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TD-11

Decision 82 09 037 SEP 22 1982

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of WESTERN TRAVEL PLAZA, INC., a California corporation, for a certificate of public convenience and necessity to operate as a passenger stage corporation pursuant to the provisions of Section 1031, et seq. of the California Public Utilities Code in the Counties of Alameda, Contra Costa, Los Angeles, Marin, Fresno, Mariposa, Merced, Monterey, Orange, Sacramento, San Diego, San Mateo, Santa Clara, Santa Cruz, Solano, Sonoma, Stanislaus, Tuolumne and Yolo.	Application 59818 (Filed July 17, 1980; amended September 23, 1981)
In the Matter of the Application of KINTETSU INTERNATIONAL EXPRESS (USA), INC., a California corporation, for a certificate of public convenience and necessity for passenger sight-seeing service in Alameda, Contra Costa, Los Angeles, Marin, Mariposa, Merced, Monterey, Orange, San Diego, San Francisco, San Joaquin, San Mateo, Santa Clara, Santa Cruz, Stanislaus, and Tuolumne Counties.	Application 60174 (Filed January 7, 1981; amended September 21, 1981)

In the Matter of the Application of NIPPON EXPRESS U.S.A., INC., a New York corporation, qualified to do business in California, for a certificate of public convenience and necessity to operate as a passenger stage corporation pursuant to the provisions of Section 1031, et seq. of the California Public Utilities Code in the Counties of Alameda, Contra Costa, Fresno, Los Angeles, Marin, Mariposa, Merced, Monterey, Orange, Sacramento, San Diego, San Francisco, San Joaquin, San Mateo, Santa Clara, Santa Cruz, Solano, Sonoma, Stanislaus, Tuolumne, and Yolo.	Application 60181 (Filed January 9, 1981; amended September 23, 1981)
In the Matter of the Application of JATS ENTERPRISE, INC., a California corporation, for a temporary and permanent certificate of public convenience and necessity to operate as a passenger stage corporation pursuant to Section 1031, et seq. of the California Public Utilities Code, in the Counties of Alameda, Contra Costa, Los Angeles, Marin, Fresno, Mariposa, Merced, Monterey, Orange, Sacramento, San Diego, San Mateo, San Francisco, San Joaquin, Santa Clara, Santa Cruz, Solano, Sonoma, Stanislaus, Tuolumne, and Yolo.	Application 60221 (Filed January 27, 1981; amended September 23, 1981)
In the Matter of the Application of JETOUR USA, INC., a California corporation, for a certificate of public convenience and necessity to operate as a passenger stage corporation to provide sightseeing tours between specified points in California and for interim temporary authority.	Application 60286 (Filed February 22, 1981; amended September 23, 1981)

(See Decision 93726 for appearances.)

Additional Appearances [1]

Steven Teraoka, Attorney at Law, for Western Travel Plaza, Inc., applicant in Application 59818.
James H. Lyons, Attorney at Law, for Orange Coast Sightseeing Company and Starline Sightseeing Tours, Inc.; Knapp, Grossman & Marsh, by Warren Grossman, Attorney at Law, for Gray Line Tours Company; Eldon M. Johnson, Attorney at Law, for California Bus Association; Handler, Baker, Greene & Taylor, by Daniel W. Baker, for SFO Airporter, Inc.; William R. Daly, for World Wide Joye Tours, Inc.; and Albert Rice, for John Kennedy Transit; interested parties.
Sheldon Rosenthal, Attorney at Law, for the Commission staff.

OPINION ON REHEARING

I. Introduction

These applications were filed following our decision in the matter of Dolphin Tours v Pacifico Creative Service, Inc., Decision (D.) 92455 dated December 2, 1980 in Case (C.) 10732. Each applicant seeks a certificate of public convenience and necessity in order to continue to operate its tour business in California. Each applicant asserts that no Commission authority is required in order to conduct its business, and each applicant has filed a motion to dismiss its application, based on lack of jurisdiction.

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[1] Although rehearing was limited to briefs and no hearings were held, these parties filed briefs on rehearing and are, therefore, additional appearances on rehearing.

Each applicant was granted a temporary certificate, pending the outcome of these proceedings. Rehearing of the decision to grant temporary certificates was ordered.

On November 13, 1981, we issued D.93726 resolving these matters. We found that sightseeing-tour service, originating and terminating at the same point, is not public utility service and that sightseeing-tour carriers should not be regulated as passenger stage corporations. We held that we had no jurisdiction to regulate sightseeing-tour carriers.

We recognized that our decision reversed a longstanding interpretation of the Public Utilities (PU) Code and might disrupt current industry practices. Accordingly we provided for a transition period while matters were resolved.

In particular, we allowed parties the opportunity to stay the decision by the timely filing of petitions for rehearing. Pending judicial review we provided for continuing regulation as follows:

1. Pending and new applications for operating authority will be granted ex parte with temporary certificates upon a showing the applicant has liability insurance prescribed by General Order (GO) 101. This will be done by interim decisions and orders.
2. Application for rate increases will be processed in our usual fashion.
3. All sightseeing-tour carriers will be required to maintain the limits of liability insurance set by GO 101.

We also announced our intention to seek legislation that would require insurance for sightseeing-tour operators in amounts at least equal to coverage required of passenger stage corporations.

In the meantime we provided that each applicant's temporary authority would continue until further order. When the decision did become effective, we provided that any carrier could (a) cancel its tariffs for sightseeing-tour service and (b) conduct intrastate sightseeing-tour service without rate, route, or service regulation by this Commission.

We recognized the impact of this decision by providing that we would entertain applications for rehearing from interested persons who were not parties in these proceedings. A number of petitions for rehearing were filed, and by D.82-02-062 dated February 4, 1982, rehearing was granted. Since the issues in this proceeding are legal and involve questions of legislative intent, rehearing was limited to the filing of concurrent briefs due in 30 days. By Administrative Law Judge's Ruling the time for filing briefs was extended to March 29, 1982.

We served a copy of our order granting rehearing and D.93726 on all passenger stage corporations inviting them to file briefs. A number of briefs were filed, opposing as well as supporting the original decision. Based on the points made in the briefs, some further elaboration on our part is appropriate.

II. Jurisdiction

A. Introduction

The original decision describes the nature of applicants' business in detail. In summary, they offer their tours in Japan (and Hong Kong) to persons buying prepaid packaged tours. Applicants provide guides, interpreters, and other services. Transportation is arranged by way of vehicles chartered from California operators holding appropriate charter-party carrier authority. These circumstances make this a suitable case to address industrywide issues.

Applicants move to dismiss their applications on the bases that they do not hold out, in California, any services to the public and are therefore not common carriers subject to regulation, and that their primary business is not transportation. A narrow ruling on these motions would leave unsettled the industrywide implications of the action.

If the motions are granted, applicants gain a competitive advantage over domestic operators who remain subject to regulation. While applicants serve only a specialized portion of the public, the substantial interest in these proceedings demonstrates a corresponding interest in serving that portion of the public.

If the motions are denied, we assume the burden to regulate rates for "carriers" who have no equipment and who provide various services other than transportation. We should undertake such responsibility only upon a decisive declaration of authority by the Legislature.

The original decision balanced these interests by deregulating sightseeing generally, equalizing the competitive positions of applicants and others. In this decision we again find that no authority is required to hold out sightseeing-tour services to the public.

B. Sightseeing Service is Not Passenger Stage Service

For the convenience of those following these proceedings to better understand this opinion, we have attached as Appendix A the applicable pages of D.93726, which we are essentially ratifying and buttressing in this opinion on rehearing (D.93726 pp. 7-13).

These applications vividly illustrate the basic principle that underlies our conclusion: sightseeing involves two separate services - the transportation is only incidental to the sightseeing purpose of the tour. We hold that such transportation is not the type intended by the Legislature to be regulated as common carriage. Because of the concerns expressed by various parties, we will elaborate on the meaning of "sightseeing" for purposes of this decision.

Several parties express concern that the holding in this decision will be used by unscrupulous operators to avoid regulation of legitimate passenger stage operations. We think this is unlikely if "sightseeing" is adequately defined.

For purposes of this decision, sightseeing-tour service involves round-trip travel in the same vehicle with guide services (and perhaps more) for an informational purpose. It does not include round-trip travel in the same vehicle to see an event, such as a football game. In the latter case, the travel is "transportation" because it is not incidental to the purpose of the services provided by the purveyor of the travel.

Opponents point to a continuing pattern of regulation that has prevailed since 1927, affirmed by this Commission's D.92455 in C.10732, Lavelle v Pacifico, dated December 2, 1980. They assert that this most recent action, our D.93726, is contrary to the Legislature's intent.

In the original decision we announced that the Commission was mistaken in 1927 when it undertook to regulate sightseeing. Our finding is based on an objective reexamination of the relevant sections of the PU Code. This reexamination was essentially forced upon us by circumstances outside our control.

The pattern of regulation that followed from the 1927 decision was apparently workable, and satisfactory to the parties to the process. Over time a series of decisions followed that were themselves reasonable, assuming they were founded on a reasonable premise. We conclude now they were not.

The jurisdictional decision in C.10732, Lavelle v Pacifico (D.92455), must be evaluated in this context. Based on the historic statutory construction and the resulting pattern of regulation, the decision was well-founded. But we examined there only the issue of whether certain tourist services were passenger stage operations as that term was then understood. We did not examine the larger issue of whether the Commission had jurisdiction over services which had become so specialized that they no longer could be called transportation. Since that decision, the enormous task of trying to treat fairly, in deciding whom to certificate, the veritable host of sightseeing applicants, all competing with each other and with established operators, has caused us to reexamine the historic assumption of jurisdiction.

Specifically, we have in mind the changes in tourism that have occurred and were documented for us in the heavily litigated proceedings that followed our decision in Lavelle v Pacifico. The magnitude of the controversy created by that decision and the nature of the industry in 1982 - where the multifaceted amenities of personal and informational services during travel over a loop are what matter to sightseers[2] - compelled us to step back and question what the Legislature intended, based on the statutory scheme, for regulation of sightseeing. A close reading of § 1031 - undertaken word for word - proved beyond doubt, in our view, that the statutory basis which had for years been presumed to exist in fact did not exist. It was this review, undertaken for the first time, that led us to the conclusion that the Legislature had not devised a comprehensive scheme of regulation for sightseeing and that we lacked jurisdiction in this area. We went so far as to go back to the source of the doctrine that sightseeing is a passenger stage function. We found that it is not. With the linchpin of passenger stage status missing, it follows logically that sightseeing is and should be, absent legislative action, an unregulated and basically competitive industry. As is documented later in this decision, it is fully apparent that the Legislature concurs in our conclusion.

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[2] See, e.g. D.93725 (In re Pacifico Creative Services, Inc., A.58739) at 26, 27, and 30 and D.82-08-021 (In re J. Mark Lavelle, dba Dolphin Tours, A.60582) at 3, 5, and 7.

Parties refer most often to § 1031 as a manifestation of the Legislature's intention that we regulate sightseeing. That section provides as follows:

> "1031. No passenger stage corporation shall operate or cause to be operated any passenger stage over any public highway in this State without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation, but no such certificate shall be required of any passenger stage corporation as to the fixed termini between which, or the route over which, it was actually operating in good faith on July 29, 1927, in compliance with the provisions of Chapter 213, Statutes of 1917, nor shall any such certificate be required of any person or corporation who on January 1, 1927, was operating, or during the calendar year 1926 had operated a seasonal service of not less than three consecutive months' duration, sight-seeing buses on a continuous sight-seeing trip with one terminus only. Any right, privilege, franchise, or permit held, owned, or obtained by any passenger stage corporation may be sold, assigned, leased, mortgaged, transferred, inherited, or otherwise encumbered as other property, only upon authorization by the commission."

We are not persuaded that this section supports the regulation of sightseeing operators as common carriers.

Read carefully, this language does not support the contentions of those seeking to overturn D.93726. While it is generally understood as a "grandfather" clause, the separate reference to "sight-seeing buses on a continuous sight-seeing trip with one terminus only" in fact indicates only that such service is not passenger stage service. If the position of the opponents of D.93726 was well-founded, then the additional language related to sightseeing would be superfluous. We are simply not willing to base jurisdiction on such an ambiguous foundation.

Some parties argue that the Legislature recognized that sightseeing is a passenger stage function by the enactment of § 5402, which provides:

> "5402. No person, partnership, corporation, or organization shall sell transportation by a passenger stage on an individual-fare basis for a sight-seeing trip in California on a route for which a passenger stage corporation has obtained a certificate of convenience and necessity if the seller intends to charter or charters the passenger stage in California at a rate per passenger which is less than the individual fare for which the transportation is sold."

This reliance is misplaced.

In fact, this section supports our decision. It expressly recognizes that one may charter a bus and sell tickets on an individual fare basis for a sightseeing trip, the business of these applicants. It only requires that the fare be no less than what a passenger stage corporation would charge for transportation over some portion of the trip. This section only prohibits persons from chartering a bus and competing with a passenger stage corporation for transportation.

Up to this point the debate has focused on questions of narrow statutory construction. What does "transportation" mean? What does "between fixed termini or over a regular route" mean? The proponents of public utility regulation of sightseeing carriage have offered little more than historical usage to support their position. We think this debate is reasonably conducted on a larger stage.

The basic question is whether sightseeing is a public utility function. In the absence of a clear declaration by the Legislature, we conclude that it is not.

A public utility is often referred to as a "natural monopoly." Public utility regulation is a substitute for competition as the primary guarantor of acceptable performance and rates. The

four principal components of regulation that distinguish the public utility from businesses in other sectors of the economy are: control of entry, rate fixing, prescription of quality and conditions of service, and the imposition of an obligation to serve everyone under reasonable conditions.

Public utilities are ordinarily understood as providing essential services - the kind that other industries and the public generally require. Such services may be provided by either municipal corporations (California Constitution, Art. XI, Sec. 9) or private corporations and persons (California Constitution, Art. XII, Sec. 3). Where the services are provided by the latter, the service is still quasi-governmental. As stated by the California Supreme Court,

> "In California a public utility is in many respects more akin to a governmental entity than to a purely private employer. In this state, the breadth and depth of governmental regulation of a public utility's business practices inextricably ties the state to a public utility's conduct, both in the public's perception and the utility's day-to-day activities. (Citation omitted.) Moreover, the nature of the California regulatory scheme demonstrates that the state generally expects a public utility to conduct its affairs more like a governmental entity than like a private corporation. Both the prices which a utility charges for its products or services and the standards which govern its facilities and services are established by the state (citations omitted); in addition the state determines the system and form of the accounts and records which a public utility maintains and it exercises special scrutiny over a utility's issuance of stocks and bonds. (Citations omitted.) Finally, the state had endowed many public utilities...with considerable powers generally enjoyed only by governmental entities, most notably the

> power of eminent domain. . ." (Gay Law Students Assn. v PT&T (1979) 24 Cal 3d 458, 469-70.)

We believe that the elevation of sightseeing service to this status, based on the authorities cited, is a mistake.

PU Code § 226 refers to passenger stage corporation service "between fixed termini or over a regular route." We believe that this is a reference to either of two types of service that are widely recognized as common carrier, public utility service - from one place to another, as in intercity service, or among many points on a grid, as in intracity service. In both instances the carrier provides transportation, and the purpose of the transportation is to get from one point to another. Both of these services are widely recognized as public utility in nature.

The "natural monopoly" feature of passenger stage operations is indicated by the last sentence of PU Code § 1032, which provides as follows:

> ". . . The commission may, after hearing, issue a certificate to operate in a territory already served by a certificate holder under this part only when the existing passenger stage corporation or corporations serving such territory will not provide such service to the satisfaction of the commission."

This language is consistent with public utility concepts of common carriage, protecting the utility from unreasonable competition in recognition of the policy considerations that supported original determination of utility status.

The sightseeing operator is not readily grafted onto this branch of public utility regulation. The transportation is incidental to the sightseeing service, which itself is inherently competitive. The multitude of various amenities provided by the tour operators are not easily expressed in tariff form. There is nothing "natural" about a monopoly on sightseeing service.

This point is illustrated by a simple example. One of the longstanding areas of contention in common carrier regulation is the carrier's obligation to serve less profitable (or unprofitable) routes in addition to more profitable routes. The restriction on entry can serve to prevent too many competitors from coming in and serving only the more profitable routes, driving up the fares or curtailing service on the other routes. The deregulation debate has focused on these consequences.

In this context public utility regulation of sightseeing-tour service seems ridiculous. Which are the unprofitable sightseeing-tour routes that should be served by the common carrier who also serves the choice routes? There is nothing to suggest that the Commission could or should make such determinations.

While sightseeing may be perceived as essential to the tourist industry, it is not essential to the public in the way that utilities services are generally. If its importance to tourism is offered as the rationale for regulation, then hotels, motels, and rental car agencies should also be regulated as public utilities. We are hard-pressed to explain the public policy considerations that would have a tourist arrive on an unregulated airline, rent an unregulated car, check into an unregulated hotel, and take a regulated sightseeing tour. We do not find that the Legislature could not provide for such a result, only that it has not.

In the original decision we relied heavily on the California Supreme Court decision in Golden Gate Scenic Steamship Lines v PUC (1962) 57 C 2d 373 for the proposition that sightseeing is not "transportation" because it is not "the taking up of persons or property at some point and putting them down at another." (57 C 2d 373, 380.) Various parties attack our reasoning, referring particularly to differences between vessels and passenger stages. We think these are differences of degree, not kind, and reaffirm our

holding. No proponent of regulation has addressed the fundamental question: why should sightseeing by vessel be unregulated and sightseeing by passenger stage be regulated?

The facts of these applications indicate that utility regulation of sightseeing may be more likely to inhibit tourism than promote it. The specialized nature of applicants' tour services are calculated to serve only a specialized segment of the public - discrimination in classic utility terms. The tourist is much better served by a competitive market that anticipates and promotes demand, instead of a monopolist who serves at its pleasure until shown that it "will not provide such service to the satisfaction of the commission."

Notwithstanding these policy considerations, proponents of regulation argue that the Legislature has manifested its intent to regulate by failing to enact legislation supported by this Commission that would achieve the results of this decision. But this position is rebutted by the Report of the Legislative Analyst to the Joint Board Committee on the 1982-83 Budget Bill, a matter of public record. The report notes that the Governor's Budget eliminated funding for "Sightseeing Carrier" regulation other than for insurance regulation (Item 8660, pp. 1720-1721). The corresponding personnel position cuts to implement this incremental $155,000 budget reduction are as follows:

ALJ Division	- 1 Examiner II, PUC position - 1/2 Hearing Reporter position
Transportation Division	- 2/5 Sr. Transportation Engineer position - 1 Assoc. Transportation Engineer position - 1/5 Transportation Analyst position

These reductions are shown at pages GG 150-151 of the Governor's Budget for 1982-83. Thus the Legislature was aware that the Commission would be and is funded during the 1982-83 fiscal year to provide, at most, only overseeing of insurance. Funding for

certification and rate regulation of sightseeing-tour carriers is eliminated. Under Rule 73, the Commission takes official notice of the state budget and the fact of elimination of funding for tour bus regulation.

C. Insurance

In the original decision we expressed our concern regarding insurance requirements for sightseeing-tour carriers. We indicated our intention to seek legislation to require appropriate insurance limits.

This problem has been greatly alleviated by the enactment of AB 1486 in 1981, which amends Vehicle Code § 16500.5 to require owners of commercial vehicles designed to carry 16 or more persons to maintain the ability to respond in damages in the amounts required by the Department of Motor Vehicles, i.e., "at levels equal to those prescribed by the Public Utilities Commission for owners and operators of for-hire vehicles..." (Vehicle Code § 16500.5(2)(c).) However, the bill does not cover all sightseeing operations, since it does not apply to vehicles designed to carry 15 or fewer persons. Therefore we will continue to seek legislative action in this regard.

D. Implications

We recognize the significant issues regarding our decision to deregulate round-trip sightseeing and again provide for a transition period. Such deregulation will occur upon the effective date of this order.

Our original decision held that one-way sightseeing remains regulated. Our decision today leaves that holding intact. Carriers providing one-way sightseeing remain fully subject to the Commission's jurisdiction.

III. Implementation

As stated above, each of these applicants presently has temporary authority. In light of our holding in this decision we could dismiss their applications. However, pending the possibility of judicial review, we wish to maintain the status quo. Therefore we extend the applicants' temporary certificates until further notice. In order to preserve the status quo to the fullest extent pending judicial review of this matter, we shall continue to require all carriers wishing to enter into the business of providing sightseeing services to file an application for authority from the Commission. Such applicants will be granted interim certificates and temporary authority upon proof that they have liability insurance in the proper amounts.

Findings of Fact

1. The heavily litigated proceedings that followed our decision in Lavelle v Pacifico, the magnitude of the controversy created by that decision, and the changed nature of the sightseeing industry in 1982 - where the multifaceted amenities of personal and informational services during travel over a loop are what matter to sightseers - have compelled the Commission to reexamine PU Code § 1031.

2. Sightseeing involves two services, travel and informational.

3. Travel is incidental to the informational purpose of sightseeing.

4. Round-trip sightseeing service does not involve transportation.

5. Sightseeing services are inherently competitive in nature.

6. Sightseeing is not an essential service.

7. Public utility regulation of sightseeing is more likely to inhibit tourism than to promote it.

8. The Legislature eliminated operational funds for PUC regulation of sightseeing-tour services in the 1982-83 budget.

9. Sightseeing carriers should be adequately insured.

10. If this Commission does not regulate sightseeing-tour carriers, such carriers who operate vehicles seating 16 passengers or more will be subject to the minimum public liability insurance requirements of Vehicle Code § 16500.5.

11. This decision affirms D.93726 and therefore does not change the present status of Commission regulation of sightseeing; accordingly, it should be effective today.

Conclusions of Law

1. Round-trip sightseeing-tour service is not passenger stage corporation service.

2. Round-trip sightseeing-tour service is not subject to the regulation of this Commission.

3. One-way sightseeing carriers remain fully subject to the Commission's jurisdiction.

4. These applicants and new entrants into sightseeing markets should be allowed to conduct business as usual pending judicial review.

ORDER ON REHEARING

IT IS ORDERED that:

1. The temporary certificates previously issued in Applications 59818, 60174, 60181, 60221, and 60286 are extended until further order.

2. Applicants in each of these matters may continue their certificated operations so long as they maintain liability insurance prescribed by General Order (GO) 101.

3. Pending final judicial review, carriers wishing to provide sightseeing services must continue to apply for authority from the Commission. Such applicants will be granted interim certificates and temporary authority upon establishing that they have liability insurance as required under GO 101.

This order is effective today.

Dated SEP 22 1982, at San Francisco, California.

I dissent for the same reasons set out in my prior dissent.

/s/ JOHN E. BRYSON
Commissioner

RICHARD D. GRAVELLE
LEONARD M. GRIMES, JR.
VICTOR CALVO
PRISCILLA C. CREW
Commissioners

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

Joseph E. Bodovitz, Executive Director

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Is Sightseeing or Tour
Service a Public Utility
Passenger Stage Operation?

We agree with our staff that sightseeing service, as contrasted to the point-to-point movement of passengers, is not public utility passenger stage corporation service. The question of whether tour service is public utility service within the statutory scheme set out by the Legislature has, we believe, been taken as given far too long. The present reanalysis is somewhat akin to our relatively recent reanalysis of whether driveaway service for transporting vehicles fits within the statutory scheme of regulated for-hire carriage; we found, after 28 years of regulation, it did not (D.89807 issued December 19, 1978).

Staff points out that "the common thread of PU Code Sections 208, 225 and 226 is transportation" (staff brief, p. 9). For example, Section 226 speaks of transportation between "fixed termini" (point-to-point) or "over a regular route." "Over a regular route" contemplates, we believe, the situation where one terminus is not fixed, but rather encompasses a route or area. Also, the concept of "over a regular route" in connection with public utility common carriage or transportation must be looked at in connection with the Supreme Court's analysis of the elements of common carriage transportation:

> "The California Supreme Court has defined transportation as '...the taking up of persons or property at some point and putting them down at another.' (Emphasis the Court's) Golden Gate Scenic Steamship Lines, Inc. v. PUC (1962) 57 C 2d 373, 380. This certainly is not descriptive of the typical sightseeing service, which is a round trip for the purpose of viewing sights, not to reach a particular place." (Staff brief, p. 9.)

Accordingly, we believe, given the statutory scheme for bus regulation in California, and this judicial interpretation of transportation, "over a regular route" as used in Section 226 means transportation from "here to there" and not a closed door loop. As such, sightseeing or tour service is not passenger stage corporation service. This means the test for determining routes and schedules before service is authorized, and approval of rate levels, are activities we should no longer engage in with respect to tour or sightseeing service.

However, our discussion would not be complete without an analysis of PU Code § 1031, which specifically mentions "sightseeing buses", and the genesis of this Commission's sightseeing-tour bus regulation.

For the last 54 years, it has been assumed that PU Code § 1031 authorizes the Commission to regulate sightseeing operators. Today, we reexamine the validity of this assumption. We find that the PU Code provides neither authorization nor structure for regulation of sightseeing operators.

PU Code § 1031 provides:

> "No passenger stage corporation shall operate or cause to be operated any passenger stage over any public highway in this State without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation, but no such certificate shall be required of any passenger stage corporation as to the fixed termini between which, or the route over which, it was actually operating in good faith on July 29, 1927, in compliance with the provisions of Chapter 213, Statutes of 1917, nor shall any such certificate be required of any person or corporation who on January 1, 1927, was operating, or during the calendar year 1926 had operated a seasonal service of not less than three consecutive months' duration, sight-seeing buses on a continuous sight-seeing trip with one terminus only. Any right, privilege, franchise, or permit held, owned, or obtained by any passenger stage corporation may be sold, assigned, leased, mortgaged, transferred, inherited, or otherwise encumbered as other property, only upon authorization by the commission."

For this discussion the critical portion of this statute lies in the words "nor shall any such certificate be required of any person or corporation who on January 1, 1927, or during the calendar year 1926 had operated a seasonal service of not less than three consecutive months' duration, sight-seeing buses on a continuous sight-seeing trip with one terminus only."

Taken as it stands, this portion of the statute is only a grandfather provision. It states that certain specified sightseeing operators may operate as passenger stage operators without having a certificate of public convenience and necessity authorizing such passenger stage operations. In other words, the provision literally does nothing more than excuse certain specified sightseeing operators from having to apply for a passenger stage certificate.

This analysis is bolstered by comparison of the words "sight-seeing buses on a continuous sight-seeing trip with one terminus only" (PU Code § 1031, emphasis added) with the words found in § 1035 of the Code. That section provides, in pertinent part: "Any act of transporting...any persons by stage, auto stage, or other motor vehicle upon a public highway of this State between two or more points...shall be presumed to be an act of operating as a passenger stage corporation within the meaning of this part." (Emphasis added.)

As noted earlier, transportation has been defined by the California Supreme Court as the act of picking up persons at one location and setting them down at another. Transporting between two or more points is passenger stage operation. Movement on a continuous sightseeing trip with one terminus only is sightseeing operation, but not transportation. The Code very clearly establishes this dichotomy between passenger stage operations, on the one hand, and sightseeing operations, on the other.

We have also examined the provisions of the Auto Stage and Truck Transportation Act of 1917, a predecessor to Article 2 of

Chapter 5 of the Public Utilities Act. We do not find that the terms of Section 1(c) of that Act compel a different conclusion from that reached above. Section 1(c) of the 1917 Act[1] excluded from the definition of the term "transportation company", "corporation or persons...in so far as they own, control, operate or manage taxicabs, hotel busses or sight-seeing busses..." In 1927 this exemption from the term "transportation company" was deleted from the Code, at the same time that § 1031 was enacted. This deletion of the exemption does not provide a basis for concluding that sightseeing operations are passenger stage operations or are "transportation" or that § 1031 authorizes regulation of sightseeing operators. As noted above, we elsewhere explain that under §§ 208, 225, and 226, sightseeing is not transportation. The deletion of the exemption from "transportation company" does nothing more than reflect that fact.

The deletion of "sightseeing buses" from exempt status understandably caused the 1927 Commission to assume it must start

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[1] "The term 'transportation company,' when used in this act, means every corporation or person, their lessees, trustees, receivers, or trustees appointed by any court whatsoever owning, controlling, operating or managing any automobile, jitney bus, auto truck, stage or auto stage used in the transportation of persons or property as a common carrier for compensation over any public highway in this state between fixed termini or over a regular route and not operating exclusively within the limits of an incorporated city or town or of a city and county; provided, that the term 'transportation company,' as used in this act, shall not include corporations or persons, their lessees, trustees, receivers or trustees appointed by any court whatsoever, in so far as they own, control, operate or manage taxicabs, hotel busses or sight-seeing busses, or any other carrier which does not come within the terms 'transportation company' as herein defined." (Emphasis added.) (Sec. 1(c).)

regulating this activity. However, as has already been shown, that Commission should have concentrated on what the new code provided, rather than on what was no longer present. The section did provide a grandfathering of those sightseeing carriers who wished to be passenger stage corporations. It did not, by omitting exemptions, transfer sightseeing buses, hotel buses, or taxicabs into passenger stages.

One of the ironies created by the 1927 Commission is that it determined to regulate sightseeing, but not hotel bus operations or taxicabs. All three operations were formerly exempted under the Auto Stage and Truck Transportation Act. All three exemptions disappear in the Public Utilities Act. Yet, only sightseeing operations were brought under the Commission's ambit. Under what authority was the 1927 Commission permitted to select those whom it would regulate?

We can easily see how the 1927 Commission mistakenly determined it was obligated to regulated sightseeing service. We are equally appreciative of how this error, once started, continued unabated. No one, including the Commission, ever thought to critically examine this ruling and it continued, fully effective yet wrong, to this day. Now that the error has been brought to light we must resolve what to do.

We have already taken the first and most difficult step. We have acknowledged that we were wrong. As a Commission we were wrong in 1927 when the initial mistake was made and we were wrong in 1981 when we continued the same mistake. We can only thank Justice Mosk for collecting a compendium of judicial apologies in his concurring opinion in Smith v Anderson (1967) 67 C 2d 635, and commend it to all who might have visions of infallibility.

Having discovered the error it may not be ignored. The fact that it was long believed to be correct does not validate an

erroneous assumption of jurisdiction never given to us. (Trabue Pittman Corp. v County of LA (1946) 29 C 2d 385.) This situation is not at all akin to the requirement of dedication found by the California Supreme Court to be an implied part of public utility status. (Richfield v PUC (1960) 54 C 2d 419.) That was an implied characteristic of an entity that would otherwise be under our statutory purview. It was an additional finding required before we could regulate. In the present instance we have an industry of specialized carriers under our regulation that would never have been under public utility regulation, but for the initial error.

Aside from the legal analysis of the statutory scheme, concluding tour or sightseeing service is not passenger stage corporation service, we note that sightseeing or tour service is essentially a luxury service, as contrasted with regular route, point-to-point transportation between cities, commuter service, or home-to-work service. In those cases members of the public may be in a situation where they have no other mode for essential travel. And, there it is in the public interest to regulate rates, schedules, and services for what may very well be captive patrons.

We recognize that today's decision is a departure from past Commission precedent. We are sure those companies who are already in business and doing well under regulation will take vocal exception with this decision. However, we believe our analysis of the statutory scheme for bus regulation in California is sound. Aside from the legal analysis requiring us to find sightseeing-tour service is not common carriage, we believe this change in our regulation will allow us to engage in better entry and rate regulation over point-to-point common carriers, and ultimately enable us to provide better regulation for the user of regular route, point-to-point bus service.

(END OF APPENDIX A)

(See Decision 93726 for appearances.)

Additional Appearances [1]

Steven Teraoka, Attorney at Law for Western Travel Plaza, INC. applicant in Application 59818.
James H. Lyons, Attorney at Law, for Orange Coast Sightseeing Company and Starline Sightseeing Tours, Inc.; Knapp, Grossman & Marsh, by Warren Grossman, Attorney at Law, for Gray Line Tours Company; Eldon M. Johnson, Attorney at Law, for California Bus Association; Handler, Baker, Greene & Taylor, by Daniel W. Baker, for SFO Airporter, Inc.; William R. Daly, for World Wide Joye Tours, Inc.; and Albert Rice, for John Kennedy Transit; interested parties.
Sheldon Rosenthal, Attorney at Law, for the Commission staff.

OPINION ON REHEARING

I. Introduction

These applications were filed following our decision in the matter of Dolphin Tours v Pacifico Creative Service, Inc., Decision (D.) 92455 dated December 2, 1980 in Case (C.) 10732. Each applicant seeks a certificate of public convenience and necessity in order to continue to operate its tour business in California. Each applicant asserts that no Commission authority is required in order to conduct its business, and each applicant has filed a motion to dismiss its application, based on lack of jurisdiction.

[1] Although rehearing was limited to briefs and no hearings were held, these parties filed briefs on rehearing and are, therefore, additional appearances on rehearing.

These applications vividly illustrate the basic principle that underlies our conclusion: sightseeing involves two separate services - the transportation is only incidental to the sightseeing purpose of the tour. We hold that such transportation is not the type intended by the Legislature to be regulated as common carriage. Because of the concerns expressed by various parties, we will elaborate on the meaning of "sightseeing" for purposes of this decision.

Several parties express concern that the holding in this decision will be used by unscrupulous operators to avoid regulation of legitimate passenger stage operations. We think this is unlikely if "sightseeing" is adequately defined.

For purposes of this decision, sightseeing-tour service involves round-trip travel in the same vehicle with guide services (and perhaps more) for an informational purpose. It does not include round-trip travel in the same vehicle to see an event, such as a football game. In the latter case, the travel is "transportation" because it is not incidental to the purpose of the services provided by the purveyor of the travel.

Opponents point to a continuing pattern of regulation that has prevailed since 1927, affirmed by this Commission's D.92455 in C.10732, Lavelle v Pacifico, dated December 2, 1980. They assert that this most recent action, our D.93726, is contrary to the Legislature's intent.

Specifically, we have in mind the changes in tourism that have occurred and were documented for us in the heavily litigated proceedings that followed our decision in Lavelle v Pacifico. The magnitude of the controversy created by that decision and the nature of the industry in 1982 - where the multifaceted amenities of personal and informational services during travel over a loop are what matter to sightseers[2] - compelled us to step back and question what the Legislature intended, based on the statutory scheme, for regulation of sightseeing. A close reading of § 1031 - undertaken word for word - proved beyond doubt, in our view, that the statutory basis which had for years been presumed to exist in fact did not exist. It was this review, undertaken for the first time, that led us to the conclusion that the Legislature had not devised a comprehensive scheme of regulation for sightseeing and that we lacked jurisdiction in this area. We went so far as to go back to the source of the doctrine that sightseeing is a passenger stage function. We found that it is not. With the linchpin of passenger stage status missing, it follows logically that sightseeing is and should be, absent legislative action, an unregulated and basically competitive industry. As is documented later in this decision, it is fully apparent that the Legislature concurs in our conclusion.

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[2] See, e.g. D.93725 (In re Pacifico Creative Services, Inc., A.58739) at 26, 27, and 30 and D.82-08-021 (In re J. Mark Lavelle, dba Dolphin Tours, A.60582) at 3, 5, and 7.

ding. No proponent of regulation has addressed the fundamental question: why should sightseeing by vessel be unregulated and sightseeing by passenger stage be regulated?

The facts of these applications indicate that utility regulation of sightseeing may be more likely to inhibit tourism than promote it. The specialized nature of applicants' tour services are calculated to serve only a specialized segment of the public - discrimination in classic utility terms. The tourist is much better served by a competitive market that anticipates and promotes demand, instead of a monopolist who serves at its pleasure until shown that it "will not provide such service to the satisfaction of the commission."

Notwithstanding these policy considerations, proponents of regulation argue that the Legislature has manifested its intent to regulate by failing to enact legislation supported by this Commission that would achieve the results of this decision. But this position is rebutted by the Report of the Legislative Analyst to the Joint Board Committee on the 1982-83 Budget Bill, a matter of public record. The report notes that the Governor's Budget eliminated funding for "Sightseeing Carrier" regulation other than for insurance regulation (Item 8660, pp. 1720-1721). The corresponding personnel position cuts to implement this incremental $155,000 budget reduction are as follows:

ALJ Division	- 1 Examiner II, PUC position - 1/2 Hearing Reporter position
Transportation Division	- 2/5 Sr. Transportation Engineer position - 1 Assoc. Transportation Engineer position - 1/5 Transportation Analyst position

These reductions are shown at pages GG 150-151 of the Governor's Budget for 1982-83. Thus the Legislature was aware that the Commission would be and is funded during the 1982-83 fiscal year to provide, at most, only overseeing of insurance. Funding for

III. Implementation

As stated above, each of these applicants presently has temporary authority. In light of our holding in this decision we could dismiss their applications. However, pending the possibility of judicial review, we wish to maintain the status quo. Therefore we extend the applicants' temporary certificates until further notice. In order to preserve the status quo to the fullest extent pending judicial review of this matter, we shall continue to require all carriers wishing to enter into the business of providing sightseeing services to file an application for authority from the Commission. Such applicants will be granted interim certificates and temporary authority upon proof that they have liability insurance in the proper amounts.

Findings of Fact

1. The heavily litigated proceedings that followed our decision in Lavelle v Pacifico, the magnitude of the controversy created by that decision, and the changed nature of the sightseeing industry in 1982 - where the multifaceted amenities of personal and informational services during travel over a loop are what matter to sightseers - have compelled the Commission to reexamine PU Code § 1031.

2. Sightseeing involves two services, travel and informational.

3. Travel is incidental to the informational purpose of sightseeing.

4. Round-trip sightseeing service does not involve transportation.

5. Sightseeing services are inherently competitive in nature.

6. Sightseeing is not an essential service.

7. Public utility regulation of sightseeing is more likely to inhibit tourism than to promote it.

8. The Legislature eliminated operational funds for PUC regulation of sightseeing-tour services in the 1982-83 budget.

Staff points out that "the common thread of PU Code Sections 208, 225 and 226 is transportation" (staff brief, p. 9). For example, Section 226 speaks of transportation between "fixed termini" (point-to-point) or "over a regular route." "Over a regular route" contemplates, we believe, the situation where one terminus is not fixed, but rather encompasses a route or area. Also, the concept of "over a regular route" in connection with public utility common carriage or transportation must be looked at in connection with the Supreme Court's analysis of the elements of common carriage transportation:

> "The California Supreme Court has defined transportation as '...the taking up of persons or property at some point and putting them down at another.' (Emphasis the Court's) Golden Gate Scenic Steamship Lines, Inc. v. PUC (1962) 57 C 2d 373, 380. This certainly is not descriptive of the typical sightseeing service, which is a round trip for the purpose of viewing sights, not to reach a particular place." (Staff brief, p. 9.)

Accordingly, we believe, given the statutory scheme for bus regulation in California, and this judicial interpretation of transportation, "over a regular route" as used in Section 226 means transportation from "here to there" and not a closed door loop. As such, sightseeing or tour service is not passenger stage corporation service. This means the test for determining routes and schedules before service is authorized, and approval of rate levels, are activities we should no longer engage in with respect to tour or sightseeing service.

However, our discussion would not be complete without an analysis of PU Code § 1031, which specifically mentions "sightseeing buses", and the genesis of this Commission's sightseeing-tour bus regulation.

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regulating this activity. However, as has already been shown, that Commission should have concentrated on what the new code provided, rather than on what was no longer present. The section did provide a grandfathering of those sightseeing carriers who wished to be passenger stage corporations. It did not, by omitting exemptions, transfer sightseeing buses, hotel buses, or taxicabs into passenger stages.

One of the ironies created by the 1927 Commission is that it determined to regulate sightseeing, but not hotel bus operations or taxicabs. All three operations were formerly exempted under the Auto Stage and Truck Transportation Act. All three exemptions disappear in the Public Utilities Act. Yet, only sightseeing operations were brought under the Commission's ambit. Under what authority was the 1927 Commission permitted to select those whom it would regulate?

We can easily see how the 1927 Commission mistakenly determined it was obligated to regulated sightseeing service. We are equally appreciative of how this error, once started, continued unabated. No one, including the Commission, ever thought to critically examine this ruling and it continued, fully effective yet wrong, to this day. Now that the error has been brought to light we must resolve what to do.

We have already taken the first and most difficult step. We have acknowledged that we were wrong. As a Commission we were wrong in 1927 when the initial mistake was made and we were wrong in 1981 when we continued the same mistake. We can only thank Justice Mosk for collecting a compendium of judicial apologies in his concurring opinion in Smith v Anderson (1967) 67 C 2d 635, and commend it to all who might have visions of infallibility.

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