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Decision No. 79812

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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of WILLIAM E. LEE, dba FRANCISCAN LINES, for a Certificate of Public Convenience and Necessity to operate as a passenger stage corporation.	Application No. 50537

ORDER DENYING REHEARING AND AMENDING DECISION NO. 79625

Petition for rehearing of Decision No. 79625 was filed on February 4, 1972 by Franciscan Lines, Inc. That decision refused to grant a certificate of public convenience and necessity to petitioner to operate sightseeing tours. Gray Lines, Inc., protestant to the application of Franciscan Lines, Inc., filed a memorandum in opposition to the petition for rehearing on February 11, 1972.

Decision No. 79625 found that substantially all of applicant's proposed tours were within protestant's territory. Furthermore, we found that protestant would provide satisfactory service upon the correction of a specific service deficiency. We concluded that a certificate could not be granted because of these findings and because of the language of Public Utilities Code Section 1032.

The alleged errors in Decision No. 79625 total five in number. The following discussion will describe and discuss each of these in turn:

1. It is alleged that Public Utilities Code Section 1032 does not prohibit this Commission from issuing a certificate to

render a passenger stage corporation service for which public convenience and necessity has been shown.

In Re Fialer's, 38 CRC 880 (1933), writ denied, granted a certificate to applicant notwithstanding similar operating authority currently possessed by another carrier. The decision clearly stands for the proposition that competition is not to be precluded by Section 50-1/4 of the Public Utilities Act when public convenience and necessity require that there be more than one carrier in the field.[1]

Thirty-three years later this Commission was again faced with an evaluation of Section 1032. In Tanner Motor Tours Ltd., 66 CPUC 299 (1966), we concluded that "... Absent §1032, public convenience and necessity would require granting of application of Southern California Sightseeing Company, Inc." (Ibid., p. 303.) That decision concerned a request for a certificate wherein such service proposed would be substantially similar to service presently authorized to an existing carrier. A later decision involving the same matter found "... the last sentence of Public Utilities Code §1032 precludes, as a matter of law, the granting of the application of Southern California Sightseeing Company, Inc., unless Tanner Motor Tours, Ltd., will not provide service to the satisfaction of the Commission."[2]

We are apparently faced with conflicting decisions. Fialer's finds no prohibition in Section 1032 on the granting of a certificate when the tests of public convenience and necessity are met. Tanner, on the other hand, finds Section 1032 to be a limitation on our authority to issue a certificate even when said certificate

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1/ Section 50-1/4 is substantially the same as Public Utilities Code §1032.

2/ Application of Southern California Sightseeing Company, Inc., 67 CPUC 125, writ denied.

is required by the tests of public convenience and necessity.

Since both decisions have been passed upon by the Supreme Court and since we, further, cannot logically follow both of them, we chose to follow that decision which reflects the latest thinking of both this Commission and the Court. In addition, it is our opinion that the language of Section 1032 is so clear that it cannot be reasonably interpreted in any other way than to be a legislative mandate to this Commission prohibiting competition in a territory served by an existing carrier. It is inescapable that Tanner impliedly overrules Fialer's to the extent that they are inconsistent. Decision No. 79625 follows Tanner.

2. It is alleged by petitioner that if Section 1032 prohibits the issuance of a certificate to render passenger stage corporation service for which public convenience and necessity have been established, it violates both federal and state anti-trust laws, and is therefore unlawful and void on its face.

Concluding, as we have, that the legislative act prohibits competition, we are bound to follow its dictates. We have been offered no authority, nor did a review of the law reveal any basis, upon which we possess the power to disregard provisions of the Public Utilities Code. As this Commission said in Decision No. 79625, page 5, "... when the anti-competitive policy is statutory rather than regulatory, we must assume that the legislature acted on sufficient grounds."

3. Petitioner's third argument is that the decision "... is arbitrary, capricious and unreasonable and, hence, unlawful and erroneous because it completely disregards the compelling evidence of protestant's continuous course of monopolization and reprehensible restraints of trade, including deliberate efforts to impede and deny a fair hearing before the Commission."

Finding, as we have, that our authority to issue certificates of public convenience and necessity is limited by Section 1032, it would, nevertheless, be an idle act to evaluate the factors for or against competition. Having reached the conclusion that there can be no competition (unless the existing carrier will not provide service to the satisfaction of the Commission), it is thereafter irrelevant to consider evidence of whether there should be competition.

To the extent that there are service deficiencies in the existing carrier's operations, Section 1032 does allow the entry of a new carrier into the territory (Orange Coast Sightseeing Company, 70 CPUC 479 (1969)). We also have the power to allow and order, if necessary, the existing carrier to cure these deficiencies. The examiner's proposed report, together with Decision Nos. 78560 and 79625, evidence that full consideration was given to all aspects of protestant's conduct that are relevant in determining whether service deficiencies in a limited number of instances should be allowed to taint other service found to be satisfactory. In Decision No. 79625, we answered that question in the negative and herein reaffirm that conclusion.

Anti-trust factors must be considered to the extent this Commission has the power to give recognition to them in its decision. (Northern California Power Agency v. P.U.C., SF 22795 (1971).) This requirement has been complied with. We do not construe Section 1032 to mean that minor service deficiencies in certain operations by an existing operator open the door in its territory to competition throughout that territory upon a showing of public convenience and necessity. Such an analysis would fly in the face of the legislative act that is clearly anti-competitive in nature.

4. Petitioner next alleges that the decision of the Commission is arbitrary, capricious and unreasonable and hence unlawful and erroneous because it completely disregards and distorts

Commission precedents with respect to applicable law.

We have, hereinabove, discussed this issue with respect to the Fialer's and Tanner cases. Orange Coast Sightseeing Co. is not inconsistent with our opinion in Decision No. 79625. Petitioner's arguments in this regard are rejected.

5. Finally, the petition urges that the decision of the Commission is arbitrary, capricious and unreasonable because its findings of fact are not supported by substantial evidence, it has based its conclusions upon inadequate and insufficient findings of fact, and its findings of fact are inconsistent with its conclusions of law, all of which violate Section 1705 of the Public Utilities Code.

Evaluation of the findings of fact made in Decision Nos. 78560 and 79625 compels us to reject petitioner's claim herein. We do, however, feel that our decision under attack is made clearer by the addition of five conclusions of law.

CONCLUSIONS

1. The law in Fialer's (38 CRC 880) conflicts with the law in Tanner (66 CPUC 299) and the cases are not reconcilable.

2. Petitions for writ of review were filed in the Supreme Court in both the Fialer's and Tanner cases; said writs were denied by the Supreme Court.

3. Public Utilities Code Section 1032 prohibits and restricts competition in a territory served by an existing carrier.

4. Fialer's was impliedly overruled by Tanner to the extent it was inconsistent therewith.

5. Petitioner, Franciscan Lines, Inc., having petitioned for rehearing, and no adequate grounds having been made to appear, rehearing should be denied.

IT IS ORDERED that:

1. Decision No. 79625 is hereby amended by the inclusion

of conclusions 1 through 5 as hereinabove stated.

2. Petition for rehearing of Decision No. 79625, as amended, is denied.

Dated at San Francisco, California, this 14th day of MARCH, 1972.

William Symons Jr. Chairman

J. P. Vukasin Jr.

Vernon L. Sturgeon

Thomas Moran

Commissioners

Lobstein, J. P. Vukasin Jr., Chairman.