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Decision 92-09-053 September 2, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Yellow Cab Cooperative, Inc., for Approval of Securities or Agreements of Indemnity for Adequate Protection Against Liability Pursuant to General Order No. 115-D(5).	Application 89-05-066 (Filed May 26, 1989; amended June 27, 1989, September 29, 1989, and January 16, 1990)

Hassard, Bonnington, Rogers & Huber, by Philip S. Ward, Attorney at Law, for Yellow Cab Cooperative, Inc., applicant.
Kathleen Maloney and Hallie Yacknin, Attorneys at Law, for the Transportation Division.

OPINION

Yellow Cab Cooperative, Inc. (Yellow Cab) is a California corporation licensed as a charter-party carrier of passengers (TCP 1297P) and as a passenger stage corporation (PSC 1297). It has obtained insurance from Chariots of Hire Risk Retention Group Insurance Company (Chariots of Hire or COHRRG). Yellow Cab seeks a determination, pursuant to General Order (GO) 115-D(5), that the policy of insurance issued by Chariots of Hire satisfies the evidence of liability protection required under Public Utilities (PU) Code § 5392.

Procedural Background

After the filing of the application on May 26, 1989, the Transportation Division filed a protest on June 26, 1989. Relying on Yellow Cab's letter of June 20, 1989, which stated its intention to amend its application, Transportation Division limited its protest to the assertion that the application was incomplete and hypothetical. Transportation Division also asked

for the time to file a further protest to the amended application.

On June 27, 1989, Yellow Cab filed a voluminous amendment to the application. The administrative law judge (ALJ) issued a ruling on July 20, 1989, extending the protest period to August 11, 1989. Transportation Division filed its protest to the amended application on August 11, 1989. Yellow Cab filed a response to that protest on September 29, 1989. Concurrently therewith Yellow Cab file a second amendment to its application. On October 30, 1989, Transportation Division filed a motion for a Commission order resolving the legal issue in the proceeding. Yellow Cab submitted three pleadings in response to the motion of the Transportation Division. A third amendment to its application and a motion for a prehearing conference (PHC) were filed January 16, 1990. Yellow Cab's response to the Transportation Division's motion was rejected for filing by the Docket Office as untimely under Rule 42(b).

The ALJ set a PHC for March 13, 1990. The parties appeared at the PHC and argued the legal issue raised by the motion of the Transportation Division. The Transportation Division argued, inter alia, that Yellow Cab's application should be dismissed because PU Code § 5391 and 5392 precluded acceptance of the insurance policy that Yellow Cab proposed to use. As part of its argument, Yellow Cab submitted its rejected response to the motion of the Transportation. The response was copied into the record as part of Yellow Cab's argument without objection. After argument on the Transportation Division's motion to dismiss the application, heard at the prehearing conference on March 13, 1990, the ALJ denied the motion by ruling dated June 26, 1990[1].

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[1]The ALJ concluded that the PU Code did not prohibit Yellow Cab's proposed insurance filing.

That ruling led to evidentiary hearings on October 22, 1990,[2] on January 7, 8, 9, and 25, and on February 13, 1991. On the latter date the case was submitted, subject to the filing of concurrent briefs due 21 days after the filing of the last volume of the transcript. Yellow Cab and Transportation Division filed briefs on March 22, 1991.

Issues to Be Decided

1. Does the Commission have statutory authority, i.e. jurisdiction, to grant the application?

2. What public policies apply to the consideration of this application?

   a. Federal Policies

   b. State Policies

   c. Commission Policies

3. What is the Transportation Division's position vis-a-vis applications such as the instant application?

4. Has the applicant made a persuasive showing that its proposal provides adequate protection to the public?

   a. By what standard should the adequacy of its showing be judged?

   b. By that standard, does the applicant's proposal provide adequate insurance protection to the public?

Issue No. 1 - Jurisdiction

It has been the Transportation Division's position from the outset that the Commission lacks jurisdiction to grant the authority sought by applicant. That position was argued in the motion filed by Transportation Division on October 30, 1990, which the ALJ denied. Transportation Division reasserted its position on the jurisdictional issue through its brief. It,

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[2] The hearing on October 22 was limited to argument on Transportation Division's motion for a continuance, which was granted.

however, addressed that issue in a single paragraph toward the end of its brief (TD Brief, p. 41); and it did so principally by attaching and incorporating by reference its earlier motion. We disagree with the ALJ's ruling, and we will adopt TD's position on this issue. PU Code § 5392 is controlling on what types of public liability protections the Commission can accept. PU Code § 5392 states that:

> The protection required...shall be evidence by the deposit of any of the following with the Commission....
>
> (a) A policy of insurance, issued by a company licensed to write insurance in this state, or by nonadmitted insurers subject to Section 1763 of the Insurance Code, if the policies meet the rules promulgated therefor by the commission.
>
> (b) A bond of a surety company licensed to write surety bonds in the state.
>
> (c) Evidence of the qualification of the charter-party carrier of passengers as a self-insurer as may be authorized by the commission.

We read the verb "shall" in § 5392 as a mandate limiting the sphere of action the Commission may take in approving public liability protection. A plain reading of § 5392 clearly limits the Commission's discretion to the three types of filings cited. Furthermore, this reading of the statute makes sense. Under this reading, when protection against liability is afforded by insurance policies or surety bonds, the Department of Insurance, and not the Public Utilities Commission, is responsible for reviewing, either directly or indirectly, the financial solvency of the insurance or bonding company. Thus, § 5392(a) requires insurance to be issued by a company licensed to write insurance

by the Department of Insurance or else, if the insurance is not written by a licensed company, it must be issued through a licensed surplus line broker pursuant to §1763 of the Insurance Code. Surplus line brokers are themselves licensed by the Department of Insurance and their placement of insurance is subject to review by the Department of Insurance. (See, e.g., Insurance Code §1765.1.) Similarly, the qualifications of bonding companies writing bonds under §1763(b) are subject to review by the Department of Insurance, because only a surety company licensed by the Department of Insurance can write such bonds. While §1763(c) requires this Commission to review a company's qualifications as a "self-insurer" that does not require this Commission to review the financial solvency of an insurance company. Self-insurance is not insurance. Insurance involves a shifting of the risk to another. (See Insurance Code §22.) When a company "self-insures" it does not shift the risk of paying liability claims to another company, but retains those risks itself. Thus, in evaluating the qualifications of a self-insurer, this Commission examines the financial wherewithal of an company subject to this Commision's jurisdiction, and does not have to evaluate the financial solvency of the insurance company. In short, our reading of §5392 as limiting the kinds of filings this Commission can accept means that the California Department of Insurance -- the department with expertise in the area -- and not this Commission reviews the financial solvency of the insurance companies. A contrary reading of the statute, which would allow this Commission to accept insurance filings not made in accordance with §5392(a), would require this Commission to evaluate the financial solvency of insurance companies, an area in which this Commission lacks in-house expertise.[3]

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[3]The appropriateness and ability of Commission staff to review and evaluate the financial solvency of insurance companies is discussed below in the Factual Consideration of Yellow Cab's Application.

While section 5 of G.O. 115-E does invite applications for approval of "other...agreements of indemnity", we must conclude that a statute prevails over an inconsistent regulation. Accordingly, we plan to issue an Order Instituting Rulemaking to revise G.O. 115 to eliminate that inconsistency.

For similar reasons, we reject the argument that PU Code §5381 permits this Commission to expand the kinds of filings that can be made to demonstrate adequate protection against liability beyond those listed in §5392. Section 5381, like PU Code §701 gives the Commission broad powers to "do all things, whether specifically designated in this part, or in addition thereto, which are necessary and convenient in the expertise of [the Commission's] power and jurisdiction." However, §5381 is self-limiting because it also provides that the Commission may do so" [t]o the extent that such is not in consistent with provisions of this chapter." (Emphasis added.) Clearly, a reading of § 5381 that would permit other forms of public liability protection is inconsistent with § 5392. Moreover, § 5381 like § 701 does not provide the Commission with limitless powers. (Compare Pacific Tel. & Tel Co. v. Public Utilities Commission (1965) 62 Cal. 2d 634, 653 (section 701 does not authorize the Commission to disregard express legislative directions to it).) In short, we conclude that we do not have statutory authority under § 5381 to consider and to approve, if appropriate, alternatives to the specific forms of protection listed in § 5392.

Issue No. 2 - Public Policies

Federal Policies

We cite first in this section the policy of the Federal Government. Applicant's insurer is licensed by the State of Arizona and is acting assertedly under color of federal law in conducting business in California. Further, the existence of a nation-wide policy, established by Congress, concerning liability insurance requirements, should at least be officially noticed and recognized. COHRRG, of which Yellow Cab is a member, is a risk

retention group formed under the federal Risk Retention Act (Act). (15 U.S.C. § 3901, et seq.) The Act was passed in two pieces: (1) the Product Liability Risk Retention Act of 1981, which was limited to product liability insurance; and (2) the Risk Retention Amendments of 1986, which expanded the coverage of the Act to all types of liability insurance. Generally, the Act allows entities engaged in the same basic business to form an insurance company under the laws of a particular state. If this state chartered insurance company meets certain ownership or control requirements, it can provide insurance to its members - that is, members of the risk retention group - in states in which it is not licensed. The Act purports to limit the regulatory authority of the states in which the risk retention group is not licensed. However, under the Act such a state may require a risk retention group to:

(a) Comply with the unfair claim settlement practices law of the State;

(b) Pay, on a nondiscriminatory basis, applicable premium and other taxes which are levied on the admitted insurers and surplus lines insurers, brokers, or policyholders under the laws of the State;

(c) Participate, on a nondiscriminatory basis, in any mechanism established or authorized under the law of the State for the equitable apportionment among insurers of liability insurance losses and expenses incurred on policies written through such mechanisms;

(d) Register with and designate the State Insurance Commissioner as its agent solely for the purpose of receiving service of legal documents or process;

(e) Submit to an examination by the State Insurance Commissioner in any State in which the group is doing business to determine the group's financial condition if

1) The commissioner of the jurisdiction in which the group is chartered has not begun or has refused to initiate an examination of the group; and

2) Any such examination shall be coordinated to avoid unjustified duplication and unjustified repetition;

(f) Comply with a lawful order issued -

1) In delinquency proceedings commenced by the State insurance commissioner if there has been a finding of financial impairment under subparagraph (e); or

2) In a voluntary dissolution proceeding;

(g) Comply with any State law regarding deceptive, false, or fraudulent acts or practices, except that if the State seeks an injunction regarding the conduct described in this subparagraph, such injunction must be obtained from a court of competent jurisdiction;

(h) Comply with an injunction issued by a court of competent jurisdiction, upon a petition by the State insurance commissioner alleging that the group is in hazardous financial condition or is financially impaired; and

(i) Provide the following notice, in 10-point type, in any insurance policy issued by such group:

N O T I C E

This policy is issued by your risk retention group. Your risk retention group may not be subject to all of the insurance laws and regulations of your State. State insurance insolvency guaranty funds are not available for your risk retention group. (15 U.S.C. § 3902(a)(1).)

Yellow Cab relies on § 3902 of the Act, which provides in part:

> "(a) Except as provided in this section, a risk retention group is exempt from any State law, rule, regulation, or order to the extent that such law, rule, regulation, or order would --"
>
> "(3) Require any insurance policy issued to a risk retention group or any member of the group to be countersigned by an insurance agent or broker residing in that State; or
>
> "(4) Otherwise discriminate against a risk retention group or any of its members, except that nothing in this section shall be construed to affect the applicability of State laws generally applicable to persons or corporations."

Transportation Division counters, citing § 3905(d) of the Act, that the state may still require placement of liability insurance through a state-licensed surplus lines broker. § 3905(d) provides:

> "Subject to the provisions of section 3905(a)(4) this title relating to discrimination, nothing in this chapter shall be construed to preempt the authority of a State to specify acceptable means of demonstrating financial responsibility as a condition for obtaining a license or permit to undertake specified activities. Such means may include or exclude insurance coverage obtained from an admitted insurance company, an excess lines company, a risk retention group, or any other source regardless of whether coverage is obtained directly from an insurance company or through a broker, agent, purchasing group, or any other person."

It is clear from these federal statutes that the Act does not preempt state laws, rules, regulations, or orders, when they apply to the demonstration of financial responsibility in obtaining a license or permit to undertake specified activities.

In fact, in this context the Act explicitly allows a state: (1) to require liability insurance to be issued by "an admitted insurance company" or "an excess lines company"; or (2) to "exclude insurance coverage obtained from...a risk retention group." The unambiguous language of the Act requires the conclusion that the Commission would not trespass on the Supremacy Clause of the Federal Constitution if it were to hold that in obtaining passenger charter-party permits and certificates or passenger stage certificates applicants must provide evidence of protection against liability in one of the ways listed in PU Code § 5392.

State Policies

When the application was filed in 1989, the State Legislature had not addressed the issue of risk retention groups formed under the federal Act. In 1990, however, it enacted the California Risk Retention Act of 1990 (CRR Act). (SB 95, Robbins; Stats. 1990, Chapter 1521; Insurance (Ins.) Code, § 125, et seq.; Exhibit 9.) The CRR Act states that its purposes, as relevant here, are:

> "(a) To regulate the formation and operation of risk retention groups...formed pursuant to the federal Liability Risk Retention Act of 1986, to the extent permitted by that law.
>
> "(b) To promote the formation and operation of risk retention groups...in this state. Californians who are experiencing difficulty in obtaining liability coverage are encouraged to form and operate risk retention...groups in this state." (Ins. Code § 128; emphasis added.)

In structuring the CRR Act, the Legislature took some pains to confer powers on the Insurance Commissioner that were

consistent with those reserved to the states by the federal Act.[4] Ins. Code § 130(e)(2), provides, however, that:

> "'Liability' includes financial responsibility required by the state for any activity for which an individual shall be required to obtain a license or certificate to provide a service. For purposes of this subdivision, a state agency shall have discretion to accept or deny proof of financial responsibility."

Here the Legislature appears to allude to § 3905(d) of the federal Act and to recognize the power of the state and its agencies to exercise discretion in deciding what types of insurance shall constitute adequate protection against liability, where licenses and permits are involved.

Thus, while promoting and encouraging the formation and operation of risk retention groups in California, the CRR Act also recognizes the inherent authority of the state and its agencies to exercise discretion - in licensing and permitting certain activities - to decide what types of insurance policies will constitute adequate protection against liability.

Commission Policy

This is the first proceeding in which an applicant has sought to substitute a policy of insurance issued by a risk retention group for one of the means of demonstrating adequate protection against liability listed in PU Code § 5392. The Commission has no established policies, set forth in its decisions or regulations, dealing with risk retention groups.

Transportation Division Position

The position of the Transportation Division, as expressed in the testimony of its Director (Exh. 20), is:

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[4] Ins. Code § 136 provides: "The powers authorized by this chapter shall only be exercised to the extent these powers are not preempted by the Product Liability Risk Retention Act of 1981, as amended by the Risk Retention Amendments of 1986." (Cf. § 128(a).)

1. That the Commission does not have authority to approve the application because the proposed insurance does not fit into any of the statutory categories set forth in PU Code § 5392.

2. That the Transportation Division does not have the personnel or expertise to investigate proposals for alternate types of liability protection.

3. That the public is best served if liability protection is provided by California licensed insurers or surplus lines brokers regulated by the Department of Insurance.

Factual Consideration of Yellow Cab's Application

We have determined above that the Commission has the statutory obligation to deny an application by a charter-party carrier to make a liability insurance filing using a risk retention group *if*, as here, that risk retention group is not licensed as an insurance company by the California Department of Insurance and its certificates of insurance are not signed by a licensed surplus line broker. Even though we do not have the option to grant Yellow Cab's instant application, because considerable testimony was presented considering the particular merits of Yellow Cab's proposal, we will evaluate that evidence.

Is Yellow Cab's Showing Persuasive?

By What Standard Should Yellow Cab's Showing be Judged?

PU Code § 5391 speaks of "adequate protection against liability imposed by law...for the payment of damages" for several types of risks:

1. Personal bodily injuries, including death resulting therefrom;

2. Bodily injuries to, or death of, more than one person as a result of any one accident; and

3. Damage or destruction of property.

The limits of this protection are set by statute or regulation. Charter-party carriers must, as a general rule, meet the same minimum requirements as passenger stage corporations. (PU Code § 5391) These requirements are set forth in PU Code

1040, where the minimums "shall not be less than the requirements which are applicable to operations of carriers conducted pursuant to the federal Bus Regulatory Reform Act of 1982 (P.L. 97-261)."[5] The minimum requirements for amounts of coverage are set forth for various sizes of vehicles in GO 115-E(1). Thus, the determination of whether a particular policy of insurance covers these three types of risks and meets the minimum amounts of coverage is largely a ministerial act.

If the statute allowed us to accept Yellow Cab's proposed filing, additional standards could be implied from the statutes governing protection against liability and from GO 115-E. On the one hand, admitted insurers, nonadmitted insurers subject to Ins. Code § 1763, and licensed surety companies, since they are subject to regulation, direct or indirect, by the Department of Insurance, are presumed to be able to provide the coverages for which they contract through the policies of insurance or bonds that they issue. (PU Code § 5392(a) and (b).) On the other hand, a charter-party carrier seeking to become a self-insurer must provide such evidence of its qualification as a self-insurer "as may be authorized by the Commission". (PU Code § 5392(c).) In GO 115-E(4), the Commission has specified the kind of showing it requires from an applicant for self-insurer status. It must file an application:

> "...supported by a true and accurate statement of its financial condition and other evidence which will establish to the satisfaction of the Commission the ability of such charter-party carrier of passengers to satisfy its obligations for public liability and property damage within the limits hereinabove prescribed, without affecting the

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[5] The minimum requirement for vehicles designed to carry not more than eight persons, including the driver is $750,000. (PU Code § 1040; cf. § 5391.2 for the same requirement for class C charter-party carriers.)

> stability and permanency of the business of such charter-party carrier of passengers."

These provisions apply specifically to applications for self-insurer status. Under GO 115-E(5), applications seeking approval of "other securities or agreements of indemnity," must satisfy the Commission that the proposed instrument "will afford the security for the protection of the public <u>hereinabove contemplated</u>." (Emphasis added.) Thus, in the absence of a conflicting statute, we would interpret the emphasized language, as it applies to this case, to mean both: (1) the security afforded by the minimum amounts of coverage specified in GO 115-E(1); and, (2) the security afforded by "a true and accurate statement of...financial condition and other evidence which will establish...the ability of...[the proposed insurer]...to satisfy its obligations for public liability and property damage...without affecting the stability and permanency of [its] business...." In other words, we would import into GO 115-E(5) the same standards that we would apply to self-insurer applications, except that we would apply those standards to the proposed insurer, rather than the charter-party carrier. We will now consider the evidence in light of the standards just discussed.

<u>Does Applicant Meet the Standard?</u>

Transportation Division points out the following weaknesses in Yellow Cab's factual showing:

1. Exhibits 24A and 24D are Deposit Escrow Agreements reflecting sums purportedly held by Security Pacific Bank of Arizona. Exhibit 24A pertains to a $600,000 escrow account between Chariots of Hire Indemnity Co., the Barbados reinsurance company (COHI (Barbados)), and the Arizona Director of Insurance. Exhibit 24D pertains to a $500,000 escrow agreement between Chariots of Hire Risk Retention Group (COHRRG) and the Arizona Director of Insurance. Neither document is dated and the only

signature is that of James Steele, Yellow Cab's president. Steele signs Exhibit 24A as president of COHRRG, whereas the agreement is between COHI (Barbados) and the Arizona Director of Insurance. The signature lines for the Director of Insurance and a bank officer are blank. Both exhibits refer to an "Attachment A," which is supposed to spell out the form of the investment of the monies in the escrow accounts. Neither exhibit contains Attachment A.

Transportation Division argues that these documents do not constitute evidence that the purported sums are actually on deposit. We wonder why Yellow Cab did not offer canceled checks or bank statements to show that the sums reflected by Exhibits 24A and 24B are in fact on deposit with Security Pacific Bank.

2. Yellow Cab introduced two certificates of contribution as part of Exhibit 24C. The $500,000 certificate between Yellow Cab and COHRRG is dated November 5, 1989, and signed by Steele for both companies. The $100,000 certificate between COHI (Barbados) and COHRRG, is dated June 1, 1989, and signed by Steele for both companies.

Transportation Division argues that Yellow Cab failed to produce any evidence that the transfers of funds reflected in these documents actually occurred. No bank statements or audit reports support them. Nor is there any evidence that the Arizona Department of Insurance has approved them. In California for such certificates to be treated as capital the Department of Insurance must approve them in advance. Yellow Cab offered no evidence of the Arizona's acceptance or approval of the certificates, other than its assumption that Arizona's silence constituted acceptance. Yellow Cab did not offer in support of its assumption any Arizona statute or regulation governing the acceptance or approval of certificates of contribution.

3. Yellow Cab offered as evidence of its solvency a handwritten list of monthly checking account ending balances and

marketable securities for 1990. (Exhibit 1D.) Although Steele sponsored the document, he did not prepare it. Transportation Division argues that the document does not state on its face that it pertains to Yellow Cab; that scant information about its preparation was offered; that it is neither dated nor initialed; and that better ways of showing Yellow Cab's solvency must exist, such as bank statements or the actual ledger pages from which the summary was derived.

It is not unusual in our proceedings for an officer of a regulated company to testify to material prepared by another employee of the company. Transportation Division's arguments address the weight that should be accorded this exhibit. We are not persuaded that Exhibit 1D, combined with Steele's oral testimony, does not reflect cash flow and solvency of Yellow Cab during 1990.

4. During discovery Transportation Division asked Yellow Cab to provide bank or other confirmation of major asset accounts of Yellow Cab, COHRRG, and COHI (Barbados). While indicating a willingness to provide such information, Yellow Cab did not in fact provide it. Yellow Cab's temporizing response to Transportation Division's data request, and its testimony that, if Transportation Division's only objection to the application were the one posed by its data request, Yellow Cab would provide the requested information, are not entitled to any weight. To the contrary, Yellow Cab's refusal to cooperate in Transportation Division's discovery requests may imply that Yellow Cab has something to hide.

5. Yellow Cab capitalized COHI (Barbados) with $1,008,610 in cash. Yellow Cab then borrowed $1,000,000 from COHI (Barbados), which loan is represented by a demand note dated May 1, 1989. Then, on June 1, 1989, Yellow Cab capitalized COHRRG with $1,000,000. Transportation Division characterizes this series of transactions as double counting, whereby the same $1,000,000 is used to capitalize two different companies.

Transportation Division's expert witness from the California Department of Insurance testified that under generally accepted accounting principles, the demand note from Yellow Cab to COHI (Barbados) should not be treated as capital by COHI (Barbados).

6. Yellow Cab's October 3, 1990, audited financial statement indicates that COHI (Barbados) lost $766,436 in the fiscal year ending May 31, 1990. (Exhibit 1C.) However, an audit of COHI (Barbados) shows that it had net income of $330,160 for the same period. (Exhibit 17.) The discrepancy between the two financial statements offered by Yellow Cab is not resolved on this record.

7. Yellow Cab is organized as a cooperative. Its members must pay in any excess of expenses over revenues; and it must pay out to its members as patronage dividends any excess of revenues over expenses. Yellow Cab paid out to its members as patronage dividends $2,263,292 in 1989 and $2,439,539 in 1990. Transportation Division views the financial condition of Yellow Cab from a post-dividend perspective, whereas Yellow Cab asks the Commission to view its financial condition from a pre-dividend perspective.

In the regulation of stationary utilities we are accustomed to examining the annual reports of public utilities from a pre-dividend perspective. Thus, public utility corporations report their earnings to their stockholders and to the financial community as if dividends had not been paid. We know, however, that major public utility corporations pay regular dividends, except in the most extreme and rare cases involving financial emergencies. Regulatory commissions and the financial community expect public utilities to compensate their owners for the cost of invested capital by paying out quarterly a substantial fraction of their total earnings as dividends.

While it may be traditional, customary, or necessary - perhaps for income tax purposes - to account for patronage dividends as liabilities, this practice does not detract from the

obvious fact that Yellow Cab earned a significant surplus of revenues over expenses in 1989 and 1990. By paying out its surplus revenues to its members, in accordance with the terms of its charter, Yellow Cab demonstrates profitability and solvency. Accordingly, we do not share Transportation Division's post-dividend perspective on the issue of Yellow Cab's financial condition.

8. Yellow Cab's October 3, 1990, audit shows a current liability of $2,209,572 for deferred income taxes. To improve Yellow Cab's total debt to total asset ratio, it asks the Commission to view its financial condition as if the deferred income taxes need not be paid. However, Yellow Cab did not offer expert testimony that such a view was reasonable in the circumstances of this case.

9. Yellow Cab's audit also shows a contingent liability of $1,000,000, involving an income tax dispute with the Internal Revenue Service.

10. Transportation Division's evidence shows that COHRRG does not collect enough premiums to cover losses and expenses. Its expert witness identified a reserve deficiency of $171,989.

11. Transportation Division's expert witness (de Guzman) from the California Department of Insurance testified that, if COHRRG sought to be admitted as a California multiple-line insurer, it would require $5,400,000 of capital and surplus. As a mono-line insurer, it would require $2,200,000 of capital and surplus. According to de Guzman's calculations, which did not consider $600,000, represented by the certificates of contribution (Exhibits 24B and 24C), COHRRG does not have the capital and surplus to meet California's requirements for either a mono- or multiple-line insurer.

He also testified that the escrow accounts provided as insurance and reinsurance protection would not be acceptable in California, because they are not signed and dated. In addition, COHRRG would be denied admission in California because the

financial statements of COHI (Barbados) do not show adequate surplus. The $1,000,000 demand note, carried on the books of COHI (Barbados) as an asset, would not be considered an admitted asset in California. After disallowing the demand note, COHI (Barbados) would have a negative surplus. Finally, COHRRG would not be admitted because the ratings of its reinsurers are not acceptable.

De Guzman also examined COHRRG to determine if it was in a "hazardous financial condition", as defined by the Federal Risk Retention Act. He used the Arizona surplus requirement of $1,000,000 to test COHRRG's condition. COHRRG's September 30, 1990, quarterly statement shows surplus of $1,526,153. However, after disallowing the $600,000 of certificates of contribution - as to which there is no evidence of Arizona's acceptance - COHRRG's surplus falls below the $1,000,000 Arizona requirement.

Finally, de Guzman testified that COHRRG would not qualify as a surplus lines carrier in California, because it does not have the required $5,400,000 of capital and surplus and it does not meet the seasoning requirement, not having been in business for three years.

12. The California Department of Insurance has asked the Arizona Department of Insurance to conduct an investigation of COHRRG. Under the Federal Risk Retention Act, a nondomiciliary state may request the domiciliary state to investigate a risk retention group. If the domiciliary state declines to examine the risk retention group, then the nondomiciliary state may conduct its own examination. Arizona had not responded to California's written request as of the last day of hearing. Transportation Division argues that an investigation of COHRRG, pending either before the Arizona or California Department of Insurance, provides another reason to deny the application.

13. Transportation Division identified four areas of uncertainty regarding COHRRG's ability to provide the coverage required by the Commission:

a. Arizona law prohibits insurers from being at risk on any one claim by an amount greater than 10% of its surplus. While COHRRG has reinsurance contracts that limit its exposure, Transportation Division's actuary identified a risk that could expose COHRRG to claims for which its reinsurers would have no obligation. Yellow Cab offered an agreement between COHRRG and COHI (Barbados) that would close this gap in its business plan and put COHRRG into compliance with Arizona law. According to Transportation Division, however, while the agreement alleviates the problem as to COHRRG, it shifts the strain from COHRRG to COHI (Barbados). That is, COHI (Barbados would now be at risk for an amount that far exceeds 10% of its surplus.

b. The financial statement of COHI (Barbados), as of May 31, 1990, (Exhibit 8) and the financial statement of Yellow Cab, as of May 31, 1990, paint different financial pictures of COHI (Barbados):

* Exhibit 1C shows ($766,000) net profit, while Exhibit 8 shows net income of $330,160.

* Exhibit 1C shows loss reserves (a liability) of $1,964,232, while Exhibit 8 shows $1,200,003.

* Exhibit 1C shows total capital and liabilities of $2,634,097, while Exhibit 8 indicates the equivalent sum of capital plus retained earnings to be $1,557,872.

c. COHRRG's growth is indicated by evidence that it experienced 2.5 times more direct earned premiums through September 30, 1990, than it did in the previous year. But, despite this growth, a significant decline in incurred-but-not-reported losses between December, 1989, and September,

1990, indicates that COHRRG's loss reserves are inadequate. Transportation Division contends that, from an actuarial standpoint, this indicated reserves inadequacy, as well as COHRRG's significant growth in exposure, means that more recent data should be analyzed to obtain an accurate actuarial picture of COHRRG's current financial position.

d. Yellow Cab offered rebuttal testimony to Transportation Division's evidence that its reserves are inadequate. However, the rebuttal testimony was problematic in that the figures submitted seemed to increase the reserve deficiency to which Transportation Division's witness had testified. Also, the rebuttal witness could not show the source of the figures he submitted.

Yellow Cab's showing tended to counter some of the weaknesses pointed out by Transportation Division:

1. We have already indicated our belief that the financial soundness of Yellow Cab should be viewed from pre-dividend perspective.

2. Yellow Cab's financial condition also compares favorably with Greyhound Corporation, whose self-insurer application of about the same vintage the Commission granted expeditiously and without hearing.[6] (D.89-09-036 in A.89-05-051) Transportation Division's witness, faced with a decision whether to invest in a taxi company making a return of 13.6% on net worth (industry average) or an intercity bus company making a

[6]Of course, Yellow Cab, unlike Greyhound, does not propose to be a self-insurer, but instead proposes to shift its risks to COHRRG. Moreover, unlike Greyhound, Yellow Cab has not obtained authority to self-insure from the ICC prior to filing its application here.

return on net worth of 4.5% (industry average), would choose the taxi company. Moreover, the evidence showed that Yellow Cab's taxis produced about $18,000 of revenue per unit, while Greyhound's buses produced only $8,600 per unit, despite the fact that bus revenues should be significantly higher than taxi revenues because of the disparity in the number of seats between the two carriers.

3. In cross-examination of Transportation Division's actuary, Votta, it became clear that several of the problems raised regarding COHRRG could be fixed by appropriate adjustments to its operations. For example, the following exchange occurred between Votta and counsel for Yellow Cab:

Q Would you agree that with respect to the Chariots of Hire plan of operation, that is the foundation, if you will, for the application, that it...appears to be a good plan in the manner in which it is constructed?

A As an insurance company and as a risk retention group meeting the requirements of the Risk Retention Act, yes, I agree.

Q And it appears to have a good spread of risk or an adequate one?

A I would have to say no based on my analysis as of September 30, 1990.

Q That analysis, however, being one that assuming appropriate changes are made, would be satisfied, right?

A Could be satisfied, yes. (Tr. 4:465.)

This testimony illustrates a fundamental problem with Yellow Cab's showing. Yellow Cab concedes certain weaknesses in its showing, and Transportation Division's witness agrees that they are correctable problems. But all of such corrections are

not demonstrated on this record. Yellow Cab asks the Commission to exercise faith in it and its affiliates, COHRRG and COHI (Barbados), that the problems identified on this record will be fixed. Yellow Cab, however, has the burden of persuading us that its agreements of insurance with its affiliates will in every respect be equivalent to that which could be obtained through the usual insurance channels. Promises are not equivalent to performance; and reassurances do not equal reality.

Had we not decided to deny this application on the legal grounds discussed above, we would be faced with resolving this case on the record before us, not upon assurances that Yellow Cab, COHRRG, and COHI (Barbados) will rectify in the future any problem or deficiency identified by Transportation Division. We are not convinced on this record that Yellow Cab's arrangements with COHRRG and COHI (Barbados) are equally capable, with traditional carriers, of providing to the traveling public the protection that our statutory law seeks to assure.

We do not deny that there are points of light in Yellow Cab's application and showing. We are particularly impressed with Yellow Cab's apparent financial strength. But other areas are murky. We are concerned, as was Votta (Tr. 4:468), with the transactions between Yellow Cab and its affiliates involving loans and surplus notes. We also find the silence of the Arizona Department of Insurance deafening. Finally, the California Department of Insurance seeks an Arizona investigation of COHRRG. We are not unmindful of Transportation Division's policy arguments. The evaluation of affiliated insurance companies of regulated businesses is not a task for which our staff is prepared or qualified. Moreover, insurance expertise in the California civil service lies within the walls of the Department of Insurance. We would be loath to attempt to duplicate that

expertise here, without legislative support in terms of positions and appropriations.[7]

Accordingly, for the reasons stated above, we would also deny the application on a factual basis.

Comments Filed Under Rule 77.2, et seq.

The ALJ's proposed decision was mailed to the parties on July 31, 1992. On August 14, 1992, Yellow Cab filed a motion to extend the comment period by an additional 32 days, from August 20 until September 21. The ALJ denied the motion, ruling that good cause had not been shown. Both Yellow Cab and Transportation Division filed comments on August 20, 1992.

Yellow Cab argues that the ALJ's proposed decision is contrary to the weight of the evidence. This argument is supported only by Yellow Cab's attempt to incorporate its brief by reference in its comments. This approach is contrary to the explicit language of Rule 77.3.

Yellow Cab also urges the Commission to: (1) adopt the ALJ's conclusion that the Commission does have jurisdiction to grant the relief sought by Yellow Cab, asserting that such a holding will eliminate this threshold jurisdictional issue from future cases of this kind; (2) articulate a procedure for the prompt and efficient handling of applications of this kind; (3) if the Commission adopts the ALJ's proposed decision as its own, to do so without prejudice to the resubmission of Yellow Cab's application augmented by additional supporting evidence.

In view of our holding that we lack jurisdiction to grant the relief sought by Yellow Cab, we need not act on any of Yellow Cab's recommendations.

Transportation Division's comments consist principally of reiteration and expansion of both its legal and policy arguments on

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[7] Current events suggest that neither positions nor appropriations will be forthcoming in the near future, given the national recession and California's budget crisis.

the issue of the Commission's jurisdiction. Since we adopt the Transportation Division's view, we need not consider its comments in detail.

In reply comments filed August 25, 1992, Yellow Cab again urges the Commission to adopt the ALJ's holding on the jurisdiction issue and to reject the narrow, strict construction approach advocated by the Transportation Division. Yellow Cab asks the Commission to harmonize the legitimate concern for financial responsibility with the public policies embodied in risk retention legislation.

Yellow Cab points out that Transportation Division's legal analysis is devoid of any cited authorities, cites no precedent of any kind, and discusses no applicable principles of statutory interpretation. Yellow Cab also criticizes Transportation Division's policy arguments, contending that its policy concerns are not compelling, that, in any event, Yellow Cab has suggested ways to overcome the burden on the staff occasioned by such applications, and that others ways may be developed.

Finally, Yellow Cab cites, and appends, Charter Risk Retention Group Insurance Co. v. Rolko, et al., No. A.1: CV-92-236, a federal district court order (June 11, 1992) from the Middle District of Pennsylvania. In the order, the court denies a motion to dismiss the action filed by the defendant commissioners. The action was a response by the Charter Risk Retention Group Insurance Company (Charter) to orders to show cause issued by the Pennsylvania Public Utilities Commission against 16 limousine companies insured by Charter, directing them to show why they should not be required to insure through a carrier licensed in Pennsylvania. Unless they made a proper showing, they would be subject to suspension or revocation proceedings. Charter filed suit against the commissioners in their individual capacities, seeking a declaratory judgment that the enforcement of Pennsylvania PU Code, § 512, and certain implementing regulations, is unconstitutional and in

violation of the Liability Risk Retention Act of 1986, 15 U.S.C. Section 3901, et seq.

In their motion to dismiss, the defendants argued that:

1. There is no federal question jurisdiction;

2. Charter's claim against them in their individual capacities is, in effect, a claim against the Commission, which is barred by the 11th Amendment; and

3. That the complaint fails to state a cause of action.

The federal district court found against the defendant commissioners on all three grounds asserted in the motion to dismiss. The court ordered a scheduling conference for June 30, 1992.

The ruling of the district court is merely a skirmish before the main battle. So far as we know, the trial has not yet occurred, nor has an appeal been taken to the court of appeals with jurisdiction over the district court. No citation is offered to a decision of the United States Supreme Court. While the district court's interpretation that the federal Liability Risk Retention Act of 1986, may preempt over the Pennsylvania Public Utilities Code, sounds a cautionary note, it is certainly not binding on this Commission; nor is it clear that the same result would be reached by a federal court with California jurisdiction, were it to apply the federal Liability Risk Retention Act to a different state statutory scheme and a different factual setting.

We are not persuaded by Yellow Cab's comments that we are required to reach a different result than to conclude that we do not have jurisdiction to grant Yellow Cab's application.

Findings of Fact

1. COHRRG's statement of financial condition is neither accurate, clear, complete, nor consistent.

2. COHRRG's statement of financial condition does not establish COHRRG's ability to satisfy its obligations for public

liability and property damage without affecting the stability and permanency of its business.

3. Yellow Cab has not met its burden of showing that its insurance arrangements with COHRRG will afford the security for the protection of the public that the PU Code contemplates.

Conclusions of Law

1. Pursuant to PU Code §5392, the Commission cannot accept filings to demonstrate adequate protection against liability that are not of the kinds listed in that section.

2. The Commission does not have statutory authority under PU Code § 5381 to consider and to approve, if appropriate, alternatives to the specific forms of protection listed in § 5392.

3. The Risk Retention Act does not preempt state laws, rules, regulations, or orders, when they apply to the demonstration of financial responsibility in obtaining a license or permit to undertake specified activities and require an insurance policy issued to a member of a risk retention group to be countersigned by a broker licensed by that state.

4. The Risk Retention Act explicitly allows a state: (1) to require liability insurance to be issued by "an admitted insurance company" or "an excess lines company"; or (2) to "exclude insurance coverage obtained from...a risk retention group."

5. The Commission would not trespass on the Supremacy Clause of the Federal Constitution if it were to hold that in obtaining passenger charter-party permits and certificates or passenger stage certificates applicants must provide evidence of protection against liability in one of the ways listed in PU Code § 5392.

6. While promoting and encouraging the formation and operation of risk retention groups in California, the CRR Act also recognizes the inherent authority of the state and its agencies to exercise discretion - in licensing and permitting certain activities - to decide what types of insurance policies will constitute adequate protection against liability.

7. The COHRRG policy does not constitute adequate protection against liability.

8. The application should be denied.

O R D E R

IT IS ORDERED that the application is denied.

This order becomes effective 30 days from today.

Dated September 2, 1992, at San Francisco, California.

DANIEL Wm. FESSLER
President
JOHN B. OHANIAN
NORMAN D. SHUMWAY
Commissioners

Commissioner Patricia M. Eckert, being necessarily absent, did not participate.

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

NEAL J. SHULMAN, Executive Director