

NB

Decision No. 79625

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application)
of William E. Lee, dba Franciscan)
Lines, for Certificate of Public)
Convenience and Necessity to)
Operate as a passenger stage cor-)
poration.)

Application No. 50537

Martin J. Rosen, Attorney at Law, for
applicant.
William W. Schwarzer, Attorney at Law
for The Gray Line, Inc., protestant.

OPINION ON REHEARING

Applicant, on September 10, 1968, sought the issuance of a certificate of public convenience and necessity to perform the following sightseeing tours from San Francisco:

- Tour 1 Land and water tour of San Francisco,
Muir Woods and Sausalito.
- Tour 2 San Francisco, Golden Gate and Sausalito.
- Tour 3 49-mile Scenic Drive (San Francisco).
- Tour 4 Muir Woods and Mt. Tamalpais.

The Gray Line, Inc. (Gray Line), as protestant, sought denial of the application on the grounds that it was an existing carrier providing satisfactory service in the San Francisco Bay territory (§ 1032, Public Utilities Code) and specifically that the proposed tours would compete directly with Gray Line's most popular tours. The Gray Line tours most directly involved are Tour No. 1 (City), No. 12 (Muir Woods and Sausalito), and No. 16 (Three Bridges); the latter tour also provides a lunch stop in Tiburon. Gray Line also has included in its tariff a 49-mile Scenic Drive tour and one covering both Muir Woods and Mt. Tamalpais. Those tours are not, however, actively promoted and will only be performed when and if a

minimum of six passengers discover protestant's obligation to perform those services and demand it.

James A. Drucker became a partner with applicant Lee subsequent to filing. The partnership was subsequently incorporated and by amendment of April 9, 1969 the corporation was substituted as applicant.

Public hearings were held before Examiner Fraser on various dates in March and July of 1969, and the matter was submitted on January 6, 1970.

Examiner Fraser's Proposed Report was issued on July 15, 1970. The Report discussed various details of applicant's operations as a charter-party sightseeing carrier, and of the proposed passenger stage sightseeing operation. The report also discussed public testimony which would tend to indicate that the sightseeing market in question would support and would be better served by competition.

The report further discussed public testimony concerning the quality of protestant's service.

The Examiner assessed the fundamental issues as being:

1. Whether the provisions of Section 1032 of the Public Utilities Code must be enforced to protect the protestant herein.
2. Whether public convenience and necessity required the proposed service of applicant.
3. Whether protestant is providing an adequate service.

The Examiner proposed that each of the issues be resolved in favor of protestant.

Applicant filed exceptions to the Report and a Petition to Set Aside Submission on September 18, 1970 and protestant replied thereto on November 17, 1970.

Decision No. 78560 herein issued on April 20, 1971, revised the Examiner's recommendation and granted the proposed certificate to applicant.

Protestant, Gray Line, Inc., petitioned for rehearing April 30, 1971 (staying the certificate grant) on the grounds that the

decision was not supported by adequate findings, and that the Commission had misconstrued the Orange Coast decision, Decision No. 76527, in Application No. 49730 (rev. den. S.F. No. 22731). /

The Decision No. 78846, herein, rehearing limited to oral argument was granted. Oral argument was held August 9, 1971 before Examiner Gilman.

Discussion

Finding 8 in the previous decision indicated that the last sentence of Section 1032¹ was not applicable to this proceeding on the grounds that the proposed services were different from the existing carriers. That reasoning was incorrect (Fialer's, Inc., 38 C.R.C. 880), and we must decide this case under both the letter and spirit of Section 1032.

The existing carrier has an item in its tariff which allows it to refrain from conducting any tour unless there is a minimum of six passengers. By converting certain tours from a scheduled to an on-call basis and then failing to give adequate notice to the public of the availability of such tours, protestant achieved a de facto discontinuance of some of its service.

However, since a majority of the points on the discontinued tours were covered by other tours actually promoted and performed, the major point of interest not practically available to protestant's customers was Mt. Tamalpais. The record is not entirely clear on this point, but it appears that certain points of interest on the 49-mile tour of San Francisco were also omitted from any of the promoted tours.

The previous decision's public convenience and necessity finding by necessary inference determined that service to

¹ The pertinent portion of which provides that "[t]he Commission may, after hearing, issue a certificate to operate in a territory already served by a certificate holder under this part only when the existing passenger stage corporation or corporations serving such territory will not provide such service to the satisfaction of the Commission."

Mt. Tamalpais and the whole of a tour similar to applicant's (and thus to protestant's) 49-mile tour was required. It did not, however, determine what if any frequency was necessary.

Since the Commission, under Section 1032, has the discretion to allow an existing carrier to cure a service deficiency before deciding whether to apply the radical remedy of competition (Tanner Motor Tours Ltd., 66 PUC 299), the ultimate question is whether this public need should be served by applicant or by protestant. It is apparent that applicant could render a viable service to these points only if such service is offered in conjunction with other services directly competitive with protestant's tours which are found to be satisfactory.

Since we are bound to respect the policy as well as the precise wording of Section 1032, it would be difficult to justify awarding applicant a certificate which, in most respects, parallels and directly competes with protestant's tours, merely to obtain service to Mt. Tamalpais and whatever portions of the 49-mile tour are not now practically available.² Since we have the discretion, we should choose the result most in conformity with the legislative policy, i. e., to permit protestant to remedy the deficiencies in its service.

In Orange Coast we certificated competition within the portion of an existing carrier's territory affected by a service defect. In this case we are asked to certify not merely in the affected territory, but also in territory where we could find no significant defect. We do not think either the Orange Coast doctrine or the policy underlying Section 1032 would allow us to treat service that is in major part satisfactory as being automatically tainted by the deficiencies disclosed on this record.

² Since we have no statutory jurisdiction over one-terminus water tours (Golden Gate S.S.Lines v. P.U.C., 57 Cal. 2d 373), we do not think the awarding or denying of a passenger stage certificate is an appropriate means to obtain such service for the public.

Where a Commission policy inhibits or restricts competition the Commission must rely on appropriate findings and conclusions demonstrating "consideration of overriding importance"

(Northern California Power Ass'n v. P.U.C., 5 Cal. 3rd 370 at 377).

However, when the anti-competitive policy is statutory rather than regulatory, we must assume that the Legislature acted on sufficient grounds.

Additional Findings

1. Protestant, The Gray Line, Inc., has not adequately informed the public of the availability of tours offered on an on-call basis.

2. If the deficiency described in Finding 1 is corrected, protestant's service to the public will be satisfactory to the Commission.

3. Protestant's certificate and tariff do not accurately describe the services offered to the public.

4. Protestant's territory includes all the points of origin and all the points of interest proposed by applicant, with the exception of the water portion of applicant's Land-Water Tour.

5. A service by applicant limited to the points affected by the deficiency described in Finding 1 would not be economically self-sustaining.

Conclusions

1. Under Section 1032 of the Public Utilities Code and the additional findings made above, no certificate can be issued to applicant.

2. This Commission has no jurisdiction to impose an obligation to perform one-terminus water tours on any common carrier, either directly or by classifying a failure to offer such tours as unsatisfactory service.

O R D E R

IT IS ORDERED that:

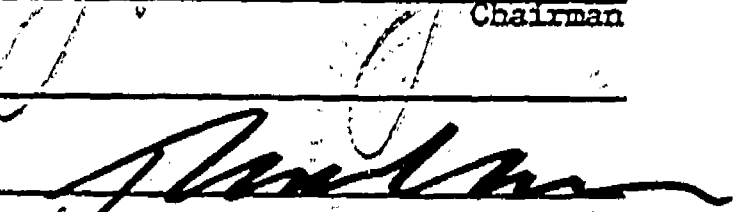
1. Ordering paragraphs 1 and 2 and Finding 8 of Decision No. 78560 are rescinded.
2. Protestant shall submit a plan for an improved public information program within twenty days after the effective date of this order.
3. Protestant shall, within forty days after the effective date of this order, submit a proposed certificate and tariff which accurately describe its present public offerings.

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

Dated at San Francisco, California, this 18th day of JANUARY, 1972.



Chairman



Vernon L. Sturgeon



Commissioners

Commissioner William Symons, Jr., being necessarily absent, did not participate in the disposition of this proceeding.