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Decision 92-10-011 October 6, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of)
Airport Limousine Service of)
Sunnyvale, Inc. dba Airport)
Connection under Section 854)
of the Public Utilities Code)
to transfer control of the)
passenger stage corporation to)
AJBL Enterprises, Inc.)

ORIGINAL
Application 91-07-026
(Filed July 17, 1991;
amended March 2, 1992)

John Paul Fischer, Attorney at Law, for Airport
Limousine Service of Sunnyvale, Inc., dba
Airport Connection, Lynell Phillips, for
AJBL Enterprises, Inc., and Clifford Orloff,
for TTMC, applicant.

James S. Clapp, for Lorrie's Travel & Tours,
Inc., Marc Hershman, Attorney at Law, for
SFO Airporter, Inc. and Lloyd Long, for
BayPorter Express, protestants.

James T. Quinn, Attorney at Law, for the
Transportation Division.

O P I N I O N

This is an application to sell the stock of a passenger stage corporation, Airport Limousine Service of Sunnyvale, Inc. (ALSS), (PSC 899), now completely owned by Professor Clifford Orloff, to a new corporation, AJBL Enterprises, Inc. AJBL's stock is now¹ owned by Ms. Lynell Phillips, who is also the president and general manager of ALSS. Disregarding the corporate entities, this proceeding is essentially a proposal to transfer an owner's

1 When the application was first filed, AJBL's stock was owned by Jacob Levy. During the course of proceedings, the application has been amended to reflect the fact that Mr. Levy has sold his interest to Ms. Phillips.

equity interest to the person who already manages the regulated operation.

ALSS conducts its certificated operations as an airport van carrier, by acting as an an overlying carrier. It holds the certificate and interfaces with both customers and with regulatory bodies, while the actual transportation is provided by a stable of owner-operators, who also hold authority from this Commission, usually charter permit authority.

BayPorter Express, Inc. (PSC 1442), and Lorrie's Travel and Tours, Inc. (PSC 1003) protested the original application and are still active protestants. SFO Airporter (PSC 1275) also protested but is no longer active.

The Transportation Division Staff also protested. It noted evidence of many consumer complaints. An extraordinary number of these dealt with carrier "no shows"; in many instances, no shows caused passengers to miss flights or tour reservations. It also noted that ALSS' certificate was suspended in April, and August 1991, because vehicles operated under the certificate failed to meet California Highway Patrol (CHP) safety standards. Finally the protest alleged that ALSS, under Professor Orloff's direction, continued to operate for some time after suspension. (The suspension has long since been lifted, after the vehicles passed a reinspection.)

The Staff, using its citation forfeiture procedure, entered into negotiations with the applicants for sanctions for this alleged misconduct. While not admitting liability, Professor Orloff and the applicant corporations agreed among other things

that Orloff should no longer remain in the passenger stage business.²

In exchange for the sale of ALSS stock and the agreement of Professor Orloff not to compete, AJBL will pay a total of \$800,000 including a note of \$700,000 payable over seven years at an interest rate of 8%. The note will be personally guaranteed by Ms. Phillips and she will issue a second deed of trust on her home to secure her personal guarantee.³

Since Ms. Phillips has less property to serve as security for the purchase price than AJBL's original owner, the stock of ALSS will serve as part of the security. This means that in the event of a default, Professor Orloff could regain control of the certificated operation.

Orloff claims to have offered to sell to several independent individuals and corporations who might be interested in purchasing such an operation, including companies who already hold certificates for airport bus service. In response to a question by the Administrative Law Judge (ALJ), the applicants have alleged that Orloff actively offered ALSS for sale to Robert Werby, Howard Zack, Supershuttle (PSC 1275), John Kindt, Eugene Jen, Jeffery Mick and Amnon Levy. When no satisfactory offers were received, Orloff then looked within his own organization. No one has challenged this representation.

2 The agreement for sale of the stock included a no-competition clause, barring Orloff from involvement in an airport passenger van business for seven years. The settlement in the citation forfeiture incorporates that clause and makes it enforceable on behalf of the public.

3 No fee is due on any of the financing for this transaction. Under PU Code § 1904b, no fee is to be charged for issuance of an evidence of indebtedness if used to "take over" any other financing instrument on which a fee has previously been paid.

Staff has withdrawn its protest because it is satisfied with the outcome of the citation forfeiture negotiations.

A major element in Lorrie's protest is that Ms. Phillips was general manager during the period covered by consumer complaints, safety violations and defiance of suspension orders. Lorrie's wants a hearing to determine whether Ms. Phillips' involvement in ALSS' misconduct vitiates a fitness finding. Its basic concern over financial questions is the possibility that a default might occur, placing control back in Professor Orloff's hands.

BayPorter wants to use this proceeding as a springboard for a broadbased industry inquiry, focussed on the use of underlying carriers to perform airport passenger stage operations. It is also concerned with "gate and gas" operations where the underlying carrier is a lessee of the prime carrier rather than a truly independent carrier.

Applicants contend that no hearing is necessary.

Prehearing conferences were held under both the original and the amended application. The ALJ issued several rulings requiring additional information from applicants but denying protestants' demands for an evidentiary hearing.

Is an Evidentiary Hearing Required?

An administrative body is not required to afford an evidentiary hearing in every dispute. If one of the disputants will not be injured by the action under consideration, or if the dispute involves questions of law or policy rather than fact, it may decide a matter after giving a protestant nothing more than an opportunity to argue its position. This Commission recognizes this elementary principle of administrative law. Rule 8.2 provides that a filing of a protest does not guarantee a trial of evidentiary facts in a formal hearing.

In this case, the rulings weighed the public interest in financial and fitness questions against the delay and expense of an

evidentiary hearing before rejecting Lorrie's and BayPorter's demands.

We have ratified the ALJ's reasons for not granting evidentiary hearing. Since protestants have had a fair opportunity to argue the question, due process requires nothing more.

We have found that neither protestant would be injured by the proposed transfer. We have concluded, therefore, that they have no "standing" to protest. It is plain that neither protestant is defending a legitimate private interest. Therefore, the only other function they could serve is as volunteers to advance a claimed public interest.

BayPorter's Contention

BayPorter wants the Commission to take another look at the policy aspects of passenger stage operations using independent owner-operators. BayPorter does not claim that inaction on these questions will injure it. While the public might benefit from an industry-wide policy review, conducting it within the context of an application to transfer is clearly inappropriate.

The applicants should not be forced to defend a long-standing policy by themselves. In all fairness, the burden should be shared by all carriers who operate with underlying carriers. Nor should applicants' proposal to transfer be delayed for months, perhaps years, while numerous parties debate the need for, and possible details of, a new policy.

Lorrie's Contentions

Lorrie's has taken the position that the the Staff's participation in the citation forfeiture procedure has fallen short of the energy and effectiveness needed to protect the public interest. Lorrie's, therefore, contends that it should be granted an evidentiary hearing to act as a substitute prosecutor to explore fitness and financial issues. More specifically, it asserts that

Ms. Phillips should be examined⁴ on a public record to determine the extent of her involvement in ALSS' past misdeeds.

Lorrie's hopes that the hearing would demonstrate that Ms. Phillips as well as being derivatively responsible for ALSS' actions while under her management and control, was also personally responsible. Presumably, Lorrie's expects the Commission to respond to such proof by vetoing the transfer.

As applicants have pointed out, it should be obvious that protestants are not acting in the public's interest. The denial they seek would retain Professor Orloff in ultimate control of the operation. Leaving him in control would constitute a benefit for the public only if he had been an innocent figurehead during ALSS' misconduct. Neither protestant has made such a claim. Even Professor Orloff has not made such a claim.

The same flaw vitiates Lorrie's position on financing. It complains that there is a possibility Professor Orloff will be able to resume control of the operation because of default. Presumably, we should find the financing inadequate, and veto the transfer. This would guarantee that Professor Orloff will remain in control. It would also frustrate Staff's not unreasonable hopes that Ms. Phillips will be more sensitive to safety and service concerns when freed of Professor Orloff's authority.

There is an obvious mismatch between the tactics which Lorrie's has adopted and the ends it claims to seek. Its tactics will tend to leave Professor Orloff in a position to share power over a certificated operation. Yet success in imposing the expense and delay of hearing on a competitor would make it more likely that

4 It is significant that Lorrie's, though represented by counsel, has not conducted even the most limited discovery on the fitness question. Inferrably, it plans to develop the evidence by examining adverse witnesses in the hearing room. This is a tactic which will maximize waste of time and money not only for its competitors, but for the public.

the contract will not be executed or that a default will occur. In our opinion, if Lorrie's had the public interest at heart, it would have concentrated its efforts on helping Professor Orloff find an independent buyer, rather than on obstructive litigation.

Lorrie's Standing to Attack the Staff/Applicant Settlement

Lorrie's claims it is entitled to a hearing to demonstrate that the citation forfeiture plea bargain was too lenient. This presents a novel question, one which has not been adequately argued. When, if ever, should a regulated enterprise be afforded a hearing to complain that a prosecutor did not achieve the best possible plea bargain from a competitor? For the present, we will merely note that Lorrie's has not cited any instance where either a court or an administrative agency would permit participation in a plea-bargain by a competitor or indeed by anyone who was not injured by the alleged misconduct. Since Lorrie's argument barely scratches the surface of what could be a very complex policy and procedural issue, we will not attempt to resolve the question here.

Competitive Issues

Under NCPA v. CPUC (1971) 5 Cal 3d. 370, the Commission is required to consider, on its own motion, whether a proposed action is anti-competitive, and to weigh the anti-competitive effect against the expected public benefit if any. We believe that this requirement extends to procedural as well as substantive matters. In this instance, the likelihood that a hearing would produce any public benefit is very small. In contrast, there would be a significant possibility that the expense, delay and management distraction caused by a hearing would reduce ALSS/AJBL's effectiveness as a competitor.

Outcome

We can determine without holding a hearing that the proposed transfer will not leave the public worse off than the status quo. For that reason, and since there is at least some

reason to believe that the new management will be more responsible, it should be authorized. Since the proposed transfer is part of an integrated citation settlement, this fact provides additional justification for allowing it to go forward.

Findings of Fact

1. Vetoing the proposed transfer would not leave control of the certificated operation in the hands of persons more fit than Ms. Phillips.

2. The proposed transfer could allow Professor Orloff to resume control in the event of AJBL fails to pay for the transfer. If we were to reject the transfer, Professor Orloff would remain in control. The possibility of removing Professor Orloff from control is more in the public interest than the certainty that he would remain in control.

3. Vetoing the proposed transfer would not cause ALSS to find a better financed or a fitter purchaser. No protestant has alleged that Professor Orloff failed to make a reasonable attempt to find such a purchaser.

4. Holding a hearing is unlikely to produce any benefit to the public.

5. Protestants will not to be injured by the proposed transfer.

6. Granting a hearing can be expected to weaken competition in the market for SFO passenger stage transportation to an unknown extent. If Lorrie's were able to prove its allegations concerning fitness and adequacy of financing, it is unlikely that the outcome would benefit the public.

7. Protestants have been given an adequate opportunity to explain what they expect to accomplish if an evidentiary hearing were held and to argue that such hearing is required.

8. There is insufficient likelihood of any benefit to the public interest to justify the delay, expense, burden and possible anti-competitive effect, of conducting an evidentiary hearing.

9. Staff and applicants have agreed to the requirements set forth in Appendix A. That agreement provides reasonable protection for the public's interest in safety and quality of service.

10. The settlement between Staff has as one of its main features a requirement that Professor Orloff divest himself of control of ALSS.

11. A party other than a victim should not be granted a hearing to criticize the outcome of a citation forfeiture.

12. The proposed security issue is for lawful purposes and the money, property, or labor to be obtained by it are required for these purposes. Proceeds from the security issue may not be charged to operating expenses or income.

Conclusions of Law

1. The Commission should not deny permission to transfer the stock of a passenger stage corporation unless the proposed transfer would be adverse to the public interest.

2. The public interest does not require an evidentiary hearing.

3. Since the proposed transfer will not injure protestants, their standing to file a protest is in question. However, we do not reach that issue.

4. The Commission has discretion to grant an evidentiary hearing to protestants even if they lack standing, if the outcome they seek could protect the public interest.

5. Where such protestants are competitors of the applicant, the Commission should weigh the public interest at stake against likely injury to competition caused by the delay, expense and uncertainty of litigation.

6. The proposed inquiry into Ms. Phillip's conduct would tend to protect the public interest only if there were a realistic expectation of finding another purchaser with no connection with ALSS.

7. The proposed inquiry into financial matters would tend to protect the public interest only if rejecting the proposed transfer would not leave the operation in control of the existing ownership.

8. The Commission should authorize the proposed transfer.

9. Under the settlement and the contract of sale, the Commission Staff or any other agency acting in the name of the People of the State of California can enforce the provisions of the contract barring Professor Orloff from activities which would require passenger stage or charter party authority for a limited period.

10. The settlement should be adopted as part of the Commission's order.

11. Because of delays occasioned by protests, this order should be effective when issued or when all of the citation forfeiture fines are paid, whichever is later.

12. This authorization is not a finding of the value of the rights and properties to be transferred.

O R D E R

IT IS ORDERED that:

1. AJBL Enterprises, Inc. is authorized to purchase all stock of Airport Limousine of Sunnyvale, and Lynell Phillips is authorized to assume control and to hold a controlling interest in Airport Limousine of Sunnyvale, within 120 days after the effective date hereof. If the transfer is not completed within 120 days this authorization shall be suspended, pending further order of the Commission.

2. Immediately upon completion of the transfer of stock, AJBL shall notify the Transportation Division in writing or by fax. Within 30 days after the transfer is complete, applicants shall serve and file in with the Commission's Docket Office 13 copies of

the instrument of transfer together with a covering letter bearing the number of this application and the Decision number.

3. Until and unless superseded by an industry-wide Commission Order covering the safety responsibilities of overlying carriers, Airport Limousine of Sunnyvale, Lynell Phillips, and AJBL etc. shall comply with Appendix A.

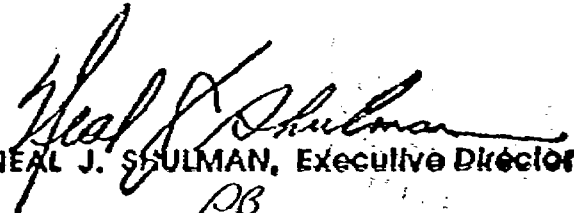
4. On or after the effective date of this order, but before February 1, 1993, for the purposes specified, transferee may issue an evidence of indebtedness in principal not exceeding \$700,000, (and may execute and deliver an encumbering document). This document shall be substantially the same as that attached to the application.

5. This order grants the application, as amended, in full. This order is effective today.

Dated October 6, 1992, at San Francisco, California.

DANIEL Wm. FESSLER
President
JOHN B. OHANIAN
PATRICIA M. ECKERT
NORMAN D. SHUNWAY
Commissioners

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


NEAL J. SHULMAN, Executive Director
PB

APPENDIX A

AIRPORT LIMOUSINE OF SUNNYVALE, INC.
(ALSS)

- (1) ALSS will inspect and maintain all of its vehicles, regardless of seating capacity, and maintain a record of all inspections and maintenance, in accordance with the requirements of the California Vehicle Code (CVC) and Title 13, California Code of Regulations. Vehicle inspections shall include, but not be limited to, those described in CVC Section 34505(a) and Title 13, Section 1215.
- (2) ALSS will require each subcarrier it engages to inspect and maintain its vehicle(s) in accordance with paragraph (1). ALSS will institute a program to monitor its subcarriers' compliance with this requirement.
- (3) ALSS will cooperate with the CHP and San Francisco International Airport (SFO) police in any inspection of its vehicles or maintenance records. ALSS shall notify the Compliance and Enforcement Branch of any instance where one of its vehicles, or a vehicle operated by one of its subcarriers, has been placed out of service or in restricted service by the CHP or SFO. Such notification shall be made in writing within 10 days of the action.
- (4) ALSS will respond to all written complaints regarding its services within 15 days of receipt in accordance with General Order 158, Part 7.01. ALSS will maintain a register of every written complaint received. The register shall include, at a minimum, the name of the complainant, the date the complaint was received, the date of ALSS' response, a brief description the nature of the complaint, and the disposition. Every three months ALSS shall submit a copy of the complaint register to the Compliance and Enforcement Branch covering the preceding three-month period. The register and all correspondence and records regarding complaints shall be maintained for a minimum of three years from the date of receipt of the complaint.
- (5) Before employing the services of a subcarrier, ALSS will verify with the Commission that the subcarrier holds valid charter-party authority from the Commission and that each vehicle the subcarrier will use is listed on the subcarrier's current equipment statement on file with the Commission. At least once every three months, ALSS will verify with the Commission that the subcarrier's authority is in good standing.
- (6) ALSS will adhere to the fares, schedules, rules and regulations contained in its tariff and timetables on file with the Commission. ALSS will maintain a record of any scheduled service (referred to in its tariff as "Minicoach Shuttle") which it fails to perform, including the reason for nonperformance. Such records shall be maintained for a minimum of three years.

(END OF APPENDIX A)