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Decision No. 84763

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of
DAVID W. KEAN, dba BACCHANTS'
PILGRIMAGES, for a certificate of
public convenience and necessity to
operate a Multi-Day Wine Oriented
Sightseeing Tour Service starting
and ending in San Francisco,
California.

Application No. 55636
(Filed April 17, 1975)

Alan L. Nobler, Attorney at Law, for
applicant.

Richard M. Hammon, Attorney at Law, for
Gray Line, Inc. and California Parlor
Car Tours Company, protestants.

Masaru Matsumura, for the Commission staff.

O P I N I O N

Applicant requests a certificate of public convenience and necessity to operate as a passenger stage corporation for the transportation of passengers and their personal baggage in connection with a wine-gourmet oriented sightseeing tour. The proposed tour would be for five days and four nights and would commence at various hotels in the Union Square area of San Francisco and at the Hilton Inn at the San Francisco International Airport. From these points the route proceeds to Santa Clara County where a selection of wineries will be visited, to San Juan Bautista for visits to the mission and the State Historical Park, to the Paicines vineyard region, and ending at a hotel in Monterey for overnight. The proposed second day itinerary includes historical and scenic drives and visits on the Monterey Peninsula, to the Carmel Valley, and to Point Lobos and Big Sur State Parks, with return to the hotel in Monterey overnight. The proposed

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third day itinerary proceeds northward through San Francisco, across the Golden Gate Bridge to Tiburon, thence to the town of Sonoma for a tour of the historic points of interest and visits to one or more wineries, and finally on to a hotel in Napa overnight. The proposed fourth day itinerary consists of visits to selected wineries in Napa and northern Sonoma Counties, with return to the hotel in Napa overnight. The proposed fifth day itinerary consists of additional visits to selected wineries in Napa County. The tour ends at the hotel in Napa after lunch. Optional transfer to either the vicinity of Union Square or the San Francisco Airport will be arranged but is not included in the tour. The fare for the proposed tour would be \$305 per person based on double occupancy of hotel rooms with a supplement of \$40 for single occupancy of hotel rooms. In addition to including transportation and hotel accommodations, the fare includes some meals, sightseeing, admission charges, services of a guide and/or escort, and tips to hotel staffs and waiters serving meals included in the tour.

The application was protested by Gray Line, Inc. and California Parlor Car Tours Company (Cal Tours). A duly noticed public hearing was held before Examiner Arthur M. Mooney in San Francisco on July 15, 1975, on which date the matter was submitted.

Following is a summary of the evidence presented by applicant regarding his experience and the proposed service. He became interested in wine making approximately 12 years ago and has operated Bacchants' Pilgrimages since 1971. His tours are specifically designed for wine connoisseurs who are interested in wine making. Prior to commencing his own tour business, he had looked for a tour to the French wine country. Finding no good one, he set up his own. He has conducted seven tours to the wine producing areas of various foreign countries. These included four to France and one each to Italy, central Europe, and South America. A total of 80 people have

taken these tours. He is a member of the San Francisco Area Chapter of the American Wine Society and has advertised his tours in wine magazines. The tours included transportation, meals, visits to wineries, and guides. Although they have not been profitable as yet, he will continue to offer tours to Europe. He had been employed by the IBM Corporation and retired from it several years ago. He now devotes all of his time to his tour business. In early 1973, he had inquiries from people on his mailing list regarding the availability of tours to the California wine country. As a result of these inquiries, he operated two custom tours for particular customers to this area in the fall of 1973 and two more for the general public in the fall of 1974. He made money on the 1973 tours. The income from the 1974 tours did not cover all of the cost of advertising and brochures. The latter two were substantially similar to the tour he now proposes to operate. The brochure in Exhibit 1 sets out in detail the itinerary for the proposed tour and provides that there could be slight variations in the itinerary depending on which wineries were in production and the particular interests of the participants. The witness explained, however, that each tour would be substantially as shown in the brochure. The proposed tour can be operated at a profit with four customers. The amount of profit per tour would vary depending on the number of people and would be approximately \$650 if there were 18 people. If less than four people were to sign up for a tour on a particular date, it would be cancelled. While he plans to operate two tours per month this year for a three-month period limited to a maximum of 30 passengers per tour with the first tour scheduled for Monday, August 11, next year he intends to operate a total of four additional tours during June and July and to increase the maximum number of persons per tour to 35. There is no similar, special interest tour offered by anyone else with which the proposed service would compete. Yankee Holidays, a major tour operator in the northeastern

United States and wholesaler of tours to other parts of the country, will serve as wholesale agent in the New England states for the proposed tour and will vigorously promote the tour with travel agents in this region. Trans World Airlines, Inc. (TWA) has advised applicant that it intends to assist in promoting the tour. In June of this year, 23 travel agents from the New England states were brought here by Yankee Holidays and TWA to take an abbreviated two and one-half day version of the tour to familiarize themselves with it. Travel agents are now offering the tour and have received reservations for various dates.

Applicant testified as follows regarding his reason for requesting the sought certificate: In 1973 and 1974 he contacted Gray Line, Inc. and Cal Tours to lease bus equipment. Their equipment was either too large or not the type he wanted. He leased the equipment from another bus company. He had discussed the possibility with Cal Tours of having one of its tours tied on to either end of his tour but the scheduling could not be worked out. During further discussions of this in the spring of 1975, he informed Cal Tours that the charge for his tour would be on a per person basis and was advised by it that since he was going to charge individual fares, he would need a certificate. He immediately checked this with the Commission but did not receive a clear answer. So to be safe, he filed the instant application.

Applicant stated that he does not own any passenger equipment and that all vehicles required to provide the proposed service will be leased from duly licensed charter operators or from vehicle rental companies. He explained that the equipment that would be used for a particular tour would depend upon the number of participants. The witness testified that he has written quotations and commitments from Falcon Transit Lines for equipment that will accommodate up to 38

passengers and from Holly Tours for stretch limousines that will accommodate up to 17 passengers and that he will rent a maxi-van from Anthony Rent-A-Car for any tour with less than 12 participants. He stated that he would drive or furnish the driver for the maxi-van and that the lessors of the other equipment would furnish the driver and necessary insurance.

Applicant and his wife have personal assets of \$110,056, personal liabilities of \$19,613, and a personal net worth of \$90,443. His annual income from retirement, dividends, and interest is \$9,088.

The attorney for Gray Line, Inc. and Cal Tours stated that his clients would have no objections to the sought authority if it were limited to the five-day tour outlined in the application and described in the brochure in Exhibit 1 with the reasonable deviations described by applicant and if it were restricted to two tours per month during the months of June through October and to a maximum of 35 passengers per tour. With the assurance by applicant that this is the limited authority he seeks and nothing more, the protests were withdrawn.

Counsel for applicant questioned whether the service his client proposes to perform is in fact subject to Commission regulation. He argued that his client is a small businessman; that the tours are custom designed for a particular clientele and are only operated twice monthly for a limited period of time; that the main purpose of the tour is visiting wineries, and the transportation is incidental; that the passenger stage sections of the Public Utilities Code were not designed for this type of operation; and that it is not reasonable to subject his client to these regulations and the substantial costs of complying therewith. The attorney for Gray Line, Inc. and Cal Tours pointed out that for the type of service applicant proposes, the Interstate Commerce Commission has provisions for issuing a broker's license which would protect existing carriers and recommended that

California adopt similar regulations. The Commission staff representative asserted that a passenger stage certificate is required for the proposed service and in support of his position argued that to hold otherwise would open the door to anyone who wished to provide a similar service with no regulation or protection whatsoever for the public and that this could lead to ruinous competition and would have an adverse effect on existing carriers and the public.

Discussion

We are of the opinion that applicant does require a certificate of public convenience and necessity to operate as a passenger stage corporation before he can provide the proposed service.

The sections of the Public Utilities Code which are involved in this proceeding are the following: Section 225 defines a passenger stage as including "...every stage, auto stage, or other motor vehicle used in the transportation of persons, or persons and their baggage... when such baggage...is transported incidental to the transportation of passengers." Section 226 defines a passenger stage corporation as including "...every corporation or person engaged as a common carrier, for compensation, in the ownership, control, operation, or management of any passenger stage over any public highway in this State between fixed termini or over a regular route...." Section 211(c) includes passenger stage corporation within the definition of common carrier. Section 216(b) provides in part that any common carrier that performs service for the public or any portion thereof for compensation is a public utility subject to the jurisdiction of the Commission and the applicable provisions of the Public Utilities Code. Section 1031 requires a passenger stage corporation to obtain a certificate of public convenience and necessity prior to the operation of any passenger stage over any public highway in the State. Section 1035 provides in part that where fares are computed, collected, or demanded on an individual fare basis, it is presumed that the operations are those of a passenger stage corporation.

Here, the various types of equipment applicant proposes to use for the transportation of his customers and their baggage are all included in the definition of passenger stage in Section 226. His operations are clearly those of a passenger stage corporation as defined in Section 226. While he does not own the equipment, he will lease or rent it and will exercise control over it and operate it over a regular route and between fixed termini for compensation. Although there could be some variation in the particular wineries visited, the route would be substantially the same for each tour. Also, the origin points at San Francisco and the San Francisco International Airport, the two overnight stops at Monterey, and the two overnight stops at Napa, the destination, will not vary. Being a passenger stage corporation, he is a common carrier, and since his service is designed for and offered to that portion of the public with a particular interest in wine making and is for compensation, he is a public utility and subject to Commission regulation as provided in Section 216(b). Furthermore, his charges are on an individual fare basis, and, as stated in Section 1035, it is presumed that his operations are those of a passenger stage corporation. The evidence herein supports this presumption. Since he is a passenger stage corporation, he must obtain a certificate of public convenience before commencing the proposed service as required by Section 1031. The fact that applicant will offer only two tours per month for a limited number of months and will cancel any tour for which less than four participants have signed up is irrelevant and in no way alters our determination that his proposed operations are those of a passenger stage corporation. There are no provisions in the Public Utilities Code that set any minimum standards regarding frequency of service in determining passenger stage corporation status. Here, all the elements of a passenger stage corporation operation are present, and a certificate is required.

We recognize that the service applicant proposes is a sightseeing tour which extends over a five-day period and, in addition, has certain additives, including lodging, some meals, visits to various wineries and other points of interest, admission charges, a tour guide, and certain tips. However, the transportation is certainly not incidental to the proposed offering as contended by applicant. It is an integral part of it. We have consistently held that transportation for the purpose of sightseeing is not separately treated by the Public Utilities Code and that operators of extra-city sightseeing service are passenger stage corporations as defined in Section 226 and require a certificate of public convenience and necessity as provided in Section 1031. (See The Gray Lines Tour Co. (1973) 74 CPUC 669.)

Having determined that a certificate is needed for the proposed service, the next issue for our consideration is whether the record establishes public convenience and necessity. While the evidence on this issue was not substantial, a sufficient showing has been made to establish this. Applicant has testified that he has had requests from people on his mailing list for such a service. Also, the concern of Yankee Holidays and TWA regarding the proposed service certainly shows that there is a potential public interest in the tour.

The evidence shows that applicant has the financial ability and experience to perform the proposed service. As to his fitness, he has operated several California wine tours in the past without a certificate. However, according to the evidence, he was not aware at that time that he required operating authority. While this was an error on his part, it is not enough to establish that he is an unfit person to hold a passenger stage certificate. Furthermore, upon being advised that a certificate might be required, he immediately filed the instant application.

The certificate will be granted. We realize that other passenger stage corporations operate in the territory applicant will serve and that Section 1032 of the Public Utilities Code provides in part that in such circumstances, the Commission may issue a certificate only when the existing carriers will not provide such service to the satisfaction of the Commission. However, this provision of Section 1032 is not at issue in this proceeding. The service which applicant will provide is a specialized, five-day, sightseeing service. The certificate will be restricted to this service only. No existing carrier now performs or has advised us that it intends to perform a comparable service. Applicant will be providing a service not now offered to the public and will, therefore, not compete with any existing carrier.

Findings

1. The service applicant proposes is a five-day sightseeing trip from various hotels in the Union Square area of San Francisco and the Hilton Inn at the San Francisco International Airport to Monterey and from there to and terminating at Napa, visiting various wineries and points of interest between these points and in the vicinity thereof. The trip includes lodging, some meals, admission charges, a tour guide or escort, and certain other additives.
2. Applicant will lease or rent passenger stage equipment for this service and the equipment will be under his control.
3. The fare for the proposed service is \$305 per person based on double occupancy of hotel rooms with a supplement of \$40 for single occupancy of hotel rooms and includes transportation and all additives referred to in Finding 1.

4. The proposed service is specifically designed for that portion of the public that has a particular interest in visiting wineries and observing wine making.

5. The transportation of the participants in the tour and their baggage is an integral part of the proposed service.

6. Operators of extra-city sightseeing service of the type involved herein are passenger stage corporations as defined in Section 226 of the Public Utilities Code and require a certificate of public convenience and necessity as provided in Section 1031 of the Code.

7. Applicant proposes to operate two tours per month during August, September, and October of this year for a total of six tours and, in addition to these, proposes to operate two tours per month during June and July of next year and thereafter for a total of ten.

8. The Public Utilities Code does not provide minimum frequency of service standards for determining passenger stage corporation status. Here, all of the elements of a passenger stage corporation are present, and a certificate is required.

9. No passenger stage corporations operating in the territory applicant proposes to serve offer or intend to offer a service comparable to that for which applicant seeks authority to perform.

10. Applicant possesses the experience and financial resources and is a fit person to institute and maintain the proposed service.

11. Public convenience and necessity require the service proposed by applicant.

12. We find with reasonable certainty that the project involved in this proceeding will not have a significant effect on the environment.

Conclusion

The application should be granted as provided in the order which follows.

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

O R D E R

IT IS ORDERED that:

1. A certificate of public convenience and necessity is granted to David W. Kean, doing business as Bacchants' Pilgrimages, authorizing him to operate as a passenger stage corporation, as defined in Section 226 of the Public Utilities Code, between the points and over the routes set forth in Appendix A of this decision.

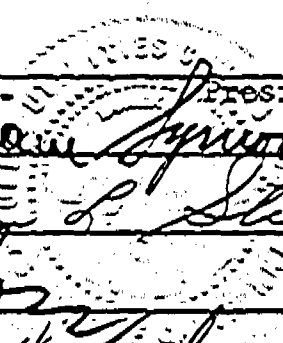
2. In providing service pursuant to the authority granted by this order, applicant shall comply with the following service regulations. Failure so to do may result in a cancellation of the authority.

- (a) Within thirty days after the effective date of this order, applicant shall file a written acceptance of the certificate granted. Applicant is placed on notice that if he accepts the certificate he will be required, among other things, to comply with the safety rules administered by the California Highway Patrol, the rules and other regulations of the Commission's General Order No. 98-Series, and the insurance requirements of the Commission's General Order No. 101-Series.

- (b) Within one hundred twenty days after the effective date of this order, applicant shall establish the authorized service and file tariffs and timetables, in triplicate, in the Commission's office.
- (c) The tariff and timetable filings shall be made effective not earlier than five days after the effective date of this order on not less than five days' notice to the Commission and the public, and the effective date of the tariff and timetable filings shall be concurrent with the establishment of the authorized service.
- (d) The tariff and timetable filings made pursuant to this order shall comply with the regulations governing the construction and filing of tariffs and timetables set forth in the Commission's General Orders Nos. 79-Series and 98-Series.
- (e) Applicant shall maintain his accounting records on a calendar year basis in conformance with the applicable Uniform System of Accounts or Chart of Accounts as prescribed or adopted by this Commission and shall file with the Commission, on or before March 31 of each year, an annual report of his operations in such form, content, and number of copies as the Commission, from time to time, shall prescribe.

The effective date of this order is the date hereof.

Dated at San Francisco, California, this 5th
day of AUGUST, 1975.



President
William Synnott, Jr.

Vernon L. Stenger

Paul J. [illegible]
Commissioners

Appendix A

David W. Kean
doing business as
BACCHANTS' PILGRIMAGES

Original Title Page

CERTIFICATE

OF

PUBLIC CONVENIENCE AND NECESSITY

Showing passenger stage operative rights, restrictions, limitations,
exceptions and privileges applicable thereto.

All changes and amendments as authorized by the Public Utilities
Commission of the State of California will be made as revised
pages or added original pages.

Issued under authority of Decision No. 84763,
dated AUG. 5 - 1975, of the Public Utilities
Commission of the State of California, in Application No. 55636.

Appendix A

David W. Kean
doing business as
BACCHANTS' PILGRIMAGES

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SECTION 1. GENERAL AUTHORIZATIONS, RESTRICTIONS, LIMITATIONS
AND SPECIFICATIONS.

David W. Kean, an individual doing business as Bacchants' Pilgrimages, by the Certificate of Public Convenience and Necessity granted by the decision noted in the margin, is authorized to transport passengers and their baggage on a wine-gourmet oriented tour including various sightseeing attractions that commence from San Francisco and San Francisco International Airport, and continue to the Counties of Santa Clara, Santa Cruz, San Benito, Monterey, Napa and Sonoma over and along the routes described in Section 2 and subject to the following conditions:

- (a) Each tour shall be conducted for a period of five days.
Any abbreviated tour that is conducted shall be for travel agents only.
- (b) Each tour shall be conducted for a minimum of four (4) persons and a maximum of thirty-five (35) persons.
- (c) Service shall be operated from June through October of each year with a maximum of two tours per month.
- (d) Each tour ends at one of the hotels lodged by the group in Napa. Transportation from Napa to the Union Square area of San Francisco or San Francisco International Airport shall be offered as an option at an additional cost.
- (e) Each tour group may, at its option, spend additional time than is allotted at some stops. In such instances, the carrier reserves the right to eliminate other stops so as to comply with above Condition (a).

Issued by California Public Utilities Commission.

Decision No. 84763, Application No. 55636.

Appendix A

David W. Kean
doing business as
BACCHANTS' PILGRIMAGES

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SECTION 2 ROUTE DESCRIPTION

1st day

Commencing at the Sir Francis Drake Hotel with additional pickups at other hotels in the Union Square vicinity in San Francisco, thence over the most appropriate streets, roads and freeways, with an option to stop at Hilton Inn at San Francisco International Airport for passenger pickup, thence to the various wineries and sightseeing attractions in the Counties of Santa Clara, San Benito and Monterey.

2nd day

Sightseeing in the Monterey Bay Area, Point Lobos and Big Sur.

3rd day

Commencing from Monterey, thence over the most appropriate streets, roads and freeways to Bargetto's Winery (Soquel), Santa Cruz, Golden Gate Bridge, San Francisco, Sausalito, Tiburon and to the wineries in Sonoma and Napa counties.

4th and 5th days

Visiting the selected wineries in Napa and Sonoma Counties and terminating at Napa, with optional return transportation to San Francisco or the San Francisco International Airport.

Issued by California Public Utilities Commission.

Decision No. 84763, Application No. 55636.