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Decision No. 91861 JUN 3 1980

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 petroleum and petroleum products in bulk, in tank truck equipment statewide as provided in Minimum Rate Tariff 6-B and the revisions or reissues thereof.	Case No. 5436 Order Setting Hearing 244
And Related Matters.	Case No. 5432 Order Setting Hearing 960 Case No. 6008 Order Setting Hearing 36

(See Decision No. 90354 for appearances.)

Additional Appearances

Handler, Baker, Greene and Taylor, by Marvin Handler and Raymond A. Greene, Jr., Attorneys at Law, for Sheldon Oil Company and twenty-five other motor carriers; and Loughran and Hegarty, by Thomas M. Loughran, Attorney at Law, for Jet Delivery, Inc. and four other highway carriers; respondents.

William Haerle and Richard W. Smith, Attorneys at Law, for California Trucking Association; Graham and James, by David Marchant, Attorney at Law, for California Carriers Association; Norman I. Molaug, for J. C. Penney Company; James D. Martens, for California Dump Truck Owners Association; and Frank Spellman and Phillip K. Davies, for themselves; interested parties.

James J. Cherry and Ellen LeVine, Attorneys at Law, for the Commission staff.

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OPINION AFTER FURTHER HEARING

On May 22, 1979 the Commission issued Decision No. 90354 in Case No. 5436, OSH 244 (and related matters) canceling minimum rate regulation of tank and vacuum truck transportation and establishing a new regulatory program of more competitive individual carrier-filed rates. Minimum rates on this transportation were to be canceled and the new competitive program implemented through a transition period beginning April 30, 1980. The California Trucking Association (CTA) subsequently filed suit in the United States District Court to enjoin the Commission from proceeding with these changes in motor carrier regulation. In its complaint CTA alleged that the Commission had denied it procedural due process by relying upon historical writings which were not introduced into the record and by incorporating the testimony of three economists CTA had cross-examined in a prior Commission proceeding without affording CTA the opportunity to cross-examine them or rebut their testimony in the present proceeding. On November 16, 1979 the Court issued a verbal order granting the injunction. A written order followed January 16, 1980 permanently enjoining the Commission from giving any force or effect to Decision No. 90354.

Although we took exception to the Court's holding and have filed an appeal with the United States Court of Appeals, we also immediately undertook to remedy the alleged procedural deficiencies underlying the Court's action. Case No. 5436, OSH 244 was reopened by Decisions Nos. 91063 and 91284 for further hearings to permit CTA to cross-examine and rebut the testimony previously provided by the three economists: Thomas Gale Moore, Michael Conant, and Peter Max. In addition, the Commission provided all tank and vacuum truck carriers additional notice and an additional opportunity to be heard with regard to the regulatory reforms set forth in Decision No. 90354.

Hearings in this reopened proceeding were concluded and the case submitted for decision upon the filing of closing briefs April 29, 1980. The historical writings referred to in Decision No. 90354 and in the District Court's Findings of Fact and Conclusions of Law were not incorporated into the record and will not be considered in reaching a decision in this case. The prior testimony of Peter Max was not incorporated into the record after we reopened this proceeding, nor was he recalled for cross-examination. His testimony has accordingly been stricken from the record and will not be considered. The prior testimony and cross-examination of Thomas Gale Moore and Michael Conant in Case No. 5436, Petition 194 was properly incorporated into this record and these witnesses were recalled for further cross-examination following our decision reopening this proceeding. Only their testimony and cross-examination, the rebuttal of CTA and other witnesses introduced in these proceedings following reopening, and the evidence introduced in our original hearings in Case No. 5436, OSH 244 with which the District Court found no fault have been considered in reaching this decision. This decision, based upon the full record in Case No. 5436, OSH 244, supersedes Decision No. 90354.

Summary of Evidence

Commission Staff

In the original hearings in this proceeding the Commission staff presented a policy statement recommending elimination of minimum rate regulation and summarizing reasons justifying its recommendations. The staff observed that minimum rate regulation was designed to meet the economic conditions of the 1930s, and proceeded to illustrate the inadequacy of the system to meet the needs of the 1980s.

Although the original intent was only to set true minimum rates, the Commission-established minimum rates have become standard or prevailing rates for the trucking industry. This effect has been the result of a combination of factors. Neither the Commission nor the staff has ever been able to develop any standards for productivity or efficiency. As a result, cost studies reflect not the cost of the most efficient carriers as originally anticipated, but rather the costs of a simple sample of carriers. Equally problematic is the difficulty of conducting and timely completing the cost and rate studies necessary to establish and maintain the minimum rate system. During periods of rapidly increasing costs, such as we have experienced in recent years, these studies are typically several years out of date by the time they are completed. Between full scale studies the Commission has resorted to abbreviated cost offset procedures by which rates are increased to reflect increased costs without any analysis of current transportation circumstances. Even if studies could be adequately conducted and completed in a timely fashion, however, the minimum rate system would have serious deficiencies. The system is premised on the assumption that all carriers will have the same approximate costs, traffic flow, and traffic mix as the study group. This fundamental assumption is in error. Some carriers enjoy high-load factors; others have low-load factors. Some haul in areas of the State where costs are high and others where costs are low. Traffic flow and traffic mix for individual carriers are more likely to differ from the sample group than they are to resemble them.

In lieu of the present system of minimum rate regulation, the staff recommended that carriers file their own rates subject

to continued Commission supervision and review. A series of seven exhibits were offered detailing the proposed program. This carrier-filed rate proposal would, in the staff's opinion, have the following advantages:

> "Individual carriers could establish rates tailored to their own operations, responsive to demands for their services and to the quality of services for which shippers would be willing to pay. Carriers could respond more quickly to changes in economic conditions, traffic patterns and shipping practices, and to compete more effectively with proprietary operations. The program would allow greater flexibility in the rate structure, encourage innovative rate making and provide incentives for improving carrier efficiency and productivity. In effect, the program would define a minimum rate as the lowest just and reasonable 'going' rate for specific transportation circumstances." (Exhibit 244-1, p. 13.)

In Decision No. 90354 the Commission initially adopted a carrier-filed rate program similar to that proposed by the staff.[1/] The staff subsequently supported the program outlined in Decision No. 90354 in the reopened hearings, but recommended one modification designed to insure equal competitive opportunity among carrier classes.

> "Because of the potential problem that certain common carrier rate filings may not become effective as quickly as contract carrier filings, staff recommends that, in order to equalize the competitive opportunities of common and contract carriers, that the following modification of the Commission program be adopted: Any rate change by a contract carrier which results in a charge lower than his existing rate and lower than a competitor's rate, must be filed

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1/ A copy of the program outlined in Decision No. 90354 is attached hereto as Appendix A.

> with the Commission on 30 days' notice. This will eliminate any potential disparity between common and contract carriers in giving notice to reduce rates to acquire business. It will also allow a protesting carrier sufficient opportunity to file a protest if he so desires." (Staff concurrent brief, p. 14.)

Economists Moore and Conant

Although Thomas Gale Moore and Michael Conant were originally called by the California Attorney General in Case No. 5436, Petition 194, they were recalled in the reopened hearings herein by the Commission staff. Both presented the same prepared testimony as was presented in Case No. 5436, Petition 194 (Exhibits 244-32 and 34, respectively). Also admitted into evidence were exhibits containing the extensive cross-examination of these witnesses in the prior proceeding (Exhibits 244-33 and 36).

Testifying on the basis of his extensive studies of motor transportation both in this country and abroad, Moore noted that in all studies of regulated versus unregulated carriage, regulated rates were found considerably higher than unregulated rates. A series of court decisions in the 1950s exempting fresh-dressed poultry, frozen poultry, and frozen fruits and vegetables from Interstate Commerce Commission (ICC) rate regulation provided an opportunity to determine the effects of price competition upon motor carrier rates. Subsequent studies indicated that rates for fresh-dressed poultry fell an average of 33 percent, frozen poultry fell 26 percent, and rates for frozen fruits and vegetables declined 19 percent. In a separate study conducted by the National Broiler Council rates for transportation of ICC regulated cooked poultry were compared with those for ICC exempt fresh poultry. Rates were found to be 33 percent lower on the unregulated fresh poultry.

Although rates declined, service was found to have improved under rate deregulation. Service options were expanded, in-transit time was reduced, and schedules and routes were better adapted to meet the needs of shippers.

Moore also noted that trucking has flourished without rate regulation in a variety of industrialized nations including Great Britain. He found Britain to be of particular note. When rates fell in Britain as a result of liberalized regulation, profits were not adversely affected. The resulting competition led to increased carrier efficiency allowing rates to decline without affecting industry profits.

The elimination of minimum rate regulation would in Moore's opinion produce the same effect in California. The unavailability of price competition under the minimum rate system has produced excess service competition inflating carrier's costs and reducing their profits. The elimination of this excess service competition would in Moore's opinion be the natural result of increased price competition.

Primarily upon the basis of the evidence we have summarized, Moore concluded that competition in the trucking industry can provide substantial benefits to the public without harming the industry.

Although Conant has had only limited experience with motor transportation regulation, he provided a general critique of motor carrier regulation upon the basis of general economic theory, a survey of relevant academic literature, and his experience with other modes of regulated transportation. In his opinion there is no justification for regulating trucking as though it were a monopoly. In his opinion the industry is inherently competitive and would be better left competitive. Conant responded in some

detail to the more frequently encountered arguments made in favor of continuing minimum rate regulation:

> "Arguments of the motor carriers who profit from minimum rate regulation are obviously self-serving. They are designed to extend their protection against free competitive enterprise. Among their leading arguments are that regulation:
>
> "1) Prevents destructive or ruinous competition;
>
> "2) Results in better service; and
>
> "3) Enables cross-subsidization of net loss services.
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> "The motor carriers and other regulated firms who benefit from minimum price regulation use 'destructive competition' and 'ruinous competition' to describe what other persons call competition. Human selfishness provokes members of any monopolistic cartel to oppose free competitive enterprise for themselves but, of course, favor it for those who sell them inputs. If food stores or clothing stores, who like truckers supply essential marketing services, organized cartels similar to the American Trucking Association and demanded government minimum price legislation to reinforce monopoly pricing, truckers and Teamsters would surely oppose it as exploitive of all consumers. Yet motor carriers

say they should be relieved of meeting effective competition because they label it destructive and a jungle. There is no evidence to support motor carrier allegations that effective competition would result in most firms selling below average total costs for long periods and then leaving the industry. If the 15 to 20 percent of firms which leave the California motor carrier industry every year were not replaced by others in just one year, there would be a great reduction in the excess capacity which has been provoked by minimum rate regulation. Under effective competition, prices in other industries tend toward levels which cover average cost plus a market return on investment. There is no reason to believe they would not do so in trucking. The destructive or ruinous competition defense has been rejected as false in antitrust cases since the opinion of Judge Taft in United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), aff'd 175 U.S. 211 (1899).

"As noted in American Trucking Trends, operating ratios of common carriers in regulated motor carriage have been over 94 percent in recent years. This figure is a reasonable estimate of the percentage of costs which are variable with output. No reasonable person would knowingly price below variable cost except in the extremely rare instance when he estimated he could be a successful predator. Consequently, an effectively competitive motor carrier industry may reduce its excess capacity by prices temporarily falling a few percentage points below total costs. But as soon as the weakest firms left the industry, rates should again rise to cover total cost including a market rate of return on investment.

"Another aspect of the 'destructive competition' which is also false is that effective competition will seriously impair the ability of motor carriers to secure capital. The case of entry into trucking and the capital supply to other competitive industries demonstrate the falsity. Entry into the trucking industry by the owner of one truck means that capital does not have to be secured in large amounts in order to be a trucker. Equity capital is necessary to the extent of the down payment needed for one truck. Numerous

financial institutions are available to supply the loan for the remainder of the cost. Furthermore, the argument that firms in effective competition, such as food stores, cannot readily secure capital is false. The small store is financed by family savings as would the owner of one truck. The larger national firms are financed on the national securities exchanges, whether they be food retailers or motor carriers.

"The argument that minimum rate regulation results in better service has not been proven. Minimum rate regulation may attract excess capacity into the industry so that there are a substantial minority of truckers without enough business to occupy their equipment. But there is no evidence that available idle equipment means better service in the industry. Under effective competition, there is an incentive for all existing firms to compete on the basis of service as well as price. The firm offering inferior service should expect to lose customers and fail. The large number of firms in trucking and the ease of entry should assure that, in any geographical area where it is profitable to run a truck, one will be run. Thus, there will be service to all small towns where it is profitable to engage in trucking.

"The cross-subsidization argument is that common carriers must have minimum rate regulation in order to make extra profits on high-traffic routes or services so they can subsidize net loss operations on light-traffic routes or services. Posner labels this Taxation by Regulation in 2 Bell J. Econ. & Mgmnt. Sci. 22 (1971). The proposition says that shippers in rural areas or small towns or with small shipments should receive transport service at rates below the cost of serving them and that other shippers should pay monopoly rates to subsidize them. The equal rate rule for shippers in all locations and of all size shipments is truly a legal enforcement of discriminatory rates. Differences in rates reflecting differences in cost are not allowed. The effect is great misallocation of resources as firms enter business

to try to serve the high traffic routes whose rates are above competitive levels. The rate structure of the whole industry is raised in order to subsidize a minority of shippers. Ultimately, the public pays the bills. If state legislatures were asked instead to levy taxes in order to pay cash subsidies to these shippers, it is very likely the Legislature would reject this as an unworthy social service. Internal cross-subsidization imposed by statute was a major cause of railroad bankruptcy in the Northeast. Regulatory agencies are coming to realize that it is not a useful public policy.

"VII. Predatory Pricing

"The Commission has indicated in some of its recent decisions that the purpose of minimum rates is to prevent predatory pricing. The argument that without minimum rate regulation there would be predatory pricing in this industry of inherently competitive structure is just false. Predatory pricing is the case where a firm, usually a dominant one, holds prices below cost for a long period in order to drive rivals out of a market and subsequently raises prices to monopoly levels. There are few confirmed instances of this, even by dominant firms, because it is so costly. The predator incurs a present and substantial loss for gains that are not only deferred but are likely to be temporary. In an industry with low costs of entry, as soon as the new monopoly price is set, new entry is attracted. Consequently, firms in an industry like motor carriers should easily anticipate that predatory price cutting cannot be a profitable venture." (Exhibit 244-34, pp. 10-14.)

CTA's cross-examination of Conant and Moore in this proceeding did not differ significantly from their cross-examination in Case No. 5436, Petition 194. Neither Conant nor Moore conducted any detailed study of regulated petroleum transportation in California, but both explained that their testimony was based upon general economic principles and experience with regulation in other jurisdictions. Although both favored complete economic deregulation of the trucking industry, both testified that given laws requiring rate regulation it would be preferable to have a system of carrier-set rates subject to regulatory approval than to continue mandatory state-set minimum rates. Both admitted that ideally all carriers should be permitted to operate under the same rules and responsibilities, but remained firm in their opinion that differences in carrier classes provide no justification for continuing minimum rate regulation.

California Manufacturers Association

The California Manufacturers Association (CMA) supported in principal the substitution of shipper-carrier negotiated rates in lieu of Commission's set minimum rates. CMA's position was presented by Richard N. Bona, Regional Traffic Manager for Mobil Oil (Mobil). Mr. Bona also testified on behalf of Mobil. CMA and Mobil recommended that petroleum irregular route carriers (PIRs) and common carriers of petroleum products in bulk in tank trucks continue to establish, publish, and file tariffs with the Commission setting forth their rates and charges for transportation of bulk petroleum products. They recommended that petroleum contract carriers be authorized to establish, publish, and file rate schedules stating their rates for shippers of petroleum in bulk. These rates should be both maximum and minimum rates for the named shippers. CMA and

Mobil further recommended that minimum rates be phased out gradually, and that commodities presently exempt from rate regulation continue exempt. In the reopened hearings CMA supported the regulatory reforms outlined in Decision No. 90354. (See CMA's brief.)

Teamsters Union

The Teamsters Union (Teamsters) opposed reregulation in any form. They expressed considerable opposition to the Commission staff's original recommendation. They felt it would be disastrous to the tank truck industry and to the Teamsters membership working in the industry. They felt it would produce cutthroat competition and would force legitimate operators into the untenable position of competing with individual owner-operators and "fly-by-night" operators that drive unsafe equipment and violate operating-hour limitations and other regulations. If, however, the Commission were to adopt some form of carrier-filed rate system in lieu of the present minimum rate program, Teamsters urged that the wage component of any rate justification be required to equal or exceed the prevailing wage, inclusive of fringe benefits, as determined by the California Department of Industrial Relations according to California Labor Code Sections 1720, et seq.

CTA

In the original hearings in this proceeding CTA sought to defend the present minimum rate system of regulation and criticized the Commission staff's proposed carrier-filed rate alternative. CTA expressed the opinion that adequate price competition exists under present regulation. Competition particularly with proprietary carriage has had a substantial impact on regulated for-hire carriers and has allegedly ensured low rate structures. CTA also claims that innovative ratemaking is commonplace and cited Commission-established commodity and volume incentive rates as examples.

Present regulation was also defended by reference to the high level of service competition evidenced by the virtual absence of service-related complaints. CTA argued in summary that the present system should not be changed merely to relieve the Commission staff of the difficulties experienced in administering the minimum rate program.

CTA criticized the carrier-filed rate program proposed by the staff on a number of grounds. Common carriers would allegedly be disadvantaged under the staff's proposal. CTA believed that common carriers which are required by law to provide nondiscriminatory public utility service will not be able to compete with contract carriers, which CTA observed are free to limit their service to selected shippers. The staff's recommendation to exempt presently existing rate exempt transportation from rate regulation under their new program was questioned by CTA. CTA maintained that the present exemptions from minimum rate regulation exist only because of the minimum rate system and argued that should the Commission decide to cancel minimum rates, these exemptions should be canceled along with them. CTA joined Teamsters in advocating the use of a prevailing wage standard for use in evaluating the reasonableness of carrier-filed rates in the event the Commission adopts such a program.

In the reopened hearings CTA dropped its defense of minimum rates and focused instead on the details of the regulatory reform program outlined in Decision No. 90354. CTA's primary contention in this latter phase of the proceeding was that the program contained in Decision No. 90354 unfairly disadvantages common carriers and concomitantly unfairly advantages contract carriers. In support of this position CTA offered the testimony of four economists, a transportation consultant, a tariff publishing agent, three bankers, four CTA staff members, and six highway carriers. The differences

in regulatory treatment of these carrier classes were summarized by CTA in Exhibit 42 as follows:

1. The Commission's program requires thirty days' public notice for rate changes filed by common carriers. The same Commission program provides that changes in contract carrier rates may be made effective on the date filed.

2. Rate changes filed by common carriers must be justified: that is, they must be accompanied by an evidentiary showing, and the Commission must make a specific finding that such changes are justified. Rate changes filed by contract carriers require no justification by the carrier unless forced to respond in a complaint or investigation proceeding.

3. The burden of proving rates reasonable is on the common carrier when it changes its provisions. In connection with contract carrier rate changes, the burden of proof rests with protestant or complainant.

4. So-called traditional common carriers (those who were certificated pursuant to Section 1063 of the Public Utilities Code) will continue to bear full responsibilities of service and non-discrimination with respect to the entire scope of their operating certificates. Common carriers who received their operating authority pursuant to Section 1063.5 will be able to unilaterally determine the scope of their operations, expanding or contracting them at will.

5. Common carrier tariffs must be filed to meet strict technical requirements which provide an intelligible and uniform format for ready reference and use. Tariffs not meeting such requirements are rejected by the Commission. Contract carriers are held to sketchy requirements as to terms of the contracts under which they operate. There is no uniform order or arrangement prescribed.

6. Common carrier tariffs must be maintained open for public inspection at each carrier's terminal facility and such tariffs must be furnished to persons willing to pay reasonable subscription fees. Contract carrier rates are filed only with the Commission and there is no requirement that copies of contracts be furnished to any other party.

7. A common carrier cannot raise its rates - including rates which have been previously reduced to meet a competitor - without a full evidentiary showing and a finding by the Commission that the increase is justified. A contract carrier may raise its rates merely by filing an increased schedule with the Commission.

8. A common carrier is prohibited from discriminating in its rate structure. If competition compels it to extend a reduced rate to one shipper, any prejudiced shipper must also receive a commensurate rate reduction. A contract carrier is under no similar prohibitions and may establish discriminatory rates even between similarly located competing shippers.

9. A common carrier cannot file rates which violate so-called long- and short-haul provisions of the Constitution and statutes. Any rate reduction made at one end of its line must apply to all intermediate points. A contract carrier may assess higher rates to intermediate points or may reduce rates to heavily traveled termini without reducing rates at intermediate locations.

10. The common carrier is required to file copies of annual reports with the Public Utilities Commission and it must maintain its books and records in accordance with a detailed, prescribed Uniform System of Accounts. In addition, if the common carrier has annual gross operating revenues of $200,000 or more, it must file with the PUC a copy of each financial statement prepared in the normal course of business, whether monthly or for other definite periods. A contract carrier is required to file no financial statements with the PUC.

11. A common carrier may not dispose of, or encumber its property without the prior specific approval of the Public Utilities Commission. A contract carrier is under no constraint concerning the sale or encumbrance of its property. (Exhibit 244-42, pp. 4-7.)

CTA contended that contract carriers have historically been viewed as an extension of private carrier operations and as a consequence have, by a variety of means, been prohibited from competing directly with public utility common carriers. Contract carriers have, for example, never been allowed to solicit freight from the public generally. CTA contended that minimum rates are another example of the regulatory protection afforded common carriers. To ensure that common carriers are adequately protected under any form of reregulation, CTA proposed that contract carriers be made subject to additional restrictions including pricing terms and conditions parallel to those under which common carriers must operate. CTA proposed two series of recommendations designed to accomplish this result. The first assumes a policy decision is made that common carriers of petroleum products are no longer necessary, and the second that the public interest is found to still require maintenance of a viable common carrier system.

If the common carrier is no longer required as a matter of public policy, CTA recommends that the Commission should sponsor legislation to accomplish the following:

1. Amend the Constitution of the State of California to remove references to transportation of property by transportation companies. Such deletions should include all current prohibitions against discrimination and the assessment of unreasonable or excessive charges; all current provisions which compel a decision by the Commission after a showing in connection with increased rates; and all provisions which preclude assessment of higher rates for a shorter than for a longer distance over the same line or route, or which preclude the assessment of charges resulting in greater compensation as a through rate than the aggregate of intermediate rates; and such other deletions as are necessary and consistent with Items 2 and 3, below.

2. Amend the Public Utilities Code, Division 1, to remove all reference to "common carriers" and to delete or change all provisions therein which regulate common carriers as public utilities.

3. Amend the Public Utilities Code, Division 2, as necessary, to remove all references to common carriers and such other carriers as deemed necessary, and to establish such new class or classes of carriers as will enable competing carriers to have equal competitive opportunities.

The specific method of implementing these recommendations with respect to tank truck operators, as set out in the testimony of Witness Broberg, is for the Commission to support SB 1886 (Senator Rains) which would create and define a class of permit carrier designated as "tank truck carrier" and would delete the categories of petroleum irregular route carrier and petroleum contract carrier from the Public Utilities Code.

On April 2, 1980, the Commission voted to support this measure.[2/] The bill was amended in the Senate on April 16, 1980 to include vacuum truck carriers.

2/ The letter to the author of the bill (Senator Rains) informing him of Commission support for bill stated as follows:

"The Commission considered your SB 1886 at its Conference of April 2, 1980, and voted 4-0 to support the measure.

"SB 1886 would eliminate the existing categories of petroleum irregular route carrier and petroleum contract carrier and create a new class of permit carriers designated as tank truck carriers. The Commission's support of this measure is based on the assumption that all current petroleum carriers will be required to convert their operating authorities to the new tank truck permit. The bill however, does not yet include a provision requiring existing petroleum irregular route carriers and petroleum contract carriers that intend to continue their operations to obtain a tank truck carrier permit."

The requirements of SB 1886 apply to tank truck and vacuum truck carriers irrespective of the commodity transported. Thus the provisions apply to petroleum products in tank trucks for which minimum rates have been established, and to other fluid commodities in tank trucks for which no minimum rates are established. SB 1886, if adopted, would substantially accomplish CTA's first series of recommendations with respect to common carriers engaged in operation of tank trucks or vacuum trucks, the types of carrier operations involved in this proceeding.

If it is decided that the public interest requires continued maintenance of a viable common carrier system, CTA recommends the following changes to ensure common carriers an equal opportunity to compete and to earn a reasonable return on investment:

1. The Commission should redefine "contract carrier" in such a manner that neither encourages nor allows a general holding out to the public. In this connection it should establish reasonable standards as to maximum numbers of shippers with whom such carriers may contract before there attaches a prima facie presumption of holding-out requiring a common carrier certificate. Such maximum number should probably not exceed ten shippers. It should also rescind its "specialized" contract carrier concept.

2. The Commission should require that all common carriers holding certificates, whether issued pursuant to Section 1063 or 1063.5 of the Public Utilities Code, be held to the same historical standards of service to the public.

3. The Commission should establish requirements for written contracts and related rules and regulations pertaining thereto, and it should then compel adherence to such requirements by all contract carriers, irrespective of commodity transported or geographical area served.

4. The Commission should require that changes in contract carrier rates be made effective on no less public notice than that required for common carrier rate changes.

5. The Commission should require that its historical interpretations of Sections 452, 454, and 455 of the Public Utilities Code be observed with respect to common carrier rate changes. It should not allow common carriers to meet rates of contract carrier competition without specific showings and findings as required by such provisions.

6. The Commission should require that contract carriers who wish to increase or reduce rates be required to submit operational and cost justifications for such changes, bearing the burden of proving such rates reasonable in the case of complaints or petitions for suspension and investigation.

7. The Commission should defer the cancellation of minimum rates for approximately two years, or until carriers have had approximately two years' experience with individual or bureau or agent tariff filings as required by certificates issued pursuant to Section 1063.5 of the Public Utilities Code and only after the future ability of carriers to engage in collective ratemaking without Sherman Act jeopardy has been assured.

8. The Commission should scrap its Transition Tariff concept since such a tariff will be unnecessary under Item 7.

9. The Commission should encourage a friendly test of the lawfulness of its prevailing wage concept and, if lawful, should make such changes as will truly assure that all filed rates do, in fact, always reflect prevailing wage levels.

10. The Commission should make such other amendments to or changes in its regulations as are necessary to ensure equal competitive opportunity consistent with the maintenance of a viable common carrier system in the State of California. Such equal competitive opportunity under a carrier-made rate environment should be assured to the same extent that minimum rates have assured such equal opportunities historically.

    Specific recommendations embraced under this heading are:

    (a) Expand the financial information required to be reported to the Commission by highway carriers so that competitors would not have to resort to discovery procedures to obtain financial data pertinent to the support or opposition of rate changes.

    (b) Cancel unlimited cross-subhauling approved in Decision No. 91347 in Case No. 10278 and limit subhauling to carriers holding the same type of operative authority as the overlying carrier for whom the subhauling service is performed.

11. To the extent necessary, the Commission should sponsor legislation to enable it to lawfully pursue the matters and the purposes indicated above.

The economists offered by CTA, Martin Farris, John Carter, Michael Boskin, and Garland Chow, expressed concern that free market rate competition may disadvantage common carriers to the extent such carriers are more constrained in their operations by regulation than other classes of carriers. While all agreed that any competitive regulatory program must recognize the relative ability of common and contract carriers to compete, three of the four had not read Decision No. 90354 and were thus not prepared to comment on the impacts of the program outlined therein. None had conducted or relied upon any study of the California tank truck industry, and with the exception of Chow, they were unfamiliar with the minimum rate system. Chow provided the most comprehensive and specific testimony of the four economists offered by CTA, and appeared to have provided the testimony upon which CTA's policy recommendations were based. In Exhibit 65, Chow reached the following conclusions:

1. The conclusions reached by Dr. Moore on regulation of motor carriers in Europe are based on faulty data or inaccurate correlation of data.

2. The conclusions of Dr. Moore that motor rates are lower in Canadian jurisdictions where such rates are not regulated should be qualified, inasmuch as no consideration was given in the development of the basic data relied upon by Dr. Moore to the different characteristics of the traffic in each province.

3. The level of motor carrier rates in any country, state, or other jurisdiction involves factors other than economic regulation, such as social and political considerations.

4. The Bruce Allen study of unregulated trucking in New Jersey fails in its ultimate objective of determining the impact of regulation on trucking.

5. Without a statement of goals, there are no criteria for measuring and evaluating any changes in regulatory changes that are beneficial to the public.

6. Highway common carriers will be at a competitive disadvantage against less regulated competitors under the reregulation program adopted in Decision No. 90354.

7. There is cross-subsidization of less truckload traffic by truckload traffic under the present minimum rate structure because of the manner in which joint costs are allocated between such classes of traffic. If each class of traffic returns the costs associated with that class, there will be less cross-subsidization; thus, truckload rates would tend to decrease and less truckload rates would tend to increase. More competition will exist in the truckload area because proportionately fewer capital goods are necessary to perform that type of transportation as compared to less truckload transportation.

8. In general, truckload carriers exhibit fewer of the characteristics of an industry which requires regulation than less truckload carriers (TR 2893).

Farris, Boskin, and Carter agreed with Chow in some respects, but went further than Chow to support competition in the motor carrier industry. These three favored a more competitive regulatory environment which affords motor carriers price and service flexibility essentially similar to that advocated by Moore and Conant. Boskin cited several benefits of enhanced competition which parallel those referred to by Moore and Conant. These include lower prices for shipping freight which in turn would lead to lower prices or lower costs of production, and transportation rates which more accurately reflect route by route and item by item the actual cost of providing the transportation.

The representatives of three banks operating in California familiar with motor carrier financing were called by CTA. These representatives, Edward Eyre, John Frey, and John Jalonen, indicated that motor carriers obtain most of their financing through bank loans since there is no ready market for equity issues of most motor carriers. They also indicated that any instability in the industry which may result from regulatory changes under review in this proceeding would cause lenders to more closely scrutinize financing applications and more closely monitor ongoing financial relationships with California motor carriers. However, none of the bankers was familiar enough with Decision No. 90354 or the Commission staff's recommendation to comment with regard to the specific impact of these possible changes on carrier financing.

CTA's legislative advocate, a former deputy commissioner of the California Highway Patrol, indicated that he believes the Highway Patrol does not have sufficient personnel to periodically inspect all for-hire carrier trucking equipment and that as a result, the maintenance and safety of equipment is largely left to the individual carriers. This witness also expressed the opinion that

any reduction in carrier profitability would probably cause carriers to spend less on equipment maintenance and repairs, thus reducing the safety of carrier operations.

CTA also prepared two exhibits, 244-58 and 244-59, which purport to show the relationship between transportation costs and retail selling price for various consumer products, none of which are subject to this proceeding. The exhibits show, however, that when only the cost of transportation of the described items from distribution points to the location of final sale is considered, transportation costs represent a relatively small percentage of the product price. The costs of transporting raw materials to the point of manufacture and the finished, packaged product to distribution points would increase this percentage.

Carrier and Shipper Witnesses

Robert Hildreth appeared on behalf of ACME Transportation (ACME) both in the original hearings and in the reopened hearings. ACME is a tank truck carrier and has been in business in California over 40 years with yearly revenues of about $5 million. Hildreth pointed out that tank truck transportation is a highly specialized business requiring special equipment and special training in order to meet required safety standards. He stated that shippers have individual requirements that vary widely. ACME is primarily in the business of transporting commodities exempt from Commission minimum rate regulation. He testified that shippers and carriers have benefitted from the economy, flexibility, and responsiveness that rate exemption has allowed. There is ample competition in this type of transportation and the carriers involved have been stable and sound. The transportation of petroleum has by contrast been subject to Commission minimum rates and the results, according to Hildreth, have been unfortunate. Regulatory lag in offsetting cost

increases has severely damaged carrier profits and inflexible tariffs have caused shippers to ship much of their products by their own trucks in proprietary operations. In the original hearings ACME expressed its concern that rate-exempt transportation continue rate exempt, and that no tariffs be required for this transportation. ACME's principal regulated tank truck movement is gasoline which the company transports as a petroleum irregular route carrier under volume tender rates at the Minimum Rate Tariff 6-B (MRT 6-B) level. In the reopened hearings Hildreth objected to that feature of the program outlined in Decision No. 90354 which would permit contract carriers to raise or lower rates after the transition period on one day's notice. Hildreth thinks he could not compete as a petroleum irregular route carrier without the same freedom to change rates afforded petroleum contract carriers.

Hugh Cook testified on behalf of the Wine Institute. The Wine Institute was established in 1934 and is a trade association financed by California wineries. It is nonprofit and is composed of 370 companies operating 382 bonded wineries. The membership of the Wine Institute accounts for approximately 71 percent of all wine produced in California. Wine Institute members ship 175 million gallons of wine, brandy, wine spirits, and grape concentrate each year in bulk between California points by for-hire carriers. That figure does not include the tonnage hauled by proprietary carriage. This transportation is presently exempt from minimum rate regulation. (See Item 41 in MRT 2.) Wine Institute's primary concern in these proceedings is to make sure that this transportation continues exempt from minimum rates. Wine Institute members have found that there is no substantial disparity between the rates offered different shippers, and the rate levels which have emerged in this relatively

free market are acceptable to both Wine Institute members and the public carriers. Most of the carriers used have been in business a substantial period of time and continue to seek out wine traffic because they find the business profitable. Wine Institute's position is that wine is generally considered to be an agricultural commodity and the present exemption is entirely consistent with the legislative mandate embodied in Section 3661 of the Code which directs the Commission to adopt rate policies which will promote the freedom of movement of agricultural products. To the knowledge of Mr. Cook, all the parties involved in the transportation of bulk wine, be they shippers or carriers, are entirely satisfied with the present minimum rate exemption and transportation conditions.

Ken Anderson appeared for Cherokee Freight Lines (Cherokee) which operates as a radial highway common carrier and as a highway contract carrier throughout the State. Cherokee specializes in the transportation of bulk commodities both liquid and dry. Approximately 88 percent of Cherokee's income is earned from the transportation of exempt bulk liquid commodities. A substantial portion of this is earned from the transportation of bulk wine and winery products. Cherokee is the largest hauler of bulk wine products in California. Cherokee's position in these proceedings, which parallels that of Wine Institute, is that those commodities are now exempt from minimum rate regulation and should remain exempt under any reregulation plan.

Mr. Roland Ernst, president of Oilfields Trucking Company (Oilfields), testified on behalf of his company. Oilfields operates pursuant to a California intrastate petroleum irregular route certificate and a radial highway common carrier permit and also under interstate and foreign commerce subject to certificates from the Interstate Commerce Commission. It claims to have the largest California intrastate tank truck revenues of any petroleum carrier in California. It transports various types of petroleum products in California, Arizona, and Utah. All service is performed in tank vehicles and 90 percent of the gross revenues are from California intrastate operations. This transportation is generally under a

tariff filed by Western Motor Tariff Bureau, Inc. and at rates substantially the same as MRT 6-B. About 9 percent of Oilfield's transportation is performed under its radial highway common carrier permit and consists of transportation of bulk commodities exempt from Commission minimum rates. Oilfields expects to continue this exempt transportation under a highway contract carrier permit granted pursuant to SB 860. Oilfields is a union carrier and is unable under its present contracts to achieve any flexibility in its labor costs. Oilfields' position is that if the Commission undertakes to abandon rate regulation as proposed by the staff, Oilfields will have no alternative but to suspend the renewal of its volume tender agreements which represent approximately two-thirds of its traffic. It claims this would result in layoffs of personnel. The result, according to Oilfields, would be the purchase of equipment from union carriers by one-truck operators who would then undertake and perform one-truck service or lease their equipment to nonunion carriers.

Mr. Arvel G. Batchelor, president, appeared for Allyn Transportation Company (Allyn). Allyn is primarily a California carrier operating pursuant to a petroleum irregular route certificate and radial highway common carrier and contract carrier permits. In 1977 its gross revenue was $5,800,000, 89 percent of which was intrastate California. It operates a diversified truck fleet consisting of tank vehicles of all varieties, high cube bulk hoppers, and flatbeds. With the exception of all management employees, all employees are covered by union contracts. Eleven percent of its revenues come from interstate service and Nevada intrastate, 20 percent of its revenues are from petroleum tank truck operations, and 30 percent from California exempt tank truck operations. The remainder represents hopper and flatbed transportation. Allyn is a specialized carrier providing specialized services to its many shippers. It prides itself on its driver training and safety programs as well as

hazardous materials handling. Allyn supports the Commission staff's proposal for carrier-made rates on petroleum products, and the continuation of rate exemptions on currently exempt commodities. It does, however, have four concerns about such a program. These are: (1) expense of the carriers for individually developing costs and rates traditionally covered by minimum rates; (2) the cost of preparing and publishing the individual tariffs and revisions thereof; (3) the ability of the Commission staff to determine if the carrier-filed rate is reasonable since potential protesting carriers will not, except at prohibitive expense, have the ability to monitor new filings; and (4) the ability of the Commission staff to determine those carriers legitimately engaged in contract carriage. Allyn is concerned that if presently rate-exempt commodities transportation becomes rate regulated due to the fact that it cannot be defended as contract carriage, the required common carrier tariff filings would be rigid and unresponsive to shipper and carrier needs. This could result in a diversion of present traffic to proprietary carriage because the high degree of equipment utilization and operational flexibility would be lost. In summary, Allyn is in favor of the status quo for rate-exempt liquid commodities transportation and supports the Commission staff proposal for carrier-made rates on petroleum products on the basis of a gradual phase-out of minimum rates.

Mr. Edward Olmo appeared on behalf of Shell, a company which is a well-known manufacturer and marketer of petroleum and chemical products throughout the United States with significant involvement in California. Shell supports continued transportation safety regulation but does not support continued rate regulation. Shell believes that the easing of economic control over motor carrier transportation with eventual decontrol would assist both shippers and carriers in providing safe and efficient transportation service, with prices reflecting true cost and providing sufficient return on investment to attract new capital. Shell believes that the present system of minimum rate regulation in California is complex, inefficient,

anticompetitive, and in many instances, results in rates which are too high. The present minimum rate system denies carriers the right to establish rates based on their own costs reflecting their operating efficiencies. Based on Shell's experience in shipping throughout the country, the most efficient rate systems are those incorporating a minimum of regulation and providing for negotiation between carriers and shippers. Shell proposes that the California intrastate rate regulation be patterned initially after the ICC system in order to bring California's transportation policy more closely in line with that of other states. It would provide an organized policy for encouraging industry-established rates within California and serve as a preliminary step toward complete economic decontrol.

Michael Harvath appeared for Hunt-Wesson Foods, Inc. (Hunt-Wesson). Witness Harvath is traffic manager, motor carriers, for Hunt-Wesson. Hunt-Wesson is a major purchaser, manufacturer, and refiner of vegetable oils. It also manufactures vinegar and ships oils and vinegar in bulk by for-hire carriers. Other commodities they ship in bulk are caustic soda and tomato paste. All four of these commodities are exempt from minimum rate regulation. Hunt-Wesson urges the Commission to accept the staff proposal concerning the continuation of all presently rate-exempt commodities.

Mr. Sam Miles (Miles) presented some rebuttal testimony on behalf of 17 carriers that transport bulk liquids in tank vehicles. These 17 carriers include two highway common carriers of petroleum products, eight petroleum contract carriers, four carriers of milk and related dairy products, two transporters of liquid fertilizer solutions, and one carrier of fruit juices in bulk. In 1977 their combined revenues totaled over $27 million, mostly from the operations described above. Miles contended that the staff proposals, which he believes are designed to provide more opportunities for truckers to have control over the rate structure and the Commission to have less control, may have just the opposite effect. He believes that will

come about because the Commission will have the power to investigate and suspend the rates of an increased number of common carriers (i.e., the new common carriers resulting from options under SB 860) and all contract carriers transporting commodities that are not exempt. Heretofore, those carriers, radial highway common carriers and contract carriers, were only required to abide by minimum rates. He stated that under the present program all parties know what the rates are, or at least what the floor is, because of the minimum rate tariffs; but under the staff proposals, the Commission in an investigation and suspension proceeding will eventually set the exact rate by which one carrier alone must abide. Miles stated that the staff's position that a rate is reasonable if it is not lower than the carrier's cost of performing the service and not higher than the value of service to the shipper is not a valid concept for truckload transportation because the "value of service" theory is inappropriate for the setting of truckload rates. The concept may have been valid during the days of monopoly railroads but now shippers will not pay exorbitant rates, even though the value of the service might exist, because they can buy and operate their own equipment. He believes there is only one method for determining the reasonableness of a truckload rate, and that is to compute a particular carrier's actual costs for performing a service and add a reasonable amount for profit. If one tries to add any other factors to the process, Miles thinks an artificial rate level is produced that may be too low for the carrier to make a decent profit or, just as bad, one that allows too much profit. Shippers with an adequate volume of freight will buy their own trucks and do their own hauling before they will let the trucker make an exorbitant profit. Miles points out that in the past, rates have been bottomed on minimum rate tariffs; whereas, under the staff's proposal, the day would come when the transition period has ended and each carrier tariff would be based on individual requirements. Miles said that the investigation and suspension procedure might be requested of the

Commission every time a carrier believes that a competitor is about to publish a rate that may hurt the complaining carrier's operation, and it is possible that the staff workload, compared to present, would be increased since they might have to review many complaints and determine, not just a minimum rate, but what is a just and reasonable rate.

Bob Justice testified on behalf of Erickson Trucking, Inc. (Erickson). Erickson holds a petroleum contract carrier permit and has converted its radial highway contract permit to a highway common carrier authority. It engages exclusively in vacuum truck operations. Most of its operations are on private property, which is exempt from regulation. The balance of its work is subject to MRT 13. Justice indicated that Erickson's nonexempt operations are primarily for the general public and should be conducted under common carrier authority. He felt that the rigorous tariff filing requirements and possible delays in obtaining rate increases would make it difficult to operate as a common carrier. To remedy this the carrier (with others) sought legislation (SB 621) to remove the restrictions placed on the vacuum truck industry. That bill would have created a single class of carrier that would have contract carrier status. SB 621 was passed by the Legislature but vetoed by the Governor. Justice stated that absent the relief sought in SB 621, Erickson would opt to operate as a contract carrier in order to have the freedom provided the contract carrier as opposed to a common carrier operation.

Philip N. Deckard appeared on behalf of Dedicated Transport, Inc. (Dedicated) which operates statewide as a petroleum contract carrier. Dedicated has a favorable operating ratio (87) at the present time because its nonunion status permits it to enjoy lower labor costs than many union carriers. The rates now assessed by Dedicated are those in MRT 6-B. Dedicated favors the reregulation plan adopted in

Decision No. 90354 because it believes it would create a distinct competitive advantage for it in view of its generally lower labor costs. Deckard pointed out that labor costs comprise more than 60 percent of total operating costs. He indicated that it would avoid common carrier status.

Fredericksen Tank Lines, Inc. (Fredericksen) appeared by way of L. D. Robinson. Fredericksen operates as a PIR in California and transports petroleum products as a common carrier within Nevada and between Nevada and California. Approximately three-quarters of its earnings are from its California intrastate operations. Fredericksen employs Teamsters drivers. It primarily transports gasoline and diesel fuel under volume tender rates. According to Robinson, volume tender rates are low compared to the point-to-point rates on the same commodities. Robinson believes the program outlined in Decision No. 90354 will place it at a tremendous disadvantage as contract carriers will have more rate flexibility. Contract carriers assertedly will be able to undercut it adversely affecting the company's already marginal profit picture. Robinson believes that contract carriers would propose rates for volume tenders for large shippers that would be below the level of Fredericksen's operating expenses. Not only would Fredericksen lose such volume tenders, it also would lose the more profitable point-to-point traffic. Robinson stated that its experience shows that shippers demand the lowest rates available, and that once traffic is lost to a carrier offering a lower rate it is seldom regained. The complaint procedure adopted on the reregulation plan assertedly provides no remedy to a complaining carrier once the traffic is lost.

Cleo Evans appeared for Evans Tank Lines, Inc. (Evans) in both the original and reopened hearings. Evans operates as a PIR and as a highway common carrier for petroleum products, and as a highway contract carrier for the transportation of general commodities. It has recently acquired an agricultural carrier permit. The carrier's employees are subject to union labor agreements. All of its business is performed as a common carrier. Because the carrier is subject to Teamsters labor contracts, it does not expect to be able to compete with carriers having lower labor costs. Labor and payroll costs comprise more than 65 percent of its total operating costs. The contract carrier's ability to file rate reductions on a one day's notice assertedly prevents common carriers from attempting to block reductions the common carrier believes are below cost. Complaint procedures do not provide an adequate remedy as a contract carrier may change its rates several times before the complaint is decided.

A. J. Eyraud offered testimony on behalf of Asbury System. Asbury System is the parent company of Asbury Transportation, Asbury Contractors, and Asbury Freight Lines. Asbury System and Asbury Transportation operate California tank line services. Asbury System and Asbury Transportation shut down southern California tank truck operations in early 1977 and at that time the Asbury companies fired more than 100 employees allegedly because of the prospect that the Commission might cancel minimum rates. The record is not clear as to the extent that use of subhaulers has been substituted

for employed drivers. A formal application was filed to change operations from that of a PIR to petroleum contract carrier operations.[3/] Eyraud believes that the minimum rates are too low and that shippers will not pay in excess of minimum rates. The Asbury companies are subject to union contracts. It is the view of Eyraud that, as the largest petroleum carrier in the State, it cannot continue to pay union wages and compete with nonunion carriers. According to Eyraud, the Asbury petroleum operations were begun in 1922 before regulation. While the initiation of operations preceded minimum rates, existence of minimum rates influenced the Asbury companies to expand common carrier petroleum tank truck operations. Eyraud asserted that the reregulation program outlined in Decision No. 90354 will not promote more efficient utilization of equipment, and will reduce safety of operations. Although the program will increase price competition, Eyraud felt it will also create an advantage for nonunion carriers that enjoy lower costs than union carriers. The witness believes the reregulation should be abandoned and the minimum rates should be retained.

3/ Decision No. 86177 dated July 27, 1976 in Application No. 55762 authorized Asbury Transportation to suspend its petroleum common carrier's operating authority. The period of suspension extended by Decision No. 87673 of August 2, 1977, expired on December 31, 1977.

Discussion

The evidence of record in this proceeding compels regulatory reform. The evidence in support of continued minimum rate regulation of tank and vacuum truck transportation pales in comparison to the legitimate criticism of this regulatory system. While the industry and California may have prospered under minimum rate regulation, one may legitimately question whether it is more accurate to say both have simply endured it. In the reopened hearings in this proceeding even CTA appears to have conceded the necessity for regulatory change in this segment of the industry. In its reply brief filed in the reopened phase CTA stated:

> "At no place within the direct testimony of any witness sponsored by CTA was there any defense of the present minimum rate program. CTA is fully aware of the Commission's intent to dismantle the current system of minimum rate regulation, and is attempting to assist the Commission in replacing minimum rates with a viable alternative."

The Need for Regulatory Reform

General economic conditions and the motor transportation industry have changed considerably over the past 40 years. Inexplicably, however, our manner of regulating the industry has remained basically unchanged. The complex nature of the industry and rapid inflation have combined to preclude development of the detailed cost and rate studies anticipated when the minimum rate program was adopted in 1938.

The resort to cost offset methodologies was a convenient and innovative approach to maintaining the viability of the system, but was never intended to replace, and has never been a satisfactory alternative to full scale studies. Absent such studies we have been unable to establish rates with any real assurance that our ratemaking has reflected the actual characteristics of the industry.

A more critical flaw in our implementation of the minimum rate program has been our inability to establish adequate efficiency standards for selecting study carriers. Our original objective in establishing minimum rates was only to end destructive rate cutting thereby leaving carriers the responsibility and freedom to determine their precise rates on the basis of their own individual operations. It was anticipated that this goal could be achieved by predicating minimum rates upon the costs of carriers most efficiently transporting the particular commodities in question. All other carriers would then be compelled to price the majority of their services somewhat higher than the established minimum, as their own operations and the service requirements of their shippers warranted. In theory, healthy price and service competition would occur above minimum levels. The theory underlying the program may have been sound, but our inability to develop an adequate means to identify the efficient carriers critical to the implementation of the program has distorted its entire effect. Rates intended as minimum have become in actuality going rates. Although the system was intended to interpose regulation only to end destructive rate competition it has in practice eliminated nearly all such competition.

Individual variations in costs, operating conditions, traffic flow, and productivity are lost in the averaging process by which minimum rates are developed. If the minimum rates were at true minimum levels, the opportunity would exist for carriers to reflect their actual operating conditions in their individual rates. The generally high level of the minimum rates has, however, restricted the opportunity for such carrier sensitive ratemaking. Carriers may still freely assess charges in excess of the minimum where circumstances warrant, but the high level of the minimums has greatly reduced the need for upward adjustments and greatly increased the need for rate

reductions. In order to reduce rates to reflect favorable operating conditions carriers must expend considerable time and money to apply for specific Commission authority under Section 3666 or 452. Most carriers do not find this procedure to be cost-effective and consequently rarely apply. As a result, important ratemaking factors requiring the exercise of managerial discretion rarely receive consideration. The system, intended to be dynamic and responsive has become rigid and outmoded.

Due to a combination of these factors the minimum rate levels have become excessive. The mere fact that they are going rates in most instances confirms the fact that they are excessive. We have recognized them as going rates in practice and have regularly increased them to reflect increased costs without any analysis of whether such costs could be recovered by way of independent carrier rate adjustments above the minimum. This practice has compounded the problem. Excessive rates not only mean higher costs to shippers, but also added costs to consumers who ultimately purchase the products transported.

The generally high level of the minimum rates has been a problem of continuing concern to the Commission. We have long been aware that fairly substantial volumes of freight move at less than minimum rail alternative rates under Section 3663, and by owner-operator subhaulers who generally receive substantially less than minimum rates from prime carriers and transportation brokers. At the same time, innovative carriers with lower costs and higher productivity have been deterred from offering lower rates by the expensive and time-consuming procedures required to obtain the authority necessary to deviate from minimum rates. Neither the fortuitous presence of a rail spur, nor the interposition of a broker between shipper and carrier has any direct relation to the costs of performing the service, yet these are the factors which have been most

influential in the receipt of less than minimum charges by carriers under present regulation. Ironically, the high level of minimum rates has increased the opportunities for rate discrimination and carrier exploitation while discouraging the establishment of legitimate cost justified rate differentials.

Economic analysis introduced into this proceeding suggests that the minimum rate program has produced excess service competition and contributed to excess trucking capacity in the State.

Since carriers cannot legally charge rates below the minimum, and since the minimum rates have become the going rates in most instances, price competition in the industry has been severely restricted. Since minimum rate enforcement prevents carriers from attracting new business by offering reduced rates, carriers have competed by offering better service. If the higher costs of offering such service were passed on only to those shippers desiring the added service, no problem would exist. The evidence indicates, however, that rates charged for motor transportation service in California are not service sensitive. With few exceptions shippers are charged the minimum rate regardless of the level of service required or received. Thus, the burdens of this form of competition are borne by all shippers in the form of generally higher rates.

High rates and relatively easy entry standards into the trucking business in California have probably contributed to the excess trucking capacity in the State. Relatively high rates in relation to carrier costs attract new entrants with the illusion of assured profits. Each new entrant contributes further to the existing excess capacity and further dilutes the available traffic, reducing load factors, increasing costs, intensifying expensive service competition, and lowering profit margins for the industry as a whole.

It is our conclusion, based upon the extensive evidentiary record in this proceeding, that minimum rate regulation is no longer in the public interest and should be abolished. It is our belief that carriers, as businessmen, could better serve the overall public interest if they could negotiate with shippers and submit their rates for our approval. In this manner cost justified rate differentials and rate innovations, such as peakload pricing and directional rates, would be encouraged instead of discouraged. Efficiency and productivity would also be encouraged through the opportunity to compete on a price basis as well as on the basis of service. Experience with rate competitive motor transportation both in this country and abroad appears favorable. There is no reason to believe California tank truck carriers would not continue to prosper under such a liberalized system of regulation.

Commission Authority to Cancel Minimum Rates

The California Supreme Court recently addressed the question of whether the Commission is required by law to establish and maintain minimum rates for trucking services. In California Trucking Association v Public Utilities Commission (1977) 19 C 3d 240, supra, the Court said, and very clearly, that the Commission need not set any rates at all under Section 3662.

> "California Trucking appears to concede that under the provisions of Section 3662, the commission is vested with the discretion to determine whether or not to establish minimum rates to be charged by highway permit carriers. Since the section provides that the commission may set either maximum or minimum rates, it cannot be said that it mandates the commission to set minimum rates under all circumstances.10/

> "10/ Nor can it be argued that the provision requires the setting of maximum rates where minimum rates are inappropriate. The thrust of the section is to allow the Commission to set either type or rate, or no rate at all." (19 C 3d 246)

In reaching its decision, the Court also considered the effect of Public Utilities Code Section 726.

> "In our view of the Commission's construction of Section 726 is correct. The provision that the Commission shall fix 'as' the minimum rate the lowest of the lawful rates implies the standard by which minimum rates are to be determined rather than the requirements that such rates be set." (19 C 3d 247)

Thus, no additional statutory authority is required for the Commission to exercise its discretion to cancel MRTs 6-B and 13.

Antitrust Considerations and Rate Bureaus

The Commission has been mandated by the California Supreme Court to consider the antitrust implications of its regulatory activities. (Northern California Power Agency v PUC (1971) 5 C 3d 370.)

CTA has maintained that if the Commission adopts a reregulation program which encompasses carrier-made rates, carriers may face peril under the federal antitrust laws if they attempt to engage in group ratemaking.

Under the minimum rate system both permitted and common carriers enjoyed antitrust protection provided by the state action exemption found in Parker v Brown (1943) 317 US 341. Although the extent of that protection may be debated in light of more recent decisions, Cantor v Detroit Edison Co. (1976) 428 US 579; Goldfarb v Virginia State Bar (1975) 421 US 773; Rice v Alcoholic Beverage Control Appeals Board (1978) 21 C 3d 431, there is little question that individual carrier rate filing in lieu of uniform minimum rate regulation will increase the potential for competition in the industry notwithstanding questions concerning antitrust immunity. The purpose of out antitrust laws is to preserve and promote competition.

> "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that

> the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question..." (Northern Pacific Railway Co. v United States (1958) 356 US 1, 4-5.)

The action we have taken will enhance competition, and thus is entirely consistent with the principles and purposes of national and state laws and policies intended to discourage anticompetitive conduct.

We have not, however, embraced competition without reservation. The plan we have adopted is a program of reregulation, not deregulation. We recognize the for-hire motor transportation industry as a regulated industry under California law and acknowledge our responsibility to regulate rates. We have given consideration to antitrust issues in this proceeding and will give full consideration to the related issues currently before the Commission in Case No. 10368, our generic investigation into collective ratemaking. Until we have reached a decision in Case No. 10368, common carriers will continue to be allowed to engage in collective ratemaking through bureaus approved under Public Utilities Code Section 496. Carriers chosing to do so should, however, recognize the significant legal uncertainty surrounding the effect of Section 496 approval on potential federal antitrust liability. Carriers who have not already done so should obtain the advice of legal counsel prior to engaging in collective ratemaking.

Competitive Equality among Carriers

CTA's primary concern in the reopened hearings was with the issue of competitive equality among carrier classes. CTA alleged that the regulatory program outlined in Decision No. 90354 would create so significant a competitive advantage for contract carriers that common carriers would be totally incapable of competing. This, according to CTA, is the consequence of the Commission's not appreciating the effect of common carriers being regulated as public utilities under the Public Utilities Act (Public Utilities Code Sections 201-2115) while contract carriers are not so regulated. To compensate, CTA proposed that a number of additional restrictions be imposed on contract carriers. CTA's specific recommendations are discussed later in this opinion.

The Commission staff took the position that totally uniform regulation is neither required nor, in light of the differences in common and contract carrier operations, desirable. Staff recommended, however, that we ensure relative competitive equality between carrier classes in light of existing differences in regulation. With these considerations in mind, staff supported the program outlined in Decision No. 90354 with the sole exception of the notice period for contract carrier rate changes after the transition period. Staff recommended that we adopt the program outlined in Decision No. 90354 with the following modification: Any rate change by a contract carrier which results in a charge lower than his existing rate and lower than highway carrier competitors' rates must be filed with the Commission on 30 days' notice. This, in the staff's opinion, will eliminate any potential competitive disparity between common and contract carriers.

We share the concern of CTA and staff with respect to competitive equality. In moving to reform motor carrier regulation we have attempted to, and will continue to attempt to, equalize the competitive opportunity of all highway carriers in California.

We do not, however, find CTA's arguments concerning the endangered common carrier species convincing. CTA has correctly identified a number of regulatory distinctions which are the result of common carriers being regulated as public utilities, but it has conveniently overlooked the significant operational benefits common carrier status brings. Highway common carriers and PIRs may solicit and serve any member of the general public without limitation. Contract carriers in contrast may only serve a limited number of shippers with which they must have a continuing contractual relationship. In our opinion this operational restriction on contract carriers is far more severe than any common carrier obligation or inconvenience cited by CTA.

CTA expressed particular concern with respect to the service obligation of common carriers. It argued that common carriers are required by law to haul unprofitable shipments and serve unprofitable routes. The losses incurred on this undesirable traffic it claimed will prevent common carriers from competing with contract carriers for good profitable freight. In any business enterprise the opportunity for profit is accompanied by the risk of loss. This is as true of contract carriers as it is of common carriers. Carriers of both classes may operate unprofitably from time to time, but neither is required to do so. The Commission has never required any trucker, common or contract, to haul any freight at a loss and will not do so under the reform program adopted in this decision. Although common carriers are obligated to provide service in accordance with their certificates and tariffs, the obligation is voluntarily undertaken by all carriers seeking common carrier rights. Carriers undertake these obligations by application to the Commission and may be relieved of them in the same manner.

In designing the regulatory program outlined in Decision No. 90354 we attempted to recognize and account for the differences

between common and contract carrier operations. We are persuaded however that the program adopted herein should be modified as suggested by the staff. With this modification all rate reductions of competitive significance will be publicly noticed and an adequate opportunity to protest provided to all shippers and carriers.

Labor Costs

Teamsters and a number of union carriers opposed elimination of minimum rates on the ground that rate competition will have an adverse effect on union companies and union membership. They argued that the price paid for such items as truck tractors and trailers, tires, oil, maintenance, and fuel does not vary significantly from carrier to carrier and concluded that any price competition must therefore come at the expense of labor.

Even if costs other than labor costs do not vary significantly from carrier to carrier, it does not follow that competition will occur at the expense of labor. Variations in carrier operating efficiency provide opportunities for savings and for rate competition at least as significant as variations in direct carrier costs. We recognize, however, that minimum rates have been based upon union labor costs and that the trucking industry has operated under this system for forty years. In order to avoid disruptions in the labor market and to encourage competition on the basis of operational efficiency, we will require that all rates established under the program adopted herein reflect the prevailing wage as recently defined in Decision No. 91265.

Rate-Exempt Commodities

Selected commodities and transportation have been exempt from minimum rate regulation either because of inherent difficulties in determining proper minimum rates, or because of the legislative

requirement of Section 3661 that the freedom of movement of the products of agriculture should be promoted. These exemptions from rate regulation have been reflected in Commission minimum rate tariffs (See e.g., Decision No. 80134). CTA has contended that current exemptions are from minimum rates, and that as a consequence there can be no exemptions if there are no minimum rates.

Much of the transportation performed by tank and vacuum trucks is exempt from rate regulation. Rates for this transportation are competitively set by individual carriers and have been set in this manner for years. There is no evidence of predatory pricing, excessive business failures, industry instability, or unreliable service in these segments of the trucking industry. On the contrary, both shippers and carriers have expressed near unanimous satisfaction with rates and service and have actively opposed any change in their present exempt status. The testimony of those involved in exempt transportation provides clear and convincing evidence that economic regulation is not necessary for stability or marketplace order in this segment of the industry. Commodities transported in bulk by tank and vacuum tank vehicles presently exempt from rate regulation by the provisions of MRTs 2, 6-B, and 13 should remain exempt.

Safety

Several carriers expressed the belief that competition will erode carrier profits to the extent that carriers will be unable or unwilling to maintain and operate their equipment in a safe manner.

These witnesses have overlooked the distinction between economic regulation and safety regulation. Economic regulation is not a very effective means of insuring safety. The minimum rate system does not insure profits any more than they will be insured under the competitive program adopted herein. Moreover, even if profits were guaranteed there would be no assurance that carriers would spend an appropriate amount on maintenance. The incentive to skimp on maintenance

and safety to increase short-term profits exists today and will exist under any conceivable form of regulation. Safety regulations are the appropriate means to insure safety. Existing safety regulations are enforced in California by the California Highway Patrol and will continue to be enforced in the future as they have in the past. If problems with carrier safety exist or develop, they should be addressed through well-constructed, well-enforced safety regulations.

Environmental Considerations

In enacting the California Environmental Quality Act of 1970 (CEQA), Public Resources Code Section (Pub. Res. C. Sec.) 21000 et seq., the Legislature established a state policy requring consideration of environmental as well as economic and technical factors in evaluating regulatory actions and programs. This policy is clearly declared in Pub. Res. C. Secs. 21000 and 21001 and broadly expressed in paragraph (g) of both sections:

> "It is the intent of the Legislature that all agencies of the state government which regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage." (Pub. Res. C. Sec. 21000(g).)

> "The Legislature further finds and declares that it is the policy of the state to: ...Require governmental agencies at all levels to consider qualitative factors as well as economic and technical factors and long-term benefits and costs, in addition to short-term benefits and costs and to consider alternatives to proposed actions affecting the environment." (Pub. Res. C. Sec. 21001(g).)

In some instances CEQA requires that this policy be implemented through preparation and consideration of an environmental impact report (EIR) prior to agency decision making. (See Pub. Res. C. Secs. 21061 and 21100.) However, EIRs are required to be prepared

by state agencies, boards, or commissions only "on any project they propose to carry out or approve which may have a significant effect on the environment." (Pub. Res. C. Sec. 21100, emphasis added.)

Although the policy provisions of CEQA (Pub. Res. C. Secs. 21000 and 21001, supra) apply to this proceeding, the EIR provisions (Pub. Res. C. Secs. 21100 et seq.) do not. (Re Environmental Impact Reports (1973) 75 CPUC 133, 142, rehearing denied 75 CPUC 243, 246, writ denied, SF No. 23034, January 16, 1974.) The key term "project" is defined in Pub. Res. C. Sec. 21065 to include only the following agency actions:

(a) Activities directly undertaken by any public agency.

(b) Activities undertaken by a person which are supported in whole or in part through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.

(c) Activities involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.

It is clear that neither (b) nor (c) apply since issues in this proceeding involve neither financial assistance nor licensing. Although in this decision we are directly undertaking a significant change in the method of tank truck rate regulation, neither does this appear to be the type of activity contemplated by paragraph (a). In California Administrative Code Section 15037 promulgated to implement CEQA, paragraph (a) of Pub. Res. C. Sec. 21065 has been interpreted to refer to activities involving or related to construction activities.

> "Project means...: (1) An activity directly undertaken by any public agency including but not limited to public works construction and related activities, clearing or grading of land, improvements to existing public structures, enactment and amendment of zoning ordinances, and the adoption of local General Plans or elements thereof pursuant to Government Code Sections 65100 through 65700." (California Administrative Code Section 15037(1).)

This proceeding is essentially a rulemaking proceeding involving the means by which rates will be set in the tank truck industry. It is totally unrelated to construction activities.

Even though the EIR provisions of CEQA do not apply to this proceeding, and no EIR or negative declaration is required, the Commission is still under a statutory duty to recognize and implement the policy stated in Pub. Res. C. Secs. 21000 and 21001. In reaching this decision, we have discharged this duty by considering environmental factors as well as the significant economic, technical, and procedural factors raised in this proceeding.

Upon analysis of the evidence before us, we find that establishing the regulatory system adopted herein will have a beneficial effect on the environment. We expect increased price competition to produce increased operational as well as financial efficiency. Equipment utilization should be maximized, thereby reducing empty miles, excessive use of the highways, and unnecessary fuel consumption.

CTA Recommendation

CTA made a number of recommendations designed to provide additional protection for common carriers. A number of these related to the regulatory reform program outlined in Decision No. 90354. Others were beyond the scope of this proceeding and concerned regulatory changes made in Decision No. 89575, our decision implementing Chapter 840, Statutes 1977 (commonly referred to as SB 860), and Decision No. 91347, the most recent decision issued in Case No. 10278, our generic investigation into the practice of subhauling. In summary, its recommendations were as follows:

1. Redefine "contract carrier" and establish a maximum number of shippers contract carriers may serve which should probably not exceed ten.
2. Require all common carriers whether licensed under Public Utilities Code Section 1063 or 1063.5 to comply with historical standards of service.
3. Establish and compel adherence to standards for written contracts.
4. Contract carrier rate changes should be effective on no less public notice than common carrier rate changes.
5. Common carriers should not be allowed to meet the charges of competing contract carriers without specific cost showings.
6. All contract rate changes, increases, as well as decreases, should be justified by operational and cost data.
7. Cancellation of MRTs 6-B and 13 should be deferred for approximately two years.
8. Sufficient financial reporting should be required of all highway carriers to permit evaluation of all individual carrier rate filings without resorting to discovery procedures.
9. The Commission should rescind Decision No. 91347 authorizing unlimited cross-subhauling.

These recommendations are discussed in order.

In Decision No. 89575 the Commission addressed and specifically rejected the suggestion that contract carriers be limited to a specific number of contracts.

> "We now reject any implication that status may be determined by a specific number of contracts uniformly applied. We anticipate no such uniform limit on the number of contracts a contract carrier may have or the number of shippers it may serve. To establish such a limit would attribute far too much significance to but one of the relevant criteria. See e.g., Samuelson v CPUC (1951) 36 CA 2d 722. Consistent with our intent to define rather than restrict contract carriage, we will presume lawful operations presently conducted pursuant to contract authority without regard to the number of contracts or shippers served." (Decision No. 89575, mimeo. p. 17.)

We are not persuaded by any evidence in this record that any specific limitation should be imposed on the number of contracts or shippers contract carriers may serve.

In Decision No. 89575 we provided a five-year transition period for radial highway common carriers to convert to common carrier operations under Public Utilities Code Section 1063.5. During this transition period Section 1063.5 carriers will be allowed to expand and contract their services, as they previously did as radial carriers, without showing public convenience and necessity. With this sole exception, Section 1063.5 and Section 1063 common carriers will be subject to absolutely uniform regulation. To the extent that Section 1063.5 carriers choose to exercise their common carrier certificate, they will be required to comply with all provisions and will be under all obligations imposed upon Section 1063 carriers by the Public Utilities Act. The freedom of choice granted to Section 1063.5 carriers during the transition period is not unique, only the method by which this choice may be exercised is unique. Traditional Section 1063 common carriers may also expand and contract their services and do so with frequency, but they are theoretically required to obtain prior Commission approval to do so.

In Decision No. 89575 we established guidelines for determining the proper scope of contract carrier operations and required contract carriers, other than petroleum and cement contract carriers, to file written contracts with the Commission. In the regulatory program of competitive individual carrier-filed rates adopted herein, contracts will become a critical element of our procedure for rate review. We will, therefore, require that all petroleum contract carriers file contracts with the Commission and abide by the policy guidelines adopted in Decision No. 89575. A copy of those guidelines appropriately amended is attached hereto for reference as Appendix B.

Both CTA and the Commission staff criticized the notice provisions for contract carrier rate reductions after the transition period outlined in Decision No. 90354. As previously indicated, we are persuaded that the program adopted should be modified as suggested by the staff. CTA suggests that all contract carrier rate changes be made on not less than 30 days' notice, but provided no real justification for this additional restraint on contract carrier operations. Contract carriers may now increase rates without advance public notice and may decrease rates to the minimum rate level without notice. We see no reason to deprive them of this pricing flexibility.

Under minimum rate regulation carriers could obtain authority to charge special rates under Public Utilities Code Section 3666 below published minimums which were typically limited to a single named carrier and a specific shipper. This allowed more sophisticated carriers to obtain select business immune from the competition of other carriers. Under the reform program outlined in Decision No. 90354 such private rates would be prohibited. Any carrier would be permitted to meet the charges of any other competing motor carrier. CTA's opposition to this provision of the program seems inconsistent with their concern for equality of competitive opportunity. In our opinion this provision is essential to preserve that equality, and is consistent with Public Utilities Code Sections 452 and 455.

No need appears to require cost and operational justification for all contract carrier rate changes. Under the present minimum rate system contract carriers are only required to justify rates below published minimums. Requiring justification of all rates would impose an unreasonable administrative burden upon carriers and does not appear necessary or useful for any legitimate regulatory purpose. In order to provide for an orderly transition from minimum rates to competitive individual carrier-filed rates, justification will, however, be required for key contract rate reductions as further explained under "The Program Adopted".

We find no justification for additional delay in canceling MRTs 6-B and 13. The general issue of minimum rate regulation of motor carriers and alternatives to such regulation has been under study since 1974 when the Commission on California State Government Organization and Economy (Little Hoover Commission) released its report recommending elimination of minimum rates. Minimum rate regulation of tank and vacuum truck transportation has been under specific study since this proceeding was first initiated April 12, 1977. We recognize that the transition from uniform state-set minimum rates to competitive carrier-set rates will not be easy and will implement the change gradually through a transition period of one to two years' duration. We see no need, however, to maintain minimum rate regulation any longer than provided for in this decision.

Individual carrier-set rates must be evaluated upon the basis of each individual carrier's costs and operating circumstances. Analysis of specific rates will often require very specific information. This type of information could not practically be provided by carriers in annual-type reports. It can best be obtained through discovery. No additional financial reporting will be required of carriers under the program adopted.

CTA's concern with respect to cross-subhauling was considered in hearings held in Case No. 10278 and was rejected in Decision No. 91347. The appropriate remedy for CTA now lies with the California Supreme Court. The issue of cross-subhauling is beyond the scope of this proceeding.

The Program Adopted

After consideration of all of the evidence properly introduced in the original hearings in this proceeding and in the reopened hearings, we have concluded that the regulatory program outlined in Decision No. 90354 should be adopted in modified form as recommended by the Commission staff. This change will equalize the notice period required for common and contract carrier rate reductions below the charges of competing carriers both during and after the transition period. Any rate reduction which results in a charge lower than the charges of competing carriers must be filed on a 30 days' notice. In all other respects the program adopted, and described below, parallels the program outlined in Decision No. 90354.

In summary, the effect of this decision is to shift the primary responsibility for day-to-day motor carrier rate setting from the Commission to the industry, from government to private enterprise. Rates negotiated by shippers and carriers will be presumed reasonable. The Commission will, however, retain and continue to exercise jurisdiction to protect the interests of shippers, carriers, and the general public. Regulatory authority will be exercised to encourage rather than discourage price competition. To avoid disruption of existing labor markets and to encourage competition on the basis of operational efficiency, the Commission will require that rates reflect prevailing labor costs.

In order to ensure an orderly transition, the new program will be implemented gradually. MRTs 6-B and 13 will be canceled July 31, 1980. In lieu thereof the Commission will publish two transition tariffs which will remain in effect an adequate length of time to facilitate the transition to competitive carrier-set rates. It is anticipated that the transition tariffs will be maintained for one to two years.

The transition tariffs will serve two independent purposes. First, they will be available for common carriers that so desire to adopt in whole or in part as their own tariff. In Decision No. 89575 implementing SB 860 we provided a mechanism for common carriers, particularly new carriers converting under Section 1063.5, to satisfy statutory tariff requirements by adopting one or more Commission minimum rate tariffs as their own. Through the transition tariffs we will preserve this convenient method for common carrier tariff publication notwithstanding cancellation of MRTs 6-B and 13. Secondly, the transition tariffs will facilitate transition from minimum rates to carrier-filed rates by serving as a threshold for rate justification. Contract rates below the applicable transition tariff rate, filed during the transition period, must be accompanied by justification of the rate level. In this manner we will able to control the degree of price competition within acceptable and healthy bounds during which in all probability will be a difficult period of transition.

The transition tariffs will contain rates equivalent to MRTs 6-B and 13, respectively, and, in addition, any Sections 452 and 3666 rate deviations in effect on July 31, 1980. The transition tariff rate levels will not be adjusted by the Commission after they are initially published.

Alternative rail rates currently available to carriers under Section 3663 will no longer be available. Since minimum rates will be canceled, Section 3663 will have no application under the new program. Rail rates will, however, be available in a more restricted manner for a period of time the duration of which will be governed by shipper-carrier negotiation. Rail rates will continue to be available pursuant to contracts filed on or before the date

minimum rates are canceled July 31, 1980. Any contract rate lawful when filed will be grandfathered and may continue to be utilized without justification after minimum rates are canceled. In addition, rail rates contained in motor common carrier tariffs on July 31, 1980 will be similarly grandfathered. Our provision for competitive rate filing, discussed more fully below, will preserve the general availability of most rail rates until they are eliminated from both filed contracts and motor common carrier tariffs.

The rates of contract carriers will be established by each individual carrier and approved by the Commission under Section 3662. All such rates will be approved on the basis of individual carrier costs (except labor costs) and individual carrier's operating conditions considered in light of the needs of commerce and the public interest. No rate approved will involve more than one type or class of carrier within the meaning of Section 726. Contract rates approved will only be those contained in actual carrier contracts, and thus will be both minimum and maximum rates for the specific transportation involved.

During the transition period, contract rates below the applicable transition tariff rate must be accompanied by rate justification. Rate justification may consist either of (1) a statement that the rate is filed to meet the charges of a motor carrier competitor, accompanied by a reference to the competitor's tariff or contract charge being met, or (2) operational and cost data (including imputation of prevailing wage levels) which demonstrate that the rate proposed will contribute to carrier profitability. Rates justified on a competitive basis may be at or above the competitor's level, but must apply to the same commodities between the same general geographic points. Operational and cost justification will be more liberally interpreted under our new program than under prior Commission

Section 3666 deviation procedures. Innovative pricing will be encouraged, but must be reasonable in light of existing carrier costs and transportation characteristics. In no event will rates which do not contribute to carrier profitability be approved on an operational basis.

Contract rates at or above the transition tariff, or filed to meet the charges of a competing carrier, will be effective on the date filed with the Commission or such later date as may be provided by the terms of the contract. Rates filed during the transition period below both the transition tariff and the charges of competing carriers will become effective 30 days after the date filed, absent protest. In the event of protest, all such rates will be temporarily suspended for a period of time not to exceed an additional 30 days during which time the Commission must either reject the protest and allow the rate to become effective or suspend the rate pending hearing.

After cancellation of the transition tariffs, all contract filings, except rate reductions below the charges of competing motor carriers, will be effective on the date filed with the Commission or such later date as may be provided by the terms of the contract. Rate reductions below the charges of competing motor carriers must be filed on a 30 days' notice. Rates negotiated by shippers and carriers and evidenced by binding contracts will be presumed reasonable, but will be subject to review upon complaint or petition for investigation and suspension.

We are fully cognizant of the impacts our elimination of minimum rates will have on common carriers. Under minimum rate regulation, Sections 3663 and 726 combined to subject common carriers, as well as contract carriers, to minimum rates. Neither Section 3663 nor 726 will apply to our new system of individual carrier-set rates.

Thus, the approved rates of permit carriers will not be directly applicable to common carriers.

Common carrier rates will be governed by Section 454 for rate increases and Sections 455 and 452 for rate decreases. Under Section 455, a public utility may reduce a rate without authority from the Commission on a 30 days' notice or such shorter notice as the Commission may prescribe. The impact of Section 455 is limited with respect to motor common carriers by Section 452. Section 452 specifically authorizes rate reductions when the needs of commerce or the public interest require, subject to Commission discretion to require justification. Any rate that is reduced to meet the rate of a motor carrier competitor is in the public interest and may be filed and effective under our new program on the same day service is to be initiated. Such filings must be accompanied by a reference to the competitor's tariff or contract charge being met. Common carrier tariff rate reductions below the charges of motor carrier competitors must, however, be accompanied by a statement of cost or operational justification. This procedure is consistent with Section 452 and will equalize the competitive opportunity of common and contract carriers. An abbreviated outline of the program adopted follows.

Program Outline

1. MRTs 6-B and 13 will be canceled July 31, 1980.

2. Bulk liquids exempt from MRT 2 will continue to be rate exempt and exempt from the provisions of this program.

3. Transition Tariffs 6-B and 13 will be published in lieu of MRTs 6-B and 13 and will be effective with the cancellation of the minimum rate tariffs.

4. Transition Tariffs 6-B and 13 will consist of the lowest rates contained in MRTs 6-B and 13 and any Section 3666 or 452 deviations in effect on July 31, 1980.

5. The transition tariffs will not be adjusted by the Commission after they are initially published and will be canceled at the end of the transition period.

6. The duration of the transition period will be determined by experience under our new program but is not expected to exceed two years.

7. Transition Tariffs 6-B and 13 will not function as minimum rate tariffs. They will serve as a guide for the initial establishment of tariffs by new Section 1063.5 common carriers and as a threshold for purposes of contract carrier rate justification requirements.

8. Contract carrier operations will be governed by the following:

   a. Upon cancellation of MRTs 6-B and 13, contract carriers may operate only pursuant to contracts on file with the Commission. Contracts may be filed on or before July 31, 1980 and thereafter as negotiated. All contracts will be available for public inspection.

   b. Any contract rate filed below the transition tariff must be accompanied by a statement of justification. Such justification may

consist either of reference to a motor carrier competitor's rate being met or operational and cost data showing that the proposed rate will contribute to carrier profitability.

c. Contract rates filed below both the transition tariff and the charges of competing carriers must be filed on 30 days' notice and may become effective 30 days after the date filed, absent protest.

d. Contract rates filed to meet the charges of motor carrier competitors may be made effective the date filed with the Commission or such later date as may be provided by the contract terms.

e. Contract rates at or above the transition tariff may be made effective on the date filed or such later date as may be provided by the terms of the contract.

f. After the transition period, contract rates may be filed at any level without initial justification. Contract rates at or above the charges of other carriers may be made effective on the date of filing or such later date as may be provided. Contracts containing rates below the charges of competing carriers must be filed on a 30 days' notice.

9. Common carriers (and PIRs) will be governed by the following:

a. Common carrier rate increases will be subject to justification and approval of the Commission as required by the Public Utilities Code Section 454.

b. Any rate reduction below the transition tariff must be accompanied by a statement of justification. Such justification may consist either of reference to a motor carrier competitor's rate being met or operational and cost data showing that the proposed rate will contribute to profitability.

c. Rate reductions below the charges of motor carrier competitors will be governed by the Public Utilities Code Section 452.

d. Rate reductions filed to meet the charges of motor carrier competitors may be made effective the date filed with the Commission or such later date as may be provided.

e. Tariff changes not resulting in an increase in rates may be filed under Public Utilities Code Section 455 without justification and may be made effective on 30 days' notice or such shorter notice as the Commission may provide.

10. The cost data upon which the profitability of carrier-filed rates will be assessed will include individual carrier costs and the prevailing labor cost as determined by the Commission in accordance with Decision No. 91265.

11. Any interested person will be entitled to file a complaint against any filed rate in accordance with the Public Utilities Code Section 1702.

Findings of Fact

1. Minimum rate regulation was designed to respond to the economic conditions of the 1930s, conditions which no longer exist.

2. MRTs 6-B and 13 do not meet the needs of carriers and shippers for the transportation of commodities in bulk by tank and vacuum tank vehicles.

3. With few exceptions the minimum rates in MRTs 6-B and 13 for the transportation of commodities in bulk by tank and vacuum tank vehicles are the prevailing or standard rates for the industry.

4. The cost studies which underlie MRTs 6-B and 13 have not been and cannot reasonably be updated with the frequency present economic conditions require.

5. The Commission has been unable to establish adequate productivity or efficiency standards for selecting appropriate carriers to study for purposes of setting minimum rates.

6. The cost studies which support the development of rates in MRTs 6-B and 13 for the transportation of commodities here at issue reflect no more than the costs of a simple sample of carriers.

7. The minimum rates are generally higher than they would be if they were competitively set.

8. The minimum rates do not accurately reflect actual industry costs and operating conditions and have discouraged cost-justified rate differentials.

9. Excessive minimum rates have increased transportation charges to shippers, increased costs to consumers who ultimately purchase the products transported, and have limited the markets in which products can be sold.

10. Economic analysis suggests that high minimum rates may have produced excess service competition and excess trucking capacity in the industry.

11. Minimum rate methodology is inadequate to reflect the costs, operating conditions, and efficiencies of individual carriers.

12. Different shippers and carriers operate under widely varying conditions and have unique requirements which cannot be fully considered when minimum rates are established based on industry averages.

13. Much of the tank truck transportation subject to this proceeding is presently exempt from rate regulation.

14. There is no evidence of predatory pricing, excessive business failures, industry instability, or unreliable service in the rate exempt segment of the tank truck industry in California.

15. Shippers and carriers have benefited from the flexibility and responsiveness with respect to rate setting now allowed in the area of transportation exempt from minimum rates.

16. Our experience with rate exempt tank truck transportation provides clear and convincing evidence that economic regulation is not necessary for stability or marketplace order in this segment of the industry.

17. Safety regulations are the appropriate means of ensuring safe carrier operations.

18. The needs of commerce and the public interest require that carriers be allowed to meet the charges of competing motor carriers.

19. In order to equalize competitive opportunity, the Commission should provide general relief to common carriers pursuant to Section 452 of the Public Utilities Code to meet the rates of competing motor carriers by permitting the common carriers' rates filed for such purpose to become effective on the same day that the common carrier tariff filing containing such is filed.

20. The cost criteria for justification of rates under the reregulation plan adopted herein should be as follows:

a. Labor costs will be calculated on the basis of the prevailing wage as determined by the Commission in Decision No. 91265.

b. All other cost elements will be based upon the individual carrier's actual costs.

21. The enforcement of safety standards by the California Highway Patrol and State Fire Marshal will not be affected by the changes in economic regulation adopted in this decision.

22. No additional financial reporting requirements of highway carriers are required in conjunction with the regulatory program adopted. The information necessary to evaluate individual rates can best be obtained through discovery.

23. It is not necessary to delay the implementation of the new regulatory system adopted herein.

24. Under the reregulation plan adopted in this decision, commodities transported in bulk by tank and vacuum tank vehicles presently exempt from rate regulation by provisions of MRTs 2, 6-B, and 13 should remain rate exempt. Contract carriers will not be required to file contracts with the Commission for rate exempt transportation.

25. The regulatory system adopted herein will promote increased operational efficiency of highway carriers, thereby reducing empty miles, excessive use of the highways, and unnecessary fuel consumption.

26. The regulatory system adopted herein will have minor beneficial effects on the environment.

Conclusions of Law

1. The rulings of the assigned ALJ on motions to exclude certain evidence presented by CTA were proper.

2. The motion of CTA to disqualify ALJ Alderson should be denied.

3. The Commission is not required to establish minimum rates under Division 2 of the Code and has authority to cancel at any time those it has previously established.

4. The extent of antitrust immunity afforded carriers by the Public Utilities Code Section 496 and the state action exemption is at present uncertain.

5. Highway common carriers and PIRs may solicit and serve any member of the general public without limitation.

6. Highway contract carriers and petroleum contract carriers may only serve a limited number of shippers with which they must have a continuing contractual relationship.

7. Cross-subhauling authorized by Decision No. 91247 is beyond the scope of this proceeding.

8. With the exception of the five-year transition period during which Section 1063.5 carriers can expand and contract their services without showing public convenience and necessity, Decision No. 89575 provided for absolutely uniform regulation of Section 1063 and Section 1063.5 common carriers.

9. The rates contained in contracts filed by contract carriers should be approved by the Commission under Section 3662.

10. The rates contained in contracts filed by contract carriers and approved by the Commission under Section 3662 will, in effect, constitute minimum and maximum rates for the specific transportation covered by the contracts.

11. Since we are adopting a system of individual carrier-filed rates and canceling minimum rates, neither Section 726 nor Section 3663 will apply.

12. To avoid disruption of existing transportation patterns, rail rates should be grandfathered in the manner discussed herein.

13. Common carrier rate changes will be governed by Sections 452, 454, and 455.

14. The Commission may exempt selected commodity transportation from rate regulation under Division 2 of the Code.

15. The regulatory program adopted in this decision is consistent with state and federal antitrust law.

16. The regulatory program adopted in this decision will not create any unfair competitive advantages for any class of carrier.

17. The reregulation program adopted will not result in any unfair competitive advantages for carriers or shippers who have carrier/carrier or carrier/shipper affiliations over those who do not.

18. Safety regulation of carriers engaged in tank truck transportation is not within the jurisdiction of this Commission. It is the responsibility of the California Highway Patrol, the California State Fire Marshal, the United States Department of Transportation, and the ICC.

19. The reregulation program adopted satisfies the requirements of Section 3502.

20. Although the policy provisions of CEQA, Pub. Res. C. Secs. 21000 and 21001, apply to this proceeding, the EIR provisions, Pub. Res. C. Secs. 21100 et seq., do not.

21. The reregulation plan described in the body of this opinion should be adopted by the Commission.

22. This decision supersedes Decision No. 90354. Decision No. 90354 shall hereafter have no force or effect.

ORDER IN REOPENED PROCEEDING

IT IS ORDERED that:

1. The reregulation plan detailed in the opinion of this decision is adopted and shall be effective July 31, 1980.

2. Minimum Rate Tariffs 6-B and 13 are canceled effective July 31, 1980.

3. The Commission's Transportation Division shall do the following:

a. Prepare a program for presentation to the Commission within sixty days after the effective date of this order which will monitor retrospectively and prospectively the effects of this reregulation on the tank truck transportation industry. In formulating this program, the staff is directed to solicit suggestions from any parties to these proceedings who may be interested.

b. Prepare for Commission resolution the necessary rules, and new and revised general orders to implement the adopted reregulation program.

c. Prepare the transition tariffs for distribution by July 31, 1980.

4. The Executive Director shall serve a copy of this decision on all petroleum contract and petroleum irregular route carriers and all carriers subscribing to Minimum Rate Tariffs 6-B and 13.

5. The motions of California Trucking Association to disqualify ALJ Alderson and for a presiding officer's proposed report are denied.

In order to alleviate some of the industry confusion caused by the long delay in implementing the regulatory changes outlined in Decision No. 90354, this order is effective the date hereof.

Dated JUN 3 1980, at San Francisco, California.

President

Commissioners

Commissioner Claire T. Dedrick, being necessarily absent, did not participate in the disposition of this proceeding.

APPENDIX A

Program Outline Adopted in Decision No. 90354

1. MRT 6-B and MRT 13 will be cancelled January 31, 1980.
2. Bulk liquids exempt from MRT 2 will continue to be rate exempt and exempt from the provisions of this program.
3. Transition Tariffs 6-B and 13 will be published in lieu of MRTs 6-B and 13 and will be effective with the cancellation of the minimum rate tariffs.
4. Transition Tariffs 6-B and 13 will consist of the lowest rates contained in MRTs 6-B and 13 and any Section 3666 or 452 deviations in effect on January 31, 1980.
5. The transition tariffs will not be adjusted by the Commission during their life, and will be cancelled at the end of the transition period.
6. The duration of the transition period will be determined by experience under our new program, but is not expected to exceed a year or two.
7. Transition Tariffs 6-B and 13 will not function as minimum rate tariffs. They will serve as a guide for the initial establishment of tariffs by new 1063.5 common carriers, and as a threshold for purposes of contract carrier rate justification requirements.
8. Upon cancellation of MRTs 6-B and 13, contract carriers may operate only pursuant to contracts on file with the Commission. Contracts may be filed on or before January 31, 1980 and thereafter as negotiated. All contracts will be available for public inspection.
9. Any rate filed by a contract carrier below the transition tariff during the transition period must be accompanied by a statement of justification. Such justification may consist either of (a) reference to a motor carrier competitor's rate, or (b) operational and cost data showing that the proposed rate will contribute to carrier profitability.

10. Contract rates at or above the transition tariff, or filed to meet the charges of a competing carrier, will be effective on the date filed or such later date as may be provided by the terms of the contract. Such rates may be subject to review upon the filing of a complaint.

11. Rates filed during the transition period below both the transition tariff and the charges of competing carriers will become effective 30 days after the date filed, absent protest.

12. After the transition period, rates may be filed at any level without initial justification and will be effective on the date of filing or such later date as may be provided. After the transition period, rate levels will be subject to review only upon the filing of a complaint.

13. Any interested person will be entitled to file a complaint against the filed rate for any transportation service in accordance with Public Utilities Code Sections 1702 and 3662. The cost data upon which carrier profitability will be assessed upon complaint will include a prevailing wage standard for labor costs as discussed more fully infra.

14. The rates of highway common carriers and petroleum irregular route carriers will be governed by Sections 452, 454 and 455. Common carrier rate filings below the transition tariff (during the transition period) must be accompanied by a statement of justification. Such justification may consist either of (a) reference to a motor carrier competitor's rate, or (b) operational and cost data showing that the proposed rate will contribute to carrier profitability.

COMMISSION POLICY ON THE PROPER SCOPE OF
HIGHWAY CONTRACT AND PETROLEUM CONTRACT CARRIER OPERATIONS
IN THE TRANSPORTATION OF COMMODITIES IN BULK
IN TANK TRUCKS AND VACUUM-TYPE AND PUMP-TYPE TANK VEHICLES

The purpose of this statement is to inform carriers engaged in contract carriage of tank truck commodities of the Commission's policy on the proper scope of such operations and to set the following guidelines which the Commission will apply in determining whether a highway carrier is operating as a contract carrier. The question of whether a contract carrier is lawfully operating is determined on a case-by-case basis dependent upon the facts surrounding the carrier's operations.

1. A contract carrier generally may not solicit individual one-time shipments; it may solicit and enter into negotiated continuing hauling relationships with shippers, i.e., contracts. Individual one-time shipments may be solicited where the specialized nature of the transportation is sufficient to distinguish it from common carrier service or where a carrier is performing a rate-exempt transportation service.

2. A contract carrier must generally have a continuing relationship with the shipper or shippers it serves. A continuing relationship requires that service be provided periodically over a period of time, not less than thirty days in duration. A continuing relationship cannot be predicated upon a single shipment.

3. A shipper using the service of a contract carrier can be either the consignee or consignor. Normally, the shipper is regarded as the party who pays the charges for the transportation provided; however, the shipper may also be the party who controls the traffic such as the manufacturer of Brand X who ships freight collect to exclusive dealers of Brand X.

4. A contract carrier must provide services that are specialized or tailored to the particular requirements of the shipper being served. Examples of specialized services include, but are not limited

to, providing repeat service over a period of time with specialized equipment, unique loading/unloading and accessorial activity, or specialized scheduling of service. Such specialization alone in some instances distinguishes contract from common carrier operations. Heavy hauling and the transportation of rate-exempt commodities are examples of such specialized operations.

5. All contract carriers, except carriers engaged in rate-exempt transportation, must file written contracts with the Commission prior to, or on the same day, service is initiated. Such contracts shall be available for inspection by the public. Contract carriers may provide service only pursuant to written contracts which shall bind both carrier and shipper to good faith performance for a specific term, and contracts shall contain the following:

   a. The name of the carrier.

   b. The name of the shipper.

   c. The duration of the contract.

   d. The area involved in performance, such as the route and/or termini.

   e. A description of the services to be provided and the projected frequency.

   f. The commodities involved, and the projected tonnage or other appropriate unit of measurement to be handled.

   g. The compensation to be paid and received.

   h. The conditions, if any, under which changes in compensation or other terms of the contract may be made by the parties.

6. Copies of contracts must also be kept on file in the carrier's office and available for inspection by the Commission or the Commission staff. They shall be retained by the carrier for not less than three years after expiration.