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Decision 92-12-065 December 16, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking
concerning the regulation of
passenger carrier services.

ORIGINAL

R.88-03-012

(Filed March 9, 1988)

O P I N I O N

Background

We instituted this proceeding two years ago to revise and update the regulation of charter-party carriers and passenger stage corporations, especially transportation to the airport by on-call vans and buses. Since that time, we issued an interim order, Decision (D.) 89-10-028, cancelling General Orders (GO) 79 and 98-A and replacing them with GOs 157 and 158.

In the interim decision, we also indicated our intent to revise Rule 15(e) of our Rules of Practice and Procedure to fully implement our new regulations. Revisions to our procedural rules are governed by the Government Code. We ordered that the required publication be performed in accordance with the Government Code and held this proceeding open to adopt the revised rule.

Because we were concerned about the undisputed intervenor testimony that throughout the state there was no reliable airport transportation available for passengers in wheelchairs, we directed the Transportation Division (TD) to prepare a report on statewide airport access for passengers in wheelchairs. We indicated that after receipt of this report, we would determine if an investigation of these issues was necessary. We specified that the report must identify existing airport transportation service to passengers in wheelchairs, discuss the need for additional service specifying the type of service needed, calculate the cost of additional service and assess the impact of any increased cost on carriers and rates. However, before the report was completed,

Congress passed the Americans With Disabilities Act (ADA or Act) which prescribed specific requirements for transportation and transportation facilities accessible by the disabled, including passengers in wheelchairs. (42 USC 12 101 et seq.)

When TD filed its wheelchair access study on August 15, 1990, TD indicated that the federal requirements were unclear and might take time to clarify. TD requested to report on ADA at a later unspecified date. TD proceeded to report on statewide transportation conditions for wheelchair passengers.

First, TD confirmed that there is no para-transit or public transit service available at a price and service level comparable to the airport service offered by respondents. TD then calculated the cost to retrofit vehicles, and the impact of this cost on rates. TD presents the impact on rates of regulated airport carrier service in ranges because of the uncertainty of ridership by passengers in wheelchairs. Total costs are lowered by increased ridership. However, estimating potential ridership by passengers in wheelchairs is a complex task and was not attempted by TD. The cost analysis assumes that between 0.014 and 0.65 percent of all passengers are in wheelchairs. The lower ridership figure is from a carrier currently providing service to passengers in wheelchairs under existing tariffs. The high figure represents total statewide potential wheelchair passengers. Therefore, TD uses high and low estimates of ridership, resulting in high and low estimates of increases in rates. TD's cost estimates include the purchase, installation, and maintenance of wheelchair lifts, driver training to operate lifts and appropriate tax deductions.

TD reports that many interests involved in providing wheelchair accessible service must be balanced to select the type of service needed. These interests include: minimizing fare increases to wheelchair passengers; minimizing cost to enter passenger stage operations; minimizing costs to non-wheelchair passengers; providing the level of wheelchair accessible service

needed in authorized service territories; providing wheelchair accessible service equal to that of other passengers (mainstreaming); and, minimizing impact of required service on costs and profits.

TD recommends that, based upon our balancing of the above interests of carrier, ambulatory passenger and wheelchair passenger, we choose one of these three options:

Option 1 - Full Service and Mainstreaming at Very High Cost: equip all vehicles with wheelchair lifts (involves 81 carriers with 672 vans 97 buses and 78 mini-buses). Fare impact: low of \$0.18 to \$0.44; and, high of \$0.33 to \$1.10.

Option 2 - Full Service and Limited Mainstreaming: equip 10% of fleet, or a minimum of 1 vehicle (involves 81 carriers with 89 vans, 7 buses and 9 mini-vans). Advance reservations for scheduled service required. Fare impact: low of \$0.02 to \$0.04; and, high of \$0.05 to \$0.08.

Option 3 - Full Service, Exempt Carriers With Less Than Five Vehicles: equip 10% of fleet, except carriers with less than five vehicles (involves 50 carriers with 63 vans, 5 buses and 18 mini-vans). Fare impact: low of \$0.02 to \$0.04; and, high of \$0.05 to \$0.08.

Although Options 2 and 3 are low in the fare impact, TD also discusses their disadvantages. TD reports that it has not assessed the level of need for wheelchair accessible service throughout the state and that this level of service may vary.

On February 15, 1991, we held the first prehearing conference for the sole purpose of hearing parties' assessment of the impact of ADA on this proceeding. At this prehearing conference, the California Bus Association (CBA) appeared for the first time. TD asserted that ADA preempts the states from regulating transportation services accessible to passengers in wheelchairs. Other parties asserted that new regulation to require

airport transportation for wheelchair passengers is not needed since ADA requires that newly purchased vans and buses of private carriers be wheelchair accessible. Should we disagree that we are preempted or that ADA will resolve the issue of wheelchair access, Marin requests hearings on TD's report because it believes numerous calculations are in error. Parties agreed that ADA was complex, extensive, unclear, and that the best course of action in order to assess the impact of ADA on this proceeding was to await federal DOT regulations to be issued in July, 1991. In the meantime, Mr. Skaff, representing passengers in wheelchairs, agreed to file a statement of his position, including legal support, and a time was set for parties to respond.

Skaff's position is that the Commission should resolve the pending issues of wheelchair access to airport carrier services notwithstanding enactment of ADA. Skaff urges more stringent state regulation to insure these services are provided. However, he proposes no specific regulation.

CBA initially responded that the proceeding should be dismissed since federal regulation will provide the same relief requested in this proceeding.

On January 22, 1992, after the issuance of federal regulations implementing ADA, we held a Second Prehearing Conference to see if the federal regulations clarified ADA's impact on this proceeding. Although parties were still unsure of ADA's impact and divided in their opinion of how to resolve this proceeding, they agreed to meet and attempt to draft jointly proposed guidelines for an interim level of service in the state while the federal bus study and bus regulations ordered in ADA are being completed. Regulations pursuant to this study are not required until 1995 or 1996. Dates were set for the filing of the proposal and the responses. In anticipation of recommending guidelines that would apply to all van operators who are not participants in this proceeding, CBA questioned whether all

affected carriers should receive notice and be given an opportunity to comment on the proposal. This matter was taken under submission until the parties derived a joint proposal.

On February 24, 1992 CBA submitted recommended guidelines for airport bus passengers with disabilities to reduce the delay in achieving the goals set by ADA. Within this document, Skaff's opposition to various recommendations is noted. The guidelines were ordered to be distributed to all parties and a time for comments was set. BayPorter Express (BayPorter) distributed comments opposing the guidelines and offering an alternative proposal.

The assigned Administrative Law Judge ruled that briefs on the legal issue of preemption should be filed on October 5, 1992. Skaff obtained counsel who requested and was granted a 10-day extension. However, counsel for Skaff filed a one paragraph brief that was untimely. This brief is not received.

In this decision we conclude that ADA preempts conflicting state regulation of wheelchair accessible passenger stage and charter-party service, although equal or greater protection is expressly allowed. We decline to adopt interim guidelines to minimize the delay in implementing federal bus regulation because to do so would violate our obligation to regulate. We do not adopt advisory opinions. We order respondents to annually report service to passengers in wheelchairs and TD to report on the changes in airport service to wheelchair passengers after a year's experience is developed.

We adopt a revised Rule 15(e) in our Rules of Practice and Procedure, and close this proceeding.

Federal Preemption

TD contends that ADA preempts this Commission from adopting rules or regulations in this proceeding which conflict with the Act. In summary, we agree. Congress' intent to preempt conflicting state regulation is implied in ADA's preamble, purpose,

and pervasiveness and is expressly stated in the section discussing the power of states and local government in relationship to the Act. We will briefly reiterate these portions of the Act.

In the preamble, Congress declares that ADA is intended to set a national standard of non-discrimination against the disabled, including passengers in wheelchairs. Congress states the purpose of ADA is to ensure that the federal government plays a central role in protecting the rights of the disabled.

Congress uses its powers under the fourteenth amendment and the commerce clause to establish and enforce the standard set in ADA. ADA requires public and private entities to provide services and facilities that are accessible to the disabled. "Disabled" is defined to include passengers in wheelchairs; "Private entities" is defined to include bus and van passenger carriers that affect commerce. States are not immune from ADA's provisions. Congress establishes a standard for accommodating the disabled in areas it considers to be the major areas of life, namely, the workplace, public services and facilities, private services, and telecommunications. The Act is so detailed that it prescribes the architectural configuration of facilities and structural details of vehicles to provide wheelchair access.

Congress speaks to the issue of preemption. It declares that states and local jurisdictions are not prevented from enacting laws providing greater or equal protection for the disabled. (42 USC 12201(b)) DOT regulations elaborate on the relationship between ADA and other laws:

"We also would point out that the ADA does not assert any blanket preemptive authority over state or local nondiscrimination laws and enforcement mechanisms. While requirements of the ADA and this regulation would preempt conflicting state or local provisions...the ADA and this rule do not prohibit states and localities from legislating in areas relating to disability...Also, states and localities may continue to enforce their own parallel

requirements...." (49 CFR Part 37, Appendix D, p. 45736.)

We conclude that ADA preempts conflicting state regulation of transportation services and facilities accommodating passengers in wheelchairs. However, ADA does not affect our jurisdiction to regulate other matters of this transportation, such as certification, vehicle safety or insurance requirements.

Marin argues that ADA may prohibit all state law involving discrimination against the disabled. However, ADA itself, in defining the state's relationship to ADA, refutes this argument.

CBA argues that ADA preempts the regulation of all significant aspects of transportation for the disabled, except the timing of services. We disagree that ADA preempts regulation of all aspects of transportation for the disabled since it only legislates in the area of vehicle and facilities accommodation. We may regulate the timing of transportation services to the disabled if our regulation does not conflict with ADA. However, we are not sure that CBA's proposal meets this test. We hesitate to interfere with this federal mandate since ADA prescribes interim measures to accommodate passengers in wheelchairs and allows carriers to meet a level of equivalent service. Until ADA is fully operational we cannot be sure CBA's proposal is not in conflict. Therefore, we reject this argument.

Impact of ADA on This Proceeding

ADA directly provides remedies for transportation service to passengers in wheelchairs by mandating that new vans be wheelchair accessible. The issue of wheelchair access is pending in this proceeding. Respondents must comply with ADA. It is probable that ADA will affect the need for statewide service to passengers in wheelchairs because all new airport vans must now have wheelchair lifts or comply with the standards of accessibility as determined by the Administrator of the federal Urban Mass

Transportation Administration on a case-by-case basis. Therefore, any need for service developed in hearings in this proceeding will likely change.

Marin points out that there is no request in this proceeding to provide protection for the disabled greater than that provided by ADA. Marin also contends that there is no record in this proceeding upon which to base such relief. Marin is correct since no evidentiary hearing has been held to cross-examine TD's report.

Even though Skaff requests relief in spite of ADA, no recommendations are made. In addition, since ADA bus regulations will not be promulgated until after an extensive study is completed in 1995, there is no way to know if our regulation conflicts with ADA.

Under these circumstances, it is futile to order further action in this proceeding. CBA proposed that we adopt "recommended" guidelines during ADA's lag in promulgating bus regulations. Marin supports these guidelines and recommends that we wait until ADA is fully implemented before we attempt to adopt regulation in this proceeding. Marin suggests that this proceeding can be reopened at a later date, if necessary.

CBA's Recommended Guidelines

In the interim period, while the federal bus study is being completed and bus regulations are being enacted, Marin and CBA request that we adopt CBA's recommended guidelines to reduce the delay in providing transportation to passengers in wheelchairs. These guidelines would not be mandatory, but "recommended" for all airport carriers to follow.

Airport service is predominantly provided by carriers operating vans. CBA represents bus operators and Marin is a bus operator. To dispel any notion of unfairness, CBA recommended that the proposal be distributed for the comments of van operators.

This request was made prior to the presentation of a proposal and was taken under submission.

Skaff's alternative recommendations are noted within the guidelines. Therefore, no joint agreement was reached. CBA distributed its proposal to parties in the proceeding. BayPorter Express (Bay Porter), a van operator, filed opposing comments and offers an alternative incentive and reward proposal.

CBA proposes that, within 60 days after a decision is effective, airport carriers would be encouraged to meet the transportation needs of passengers in wheelchairs either directly or indirectly. CBA believes that sufficient vehicles to serve passengers in wheelchairs already exist, but that better coordination and dispatching are needed. Upon reasonable notice, the carrier would either provide transportation requested by a passenger in a wheelchair or be responsible, as a broker/facilitator, for procuring transportation. If a carrier does not have a vehicle with lift equipment, he or she would procure the vehicle from another licensed carrier. Carriers would provide service at established service points or within their service territory, based upon their existing authority for scheduled routes or on-call service. The charge for service to passengers in wheelchairs would not exceed the carrier's published rate. The Commission would relieve carriers of any anti-trust liability for providing service to passengers in wheelchairs. CBA proposes that we review the need for the recommended guidelines one year after they are in effect.

CBA admits that it represents bus operations which do not generally serve airports and that its proposal has not been presented to or endorsed by airport carriers operating vans. However, it believes the proposal is a starting point for development of a plan to reduce the delay in airport transportation for persons with disabilities.

Skaff disagrees with the contention that there are sufficient lift-equipped vehicles to serve passengers in wheelchairs. Skaff indicates that these vehicles, which are the ones used in paratransit services are currently over-booked and used beyond their intended capacity. Skaff objects to the lack of specification for a reasonable time for advance notice. He requests a 4-hour advance notice for service, which exceeds ADA's requirement of a 48-hour notice. He requests statewide hearings regarding service to passengers in wheelchairs after one year, rather than a Commission review.

BayPorter believes that recommended guidelines will weaken ADA by adding a concept of broker/facilitator. BayPorter argues that ADA already requires carriers to pool lift-equipped vehicles to provide equivalent service after the acquisition of one lift-equipped vehicle. BayPorter believes the concept of equivalency in ADA allows carriers to limit their purchases of lift-equipped vehicles to the number of vehicles actually needed, rather than requiring every new vehicle to be lift-equipped. This issue will be resolved by the Department of Transportation as carriers request certification under the ADA equivalency exception.

BayPorter offers an alternative Commission incentive approach. It requests that the Commission choose one or more of these rewards for carriers complying with ADA: discount transportation fees, discount state registration fees for lift-equipped vehicles, waive bridge tolls, allow complying carriers to use freeway "diamond lanes" at all times, reduce insurance rates for accessible vehicles, and/or request that airport authorities reduce access fees.

Discussion

We find some aspects of the recommended guidelines to be already required by ADA, such as non-discrimination in the rate charged passengers in wheelchairs. We find other aspects of these guidelines conflict with ADA, such as not specifying a time for

advance notice, when ADA requires a maximum of 48 hours. The majority of the incentives in BayPorter's alternate proposal are not within our jurisdiction to provide.

However, we will not resolve the issues presented by the interim proposals until we resolve the threshold question of whether we should adopt a proposal that is purely advisory. This is contrary to our function as a regulatory agency with a duty to affirmatively regulate. In addition, advisory guidelines are unenforceable.

The decision to voluntarily provide greater service than ADA requires is laudible, and one which we anticipate respondents will make. The Commission and parties in this proceeding have expended time, money and effort for the past two years pursuing a resolution of the issue of wheelchair access. The participants have been sensitized to the issues and responded by the beginning of a joint agreement to provide immediate relief to wheelchair passengers. We encourage the parties to complete this effort.

Even though we cannot adopt the recommended guidelines, we have an affirmative duty to support ADA. Therefore, we will order respondents and new carriers to show compliance with ADA and its vehicle requirements.

Effective February 26, 1992, ADA requires respondents purchasing new vans to purchase lift-equipped vehicles. We request our Transportation Division to revise Commission vehicle reports to require that vehicles of new carriers or carriers renewing authority meet these specifications. Violation of ADA vehicle requirements may be grounds for denial of certification or renewal of authority.

In addition, we direct TD to devise the most expeditious method for each respondent to annually report the level of service to passengers in wheelchairs. Within one year after the effective date of this decision, TD shall report the progress of service to

passengers in wheelchairs. We request that TD bring to our attention a need to further investigate this service in the future.

Notice of our Intent to adopt revisions to Rule 15(e) of our Rules of Practice and Procedure was published by the Office of Administrative Law on July 28, 1992. No further comments have been received. Therefore, we will adopt the revisions in Rule 15(e) as proposed in interim D.89-10-028.

This proceeding is closed.

Findings of Fact

1. In the interim order, D.89-10-028, we held this proceeding open to receive a report from the TD and to adopt a revised Rule 15(e) of our Rules of Practice and Procedure.
2. Publication of our intent to revise Rule 15(e) has been duly published by the Office of Administrative Law.
3. On July 26, 1990, Congress enacted ADA, 42 U.S.C. 12101 et seq., effective July 26, 1991. On July 26, 1991 and September 6, 1991 regulations pursuant to ADA were promulgated by the Department of Transportation and Department of Justice. (28 CFR Parts 35 and 36; and, 49 CFR Parts 27, 37, and 38.)
4. ADA defines private entities as non-public entities providing transportation service which affects commerce, including charter-party service. Respondents in this proceeding provide such service. Therefore, ADA applies to respondents.
5. Effective February 25, 1992, ADA requires that newly purchased vans used in fixed route or demand responsive transportation systems must be readily accessible to the disabled, including passengers in wheelchairs, and wheelchair lifts must meet ADA's specifications. ADA requires an extensive bus study prior to the promulgation of regulation for buses. This study must be completed within 36 months after the enactment of ADA and the President may extend this deadline one year. One year after the bus study is complete, the Secretary of Transportation must issue

regulations to carry out recommendations in the study. Therefore, ADA bus regulation may not be issued until 1995 or 1996.

6. On August 15, 1990, TD filed the report ordered in our interim decision. TD was unable to assess the impact of ADA on this proceeding. TD indicates that there is no para-transit and public transit service available at a price and service level comparable to regulated airport transportation service. TD recommends that one of three levels of service may be appropriate for passengers in wheelchairs. TD does not assess the level of need for airport transportation for passengers in wheelchairs in all locations throughout the state.

7. Marin contends that TD's report contains calculation errors and requests a hearing.

8. CBA, representing bus operators which do not generally serve the airport, requests that the Commission adopt non-mandatory guidelines for respondents as a way to minimize the delay in fully implementing ADA. Skaff, representing passengers in wheelchairs, does not completely agree with all of CBA's proposed guidelines. BayPorter opposes the guidelines and proposes that the Commission adopt an alternate proposal providing certain incentives and rewards to carriers complying and operating above ADA-required levels of service. Marin agrees that CBA's proposal is reasonable.

9. The Commission does not adopt advisory opinions, such as CBA's proposed non-mandatory guidelines.

10. TD argues that ADA prohibits conflicting state regulation, yet allows greater or equal protection of the disabled. CBA argues that ADA preempts all but the timing of providing transportation services to the disabled. Skaff requests that the Commission adopt regulation in this proceeding in spite of ADA. Marin argues that ADA may partially or completely preempt regulation in this proceeding.

11. It is premature and unreasonable to order a hearing on the disputed issues in this proceeding since ADA may provide an

adequate remedy for passengers in wheelchairs. It is equally unreasonable to hold this proceeding open until ADA is fully implemented in 1995 or 1996.

12. It is reasonable to support compliance with ADA by verifying that new vans purchased by respondents after February 25, 1992 are accessible to passengers in wheelchairs as specified by ADA.

13. It is reasonable to track the progress in providing airport service to passengers in wheelchairs to assess the need for greater or equal protection of these passengers' airport transportation service, if necessary, in the future.

Conclusions of Law

1. ADA of 1990 prohibits conflicting state regulation of public and private transportation accessible to disabled passengers, including passengers in wheelchairs. ADA allows states to provide greater or equal protection of the disabled. ADA applies to passenger stage and charter-party carriers regulated by this Commission.

2. There is no record in this proceeding to order regulation which gives greater or equal protection to the disabled than that provided by ADA.

3. CBA's proposed guidelines to minimize the delay in implementing ADA constitute a request to adopt an advisory opinion, a request which we should not grant.

4. BayPorter's incentive and reward proposal requests remedies which are outside of this Commission's jurisdiction.

5. In support of ADA, all passenger stage and charter-party carriers should be required to comply with ADA and show written evidence of compliance prior to the granting of new authority or renewal of existing authority.

6. This proceeding should be closed.

ORDER

IT IS ORDERED that:

1. All existing passenger state and charter-party carriers shall comply with the American with Disabilities Act of 1990 (ADA).

2. The Commission's Transportation Division (TD) shall devise the most efficient method to verify that respondents' comply with ADA and that their vehicles and those of new passenger stage and charter-party carriers comply with ADA, such as revising the vehicle report.

3. Passenger stage and charter-party carriers shall annually report the progress of airport service to passengers in wheelchairs as directed by TD. TD shall revise or supplement the Annual Report or other required reports to include respondents' statement of this progress. In accordance, all existing passenger stage and charter-party carriers shall maintain the following records, on a monthly basis:

- a. The number of passenger vehicles, owned or leased.
- b. The number of passenger vehicles, owned or leased, which are accessible to passengers in wheelchairs.
- c. The number of passengers in wheelchairs requesting transportation.
- d. The number of passengers in wheelchairs actually carried.
- e. The number of passengers in wheelchairs requesting transportation which were referred to other transportation services and name of referral.
- f. The number of passengers in wheelchairs requesting transportation which were refused service; and the reason for the refusal.

4. Within 18 months after the effective date of this decision, TD shall prepare and submit to the Commission a report on the progress of adequate airport transportation for passengers in wheelchairs, indicating whether a new investigation of this issue is warranted.

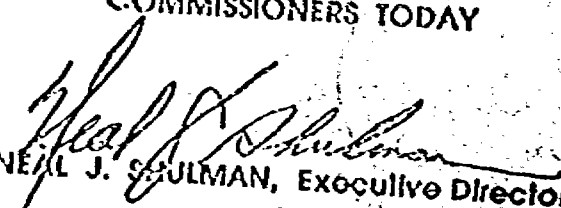
This proceeding is closed.

This order is effective today.

Dated December 16, 1992, at San Francisco, California.

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

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


NEAL J. SCHULMAN, Executive Director