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ORIGINAL

Decision 82 09 040 SEP 8 - 1982

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of CAL COAST CHARTER, INC., for an extension of certificate of public convenience and necessity to operate a passenger stage service throughout the City of San Luis Obispo, California.	Application 82-05-67 (Filed May 28, 1982)
In the Matter of the Application of CAL COAST CHARTER, INC., for an extension of certificate of public convenience and necessity to operate a passenger stage service between San Luis Obispo, California, and Morro Bay and Los Osos, California.	Application 82-06-01 (Filed June 1, 1982)

Eldon M. Johnson, Attorney at Law, for applicant.
Handler, Baker, Greene & Taylor, by William D. Taylor, Attorney at Law, and Robert K. Schiebelhut, Attorney at Law, for San Luis Transportation, Inc., Central Coast Transit, South County Express, North Coastal Transit, and South County Area Transit, protestants.
Richard D. Rosenberg, Attorney at Law, for the Commission staff.

O P I N I O N

Introduction

Under Public Utilities (PU) Code Section 1031 et seq. applicant Cal Coast Charter, Inc. (Cal Coast), a California corporation, seeks to extend its certificate of public convenience and necessity (CPC&N) to operate as a passenger stage corporation by adding service in and around the City of San Luis Obispo (City) and its vicinity as described in exhibits to Application (A.) 82-06-01, and by adding service between certain points in San Luis Obispo County as described in exhibits to A.82-05-67. Cal Coast is currently authorized to provide passenger stage service between Moorpark College, Moorpark, Thousand Oaks, and Newbury Park, in Ventura County, under certificate PSC-1153.

Cal Coast's proposed new routes, fares, and schedules are set forth as exhibits to the applications. The proposed service in and around the City is to be scheduled with a basic one-way fare of 50¢. The proposed county service is to be among the communities of San Luis Obispo, Morro Bay, and Los Osos. It is also to be scheduled service with a basic one-way fare of 75¢ except that the fare between San Luis Obispo and Cuesta College is to be 50¢.

Service over these identical routes has been provided for some time by protestant San Luis Transportation, Inc. (SLT), which has a CPC&N for both routes. SLT wishes to continue to provide the service. It was still doing so at the time of the hearing.

The Cal Coast contracts with local agencies are the fundamental problems facing us in this consolidated matter (and, for that matter, the prior applications of SLT which led to the certification for these routes which we issued to it). One contract is with the City and one is with North Coastal Transit (NCT), an agency comprised of representatives from several local governmental entities.

As a result, we not only have the usual question of whether Cal Coast has made a showing sufficient to receive a CPC&N to operate these proposed services, but we also have a jurisdictional question. Cal Coast has moved for a dismissal of its applications on the ground that sole jurisdiction over these two proposed bus services rests with the public entities with which Cal Coast has contracted, the City and NCT. Staff supports this position.

Protestant SLT asserts that jurisdiction over this matter rests with the Commission and also asserts that those elements of proof necessary to establish public convenience and necessity to warrant certification of these routes do not exist as to Cal Coast.

Background

Briefly, this consolidated matter arose out of the following circumstances.

In 1974, the city council of the City decided the City and its environs needed public transportation. It contracted with SLT to provide it. The contract amount required a subsidy which was comprised of State Transportation Development Act Funds and City general funds. The contract ended in March 1982, but

was extended through June 1982. Sometime in 1980 SLT applied for Commission certification for these city routes. According to SLT president Patrick D. Linington, application was made to the Commission as a result of SLT's extension of routes outside the city limits and conversations with a staff member indicating that this action was necessary. The authority to operate was granted by Decision (D.) 92599 on January 6, 1981 (though it is clear from the testimony of Linington that the extended service was already in operation prior to Commission authorization).

In 1979, NCT, with a governing board comprised of representatives from the Cities of San Luis Obispo, Morro Bay, Atascadero, a community college district, and the County of San Luis Obispo, also decided to contract with SLT for bus service among the various communities represented on the board. Like the City, NCT subsidized the bus service beyond farebox receipts with money it received from the State Transportation Development Act Funds.

The City, as a member of NCT, provided staff for NCT. This staff is the same staff assigned to the transit system in the City. They are paid with NCT funds when engaged in NCT business, but are City's employees. SLT received Commission authority for the original NCT routes in D.92522 dated December 16, 1980.

Not surprisingly the contracts generated by these two entities with SLT are virtually identical in their terms. They also expired at the same time on March 31, 1982, with an extension through June 30, 1982.

The authority granted by the Commission in these two instances was not drafted to expire coincidental with the contract expiration date--our present practice when we are confronted with similar applications. Thus, SLT still has authority from the Commission to operate over these routes, but SLT's written contracts with the City and with NCT have expired.

In early 1982 the City and NCT published bid notices for continuation of the bus services in question beyond the end of June 1982. Bids were submitted by both Cal Coast and SLT, among others. Cal Coast was selected by both the City's city council and NCT's board of directors. Contracts were instituted between each entity and Cal Coast was to begin service on July 1, 1982 over the same routes previously served by SLT.

Cal Coast's A.82-05-67 and A.82-06-01 were filed respectively on May 28 and June 1, 1982. The former application is for the routes contracted for with the City; the latter application is for the routes contracted for with NCT. The schedules, routes, and fares set forth in these applications are requirements of the contracting agency, not determinations made by Cal Coast. Furthermore, the fares are not amounts Cal Coast is to receive. The contracts specify that Cal Coast will receive certain sums of money from the agency, including a specified rate per mile.

On June 15, 1982 the Commission issued D.82-06-086 and D.82-06-087 granting the certificates requested by Cal Coast. On June 16, 1982 a protest to the applications was filed by SLT. On June 17, 1982 the Commission issued D.82-06-105 and D.82-06-106 rescinding D.82-06-086 and D.82-06-087, respectively, because the proposed decisions had not been noticed to the public as

required by the Open Meeting Act, California Government Code Sections 11120 et seq. As a result of the intervening protest the matters were set for consolidated hearing. It was held in Los Angeles commencing on July 27, 1982. The case was submitted on July 30 pending receipt of two concurrent briefs, one on jurisdiction and one on substantive issues to be postmarked no later than August 6 and August 9, 1982 respectively.

Public Convenience and Necessity

Assuming, as we have in the past in these matters, that jurisdiction over Cal Coast does rest with the Commission, we address the question of whether Cal Coast has made a showing sufficient to satisfy the requirements of PU Code Section 1031. We believe Cal Coast did sustain its burden.

This conclusion is based in part on the testimony of David Elliott, representing both the City and NCT, who testified about the award of contracts to Cal Coast and to the fact that both entities chose the terms of the Cal Coast bid over those of the other bidders including SLT.

There is also sufficient testimony from both Elliott and Cal Coast president, Peter Dworkis, to establish that the buses to be used meet all current statutory and regulatory requirements, that the drivers to be employed will be adequately trained in technical and safety matters, that the equipment will be adequately maintained, that Cal Coast has adequate financial resources to operate its proposed service, and that operation of these services will not have any significant effect on the environment.

SLT attempted to show that the buses proposed to be used by Cal Coast immediately and those to be used later on will produce more air pollution than those being used on these routes by SLT. While that fact may be accurate, the test we apply is not whether one bus is better than another, but whether the one selected may have a significant effect on the environment. We believe there is no possibility of that being the case here. Buses replace automobiles, the combined pollution of which would unquestionably be greater than that produced by the replacement bus. Thus, while we would like to see state-of-the-art buses in every instance, we recognize that other considerations might make this impossible or undesirable.[1/]

SLT also questioned whether the amount of money set forth in the contracts between Cal Coast and each governmental entity would be "compensatory". The simple answer is we believe the contracts do provide sufficient money to compensate Cal Coast for its services. Both contracts provide for a guaranteed amount per route mile of vehicle service plus a fixed amount per month per bus plus a fixed amount per month for maintenance/ operations facilities where the City or NCT "deem that company must provide" those things.

The rate per mile in the contracts is $1.51. SLT's own president testified that he believed he could operate the City service for $1 to $1.40 per mile and the NCT service for 70¢ to 90¢ per mile. The president of Cal Coast testified that he calculated that he would make about a 10% profit under the

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1/ Significantly, the buses over which SLT expressed most concern are ones ordered by the City and NCT to replace buses owned by Cal Coast.

contractual terms. Taking the testimony of these two witnesses together and adding the fact that the staff for the City and NCT analyzed the capability of Cal Coast and concluded that they could perform at the rates they offered, we conclude that Cal Coast's contractual rate will be compensatory.

However, the contractual rate is not even a part of the format of an application to the Commission. Rather, we require, and have received a recitation of the fares to be charged passengers. This is a rate which is set by the governmental entity and has, in this case at least, little relationship to actual cost. So, Cal Coast furnished us with a statement that the farebox receipts will be subsidized by moneys from other sources.

A thorough inquiry on this point inevitably leads us to monitoring the economic decisions of the governmental entity. If we fail to inquire at all, we are simply rubber-stamping the activities of that entity. In the past it has been our policy in similar circumstances to do just that. In this case we have the benefit through several exhibits and through the testimony of David Elliott, of being informed of some of the considerations pondered by the City and NCT in arriving at their determination about fares. From these it appears that the City and NCT will be able to fulfill their contractual obligations and provide the citizens with the described service.

Based on the above observations and the determination of the City and NCT that such service is needed by their citizens, we believe that Cal Coast has shown public convenience and necessity require the proposed services. However, a knotty collateral issue still remains. SLT retains a CPC&N from the

Commission and claims it will continue its service over these two routes even though it has not won the new contracts with the City and NCT. While we recognize that the validity of the contracts is being litigated by SLT, Cal Coast, the City, and NCT, still SLT's president Linington claims that SLT can operate these routes without subsidy and without losing money under its Commission certification. Although there was some evidence to the contrary, we do not believe it was sufficient to justify our considering withdrawing SLT's certification.

Thus, the knotty question arises: What will be the practical effect on the public if two competing bus services are offered over these routes? While, as we noted in American Buslines, Inc. (1980) 3 CPUC 2d 246, 255,

> "Competition stimulates efforts of competitors to excel, which accrues to the benefit of the general public",

the record here does not convince us that the general public will benefit in this instance if both Cal Coast and SLT operate. These communities could not likely support a doubled bus service.

Furthermore, if we were to permit two companies to operate on these routes we would be superimposing our differing determination of what is best for these communities over their determinations as evidenced in the awarded contracts. While we believe the record here supports granting the extended CPC&N to Cal Coast, it does not support withdrawing the existing certificates from SLT. If some party wishes us to consider doing that, a complaint should be filed with us.

Jurisdiction

Since the motion made by Cal Coast challenges our very right in these instances to require CPC&N under PU Code Section 1031 as prerequisites to the operation of the proposed bus services of Cal Coast, and since the problems addressed above come about because of the undefined line separating Commission and local jurisdiction over local bus services, we turn our attention to the question of jurisdiction.

Much confusion has arisen in this case regarding the positioning of the phrase "and common carriers" in Article XII, Section 3 of the California Constitution, which reads:

> "Private corporations and persons that own, operate, control, or manage a line, plant, or system for the transportation of people or property, the transmission of telephone and telegraph messages, or the production, generation, transmission, or furnishing of heat, light, water, power, storage, or wharfage directly or indirectly to or for the public, and common carriers, are public utilities subject to control by the Legislature. The Legislature may prescribe that additional classes of private corporations or other persons are public utilities." (Emphasis added.)

The significance of that positioning is that all common carriers, not just those owned, operated, controlled, or managed by private corporations or other persons, are public utilities subject to control by the Legislature.

This rationale was adopted by the California Supreme Court in interpreting Article XII, Section 23, the predecessor to Article XII, Section 3, in Los Angeles Met. Transit Authority v Public Util. Com. (hereafter LA Met) (1963) 59 C 2d 863, 869, where it stated:

> "The fact that petitioner is a publicly owned, as opposed to a privately owned common carrier, does not take it out of the general category of 'common carrier' (citations omitted)."

However, the Commission's jurisdiction over publicly owned common carriers remains narrow. As the California Supreme Court said in County of Inyo v Public Util. Com. (1980) 26 C 3d 154, 166:

> ". . . We reiterated in Orange County Air Pollution Control Dist. v. Public Util. Com. (1971) 4 Cal. 3d 945, 953 at footnote 7 [95 Cal.Rptr. 17, 484 P.2d 1361], that 'the commission has no jurisdiction over municipally owned utilities unless expressly provided by statute'. Significantly, when the legislature first granted the PUC regulatory authority over the Los Angeles Metropolitan Transit Authority, it enacted such a specific statute (Stats. 1951, ch. 1668, p. 3804), and observed that in so doing it has made exceptions to a long established policy....' (Stats. 1951, ch. 1668, § 13.4.) . . ."

This language unambiguously contradicts the contention advanced by SLT that Article XII, Section 3, restricts Commission jurisdiction over entities other than private corporations or persons in the absence of specific legislation except where those entities are common carrier.

SLT also contends that PU Code Sections 211 (the definition of common carrier) and 226 (the definition of passenger stage corporation) mandate a finding that jurisdiction over publicly owned common carriers lies with the Commission. This argument suggests that the meaning of a constitutional provision should be garnered from the statutory law--of course, the reverse must always be the case.

Both the cases cited above deal with publicly owned utilities. LA Met deals with a statutorily constituted public transit authority, and Inyo deals with a water company owned by

a municipality. In the present matter, the parties disagree about whether the City and NCT, who have contracted for these services, would retain "ownership" of the proposed systems or whether the contractual arrangement vests ownership with Cal Coast. The cited cases do not address this question. They talk about ownership simply because the utilities in question are owned by the public entities. Article XII of the California Constitution does not mention ownership either. Rather, it distinguishes "private corporations and persons that own, operate, control, or manage" the enumerated utilities from any other utilities (i.e. those that are not private).

We do not believe ownership of the utility is the sole issue in distinguishing a public system from one owned, operated, controlled, or managed by a private corporation or person. Further, the more important aspect of that issue is the public entity's "ownership" of the right to operate or to permit others to operate utilities under its regulation. The issue is not only the extent of control exercised by the public entity, as suggested by the parties, but also whether the entity has exercised either its right to establish, furnish, and operate a utility system or exercised its alternative right to contract for that system. We view the exercise of either alternative as the implementation of an ownership right. The extent of involvement by the public entity is additional evidence that helps determine the potential public utility status of the operation.

Article XI of the California Constitution deals with municipal corporations. The City is such an entity. Section 9(a) of Article XI permits a municipal corporation to "establish, purchase and operate public works to furnish its inhabitants with...transportation..." It goes on to say that the service may be furnished outside the municipal boundaries with certain exceptions inapplicable here. Section 9(b) of Article XI states:

> "Persons or corporations may establish and operate works for supplying these services upon conditions and under regulations that the city may prescribe under its organic law."

Section 9 clearly gives cities the right to either establish and operate their own transportation systems or to permit others to establish and operate them under regulation by the cities.

As staff points out there are no definitions of "municipal operator" or the word "operate" set forth in Division 1 or Division 2 of the Public Utilities Code but those words are defined in Division 11 of the Code and while not relating directly to Commission jurisdiction to provide us with the Legislature's recent thinking on the meaning of those terms.

Section 99209 provides:

> "'Municipal operator' means a city or county, including any nonprofit corporation or other legal entity wholly owned or controlled by the city or county, which operates a public transportation system, or which on July 1, 1972, financially supported, in whole or in part, privately owned public transportation system, and which is not included,in whole or in part, within an existing transit district."

Section 99209.5 provides:

> "'Operates' for purposes of Section 99209, and 'operation' for purposes of paragraph (1) of subdivision (b) of Section 99289, mean that the operator owns or leases the equipment, establishes routes and frequency of service, regulates and collects fares and otherwise controls the efficiency and quality of the operation of the system, but does not require that operators of rolling stock be employees of a public agency."

Testimony and evidence presented in this proceeding show that virtually every element of this definition of "operates" will be satisfied by the relationships between Cal Coast and the City and NCT. (1) Although not technically a lease, the contracts provide for fixed payments for transit coaches on a monthly basis, with the City and NCT having the right to provide their own coaches as they acquire them. Moreover, testimony from Elliott, who

appeared on behalf of the City and NCT, indicated that four coaches have already been purchased by the City and NCT, and that eventually all coaches would be owned by the City and NCT. (2) Testimony from Elliott and Dworkis, the president of Cal Coast, indicated that the City and NCT established the proposed routes and schedules. (3) The contracts show that the City and NCT establish the fares and that all fares collected are the property of the City and NCT, although Cal Coast is responsible for physically collecting the fares. (Section 4, Ex. 11, 12.) ( ) The contracts require Cal Coast to comply with the City and NCT's regulations and policies concerning: cleanliness, neatness and safety of bus operations, advertising in buses, a "Driver's Code of Conduct", insurance requirements, and maintenance schedules. (Sections 6 and 8, Exs. 11, 12.)

Elliott further testified that both the City and NCT intended to eventually provide not only all the buses for the service, but the terminal and maintenance yards as well, so that ultimately Cal Coast, or another company, would be providing only labor for driving and maintaining the buses. The only reasonable conclusion that can be drawn from the facts concerning Cal Coast's contractual obligations to the City and NCT is that Cal Coast is not in control of the operation of the system but is merely providing the equipment and labor for the City and NCT to operate the system.

The manner in which Cal Coast will serve the City and NCT is significantly different from that of the current operation of SLT and demonstrates the distinction between a municipally operated bus service and one run by a private common carrier subject to PUC participation. SLT is currently operating the identical service that Cal Coast intends to offer, according to the testimony of Linington the president of SLT, but SLT has no contract with either the City or NCT (other than an oral agreement whereby SLT will receive full fare value for each passenger, regardless of the type

of discount pass or ticket the passenger presents to the bus driver). Having no contract, SLT can operate as it pleases subject only to PUC jurisdiction. Unlike Cal Coast's situation, SLT can dictate the fares, routes, hours of operation, number of buses, and every other aspect of its operation, subject only to PUC authorization. Thus, if SLT continues to provide the service, the City and NCT will be precluded from exercising any control whatsoever over the transit operations of SLT, other than through the PUC.

It is clear to us, based on the constitutional and statutory language referred to above as well as the facts developed in this record, some of which are also mentioned above, that the operation here is being conducted by City and NCT and not by Cal Coast.

We find no specific statute conferring Commission jurisdiction over the transportation systems of public entities such as City and NCT. Definitional language of the sort set forth in PU Code Sections 226 and 211 is not sufficiently specific. Thus, while the Legislature has the power to confer total or partial jurisdiction upon the Commission over these particular proposed common carriers (thereby creating concurrent jurisdiction with the public entities), it has not made further "exceptions to a long-established policy" of not imposing Commission jurisdiction where municipal jurisdiction already exists as described in the Inyo case. Since we have no jurisdiction over Cal Coast we must grant its motion to dismiss.

Today's decision results from a case of first impression. We have not previously been asked to address this question of jurisdiction over passenger stage corporations under circumstances such as those presented by this case. We recognize that our decision departs from past practice in that we have assumed jurisdiction and granted certificates in situations where a public governmental entity may have already exercised its constitutional authority under Article XI, Section 9. We will not reopen those matters. However, our future actions will take today's decision into account.

Our recent decision in Harbor Carriers, Inc. v Golden Gate Bridge Highway and Transportation District and Blue and Gold Fleet, D.82-07-22, July 7, 1982, has been cited to us by SLT. That case is not analogous to the present matter. Our decision in Golden Gate Bridge relied on the fact that, unlike this matter, a statute (PU Code Section 562) does exist which grants the Commission specific jurisdiction over certain aspects of the Golden Gate Bridge Highway and Transportation District's operations. Our decision today is not inconsistent with Golden Gate Bridge.

Findings of Fact

1. Cal Coast has the ability, experience, and financial resources to perform the proposed service.

2. Cal Coast proposes to operate buses described in its applications and Exhibit 4 over three routes within San Luis Obispo County described in its application A.82-06-01 and over various routes in and around the City of San Luis Obispo as described in A.82-05-67.

3. City and NCT have entered into contracts with Cal Coast for the services described respectively in A.82-05-67 and A.82-06-01.

4. It can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.

5. SLT opposes the grant of a CPC&N to Cal Coast and proposes to continue its present operation over the same routes which are the subject of these applications.

6. SLT operates over these routes under certificates of public convenience and necessity granted by this Commission.

7. Cal Coast claims this Commission lacks jurisdiction over the proposed service and moves for dismissal on that basis.

Conclusions of Law

1. The City and NCT have exercised jurisdiction over the routes described in A.82-05-67 and A.82-06-01 respectively.

2. As a result of public entity exercise of jurisdiction each of the proposed systems is a public system.

3. No specific statute exists which would give the Commission jurisdiction over these public systems.

4. This Commission has no jurisdiction over the proposed service. These applications should therefore be dismissed.

5. Because of the nature of these findings, this order should be effective on the date it is signed.

O R D E R

IT IS ORDERED that Application 82-05-67 and Application 82-06-01 are dismissed for lack of Commission jurisdiction.

This order is effective today.

Dated SEP 8 1982, at San Francisco, California.

JOHN E. BRYSON
President
RICHARD D. GRAVELLE
LEONARD M. GRIMES, JR.
VICTOR CALVO
PRISCILLA C. GREW
Commissioners

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

Joseph E. Bodovitz, Executive Director