

Alt.-RDG/hk **

Decision No. 89497 OCT 3 1978

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Investiga-)
tion for the purpose of consid-)
ering and determining minimum)
rates for transportation of any)
and all commodities statewide,)
including, but not limited to,)
those rates which are provided)
in Minimum Rate Tariff 2 and the)
revisions or reissues thereof.)

Case No. 5432
Petition For Modification
No. 1027
(Filed June 20, 1978)

OPINION AND ORDER

By this petition, Big Pine Trucking Company, Inc., requests authority to continue to publish less-than-minimum rates for the transportation of clay and related articles from Laws, Keeler and Olanca to points within the Los Angeles area and Orange County. Petitioner also seeks to amend the current authority by cancelling the rates on alfalfa pellets from Cottonwood Canyon Ranch, near Benton, to points in the Los Angeles area and Orange County. The current rates expired August 1, 1978.¹

The petitioner seeks to increase the rates from 50 and 52 cents to 55 and 57 cents, respectively, for shipments of clay products from Keeler and Laws and Olanca to points in the Los Angeles area. Comparable increases are also being sought for shipments from the same points of origin to points in Orange County. The petitioner presented no justification for the increases; however, the proposed increased rates are below the current minimum rates. The petition was mailed to California Trucking Association and other interested parties on or about June 19, 1978. The petition was listed on the Commission's Daily Calendar of June 21, 1978. No objection to the granting of the petition has been received.

¹ The rates are currently published in Items 4545 and 4546, Western Motor Tariff Bureau, Inc., Agent, Local, Joint and Proportional Freight and Express Tariff No. 111, Cal.P.U.C. No. 15.

By Decision 89228 dated August 8, 1978, in this case, we issued an Interim Opinion and Order granting the authority as requested, except for the requested increase in rates. The authority to publish rates less than minimum for the transportation of clay and related articles from Laws, Keeler, and Olancho to Los Angeles and Orange Counties was authorized to expire August 1, 1979. We will now address the issue of the increase in rates. The present opinion and order will be the final order in this case and will contain all relevant findings of fact and conclusions of law. To the extent that any findings or conclusions conflict with those contained in the Interim Order, the findings and conclusions herein prevail.

The Commission publishes minimum rates established under Section 3662 of the Code² after a finding that such rates are just, reasonable and non-discriminatory. These rates have, under Section 726 of the Code, become minimum rates for common carriers as well as permitted carriers. The Commission also authorizes common carriers to establish rates less than a maximum reasonable rate "when the needs of commerce or public interest require" (Section 452).

Primarily because of Section 726, Section 452 authority to assess rates less than reasonable maximum rates has, in most circumstances, amounted to authority to assess rates less than the Commission published minimum rates established under Section 3662. Because of Section 3663, all permit carriers may also charge this rate. This has the practical effect of amending the minimum rate. One element of the showing required by highway common carriers to publish a rate under Section 452, and less than the minimum rate, has traditionally been that the rate be shown compensatory.

Since the Commission's published minimum rate has been found just, reasonable and non-discriminatory and any rate approved under Section 452 has also been found justified and in the public interest, any rate between the lower Section 452 rate and the published minimum rate must also be justified, all other things being equal.

²All code sections refer to Public Utilities Code.

Therefore, it can be seen that as a matter of policy there is no need for a further showing before the Commission to increase a Section 452 rate up to the level of the Commission's minimum rates. However, it must be determined whether or not Code Section 454 requires such a further showing.

Two recent decisions of the California Supreme Court provide some guidance. In Calif. Trucking Ass'n. v. Cal. P.U.C., (1976) 19 C.3d. 240, the court enunciated the general principle that Sections 1705 and 1708 of the Code require that the opportunity for a hearing be provided to rescind, alter or amend any order or decision of the Commission.

In City of Los Angeles v. Cal. P.U.C., (1975) 15 C.3d. 680, the court rejected the principles that a "... rate is a single set of unvarying charges, and that a hearing must occur before each variation in those charges". The court emphasized that due process requires hearings only at the "significant point" at which the adjustment clause underlying the variation in charges was at issue.

The issues presented in this case are similar in important respects to those presented in City of Los Angeles v. P.U.C. (supra). Motor transportation rates need not be considered a single set of unvarying charges, nor must a hearing be held prior to each variation in these rates. There are two significant points in proceedings as presented here to increase a Section 452 less than minimum rate to a level still less than or equal to the Commission published minimum. These are 1) the establishment of the Commission published minimum rates and 2) the issuance of authority to publish a rate less than minimum under Section 452. The requirements set forth in Section 454 and in CTA v. P.U.C. (supra) are fully satisfied through the opportunities provided all parties to be heard at both of these significant points. There is no further need or purpose to be served by requiring additional Commission review.

The authority to establish a lower rate has been generally restricted by an expiration date. The expiration date restriction has had primarily two effects. One effect has been that the rate can be reviewed periodically to test its profitability. A second

effect is that upon the expiration of a lowered rate the rate automatically reverts to the Commission's minimum rate without a showing of justification, unless the carrier seeks an extension of this lowered rate. This is proper because the Commission has found that the published minimum rate is just, reasonable and non-discriminatory.

Since no authority is required to increase a lowered rate up to the minimum rates, it can be seen that the only function of an expiration date on the lowered rate is to provide a mandatory review of its profitability.

In this regard, we note that the rates of a highway common carrier are subject to challenge by interested parties as being unreasonably low at any time. Procedures have been established for such challenges (e.g., G.O. 113). This being the case, we no longer deem it necessary to require carriers to file periodic requests to extend a Section 452 authority.

We also are aware of, and realize the need to discuss, the broader implications of granting authority for a common carrier to establish a rate less than the Commission's minimum rate tariffs. When a common carrier receives authority from the Commission and then publishes a rate less than minimum, that rate then becomes the minimum rate pursuant to Section 3663 of the Code. We will, therefore, require that other common carriers publishing a rate based on the Section 452 authority we have granted to a particular common carrier must make reference in their tariff publication to the decision that is the basis of their published rate. This will afford ample notice to anyone investigating the Commission authority authorizing publication of a particular rate.

Findings

1. The Commission has, after hearing, published Minimum Rate Tariff No. 2 which contains rates for the transportation of clay and related products between the points involved in this proceeding.

2. The Commission has previously granted authority to Big Pine to publish rates less than the published minimum rates.

3. Big Pine seeks to increase these rates, though to a level that would still be below the rates in Minimum Rate Tariff No. 2.

In the circumstances, the Commission concludes that:

1. When a common carrier has published a less than minimum rate under authority granted pursuant to Section 452 and increases such a rate to a level less than or equal to the Commission published minimum rate, the requirements of Section 454 of the Code are satisfied by the showing and finding made in the establishment or approval of the published minimum rate as well as the decision granting the original 452 authority.

2. The needs of commerce and the public interest require that the authority to publish rates less than minimum on clay and related articles from Laws, Keeler and Olancha to the Los Angeles area and Orange County be continued.

3. No further authority from the Commission is required to allow the published rates on alfalfa pellets from Cottonwood Canyon Ranch to be increased to the level of the present minimum rates.

4. No further authority from the Commission is required to allow the petitioner to publish increased rates, which increased rates are less than the minimum rates, on the transportation of clay and related articles between the points named herein.

O R D E R

IT IS ORDERED that:

1. Big Pine Trucking, Inc., is hereby authorized to publish and file rates for the transportation of clay and related articles, as set forth, and subject to the conditions specified, in Appendix A attached hereto and by this reference made a part hereof.

2. Tariff filings shall be made effective on not less than one day's notice to the Commission and to the public.

3. Big Pine Trucking Company, Inc., is authorized to depart from the provisions of Section 461.5 of the Public Utilities Code in establishing and maintaining the rates authorized herein. Schedules containing the rates published under this authority shall make reference to this order.

The effective date of this order is the date hereof.

Dated at San Francisco, California, this 3rd day of OCTOBER, 1978.

*I will file a dissent -
William Synars, Jr.*

Robert Bateman
President

Vernon L. Sturgeon
Richard D. Hoyle
Clair T. Debril
Commissioners

APPENDIX A
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Authorized Rates and Rules
Applicable Thereto

Application of Rates - Commodities

The rates herein set forth apply for the transportation of the following commodities when packed in bags and palletized:

Clay	Soapstone
Pyrophyllite	Talc
Silt (Soil)	Sand, including Silica Sand
Barytes	

Rates in Cents per 100 Pounds

<u>From</u>	<u>To</u>	<u>Rates</u>	<u>Minimum Weight in Pounds Per Shipment</u>
Keeler	Points within the Los Angeles	#55 ø57	40,000
Laws	Area as described below and	#55 ø57	40,000
Olancha	points intermediate thereto.	#55 ø57	40,000

Keeler	(#60 ø62	40,000
Laws	(Points in Orange County.	#60 ø62	40,000
Olancha	(#60 ø62	40,000

#Applicable only when shipment is loaded into carrier's equipment by the consignor, and when shipment is unloaded without expense to carrier by consignee with power equipment, provided that the shipping document indicates that the shipment was loaded by consignor and is to be unloaded by consignee under conditions described in this reference. Consignee shall certify unloading in accordance with instructions.

øApplicable only when shipment is loaded into carrier's equipment by the consignor, and when shipment is unloaded by consignee with the physical assistance of a single carrier employee (either driver or helper, subject to Note) by use of power equipment furnished by the consignee without expense to the carrier, provided the shipping document indicates that the shipment was loaded by consignor and is to be unloaded by consignee under circumstances outlined in this reference. Consignee shall certify unloading in accordance with instructions.

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APPENDIX A
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Note: The physical assistance to be provided by the single carrier employee shall be restricted to work within, on, or immediately adjacent to the carrier's equipment.

Los Angeles Area: The Los Angeles Area, as so designated in connection with the rates set forth above, shall include Los Angeles and ten (10) miles thereof, including Long Beach.

Shipments transported subject to the rates herein specified shall not be accorded privileges of split pickup or of split delivery.

Charges for transportation under the rates herein specified shall be assessed on gross weight of the shipment. No allowance shall be made for the weight of the bags and/or pallets.

(END OF APPENDIX A)

C.5432, Pet 1027, D.89497

Deviation Under P.U.Code § 452

COMMISSIONER WILLIAM SYMONS, JR., Dissenting

With the dismissal of Case No. 9963 last year, rough and reckless reregulation of trucking was to come to an end. A "new spirit" was proclaimed, which promised prior consultation with all affected parties and that future changes would be carefully made. Also promised to the truckers and the legislature was an end to the indiscriminate and unscrutinized granting of deviations.

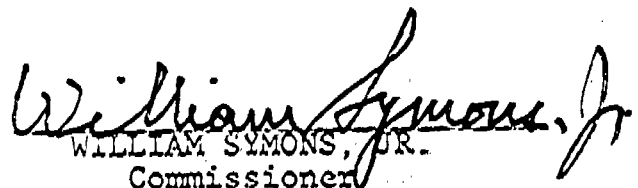
Today's order shows the Public Utilities Commission is back-sliding on that pledge. Deviations are the exception from the norm, and the applicant must establish by the evidence that he qualifies for the favored dispensation to charge less than his competitors are to charge.

Deviations for common carriers under PUC # 452 must be monitored even more closely. As today's decision correctly observes, granting a 452 deviation... "has the practical effect of amending the minimum rate". (Mimeo pg. 2).

It is not onerous to require that the possessor of a deviation authority justify its continuance on a yearly basis. In an era of 8% to 9% inflation to require otherwise would be lax.

At first glance, a deviation automatically continued one year to the next does not seem untoward. The same seems true for a deviation that is slightly adjusted upward. Yet, we must consider that the institution of loosely-monitored self-adjusting § 452 deviations, which the Commission majority establishes today, means more than that. It allows minimum rates to be set, not by the Commission, but by the deviator. If allowed to drift, the deviation can become quite distant in time from its original justification, and its basis lies in out-of-date evidence. Since § 452 deviations admittedly have the ... "practical effect of amending the minimum rate" they cannot be analogized to an insignificant status, as the Commission majority would have us believe. It is clear that § 452 and California Trucking Association v California Public Utilities Commission, (1976) 19 c. 3d. 240 require a hearing. Nor do those who refer to "the complaint procedure" offer a viable institutional answer to this problem. Under the complaint procedure, it seems apparent to me, the burden of coming forward with evidence shifts to the protestant. Since the deviator, not the protestant, is alone privy to the facts which do or do not justify the deviation, such a shift in the burden of proof stifles any hope of effective scrutiny of deviations.

San Francisco, California
October 3, 1978


WILLIAM SYMONS, JR.
Commissioner