ALJ/PAB/ltq **

Decision 89-04-050 April 12, 1989

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of San Luis Transportation, Inc. dba EZ Come .. EZ Go - Marin for interim and permanent authority to operate a door-to-door demand - responsive and scheduled ground transportation service between San Francisco Airport, and points in Marin County, East of White's Hill, and South of Marinwood.	ORIGINAL Application 88-06-022 (Filed June 16, 1988)

O P I N I O N

I. Procedural Background

On June 16, 1988, applicant, San Luis Transportation, Inc., also known as EZ Come .. EZ Go - Marin, filed an application for interim or permanent authority to operate an on call van service from parts of Marin County to San Francisco International Airport (SFO).

Notice of this application appeared on the Commission's Daily Calendar on June 20, 1988.

On July 1, 1988, Marin Airporter (Marin) protested this application alleging it would duplicate existing service, cause Marin to loose credibility in providing service, dilute passenger traffic and threaten its revenues. Marin also alleged that applicant had not established a public need or fitness to operate the proposed service and that the application was void of proposed operation information. Marin requested a hearing to address these issues.

On July 15, 1988, Santa Rosa Airporter, Inc. (Santa Rosa) protested the application alleging there was no public need for the proposed service and requested a hearing to examine this issue.

Applicant responded to each protest. Applicant alleged that no harm would occur if this service was instituted. Applicant alleged that Santa Rosa had no interest in the application because its service area was 30 miles north of applicant's proposed service area. Applicant alleged that Santa Rosa had not divulged an ownership interest in Marin implying collusion of protestants. Applicant alleged its van service was different from Santa Rosa's scheduled service with different markets. Applicant requested that the protests be denied and no delay occur in its proposed start-up date of Christmas, 1988.

Marin replied that the application description of departures labelled "as directed" were ambiguous and that similar operations in the past had led to public confusion and dissatisfaction. Marin alleged that applicant's desired start-up by Christmas was no reason to ignore certification requirements.

On July 20, 1988, the Commission Transportation Division (staff) notified all parties of its participation in this application. Staff alleged that clarification was needed of applicant's balance sheet, proposed service to SFO, proposed methods of operation and proposed use of charter operations.

Subsequently, applicant amended the application to delete scheduled service and to add provisions for access for wheelchair passengers.

A prehearing conference was held on August 17, 1988 where it was ruled that a hearing would be held due to the protests regarding fitness and staff's unanswered questions about financing and operations. At this prehearing conference, applicant alleged that an emergency existed which justified the grant of interim authority. According to applicant, the San Francisco Airport Commission would imminently approve parking regulations precluding applicant from obtaining parking space at San Francisco International Airport (SFO) in the future. The assigned Administrative Law Judge (ALJ) ruled that applicant file a written

motion seeking emergency interim authority, with supporting documents by August 29, 1988 and that protestants and staff respond by September 8, 1988. At the request of Santa Rosa, hearing time was reserved on October 19, 1988 for applicant to present witnesses on the issue of the alleged emergency. The October 19 hearing date was later vacated at applicant's request.

A further prehearing conference was held on October 27, 1988. At that time, applicant's motion for emergency interim authority was denied because no witnesses, facts or argument regarding the alleged emergency had been presented.

Hearings on applicant's case in chief were held on October 27 and 28, 1988. Near the end of applicant's testimony, staff moved for a continuance so that applicant could provide additional information on financing and control of the company. During the course of the hearing applicant represented that its finance witness Mr. Evans, had just died in a car crash.

Applicant opposed a continuance. Protestants moved to dismiss the application due to its ambiguities and uncertainties, or in the alternative, to continue the matter until a revised application was filed. Applicant completed presentation of its case and opposed dismissal and renewed its request for interim authority. The hearing was adjourned to a date to be set in the future.

On October 31, 1988, applicant wrote a letter requesting that the pending motions to dismiss be denied and a continuance granted until the staff reviewed applicant's proposed operations.

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assigned ALJ ruled that the matter would be submitted based on the record unless within 15 days staff or protestants requested further hearings.

On November 22, 1988, applicant's president, Mr. McDonnell, wrote a letter to the assigned ALJ explaining that a recent medical test showed a 40% hearing loss in his left ear. According to Mr. McDonnell, it was this alleged hearing loss which caused him to misunderstand the telephone call from Mr. Evans secretary concerning the witness' whereabouts. Mr. McDonnell asserted that he was unaware that Mr. Evans was actually alive until he received a phone call from Mr. Evans subsequent to the latter's conversation with the assigned ALJ.

November 22 and 30, 1988, Marin and Santa Rosa, respectively, indicated in writing that no further hearings were desired and agreed to submit the matter on applicant's showing and protestants' oral motions to dismiss. The staff filed no request for further hearings.

On March 3, 1989, pursuant to the Commission's Rules of Practice and Procedure, Article 19, the Proposed Decision was mailed to all parties participating in this proceeding. No comments on the Proposed Decision have been filed.

II. Applicant's Evidence

At the hearing, Mr. McDonnell presented applicant's evidence. Applicant is a duly authorized California corporation which has had no operating company for approximately five years. However, applicant has retained its status as a corporation by paying its corporate fees. The corporation has no equipment or facilities but has approximately $1,600 in equity.

From approximately 1972 to 1982, applicant operated taxi, sightseeing, tour, and public transportation services in San Luis Obispo, Pismo Beach, Arroyo Grande, Santa Barbara, and Central Coast cities. On June 2, 1988, applicant's president, Patrick D. Linington, changed his name to Patrick D. McDonnell. (Exh. 4, Attachment B.)

Transit vans were frequently loaded to capacity, so that customers complained about the length of time to pick up or drop off nine passengers.

Applicant estimates the proposed service will cost $3.7 million annually to operate, with $1.2 million needed for start-up. (Exh. 8 and 10.) Applicant is uncertain whether equipment will be leased or purchased and whether operations will be conducted by applicant or a contractor. Applicant's estimated annual expenses are based upon the service being operated by applicant as the general partner. (Exh. 8.) There is no partnership agreement. Applicant's fleet acquisition and other start-up costs are based upon contracting the operation of the service to Dave Systems (Dave). (Exh. 9 and 10.) Applicant's estimated cost per service hour is $25.50. The estimated revenue per service hour is $36.

Dave operates six publicly funded transportation systems and one airport shuttle service in the state. Dave can provide drivers, vehicles and workers' compensation insurance, maintenance personnel, and supervision of applicant's proposed daily operations. Robert J. Wilson, vice president of Dave, testified that his company is willing to enter into an operations contract with applicant but agreed that the negotiations were preliminary. He was not aware that any contract estimates for Dave's services had been prepared for applicant; however, he was confident that a contract could be drafted to comply with Commission rules and regulations.

Applicant's proposed rates vary within three zones. For the first passenger, depending on the zone of pick-up or delivery, the rates are $15, $18, and $20. For the second passenger, depending on the zone, the fare is either $12 or $15. The proposed rates for non-stop service for the first/second passenger, respectively, are $45/$5 for Zones 1 and 2, and $50/$5 for Zone 3.

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CORRECTION

THIS DOCUMENT HAS

BEEN REPHOTOGRAPHED

TO ASSURE

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Small Business Administration (SBA) loan or pledging his personal assets. Throughout the proceeding, applicant was undecided about which financing method would be used. (Tr. 190-193.) The second day of the hearing Mr. McDonnell represented that his financing witness, Wayne Evans, had been killed in a car accident the previous evening. After staff moved for a continuance and protestants moved to dismiss, Mr. McDonnell orally pledged his personal assets to applicant. Mr. McDonnell's personal finance statement shows a net worth of $668,000 and estimated 1988 income of $97,500. (Exh. 23.) No supporting documentation was presented. No verification of these amounts occurred since it was presented in the middle of the proceeding.

After the proceedings concluded, Mr. McDonnell, in his written response to staff and protestants' oral motions, alleged that staff's cross-examination during the hearing intimidated him into pledging his personal assets.

III. Discussion

Applicant's ten years of transportation operations show that it has the experience to operate the proposed transportation service. Applicant's unchallenged testimony that no other door-to-door service exists in Marin County shows that there is a need for this service. However, applicant has not met its burden of proof that it is capable of operating and financing the proposed service. Nor has applicant shown that its proposed rates are reasonable.

Until nearly the end of the proceeding, Mr. McDonnell was undecided who would operate this proposed service, the applicant or Dave. From applicant's testimony, the first choice was to contract with Dave; however, applicant did not base its cost estimates on the cost of Dave's services. Cost estimates are based upon the applicant operating the service, a total of $3.7 million, annually. (Exh. 8.) Of this total, applicant admitted that $2.5-3 million in

expenses might be replaced with applicant's estimate of $293,000 for Dave's service, should applicant contract with Dave. (Tr. 154-156.) The estimate for Dave's services was elicited on cross-examination and unsupported with details or documentation. (Tr. 161.) This change in operations might significantly reduce applicant's costs and significantly increase revenues, but the state of the record on this issue is unsatisfactory, due primarily to applicant's failure to provide credible evidence in support of the application.

Under the scenario with applicant operating the service, Mr. McDonnell admitted the operating ratio (O/R) would be roughly 67%, a profit of 33%. (Tr. 154.) This operating ratio grossly exceeds Commission approved operating ratios of recently certified Bay Area airport services. (In Re Airport Limousine Service at Sunnyvale, Inc., D.88-09-068 (O/R 97.7%); Marin Airporter Rate Increase, D.86-03-039 (O/R 98%); In Re Bay Area SuperShuttle, Inc., D.87-11-033 (O/R 88%-94.8%)). This observation causes us to question whether applicant's rates are reasonable. If we use applicant's estimate for Dave's services of $263,000 instead of the $2.5-3 million for applicant operating the service, we derive an operating ratio which is even lower, generating a profit of over 50% which Mr. McDonnell admitted. (Tr. 154.) Based upon these calculations, we find that applicant's proposed rates are unreasonable. Should applicant choose to contract with Dave, the rates would be more unreasonable.

Staff raised the concern of who would be in control of the system should Dave be contracted to run the daily operations. Applicant responded that such arrangements are not unusual, citing Travis Express, an airport service presently operated by Dave under the carrier's charter-party authority. (D.85-04-11.) We do not find such a contract undesirable; however, the terms and conditions must clearly indicate which party is responsible for operating the service in order to prevent enforcement stumbling blocks. We have

no proposed operations contract in this case. Should there be dual control, or questions of control under such a contract, all controlling parties must be named as applicants in order to assure enforcement of Commission rules and regulations.

Through cross-examination, Marin raised the issue of its loss of revenues should the proposed service meet its projected revenues. We do not consider loss of revenues alone sufficient basis for a protest. Protestants were allowed to participate in this proceeding because of allegations that applicant was unfit and the operations not feasible.

Even if we consider applicant's evidence on the issue of loss of revenues by the existing carriers, it is insufficient to decide this issue. In supporting his revenue showing, applicant estimates that 10% of Marin's riders will switch to its service, which amounts to a $300,000 reduction in Marin's revenue. (Tr. 145.) Mr. McDonnell provided no basis for the 10% projection, other than his own opinion. (Tr. 139-140.) We are not pursuaded that this estimate is sound since applicant's ridership experience has been in the San Luis Obispo-Santa Barbara areas with mainly public transportation systems.

Applicant offered four methods of financing the proposed service: issuing stock, obtaining limited partners or an SBA loan and pledging Mr. McDonnell's personal assets. However, each option has shortcomings and none of the options is complete or definite.

The present articles of incorporation authorize only one type of stock--common. (Exh. 4.) If applicant desires to issue preferred stock, it must amend its articles and file an application to issue stock with the Commission. If additional shares of common stock are issued, applicant must file an application with the Commission. If limited partners are acquired, a partnership agreement or a proposed partnership agreement must be presented. If personal assets are pledged, there must be some documentation or evidence to verify the value of the assets. If an SBA loan is the

source of financing, applicant must give some evidence that application for the loan has been made.

In Mr. McDonnell's opinion, he could not obtain financing without Commission authority. Applicant attempted to show that given the need for this service, a business and operation plan could be derived to operate the service. On the other hand, staff and protestants' motions argue that a sound, definite proposal must be presented before authority can be granted. We agree. The burden of proof is on applicant to show that its proposal is feasible. We cannot find that applicant's proposal is clear since there are numerous options for operations and financing which impact the estimated costs and rates. The Commission cannot make business decisions for a carrier by selecting financing or operating options and we would be remiss in our duty by certifying a carrier to assess unreasonable rates. Thus, we find that applicant has not met its burden of proof to warrant the granting of authority.

Staff requests that the matter be continued. Protestants move to dismiss. The difference between these two options is that if the matter is dismissed, applicant must pay another filing fee for a new application and incur another 30-day protest period. We do not believe incurring another 30 day protest period will prejudice applicant since he has indicated that it would take at least 30 days to obtain a letter of credit. Should applicant choose to obtain financing under any other option presented, this would also take at least 30 days to complete.

The present record is contradictory with applicant changing its financing proposal during the hearing. We believe it is best to start with a new application containing a definite proposal. By doing so all parties will know which proposal to evaluate. However, there are two other concerns. First, any new application must be complete and unambiguous. We expect applicant to cooperate with our Transportation Division staff to insure this.

Second, we place applicant on notice that its credibility before the Commission is an important factor in reaching a decision in any proceeding. In the future, we expect applicant to conduct itself in accordance with Commission ethical standards contained in Rule 1 of the Commission's Rules of Practice and Procedure which states, in part, that any person who signs a pleading or brief, enters an appearance at a hearing or transacts business with the Commission agrees never to mislead the Commission or its staff by an artifice or false statement of law or fact. Applicant must abide by this rule in any further dealings with the Commission.

The application is denied, without prejudice. Protestants' motions to dismiss are granted, and staff's motion for a continuance is accordingly denied as moot.

Findings of Fact

1. Applicant has ten years' experience in transportation operations but his qualifications to operate the proposed service have not been demonstrated on this record.

2. Applicant's prior authority name Mr. Patrick D. Linington as president. Mr. Linington changed his name to Patrick D. McDonnell on June 2, 1988.

3. There is a need for the service applicant proposes.

4. Applicant has no equipment or facilities to operate the proposed service.

5. Applicant presented four financing options. Applicant has not decided how the proposed service will be financed.

6. Applicant has not decided whether the service will be operated by itself or under contract by a third party.

7. Dave has not entered into a service contract with applicant. No detailed cost estimates for Dave's service were presented.

8. Applicant's cost estimates are based upon applicant operating the proposed service. Applicant's cost estimates are not

reliable since it is not certain whether applicant or Dave will operate the service.

9. Applicant's operating ratio greatly exceeds that of carriers providing similar service. Therefore, applicant's proposed rates are unreasonable.

Conclusions of Law

1. The application should be denied, without prejudice.
2. Protestants' motions to dismiss should be granted.
3. Staff's motion for a continuance should be denied as moot.
4. In any future application before this Commission, applicant must reference this application.

O R D E R

IT IS ORDERED that:

1. The application is denied, without prejudice.
2. Protestants' motions to dismiss are granted.
3. Staff's motion for a continuance is denied.

This order becomes effective 30 days from today.

Dated APR 12 1989, at San Francisco, California.

G. MITCHELL WILK
President
STANLEY W. HULETT
JOHN B. OHANIAN
Commissioners

Commissioner Frederick R. Duda being necessarily absent, did not participate.

Commissioner Patricia M. Eckert present but not participating.

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

Victor Weisser, Executive Director

ALJ/PAB/ltq

Item 2
Agenda 4/12/89

Decision PROPOSED DECISION OF ALJ BENNETT (Mailed 3/3/89)

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I. Procedural Background

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ALJ/PAB/ltq *

Item TD-4
Agenda 4/12/89

Decision 89 04 050 APR 12 1989

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At the hearing, Mr. McDonald presented applicant's evidence. Applicant is a duly authorized California corporation which has had no operating company for approximately five years. However, applicant has retained its status as a corporation by paying its corporate fees. The corporation has no equipment or facilities but has approximately $1,600 in equity.

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Applicant requests authority to operate an on call, door-to-door, shared and exclusive ride van service from parts of Marin County to SFO. The proposed service will operate daily from 5 a.m. to 9 or 10 p.m. using 30 12-passenger vans. Applicant presently owns no equipment. However, applicant represents that all vehicles will meet the safety and maintenance requirements of the California Highway Patrol, will be marked to distinguish them from other van operations and will be radio controlled. Certificates of insurance will be filed prior to commencement of service.

Applicant's proposed service area in Marin County includes communities south of Marinwood to Sausalito which are within ten miles of both sides of Highway 101, but does not include stops on Highway 101. The proposed service territory is approximately 40% of Marin County. The proposed routes to and from SFO will vary depending upon where the passengers live. Preference will be given to passengers with prior reservations, but service will be provided to persons who request transportation during service hours. The conditions of advance reservations will be filed in applicant's tariffs prior to operation.

At the present time, there is no door-to-door van service from Marin County to SFO. A public witness, Ms. Kirkbride, frequently used a prior van service, Marin Transit, and prefers door-to-door service over that of the two scheduled carriers, Marin and Santa Rosa. Ms. Kirkbride walks with the assistance of a cane due to a back injury, yet does not have severe mobility problems. She preferred door-to-door service because of car vandalism she has experienced and because some stop locations of scheduled carriers are isolated at night. Mr. Davidov, a previous driver of Marin Transit, testified that this service grew to a ridership of 200-300 passengers a day in eight months. Marin Transit operated 4-6 ten-passenger vans in a slightly larger service area which included the same communities as the one proposed in the application. Marin

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Until nearly the end of the proceeding, Mr. McDonald was undecided who would operate this proposed service, the applicant or Dave. From applicant's testimony, the first choice was to contract with Dave; however, applicant did not base its cost estimates on the cost of Dave's services. Cost estimates are based upon the applicant operating the service, a total of $3.7 million, annually. (Exh. 8.) Of this total, applicant admitted that $2.5-3 million in

expenses might be replaced with applicant's estimate of $293,000 for Dave's service, should applicant contract with Dave. (Tr. 154-156.) The estimate for Dave's services was elicited on cross-examination and unsupported with details or documentation. (Tr. 161.) This change in operations might significantly reduce applicant's costs and significantly increase revenues, but the state of the record on this issue is unsatisfactory, due primarily to applicant's failure to provide credible evidence in support of the application.

Under the scenario with applicant operating the service, Mr. McDonald admitted the operating ratio (O/R) would be roughly 67%, a profit of 33%. (Tr. 154.) This operating ratio grossly exceeds Commission approved operating ratios of recently certified Bay Area airport services. (In Re Airport Limousine Service at Sunnyvale, Inc., D.88-09-068 (O/R 97.7%); Marin Airporter Rate Increase, D.86-03-039 (O/R 98%); In Re Bay Area SuperShuttle, Inc., D.87-11-033 (O/R 88%-94.8%)). This observation causes us to question whether applicant's rates are reasonable. If we use applicant's estimate for Dave's services of $263,000 instead of the $2.5-3 million for applicant operating the service, we derive an operating ratio which is even lower, generating a profit of over 50% which Mr. McDonald admitted. (Tr. 154.) Based upon these calculations, we find that applicant's proposed rates are unreasonable. Should applicant choose to contract with Dave, the rates would be more unreasonable.

Staff raised the concern of who would be in control of the system should Dave be contracted to run the daily operations. Applicant responded that such arrangements are not unusual, citing Travis Express, an airport service presently operated by Dave under the carrier's charter-party authority. (D.85-04-11.) We do not find such a contract undesirable; however, the terms and conditions must clearly indicate which party is responsible for operating the service in order to prevent enforcement stumbling blocks. We have

no proposed operations contract in this case. Should there be dual control, or questions of control under such a contract, all controlling parties must be named as applicants in order to assure enforcement of Commission rules and regulations.

Through cross-examination, Marin raised the issue of its loss of revenues should the proposed service meet its projected revenues. We do not consider loss of revenues alone sufficient basis for a protest. Protestants were allowed to participate in this proceeding because of allegations that applicant was unfit and the operations not feasible.

Even if we consider applicant's evidence on the issue of loss of revenues by the existing carriers, it is insufficient to decide this issue. In supporting his revenue showing, applicant estimates that 10% of Marin's riders will switch to its service, which amounts to a $300,000 reduction in Marin's revenue. (Tr. 145.) Mr. McDonald provided no basis for the 10% projection, other than his own opinion. (Tr. 139-140.) We are not pursuaded that this estimate is sound since applicant's ridership experience has been in the San Luis Obispo-Santa Barbara areas with mainly public transportation systems.

Applicant offered four methods of financing the proposed service: issuing stock, obtaining limited partners or an SBA loan and pledging Mr. McDonald's personal assets. However, each option has shortcomings and none of the options is complete or definite.

The present articles of incorporation authorize only one type of stock--common. (Exh. 4.) If applicant desires to issue preferred stock, it must amend its articles and file an application to issue stock with the Commission. If additional shares of common stock are issued, applicant must file an application with the Commission. If limited partners are acquired, a partnership agreement or a proposed partnership agreement must be presented. If personal assets are pledged, there must be some documentation or evidence to verify the value of the assets. If an SBA loan is the

source of financing, applicant must give some evidence that application for the loan has been made.

In Mr. McDonald's opinion, he could not obtain financing without Commission authority. Applicant attempted to show that given the need for this service, a business and operation plan could be derived to operate the service. On the other hand, staff and protestants' motions argue that a sound, definite proposal must be presented before authority can be granted. We agree. The burden of proof is on applicant to show that its proposal is feasible. We cannot find that applicant's proposal is clear since there are numerous options for operations and financing which impact the estimated costs and rates. The Commission cannot make business decisions for a carrier by selecting financing or operating options and we would be remiss in our duty by certifying a carrier to assess unreasonable rates. Thus, we find that applicant has not met its burden of proof to warrant the granting of authority.

Staff requests that the matter be continued. Protestants move to dismiss. The difference between these two options is that if the matter is dismissed, applicant must pay another filing fee for a new application and incur another 30-day protest period. We do not believe incurring another 30 day protest period will prejudice applicant since he has indicated that it would take at least 30 days to obtain a letter of credit. Should applicant choose to obtain financing under any other option presented, this would also take at least 30 days to complete.

The present record is contradictory with applicant changing its financing proposal during the hearing. We believe it is best to start with a new application containing a definite proposal. By doing so all parties will know which proposal to evaluate. However, there are two other concerns. First, any new application must be complete and unambiguous. We expect applicant to cooperate with our Transportation Division staff to insure this.

Second, we place applicant on notice that its credibility before the Commission is an important factor in reaching a decision in any proceeding. In the future, we expect applicant to conduct itself in accordance with Commission ethical standards contained in Rule 1 of the Commission's Rules of Practice and Procedure which states, in part, that any person who signs a pleading or brief, enters an appearance at a hearing or transacts business with the Commission agrees never to mislead the Commission or its staff by an artifice or false statement of law or fact. Applicant must abide by this rule in any further dealings with the Commission.

The application is denied, without prejudice. Protestants' motions to dismiss are granted, and staff's motion for a continuance is accordingly denied as moot.

Findings of Fact

1. Applicant has ten years' experience in transportation operations but his qualifications to operate the proposed service have not been demonstrated on this record.

2. Applicant's prior authority name Mr. Patrick D. Linington as president. Mr. Linington changed his name to Patrick D. McDonald on June 2, 1988.

3. There is a need for the service applicant proposes.

4. Applicant has no equipment or facilities to operate the proposed service.

5. Applicant presented four financing options. Applicant has not decided how the proposed service will be financed.

6. Applicant has not decided whether the service will be operated by itself or under contract by a third party.

7. Dave has not entered into a service contract with applicant. No detailed cost estimates for Dave's service were presented.

8. Applicant's cost estimates are based upon applicant operating the proposed service. Applicant's cost estimates are not

reliable since it is not certain whether applicant or Dave will operate the service.

9. Applicant's operating ratio greatly exceeds that of carriers providing similar service. Therefore, applicant's proposed rates are unreasonable.

Conclusions of Law

1. The application should be denied, without prejudice.
2. Protestants' motions to dismiss should be granted.
3. Staff's motion for a continuance should be denied as moot.
4. In any future application before this Commission, applicant must reference this application.

O R D E R

IT IS ORDERED that:

1. The application is denied, without prejudice.
2. Protestants' motions to dismiss are granted.
3. Staff's motion for a continuance is denied.

This order becomes effective 30 days from today.

Dated _____, at San Francisco, California.