

AP

Decision No. 87295

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of )  
Apex Bulk Commodities, a California )  
corporation, for an extension of its )  
certificate to operate as a cement }  
carrier. }

Application No. 55835  
(Filed July 25, 1975)

Karl K. Roos, Attorney at Law, for applicant.  
Leland E. Butler, Attorney at Law, for The  
Atchison, Topeka and Santa Fe Railway  
Company; Russell & Schureman, by Carl H.  
Fritze, Attorney at Law, for Max Binswanger  
Trucking; Fiske Bros., Inc., Ralph L.,  
Florence L., Glenn M. and Roberta S. Harris,  
doing business as Harris Transportation Com-  
pany; Raymond A. Greene, Attorney at Law, for  
Universal Transport System, Inc. and Miles  
and Sons Trucking Service; and Les Calkins,  
for Les Calkins Trucking and Earl Hudson  
Trucking; protestants.  
T. W. Anderson, for General Portland, Inc.,  
interested party.  
T. H. Peceimer, for the Commission staff.

### O P I N I O N

Apex Bulk Commodities (Apex), a corporation, operates as a cement carrier to and within Kern, Los Angeles, Orange, Riverside, San Bernardino, San Diego, Santa Barbara, and Ventura Counties pursuant to a grandfather certificate of public convenience and necessity transferred to it from Diversified Enterprises, Inc. by Decision No. 72954 dated August 22, 1967 in Application No. 49448, unreported. It also operates as a radial highway common carrier, a highway contract carrier, and a dump truck carrier pursuant to appropriate permits issued by the Commission.

By this application, it seeks an extension of its cement carrier certificate to include operations to and within the counties of Tulare, Kings, Fresno, San Joaquin, Merced, and Stanislaus. The application was protested by The Atchison, Topeka and Santa Fe Railway Company (AT&SF), Max Binswanger Trucking (Binswanger), Fiske Bros., Inc. (Fiske), Ralph L., Florence L., Glenn M., and Roberta S. Harris (Harris), doing business as Harris Transportation Company, Universal Transport System, Inc. (Universal), and Miles and Sons Trucking Service (Miles).

Public hearing was held before Examiner Arthur M. Mooney in Los Angeles on December 1 and 2, 1975 and January 14 and 15, 1976. The matter was submitted on the filing of concurrent briefs on March 24, 1976.

Applicant

Mr. Lee G. Gale testified that he has been the general manager of Apex for approximately eight years and has had many years of prior experience in the trucking industry, including the transportation of cement. He stated that he is in effect the acting general manager of Apex and performs managerial functions for it only when Mr. Glen Walker, the president, is absent which is a good part of the time and amounted to approximately five months during the past year; that he receives no compensation for this and has no financial interest in the company; that his wife is the corporate secretary of Apex and also performs general secretarial duties for it; that the president owns all of the stock in Apex; that all decisions regarding its operation are subject to the president's approval; and that any services he performs for the company are done as an accommodation to the president.

According to the evidence and the Commission's official records, Mr. Gale is also associated with Pyramid Commodities (Pyramid), a corporation, and Cal-Pac, a corporation. As to Pyramid, Mr. Gale, as an individual, was granted a grandfather cement carrier certificate for the counties of Fresno, Kern, Los Angeles, Orange, Riverside, San Bernardino, San Diego, Santa Barbara, and Ventura (In re Lee G. Gale (1965) 65 CPUC 74); this certificate was transferred from Mr. Gale to Pyramid by Decision No. 78782 dated June 15, 1971 in Application No. 52485 (unreported); subsequent to the submission of the matter before us, the portion of the cement carrier certificate of North Bay Transport, Inc. authorizing operations to and within San Joaquin County was transferred to Pyramid by Decision No. 86456 dated October 6, 1976 in Application No. 56291 (mimeograph copy), and rehearing of the decision was denied by Decision No. 86738 dated December 7, 1976; Mr. Gale is the president of Pyramid; he and his wife own 50 percent of the stock in the company, and Mr. Kenneth Teel owns the balance; and the company also holds dump truck and radial highway common carrier permits. With respect to Cal-Pac, Mr. Gale bought one half of the stock in the company about a year and a half ago, and the other 50 percent is owned by Mr. Teel; Mr. Gale is the president; and it has dump truck operating authority only. Apex, Pyramid, and Cal-Pac all share the same offices in Whittier.

Mr. Gale testified that Apex operates 18 tractors, including 3 which are equipped with power take offs and blowers for hauling cement, and 21 gravity and 4 pneumatic sets of covered hopper bottom trailers designed for hauling cement and other commodities such as sand, soda ash, limestone, grain, and feed; that 2 of the tractors and 1 set of the trailers are owned by Apex, 1 or 2 of the units are leased from individuals who are employed by Apex,

and the balance of the equipment is leased from the Security First National Bank or from the Management IV Corporation which is owned by his two sons who are 19 and 23 years old; that depending on the age of the equipment leased, the rental charge for tractors is between 18 and 20 cents per mile and for trailer units is between 3 and 6 cents per mile; that when the need for extra power equipment arises, it is obtained from Hertz at 12 cents per mile; that Apex pays for the fuel for all leased or rented equipment, and with the exception of Hertz rentals, maintains all the equipment; and that in addition to mechanics and other employees, Apex has 20 to 22 drivers on its payroll and pays them 13-1/2 cents per mile plus an hourly standby charge after two hours for loading or unloading.

The witness and the accountant for Apex, who is also its tariff publishing agent, presented the following financial evidence: As of September 31, 1975, Apex had assets of \$274,854.90, liabilities of \$196,170.74, and a net worth of \$78,684.16. For the first nine months of 1975, it had operating revenue of \$813,816.60, including \$61,689.99 from commissions on subhauls and from the sale of animal feed, and ordinary income after federal and state income taxes of \$61,805.91. Apex's operations have continued to be profitable, and it has the financial ability to perform the proposed service and add any additional equipment that it may require.

The general manager testified that Apex is providing cement carrier service within its percent certificated area and performs dump truck and radial highway common carrier services under its permitted authorities. He stated that Apex had been offered a cement haul from Victorville to Stockton which is in San Joaquin County, and this was one of the motivating reasons for filing the application. In this connection, the witness explained that Apex had been hauling roofing granuals southbound for Johns-Manville Products Corporation (Johns-Manville) from its plant at Pittsburgh to southern California for the past few years under its dump truck authority; that the plant

superintendent of Johns-Manville's Stockton plant telephoned him and informed him that the plant was having some problems with rail shipments of cement to it from the Southwestern Portland Cement Company (Southwestern) at Victorville in southern California and asked if Apex would be interested in the haul; that upon being informed of the volume of the movement involved, he told the plant superintendent that Apex would accept; that Apex published rates based on the rail rates for this move in its Local Freight Tariff 1, Cal. PUC 1, Transport Business Service, Agent, and made the necessary tariff filing with the Commission which was accepted by it; and that the haul was commenced in April 1975 and continued until June of that year when the Commission informed Apex that it did not have the authority to perform this transportation and directed it to cease any further cement hauling to the Stockton plant and to cancel its tariff rates for this move. The witness stated that it had been his understanding that a cement carrier did not need specific authority to serve a particular point if the rate it used was based on the applicable rail rate; that for this reason, when the Commission accepted the filing of the rail rate without question, the haul was commenced; that as soon as it was brought to his attention that his understanding was incorrect and that there was a problem, Apex discontinued the haul and canceled the rate from its tariff; that he then called a number of cement carriers who had authority to serve San Joaquin County to see if Apex could either subhaul or interline this transportation with them; that none of the carriers contacted would agree to this; and that he knows of no instances where any cement carriers have ever filed any joint through rates. He testified that the rail rate that had been published were based on a 150,000 minimum weight; that it took three units of equipment to make this weight; and that this freight had helped balance Apex's

southbound shipments. In this regard, he stated that Apex hauls a number of southbound shipments under its permitted authority to southern California which include, in addition to the roofing granuals from Johns-Manville's Pittsburgh plant, silica sand from Ione, which is approximately 50 miles from Stockton, sand from the Monterey area, and feed and chemicals from the Stockton-Richmond area; that Apex had been hauling some white roofing granuals north, but this traffic is no longer available; that Apex is now sending its equipment north empty to handle the southbound traffic; and that although the rail rates that were published for the Victorville-Stockton cement haul would not have been profitable if this were a one-way haul only because of the distance involved, Apex has ample southbound traffic to make it a profitable operation, and in any event, the equipment is now earning no revenue northbound. The witness stated that with the exception of Fresno County which only Pyramid has, both Apex and Pyramid have the same cement carrier authority and that Pyramid is a small company and at the time this haul was offered had only four units of equipment and could not have handled it.

The general manager testified that Apex has also been requested by the Monolith Portland Cement Company (Monolith) to transport cement from Monolith, which is near Tehachapi, to Empire, which is approximately five miles east of Modesto in the sought county of Stanislaus. He stated two of the units of equipment Apex now leases from the bank had previously been leased by Monolith.

Three public witnesses appeared on behalf of applicant. The following evidence was presented by the traffic manager and chief scheduler for Johns-Manville's Stockton plant: The plant manufactures and distributes cement pipe. It uses a high-strength, quick set cement for the pipe. Until three years ago, it obtained all of this cement from Southwestern's mill at Victorville. Since then, in order to have two sources of supply, it has been obtaining

some of the cement from the Calaveras Cement Company (Calaveras) in Calaveras County. Approximately 25 to 30 thousand tons of cement are received annually from Southwestern. It is shipped via the AT&SF to Stockton where the rail cars are switched to the Western Pacific Railroad for delivery to the plant. The shipments from Calaveras were via the shipper's trucks and are now via Johns-Manville's trucks. There are four pipe manufacturing machines at the plant. Each machine has two cement bins with a capacity of 70 tons each. It is essential that none of the machines run out of cement. If this should happen to any one of the machines, it would have to be shut down, and this would result in idle time for employees. The witness attempts to set up a weekly schedule for cement shipments to the plant, but this is difficult because the requirements for the machines are constantly being changed. Due to the limited storage space at the plant, any delays in transit times for cement shipments aggravate the scheduling problems. The plant was built in 1957, and there has been continual problems with rail shipments from the Victorville mill. These have been mainly due to delays in transit times which range from 2 to 11 days. There have also been some instances where rail shipments have arrived ahead of schedule which at times have resulted in demurrage charges. Apex was contacted regarding the Southwestern haul around April 1975 and agreed to handle it. The witness does not know how many other cement carriers serve San Joaquin County and has not been solicited by any other carrier for this business. The cement is purchased f.o.b. Stockton plant, and he instructed Southwestern to use Apex. Apex published the same rates charged by the rail line, and for the several months it performed the transportation, its service was excellent. The plant was able to order only the quantity of cement that it needed. Orders placed in the late afternoon were delivered by 6 a.m. the next morning. After Apex ceased performing the service,

rail service was again used, and it continued to be unsatisfactory. Johns-Manville will use Apex for this haul if the application is granted and it publishes the rail level of rates for the transportation. Should Apex publish higher rates for this move, the witness is not certain if he would use them, but he would take into account the prompt service by Apex, savings in demurrage charges, and the rates published by the carrier in reaching his decision.

The traffic manager of Southwestern testified as follows: Southwestern manufactures and sells cement, including a special cement which it sells to Johns-Manville's Stockton plant. The only other mill that makes this special cement is Calaveras. Shipments to Johns-Manville are now by rail. His company could not compete with Calaveras for this business if the higher truck rates were charged for this movement. During the period Apex was used, it had the rail rates published in its tariff. He supports the application and will honor Johns-Manville's request to use Apex if it is granted. As to rail service at the Victorville plant, he stated that the plant is open for rail service 24 hours a day, there are a satisfactory number of switches at the plant, and he knows of no car shortages since 1973. The witness stated that if the rail line should cancel the rail rate for non-use, the truck rate would have to be charged, and his company then might not be able to compete with Calaveras for the Johns-Manville business.

The following testimony was presented by the employee in charge of transportation for Monolith: His company manufactures and sells Portland cement. Its customers are located throughout the San Joaquin Valley. Most of the cement is shipped to its transfer storage facility at Empire via rail, and from there, it is shipped by local trucks to customers. Generally the rail service to Empire has been satisfactory, but there are sudden peaks in customer demand from time to time, and truck service is needed to supplement rail service for these peaks and other emergencies. Monolith had



used its own trucks for this in the past but disposed of them a year or so ago. If the application is granted, Monolith will use Apex for this supplemental service. Apex informed him that it would publish a rate between the rail and truck levels for this haul. There are regularly quite a few truck movements from Monolith to Empire, and it is possible that an emergency situation might require a number of truckloads on a particular day. Apex had been used for some of this transportation before the question came up regarding its authority to perform this transportation. Apex is the only carrier willing to provide this service at a rate less than the truck rate which is too high for this move. His company has had problems obtaining transportation from other cement haulers at the truck rates. It would not be economically feasible to increase the storage facilities at Empire. In addition to the Empire move, Monolith supports the application to all counties sought. It has some shipments directly to job sites which are off-rail and has also experienced difficulty in obtaining cement carriers to handle these shipments.

### Protestants

The following evidence was presented by the assistant general manager of operations of the AT&SF's lines and its assistant manager of pricing: AT&SF serves Southwestern, Monolith, and Empire. The Union Pacific Railroad also serves Southwestern; however, only AT&SF serves from Southwestern to Stockton. The Southern Pacific also serves Monolith but does not serve Empire. If there are any delays in shipments from Victorville to Stockton, they would be at Bakersfield. A 50 million dollar computerized yard is being constructed at Barstow, and when it is completed, it should relieve the congestion at Bakersfield and remedy these delay problems. The rail car supply at both Victorville and Monolith is good. Without congestion delays, the transit time from Victorville

to Stockton should be 24 hours. Johns-Manville's Stockton plant has 4 tracks which will hold about 25 rail cars. There is space for 3 cars at the bulk storage facility. The plant operates 5 days a week and will not receive or release cars on weekends. Cars are usually switched at Stockton between 3 and 7 a.m. A car arriving after 7 a.m. would not be switched until the next day. After a car is delivered to the consignee, there are 48 hours free time before demurrage charges accrue, and the free time commences at the first 7 a.m. after the car is spotted. Saturdays and Sundays are excluded from determining demurrage charges. Johns-Manville has an Average Demurrage Agreement with the Pacific Car Demurrage Bureau which provides that credits accrued for releasing cars before the expiration of the free time may be offset against demurrage charges. The total of the demurrage charges assessed against Johns-Manville for cement cars during the period December 1973 through July 1975 was \$1,620. Some of these charges were for several cars that were held by Johns-Manville for a week or more. There were also some demurrage charges for rail cars transporting other commodities. It is AT&SF's policy to cancel any rates that are not being used. If there were no rail shipments of cement from Victorville to Stockton, the cement rates for this movement would be canceled, and the higher class rates would be applicable. AT&SF could reduce its rail rates if it were necessary to hold the traffic; however, this would depend on the economics involved.

Following is a summary of the evidence presented by the general operations manager of Miles, the vice president of Universal, a partner of Harris, the executive vice president and general manager of Binswanger, and the president of Fiske: All have cement carrier certificates. Most also have other operating authority. Three have cement carrier authority to serve all of the sought counties. One

has authority for San Joaquin, Fresno, Tulare, and Kings Counties, and the other has authority for Fresno, Tulare, and Kings Counties. All also have authority to serve other counties not involved herein. Three have terminals in southern California, another has terminals in northern California, and the remaining protestant has terminals in both northern and southern California. All have a reasonable amount of cement hauling equipment. They serve the counties they are authorized to serve regularly. All asserted that there has been approximately a 20 percent decrease in their cement hauling due to a decline in cement sales resulting primarily from a reduction in highway construction which is a major source of their business. One occasionally transported cement shipments from Southwestern at Victorville to Johns-Manville at Stockton in 1974 at the truck rates. Another performs interstate transportation for Southwestern. Several have performed other transportation for Southwestern and Monolith in the past. One who has authority to serve Stanislaus County would be willing to transport cement to Empire for Monolith at a rate somewhere between the rail and truck rate levels. The others who have this county are interested in the Empire haul but would not go below the truck rates if it were offered to them. All who are authorized to serve San Joaquin County would be interested in the Victorville to Stockton haul at the truck rates but would not publish the rail rates for this move. It is their position that there is now a sufficient number of cement carriers serving the sought counties to adequately handle all available traffic there; that they have unused capacity; that the added competition of another cement carrier in this area would have a detrimental effect on them; and that they do not want the truck rates eroded by someone who would publish rail rates. Several pointed out that while applicant's evidence related primarily to two specific hauls, Victorville-Stockton and Monolith-Empire, it is seeking authority to serve all points in the sought counties. All objected to the grant of any additional authority to applicant.

Discussion

It is apparent from the record that Apex has a good financial position; that it has a reasonable amount of available equipment; and that it is experienced in transporting cement. However, the major issue with which we are concerned is whether public convenience and necessity require any or all of the sought authority. We are of the opinion that the evidence before us does sufficiently support an affirmative finding on this issue for San Joaquin and Stanislaus Counties but not for the other four sought counties.

The main thrust of Apex's presentation is that it has a number of customers in the Monterey, Richmond, Pittsburgh, and Stockton areas who ship commodities by it to southern California in hopper bottom dump truck equipment; that it did have some northbound freight from a southern California shipper, but this freight is now shipped directly from out of state to northern California and is no longer available to Apex; that since Apex's only terminal is in southern California, it must now send its equipment empty north; and that if the authority is granted, it could then transport cement northbound in this equipment to destinations in the sought counties and thereby have a balanced north and south business. While this, from a business standpoint, would be desirable for Apex, it does not, by itself, establish that a public need exists for the proposed service.

Apex did present evidence that Johns-Manville, Southwestern, and Monolith desire its cement carrier service. The evidence relating to Johns-Manville and Southwestern was concerned with a cement haul from Southwestern at Victorville to Johns-Manville's plant in Stockton. As stated above, Johns-Manville has not been satisfied with the rail service it has been receiving for this

movement, and it found Apex's service more flexible and ideal for its needs during the several months Apex handled the haul prior to being ordered to cease and desist from doing so by the Commission. Apex had published the lower rail rates for this transportation. Although it could not have afforded to charge these rates if this were a one-way haul, it was, in effect, a backhaul for southbound traffic. This made it economically feasible. Johns-Manville would most likely not have used Apex if it charged above the level of the rail rates. Southwestern could not compete on a price basis with the Calaveras mill in northern California for any of the Johns-Manville cement if the rates assessed for this transportation were above the rail rates. If Apex is granted San Joaquin County, they will again use Apex for this transportation at the rail rates which it will publish. It is to be noted that any cement carrier can legally publish rates that are not lower than the rail level for any transportation it is authorized to perform.

The evidence relating to Monolith was primarily concerned with a haul from Monolith to Empire. Monolith was satisfied with the rail service it is receiving for its basic transportation needs between these points and will continue to use rail service for this purpose. It does, however, need supplemental truck service to Empire for peaks in demand and emergency shipments which occur frequently and involve substantial tonnage, and it has, at times, had difficulties in obtaining motor carriers to perform this transportation at truck rates. If Apex is granted authority for Stanislaus County, Monolith will use Apex for this transportation at a rate between the rail and truck rates which Apex has agreed to publish. The witness for Monolith made a general statement that his company does support Apex's request for all six counties; that it does occasionally have shipments directly from Monolith to off-rail job sites in the six counties; and that because of difficulties

at times in obtaining motor carriers and in scheduling, it would like to have as many available cement carriers as possible to select from for this transportation.

Although the public witnesses who appeared in support of the sought extension were not numerous and the evidence they presented was limited, nonetheless, a representative showing has been made to establish the need for some additional service for San Joaquin and Stanislaus Counties. We are not concerned in this proceeding with the general commodity type of highway common carrier that transports a substantial variety of commodities for a multitude of shippers. Here we have a specialized common carrier who transports one commodity only, cement. The major shippers of this commodity are the mills, and they are limited in number.

The evidence in support of Apex's request for the other four sought counties, Tulare, Kings, Fresno, and Merced, is not persuasive. As pointed out above, we have only the assertion by Monolith that it would like to have available to it as many cement carriers as possible to serve these counties and the assertion by Apex that it would like to have authority for them to help balance its southbound freight. No evidence was presented regarding any specific hauls to or within these counties. The general assertions by Monolith and Apex are not enough to establish that public convenience and necessity require Apex's service for the four counties.

As to applicant's fitness, we are mindful that Apex did provide cement transportation to San Joaquin and Stanislaus Counties for several months without authority to do so. In this connection, the general manager of Apex testified that it was the opinion of himself and his company that if rail rates were used, as was the case here, no authority was necessary; that Apex did publish and file the rates for this transportation with the Commission as

required by law, and they were accepted by the Commission; that it was not until the Commission later ordered Apex to cancel these rates and refrain from performing this transportation that it became aware that its understanding was incorrect; and that Apex has complied with this Commission directive. Protestants argued that Apex has been in business for a long period of time and should have known better. We will accept Apex's assertion that this was an honest error on its part and that it is a fit company to provide cement carrier service.

We are mindful that a number of cement carriers now have authority to serve San Joaquin and Stanislaus Counties. The competitive threat by Apex to these existing carriers would not be significant. According to the evidence, Apex is concerned with traffic from southern California sources to the two counties and not with transportation within them. As to the Southwestern to Johns-Manville traffic, none of the protestant carriers are now handling it; the several that stated they were interested in this traffic would handle it at the truck rates only and not at the lower rail rates Apex would publish; Southwestern and Johns-Manville asserted that the traffic would not move at the higher truck rates; and although AT&SF stated it is taking steps to improve its service for this transportation, Johns-Manville prefers the promptness and flexibility Apex can provide. With respect to the supplemental motor service for the Monolith to Empire traffic, only one of the protestant cement carriers expressed a willingness to perform this transportation at a rate between the truck and rail levels which Apex would charge, and Monolith asserted that it has experienced difficulties in obtaining sufficient cement carriers to handle all of this freight at truck rates.

It is apparent that the additional cement carrier service by Apex authorized herein would not have a significant effect on the environment. The majority, if not all, of the equipment that would handle this traffic is now going empty north to pick up southbound freight.

An in lieu certificate incorporating both Apex's current cement carrier authority and that granted herein will be issued to it, and its present certificate will be canceled.

Findings

1. Apex holds a certificate of public convenience and necessity to operate as a cement carrier from all points of origin to and within Kern, Los Angeles, Orange, Riverside, San Bernardino, San Diego, Santa Barbara, and Ventura Counties. It also has permitted authority to operate as a radial highway common carrier, a highway contract carrier, and a dump truck carrier.

2. Apex operates 18 tractors and 25 sets of covered, hopper bottom trailers designed for hauling cement and other commodities, including sand, soda ash, feed, and similar commodities. Its operations have been profitable, and it has a good financial condition. It has had considerable experience in the cement carrier field.

3. The general manager of Apex receives no compensation from the company for his services and has no financial interest in it. His wife is the executive secretary for Apex and is also its office secretary. He is the president and half owner of Pyramid which holds a cement carrier certificate for all of the same counties included in Apex's cement carrier certificate plus Fresno and San Joaquin Counties. The latter county was added to Pyramid's cement carrier certificate in October 1976 by Decision No. 86456, supra. Both Apex and Pyramid share the same office.



4. Apex has a number of customers in the Monterey, Richmond, Pittsburgh, and Stockton areas and transports roofing granuals, sand, feed, chemicals, and similar commodities southbound for them to southern California destinations in covered hopper bottom trailers. Its terminal is in southern California. While it did have some northbound freight, this is no longer available, and its equipment is now going empty north to pick up the southbound freight.

5. Apex was requested by Johns-Manville's pipe manufacturing plant in Stockton to transport cement to it from the Southwestern mill in Victorville. It published rates based on the level of the rail rates in its tariff for this move, and filed the rates with the Commission. It performed the transportation under its published tariff rates from approximately April to June 1975 when the Commission informed it that it did not have cement carrier authority to serve Stanislaus County and directed it to cease and desist handling the Stockton haul. Apex complied with the Commission directive and has not handled it since.

6. Although the general manager of Apex has been in the cement carrier field for a number of years, he was erroneously of the opinion, prior to the cease and desist directive of the Commission referred to in Finding 5, that a cement carrier was not required to have specific authority to serve a particular county if it published and charged rail rates for the transportation it performed there.

7. Apex is a fit person to operate as a cement carrier.

8. Three public witnesses appeared for Apex. The witnesses representing Johns-Manville and Southwestern were concerned with a haul from Victorville to Stockton. AT&SF is now used for this transportation. They complained about delays and demurrage charges in connection with the rail service and asserted that it is not satisfactory. They indicated that during the several months Apex performed this service at rail rates prior to the cease and desist order referred to in Finding 5, its service was excellent; that they have been unable to obtain other cement carriers to perform this transportation at rates lower than the truck rates; that because of the closer proximity of the Calaveras mill to Stockton, Southwestern could not compete with Calaveras for any of the cement for Johns-Manville if the higher truck rates were assessed for the haul; and that if Apex is authorized to serve San Joaquin County, they will again use Apex for this transportation at the rail rates which it has agreed to publish. The third witness represented Monolith and was concerned primarily with a haul from Monolith to its transfer facility at Empire which accounts for most of the for-hire carriage performed for Monolith. He uses rail service for his company's regular transportation needs between these points and will continue to do so. He supplements this with motor carrier service for sudden increases in demand and other emergency situations which occur frequently and involve considerable tonnage. He has at times had difficulties in obtaining cement carriers to perform this transportation at truck rates. Apex has agreed to handle the supplemental hauling at a rate between the rail and truck rates, and his company will use Apex for this service if it is granted authority to serve Stanislaus County. He stated that there are occasions when cement is shipped directly from Monolith to an off-rail job site in the six counties sought by Apex, and Monolith would like to have as many cement carriers as possible, including Apex, available for this transportation.

9. AT&SF is taking steps to improve its service between Victorville and Stockton; however, Johns-Manville and Southwestern prefer the promptness and flexibility of Apex for this haul.

10. Of the five protestant cement carriers, three have authority to serve all of the six counties sought by Apex, another has authority to serve four of the sought counties, and the remaining one has authority to serve three of the sought counties. All have unused carrying capacity. The volume of their businesses has decreased due to a reduction in highway construction. Those that serve San Joaquin County were interested in the Southwestern-Johns-Manville haul but only at truck rates. As pointed out in Finding 8, because of the competitive situation between Southwestern and Calaveras, this traffic would not be available to any cement carrier unless it charged the lower rail rates for the haul. One is willing to provide the Monolith-Empire supplemental motor transportation at a rate between the rail and truck rates as Apex has agreed to do. The others authorized to perform this haul would charge the higher truck rate. Monolith has experienced some difficulties in obtaining sufficient cement carriers for all of this transportation at truck rates.

11. A cement carrier is a specialized carrier engaged in the transportation of one commodity only, cement, either alone or in combination with lime or powdered limestone. The major shippers of cement are the cement mills, and they are relatively few in number.

12. A representative showing has been made to establish the need for Apex's service for San Joaquin and Stanislaus Counties.

13. It has not been shown on this record that any of the cement carriers, including protestants, now serving San Joaquin and Stanislaus Counties will be seriously affected by the expansion of Apex's cement carrier authority to include these two counties.

14. Public convenience and necessity require that Apex be authorized to operate as a cement carrier from all points of origin to and within the counties of San Joaquin and Stanislaus.

15. The general statement by the witness for Monolith that his company would like to have as many cement carriers, including Apex, available for any transportation it might occasionally have from its cement mill to off-rail job sites anywhere in the six counties sought by Apex is not sufficient to establish that public convenience and necessity require cement carrier service by Apex for any of the four remaining counties, Tulare, Kings, Fresno, and Merced.

16. It can be seen with certainty that there is no possibility that the activity authorized herein may have a significant effect on the environment.

Conclusion

The application should be granted to the extent set forth in the ensuing order and in all other respects should be denied.

Apex is placed on notice that operative rights, as such, do not constitute a class of property which may be capitalized or used as an element of value in rate fixing for any amount of money in excess of that originally paid to the State as the consideration for the grant of such rights. Aside from their purely permissive aspect, such rights extend to the holder a full or partial monopoly of a class of business. This monopoly feature may be modified or canceled at any time by the State, which is not in any respect limited as to the number of rights which may be given.

O R D E R

IT IS ORDERED that:

1. A certificate of public convenience and necessity is granted to Apex Bulk Commodities, a corporation, authorizing it to operate as a cement carrier, as defined in Section 214.1 of the Public Utilities Code, between the points set forth in Appendix A of this decision.

2. In providing service pursuant to the authority granted by this order, applicant shall comply with the following service regulations. Failure so to do may result in a cancellation of the authority.

- (a) Within thirty days after the effective date of this order, applicant shall file a written acceptance of the certificate granted. Applicant is placed on notice that, if it accepts the certificate it will be required, among other things, to comply with the safety rules administered by the California Highway Patrol and the insurance requirements of the Commission's General Order No. 100-Series.
- (b) Within one hundred twenty days after the effective date of this order, applicant shall establish the authorized service and file tariffs, in triplicate, in the Commission's office.
- (c) The tariff filings shall be made effective not earlier than thirty days after the effective date of this order, on not less than thirty days' notice to the Commission and to the public, and the effective date of the tariff filings shall be concurrent with the establishment of the authorized service.
- (d) The tariff filings made pursuant to this order shall comply with the regulations governing the construction and filing of tariffs set forth in the Commission's General Order No. 117-Series.
- (e) Applicant shall maintain its accounting records on a calendar year basis in conformance with the applicable Uniform System of Accounts or Chart of Accounts as prescribed or adopted by

this Commission and shall file with the Commission, on or before April 30 of each year, an annual report of its operations in such form, content, and number of copies as the Commission, from time to time, shall prescribe.

- (f) Applicant shall comply with the requirements of the Commission's General Order No. 84-Series for the transportation of collect on delivery shipments. If applicant elects not to transport collect on delivery shipments, it shall make the appropriate tariff filings as required by the General Order.

3. The certificate of public convenience and necessity granted in paragraph 1 of this order shall supersede the certificate of public convenience and necessity granted by Decision No. 72954, which certificate is revoked effective concurrently with the effective date of the tariff filings required by paragraph 2(b).

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco California, this 3rd  
day of MAY, 1977.

Robert B. Berman  
President  
William J. Gibson, Jr.  
Vernon L. Sturgeon  
Richard D. Shavelle

Commissioners

Apex Bulk Commodities, by the certificate of public convenience and necessity granted in the decision noted in the margin, is authorized to operate as a cement carrier, as defined in Section 214.1 of the Public Utilities Code, from any and all points of origin to all points and places within the counties of (see Restriction):

Kern, Los Angeles, Orange, Riverside, San Bernardino, San Diego, San Joaquin, Santa Barbara, Stanislaus, and Ventura.

RESTRICTION:

Whenever Apex Bulk Commodities, a corporation, engages other carriers for the transportation of property of Apex Bulk Commodities or Bulk Transportation or customers or suppliers of said corporations, Apex Bulk Commodities shall not pay such other carriers rates and charges less than the rates and charges published in the carrier's tariffs on file with this Commission.

END OF APPENDIX A

Issued by California Public Utilities Commission.

Decision No. 87295, Application No. 55835.