

Decision 90-12-018

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Investigation)
for the purpose 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.)

ORIGINAL

Case 5437
Petition for Modification 341
(Filed May 26, 1989)

Case 9820
Petition for Modification 35
(Filed May 26, 1989)

Case 9819
Petition for Modification 111
(Filed May 26, 1989)

Larry E. Farrens, for the California Carriers
Association; Edward J. Hegarty, Attorney
at Law, for California Dump Truck Owners
Association and California Carriers
Association; and James D. Martens, for
California Dump Truck Owners
Association; petitioners.
Harold Culy, for T&T Trucking, Inc.; C. D.
Gilbert, for California Trucking
Association; Michael Lindeman, for Yuba
Trucking; Charles L. Smithers, for
Associated General Contractors of
California; and David E. Oliver, for
Teichert Aggregates; interested parties.
Kathleen M. Maloney, Attorney at Law, and
Thomas T. Hanamoto, for the
Transportation Division.

O P I N I O N

By these three petitions California Dump Truck Owners
Association and California Carriers Association (CDTOA/CCA) request
increases in rates contained in Minimum Rate Tariffs (MRT) 7-A,

17-A, and 20, which name rates and rules for the transportation of certain commodities in dump truck equipment. The increases are sought to offset increases in the cost of diesel fuel. CDTOA/CCA request increases of 3 percent in each of the three MRTs, except that no increases are requested for rates named in Items 40, 50, and 60 of MRT 7-A.

Evidentiary hearings were conducted on March 12 and 13, 1990 in San Francisco before Administrative Law Judge (ALJ) John Lemke. Evidence was presented by CDTOA/CCA, by the Commission's Transportation Division Staff (TD Staff) and by Yuba Trucking, Inc. (Yuba). The petitions were submitted subject to the filing of concurrent briefs. CDTOA/CCA subsequently requested that submission be set aside. By ruling on May 10 the ALJ denied that request. The petitions were finally submitted with the filing of concurrent briefs on July 16, 1990. Briefs were filed by CDTOA/CCA, TD Staff, and Associated General Contractors of California (AGC).

Evidence

CDTOA/CCA

Evidence was presented primarily through the testimony and exhibits of James D. Martens and J. M. Jenkins. Martens stated that CDTOA had been performing its own fuel study since early 1989. Martens was advised in January 1990 that TD Staff had recommended gathering fuel costs, and had determined that the average cost incurred by dump truck carriers was \$1.11 per gallon as of the first week in December 1989.

Jenkins testified that he substituted fuel costs of \$1.01 and \$1.10 for those contained in the the datum plane exhibit, Exhibit 94 in Order Setting Hearing (OSH) 325, Case 5437, which sets forth total costs underlying the present rates in MRT 7-A. Those total costs were in turn taken from Exhibit 55 in OSH 325, and include a cost for diesel fuel of 86 cents per gallon. In Exhibit 1 Jenkins has shown the results of his computations. For

MRT 7-A Northern Territory transportation, Jenkins' calculations indicate that increases are warranted based upon the \$1.01 fuel cost of amounts ranging between 1.6% and 2.8%, and averaging about 2.2%. Increases based upon a fuel cost of \$1.10 range from 2.6% to 4.5%, and average about 3.6%. For MRT 7-A Southern Territory transportation increases warranted are somewhat lower, averaging about 2.0% and 3.1% based upon costs of \$1.01 and \$1.10, respectively.

A TD Staff witness testified with respect to the procedure used to gather fuel costs from the dump trucking industry. He sponsored Exhibits 6 and 7, showing the results of this gathering procedure during the period June 19, 1989 to February 4, 1990. Survey results are tabulated weekly. Fuel costs shown in the exhibits range from 94 cents to \$1.11 per gallon of diesel fuel, and average \$1.06.

The witness stated that about 387 fuel questionnaires are sent out weekly. In some weeks only 50 of the questionnaires are returned with usable information in time for inclusion in a report, although eventually usually about 300 of the questionnaires are returned. The witness stated that there are no parameters observed with respect to the price paid for fuel shown on the returned questionnaire, i.e. whatever price is shown is used by TD Staff in compiling its reports.

Many errors were noted in connection with the calculations of miles per gallon shown in Exhibit 7. Errors were also pointed out regarding the inclusion of a number of carriers who reported achieving miles per gallon of less than 3. Such lower figures should have been excluded from the exhibit in accordance with established guidelines.

Another TD Staff witness reevaluated the information contained in Exhibit 7 and, after removing the data which had been found to be erroneous or improperly included, reconstructed the remaining information and presented this revised data in

Exhibit 10. This revision resulted in the elimination of 45 carriers, reducing the usable data to that obtained from 83, instead of 128, carriers. The adjusted calculations resulted in average fuel costs about the same as those set forth in Exhibit 7. Using a simple average of \$1.01, there is an increase over the original report of about 6/10 of a cent; while applying a weighted average of \$1.005 resulted in a decrease of about 3/10 of one cent per gallon.

Ray Dulany, a dump truck carrier with 14 years' experience, testified on behalf of CDTOA/CCA concerning his fuel purchase practices in Aptos. He stated that during the previous 90-day period he had paid amounts ranging from \$1.08 to about \$1.20 per gallon. Dulany is the northern California representative for CDTOA. He testified that in his capacity as northern California representative, he attends local chapter meetings throughout northern California; that based upon discussions with carriers, very few of them - less than 5 percent - are able to avail themselves of bulk purchases of diesel fuel. He conceded that some of these carriers are subhaulers, and buy fuel from their overlying carriers at levels higher than bulk, but lower than generally applicable retail prices.

James Martens, General Manager of CDTOA is also a carrier and a fuel vendor. He operates a terminal in Ontario where he maintains underground diesel fuel tanks and makes bulk purchases. He also operates a keylock service (one where carriers may come and with the use of an issued key gain access to pumps on a 24 hour basis. Martens testified that he, and every other bulk purchaser who is a carrier, sells fuel to other carriers at a markup. In a recent transaction, where he purchased fuel from B & B Fuels of Ventura, he marked his price up by 15 cents. He stated that the difference between wholesale and retail prices must be more than 30 cents, because the taxes alone come to about 29 cents, and no bulk

vendor is going to sell its fuel at only a cent or two over its own cost.

Yuba

Michael Lindeman, president of Yuba, sponsored Exhibits 11 and 12. The witness stated that he is not opposed to an increase as long as fuel cost and performance factors are accurate, and the increase justified. He presented in Table 5 of Exhibit 11 the average weekly fuel cost experienced by Yuba for each week of 1989, as well as for the entire year. Yuba's average cost of diesel fuel during 1989 was 89.87 cents, including all taxes, for bulk deliveries in Marysville. Taxes - state, federal and sales, constitute almost 30 cents per gallon of the total cost per gallon.

Lindeman also developed a composite showing for 47 supposedly representative dump truck carriers indicating the relationship between fuel, plus tax and license cost, to total costs, for years 1986, 1987 and 1988. These percentage relationships, based upon data extracted from annual reports, were 11.94%, 13.50%, and 13.33% for years 1986, 1987, and 1988, respectively. The witness considers it significant that the percentage relationships, especially for the latter two years, were holding fairly steady.

Next, Lindeman performed an analysis of the profitability of 116 dump truck carriers based upon information taken from 1988 annual reports. He determined an investment ratio of 15.84%, being the increase in carrier property from 1987 to 1988 divided by the net worth at the end of 1988. He considers this ratio an indication that the industry is, or at least was fairly healthy at the end of 1988.

Lindeman examined the fuel costs shown in 24 recent dump truck deviation proceedings. The average cost for 16 of those applications was 84.32 cents. He also presented in Table 4 of the exhibit a portrayal of how costs per mile vary based not only upon the cost per gallon of fuel, but on the miles per gallon consumed.

The witness showed, for example, that at 90 cents per gallon, a miles per gallon figure of 4.50 results in a cost per mile of 20 cents. At 5.00 miles per gallon, the cost per mile is 18 cents based on a cost of 90 cents per gallon. Lindeman considers the increased miles per gallon achieved by some later model engines to be of equal importance to the cost per gallon, since both factors are a function of cost per mile. The cost per mile figures shown in connection with the deviations mentioned above range from 13 cents to 18.72 cents, the average being 15.86 cents.

In Exhibit 12 Lindeman has shown weekly average fuel prices taken from Oil Price Information Service (OPIS), a recognized fuel reporting publication. OPIS figures represent the prices which dealers pay for fuel. Dealers then transport the fuel to a carrier's yard, or to a service station, and receive from those buyers, in addition to the OPIS price, their cost of transportation plus a dealer's markup. The information shown covers the period January 26, 1989 through February 2, 1990 and depicts base prices (without taxes) for 14 cities located throughout California. Lindeman believes these prices represent a fair portrayal of base prices, only slightly below the costs paid by most of the efficient carriers in the state. Weekly average prices range from 48.41 cents in July 1989 to 75.13 cents in December 1989. The average cost for the year was 53.61 cents. Taxes and transportation charges, plus a markup, must be added to these prices.

In Table 2 of Exhibit 11 Lindeman has shown individual and composite gross revenues, total expenses, raw operating ratios, and adjusted operating ratios for 68 representative dump truck carriers for 1988. The information was determined from the "1988 Financial Who's Who?" The raw composite operating ratio of these 68 carriers, who received about \$337 million in 1988 and incurred total expenses of about \$329.4 million, was 97.78. The adjusted operating ratio, determined by removing the purchased

transportation, was 95.50. In calculating the adjusted operating ratio, the purchased transportation cost of about \$170,500,000 was removed from both the total expense and the total revenue figures.

The ALJ announced that he would take official notice of the 1989 operating ratios of 47 representative dump truck carriers shown in bold print in Appendix A of Exhibit 11.

CDTOA/CCA, joined by CTA, moved that much of the information set forth in Exhibit 11, as well as Exhibit 12, be stricken. The basis of the motion was that the Commission had adopted a methodology for measuring fuel costs in Decision (D.) 86-08-030, and the methods employed by Yuba in Exhibits 11 and 12 departed from that methodology. A ruling on the motion was deferred until considered in the decision. After consideration, the motion is denied, because the fuel cost gathering methodology adopted by D.86-08-030 was done on a prospective basis, to be employed after final adoption by the Commission of costs and rates for efficient dump truck carriers in the OSH 325 proceeding.

Terry Lindeman, president and owner of Lindeman Brothers, Inc., a dump trucking firm, sponsored Exhibit 13. The exhibit indicates, on a weekly basis, the company's fuel costs, including all taxes, from January 1989 through February 1990. Almost 400,000 gallons of diesel fuel were purchased by the company during the year, at an average cost per gallon of about 88 cents. These costs were for bulk deliveries of fuel. On occasion Lindeman Brothers, Inc. has needed to fuel trucks away from its terminal in Broderick, and must pay more for such purchases. But the witness was unable to recall the retail prices for such purchases, conceding, however, that it is greater than the cost of the company's bulk deliveries.

The witness also acknowledged that Lindeman Brothers, Inc. engages perhaps as many as 300 different subhaulers over the period of a year, and that the company sells fuel to these subhaulers at a price marked up over the delivered prices shown in Exhibit 13. He was unable to testify regarding the precise level

of markup, but believed it "might be in the neighborhood of five percent." He stated that a sizable portion of the carrier's revenues was earned through the use of subhaulers.

TD Staff

TD Staff does not quarrel with the methodology employed by CDTOA/CCA in formulating its recommended rate increases, acknowledging that such methodology has been utilized by parties in the past and adopted by the Commission as a valid procedure for determining the levels of cost increases over those reflected in the current datum plane. However, TD Staff witnesses Karen Poff and Lorann King have presented alternatives to the traditional methodology for consideration by the Commission. They concluded that the increases in wholesale fuel costs have not been of sufficient magnitude or duration to warrant rate increases. They recommended that rates not be increased until wholesale prices, higher than those in effect at the time D.87-09-043 was issued, have been in effect for at least a year since the time this last fuel offset for dump truck carriers was granted.

Poff collected wholesale diesel prices from U. S. Oil Week and OPIS for the San Francisco Bay and Los Angeles areas, and portrayed them in graphic form in Table 2 of Exhibit 14. The data shown indicate that wholesale prices for both areas were about 81 cents in November 1985, fell dramatically to about 30 cents in August 1986, rose to about 64 cents in August 1987, and to slightly over 70 cents in early 1989, falling off to a little less than 70 cents by the end of 1989. Table 1 of the exhibit is a graph purportedly showing how retail diesel fuel price changes generally follow wholesale price changes, retail prices being between 43 cents and 63 cents higher than corresponding wholesale prices.

King testified regarding Table 3 of Exhibit 14, consisting of information taken from Platt's Diesel Wholesale Prices, and demonstrating that in about mid-1989 the wholesale price was about 65 cents, and almost 66 cents per gallon in October

1989, but that by the end of 1989 had fallen to 62 cents. In Exhibit 15 King has shown comparisons of diesel wholesale fuel prices for Los Angeles and San Francisco areas, the prices being determined from U. S. Oil Week and OPIS. In Exhibit 16 King has compared Platt's Wholesale prices per gallon with Lundberg Retail prices. It is this information which demonstrates that the difference between wholesale and retail prices ranges from 43 cents and 63 cents per gallon. The most recent information shown is for January 1990, and indicates that the wholesale price was about 62 cents and the retail price \$1.14, a difference of 52 cents. The witness acknowledged that the retail price of diesel fuel underlying current rates in the dump truck tariffs is 86 cents, and in March 1989 the price, according to Lundberg's Report, rose to \$1.05, and by January 1990 was \$1.14. This information is shown in Exhibit 16. King stated that the difference between wholesale and retail prices is the effect of a dealer's markup, plus taxes.

Briefs

AGC

AGC asserts that CDIOA/CCA prepared its exhibits which rely entirely upon TD Staff's fuel cost survey, which AGC believes was completely discredited. On the other hand, AGC contends that testimony by both TD Staff and Yuba showed that an increase is not justified. AGC therefore recommends that the sought increase be denied.

TD Staff

TD Staff maintains that its showing, presented through witnesses Poff and King, shows that diesel fuel prices have risen and fallen in a cyclical pattern in recent years; that a review of prices shows that they have been consistently below the level recognized by the Commission when minimum rates were last adjusted for changes in fuel costs. TD Staff asserts that historical data indicate that CDIOA has chosen a peak price period in which to seek an increase. It concedes that if higher prices continue for an

extended period of time, it would be appropriate for the Commission to consider increases in rates to reflect such demonstrated higher cost of fuel over the long term.

TD Staff points out that in response to rising fuel prices, the Commission set the fuel cost underlying minimum rates for dump truck carriers at \$1.09 by D.85-11-013. However, by D.87-09-043, dated September 10, 1987 the Commission adopted a price per gallon for diesel fuel of 86 cents. TD Staff emphasizes that wholesale fuel prices have been below the wholesale fuel price which existed at the time rates were set at 86 cents. TD Staff obtained retail prices for May 1988 through January 1990, and wholesale prices for January 1985 through January 1990. A comparison of retail and wholesale prices shows no lag between increases in wholesale prices and retail prices paid at the pump. While decreases in retail prices are more gradual than decreases in wholesale prices, underlying trends are very similar. It is appropriate to consider trends in wholesale prices to measure trends in retail prices when retail price data is unavailable, TD Staff asserts. Retail prices were available only from May 1988, while wholesale prices were available from January 1985. Hence TD Staff's use of wholesale price information to draw conclusions about the performance of retail prices.

CDTOA/CCA

Petitioners note that the adoption of the historical fuel cost gathering methodology - the so-called 521 Report procedure, was adopted by the Commission in D.86-08-030, and affirmed in D.88-09-069 which denied a petition for modification alleging that the 521 Report was inadequate. They also point out that D.86-08-030 specifically rejected the use of industry reports such as the Lundberg Survey and OPIS Report, because the fuel prices reflected in such reports were not representative of the fuel cost of the majority of carriers in the dump truck industry who purchase fuel in small and more expensive quantities.

Since July 1989, the methodology for gathering dump truck fuel costs has involved use of the "Report of Fuel and Oil Cost and Performance," mailed on a weekly basis to 387 dump truck carriers. Responses are summarized and a weekly computer printout prepared, as reflected in Exhibit 6. CDTOA/CCA concede there have been fluctuations since adoption of the current 86 cent MRT rates based fuel price, but assert that for at least the last year or more, the cost of fuel has risen to levels significantly over 86 cents. They refer us to Exhibit 6, covering the period June 19, 1989 through February 4, 1990 when, for 31 of the weekly periods shown, the average price of diesel fuel was \$1.00 or more for 23 of those weeks.

Petitioners concede that an adjustment need not be made for every fluctuation in fuel costs, but contend that adjustments should be made when there are consequential and sustained variances from datum plane costs. They call our attention to the rule of thumb calculation developed when fuel shortages in the late 1970's caused significant increases in prices, and indicated that for every five cents of price increase, total cost increases of one percent could be measured.

CDTOA/CCA believe TD Staff's evidence to be highly conflicting, and the preponderance thereof to indicate that increases are warranted. They request that the ALJ take official notice of information contained in Appendix 1 of their concurrent brief. This document contains 521 Report information gathered by TD Staff up to June 3, 1990, so that when reviewed with Exhibits 6, 7, and 10 dump truck carrier fuel costs for a period of about one year are portrayed. The Appendix 1 data shows that fuel prices dropped from their high in November and December 1989, but averaged slightly over \$1.03 during those first five months, ranging from \$1.00 to \$1.08. Official notice is hereby taken of the information set forth in Appendix 1 of the CDTOA/CCA brief, and the Appendix is hereby received as Exhibit 17.

Discussion

There has been a superabundance of evidence furnished by the parties participating in this proceeding - considerably more than usually supplied in an offset proceeding. This participation apparently signals a greater interest in insuring that rates are maintained at and increased only to levels found beyond all doubt to be reasonable and necessary. We view this participation as healthy and desirable in order "to secure to the people just and reasonable rates for transportation by carriers operating upon" the public highways. (Public Utilities Code, Section 3502.)

The 1989 operating ratio data of the 47 representative dump truck carriers which the ALJ took official notice of, is set forth in Table 1 below.

TABLE 1
SELECTED 1989 DUMP TRUCK CARRIERS' OPERATING RATIOS

NAME	REVENUE	EXPENSE	PT	OR	AOR
(1)	(2)	(3)	(4)	(5)	(6)
1989 ANNUAL REPORT				(3)/(2)	((3)-(4))/(2)-(4))
ALLEC	6,718,592	6,680,082	20,611	99.43%	99.43%
ASBURY	7,609,166	7,737,893	3,116,917	101.69%	102.87%
BOB'S	5,452,534	5,374,382	4,629,163	98.57%	90.51%
BULK	21,437,831	21,120,403	8,836,569	98.52%	97.48%
BURNS	3,386,261	3,613,839	161,391	106.72%	107.06%
CALKINS	6,747,930	7,525,120	1,858,357	111.52%	115.89%
D & D	14,183,351	13,072,663	2,829,823	92.17%	90.22%
DINEEN	1,592,649	1,683,650	159,454	105.71%	106.35%
DISPATCH	7,425,068	7,131,589	6,879,969	96.05%	46.16%
FLETCHER	2,622,863	2,615,056	2,462,803	99.70%	95.12%
FLEURY	1,147,167	1,176,061	978,043	102.52%	117.08%
GAGLIASSO	8,703,987	8,877,057	7,793,547	101.99%	119.01%
HANNAH	2,165,298	1,984,283	1,136,236	91.64%	82.41%
HARDEN	1,399,590	1,413,115	1,113,700	100.97%	104.73%
HARRIS	3,488,035	3,051,314	33,671	87.48%	87.36%
HARRISON	6,133,938	5,948,186	4,495,803	96.97%	88.66%
HARRI/NICH	8,598,197	8,588,518	5,112,551	99.89%	99.72%
HARTWICK	4,521,007	4,332,764		95.84%	95.84%
HILDEBRAND	6,008,353	6,101,097	3,919,721	101.54%	104.44%
INTERSTATE	3,286,798	3,347,208	1,382,791	101.84%	103.17%
IRON HORSE	14,604,135	14,447,587	5,826,815	98.93%	98.22%
KISHIDA	3,582,618	3,767,009	1,776,752	105.15%	110.21%
LANDI	1,963,106	1,656,054		84.36%	84.36%
LINDEMAN	8,113,623	7,983,520	5,661,637	98.40%	94.69%
LUTREL	3,332,262	3,166,763	1,159,545	95.03%	92.38%
MAC MILLAN	4,068,438	4,165,478	2,191,814	102.39%	105.17%
MARTENS	5,836,221	5,516,626	4,406,345	94.52%	77.65%
MATL. TNSPT	2,312,282	2,402,513		103.90%	103.90%
MILES & SONS	5,439,344	4,941,253	288,091	90.84%	90.33%
MURPHY					
NOSS	1,402,149	1,606,283	95,848	114.56%	115.63%
P & K MTLs	514,790	462,778		89.90%	89.90%
ROGERS	8,890,452	8,636,447	5,548,911	97.14%	92.40%
SALAMONI	4,897,286	4,823,419	3,650,493	98.49%	94.08%
SAND TNSPTN	2,234,187	2,331,884	1,591,394	104.37%	115.20%
SANTA CLARA	3,175,125	3,086,731	1,653,873	97.22%	94.19%
SKOFF	3,485,460	3,396,492	2,305,656	97.45%	92.46%
T. & T.	12,410,283	12,515,825	7,283,304	100.85%	102.06%
TACKETT	1,485,211	1,457,711	1,030,865	98.15%	93.95%
TOUCHATT	5,051,862	5,009,805	3,456,283	99.17%	97.36%
TRI-COUNTY	18,760,596	18,621,050	16,369,720	99.26%	94.16%
TWO RIVERS	3,454,191	3,300,183	2,364,784	95.54%	85.86%
UGALDE	4,761,996	5,001,470	3,913,410	105.03%	128.22%
UNION	2,598,413	2,472,059	68,369	95.14%	95.01%
WSP	6,259,231	7,039,986	4,597,259	112.47%	146.98%
YUBA TRUCKG	7,917,006	7,699,405	5,013,301	97.25%	92.51%
ZADINA	5,481,424	5,406,654	4,506,457	98.64%	92.33%
TOTAL	264,660,306	262,289,265	141,682,046	99.10%	98.07%
AVERAGE	5,753,485	5,701,941	3,373,382	99.24%	98.54%

Increases of 3% as requested by CDTOA/CCA, based upon the above operating ratio data, would result in cost/rate relationships in these three MRT's of 96.24% and 95.54%, respectively, for before and after adjustment for purchased transportation. Increases of 2% would result in cost rate relationships of 97.24% and 96.54%. (By D.90-07-053 in C.5437, OSH 325 we found that rates in these tariffs will be reasonable if developed at a cost/rate relationship of 94%, and ordered that rates named therein shall in the future be developed at that 94% level.)

After consideration, we believe there is adequate evidence to warrant an increase in rates in MRT's 7-A, 17-A, and 20 of 2%. We arrive at this conclusion based upon the evidence contained in Exhibits 1, 2, and 3 of witness Jenkins, as well as the operating ratio information officially noticed by the ALJ, set forth in Table 1, and the data included in Exhibits 7 and 10. We deem the approximate seven and one-half month analysis represented by Exhibits 7 and 10 adequate to serve as a basis for ordering these rate increases. This showing is convincing that the sporadic increases and decreases which earlier characterized these fuel prices have been replaced with a new plateau of increased costs, even before the Middle East crisis. The operating ratio information, together with the 521 Report figures represented by Exhibits 7 and 10, constitute two arrows pointing to the same conclusion - that rate increases are necessary in order to allow dump truck carriers opportunity to assess charges which will result in reasonable earnings.

The data furnished in Exhibits 7 and 10 provide the best information concerning the appropriate price to be recognized as the datum plane figure for use in developing costs and rates for these tariffs in this proceeding. That figure should be set at \$1.04 per gallon of diesel fuel.

We regard the evidence presented by Yuba relating to prices paid by it and Lindeman Bros., Inc. as lacking in probity for purposes of this proceeding. Those prices, while somewhat lower than those portrayed in Exhibits 10 and 17, are for the purchase of bulk fuel quantities, and for only two carriers. Similarly, the evidence presented by CDTOA/CCA through witness Dulany is not useful for deciding these petitions because it represents the cost experience of a single carrier. The evidence presented by Yuba in Exhibit 12 concerning OPIS prices indicates that the base "Rack" price for fuel is lower than the staff developed prices. But the staff figures are developed specifically from dump truck carriers, and are therefore more reliable than OPIS prices which are applicable to all types of for hire and proprietary transportation.

With respect to Yuba's evidence concerning the use of investment ratio as an appropriate measure of profitability, that method was considered in our recent decision on the profit factor to be included in minimum rates. It was rejected in D.90-07-053 in favor of a cost of capital and operating ratio calculation as the appropriate method for use in these proceedings.

Yuba's evidence concerning the lower costs of diesel fuel shown in several recent deviation proceedings should not be used in setting generally applicable rates for this transportation.

On the other hand, the Yuba evidence concerning greater miles per gallon achieved by later model dump truck equipment, particularly that achieved in the deviation proceedings referred to by Yuba, gives us sufficient concern to warrant holding our increases to 2% rather than to greater amounts. Except for this consideration, larger increases may be justified. It is better to err on the side of caution in this circumstance. We are reluctant to order increases in offset proceedings beyond those unequivocally established as necessary in order to allow the industry the opportunity to earn adequate revenues. Precise costs and rates

should be the subject for consideration in full scale general rate proceedings where all cost factors are measured.

Comments

In accordance with Public Utilities Code Section 311, the ALJ's proposed decision was mailed to parties on October 19, 1990. Comments were received from TD Staff, Yuba, and AGC. AGC's comments were filed with a motion to receive late-filed comments, which motion is hereby granted.

TD Staff notes that the proposed decision contains errors in its presentation of TD Staff's position, referring to page 8 of the decision where it characterized TD Staff's evidence incorrectly by deeming it to have concluded that increases in (retail) fuel prices had not been of sufficient duration to warrant rate increases. TD Staff points out that it had based its argument on wholesale fuel prices, noting that while retail prices had increased, wholesale prices had remained below the level existing at the time D.87-09-043 was issued. TD Staff recommended the use of wholesale prices for measuring changes in fuel costs, not the use of retail prices. Accordingly, it urges modification of the wording in the proposed decision.

Our decision here will reflect this difference in analysis between wholesale and retail fuel costs. However, we will point out that the proposed decision did not rely upon the wholesale fuel price information referred to above in reaching its conclusion concerning the increases ordered therein. Neither does our decision here rely upon that "alternative" TD staff methodology.

Similar wording on page 10 of the proposed decision incorrectly characterizes TD Staff's position, and is amended herein.

In addition, TD Staff urges that our decision be modified to reflect the fact that TD Staff believes that dump truck

operators pay lower than retail prices for fuel. Witness King had responded to a question by Mr. Martens of CDTOA that

"...many of the prices being reported by dump truck carriers appear to be at some point between wholesale and retail prices and I suspect that a majority of the carriers are actually falling somewhere within that range and not really paying what we would consider the actual retail price..."

The proposed decision, and our decision here, do not rely upon that apparently speculative statement. There is no need to reflect the sense of that statement in our adopted findings of fact, since we are relying herein upon the ongoing, specifically dump truck oriented fuel gathering information of the type set forth in Exhibit 10 which relates to retail prices paid by dump truckers.

TD Staff is concerned that taking official notice of the information in Appendix 1 to CDTOA/CCA's brief constitutes procedural error. TD Staff refers us to California Government Code Section 11515, which provides rules for the taking of official notice:

"In reaching a decision official notice may be taken, either before or after submission of the case for decision, for any generally accepted technical or scientific matter within the agency's special field, and of any fact which may be judicially noticed by the courts of this State. Parties present at the hearing shall be informed of the matters to be noticed, and those matters shall be noted in the record, referred to therein, or appended thereto. Any such party shall be given a reasonable opportunity on request to refute the officially noticed matters by evidence or by written or oral presentation of authority, the manner of such refutation to be determined by the agency." (Emphasis added.)

As counsel for TD Staff notes, Government Code Section 11515 is part of the Administrative Procedures Act, and this Commission is

not subject to that Act. Counsel asserts that the parties were given no notice of the ALJ's intention to take official notice of the material contained in Appendix 1 to the CDTOA/CCA brief, prior to issuance of the ALJ's ruling issued September 5, 1990, in which he advised all parties that official notice of the Appendix 1 information was thereby taken. In fact, no party took exception to either the request for official notice made in the CDTOA/CCA brief filed July 16, nor to the ALJ ruling issued over six weeks later. Had any party sought opportunity to ask questions on the Appendix 1 information, the ALJ would clearly have been bound to allow such opportunity. But no party objected to the CDTOA/CCA request, nor to the ALJ's ruling. The equitable doctrine of laches, it seems to us, must be applicable to these circumstances. "Those who rest on their rights may lose them."

Nevertheless, while we believe the ALJ's proposed decision properly used the Exhibit 17 information in arriving at his decision, we can reach the same conclusion by relying on the fuel cost data contained solely in Exhibits 7 and 10. We believe the proposed decision would have been proper in granting the modest increase of 2 percent, based solely upon the information contained in Exhibits 7 and 10, although that data represents fuel costs for about seven and one-half months, rather than an entire year. The Exhibit 17 information merely corroborates the Exhibits 7 and 10 data, and shows that costs based upon the earlier information rested not upon a "spike" but a seven and one-half month permanent plateau of risen fuel costs.

TD Staff states that the case was already submitted at the time CDTOA/CCA sought to have official notice taken of Appendix 1. This is not correct. The matter was submitted subject to the filing of briefs, i.e. simultaneous with the request for the taking of official notice. TD Staff concedes that it does not contest the authenticity of the Appendix 1 figures.

AGC objects to the decision being effective on the date of signature, asserting that there is no emergency involved in these circumstances. AGC also believes it would be improper to rely upon the Appendix 1 information discussed above, or to use the operating ratio data for anything other than a maximum rate increase.

Concerning the effective date issue raised by AGC, we agree it is unnecessary to consider these circumstances an emergency. It will be reasonable to have the decision become effective 20 days after signature, with tariff increases effective January 1, 1991.

AGC objects to the inclusion of the Appendix 1 data, discussed above. There is no need to further discuss this issue. With respect to its notion about the operating ratio information set forth in the proposed decision being suitable only for maximum rate considerations, we have frequently utilized such data to support our decisions when ordering increases in these particular minimum rate tariffs, and see no reason not to rely, in part, upon such current data for purposes of this proceeding.

Yuba proposes that the ALJ be reprimanded because his proposed decision was not filed until the 95th day after submission. There is no provision or requirement in PU Code Section 311 nor in our Rules of Practice, nor any circumstance involved in the processing of this decision which necessitates the sanction urged by Yuba.

The balance of Yuba's comments consist essentially of a reargument of positions previously argued, except for its objection to the Appendix 1 data discussed above under TD Staff's comments. Yuba also objects to the early effective date of the decision.

Reply Comments

CDTOA/CCA alone filed a reply to comments. It notes that TD Staff does not request that the fuel cost offset increase be

denied, or that the conclusions of law and ordering paragraphs supporting and authorizing the increase be modified.

CDTOA/CCA asserts that there is no procedural error in taking official notice of updated 521 Report data after submission of the proceeding, as alleged by TD Staff. This is because TD Staff prepared the information upon order of the Commission, and does not contest its authenticity. Furthermore, the Government Code, cited by TD Staff (Section 11515) allows official notice after submission, provided parties are given a reasonable opportunity on request to refute the officially noticed matters. CDTOA/CCA notes that no party even attempted to exercise the right to request opportunity to refute the material, either upon receipt of their July 16 brief, or after receipt of the ALJ's September 5 ruling.

After further consideration, we find that the fuel cost data set forth in Exhibits 1, 2, 3, 7, and 10, and the operating ratio information discussed above, provide a reasonable basis for increasing these rates by 2%. We also find that it would be unreasonable to make this decision effective on the day of signature.

Findings of Fact

1. By these petitions CDTOA/CCA request increases of 3% in certain rates and charges named in MRT's 7-A, 17-A, and 20, naming rates for the transportation of specified commodities in dump truck equipment.

2. Rates currently published in MRT's 7-A, 17-A, and 20 are based upon various costs, the diesel fuel portion of which is 86 cents per gallon.

3. CDTOA/CCA has presented cost information in Exhibits 1, 2, and 3 based upon increases in the costs of diesel fuel. The increases are based upon survey data furnished TD Staff on a weekly basis for the period June 19, 1989 to February 4, 1990. This

survey indicates diesel fuel costs ranging from 94 cents to \$1.11 per gallon, averaging \$1.06 per gallon.

4. CDTOA/CCA has furnished further TD Staff developed diesel fuel information in Appendix 1 to its brief filed July 16, 1990. It has asked that the Commission take official notice of this data, which indicates that for the period December 18, 1989 through June 3, 1990 diesel fuel prices continued at levels significantly higher than the datum plane figure of 86 cents per gallon. Prices ranged from \$1.00 to \$1.08, and averaged slightly over \$1.03 during this five and-one-half-month period.

5. The CDTOA/CCA brief was sent to all appearances in this proceeding. No party has taken exception to CDTOA/CCA's request that official notice be taken of the information contained in Appendix 1 to their brief. Official notice has been taken of this updated data.

6. The TD Staff fuel cost data set forth in Exhibits 7 and 10, combined with the data contained in Exhibits 1, 2, and 3, indicate that diesel fuel prices rose to levels significantly over the datum plane cost of 86 cents per gallon recognized in D.87-09-043, and provide a basis for setting the datum plane cost for purposes of this proceeding at \$1.04. The information contained in Exhibit 17 corroborates that shown in Exhibit 10.

7. The data contained in Exhibits 7 and 10 are specifically dump truck oriented, being obtained from a statistically credible sample of dump truck carriers. The fuel cost data relating to dump truck carriers furnished by Yuba is not suitable for purposes of this proceeding, because it relates to hauling performed only by Yuba and Lindeman, or for them, or to hauling performed by 8 carriers who deviate from minimum rates.

8. The data developed by TD staff in Exhibit 7, and as reconstructed in Exhibit 10, is superior to the TD staff data contained in Exhibits 14, 15, and 16, because the Exhibit 10 data is specifically dump truck carrier oriented.

9. The operating ratio information for 47 representative dump truck carriers set forth in Table 1 of this decision indicates a composite operating ratio of 99.24% before adjusting for removal of purchased transportation, and 98.54% after such adjustment. Increases in rates in MRT's 7-A, 17-A, and 20 of 2% based upon this operating ratio data would result in a cost/rate relationship in those MRT's of 97.24% and 96.54%, respectively, for before and after adjustment of purchased transportation.

10. Rates presently named in MRT's 7-A, 17-A, and 20 are unjust and unreasonable. If increased in accordance with the provisions of this decision, rates named therein will afford dump truck carriers the opportunity to earn revenues which are reasonable and necessary to maintain adequate profit margins.

Conclusions of Law

1. Based upon the evidence contained in Exhibits 1, 2, 3, 7, and 10, and the operating ratio data set forth in Table 1 of this decision, increases of 2% are warranted in MRT's 7-A, 17-A, and 20.

2. Increases have not been requested with respect to the transportation of commodities described in Items 40, 50, and 60 of MRT-A.

O R D E R

IT IS ORDERED that:

1. Minimum Rate Tariff 7-A (Appendix B to Decision 82601, as amended) is hereby further amended by incorporating Supplement 35, attached, to become effective January 1, 1991.

2. In all other respects, Decision 82601, as amended, shall remain in full force and effect.

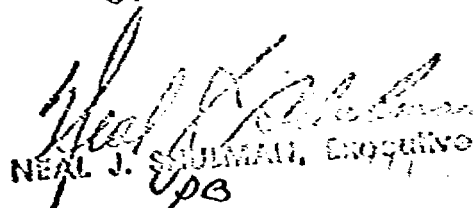
3. The Executive Director shall serve a copy of the tariff amendments on each subscriber to Minimum Rate Tariff 7-A.

This order becomes effective 20 days from today.

Dated 12-06-90, at San Francisco, California.

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

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


NEAL J. SCHULMAN, Executive Director

SURCHARGE SUPPLEMENT

SUPPLEMENT 35

(Cancels Supplement 29)

(Supplements 9, 33, 34, and 35 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

DUMP TRUCK CARRIERS

(1) APPLICATION OF SURCHARGE

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

	<u>Transportation of Commodities Described in Item 30</u>	<u>Transportation of Commodities Not Described in Item 30</u>
Moving at rates named in Item 390 (hourly rates)	◇9%	o3%
Moving at rates named in all other items	◇8.2%	o2.2%

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. Item 95 - Tarp Labor Charge;
2. Items 100 and 110 - (Railhead-to-railhead charges only);
3. Item 120 - Bridge and Ferry Tolls; and
4. Item 260 - Additional charge for service.

(1) The surcharges in this supplement are to be applied before applying the emergency fuel surcharges contained in Supplement 34 and reissues thereof.

◇ Increase)
o No change) Decision 90-12-018

EFFECTIVE 01/01/91

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