

Decision No. 85765

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of RAY E. EVANS and RUTH O. EVANS, d.b.a. TRAMWAY TRANSPORTATION AND SIGHTSEEING TOURS, for authority to operate as a tour service between points in Palm Springs and Yucca Valley.

Application No. 55981
(Filed October 3, 1975)

Robert D. Rudnick, Attorney at Law,
for applicant.
Knapp, Stevens, Grossman & Marsh, by
William Ramseyer, Attorney at Law,
for The Gray Lines Tour Company,
protestant.
John deBrauwere, for the Commission
staff.

O P I N I O N

This application by Ray E. Evans and Ruth O. Evans (Evans) is for a passenger stage certificate for an additional sightseeing tour (Tour 6) between Palm Springs and Yucca Valley with stops at specific points and along a specific route described in Exhibit 1. Evans presently holds operating authority for five sightseeing tours under D.75929 dated July 15, 1969. A protest was filed by The Gray Line Tours Company (Gray Line) which presently has operating authority for three sightseeing tours emanating from Palm Springs under D.84749 dated August 5, 1975. Only Tour No. P-3 is coextensive in any manner with the proposed tour, and then only for 13-1/2 miles out of the total proposed tour of approximately 60 miles one way.

Public hearing was held and the matter submitted in Palm Springs on February 17, 1976 before Examiner Phillip E. Blecher.

Evans proposes a year-round tour on an "on-call" basis, as set out specifically in Exhibit 1, with stops at six specific sightseeing attractions and a stop for lunch for a fare of \$17, which includes lunch and admissions to four of the attractions. Evans owns six air-conditioned vehicles (three vans and three limousines) and will purchase additional equipment as necessary, and desires permission to operate a bus. At least one vehicle a day will be dedicated to the proposed tour. A minimum tour group of five is proposed, this being the tour's break-even point. Evans has carried tours on a charter basis to several of the attractions requested, but not as to the entire proposed tour. Applicant Ruth O. Evans testified that during the season (winter months) one or two calls per day are received for tours other than those presently offered, including requests for the specific points Evans is seeking authority for. Some of these requests are by regular visitors to the Palm Springs area, who have been on the existing tours; other requests are by newcomers requesting tours of the Indian Reservation, Moorten's Botanical Gardens, Cabot's Indian Museum, and Pioneer Towns, none of which are presently served by existing tours. Evans has been in business in Palm Springs for 13 years and is financially able to operate the proposed service. Evans states that Gray Line's Tour P-3 (entitled Palm Springs-Twenty-nine Palms) drives over some of the same roads, but does not cover the same territory, makes none of the stops proposed, and goes beyond the area requested.

Gray Line's manager in Palm Springs testified that there is no great demand for its P-3 tour (also identified as Tour C in Exhibit 2, which also indicates this tour is offered on Sundays only); that it was last given about one and one-half months ago; that this tour stops at Christ Park and Pioneer Town (both of which are stops on the proposed tour), and stops for lunch in Twentynine Palms. He was vaguely familiar with Cabot's Indian Museum and the Doll House (two of the proposed stops), but had never had any tour stops at either of these spots, either certificated or charter, during his six years with Gray Line in Palm Springs. Gray Line has only gone to Moorten's on a charter basis, and has never been to the Indian Reservation proposed by Evans. Tour P-3 has not been revised since he has been in Palm Springs and he has no knowledge of any request for tours to the Indian Reservation, Cabot's Museum, or the Doll House. It was his opinion that the proposed tour covers the same territory as Gray Line and is not economically feasible. Gray Line's position is that the certificate cannot be granted unless the Commission finds that the existing certificate holder will not provide such service to the Commission's satisfaction, since the authority is requested to operate in a territory already being served (by Gray Line), pursuant to Section 1032 of the Public Utilities Code (Code). This section, as far as pertinent, reads as follows: "...the 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...serving such territory will not provide such service to the satisfaction of the Commission." Gray Line, in its final argument, indicated it is willing to provide such service, if any interest is shown. It also maintained that merely using the same roads was operating within its territory and that public convenience and necessity had not been proven by Evans.

The staff moved for dismissal of the protest on the basis that no regular service is provided by Gray Line to the points requested by Evans. This motion was denied by the presiding officer, who also indicated that it appeared to be a marginal and pro forma protest at best. The staff supported applicants' request for a certificate on the above basis and because Gray Line had never developed its routes and was thus not adequately serving the area.

Discussion

There is no question that applicants have the burden of proving public convenience and necessity to obtain a certificate here. But there is no requirement that this burden be met by public witness testimony, particularly in an application for a sightseeing tour in a resort area, which is sui generis, and by its nature serves an itinerant vacationing public. The uncontroverted testimony of applicants adequately meets its burden in this type of proceeding.

The major objection of Gray Line regards the competition clause of Section 1032, quoted above. Since Gray Line indicated it was willing to serve if any interest was shown, and because the requested route was partially coextensive in its territory on Route P-3, the most authority that could be granted is for the two stops (Indian Reservation and Moorten's Botanical Gardens) not offered by or within the routing of Gray Line. This argument is without merit for two reasons:

1. In dealing with a specialized passenger stage service, such as sightseeing tours (which we have already described as sui generis), the territory of existing carriers is construed narrowly. (The Gray Line Tours Company (1973) 74 CPUC 669, 696.) If protestant's argument was upheld, it follows that the territory involved here would cover the entire resort and sightseeing area and no competing carrier could ever be certificated. We hold

that in this type of passenger stage service, the territory means the attractions included in the tour, not the routes used, or the area involved.

Gray Line's willingness to serve, if interest is shown, is attempting to impose conditions on its willingness, and is unacceptable, particularly where its testimony indicated no such interest was shown.

2. The last sentence of Section 1032 quoted above is designed to protect existing carriers who provide the same service as requested. That is not the case here, since the service requested covers four attractions never served by Gray Line and two attractions served infrequently and intermittently and then offered only once weekly. Applicants are offering "on-call" service on a daily basis, if required, to sites not offered by Gray Line. Thus, the requested service is dissimilar to that presently provided, and since there is no other service to these places, that portion of Section 1032 is inapplicable. (Greyhound Lines, Inc. v Public Utilities Commission (1968) 68 C 2d 406, 417; Orange Coast Sightseeing Co. (1967) 67 CPUC 129.) Therefore, we shall grant the application. To hold otherwise would penalize an industrious, enterprising carrier indicating a desire to develop and expand the service offered to the public, for the sole purpose of maintaining the status quo. This was not the intent of the Legislature in enacting Section 1032.

Findings

1. Applicants have sufficient equipment, experience, and financial resources to perform the proposed service.
2. Applicants have met the burden of proving public convenience and necessity for the purposes of a sightseeing tour.
3. Public convenience and necessity require that the service proposed by applicants be certificated.
4. Sightseeing tours are a specialized type of passenger stage service primarily serving an itinerant segment of the public.
5. In applications for sightseeing tour-type passenger stage corporation certificates, "territory", as used in Section 1032, means the attractions, not the routes used or area served.
6. The tour proposed will serve a substantially different territory than any existing service.
7. Since the majority of the attractions listed in the proposed tour are not being served by any carrier, and the two attractions that are being served by protestant are not on an "on-call" basis as proposed, and are only being served infrequently and intermittently, the requested service is not in a territory already served by a certificate holder since the proposed and existing services are so dissimilar.
8. Applicants may use any equipment feasible for the proposed and existing services.
9. It can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.

Conclusions

1. The application should be granted in accordance with the ensuing order.

2. Because the proposed service is so unlike any service being performed, the last sentence of Section 1032 is inapplicable in this proceeding.

3. Sightseeing tours are a highly specialized type of passenger stage corporation, which requires a narrow interpretation of the word "territory" as set out in Finding 5 above.

Ray E. Evans and Ruth O. Evans, dba Tramway Transportation and Sightseeing Tours, are 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 Ray E. Evans and Ruth O. Evans, dba Tramway Transportation and Sightseeing Tours, authorizing them to extend operations 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 Decision No. 69812, as amended by the revised pages attached hereto.

2. Appendix A of Decision No. 69812, as heretofore amended, is further amended by incorporating Second Revised Page 2 in revision of First Revised Page 2, Second Revised Page 3 in revision of Original Page 3, First Revised Page 5 in revision of Original Page 5, and Original Page 6, all attached hereto.

3. In providing service pursuant to the authority granted by this order, applicants 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, applicants shall file a written acceptance of the certificate granted. Applicants are placed on notice that if they accept the certificate they 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, applicants 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 ten days after the effective date of this order on not less than ten 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.

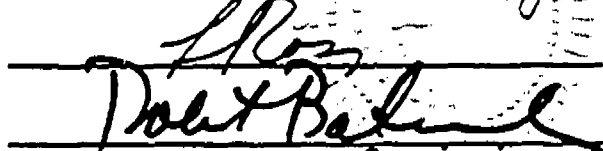
- (e) Applicants shall maintain their accounting records on a calendar year basis in conformance with the applicable Uniform System of Accounts or Chart of Accounts as prescribed or adopted by this Commission and shall file with the Commission, on or before March 31 of each year, an annual report of their operations in such form, content, and number of copies as the Commission, from time to time, shall prescribe.

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

Dated at San Francisco, California, this 15th day of MAY, 1976.


President




Commissioners

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

RAY E. EVANS and RUTH O. EVANS
doing business as
TRAMWAY TRANSPORTATION AND
SIGHTSEEING TOURSSECTION 1. GENERAL AUTHORIZATIONS, RESTRICTIONS,
LIMITATIONS, AND SPECIFICATIONS.

Ray E. Evans and Ruth O. Evans, doing business as Tramway Transportation and Sightseeing Tours, by the certificate of public convenience and necessity granted by the decision noted in the margin, is authorized to conduct a sightseeing service for the transportation of passengers between points and places in the City of Palm Springs, on the one hand, and points of interest in Riverside County, on the other hand, over and along the routes hereinafter described, subject to the following conditions and restrictions:

- (a) Motor vehicles may be turned at termini and intermediate points, in either direction, at intersections of streets or by operating around a block contiguous to such intersections in accordance with local traffic regulations.
- (b) When route descriptions are given in one direction, they apply to operation in either direction unless otherwise indicated.
- (c) All service herein authorized shall be limited to the transportation of round-trip passengers only.
- * (d) Deleted.
- (e) Passengers shall not be picked up or discharged, except within the corporate limits of the City of Palm Springs. This restriction shall not prevent stopovers for the purpose of permitting sightseeing passengers to visit various points of interest along the routes.

Issued by California Public Utilities Commission.

*Deleted by Decision No. 85765, Application No. 55981.

RAY E. EVANS and RUTH O. EVANS
doing business as
TRAMWAY TRANSPORTATION AND
SIGHTSEEING TOURS

SECTION 1. (Continued)

- (e) Service may be operated on an "on-call" basis, subject to the minimum number of passengers shown below:

- Tour No. 1 - two passengers
- Tour No. 2 - three passengers
- Tour No. 3 - three passengers
- Tour No. 4 - four passengers
- Tour No. 5 - one passenger
- * Tour No. 6 - five passengers

Tariffs and timetables of applicant shall show the conditions under which such "on-call" service will be rendered.

Issued by California Public Utilities Commission.

*Added by Decision No. 85765, Application No. 55981.

Appendix A
(Dec. 69812)

First Revised Page 5
Cancels
Original Page 5

RAY E. EVANS and RUTH O. EVANS
doing business as
TRAMWAY TRANSPORTATION AND
SIGHTSEEING TOURS

SECTION 2. ROUTE DESCRIPTIONS. (Continued)

Tour No. 3

Commencing at any point in the City of Palm Springs, thence via Tour No. 2 route to the intersection of 40th Avenue and State Highway 111, thence via State Highway 111 to Shields Date Farm. Return via State Highway 111 to the intersection of 40th Avenue, thence via Tour No. 2 route to point of origin.

Tour No. 4

Commencing at any point in the City of Palm Springs, thence via the most direct and appropriate route to State Highway 111, thence via State Highway 111, U.S. Highway 60-70-99, Banning-Idyllwild Highway (Forestry Road R-1), thence southerly through Idyllwild to the junction of State Highway 74, thence via State Highway 74 and State Highway 111 to point of origin.

Tour No. 5

Commencing at any point in the City of Palm Springs, thence via the most direct and appropriate route to State Highway 111, thence via State Highway 111 to junction of private road (owned by Mount San Jacinto Winter Park Authority, an agency of the State of California), thence westerly to the Valley Station of the Palm Springs Aerial Tramway.

* Deleted

Issued by California Public Utilities Commission.

*Changed by Decision No. 85765, Application No. 55981.

RAY E. EVANS and RUTH O. EVANS
doing business as
TRAMWAY TRANSPORTATION AND
SIGHTSEEING TOURS

SECTION 2. ROUTE DESCRIPTIONS. (Continued)

*Tour No. 6

Commencing at any point in the City of Palm Springs, thence via the most direct route to the intersection of Palm Canyon Drive, south to Moorten's Botanical Gardens, on to Indian Reservation on South Palm Canyon, back on Palm Canyon to Indian Avenue and right on Vista Chino to Palm Drive to Desert Hot Springs, to Desert View, stop at Cabot's Old Indian Pueblo Museum. Back to Palm Drive, stop at Suzi-Q's Cafe for a snack, Palm Drive to Pearson, stop at Kingdom of the Dolls, Pearson Avenue to Freeway 62 to Yucca Valley and Christs Park, to State Highway 76 to Pioneer Town, back to Freeway 62 to Highway 10 to Indian Avenue and Palm Canyon Drive to point of origin.

END OF APPENDIX A

Issued by California Public Utilities Commission.

*Added by Decision No. 85765, Application No. 55981.