 20 for rate relief, the effective date of this decision should be today.

4. The rates resulting from application of the adopted deviation procedures will be reasonable, as required by PU Code § 3666, even though the adopted procedures no longer require special circumstances nor that deviated rates always cover the carrier's fully allocated costs. These prior restrictions on the availability of deviations are too limiting and not required by statute.

5. In construing PU Code § 451 the Commission previously concluded that a common carrier rate is "reasonable" if it contributes revenues above the variable costs of performing the service.

6. The evidence concerning rate exempt agricultural carriers makes it implausible that the granting of a much lesser degree of rate flexibility to dump truck carriers will destroy the dump truck carrier industry.

7. The provisions included in this decision as Appendixes A through D/ should be adopted for an interim period of two years.

8./ The Transportation Division should produce a monitoring report on the first year's experience under these revised procedures so that the Commission can make any further revisions that may be needed.

9. The need to proceed with revisions to the Commission's procedures for authorizing deviations from minimum rates for dump truck transportation for an experimental period of two years constitutes good cause for deviating from Rules 42.1 and 42.2 (b) of the Commission's Rules of Practice and Procedure.

10. This decision should provide the bases for achieving deviations from rates in MRTs 7-A, 17-A, and 20, and should supersede Resolution TS-682 and Rules 42.1 and 42.2 (b) of the Commission's Rules of Practice and Procedure, and the Special Deviation Docket, in connection with transportation performed under those tariffs. Such supersedure is appropriate under Rule 87 of the Rules of Practice and Procedure.

11. The Commission should authorize TD staff to perform the check-off compliance review, as provided in Appendix A of today's decision, of applications for authority to deviate from rates in MRT's 7-A, 17-A, or 20.

INTERIM\_ORDER

### IT IS ORDERED that:

1. MRT 7-A/(Appendix B to D.82061, as amended) is further amended by incorporating the attached Supplement 29, effective July 1, 1989.

2. In all other respects, D.82061, as amended, shall remain in full force and effect.

3. The Executive Director shall serve a copy of the tariff amendment on each subscriber to MRT 7-A.

4. Resolution TS-682 and Rules 42.1 and 42.2 (b) of the Commission's Rules of Practice and Procedure, and the rules contained in the Special Deviation Docket, are superseded by the rules contained in Appendixes A through D, attached, in connection with transportation performed under MRTs 7-A, 17-A, and 20, effective July 1, 1989.

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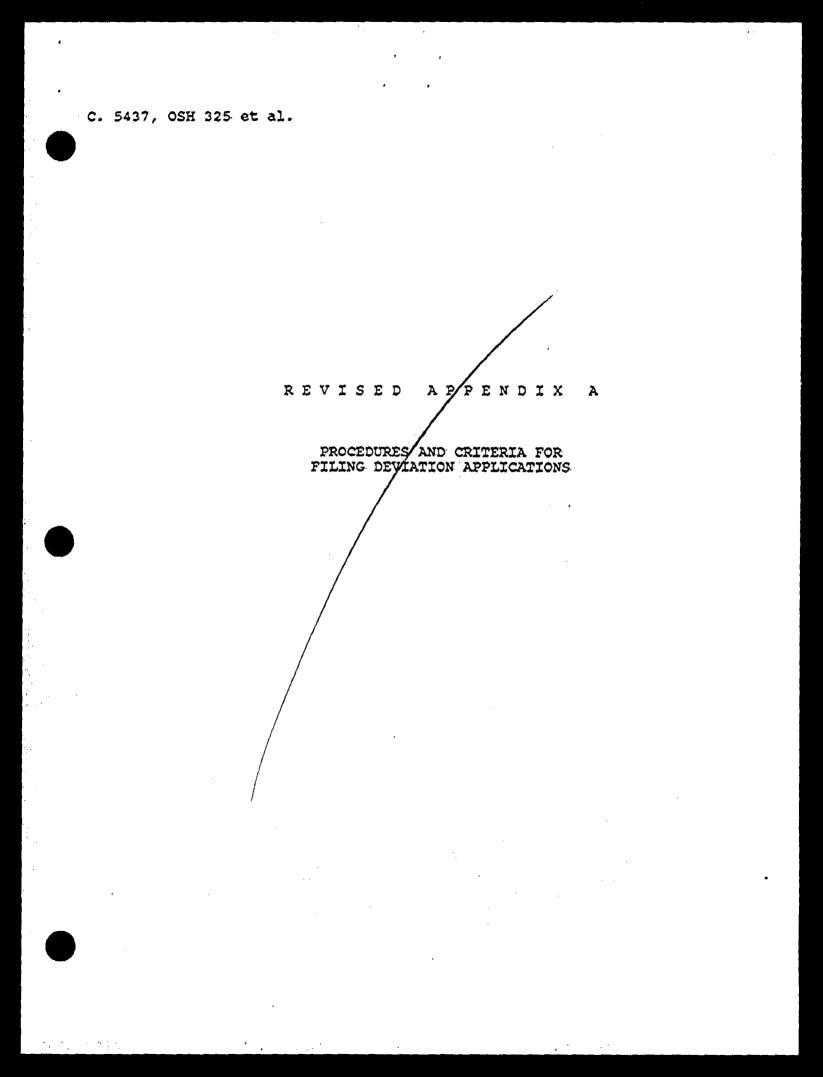
5. The authority contained in Ordering Paragraph 4 will expire June 30, 1991 unless sooner canceled, modified, or extended by further order of the Commission.

6. The Executive Director shall serve a copy of this decision on each subscriber to MRTs 7-A, 17-A, and 20.

7. On or before August 1, 1990, the Transportation Division shall present the Commission with a report describing the experience under the first year of these revised deviation procedures.

This order is effective today. ar San Francisco, California. Dated

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### THREE-TIER EXPEDITED DUMP TRUCK DEVIATION GUIDELINES AND PROCEDURES

A carrier seeking to assess less than an established minimum rate can select one of the following deviation procedures:

I. <u>SIMPLIFIED RATE DEVIATION APPLICATIONS (for rates that are no less</u> than 90% of the applicable minimum rates)

a. A Simplified Rate Deviation Procedure will be available only to carriers proposing a rate that is 90% or more of the applicable minimum rate. A proposed rate at that level is presumed to be reasonable and no cost showing is required. Staff will handle these deviation requests as informal matters and those that are not contested will become effective 30 days after calendar notice.

b. Use of this procedure will require that carriers submit:

1. A proposed rate that is no less than 90% of the applicable minimum rate.

2. Their latest available balance sheet and an income statement from the most current fiscal year.

3. Their identity and the identities, signatures and telephone numbers of the shipper and any subhaulers involved in the transportation.

4. A description of the transportation.

5. The applicable minimum rate and the proposed rate, using the same unit of measurement as that shown in the applicable minimum rate tariff.

6. A copy of their application for a Biennial Inspection of Terminals (BIT) inspection by the California Highway Patrol along with evidence of payment of the fees for that inspection; their Requestor Code Number assigned by the Department of Motor Vehicles as part of their participation in the DMV's Pull Notice Program; and certification that all subhaulers/to be used in performing the deviated transportation have also applied for a BIT inspection and are participating in the Pull Notice Program.

7. A letter of support from the shipper.

- c. Subhaulers engaged by prime carriers to provide transportation under the deviated rate must be paid not less than 95% of the deviated rate, 75% when they are providing the tractor (pulling services) only.
- d. Carriers wishing to continue use of the Simplified Rate Deviation should file an application for renewal at least six weeks in advance of the current deviation's expiration date.

- II. FOLL COST DEVIATION APPLICATIONS (for rates that are less than 90% of the applicable minimum rate)
- a. Applicants for Full Cost Deviations will adhere to the same requirements as those contained in Resolution TS-682, except that:
  - 1. It will no longer be necessary to show that the transportation in question is performed under favorable operating conditions that differ from those used in establishing minimum rates.
  - 2. Staff will process these deviation requests, to ensure compliance with these guidelines, as informal matters and, if they are not contested, will become effective 30 days after calendar notice.
  - 3. Renewal applications will no longer be handled under the Special Deviation Docket Procedure. All renewals, as with initial applications, will be processed under the informal expedited procedure.
  - 4. They shall declare that subhaulers will not be used to provide more than half of the actual transportation (as evidenced, for example, by the subhaulers providing less than half of the power units to be used), or if subhaulers are to be used on more than half of the transportation, the costs of the subhaulers employed in the transportation shall be included. The costs of subhaulers employed in the transportation shall also be included whenever subhaulers will be paid a lesser rate or charge than that sought by the applicant.
  - 5. All prime carrier applicants must submit a copy of their application for a Biennial Inspection of Terminals (BIT) inspection by the California Highway Patrol along with evidence of payment of the fees for that inspection; their Requestor Code Number assigned by the Department of Motor Vehicles as part of their participation in the DMV's Pull Notice Program; and certification that all subhaulers to be used in performing the deviated transportation have also applied for a BIT inspection and are participating in the Pull Notice Program.
- b. Full Cost applications, based on the carrier's actual cost, will continue to require a showing that the proposed rate will cover the applicant's full cost for providing the service and will produce a profit. Where financial information about subhaulers is submitted (either because they will be paid a lesser rate than that sought by the applicant or because they will provide more than half of the transportation), each subhauler must be paid enough to cover its full cost for providing the service and produce a profit as well.

#### III. <u>VARIABLE (MARGINAL) COST DEVIATION APPLICATIONS (for rates that</u> are less than 90% of the applicable minimum rate)

- a. A variable cost procedure, also based on the carrier's actual costs, will only be available to either <u>profitable carriers</u> or those with sufficient working capital. Staff will handle these deviation requests as informal matters and those that are not contested will become effective 30 days after calendar notice.
- b. Use of this procedure will require that carriers submit:
  - 1. A showing that they are either profitable or have sufficient working capital to cover any loss that could result from using the variable cost rate. More specifically, "sufficient working capital" requires: Cash or other liquid assets sufficient, over the life of the deviation, to cover: (1) the carrier's ordinary working capital requirements; plus (2) the difference between revenues that would be received under (a) the applicable minimum rate excluding the profit factor incorporated into the minimum rate, and (b) the deviated rate requested. (If a carrier wishes, it may substitute for item (2) (a) the fully allocated cost of the particular transportation.) Applicants will submit a balance sheet and income statement from the most current fiscal year. New carriers and applicants who show a loss on their income statements must submit a balance/sheet, a working capital worksheet and a projected profit and/loss statement. New carriers and applicants who show a loss on their income statements information from the applicant's bank records. These forms are contained in Appendix D.
  - 2. Their identity and the identity of the shipper and any subhaulers involved in providing the transportation.
  - 3. A letter of support from the shipper.
  - 4. A description of the transportation.
  - 5. The existing vate and the proposed rate, using an appropriate unit of measurement.
  - 6. A simple cost analysis proving that the proposed rate is at least 105% of the total of variable costs and insurance, accompanied by a statement under penalty of perjury confirming the accuracy of this analysis.
  - 7. Either a declaration that subhaulers will not be used to provide more than half of the actual transportation under the proposed rates (as evidenced, for example, by the subhaulers providing less than half of the power units to be used), or the inclusion of the costs of the subhaulers employed in the transportation.
  - 8. A copy of their application for a Biennial Inspection of Terminals (BIT) inspection by the California Highway Patrol along with evidence of payment of the fees for that inspection; their Requestor Code Number assigned by the Department of Motor Vehicles as part of their participation in the DMV's Pull Notice

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Program; and certification that all subhaulers to be used in performing the deviated transportation have also applied for a BIT inspection and are participating in the Pull Notice Program.

- c. Subhaulers engaged by prime carriers to provide transportation under the deviated rate:
  - 1. must, if providing more than half of the transportation under the deviated rate, submit to the prime carrier, for joining with the filing of the application, a simple cost analysis proving that the compensation received from the deviated rate is at least 105% of the total of variable costs and insurance to be incurred under the subject transportation. When subhaulers provide more than half of the transportation: each subhauler must make the same showing of profitability or sufficient working capital as the prime carrier; each subhauler must submit a balance sheet and income statement for the most current fiscal year, except that new subhaulers and subhaulers who show a loss on their income statement must submit a balance sheet, working capital worksheet, and projected profit and loss statement; and new subhaulers and subhaulers who show a loss on their income statement will also be required to sign a release form (found in Appendix D) authorizing the Commission to obtain financial information from the subhauler's bank records.
  - 2. must be paid not less than 95% of the deviated rate, 75% when they are providing the tractor (pulling services) only.
  - 3. must certify, under penalty of perjury, that the compensation to be received from the deviated rate will cover 105% of the total of their variable costs plus insurance. The verification form is contained in/Appendix C.
- d. <u>No renewal process will be available</u>. Carriers filing variable cost deviations must submit new applications every 6 months to continue using the rate. Carriers wishing to continue use of the variable cost rate should file at least 6 weeks in advance of the current deviation's expiration date.



a. Two copies of all applications to deviate from MRT's 7-A, 17-A and 20, including any supplements or amendments, shall be delivered or mailed to:

California Public Utilities Commission Truck Tariff Section-2nd Floor 505 Van Ness Avenue San Francisco, CA 94102

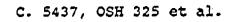
- b. If a receipt for the filings is desired, the application shall be sent in triplicate with a self-addressed stamped envelope. One copy will be date stamped and returned as a receipt.
- c. Rejected applications will be returned to the applicant with an explanation of why the application was not accepted.
- d. All applications filed will be/available for public inspection at the Commission's office in San Francisco.

#### PROCEDURES FOR REVIEW OF DEVIATION APPLICATIONS UNDER EXPEDITED PROCEDURE

- a. The deviation filing will be noted immediately in the Commission's Transportation Calendar. Renewals of simplified and full cost deviations will be labeled as such in the calendar notice. The deviated rate will become effective 30 days after the calendar notice date, unless rejected or suspended prior to that date by the Commission staff.
- b. The Commission staff/will review the proposed deviations for compliance during the 30 day notice period.
- c. Staff may reject a filing within the 30 day notice period. All rejections will be noted in the Daily Transportation Calendar and applicants will be notified by mail of the reasons for rejection.
- d. Staff will reject any application that is incomplete or fails to comply with the requirements the Commission has promulgated, including the following:
  - i. If a simplified rate deviation application, the proposed rate must be no less than 90% of the applicable minimum rate.
  - ii. If a full cost application, the proposed rate must provide an operating ratio of less than 100.
  - iii. If a variable cost application, the proposed rate must cover at least 105% of the total of variable cost and insurance.

- iv. Submit a copy of their application for a Biennial Inspection of Terminals (BIT) inspection by the California Highway Patrol along with evidence of payment of the fees for that inspection; their Requestor Code Number assigned by the Department of Motor Vehicles as part of their participation in the DMV's Pull Notice Program; and certification that all subhaulers to be used in performing the deviated transportation have also applied for a BIT inspection and are participating in the Pull Notice Program.
- e. Any party may protest a proposed rate deviation. The protest must be in writing and specifically indicate in what manner the application for a deviated rate is defective. It must be received no later than 10 days before the deviated rate is scheduled to become effective. The protestant shall serve a copy of the protest on the applicant on the same date it is either forwarded or delivered to the Commission. All protests will be noted in the Commission's Transportation Calendar.
- f. Commission staff shall reject the protest if it does not allege a failure to comply with the deviation requirements the Commission has promulgated or if the protest/is frivolous. (A "frivolous" protest is one that provides no basis for its objection to the proposed deviation.) Otherwise, staff shall evaluate the substance of the protest based on conformity with the guidelines for filing the application. Based on this review of the protest and application, staff may reject the filing before the effective date of the rate. The staff may also temporarily suspend the rate for a period of time not to exceed 45 days beyond the date of suspension, during which time it will either reject the protest or the rate, or request the Commission to further suspend the rate and set the matter for hearing. Protests may raise questions about the costs (including the underlying performance factors) that a carrier has relied on in its deviation application. Staff may try to get the protestant and applicant to resolve their differences about such costs. However, where a protest raises a non-frivolous question of fact about such costs (that is, where the protest provides some basis for its objection to the costs contained in the application), if Staff is unable to resolve the protest such that the protest is withdrawn, then Staff will suspend the rate, if it has not already been suspended, and request that the Commission docket the matter and set it for hearing. / The Commission will further suspend the rate and schedule a hearing if, based on review of the application, the protest, and Staff's recommendation, the Commission concludes that there is a material issue of fact bearing on the reasonableness of the deviated rate.
- g. Notice of any rejection or rate suspension, and any vacation of such suspension, will appear in the Commission's Transportation Calendar.
- h. If a protest results in the Commission setting the matter for hearing, the burden of proof rests with the proponent of the deviated rate.

i. Commission review of any rate which is in effect may be initiated by filing a formal complaint. A formal complaint may also be filed by a protestant whose protest has been rejected, or by a would-be protestant, before the deviated rate goes into effect. The burden of proof in a complaint shall be upon the complainant. The complainant will send a copy of the complaint to the defendant (carrier), shipper and any subhaulers who are parties to the transportation agreement.



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SIMPLIFIED RATE DEVIATION APPLICATION FORM

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1. APPLICANT INFORMATION Application No: (Commission will insert number) Is this a renewal application? \_\_\_\_yes \_\_\_\_no Cal T-No: Name: Address: Telephone: Person to contact: If a corporation, attach articles of incorporation or reference a previous filing that contained the articles: Signature of owner or officer:

2. SAFETY INFORMATION

Attach your copy of your application for a Biennial Inspection of Terminals (BIT) inspection by the California Highway Patrol along with evidence of payment of the fees for that inspection; your Requestor Code Number assigned by the Department of Motor Vehicles as part of participation in the DMV's Pull Notice Program; and certification that all subhaulers to be used in performing the deviated transportation have also applied for a BIT inspection and are participating in the Pull Notice Program.

3. FINANCIAL INFORMATION / Attach latest available balance sheet, dated \_\_\_\_\_, 19\_\_\_\_ Attach income statement for the latest fiscal year ending

4. SHIPPER INFORMATION

Attach a letter/of support from the shipper, including the shipper's name, address, telephone number, person to contact, and signature of the owner or officer.

5. TRANSPORTATION DETAILS Job location: Point of origin: Point of Destination: Haul distance: Commodity: Quantity: Applicable tariff: Applicable tariff rate: Proposed rate: Effective date of proposed rate: Termination date of proposed rate\*:

\*Note: All rate deviations must be renewed after one year. The renewal application should be submitted at least six weeks prior to expiration.

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6. SUBHAULER INFORMATION Attach separate pages with information on items 1 and 2 (on page A-1-1).

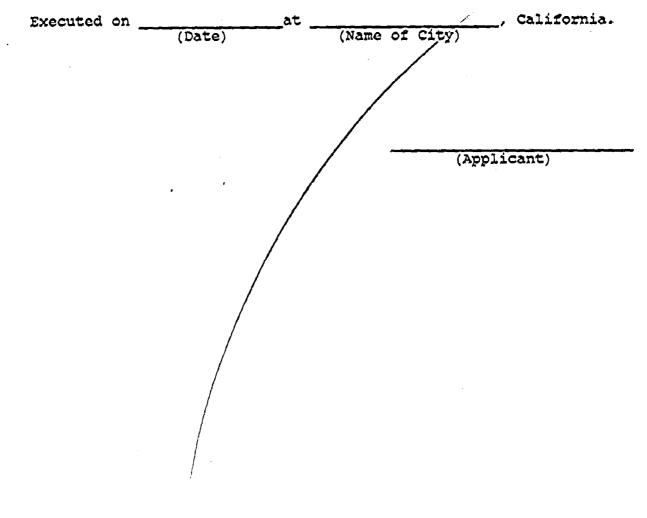


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#### CARRIER VERIFICATION

I am the applicant in the above-entitled matter; the statements in the foregoing document are true of my own knowledge, except as to matters which are therein stated on information or belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.



### CARRIER VERIFICATION

### (Where Applicant Is a Corporation)

- - -

I am an officer of the applicant corporation herein, and am authorized to make this verification on its behalf. The statements in the foregoing document are true of my own knowledge except as to the matters which are therein stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

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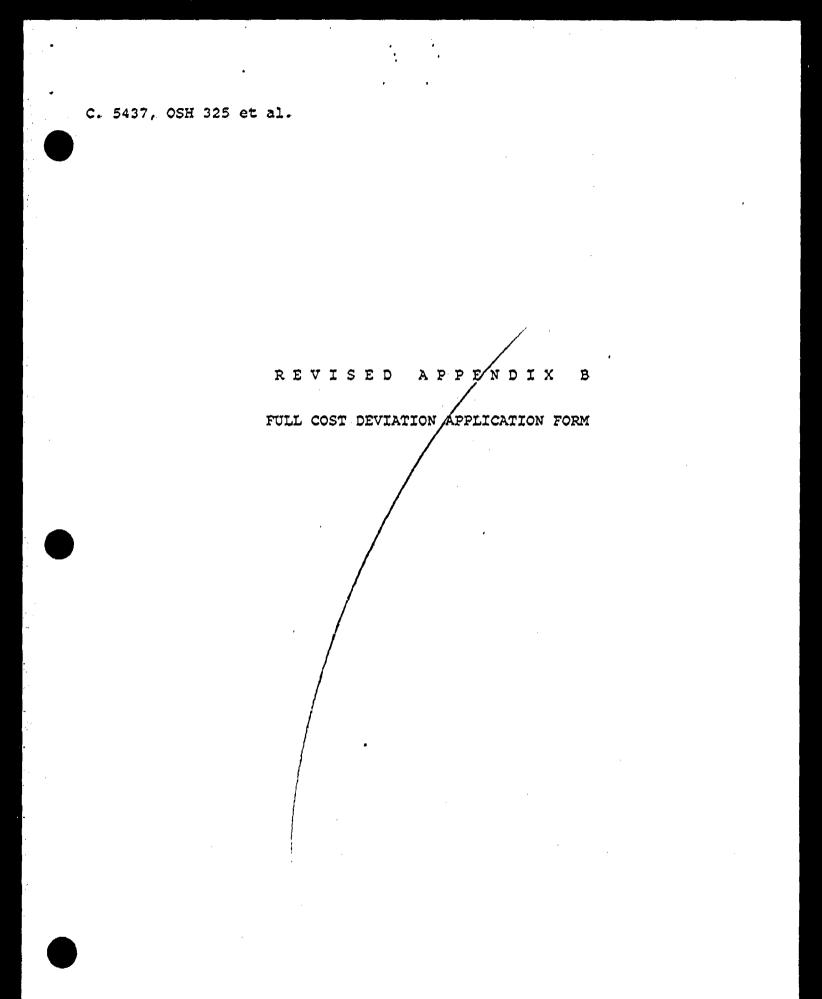
### CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing application has been served by <u>(specify method of service)</u> upon each of the following:

(List names and addresses of parties served.)

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Revised Page A-1-5 (End of Revised Appendix A-1)



APPLICATION TO DEVIATE FROM THE MINIMUM RATES FOR TRANSPORTATION OF COMMODITIES IN DUMP TRUCK EQUIPMENT

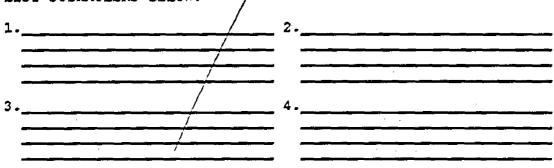
FULL COST DEVIATION APPLICATION

Is this a renewal application?yesno
Full cost deviation application # (Commission will insert number)
Name of carrier (Exact Legal Name)
Cal T-No. of carrier
Principal place of business(Street Address and City)
If applicant is a corporation, attach articles of incorporation or make reference to a previous filing that contained the articles.
Carrier is authorized to transport (Show Operating Authority)
Contact person regarding this application <u>(Name, Title, Address</u> and Telephone Number)
Commodity description and form
Deviation from Minimum Rate Tariff(Tariff Number)
Origin
Destination
Shipper
Present Rate (express in unit of measure) min, wt., unless hourly
Proposed Rate (express in unit of measure) min, wt, unless hourly
1. Describe the transportation to be performed. (The description

- 1. Describe the transportation to be performed. (The description should cover all particulars of the transportation to include but not be limited to: Loading and unloading, loadweights and anticipated volume per day or other time period, and whether the transportation is part of a backhaul or fronthaul.)
- 2. Show the estimated cost of performing the transportation under the proposed rate. Include the development of labor costs, vehicle fixed costs and mileage costs, other direct costs and allocations of administrative and other indirect costs. Overall cost should be expressed in terms of cost per 100 pounds, cost per load, or other appropriate unit of measure.

- 3. Show expected revenue from the transportation under the proposed rate in terms of revenue per 100 pounds, revenue per load or other appropriate unit of measure that will permit evaluation of the profitability of the service at the proposed rates. Explain the methods used in developing the revenue figures.
- 4. Attach a letter of support from the shipper.
- 5. Identify any carrier(s) presently providing the specific service sought by the applicant.
- 6. Attach applicant's latest available balance sheet, dated \_\_\_\_\_, 19\_\_. and an income statement for the latest fiscal year ending \_\_\_\_\_, 19\_\_.
- 7. Subhaulers will be used to perform less than half\_\_\_\_, more than half\_\_\_\_, or none\_\_\_\_ of the transportation.
- 8. If subhaulers are engaged to perform the service, they must either be paid the full proposed rate or, if the subhaulers will be paid a lesser rate or charge than that sought by the applicant, or if in any case more than half of the transportation under the deviated rate is to be provided by subhaulers, the following facts and statements must be submitted and joined with the filing of the application:
  - A. <u>Name of Subhauler</u> <u>Permit Number</u> <u>Current Address</u>

LIST SUBHAULERS BELOW:



B. A profit and loss (income) statement and a balance sheet.

- C. 5437, OSH 325 et al.
  - C. A detailed financial statement from each subhauler showing its total revenues and expenses in performing the transportation for the prime carrier for the last fiscal year and the subhauler's projected revenues and expenses for the specific transportation sought under this application.

Where financial information about subhaulers is submitted (either because they will be paid a lesser rate than that sought by the applicant or because they will provide more than half of the transportation), each subhauler must be paid enough to cover its full cost for providing the service and produce a profit as well.

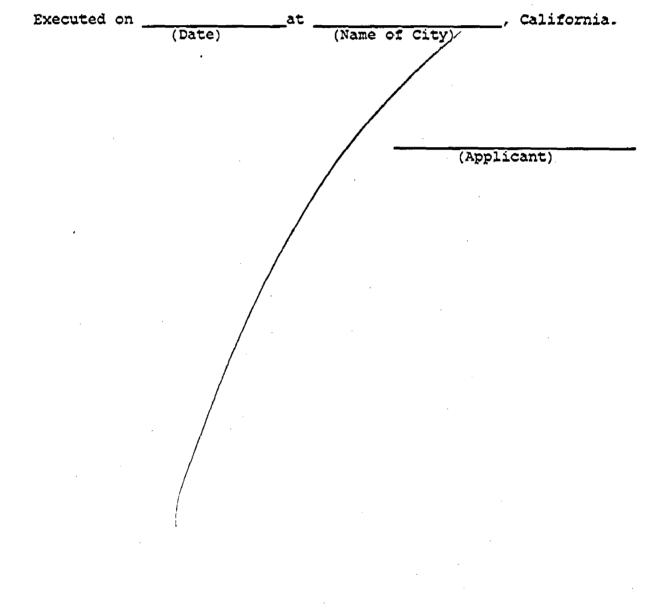
- 9. Other facts relied upon to support the reasonableness of the proposed rate.
- 10. Attach a copy of your application for a Biennial Inspection of Terminals (BIT) inspection by the California Highway Patrol along with evidence of payment of the fees for that inspection; your Requestor Code Number assigned by the Department of Motor Vehicles as part of participation in the DMV's Pull Notice Program; and certification that all subhaulers to be used in performing the deviated transportation have also applied for a BIT inspection and are participating in the Pull Notice Program.
- 11. This rate shall become effective 30 days after the date that notice of the filing appears in the Commission's Transportation Calendar.
- 12. This rate shall expire (show date) (no later than one year from the effective date).
- 13. In all other respects the rates and rules in MRT\_\_\_\_\_ shall apply.
- 14. Applicant will furnish a copy of this application to any interested party either upon their written request or that of the Commission. Renewal applications must be served upon the parties who were served a copy of the preceding application.

Dated at day of	· / ·	<del></del>	<u> </u>	California,	this
Signature:				,	
Title: Address:					
Telephone 1	Jumbers				

### CARRIER VERIFICATION

I am the applicant in the above-entitled matter; the statements in the foregoing document are true of my own knowledge, except as to matters which are therein stated on information or belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.



### CARRIER VERIFICATION

(Where Applicant Is a Corporation)

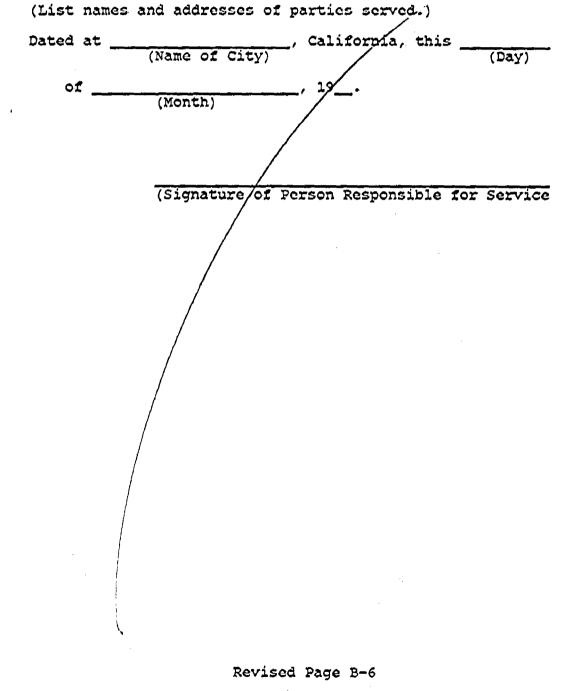
I am an officer of the applicant corporation herein, and am authorized to make this verification on its behalf. The statements in the foregoing document are true of my own knowledge except as to the matters which are therein stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

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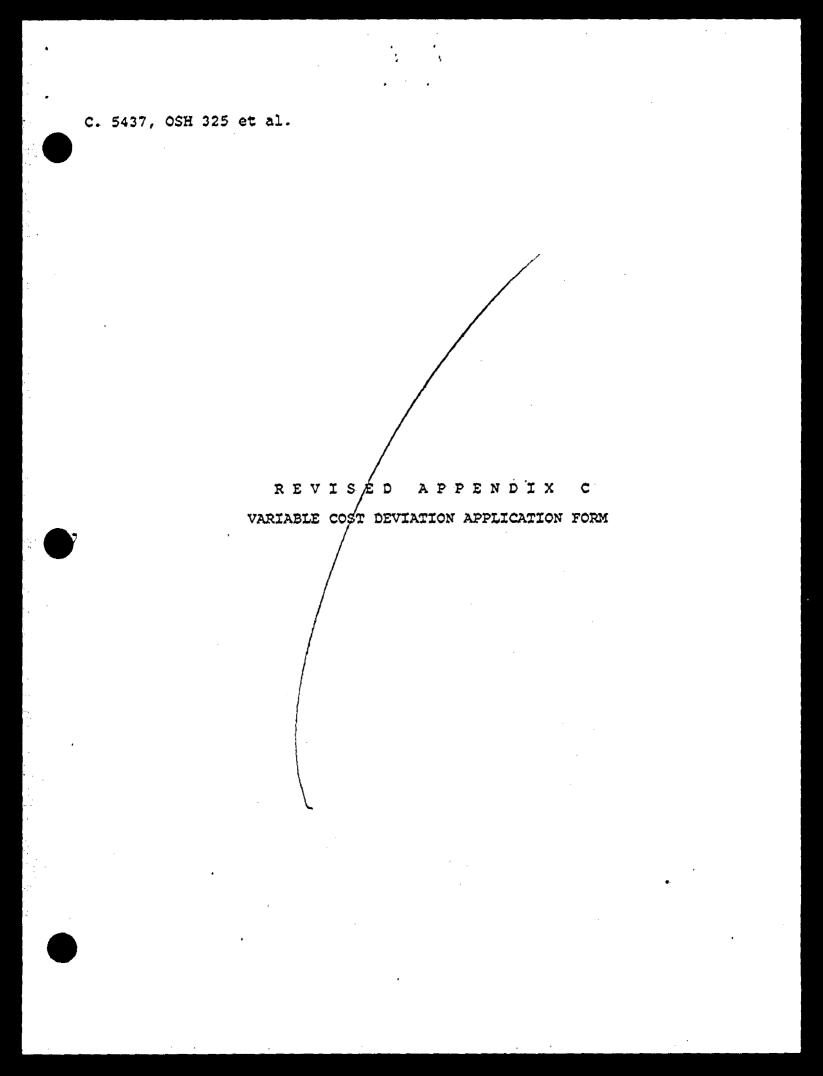
### CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing application has been served by <u>(specify method of service)</u> upon each of the following:



(End of Revised Appendix B)

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### APPLICATION TO DEVIATE FROM THE MINIMUM RATES FOR TRANSPORTATION OF COMMODITIES IN DUMP TRUCK EQUIPMENT

### VARIABLE COST DEVIATION APPLICATION

Carrier applicant qualifies to file a deviation under the variable cost deviation procedure by demonstrating profitability or working capital availability. A showing of sufficient working capital requires a showing of cash or other liquid assets sufficient, over the life of the deviation, to cover: (1) the carrier's ordinary working capital requirements; plus (2) the difference between revenues that would be received under (a) the applicable minimum rate excluding the profit factor incorporated into the minimum rate, and (b) the deviated rate requested. (If a carrier wishes, it may substitute for item (2)(a) the fully allocated cost of the particular transportation.)

Applicants will submit a balance sheet and income statement from the most current fiscal year. New dump truck carriers and those applicants who show a loss on their income statements must submit a balance sheet, a working capital worksheet, and a projected profit and loss statement. New carriers and those applicants who show a loss on their profit and loss (income) statement will also be required to sign a release form (Appendix D) authorizing the Commission to obtain financial information from the applicant's bank records.

If subhaulers are to be used, the cost justification shall either contain a declarátion that subhaulers will not provide more than half of the actual transportation under the proposed rates (as evidenced, for example, by the subhaulers providing less than half of the power units), pr include the costs of the subhaulers. When subhaulers provide more than half of the transportation: each subhauler must make the same showing of profitability or sufficient working capital as the prime carrier; each subhauler must submit a balance sheet and income statement for the most current fiscal year, except that new subhaulers and subhaulers who show a loss on their income statement must submit a balance sheet, working capital worksheet, and projected profit and loss statement; and new subhaulers and subhaulers who show a loss on their income statement will also be required to sign a release form (Appendix D) authorizing the Commission to obtain financial information from the subhauler's bank records.

Variable cost deviation application #(Commission will insert number)

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Name of carrier (Exact Legal Name)

Cal T-No. of carrier\_\_\_\_\_

Principal place of business \_\_\_\_\_(Street Address and City)\_

If applicant is a corporation, attach articles of incorporation or make reference to a previous filing that contained the articles.

Carrier is authorized to transport (Show Operating Authority)

Contact person regarding this application <u>(Name, Title, Address</u> and Telephone Number)

Description of commodity\_\_\_\_\_

Deviation from Minimum Rate Tariff (Tariff Number)

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Origin\_\_\_\_\_

Destination\_\_\_\_\_

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Shipper\_\_\_\_

Present Rate (express in unit of measure) min, wt, (unless hourly)

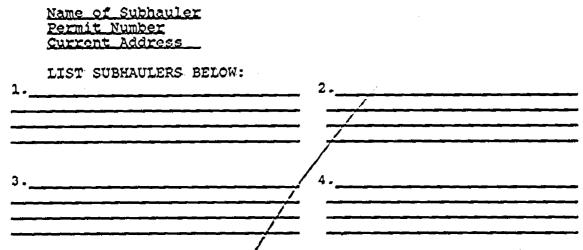
Proposed Rate (express in unit of measure) min. wt. (unless hourly)

1. Describe the transportation that will be performed under this rate. (The description should cover all particulars of the transportation to include but not be limited to: Loading and unloading, loadweights and anticipated volume per day or other time period, and whether the transportation is part of a backhaul or fronthaul.)

2. In the event that subhaulers are engaged to perform this transportation, they shall be paid no less than 95% of the revenue earned from the deviated rate. If the subhaulers are only providing "pulling" services, (tractor and driver only) they shall be paid no less than 75% of the revenue earned from the deviated rate. The difference between the deviated rate and the amount paid to the subhauler will cover any brokerage fee normally paid to the prime carrier.

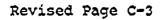
3. Subhaulers will be used to perform less than half\_\_\_\_, more than half\_\_\_\_, or none\_\_\_\_ of the transportation.

4. If authority is sought utilizing subhaulers, submit the following:



5. Attach a copy of your application for a Biennial Inspection of Terminals (BIT) inspection by the California Highway Patrol along with evidence of payment of the fees for that inspection; your Requestor Code Number assigned by the Department of Motor Vehicles as part of participation in the DMV's Pull Notice Program; and certification that all subhaulers to be used in performing the deviated transportation have also applied for a BIT inspection and are participating in the Pull Notice Program.

6. Revenue/Cost Comparisons--The rate/cost information can be stated per trip, per mile, per ton, per hour or other appropriate unit of measure. Please be consistent throughout your presentation. If the proposal contains different origin/destination combinations or different weights, please give appropriate examples. (Additional sheets may be used for subhauler data). ALL CARRIERS (and subhaulers, if subhaulers are providing more than 50% of the transportation) MUST SUBMIT REVENUE/COST COMPARISON STATEMENTS. The format on the next page can be followed or can serve as a guide:



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PROPOSED RATE:
INSURANCE COSTS:
VARIABLE COSTS:
Driver Labor
Fuel/0il
Tires
Maintenance and Repair
Gross Revenue
Other variable costs (Please specify. If none, write "none")*
TOTAL VARIABLE COST
INSURANCE PLUS VARIABLE
DIFFERENCE (Rate minus Costs)
*If an input is used specifically for the job in question, and would not be used or paid for otherwise, the input is variable.
7. Submit a letter of support from the shipper.
8. Attached are the carrier verification and the subhauler verifi- cation forms. ALL VARIABLE COST DEVIATION PROPOSALS MUST INCLUDE THE CARRIER VERIFICATION FORM. If subhaulers will be performing transportation the SUBHAULER VERIFICATION form must be submitted as well.
9. This rate shall become effective 30 days after the date that notice of the filing appears in the Commission's Transportation Calendar.
10. This rate shall expire <u>(show date)</u> (no later than six months from effective date).
11. In all other respects the rates and rules in MRT shall apply.
Revised Page C-4

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12. Applicant will furnish a copy of this application to any interested party upon either their written request or that of the Commission.

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Dated at day of	, Califo , 19	rnia, this	;
Signature: Address:		Title:	
Telephone Number: _	/		
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### CARRIER VERIFICATION

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I am the applicant in the above-entitled matter; the statements in the foregoing document are true of my own knowledge, except as to matters which are therein stated on information or belief, and as to those matters I believe them to be true.

I certify that the rates contained in Variable Cost Deviation Application #(Commission will insert number) will cover 105% of the total of all variable costs and insurance incurred in providing the transportation.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on	· /	at			California
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				Carrier	Applicant
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### CARRIER VERIFICATION

(Where Applicant is a Corporation)

I am an officer of the applicant corporation herein, and am authorized to make this verification on its behalf. The statements in the foregoing document are true of my own knowledge except as to the matters which are therein stated on information and belief, and as to those matters I believe them to be true.

I certify that the rates contained in the Variable Cost Deviation Application #(Commission will insert number) will cover 105% of the total of all variable costs and insurance incurred in providing the transportation.

I declare under penalty of perfury that the foregoing is true and correct.

Executed	on	(Date)	a		of City		fornia.
		(Sign)	ature a	nd Title	of Corj	porate	Officer
		. /					

### SUBHAULER VERIFICATION

1. 1. A.

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I am the subhauler applicant in the above-entitled matter; the statements in the foregoing document concerning this subhauler applicant are true of my own knowledge, except as to matters which are therein stated on information or belief, and as to those matters I believe them to be true.

I certify that 95%\* of the rate contained in Variable Cost Deviation Application #\_\_\_\_\_\_ will cover 105% of the total of all variable costs and insurance incurred by this subhauler applicant in providing the transportation.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on_	at	· · · ·	+	California.
	(Date) /	(Name of City)		
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(Subhauler Applicant)

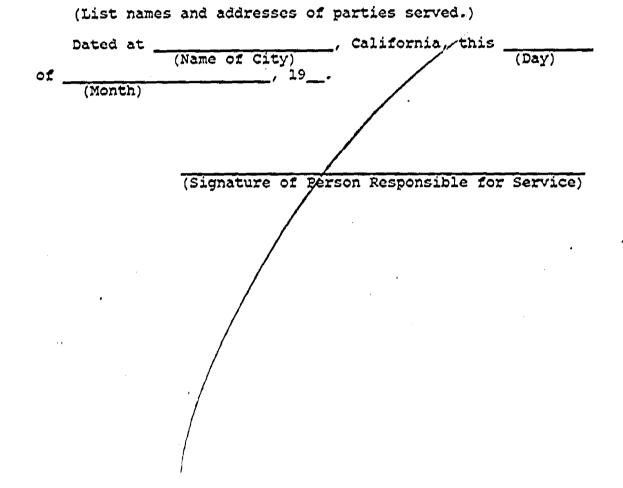
\*75% for "pullers" furnishing a driver and tractor only.

C. 5437, OSH 325 et al.

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# CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing application has been served by <u>(specify method of service)</u> upon each of the following:



Revised Page C-9 .(End of Revised Appendix C)



# REVISED APPENDIX D

RELEASE OF INFORMATION FORMS REFERRED TO IN APPENDIX C

### PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA RELEASE OF INFORMATION AUTHORIZATION

The undersigned authorizes the California Public Utilities Commission to obtain such verification or further information as it may require concerning information on financial condition set forth in the application for deviation authority, as submitted by the undersigned.

Regarding the verification of bank records, such verification shall be limited to the particular accounts and/or items listed below by the applicant and shall be limited to a period of time commencing on the date of the signing of the application and ending on the date of the granting or rejection of the application; but in no event shall the period for the verification of bank records extend beyond the date of the final disposition of the application.

The applicant has the right to revoke this authorization at any time, and agrees that any documents submitted for the purpose of demonstrating financial condition shall remain with the Commission.

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Revised Page D-1

C. 5437, OSH 325 et al.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA CONSENT TO OBTAIN INFORMATION (To be signed by non-applicant spouse of married applicant)

I authorize the California Public Utilities Commission to obtain whatever information about my financial condition it considers necessary and appropriate for the purposes of evaluating the financial condition of my spouse as an applicant for deviation authority.

Regarding the verification of bank records, my authorization is limited to the accounts and/or items listed below and is limited to a period of time commencing on the date of the signing of the application and ending on the date of the granting or rejection of the application; but in no event shall the period for the verification of bank records extend beyond the date of the final disposition of the application.

I understand that I have the right to revoke this authorization at any time.

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Revised Page D-2 (End of Revised Appendix D) State of California

Public Utilities Commission San Francisco

MEMORANDUM

CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

Date : September 5, 1989

To : The Commission (Meeting of September 7, 1989)

From : Joel T. Perlstein J TY P.U. Counsel III J TY

File No.:

Subject : Applications for rehearing by California Dump Truck Owners Association and California Carriers Association (CDTOA/CCA) and California Trucking Association (CTA) of the dump truck deviation procedures adopted in D.89-04-086 (the Decision). (Deviation procedures stayed at July 19th méeting; deemed denied dates: July 22, 1989 (CDTOA/CCA), July 25, 1989 (CTA).) (Commissioner Duda; ALJ Lemke.)

<u>RECOMMENDATION</u>: The suggested order extensively modifies the Decision, in an effort to improve support for the procedures adopted, denies rehearing, and lifts the prior stay. It makes only relatively minor changes to the adopted procedures.

Alternatively, the Commission could grant a limited rehearing. This rehearing, hopefully, would develop a record that could support the decision better than/the existing record can. This rehearing would also enable the/Commission to further limit Staff discretion, by spelling out in/greater detail how Staff is to implement the new deviation procedures.

FACTS: The Decision adopted new procedures for dump truckers to obtain rate deviations allowing them to charge less than the "minimum" rates. The Decision also raised dump truck minimum rates by 4%. Prior to the Decision, the Commission generally required that rate deviations be based on favorable circumstances attendant to the particular transportation and that the deviated rates recover the fully allocated costs of the transportation involved. Moreover, initial applications for deviations were reviewed by an ALJ and approved by formal Commission decision.

The present Decision considered new deviation procedures proposed by several parties, including: CDTOA/CCA, Transportation Division Staff (Staff), and Michael Lindeman of Yuba Trucking (Yuba). Yuba proposed that any dump truck carrier be granted a deviation up to 20% below the applicable minimum rate upon showing that its overall financial condition and safety record are satisfactory. Staff proposed an expedited two-tier deviation procedure that offered applicants the choice of making either a full cost or a variable cost showing. The Decision adopted a three-tier expedited procedure which combines modified versions of the Yuba and Staff proposals.

Thus, the Decision permits three kinds of deviation applications: (1) A "simplified" rate deviation application, for rates that are up to 10% below the applicable minimum rate. No cost showing is required. (2) A "variable" (marginal) cost deviation application, for rates that are more than 10% below the applicable minimum rate. Applicants must show that the proposed rate is at least 105% of the total of variable costs plus insurance. Applicants also must show that they are either profitable or have sufficient working capital to cover any loss incurred from using the variable cost rate. (3) A "full cost" deviation application, also for rates that are more than 10% below the applicable minimum rate. These full cost deviations closely resemble the deviations previously available, in that the proposed rate must cover all of the carrier's fully allocated costs. However, a showing of special circumstances is no longer required and rates become effective automatically unless Staff rejects or suspends them.

Thus, under the Decision, and contrary to prior practice, deviations will be available without any showing of special circumstances and need not cover all of the carrier's fully allocated costs. Furthermore, deviations will become effective in 30 days unless rejected or suspended by Staff before then.

CDTOA/CCA and CTA have both filed timely applications for rehearing. These applications allege numerous errors in the Decision. These allegations include: (1) that the Decision conflicts with the governing statutes and the Commission's consistent interpretation of those statutes for over 50 years; (2) that rates that do not cover a carrier's fully allocated costs are unreasonable; (3)/that the statute requires the Commission to approve deviation requests on a case by case basis; (4) that the Decision omits a necessary finding that rates 10% below the minimum rate or set at 105% of variable costs are reasonable; (5) that the/Decision fails to consider the economic effects of its procedures on shippers, prime carriers, subhaulers, and the dump truck industry, and that those effects are disastrous; (6) that the use of "simplified" and "variable cost" deviations will result in illegal discrimination; (7) that the new deviation procedures delegate excessive authority to Staff and provide an /inadequate opportunity for protests; (8) that there is no support for the Decision's conclusion that there is a need for greater downward pricing flexibility; (9) that there is no support for Finding of Fact No. 10 (a key finding underlying /the "simplified" procedure) and related discussion; (10) that the Decision's notion of variable costs is flawed; (11) that the easy availability of "simplified" and "variable" rate reductions conflicts with the Decision's finding that a 4% rate increase in minimum rates is reasonable and necessary; and (12) that there is a mistake in Ordering Paragraph This memo will discuss each of these issues. It will No. 5.

also address, as item (13), problems created by the suggested order's having to rely on the Commission's own expertise, rather than evidence of record.

At its meeting on July 19th, the Commission stayed the Decision's deviation procedures. We had advised the Commission that the Decision fails to address many key issues and that, at the very least, the Decision will require extensive rewriting in order to be reasonably defensible. The Commission therefore granted a stay to prevent CDTOA/CCA and CTA from deeming their applications for rehearing denied and petitioning the California Supreme Court for review before the Commission revises the Decision. CDTOA has said that it expects to petition the California Supreme Court to review the Decision.

#### DISCUSSION:

(1) Conflict with the Commission's longstanding interpretation of the governing statutes.

(2) Reasonableness of rates that do not cover a carrier's fully allocated costs.

(3) Reasonableness of deviations not based on circumstances of the particular transportation.

(4) Need for a finding that the deviated rates approved under the simplified and variable-cost procedures will be reasonable.

Public Utilities (P.U.) Code § 3666 provides:

If any highway carrier other than a highway common carrier desipes to perform any transportation or accessorial service at a lesser rate than the minimum established rates, the commission shall, upon finding that the proposed rate is reasonable, authorize the lesser rate for not more than one year.

For over 50 years the Commission has interpreted this section as requiring that a proposed less-than-minimum rate exceed the fully allocated costs of providing the particular transportation.[1] For at least 25 years,/the Commission has generally granted deviations under § 3666 only if there are unusual circumstances and conditions in the/transportation under consideration which

1 See, e.g., <u>C.W. Carlstrom</u>, 41 C.R.C. 589 (1938) (including depreciation and overhead in its cost analysis).

# lead to cost savings.[2]

CDTOA/CCA and CTA (collectively "Applicants") allege that the Decision violates § 3666 because its "simplified" and "variable cost" procedures allow rates that do not cover the fully allocated costs of providing the transportation. Applicants also allege that the Decision violates § 3666 because "unusual conditions" are no longer required to obtain deviations of any kind, and because the "simplified" procedure requires no showing at all concerning the costs or circumstances of the particular transportation. According to CDTOA/CCA, § 3666 requires the Commission to decide deviation requests on a case-by-case basis because that section "pertains to a particular carrier and a particular transportation service." (App./reh. at 3.)

Applicants accurately point out that the Decision conflicts with longstanding Commission precedents interpreting § 3666, in the above respects. The present Decision, however, discusses neither § 3666 nor the prior precedents. P.U. Code §1705 requires findings of fact and conclusions of law on all material issues. Thus, at the very least, the Decision is valuerable to reversal for its failure to explain why the Commission is refusing to follow its own prior decisions.

There is nothing in § 3666 that expressly requires a deviated rate to cover the fully allocated costs of the service. The statute only requires that the Commission find the deviated rate "reasonable". Similarly, there is nothing in § 3666 that expressly requires the Commission to review deviation requests on a case-by-case basis or to consider the costs or circumstances of the particular transportation. ( On the other hand, § 3666 does require a "finding that the proposed rate [for a service] is reasonable". This language would support an argument that the Commission must somehow consider specific facts about the particular service for which the deviation has been requested. Since the simplified deviation procedure allows a rate cut of up to 10% without consideration of any specific facts about the particular transportation service, it is probably even more vulnerable than the other procedures to a challenge that it violates § 3666.

The Commission could possibly justify a departure from its own prior precedents interpreting § 3666's reasonableness requirement. However, the present record in this proceeding

2 See, e.g., <u>Dolphin Transportation. Inc.</u>, 4 Cal. Pub. Util. Comm. 2d 409, 414 (1980) (suggesting that a finding of reasonableness under § 3666 <u>requires</u> "special circumstances"); <u>Mello</u>, 82 Cal. Pub. Util. Comm. 89 (1977) ("special circumstances" generally necessary); <u>William E. Daniel</u>, 63 Cal. Pub. Util. Comm. 147, 149 (1964). provides a far from ideal basis for justifying such a reinterpretation of § 3666's reasonableness requirement. Ideally the record would contain expert economic testimony explaining why the Commission's prior interpretation of the term "reasonable" in fact leads to unreasonable rates. Or the record would contain testimony explaining how changed circumstances in the trucking industry have made the Commission's prior interpretation of § 3666 unreasonable in light of present circumstances. Unfortunately, the record does not contain these sorts of testimony. Still, it may be possible to justify the Commission's rejection of its own prior decisions.

The suggested order follows the strategy of arguing that: the term "reasonable" is not strictly defined; the Commission's prior interpretation of the term "reasonable" was too limited; the rates resulting from application of the simplified and variablecost procedures should in fact be reasonable; and there is nothing in other relevant sections of the P.U. Code that would prevent the Commission from finding the simplified and variablecost procedures reasonable.[3]

As the Commission has previously stated:

The term "reasonable" used in the context of Section 3666 has not been defined succinctly and it is doubtful that such can be done. (<u>Major Truck Lines</u>, 71 Cal. Pub. Util. Comm. 447, 451 (1970).)

The Commission previously interpreted the term "reasonable" to require that a deviated rate cover the <u>fully allocated</u> costs of the transportation. However, it is also plausible to interpret the term as requiring only that a deviated rate exceed the <u>variable</u> costs (or marginal costs) of providing the transportation.

When the Commission required deviated rates to cover the fully allocated costs of the transportation, it required the deviatedrate job to pay its full proportional share of the carrier's fixed costs. However, where no more remunerative work is available, a rational business person will take on additional work if the revenue/from the job exceeds the variable costs of performing the job and makes <u>some</u> contribution to the business's fixed costs. Where no better paying work is available, accepting work at such a price is of net benefit to the carrier, because it covers at least some of the the carrier's fixed costs, which have

3 Another option: alternatively the Commission could order a limited rehearing in an attempt to obtain testimony along the lines outlined in the preceding paragraph above.

to be paid in any event. However, the Commission's requirement that a deviated rate cover a job's fully allocated cost would generally have prevented the carrier from taking such work at those prices. The fully-allocated-cost requirement forced carriers to behave irrationally, that is, unreasonably. Thus, the Commission could conclude that a requirement that rates <u>always</u> cover a job's fully allocated costs is <u>un</u>reasonable and that a deviated rate that more than covers a job's variable costs is reasonable.

In fact, in construing P.U. Code § 451 (relating to common carrier rates), the Commission has previously concluded that a rate is "reasonable" if it contributes revenues above the out-ofpocket (variable) costs of performing the service. See D.58664, <u>Investigation of Reduced Rates</u>, mimeo at 3, 4, 8 (June 23, 1959) (an unpublished decision concerning Southern Pacific's petroleum tank car rates) (headnoted at 57 Cal. Pub. Util. Comm. 229). <u>See also</u>, D.45770, <u>Investigation of Reduced Rates for Transportation of Bulk Cement</u>, 50 Cal. Pub. Util. Comm. 622 (628, 632 (1951); D.76718, <u>Western Motor Tariff Bureau</u>, mimeo at 8 (Jan. 27, 1970) (headnoted at 70 Cal. Pub. Util. Comm. 643).

This conclusion, that a rate above the variable cost is reasonable, supports the simplified deviation procedure as well as the variable-cost procedure. The Commission's rationale for adopting the simplified procedure was that, based on the minimum rate structure, a carrier charging no more than 10% below the minimum rate should be recovering more than its variable costs, indeed nearly all of its fixed costs as well.[4] The suggested order attempts to reinforce this point.

The Commission could further/conclude that its prior requirement that deviations be based on "unusual" or "special" circumstances was also unreasonable. The Commission's prior cases held that

4 The Commission has not required any showing that the particular carrier's variable costs will be covered, because its conclusion -- that the "simplified deviation" rate should more than cover the carrier's variable costs -- is based on the cost determinations that underlie the minimum rate structure. Furthermore, because the simplified-deviation rate is designed to cover most of the average carrier's fixed costs, in addition to its variable costs, even a carrier with above-average costs should at least cover its variable costs most of the time with such a rate. However, for a carrier or a job with well above average costs, a simplified-deviation rate might not even cover the carrier's variable costs. Thus, even if a rate that exceeds variable costs is reasonable, the simplified procedure still remains somewhat vulnerable to attack on the grounds that it fails to require any showing with regard to the carrier's particular costs. "in a Section 3666 proceeding the principal cost consideration is the cost savings directly attributable to the [unusual circumstances and conditions in the] transportation involved and not to the ability of an individual carrier to operate at lower costs than other carriers similarly situated". <u>William E.</u> <u>Daniel</u>, 63 Cal. Pub. Util. Comm. 147, 149 (1964); see also <u>Major</u> <u>Truck Lines</u>, 71 Cal. Pub. Util. Comm. 447, 453 (1970). The Commission could conclude that this restriction prevented carriers and shippers from taking advantage of a particular carrier's ability to operate more efficiently than other carriers. The Commission could therefore conclude that this restriction is unreasonable, because it forces shippers and the public to pay more than necessary for transportation services and eliminates incentives that would otherwise encourage carriers to become more efficient.

In sum, the suggested order argues: that the rates resulting from application of the simplified and variable-cost deviation procedures will be reasonable because those rates should exceed the carrier's variable costs: and that the Commission's prior interpretation of the term "reasonable" was too limited. These arguments are intended both to explain why the Commission has departed from its prior precedents and to meet Applicants' objection that the rates authorized by the Decision will not be reasonable within the meaning of P.U. Code § 3666.

CTA also argues that the Decision lacks an essential finding: that rates up to 10% below the minimum rate or set at 105% of variable costs will be reasonable. The suggested order adds a new conclusion of law, which states that the rates resulting from implementation of the deviation procedures will be reasonable. The suggested order also adds additional findings and conclusions summarizing the arguments outlined above as to why "simplified" and "variable cost" deviated rates will be reasonable.

(5) Economic effects on shippers, prime carriers, subhaulers, and the dump truck industry.

CDTOA/CCA argues that the Decision fails to consider the economic effects of simplified and variable-cost deviations on shippers, prime carriers, subhaulers, and the dump truck industry. CDTOA/CCA argues that the failure to consider these economic effects violates P.U. Code § 1705 and the Court's decision in <u>United States Steel Corp. v. Public Utilities Commission</u>, 29 Cal. 3d 603, 608-10 (1981). CDTOA/CCA correctly points out that the Decision lacks any discussion of the allegedly negative effects of the adopted procedures. Moreover, in light of the extensive argument and the evidence presented concerning the harm these procedures would allegedly cause, CDTOA/CCA is also correct that the Decision's failure to address these allegations constitutes legal error. P.U. Code § 1705 requires that the Decision include findings of fact and conclusions of law on all material issues, and <u>U.S. Steel</u> held that the Commission violated this requirement by refusing to consider the economic impact of a proposed rate exemption on shippers. <u>U.S. Steel</u> further noted that the Commission has a "duty to consider economic effects of alternative approaches" (29 Cal. 3d at 609).

CDTOA/CCA's application for rehearing generally alleges two kinds of negative economic impacts. First, citing testimony in the transcript, CDTOA/CCA alleges that the variable-cost deviation procedure and especially the simplified procedure will lead to a "significant price war," and "cause the industry to selfdestruct". Second, CDTOA/CCA argues that subhaulers will be most harmed by the new deviation procedures.

In CDTOA/CCA's view, economic power is unequally distributed in the dump truck world. Much of the actual hauling is done by small-scale subhaulers, while overlying prime carriers deal directly with the larger shippers. CDTOA/CCA believes that economically powerful shippers will insist on 10% rate reductions under the simplified procedure and that a price war will ensue. If rates are generally cut by 10%, carriers will not earn the revenues that the first half of the Decision found "reasonable and necessary" for the dump truck industry under the Commission's minimum rate program. In fact, if all rates were cut by 10% the industry would be unable to meet the costs that underlie the minimum rates (as the current minimum rates incorporate a 6% profit factor). Applicants therefore argue that the adopted deviation procedures will result in a rapid deterioration of equipment, driver, and service quality and a corresponding decline in truck safety.

Moreover, according to CDTOA/CCA subhaulers will be especially hurt, because "they have Aittle economic power and must take what the job pays or not work." (App./reh. at 24.) Thus, CDTOA/CCA argues that truck brokers like Yuba "will use [subhaulers] to absorb the losses until they go broke to be replaced with more [subhaulers] in a pattern that will last until the supply of these subhaulers is exhausted." (App./reh. at 23.) (Because CDTOA/CCA's application for rehearing has few citations to the record, it is unclear how much record evidence there is to support its position, especially with regard to its claims about harm to subhaulers.y

The notion that unregulated competition can lead to "destructive rate practices" has a long history in the proceedings of this Commission. <u>See, e.g.</u>, D.29975, <u>Application of O'Brien</u>, 40 C.R.C. 610, 615 (1937); <u>U.S. Steel</u>, 29 Cal. 3d at 612 ("the aim of minimum rate regulation is to preclude destructive rate practices") <u>citing California Trucking Assn. v. Public Utilities</u> <u>Com.</u>, 19 Cal. 3d 249, 247 (1977). For this reason it is especially important that the Commission respond to Applicants' claim that the adopted deviation procedures will result in "destructive rate practices."

The suggested order relies on the testimony of CDTOA/CCA's witness Lautze to refute this claim. Lautze had testified that Staff's variable-cost rate deviation proposal would cause the



dump truck industry to self-destruct. During Yuba's crossexamination of Lautze, Lautze testified that he was familiar with the operations of rate-exempt agricultural carriers and that their total exemption from rate regulation had not caused the agricultural carrier industry to self-destruct. (This testimony is consistent with the December 1988 report to the CPUC monitoring the bulk agricultural industry after deregulation.) In fact, Lautze testified that the current carriers are more well-financed and better qualified, while there has been a dropout of carriers who haven't been able to keep up with modern equipment, etc. Lautze did claim that this experience of the rate-exempt agricultural carriers would not apply to dump truck carriers. However, Lautze did not explain this opinion and the Commission could reasonably conclude that this evidence concerning rate exempt agricultural carriers makes it implausible that the granting of a much lesser degree of rate flexibility to dump truck carriers will cause the dump truck industry to selfdestruct.

The suggested order also makes an argument that includes, inter alia, the following points: The Commission is not aware of any regulated trucking industry in California where increased flexibility has lead to ruin as carriers all price themselves below cost and fail. Nor does the Commission believe that that will happen here. Dump truck carriers cannot be forced to accept money-losing hauls, no matter how large a shipper may be. Similarly, subhaulers are free to reject deviated-rate hauls that do not pay enough. Dump truck carriers endeavor to know their own costs and to make a profit. Accordingly, the dump truck industry will not cut rates without regard to costs in a desperate effort to meet competition and obtain work. Therefore adoption of the Simplified Deviation Procedure should not cause such deviated rates to become the going rate in the industry.

This argument continues: Of course, the limited rate flexibility introduced by the adopted deviation procedures will impose some pressure on less efficient carriers or those who provide poor service. Such a development bodes well for the health of the industry in terms of its ability to provide quality service at the lowest possible reasonable rates. Even if some carriers with higher than average costs should fail, other existing carriers with lower costs will be able to expand. And, under California's open entry policy for dump truck carriers, new carriers will be able to enter the business.

Unfortunately, I am not aware of any evidence on the record to support the preceding paragraph; [5] the Commission would apparently have to rely just on its own expertise. It would be

5 The record supporting some early parts of the paragraph before that is also somewhat weak.

much easier to support the Decision if there were expert testimony on the record to the effect that the increased competition unleashed by these more flexible deviation procedures should result in greater efficiency, improvements in service quality, and lower prices. Similarly, the Decision would have been helped by expert testimony on the record that there are lower cost carriers who can expand and that such carriers, together with new entrants, should be able to meet reasonable demands for dump truck service even after implementation of the new deviation procedures.[6] D.85-04-095 (which discontinued the Commission's proceeding to abolish dump truck minimum rates) makes the absence of such expert testimony even more problematic. That decision seems to have implicitly adopted a somewhat contrary position, that rate regulation is needed in order to ensure an adequate supply of dump trucks. Another option: Evidence along the foregoing lines might be obtained if the Commission were to grant a limited rehearing.

Based on evidence that the industry will not destroy itself by reducing all its prices below cost, the suggested order concludes that the industry as a whole will be able to meet reasonable demands for service and that adequate and dependable dump truck service will continue to be available after implementation of the adopted deviation procedures. The suggested order also finds that the adopted deviation procedures will benefit shippers through lower rates and will not cause destruction of the dump truck industry, or a shortage of supply, or a deterioration in truck safety. Moreover, the Commission stands ready to correct any unforeseen problems with these procedures and is ordering Staff to prepare a report on the first year of the two-year limited period for which the Commission is now authorizing these procedures.

CDTOA/CCA also argues that most of the revenues lost as a result of the simplified and variable cost deviations will be lost by subhaulers. This is true because the Commission requires that a subhauler receive at least 95% of the minimum or deviated rate (75% when the subhauler provides pulling service only). The suggested order turns this argument on its head, and contends that the minimum division of revenue requirements protect subhaulers. It also points out, as does CDTOA/CCA, that subhaulers receive additional protection under the 50% rule, which requires the cost data of subhaulers to be included in any

6 The record could also be improved by obtaining evidence concerning the existing level of turnover in the dump truck industry. Such evidence might well establish both that new entrants are readily available and that even inflexible minimum rates are not sufficient to ensure the survival of inefficient operators. full or variable cost deviation application if subhaulers provide more than half of the actual transportation.

(6) Allegation that the deviated rates will be discriminatory.

CDTOA/CCA argues that the simplified and variable cost procedures will produce discriminatory rates. An example of such discrimination would be where a carrier obtains a simplified deviation and cuts its rates for one of its customers by 10%, but refuses to cut its rates for that customer's competitors. (CDTOA/CCA argues that this kind of discrimination is especially onerous in the construction commodities business, where the cost of transportation may comprise nearly half the cost of delivered materials.) The Commission has previously indicated that a less than minimum rate that does not recover both the fixed and variable costs of providing the transportation would be unjustly discriminatory, because it would result in a loss that would have to be recovered from other shippers or traffic. See D.29975, <u>Application of O'Brien</u>, 40 C.R.C. 610, 611-12 (1937) (an early decision on applications to charge Yess than minimum dump truck rates). Here, where the simplified and variable-cost deviations do not recover all of a carrier's fixed costs, the carrier will have to recover those fixed costs from other customers if the carrier is to remain viable. Thus, CDTOA/CCA's claim of discrimination is quite plausible.

To rebut this claim, the suggested order relies on some testimony by CDTOA/CCA's witness Lautze. Lautze testified that a carrier could not grant a deviation to one of its customers without doing the same for its other customers, because the deviation proposals become public information. Based on this testimony, the Commission could conclude that discrimination should not be a problem here. The Commission could further conclude that carriers will not use these procedures to bestow advantages on favored customers, but rather will use them in the circumstances outlined by Staff witness Burgess, <u>i.e.</u>, when a carrier has idle capacity, and by Yuba's witness Lindeman, <u>i.e.</u>, when the deviated rate will in fact cover all of the carrier's costs but the job is relatively small or needs to be done so quickly that the time and expense of filing a full-cost deviation and defending it against protests is not worthwhile. The suggested order includes a discussion along the foregoing lines. Where different shippers are treated differently under different circumstances and there is a rational basis for the differing treatment, there should not be any illegal discrimination.

(7) Delegation of authority to staff and opportunity to protest.

CDTOA/CCA argues that the adopted procedures under which Staff will process all three kinds of deviation applications: (i) violate due process requirements; (ii) abdicate the Commission's responsibility under P.U. Code § 3666 to find deviated rates reasonable before authorizing them; and (iii) delegate excessive authority to Staff. More specifically, CDTOA/CCA alleges that the Commission cannot delegate to Staff the authority to determine whether "valid grounds exist for protest," and that the grounds of protest are too limited.

# (a) Acceptable grounds of protest

CDTOA/CCA contends that the adopted procedures do not permit, for example, protests relying on significant allegations of "price fixing, . . restraint of trade, [or] the creation of a monopoly in a certain territory" or on allegations "that subhaulers are being forced to work at a significant loss." (App./reh. at 17-18.) Although the procedures contained in the Decision's Appendix A are not entirely clear on this point, both the Decision and Appendix A seem to say that staff will reject protests that do not allege the applicant's failure to conform to the adopted guidelines.[7] The adopted guidelines do not require the applicant to prove a lack of anticompetitive effects nor do they require simplified or variable-cost applications to show that subhaulers will not incur losses.

Therefore anyone who wishes to raise allegations like those listed above apparently will have to file a formal complaint with the Commission. While the proponent of a deviated rate has the burden of proof if a protest is set for hearing, the complainant has the burden of proof in a formal complaint proceeding. Moreover, the deviation will most likely have gone into effect under the expedited procedure while the complaint is still pending.

CDTOA/CCA contends that the/Commission violates due process requirements and its responsibility to find the deviated rate reasonable under § 3666, by shifting the burden of proof and by allowing the deviated rate to go into effect before the complaint is resolved. However, there is something basically implausible about the kinds of protests that CDTOA/CCA contends the Commission is giving short shrift to. First, CDTOA/CCA wants to be able to protest "that subhaulers are being forced to work at a significant loss." However, as outlined above, the suggested order rejects the notion that any subhauler is ever forced to accept money-losing hauls.

Second, CDTOA/CCA wants to be able to protest that deviations will result in "price fixing, . . . restraint of trade, [or] the creation of a monopoly in a certain territory". CDTOA/CCA does

7 The Decision (at p.29) indicates that a protestant may file a formal complaint "if his protest is not found by TD staff to fit our adopted guidelines". Appendix A (at pp. A-5 - A-6) says that staff will evaluate "the protest based on conformity with the guidelines for filing the application". not explain how deviations will lead to these results. To the contrary, because the adopted deviation procedures will allow a greater degree of pricing flexibility, and therefore a greater degree of competition, the suggested order concludes that deviations are unlikely to cause such anti-competitive effects. Furthermore, the suggested order concludes that it is more reasonable to allow deviated rates that meet the adopted guidelines to go into effect before considering any such protests, than to allow competitors to delay the requested deviation just by filing protests making allegations of anticompetitive behavior. The would-be protestant can still file a complaint.[8] CDTOA/CCA has not shown why requiring use of the complaint procedure violates due process.

The claim that these procedures violate P.U. Code § 3666 is more plausible, but not necessarily compelling. P.U. Code § 3666 simply says that "the Commission shall, upon finding that the proposed [less-than-minimum] rate is reasonable, authorize the lesser rate for not more than one year." The statute certainly can be read as requiring a finding of reasonableness at the time the particular rate is authorized for one year. It is unclear how the Commission could make a finding of reasonableness at the time a rate is authorized if a complaint or protest alleging unreasonableness due to anti-competitive effects has been filed and not yet been resolved.

On the other hand, here the Commission will be finding in advance, on a generic basis, that rates that meet the requirements of these deviation procedures will be reasonable. This finding arguably meets the Commission's statutory obligations. Therefore, despite the potential difficulty, in light of the policy reasons for expediting deviation applications, and because CDTOA/CCA has not clearly shown legal error, we do not recommend changing the adopted procedures to permit protests like those described by CDTOA/CCA to delay deviation applications/that meet the adopted guidelines. Accordingly, the suggested order clarifies that Staff is to reject protests that do not allege a failure to comply with the adopted guidelines for deviation applications.[9]

8 The suggested order permits a protestant whose protest has been rejected, or a would-be protestant, to file a complaint with the Commission even before the proposed deviation goes into effect.

9 Other options: If the Commission wishes, the order could be changed to provide that upon the filing of such a protest Staff will suspend the rate and request the Commission to set the

(Footnote continues on next page)

#### (b) Delegation to Staff

Applicants, and especially CTA, argue that the adopted procedures violate § 3666 because a deviated rate goes into effect automatically after 30 days unless the rate is rejected or suspended by Staff before then. Applicants suggest that only the Commission can make the finding required by § 3666 (that that authority cannot be delegated to Staff), and that since rates become effective automatically unless rejected or suspended, neither Staff nor the Commission actually makes the required finding. These arguments are certainly plausible. The statute can be read as requiring Commission approval of each "proposed rate".[10] On the other hand, there is nothing in the statute that <u>expressly</u> requires the Commission to find reasonableness on a case-by-case basis, and these arguments do not take account of the suggested order's generic finding that rates resulting from implementation of the deviation procedures will be reasonable.

Moreover, as a general rule, public agencies may delegate to subordinates the performance of ministerial tasks, including the investigation and determination of facts preliminary to agency action, even in the absence of express statutory authorization. On the other hand, powers which involve the exercise of judgment or discretion generally cannot be delegated to subordinates

#### (Footnote continued from previous page)

matter for hearing. But/the availability of such automatic suspensions (in response to protests alleging some grounds of unreasonableness other /than a failure to abide by the adopted guidelines) will make it much easier for competitors to delay lower rates. Alternatively, Staff could be given discretion to decide whether such a/ protest is sufficiently meritorious as to warrant Staff suspension of the deviated rate (and a recommendation that the Commission set the matter for hearing). However, we do not recommend this option because, as discussed in greater detail below, the delegation of discretionary functions to Staff creates legal problems. Moreover, the theory of the Decision is that Staff is just being told to check off compliance with the Decision's requirements.

10 P.U. Code § 3666 permits "the commission . . . upon finding that the proposed rate is reasonable, [to] authorize the lesser rate for not more than one year." P.U. Code § 454 (dealing with rate increases by public utilities) contains some similar, but not identical, language. Under § 454's requirement of a "finding by the commission" rate increases are approved by the Commission itself, by means of either a decision or a resolution. absent statutory authorization. (Nevertheless, an agency's subsequent approval or ratification of an act delegated to a subordinate validates the act.) Here, the Decision says that the Commission is only delegating to Staff authority to check off compliance with clear guidelines. However, as we discuss in greater detail below, there is, in fact, a good deal of unclarity in the guidelines, which leaves the Commission open to a challenge that it has delegated excessive (<u>i.e.</u>, discretionary) authority to Staff.

#### (c) Staff review of protests

CDTOA/CCA does make one specific allegation that the Decision improperly delegates discretionary authority to Staff. The adopted procedure provides: "If the Commission staff determines that valid grounds exist for the protest, it will evaluate the substance of the protest based on conformity with the guidelines for filing the application . . . CDTOX/CCA asserts that this provision delegates excessive authority to Staff because it permits Staff to determine whether "valid grounds exist for the protest". This claim is plausible, because the determination as to whether a protest is valid could involve an exercise of discretion and was previously made by an ALJ and ratified by Commission decision. However, there was some testimony by Staff witness Burgess that the phrase which CDTOA/CCA objects to only means that "frivolous" protests will be rejected by Staff. "frivolous" protest is one that provides no basis for its (A) objection to the proposed rate.) Accordingly, the suggested order modifies the procedure to provide that Staff is to reject frivolous protests. Otherwise, Staff is to investigate the protest and review it in accordance with the adopted guidelines.

In addition to this one/issue that Applicants raise, the record and our work on the Decision reveal additional areas in which the Decision delegates discretion to Staff. Theoretically, the parties should not be/able to raise these additional delegation issues in court; P.U. Code § 1732 bars a party from raising any grounds not raised in the application for rehearing. Still, the suggested order limits Staff's discretion in some of these other areas, to reduce the Decision's legal vulnerability and provide clearer guidance to Staff.

(d) Review of cost-protests and Commission handling of recommendations to set for hearing

The adopted procedures provide that "[p]rotests involving costs may have merit which is not clearly determinable by Staff, in which case the rate filing will be suspended with a request to the Commission that the matter be docketed and set for hearing." This language may suggest that Staff is to exercise its judgment in determining whether a protest involving costs has merit; and CDTOA/CCA's cross-examination of Staff witness Burgess delved extensively into the extent of Staff's discretion under this provision. The suggested order therefore eliminates Staff discretion in determining the merit of a protest that raises questions about costs (including underlying performance factors). Our suggested revision clarifies that where a protest raises a non-frivolous question of fact about costs that a carrier has relied on in its deviation application (that is, where the protest provides some basis for its objection to those costs), if Staff is unable to resolve the protest such that the protest is withdrawn, then Staff will suspend the rate and request that the Commission docket the matter and set it for hearing. Under this revision, Staff will not reject a cost protest just because Staff disagrees with the protestant's allegations about costs. Note: this revision may cause delays in the approval of variable and full-cost deviation applications, and may increase the number of protests to such applications as well.

CDTOA/CCA's cross-examination of the Staff witness also expressed some concern that, even where Staff has recommended a hearing, the Commission might just let a deviated rate go into effect when the 45 day Staff-imposed suspension/expires, without holding any hearing to review the reasonableness of the proposed rate. Our suggested order therefore provides that the Commission <u>will</u> further suspend the rate and schedule a hearing if, based on review of the application, the protest, and Staff's recommendation, the Commission concludes that there is a material issue of fact bearing on the reasonableness of the deviated rate.

# (e) Staff's use of cost guidelines

In reviewing applications that rely on cost data (variable-cost and full-cost applications), Staff intends to compare the submitted costs with its own cost-guidelines. If the submitted costs fall outside of these guidelines, Staff will ask the applicant for an explanation. If Staff is not satisfied with the explanation (and in/the absence of a protest on the subject), Staff will reject the application. The Decision does not expressly provide for this procedure; however, the adopted procedures do provide that "Staff may reject a [deviation] filing within the 30 day/notice period." (The use of the word "may" implies that some discretion has been granted to Staff.)

CDTOA/CCA's cross-examination of Staff witness Burgess delved into Staff's proposed use of cost-guidelines, and the extent to which this procedure permits Staff to exercise discretionary authority. Staff has not yet developed cost-guidelines for dump truck carriers. Therefore they are not yet available for carriers to review or for the Commission to approve. Staff believes that many of the cost-guidelines developed for the general freight cost-justification program will also be useful in evaluating dump truck deviations. Other cost-guidelines will need to be developed expressly for dump truck carriers.

Staff's proposed use of cost-guidelines would permit Staff to make discretionary decisions. First, Staff would exercise discretion in establishing the guidelines. Second, Staff would exercise discretion in deciding whether an applicant had a good enough explanation of why its costs are lower than those contained in the guidelines.

Despite these problems with delegating discretionary authority to Staff, the suggested order does not contain a fix for this costguideline problem. First, a carrier whose deviation application has been rejected by Staff is not without recourse. The carrier can obtain a hearing and Commission consideration of its deviation request by filing a formal application. Thus, the carrier's situation is not all that different than it would have been if the Decision had authorized Staff to protest deviation filings where Staff believed the underlying costs were unreasonable. If Staff could file such protests, and those protests were not resolved by discussions with the applicant, the protest procedures already provide that Staff would suspend the deviated rate and request the Commission to set the matter for hearing.

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Second, it is not clear that there are any better alternatives available right now that would eliminate the Staff discretion involved in applying cost-guidelines. Of course, if the Commission were to grant a limited rehearing, it could schedule workshops to develop dump truck cost-guidelines for formal Commission adoption. This alternative would eliminate the Staff discretion involved in adopting the guidelines, but would not eliminate the Staff discretion involved in deciding whether a carrier had given an adequate explanation for submitting costs below those contained in the guidelines. Furthermore, formal Commission adoption of cost-guidelines would require formal commission action from time to time to update them.

(f) Showing of profitability or sufficient working capital under the variable cost procedure

The adopted procedure for variable cost applications requires carriers to show: /

that they are either profitable or have sufficient working capital to cover any loss that could result from using the variable cost rate. Applicants will prove profitability and working capital availability by submitting a balance sheet and income statement from the most current fiscal year. New carriers must submit a balance sheet, a working capital worksheet and a projected profit and loss statement. New carriers and applicants who show a loss on their income statement will also be required to sign a release form authorizing the Commission to obtain financial information from the applicant's bank records. These forms are contained in Appendix D. The forms in Staff's <u>proposed</u> Appendix D included a balance sheet, 45 day working capital worksheet, and projected profit and loss statement. Cross-examination of Staff witness Burgess established several deficiencies in these forms as a method of showing that the carrier has "sufficient working capital to cover any loss that could result from using the variable cost rate." More specifically, the proposed balance sheet did not distinguish between current liabilities (which may require working capital while the variable cost rate is in effect) and long-term liabilities (which do not). Furthermore, the 45 day working capital worksheet did not cover a long enough period, because a variable cost rate can be effective for six months. The final Decision removed these forms from Appendix D, which now contains only the forms for release of bank records. The Decision nevertheless still requires that all carriers submit some kind of a balance sheet, and that certain carriers submit some kind of a profit and loss statement and working capital worksheet.

Our discussions with Staff have revealed many unresolved questions concerning the meaning of the phrase "sufficient working capital to cover any loss that could result from using the variable cost rate" and how Staff will determine if a carrier has sufficient working capital. Thus, despite the Decision's statement that Staff will just be "checking-off compliance with clear requirements" (Decision at 29), Staff has been delegated considerable discretion in applying this somewhat vague workingcapital requirement. If the Commission were to grant a limited rehearing, one issue could be the clarification and implementation of this working capital requirement. The most our suggested order can do without additional hearings or workshops is to spell out a little more clearly the general nature of the working capital requirement.

Accordingly, our suggested/order defines "sufficient working capital" as follows: Cash or other liquid assets sufficient, over the life of the deviation, to cover: (1) the carrier's ordinary working capital requirements; plus (2) the difference between revenues that would be received under (a) the applicable minimum rate excluding the profit factor incorporated into the minimum rate, and (b) the deviated rate requested. (If a carrier wishes, it may substitute for item (2)(a) the fully allocated cost of the particular transportation.) Although this language leaves a number of issues unresolved, it should at least give Staff some more detailed guidance in applying the working-capital requirement and therefore limit somewhat the discretion delegated to Staff.

The suggested order also corrects and clarifies the variable-cost procedure's filing requirements for proving profitability or sufficient working capital. First, an applicant that shows a loss on its income statement will need to submit the same kinds of financial information (balance sheet, working capital worksheet, and projected profit and loss statement) as a "new" carrier.[11] Second, the suggested order expressly states that when subhaulers provide more than half the transportation, each subhauler will have to make the same showing of profitability or sufficient working capital as the prime carrier. Accordingly, the filing requirements for subhaulers when providing more than half the transportation will be the same as those for prime carriers. That is, such subhaulers will need to submit a balance sheet and income statement for the most current fiscal year, except that new subhaulers and subhaulers who show a loss on their income statement will need to file a balance sheet, working capital worksheet, and a projected profit and loss statement.

(g) The financial information submitted with simplified deviation applications

The adopted procedure for simplified deviations requires carriers to submit their latest available balance sheet and an income statement from the most current fiscal year. The Decision does not say what Staff is supposed to do with this material. There are a number of alternatives.

Yuba, the proponent of this proceduré, explained that the procedure did not require applicants to be profitable, only to be "financially sound by a balance sheet analysis". However, telling Staff to determine whether a carrier is "financially sound" based on its analysis of the balance sheet, in the absence of any standards, appears to delegate a highly discretionary function to Staff.

Staff's responsibilities would be more ministerial if applicants for simplified deviations, like applicants for variable-cost deviations, had to show <u>either</u> that they are <u>profitable or else</u> that they have <u>sufficient working capital</u> to withstand any losses from the deviated rate. However, it appears that a showing of sufficient working capital will require more information than is contained on a balance sheet. Furthermore, requiring this more complex showing may conflict with one of the goals of the simplified deviation procedure: that it be simple enough that

11 Based on our discussions with Staff, it appears that a balance sheet generally will not provide enough information for Staff to determine if a carrier has sufficient working capital. Accordingly, the suggested order requires unprofitable carriers to file a working capital worksheet and projected profit and loss statement, in addition to a balance sheet. This will increase the filing burden on unprofitable carriers seeking variable-cost deviations, especially as there are no approved forms for filing this additional information.

The suggested order also clarifies that existing, as well as new, carriers can qualify for a deviated rate by showing sufficient working capital. even a relatively unsophisticated carrier can easily prepare the required information.

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A third alternative, would be to do nothing with the financial information submitted by simplified deviation applicants. This seems pointless and contrary to the proposal that the procedure be available to financially sound carriers. Moreover, if the Commission were taking steps to ensure that only "financially sound carriers" could use the simplified deviation procedure, it would strengthen the Commission's position that this procedure does not threaten the viability of the dump truck industry.

The suggested order does not modify this aspect of the Decision, because is is not clear that any alternatives are preferable to the current language.

(h) Subhauler share of revenues under the full cost procedure

The adopted procedure for full-cost deviations does not specify the minimum percentage of revenues that prime carriers must pay subhaulers. In contrast, the variable-cost and simplified deviation procedures both specify that subhaulers "must be paid not less than 95% of the deviated fate, 75% when they are providing the tractor (pulling services) only." The Decision's application form for full-cost deviations does provide:

> If subhaulers are engaged to perform the service, they must/either be paid the full proposed rate or, if the subhaulers will be paid a lesser rate or charge than that sought by the applicant, or if in any case more than half of the transportation under the deviated rate is to be provided by subhaulers, the following facts and statements must be submitted . ... [including detailed financial information from each subhauler] (Appendix B, Page B-2, item #8.)

Thus, the full-cost procedure fails to specify how much subhaulers must be paid where the prime wants to pay them less than the full deviated rate and submits financial information about each subhauler. Nevertheless, the request that each subhauler submitting/financial information provide its "projected revenues and expenses for the specific transportation sought under this application" (Appendix B, Page B-2, Item #8C) implies that each such subhauler must, like the prime carrier, receive sufficient revenue to cover its full cost for providing the service and produce a profit as well. The suggested order therefore revises the full-cost procedure to require that where financial information about subhaulers is submitted (either because the prime wants to pay them less than the full deviated rate or because they are providing more than half of the transportation), each subhauler must be paid enough to cover its full costs and produce some profit as well.

There are other options the Commission could adopt instead. The above suggestion, although consistent with the language of the procedures contained in the Decision's Appendix B, seems somewhat inconsistent with the "50% rule" as described in the body of the "Under that requirement, if subhaulers are to be used Decision. to provide less than 50% of the actual transportation under the proposed rate, no subhauler costs or financial information need be submitted." (Decision at 33.) The adopted full-cost procedure incorporates the recommended 50% rule (Decision at 34). Nevertheless, the procedures contained in Appendix B require that a prime carrier who use subhaulers submit subhauler cost and financial information, even though subhaulers will provide less than 50% of the transportation, if the prime carrier proposes to pay subhaulers less than the full deviated rate. To avoid this seeming inconsistency, the Commission could instead require subhaulers who provide less than half of the transportation to receive at least the usual 95%/75% share of the full-cost deviated rate. The requirement that each subhauler receive something in excess of its full costs could be retained for those situations where subhaulers provide more than 50% of the transportation. Other alternatives could be devised under which the prime carrier would have a choice of either paying subhaulers the usual 95%/75% minimum share of the deviated rate, or else submitting cost information and paying each subhauler something in excess of its full costs. (This choice could be given to all prime carriers or only to those who use less than 50% subhaulers.)

(i) Subhauler/prime carrier verification under the variable cost procedure

The variable-cost procedure currently provides that: (1) all subhaulers must certify, winder penalty of perjury, that the compensation to be received from the deviated rate will cover 105% of the total of their variable costs plus insurance; and (2) prime carriers will/review each subhauler's costs and certify that they have determined the costs to be accurate and valid. These requirements apply whether or not subhaulers provide more than 50%/of the transportation. The second of these requirements seems to conflict with the purpose of the 50% rule. (Under that rule, if/subhaulers are used to provide less than 50% of the actual transportation, no subhauler costs need be submitted.) Under the adopted procedure, where subhaulers provide less than 50% of the transportation, subhauler costs will not have to be submitted to the Commission; however, they will still have to be shown to the prime carrier. We believe that one unstated purpose of the 50% rule is to get around the reluctance of many subhaulers to reveal their costs to their prime carriers. The second requirement above would defeat that purpose. Accordingly, the suggested order will eliminate the second requirement. To further implement this change, the requirement

that the carrier sign the subhauler's certification will also be eliminated.[12]

Thus, under the revised procedures all subhaulers will have to sign a certification that the rate they receive will cover 105% of their variable costs plus insurance. However, only where subhaulers provide more than 50% of the actual transportation, will any detailed subhauler cost information have to be submitted. In that situation, the prime carrier will continue to certify that it believes all statements in the application (presumably including the subhauler's statements) to be true. There are other alternatives. The Commission could keep the current requirements and subhauler/prime carrier certification form, but require them only when subhaulers provide more than 50% of the transportation. Or, the Commission could retain the current procedures.

(8) Need for downward pricing flexibility.

CDTOA/CCA challenges the Decision's statement that "[g]reater downward pricing flexibility is required to meet the needs of the industry." (Decision at 25.) CDTOA/CCA claims that there is no evidentiary support for this statement and that the only shippers that testified were in opposition to "unduly permissive rate deviations." (App./reh. at 13.)

Unfortunately, the record in/this area is not particularly strong. On the other hand, Staff did testify that downward pricing flexibility is needed, and the Decision notes that fact. However, Staff's testimony was mainly confined to the bald statement that such flexibility was needed, and cross-examination of Staff's witness established that this testimony was not based on any survey of shippers or carriers. Yuba's witness, Lindeman, did testify that flexibility would always be needed because of the extreme variability in the amount of time required for hauls of under 50 miles to construction sites. Because minimum rates are based on average requirements they are unable to take account of such variability. The suggested order adds a discussion along these lines. The Decision already notes Yuba's testimony that a full-cost deviation filing may be too costly and involve too much delay to be useful for these construction hauling projects, which often produce less than \$100,000 in annual revenues each.

The Decision also apparently tries to justify the need for additional downward pricing flexibility by saying that:

12 These changes were not contained in the suggested order distributed to Commissioners on Friday, September 1. They will be contained in a revised suggested order to be distributed shortly.



The TD staff's Variable Cost Procedure offers further opportunity to carriers with the ability to achieve further savings in situations described by the TD staff witness in his exhibit - those where they might be able to gain additional business during slow times when equipment and drivers are idle, or when carriers may be traveling empty to or from a point of pickup or delivery. (Decision at 28.)

CDTOA/CCA attacks this statement, arguing that "the Commission ignores all of the evidence which indicated that higher productivity and efficiencies (availability of backhauls, generation of work during the off-season, etc.) are simply a myth in dump truck transportation of construction commodities." (App./reh. at 22.) In fact, the Decision states that "favorable circumstances attendant to the transportation, such as a return load opportunity . . . are seldom involved in construction activity." (Decision at page 24.) In other words, backhauls generally are only available for the <u>interplant</u> transportation of dump truck commodities. And, as the Decision points out, "many deviations have been authorized [under the prior procedures] for the interplant transportation of dump truck commodities." (Decision at page 24.) Thus, the availability of backhauls does not provide any great support for the adoption of the new deviation procedures.

Furthermore, there was considerable testimony that lower rates would not create more business during the construction slow season, because bad weather, not price, is the limiting factor on use of dump trucks for construction business during the winter months. I personally found this testimony convincing. The counter-testimony was just that as a general rule of economics a decrease in price causes an increase in demand. However, the Staff witness did not conduct a study showing how much, if any, of an increase in demand could be created by decreasing dump truck rates during periods when there is a lot of idle equipment. In sum, the above-quoted statement from the Decision is not wellsupported.

The transcript, however, does contain some testimony indicating that lower rates might cause a shift from proprietary dump truck carriage to for-hire carriage. The suggested order adds this as another reason supporting the need for additional downward pricing flexibility. However, it is not a particularly strong reason. If dump truck carriers offer lower prices to shippers who now use proprietary carriage than to their current customers, there may be a problem with discrimination. On the other hand, it is not clear that cheaper prices only during the slow season would be sufficient to shift traffic from proprietary to for-hire carriage. (9) Problems with Finding of Fact No. 10 and Related Discussion.

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The Decision's Finding of Fact No. 10, which supports the simplified deviation procedure, states:

Eighty percent of the minimum rate will generally cover the variable and insurance costs of reasonably efficient carrier operations. Thus, if Yuba's proposal were tied to a rate not less than 90% of the established minimum (allowing an 8% profit factor), the resulting minimum rate deviation procedure would ensure that a reasonably efficient carrier using this procedure would be able to cover its operating costs. (Decision at 35-36.)

In the underlying discussion the/Decision says:

Based on its own experience and on information from a survey it performed, Yuba alleges that the variable costs plus insurance costs incurred to operate a unit of dump truck equipment that are typically experienced in the industry amount to about 80% of total costs. . . We agree that about 80% of the minimum rate should generally cover the variable and insurance costs of reasonably efficient carrier operations. /We acknowledged on page 5 of D.86-08-030 /issued in this proceeding that the variable and insurance costs upon which the dump truck minimum rates are now based amount to about 85% of total costs. This fact, together with the fact that the minimum rates contain an 8% profit factor, should ensure that 80% of a minimum rate returns variable and insurance costs to an efficient operator. . . If Yuba's proposal were tied to a rate that was no less than 90% of the established minimum, we would consider it a more viable proposal. The existence of the 8% profit factor in the minimum rate structure would then tend to ensure that a reasonably efficient operator who used this procedure always covered nearly its entire operating costs.

(Decision at pages 25- 26.)

Applicants challenge Finding No. 10 and its supporting discussion on a number of grounds. Several of these have merit. First, Applicants point out a conflict between the Finding of Fact and the supporting discussion. The discussion states that a rate no less than 90% of the minimum rate would permit a reasonably efficient operator to cover <u>nearly all</u> its operating costs. The Finding, on the other hand, states that a reasonably efficient carrier using this procedure <u>will be able to cover</u> its operating costs. The suggested order revises the Finding to conform to the supporting discussion. (The suggested order also notes that the term "reasonably efficient carrier operations" refers to the operations that underlie the minimum rates.)

Second, Applicants argue that the minimum rates do not contain an 8% profit factor. Apparently current ratemaking methodology is supposed to provide for an 8% profit (see the Decision at page 11). However, the first half of the present Decision, in revising the minimum rates, actually allows only a 6% profit factor. The suggested order revises the discussion and Finding to reflect this 6% profit factor.

Third, Applicants challenge the Decision's conclusion that 80% of the minimum rate will cover variable and insurance costs. They claim that the 80% figure was a figment of Yuba's imagination based on erroneous figures in its Exhibit 98. Indeed crossexamination of Yuba's witness, Lindemap, casts grave doubt on the figures in his Exhibit 98. Accordingly, the suggested order clarifies that the Decision is not relying on Yuba's testimony to support this conclusion. Rather, the Decision relies on D.86-08-030, which sets out the percentage/relationships for each cost element involved in dump truck transportation during 1984, to support its conclusion that 80% of the minimum rate should cover the efficient operator's variable and insurance costs.

Applicants further argue that/this 80% figure is not based on evidence of record. That is/technically correct. However, as the 80% figure comes from a prior decision in the same case, we do not believe that this should cause a significant problem. However, as the percentage/relationships may have changed since 1984, the suggested order emphasizes that while the Commission believes the 80% figure to be approximately correct, it is actually adopting a 90% figure.[13] The suggested order also says that the current minimum rates incorporate a 6% profit factor and that the Commission feels certain that fixed overhead and other fixed costs such as depreciation, taxes, and license fees total far more than 4% of the minimum rate. Thus, the Commission can conclude with some degree of confidence that the "reasonably efficient carrier's" variable and insurance costs comprise less than 90% of the minimum rate, and that 90% of the

13 The Decision will remain subject to attack on the grounds that there is no credible evidence concerning the extent to which the cost percentages have changed since 1984. minimum rate will in fact cover nearly all of the efficient carrier's operating costs.

Another option: The Commission might further decrease the vulnerability of the simplified deviation procedure by allowing carriers using it to cut the minimum rates only by the profit factor built into the minimum rates, currently 64. This revision would allow the Commission to conclude that rates approved under this procedure will cover <u>all</u> of the operating costs included in the minimum rates. (However, the "profit factor" apparently does include some non-operating costs, <u>i.e.</u>, interest and taxes.)

(10) Problems with the Decision's notion of variable costs.

CTA points out that not all indirect costs are fixed.[14] (Indirect costs include salaries for supervisors and clerical employees, communications and utilities expenses, rent on buildings, office fixtures and supplies, etc.) Some indirect costs vary depending on the amount of transportation performed. Still, it is clear that <u>some</u> indirect costs <u>are fixed</u>. Thus, given the 6% profit factor, at least some fixed indirect costs, and some fixed depreciation and tax costs as well, it is still probably true that variable and insurance costs total less than 90% of the minimum rate. The suggested order points out that by using a 90% figure, instead of the 80% figure, the Decision takes account of the fact that some indirect costs may be variable.[15]

CTA argues that the Decision does not define the term "variable cost". However, the Decision/does recite Staff's definition: "[i]f an input is used specifically for the job in question, and would not be used or paid for otherwise, the input is variable."

14 CTA makes the above argument, and several other arguments as well, in the affidavit of Luke R. Sherwood, which it has attached to its application for rehearing. It is generally inappropriate to attach an affidavit or declaration to an application for rehearing. It is too late to introduce new facts into the record at this stage. While a party may wish to re-open the record based on newly discovered facts, such a request should comply, at least in spirit, with Rule 84 of the Commission's Rules of Practice and Procedure. Moreover, a request to reopen the record to admit new facts is not an allegation of legal error. The Sherwood affidavit, however, does not particularly try to introduce any new facts into the record; it mostly just makes legal arguments. Accordingly, we have treated the affidavit as if it were a brief.

15 The Decision will remain subject to attack on the grounds that there is no evidence concerning the extent to which indirect costs are fixed.



The suggested order includes a finding of fact repeating this definition.

(11) Conflict between the simplified and variable-cost deviation procedures and the first half of the Decision which finds an increase of 4% in minimum rates "reasonable and necessary".

The first half of the Decision responds to a CDTOA/CCA motion for an increase in dump truck minimum rates. Finding of Fact No. 4 states that "increases in rates for the transportation of construction related commodities of 4 percentage points will allow the industry to earn revenues which are reasonable and necessary." Applicants argue that there is an inherent inconsistency between this finding that dump truck rates need to be increased 4% to produce reasonable revenues and a finding that the simplified and variable-cost deviation procedures will produce reasonable rates. Applicants are correct.

A full-cost deviation allows a carrier to charge less than the minimum rate because the costs for that particular transportation are less. The simplified and variable-cost procedures, on the other hand, allow a carrier to charge less than the minimum rate not because the carrier's costs are less, but because the carrier is willing to recover less than its fully allocated costs. Thus, there is an inherent conflict between a finding that the minimum rates produce "reasonable and necessary" revenues and deviation procedures that allow carriers to/charge less than the minimum rates without making any showing/of lesser costs.

There is another way in which the simplified and variable-cost deviation procedures conflict with minimum rate regulation. The whole theory of minimum rate regulation is that minimum rates are necessary to prevent "destructive competition" and that if truckers are free to set their own rates they will recover insufficient revenue to sustain the trucking industry over the long term. However, in order to meet Applicants' contention that the simplified and variable-cost procedures will cause the dump truck industry to self-destruct, the suggested order argues that dump truckers are not going to cut their rates without regard to their costs in a desperate effort to meet competition and that their ability to set their own rates using these procedures will not destroy the industry or cause a shortage of supply or a deterioration in safety. (See the arguments outline in item (5), There is an inherent conflict between the rationale for above.) setting minimum rates and the rationale for allowing carriers flexibility to charge less than minimum rates just because they think it serves their own best interests.

We do not see any way to avoid the above conflicts between minimum rate regulation and the adopted deviation procedures. Thus, even after revision, the Decision will remain vulnerable to attack as arbitrary and capricious in approving an inherently inconsistent combination of: (i) minimum rate regulation and (ii) deviation procedures that enable carriers to charge less



than minimum rates just because they want to. Because the suggested order includes a finding that the rates resulting from application of the adopted deviation procedures will be reasonable and explains why these deviation procedures will not cause the industry to self-destruct, it makes these inconsistencies more obvious. However, omission of these items will leave the Decision vulnerable to attack as lacking findings and conclusions on material issues.

Because of these conflicts between minimum rate regulation and the new deviation procedures, the Decision's chosen means of increasing downward pressure on dump truck rates presents legal difficulties not inherent in other options. In proceedings already underway in this case, the Commission is considering several methods of reducing dump truck minimum rates. The Commission is considering a proposal to set minimum rates based on the costs of truly efficient carriers, rather than the costs of all carriers. The Commission is also considering a proposal to reduce, or even eliminate, the profit/factor built into the minimum rates.[16] Another option the Commission may wish to consider is the setting of maximum, rather than minimum, rates for dump truck carriers. P.U. Code § 3662 clearly permits the Commission to set maximum rather than minimum rates. However, in making any major shift in policy and departing from its prior precedents, the Commission should be sure to obtain an evidentiary record justifying the change in policy. Expert testimony explaining why the new policy is better than the old policy will always be helpful. The Commission should be especially careful to obtain a/good evidentiary record if it wants to abandon minimum rate /regulation for dump trucks. In D.85-04-095 the Commission discontinued a prior investigation into abolishing dump truck minimum rate regulation was necessary to preserve stability in the dump truck industry.

Applicants also argue that/the new deviation procedures will undermine the minimum rate structure, as below-minimum rates under the simplified deviation procedure become the going rates. As outlined in sections (5) & (6) above (dealing with economic impacts and discrimination), the suggested order rejects the notion that deviated rates are likely to become the going rates. The suggested order also notes that only two deviation applications were filed during the more than half-month period during which the new deviation procedures were in effect prior to

16 Any proposal to reduce or eliminate the profit factor must take account of the extent to which the "profit factor" actually includes tax and interest costs. Furthermore, eliminating or reducing the profit factor included in the minimum rates may affect the reasonableness of allowing simplified deviations up to 10% below the minimum rate. being stayed. This is consistent with the view expressed above that these new deviation procedures are more likely to be used during slow periods when carriers have idle equipment, rather than during the summer busy season.

(12) Mistake in Ordering Paragraph 5.

Ordering paragraph 5 provides that the "authority contained in this <u>decision</u> will expire June 30, 1991 unless sconer canceled, modified, or extended by further order of the Commission" (emphasis added). As CDTOA/CCA points out, presumably only the new deviation procedures, not the Decision's minimum rate increases, are being adopted for a limited period of two years. Accordingly, the suggested order revises Ordering Paragraph 5 so that only the authority contained in Ordering Paragraph 4, which implements the new deviation procedures, will expire June 30, 1991.

#### (13) Difficulties created by a lack of record evidence.

At several points in the discussion of economic impacts in section (5), we noted that there apparently is no evidence in the record to support arguments that are included in the suggested order. Similarly, in the discussion of items (1)-(4), we noted a lack of testimony supporting the arguments the suggested order uses to explain why the Commission has abandoned its prior precedents concerning P.U. Code § 3666. Likewise, in discussing items (9) and (10) we noted a lack of evidence concerning the extent to which dump truck costs consist of variable and insurance costs.

In all these areas the Commission will have to rely on its own undisclosed expertise, rather than on testimony introduced into the record and thus subject to challenge by opposing parties. This leaves these portions of the suggested order subject to attack on appeal to the Court. The Commission could order a limited rehearing to obtain additional testimony in these areas. However, if the Commission issues the suggested order without going back to hearing to obtain additional evidence, Applicants might argue in Court that the Commission must rely on evidence in the record, or if not, must at least have given opposing parties a chance to respond.[17] While federal precedents would support the Commission's reliance on its own expertise even in the

17 The Commission could contend that any such challenge to the suggested order is barred by P.U. Code § 1732, which prohibits Court challenges on grounds not raised in the application for rehearing. In response, Applicants might contend that they were unable to raise this ground in their applications for rehearing, because the findings and conclusions they are challenging first appear in the order denying rehearing. - 30 -

absence of any record testimony, California law should apply here, and California precedents are less reassuring.

Thus, in <u>Federal Power Commission v. Transcontinental Gas Pipe</u> <u>Line Corp.</u>, 365 U.S. 1, 28-29 (1961), the U.S. Supreme Court permitted the FPC to deny a certificate of public convenience and necessity based on the FPC's own forecast of what would happen if the certificate were granted. The Court rejected the argument that the FPC "should have adduced testimonial and documentary evidence to the effect that this forecast would come true. . . . Rather, [the court thought] that a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency/" See also <u>Air Line</u> <u>Pilots Ass'n. v. Department of Transportation</u>, 791 F.2d 172, 176 (1986).

California law, on the other hand, seems to focus on the due process requirement of an opportunity for rebuttal before an agency relies on its own expertise to/resolve legislative-fact issues.[18] See <u>franz v. Board of Medical Ouality Assurance</u>, 31 Cal. 3d 124, 140-41 (1982). Nevertheless, <u>franz</u> upheld a finding that a doctor was grossly negligent, even though there was no expert testimony that his conduct/constituted gross negligence and even though the Board had not given the doctor an opportunity to rebut the Board's reliance on/its own expertise. However, <u>Franz</u> upheld the finding of gross negligence, because, given the facts of the case, "common sense" was enough to support an inference of gross negligence./ "Only where the professional significance of underlying facts seems beyond lay comprehension must the basis for the technical findings be shown and an opportunity for rebuttal given." (31 Cal. 3d at 141.) Compare Whispering Pines Mobile Home Park. Ltd. v. City of Scotts Valley, 180 Cal. App. 3d 152, 160 (1986). In that case the Court of Appeal prohibited a rent control board from relying on its own expertise to determine the reasonable rate of return for a landlord, because, inter alia, the board did not give the landlord advance notice of, and an opportunity to rebut, the facts the board relied on in making its determination.

Neither of the two California cases we have found is directly on point. Moreover, these cases are distinguishable because they rely on statutes and schemes of judicial review that do not apply to this Commission. However, both <u>Franz</u> and <u>Whispering Pines</u> seem to reflect a general preference that, where agencies rely on expert opinion, there should be expert testimony in the record, rather than a reliance on undisclosed agency expertise. Thus, these cases suggest that a Commission decision may be vulnerable if it is based on facts not contained in the record that parties

18 Legislative facts are facts used to inform an agency's judgment on questions of law and policy.

have not had an opportunity to rebut. The Commission's own Rules of Practice and Procedure buttress the conclusion that such a decision is vulnerable. Rule 73, and the Evidence Code provisions it incorporates by reference,[19] generally contemplate that parties will be given an opportunity to rebut facts and propositions before official notice is taken of them.

19 <u>See, e.g.</u>, Evidence Code §§ 453, 455.



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3. Pages 24 through 38 are replaced by Revised Pages 24 through 47 attached hereto.

4. Appendices A, A-1, B, C, and D are replaced by Revised Appendices A, A-1, B, C, and D attached hereto.

IT IS FURTHER ORDERED that:

5. Rehearing of D.89-04-086 as modified herein is denied.

6. The stay ordered by D.89-07-065 is hereby lifted.

7. For applications that were filed prior to the stay, Staff shall, in computing time periods under the new deviation procedures, include the time from the date of filing until the date of the stay, and exclude the time during which the stay was in effect.

8. The Executive Director shall serve a copy of this decision on each subscriber to MRTs 7-A, 17-A, and 20.

This order is effective today.

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