

ORIGINAL

Decision 88-03-071 March 23, 1988

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

DAVID AND LINDA WITTMAN, dba  
BOB'S RIDE,

Complainants,

vs.

SAN DIEGO AIRPORTER EXPRESS, INC.  
dba AIRPORTER EXPRESS,

Defendant/Respondent.

Case 87-04-033  
(Filed April 15, 1987)

DAVID AND LINDA WITTMAN, dba  
BOB'S RIDE,

Complainants,

vs.

SAN DIEGO AIRPORTER EXPRESS, INC.,  
dba AIRPORTER EXPRESS,

Defendant.

Case 87-04-033  
Cease and Desist Order  
(Issued May 29, 1987)

In the Matter of the Application of  
San Diego Airporter Express, Inc.,  
/dba/ "The Airporter Express  
Supershuttle" for authority to  
operate as an "on call" PSC between  
San Diego County Area communities  
and:

- (1) San Diego Lindberghfield (SDX);
- (2) The Santa Fe Train Depot;
- (3) Greyhound Bus Terminals;
- (4) Trailways Bus Terminals; and
- (5) San Diego Trolley Railheads.

Application 87-06-017  
(Filed June 3, 1987)

Informal Application for  
Reinstatement of Charter-party of  
Carriers Permit by San Diego  
Airporter Express TCP 4041P.

Application 87-07-006  
(Filed July 3, 1987)

Investigation on the Commission's  
own motion into the operations,  
rates, and practice of San Diego  
Airporter Express, Inc., doing  
business as Airporter Express.

I-87-06-030.  
(Filed June 24, 1987)

Jos. A. Bradley III, Attorney at Law, for Bob's  
Ride, complainant in C.87-04-033, protestant  
in A.87-06-017 and A.87-07-006, and interested  
party in I.87-06-030.

Randolph Wright, Attorney at Law, for San Diego  
Airporter Express, Inc., applicant in A.87-06-017  
and A.87-07-006, defendant in C.87-04-033, and  
respondent in I.87-06-030.

Grant Telfer, Attorney at Law, for the City of  
San Diego, San Diego Police Department, and Helen  
Cage, Custodian of Records, interested party.

Lawrence O. Garcia, Attorney at Law, and Paul Wuerstle,  
for the Transportation Division.

## OPINION

### Procedural History

This consolidated proceeding had its beginning with a complaint filed by David and Linda Wittman (complainants, or Bob's Ride) doing business as Bob's Ride against San Diego Airporter Express, Inc., doing business as Airporter Express (Airporter) in Case (C.) 87-04-033, filed April 15, 1987. Complainants alleged that Airporter was soliciting, diverting from complainant, and transporting passengers as a passenger stage corporation (PSC) without having in effect the required certificate of public convenience and necessity. Complainants requested that we:

1. Direct Airporter to cease and desist from soliciting passengers of complainant;
2. Direct Airporter to cease and desist from conducting operations outside the scope of its authority, particularly with regard to offering services on an individual fare basis;

3. Impose fines upon Airporter for its alleged unauthorized operations during a 28-month period; and
4. Order a disgorgement to complainants of all revenues collected by Airporter during the period January 1, 1985 to April 15, 1987, not provable by Airporter to be attributable to operations conducted pursuant to Airporter's authority.

Airporter, in its answer to Bob's Ride's complaint, admitted that it held charter-party carrier of passengers (TCP) authority, a jitney license authorizing the transportation of passengers on a regular schedule and with fares assessable on a per capita rate; a City vehicle for-hire license; and an Airport permit. Airporter had also requested attorney fees for this "frivolous" action; and the revocation of the license of Bob's Ride "for this act of unfair competition."

Bob's Ride, in an amended complaint, asked for attorney fees in an amount to be determined based upon evidence submitted.

Thereafter, on May 29, 1987 by Decision (D.) 87-05-084 in C.87-04-033 the Commission directed Airporter to cease and desist from transporting passengers in operations requiring authority from this Commission until it had acquired such authority. The cease and desist order recited that Airporter had formerly held authority to operate as a TCP but that its authority had lapsed April 15, 1987 and had not been renewed; further, that the Commission had received an affidavit from the Compliance and Enforcement Branch of its Transportation Division that Airporter was currently transporting passengers in operations requiring authority from this Commission. Public Utilities (PU) Code § 1034 empowers the Commission to issue an immediate cease and desist order when it is alleged in a complaint that a person or corporation is operating as a PSC without having a certificate of public convenience and necessity from this Commission. The order directed Airporter and its president, Thomas Harmon, its agents, servants, employees, and

all persons acting in concert with Airporter to cease and desist from all operations requiring authority from this Commission until further order of the Commission.

Airporter filed a request for PSC authority in A.87-06-017 on June 3, 1987. A request for reinstatement of its TCP permit was received May 21, 1987, and formally docketed July 3, 1987 as A.87-07-006.

The Commission's records show that the cease and desist order was personally served upon Thomas Harmon on June 8, 1987. On July 8, 1987 we issued D.87-07-046, an "Order Consolidating Proceedings, Expanding Investigation, And Order To Show Cause Re Contempt." The decision referred to the issuance of Order Instituting Investigation (I.) 87-06-030 into the operations, rates and practices of Airporter, with particular concern over the transportation of passengers by Airporter without appropriate authority from this Commission. The decision included an affidavit from James Badgett, Transportation Analyst with the Commission's Transportation Division, stating that Airporter had transported passengers subsequent to the service of the cease and desist order. This transportation, according to Badgett's affidavit, took place on June 12, 1987 from San Diego Airport (Airport) to a motel in Oceanside.

D.87-07-046 ordered consolidation of the following:

1. C.87-04-033, including the cease and desist order issued in that proceeding;
2. A.87-06-017, Airporter's request for PSC authority.
3. Airporter's application for reinstatement of TCP permit 4041P; and
4. I.87-06-030.

D.87-07-046 also expanded I.87-06-030 to consider whether Airporter is in violation of PU Code § 5413.5, and if so whether a penalty for each violation of that code section should be imposed and

whether the Commission should assess upon Airporter the reasonable expense of investigation incurred by the Commission, pursuant to § 5413.5. Finally, the decision ordered that Airporter shall show cause why they should not be adjudged in contempt for violation of D.87-05-084.

A prehearing conference was conducted July 13, 1987. A duly noticed public hearing on the consolidated proceeding was held in San Diego July 30 and 31 before Administrative Law Judge (ALJ) John Lemke. The matter was to be submitted with the filing of briefs November 9, 1987.

Application (A.) 87-06-017

Airporter withdrew its request for PSC authority during the hearing.

I.87-06-030

This investigation, dated June 24, 1987 was instituted to determine whether (1) Airporter had violated PU Code § 1031 by operating as a PSC without a certificate of public convenience and necessity; (2) whether, pursuant to PU Code § 1035 Airporter had computed, collected, or demanded rates, charges, or fares on an individual fare basis for the transportation of persons so that it should be presumed to have engaged in the act of operating as a PSC; (3) whether Airporter violated PU Code § 5401 by operating pursuant to a charter-party carrier of passengers permit and charging, demanding, or receiving compensation computed, charged, or assessed on an individual fare basis; and, (4) whether Airporter violated PU Code § 1034 by operating in violation of cease and desist order D.87-05-084.

Stipulation

Staff and Airporter stipulated as follows:

1. Airporter charged individual fares, thereby presumptively operating as a PSC.
2. Airporter continued to operate after being served with the cease and desist order.

3. Airporter would pay a fine of not more than \$3,000, and pay expenses under the provisions of PU Code § 5413.5 of not more than \$2,000.

Airporter's attorney asserted that during the period of time covered by the investigation, Airporter had insurance in effect, and also had in effect vehicle for-hire and jitney licenses issued by City.

A.87-07-006

This portion of the consolidated proceeding, a request by Airporter for reinstatement of its authority to operate as a charter-party carrier of passengers, was originally received on May 1, 1987 as an informal application for that reinstatement, but was docketed July 3, 1987 as a formal application for purposes of this consolidated proceeding. The staff took no position on Airporter's request for reinstatement of its charter-party authority, nor has Bob's Ride filed a formal protest to such reinstatement although it protested issuance of the permit at the hearing.

Joseph Bradley, attorney for complainants, had served the City of San Diego (City) with a subpoena duces tecum, seeking the production of "All San Diego Police Department Paratransit Licensing Division files on all persons currently or formerly licensed to drive for San Diego Airporter Express, doing business as Airporter Express." The subpoena was served on City approximately a week prior to the hearing. City presented the ALJ with a Motion to Quash the subpoena the first day of the hearing. The attorney for City stated that the police department is custodian of records containing private information which the public expects to be safeguarded. The subpoena contained no signature on the affidavit, nor any argument as to why the sought information is necessary. The Motion to Quash was granted. We hereby affirm the ALJ's ruling.

Evidence

Staff - I.87-06-030

At staff's request, official notice was taken of the following:

1. An application by Airporter for a charter party carrier of passengers permit dated March 3, 1986.
2. The permit issued to Airporter authorizing operations as a charter party carrier of passengers, File TCP 4041-P, dated April 15, 1986.
3. A letter dated April 15, 1986 transmitting this permit to Airporter and advising Airporter of certain conditions surrounding the exercise of the permit, including the conditions that no passenger service may be operated under the permit on an individual fare basis, and that the permit is renewable annually.
4. A letter dated January 2, 1987 from the Commission's Transportation Division to Airporter advising that its permit would expire April 15, 1987, and that without prior renewal, operations after that date would be unlawful.

These documents were received as Reference Items Nos. 1 through 4.

Donald Smith, a transportation analyst with the Commission's Transportation Division in its San Diego office, sponsored Exhibits 1, 2, and 3. Exhibit 1 consists of nine drivers' logs furnished Smith by Airporter's president, Thomas Harmon on July 22, 1986. The logs reflect transportation of passengers principally from Airport to Camp Pendleton during the period July 6 to 11, 1986. All nine parts contain a comment similar to the one contained in Part 1, as follows:

"Camp Pend 6 @ \$10.00 equals \$60.00."

Part 9 reflects transportation of two passengers to Escondido

"@ \$20.00", and a total of \$40.00. Exhibit 1 indicates a total of 86 passengers transported during this period to Camp Pendleton or Escondido on an individual fare basis.

Exhibit 2 is a schedule of rates appearing on an attachment to an Airporter business card showing the respondent's fares, per person, to Camp Pendleton, Mission Beach, Marine Corps. Recruit Depot, and Pacific Beach.

Exhibit 3 is a list of abbreviations of origins and destinations used on the drivers' logs.

The documents contained in Exhibits 1, 2, and 3 were included in a report which Smith prepared to comprise the basis for a citation forfeiture proceeding. Harmon, instead of paying the fine stated in the forfeiture denied the allegations and requested a hearing. I.87-06-030 was issued as a result of the report and Harmon's refusal to agree to the citation forfeiture.

Smith testified that the complaint alleging violations committed by Airporter and underlying his investigation was received approximately 28 months prior to date of hearing. He stated that Harmon cooperated with him during the course of Smith's investigation, and expressed no feelings of guilt or knowledge that Airporter's operations were being conducted illegally at that time.

Russell Hall, another Transportation Analyst with the Commission's Transportation Division, testified that on April 1, 1987 he rode one of Airporter's buses from Airport to Camp Pendleton, and paid a fare of \$10.00. Hall was issued a receipt for the ride (Exhibit 4).

Mary Perez-Cardenas, also a Transportation Analyst with the Commission's Transportation Division, accompanied Hall on the ride to Camp Pendleton, and also paid a fare of \$10.00. On cross-examination Perez-Cardenas stated that the driver told her he would not go to Camp Pendleton without a certain number of passengers; that he would not go with just one passenger; and that her share of that group rate would be \$10.00.



John Morgan, an Associate Transportation Representative with the Commission's Transportation Division, testified that Airporter received a charter-party permit in April of 1986, which expired in April 1987. He further testified that on May 12, 1987 he and Perez-Cardenas rode from Airport in an Airporter bus to Camp Pendleton. Morgan paid a \$10.00 fare for this transportation. The driver asked whether, in the event five passengers could not be found for the trip, Morgan and Perez-Cardenas would be willing to pay more than \$10.00 apiece. The two Commission employees agreed to pay \$15.00 apiece, if necessary.

James Badgett, a Transportation Analyst with the Commission's Transportation Division, testified that on June 12, 1987 he and a Ms. Lopez were transported in an Airporter bus from the Airport to a motel in Oceanside, for a total cost of \$35. (Badgett is the affiant to the affidavit attached to D.87-07-046.)

Enedina Lopez, a Transportation Analyst and the person referred to in Badgett's testimony, corroborated Badgett's testimony.

Airporter

Thomas Harmon, Airporter's president, testified generally as follows:

1. In addition to the TCP permit held from this Commission, Airporter holds vehicle for-hire and jitney licenses issued by City, which allow assessment of fares on an individual fare basis.
2. Airporter had operated four vehicles, all insured in accordance with Commission requirements, but has operated only three buses since the cease and desist order was served on June 8, 1987.
3. He understood that Airporter could operate with City's licenses outside the City of San Diego, provided those operations did not exceed 2 percent of Airporter's business.

4. When operating after the cease and desist order was issued, he believed Airporter was working under City authority.

5. He simply forgot to renew his TCP permit, which had lapsed April 15, 1987.

6. That after receiving service of the cease and desist order, he instructed his drivers not to operate in TCP service, but that he has difficulty sometimes controlling his drivers.

C.87-04-033

Complainant Linda Wittman testified concerning instances where she observed and overheard during July, August, and December 1986, and January 1987, Airporter employees soliciting passengers, on an individual fare basis, at the San Diego Airport to transport them to Camp Pendleton.

Jamie Potvin, a friend of complainants, sponsored Exhibit 6, a statement in which she describes how she and two others were transported by Airporter on July 24, 1987 from her home in Spring Valley, a community located outside the city limits of the City of San Diego, to the Airport. In her statement Potvin describes the driving as erratic, operating at speeds as high as 80 miles per hour, and weaving in and out of traffic. A charge of \$20.00 was assessed and paid for the trip, and a receipt issued (Exhibit 7). This "sting" arrangement was requested by and performed at the request of the Commission staff in San Diego. The counsel for Airporter objected to the receipt of the Potvin exhibits (Exhibits 6, 7, and 8) and to corroborative testimony by Linda Wittman, on the basis that none of this information had been included in the complaint, and Airporter had no prior knowledge of the allegation. Since Airporter was furnished with no prior information concerning this testimony, the motion to strike its admission is granted.

La Donna Thomas sponsored Exhibit 9, a statement which generally corroborated the information presented by Potvin and Linda Wittman concerning the July 24 transportation. The exhibit

was received subject to the same motion to strike discussed supra. This testimony is also stricken.

Miriam Cienega, an employee of San Diego Express Service, Inc., a PSC, sponsored Exhibits 10 through 13, consisting of documents which she prepared indicating transportation by Airporter to or from the Hotel del Coronado during the period April to July 1987 in four different Airporter vehicles. The evidence was adduced principally to impeach Harmon's testimony on July 30 that since June 8 he had operated only three vehicles. Cienega conceded that she did not personally observe the origin point of any of the passengers in these observed vans.

Donald Henkel, a former driver for Airporter, testified that the employment arrangement with the company was on a 50/50 basis, i.e., Henkel kept, as driver compensation, 50 percent of the revenues collected. Henkel's testimony was offered to impeach Harmon's testimony that all of his drivers during this period were treated as employees, rather than independent contractors.

(General Order 98-A, Part 12, requires that drivers be employees of the PSC or TCP, and under the direction or control of the carrier.)

Dennis Law, a ground transportation dispatcher for the Airport, testified that he had observed Airporter drivers soliciting passengers on approximately six occasions during a period of two years; but the witness could not state specifically that the solicitation was on an individual fare basis.

Marine Sergeant Lance Santiago, NCOIC of troop handlers at Camp Pendleton, testified that on one occasion he observed an Airporter driver soliciting fares to a destination 15 miles beyond Camp Pendleton for "an extra \$5 each."

George Long, a driver for Bob's Ride, stated that frequently Airporter drivers have approached passengers waiting to depart on a Bob's Ride van, and offered to take them to Camp Pendleton immediately for the same fare or less, rather than wait for the scheduled departure.

Robert Smith, former owner of Airporter, testified that in his opinion Tom Harmon attempts to operate a legitimate business.

A.87-06-006

David Wittman stated in effect that he is protesting Airporter's TCP request because the opportunity for abuse of such authority is too readily available, i.e., the line of demarcation between legitimate PSC and TCP operations is fragile; an unscrupulous TCP operator may well find the temptation to step over that line too tempting to resist, particularly in connection with the lucrative San Diego Airport/Camp Pendleton market. This protest was not made prior to date of hearing.

Exhibit 18, a list of 32 carriers operating in San Diego County, indicates that 14 of these carriers hold TCP authorities, and are potential competitors of Bob's Ride on his TCP operations.

Tom Harmon testified that he has often transported marines to Camp Pendleton during early morning and late evening hours under TCP authority. He stated that most of Airporter's business to Camp Pendleton takes place after the last Bob's Ride schedule.

Harmon declared that he has about \$7,000 in a bank, and about \$20,000 equity in three vans presently operated. He also testified that Airporter holds jitney and for-hire licenses issued by the City, authorizing operations to Coronado, and that total trips outside the City comprise less than 2% of his overall mileage. Harmon was referring to PU Code § 226, defining "passenger stage corporation" and stating, in pertinent part, "...except those, 98% or more of whose operations as measured by total route mileage operated, which are exclusively within the limits of a single city or city and county, ..." Harmon stated that he estimates that 98% of his business is within the City of San Diego; but he has never precisely calculated such a figure, and has never checked the mileages of the individual routes over which

he is authorized to operate by City. Further, Harmon testified that he is not including the Camp Pendleton transportation within the 2% allowed as PSC operations exempt from Commission regulation under PU Code § 226.

### Discussion

The complainants have realized most of the objectives sought in their complaint, or withdrawn the request for sanctions. They asked for (1) issuance of a cease and desist order, which has been issued; (2) the imposition of fines, stipulated to by Airporter; and (3) the disgorgement of revenues, which request has been withdrawn.

It will be noted that there are no provisions for fining contained in the PU Code due to unlawful PSC operations, per se; although in the circumstances before us Airporter may be fined after a finding of contempt, pursuant to PU Code § 2113, in the same manner as contempt is punished by courts of record. Thus, Bob's Ride's complaint must be denied insofar as its request for imposition of fines relates to unlawful PSC operations. (Note also that PU Code § 1033.5, added to the PU Code in 1986 and effective with 1987, contains wording authorizing the Commission to fine holders of PSC authorities; however, Airporter has never held such authority.)

Further, Bob's Ride is urging that the fine imposed on Airporter be based upon the maximum amount permitted for each and every violation identified by the Commission staff, and that in the event Airporter's TCP permit is renewed, it be subject to strict limitations which would trigger an immediate forfeiture of the authority and the payment of substantial fines in the event of subsequent violations.

The remaining issue contained in the amended complaint is the request for attorney fees. The requests for attorneys' fees may be disposed of quickly by stating that the only provisions for such awards in cases before the Commission are those found in PU

Code § 1801 et seq., and in our Rules of Practice and Procedure. Proceedings involving transportation matters are specifically exempted in these provisions by D.83-04-017 and by PU Code § 1801 which limits applicability to those proceedings which modify a rate or establish a fact or rule that may influence a rate. A complaint such as this does neither.

The complainants' case in C.87-04-033 concerning transportation to Coronado goes to the issue of whether Airporter was operating without authority, than to taking business away from Bob's Ride on the Coronado business. Complainants are authorized to perform service as a PSC only between the San Diego Airport, on the one hand, and Camp Pendleton, on the other hand. (D.83-04-049 dated April 6, 1983 in A.83-02-033). They are restricted to two service routes in performing this service, both principally over Interstate Highway 5. Evidence concerning this Coronado transportation does not indicate the basis for assessment of fares, nor origin points, and cannot be used as a basis for imposition of fines. But if the transportation was to or from points beyond Coronado, Harmon is cautioned that it is unlawful since it was performed after the expiration of Airporter's TCP permit.

Exhibit 2 shows that Airporter quotes fares to Camp Pendleton on a per person basis.

The testimony of staff witnesses Smith concerning the 1986 transportation, and of Hall and Perez-Cardenas concerning transportation to Camp Pendleton on April 1, 1987 for \$10 apiece is probative that Airporter provided service as a PSC. The testimony of John Morgan that he and Perez-Cardenas rode an Airporter bus to Camp Pendleton on May 12, 1987 for \$10 apiece is also probative that Airporter operated as a PSC. The testimony of Badgett concerning the transportation by Airporter of Badgett and Ms. Lopez to Oceanside on June 12, 1987 for \$35 is probative that Airporter operated as a TCP without a TCP permit, after the personal service

upon Harmon of the cease and desist order (D.87-05-084), and therefore in contempt for not obeying a lawful Commission decision.

Harmon's testimony is that he had met the insurance requirements at all times, and that his drivers are sometimes difficult to control. This is apparently because they are paid on a 50/50 basis, and find it difficult to refuse a fare for which Airporter may not have the proper authority.

Because of Airporter's continued operations after service of the cease and desist order, we believe it fair and reasonable to adopt the maximum conditions of the stipulation between Airporter and the staff concerning the fine and assessment. However, CCP § 1218 specifies a maximum fine for contempt of \$1,000. We will therefore impose a fine because of Airporter's contempt of \$1,000 pursuant to PU Code § 2113 and CCP § 1218, a fine of \$2,000 pursuant to PU Code § 5413.5, for operating without a TCP permit, and the assessment of \$2,000 for expenses pursuant to PU Code § 5413.5. We will issue the TCP permit requested by Airporter, subject to conditions as urged by complainant and staff. We are granting the TCP permit largely because of Harmon's testimony concerning transportation to and from Camp Pendleton under Airporter's TCP authority during times of the day before and after scheduled Bob's Ride service.

Airporter and Harmon are cautioned that each Commission decision, order, ruling, or directive is to be obeyed; that the Commission views as particularly flagrant operations in direct violation of a specific cease and desist order. Airporter and Harmon are hereby placed on notice that any similar future violation by Airporter or Harmon will result in Commission action which will permanently affect their ability to conduct for-hire operations within California requiring authority from this Commission. We should mention here that CCP § 1218 contains provisions authorizing imprisonment for contempt, in addition to those authorizing fines.

Lastly, Harmon is hereby placed on notice that he is responsible for properly managing Airporter, and for requiring his drivers to act in conformance with Commission orders and rules.

In accordance with Public Utilities Code § 311, as amended by Assembly Bill 3383, the ALJ's proposed decision was mailed to appearances on February 16, 1988. Comments were received only from the staff, stating it supports the findings, conclusions, and recommendations contained therein.

Findings of Fact

1. Bob's Ride holds a PSC certificate authorizing service between San Diego Airport, on the one hand, and Camp Pendleton, on the other hand.

2. Bob's Ride also holds a TCP permit authorizing operations from all points within 40 miles of San Diego to all points within the State of California.

3. Airporter does not currently hold operating authority issued by this Commission. It holds operating authorities issued by the City of San Diego. It formerly held a TCP permit, which expired April 15, 1987.

4. Bob's Ride's complaint, as amended, requested that Airporter be ordered to cease and desist from soliciting the complainant's passengers; cease and desist from conducting operations outside the scope of its authority, particularly with regard to offering services on an individual fare basis; the imposition of fines; the disgorgement of revenues; and attorney's fees.

5. Bob's Ride has withdrawn its request for the disgorgement of revenues.

6. D.87-05-084, in C.87-04-033 dated May 29, 1987, and served upon Thomas Harmon, Airporter's president, on June 8, 1987, ordered Airporter and its employees and all persons acting in concert with it to cease and desist from transporting passengers in operations requiring authority from this Commission.



7. D.87-07-046, dated July 8, 1987 included an affidavit by James Badgett, a Commission employee, stating that Airporter had transported Badgett and Enedina Lopez, another Commission employee, on June 12, 1987 from San Diego Airport to Oceanside, for a charge of \$35. This transportation constituted TCP service.

8. I.87-06-030 was issued June 24, 1987 to determine whether Airporter had violated PU Code § 1031 by operating as a PSC without a certificate of public convenience and necessity; whether it had assessed charges on an individual fare basis, so that it shall be presumed to have engaged in the act of operating as a PSC; whether it had violated PU Code § 5401 by operating pursuant to a TCP permit and assessing charges on an individual fare basis; and whether it had violated PU Code § 1034 by operating in violation of cease and desist order D.87-05-084 issued May 29, 1987 and served on respondent June 8, 1987. D.87-07-046 expanded I.87-06-030 to consider whether Airporter is in violation of PU Code § 5413.5, and whether fines and assessments should be imposed.

9. Airporter orally withdrew its request for PSC authority, A.87-06-017, during the hearing.

10. Evidence contained in Exhibit 1 indicates that Airporter transported passengers from San Diego Airport to Camp Pendleton or Escondido on numerous occasions during the period July 8 through July 11, 1986, and assessed charges for that transportation on an individual fare basis. During the period of this transportation, Airporter had in effect a TCP permit issued by this Commission. These acts constituted a violation of PU Code §§ 1031 and 5401.

11. Testimony of staff witnesses Smith, Hall, Perez-Cardenas, Morgan, and Lopez is probative that Airporter has operated as a PSC without a certificate of public convenience and necessity, having assessed charges on an individual fare basis.

12. Harmon stated that 98% of his operations are within the City of San Diego, but conceded that he does not include the transportation to Camp Pendleton within the 98%.

13. PU Code § 1035 provides, in pertinent part, that transporting passengers and assessing charges therefor on an individual are basis shall be presumed to be an act of operating as a PSC.

14. Airporter has not overcome the presumption stated in PU Code § 1035.

15. Airporter has filed, on May 21, 1987 an application for a TCP permit, authorizing on call airport limousine service, and in which service it will assess charges on the basis of \$40 per hour and/or \$2 per mile.

16. Evidence, particularly Harmon's testimony, indicates a need for TCP service between San Diego Airport and Camp Pendleton, at least outside of those times when Bob's Ride provides its scheduled service between those points.

17. PU Code § 5375 provides that in issuing TCP authority the Commission may attach terms and conditions required in the public interest.

18. Airporter has violated PU Code § 5371, and D.87-05-084, by operating as a TCP after its TCP permit had expired.

19. Airporter has stipulated that (a) it has assessed charges on an individual fare basis and presumptively operated as a PSC, (b) operated in for-hire operations after the cease and desist order was served upon its president, Thomas Harmon, and (c) it will pay a fine of not more than \$3,000, and costs of not more than \$2,000 pursuant to PU Code § 5413.5, for the expense of the investigation pertaining to its unlawful TCP operations.

20. The Commission has no authority to award attorney's fees in these circumstances, nor to impose fines under PU Code § 1033.5 for performing unlawful PSC operations unless the respondent is a holder of a PSC certificate.

#### Conclusions of Law

1. A fine in the amount of \$1,000 should be imposed on Airporter, pursuant to PU Code § 2113 and CCP § 1218.

2. A fine in the amount of \$2,000 should be imposed pursuant to PU Code § 5413.5.

3. Airporter should pay expenses in the amount of \$2,000 pursuant to PU Code § 5413.5.

4. Airporter should be judged in contempt of D.87-05-084, dated May 29, 1987 and served upon its president, Thomas Harmon, on June 8, 1987 because it transported passengers for hire in operations requiring authority from this Commission after the date of service of the decision.

5. A TCP permit should be issued to Airporter, subject to conditions.

6. Airporter has not shown cause why it should not be fined and assessed as set forth in this decision.

7. The stipulation between Airporter and the staff should be adopted in the maximum amounts set forth therein.

#### ORDER

##### IT IS ORDERED that:

1. San Diego Airporter Express, Inc. (Airporter) is hereby adjudged to be in contempt of D.87-05-084.

2. Within 30 days after the effective date of this decision Airporter shall pay fines of \$3,000, and an assessment of \$2,000 to this Commission.

3. A.87-06-017 is dismissed.

4. Airporter shall not operate as a passenger stage corporation until it has a certificate of public convenience and necessity authorizing such operations.

5. After receipt by the Commission of payment of the fine and the assessment specified in Ordering Paragraph 2, the Commission's Director of Transportation shall cause to be issued to Airporter the permit sought in A.87-07-006. A copy of this

decision shall be attached to the permit, and to subsequent renewals thereof.

6. If in the future Airporter, or Thomas Harmon, or any entity in which he holds a significant ownership interest, willfully violates any provision of the PU Code pertaining to the for-hire transportation of passengers, or willfully violates any lawful decision, order, or regulation of this Commission, consideration will be given to the permanent cancellation of all operating authorities held by Harmon and/or any such entity.

7. The requests for attorney's fees are denied.

8. The Executive Director is directed to cause personal service of this decision to be made upon Thomas Harmon.

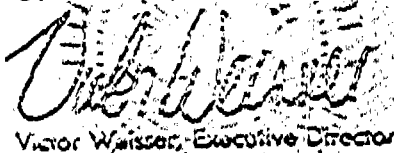
9. The complaint is granted in part and denied in part as set forth above.

This decision becomes effective with service thereof upon Thomas Harmon.

Dated MAR 23 1988, at San Francisco, California.

STANLEY W. HULETT  
President  
DONALD VIAL  
FREDERICK R. DUDA  
G. MITCHELL WILK  
JOHN B. OHEANIAN  
Commissioners

I CERTIFY THAT THIS DECISION  
WAS APPROVED BY THE ABOVE  
COMMISSIONERS TODAY

  
Victor Weissert, Executive Director

Decision 88 03 071 MAR 23 1988

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

DAVID AND LINDA WITTMAN, dba  
BOB'S RIDE,

Complainants,

vs.

SAN DIEGO AIRPORTER EXPRESS, INC.  
dba AIRPORTER EXPRESS,

Defendant/Respondent.

Case 87-04-033  
(Filed April 15, 1987)

DAVID AND LINDA WITTMAN, dba  
BOB'S RIDE,

Complainants,

vs.

SAN DIEGO AIRPORTER EXPRESS, INC.,  
dba AIRPORTER EXPRESS,

Defendant.

Case 87-04-033  
Cease and Desist Order  
(Issued May 29, 1987)

In the Matter of the Application of  
San Diego Airporter Express, Inc.,  
/dba/ "The Airporter Express  
Supershuttle" for authority to  
operate as an "on call" PSC between  
San Diego County Area communities  
and:

- (1) San Diego Lindberghfield (SDX);
- (2) The Santa Fe Train Depot;
- (3) Greyhound Bus Terminals;
- (4) Trailways Bus Terminals; and
- (5) San Diego Trolley Railheads.

Application 87-06-017  
(Filed June 3, 1987)

Informal Application for  
Reinstatement of Charter-party of  
Carriers Permit by San Diego  
Airporter Express TCP 4041P.

Application 87-07-006  
(Filed July 3, 1987)

Lastly, Harmon is hereby placed on notice that he is responsible for properly managing Airporter, and for requiring his drivers to act in conformance with Commission orders and rules.

Findings of Fact

1. Bob's Ride holds a PSC certificate authorizing service between San Diego Airport, on the one hand, and Camp Pendleton, on the other hand.

2. Bob's Ride also holds a TCP permit authorizing operations from all points within 40 miles of San Diego to all points within the State of California.

3. Airporter does not currently hold operating authority issued by this Commission. It holds operating authorities issued by the City of San Diego. It formerly held a TCP permit, which expired April 15, 1987.

4. Bob's Ride's complaint, as amended, requested that Airporter be ordered to cease and desist from soliciting the complainant's passengers; cease and desist from conducting operations outside the scope of its authority, particularly with regard to offering services on an individual fare basis; the imposition of fines; the disgorgement of revenues; and attorney's fees.

5. Bob's Ride has withdrawn its request for the disgorgement of revenues.

6. D.87-05-084, in C.87-04-033 dated May 29, 1987, and served upon Thomas Harmon, Airporter's president, on June 8, 1987, ordered Airporter and its employees and all persons acting in concert with it to cease and desist from transporting passengers in operations requiring authority from this Commission.

7. D.87-07-046, dated July 8, 1987 included an affidavit by James Badgett, a Commission employee, stating that Airporter had transported Badgett and Enedina Lopez, another Commission employee, on June 12, 1987 from San Diego Airport to Oceanside, for a charge of \$35. This transportation constituted TCP service.

8. I.87-06-030 was issued June 24, 1987 to determine whether Airporter had violated PU Code § 1031 by operating as a PSC without a certificate of public convenience and necessity; whether it had assessed charges on an individual fare basis, so that it shall be presumed to have engaged in the act of operating as a PSC; whether it had violated PU Code § 5401 by operating pursuant to a TCP permit and assessing charges on an individual fare basis; and whether it had violated PU Code § 1034 by operating in violation of cease and desist order D.87-05-084 issued May 29, 1987 and served on respondent June 8, 1987. D.87-07-046 expanded I.87-06-030 to consider whether Airporter is in violation of PU Code § 5413.5, and whether fines and assessments should be imposed.

9. Airporter orally withdrew its request for PSC authority, A.87-06-017, during the hearing.

10. Evidence contained in Exhibit 1 indicates that Airporter transported passengers from San Diego Airport to Camp Pendleton or Escondido on numerous occasions during the period July 8 through July 11, 1986, and assessed charges for that transportation on an individual fare basis. During the period of this transportation, Airporter had in effect a TCP permit issued by this Commission. These acts constituted a violation of PU Code §§ 1031 and 5401.

11. Testimony of staff witnesses Smith, Hall, Perez-Cardenas, Morgan, and Lopez is probative that Airporter has operated as a PSC without a certificate of public convenience and necessity, having assessed charges on an individual fare basis.

12. Harmon stated that 98% of his operations are within the City of San Diego, but conceded that he does not include the transportation to Camp Pendleton within the 98%.

13. PU Code § 1035 provides, in pertinent part, that transporting passengers and assessing charges therefor on an individual fare basis shall be presumed to be an act of operating as a PSC.

14. Airporter has not overcome the presumption stated in PU Code § 1035.

15. Airporter has filed, on May 21, 1987 an application for a TCP permit, authorizing on call airport limousine service, and in which service it will assess charges on the basis of \$40 per hour and/or \$2 per mile.

16. Evidence, particularly Harmon's testimony, indicates a need for TCP service between San Diego Airport and Camp Pendleton, at least outside of those times when Bob's Ride provides its scheduled service between those points.

17. PU Code § 5375 provides that in issuing TCP authority the Commission may attach terms and conditions required in the public interest.

18. Airporter has violated PU Code § 5371, and D.87-05-084, by operating as a TCP after its TCP permit had expired.

19. Airporter has stipulated that (a) it has assessed charges on an individual fare basis and presumptively operated as a PSC, (b) operated in for-hire operations after the cease and desist order was served upon its president, Thomas Harmon, and (c) it will pay a fine of not more than \$3,000, and costs of not more than \$2,000 pursuant to PU Code § 5413.5, for the expense of the investigation pertaining to its unlawful TCP operations.

20. The Commission has no authority to award attorney's fees in these circumstances, nor to impose fines under PU Code § 1033.5 for performing unlawful PSC operations unless the respondent is a holder of a PSC certificate.

#### Conclusions of Law

1. A fine in the amount of \$1,000 should be imposed on Airporter, pursuant to PU Code § 2113 and CCP § 1218.

2. A fine in the amount of \$2,000 should be imposed pursuant to PU Code § 5413.5.

3. Airporter should pay expenses in the amount of \$2,000 pursuant to PU Code § 5413.5.



4. Airporter should be judged in contempt of D.87-05-084, dated May 29, 1987 and served upon its president, Thomas Harmon, on June 8, 1987 because it transported passengers for hire in operations requiring authority from this Commission after the date of service of the decision.

5. A TCP permit should be issued to Airporter, subject to conditions.

6. Airporter has not shown cause why it should not be fined and assessed as set forth in this decision.

7. The stipulation between Airporter and the staff should be adopted in the maximum amounts set forth therein.

ORDER

IT IS ORDERED that:

1. San Diego Airporter Express, Inc. (Airporter) is hereby adjudged to be in contempt of D.87-05-084.

2. Within 30 days after the effective date of this decision Airporter shall pay fines of \$3,000, and an assessment of \$2,000 to this Commission.

3. A.87-06-017 is dismissed.

4. Airporter shall not operate as a passenger stage corporation until it has a certificate of public convenience and necessity authorizing such operations.

5. After receipt by the Commission of payment of the fine and the assessment specified in Ordering Paragraph 2, the Commission's Director of Transportation shall cause to be issued to Airporter the permit sought in A.87-07-006. A copy of this decision shall be attached to the permit, and to subsequent renewals thereof.

6. If in the future Airporter, or Thomas Harmon, or any entity in which he holds a significant ownership interest, will-

fully violates any provision of the PU Code pertaining to the for-hire transportation of passengers, or willfully violates any lawful decision, order, or regulation of this Commission, consideration will be given to the permanent cancellation of all operating authorities held by Harmon and/or any such entity.

7. The requests for attorney's fees are denied.

8. The Executive Director is directed to cause personal service of this decision to be made upon Thomas Harmon.

9. The complaint is granted in part and denied in part as set forth above.

This decision becomes effective with service thereof upon Thomas Harmon.

Dated \_\_\_\_\_, at San Francisco, California.