

ORIGINAL

Decision No. 87034

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of STUART ALAN MESSNICK, dba THE CO-ORDINATORS, for a certificate of public convenience and necessity to operate a sightseeing tour service between Anaheim, California, and Newport Beach, California.

Application No. 56634
(Filed July 22, 1976)

In the Matter of the Application of THE GRAY LINE TOURS COMPANY for a Declaratory Order finding that applicant is presently certificated to perform described passenger-stage operations and, in the alternative, for a certificate of public convenience and necessity to extend operations as a passenger-stage corporation. (Section 1032)

Application No. 56672
(Filed August 4, 1976)

Stuart Alan Messnick and Ronald Lee Messnick, for The Co-Ordinators, applicant in A.56634 and protestant in A.56672.

Knapp, Stevens, Grossman & Marsh, by Warren N. Grossman, Attorney at Law, and Bernard A. Johnsen, for The Gray Line Tours Company, applicant in A.56672 and protestant in A.56634.

James H. Lyons and J. Terence Lyons, Attorneys at Law, for Orange Coast Sightseeing Co., protestant.

Masaru Matsumura, for the Commission staff.

O P I N I O N

On July 22, 1976 Stuart Alan Messnick, dba The Co-Ordinators (applicant), applied for a passenger stage certificate of public convenience and necessity to operate a daily^{1/} sightseeing tour originating in Anaheim, then to Newport Beach for a two-hour boat cruise of Newport Harbor, then returning to the hotels in the service area (Exhibit H of the application). Pickups are proposed at various hotels in the service area; the passengers would then be brought to the origination point in Anaheim for busing to Newport Beach. The tour route is shown in Exhibits A and B of the application. The proposed fares and service conditions are described in Exhibit C of the application. The proposed tour is to leave Anaheim at 8:00 p.m. and return from Newport Beach at 11:00 p.m. Applicant's current net worth is represented in revised Exhibit E of the application as in excess of \$1,300,000.

On August 3, 1976 The Gray Line Tours Company (Gray Line) mailed a protest to the above application on the grounds that it holds the requisite authority to perform the requested service and that the present and future public convenience and necessity does not warrant issuance of a duplicating certificate.

^{1/} Subject to a 30-passenger minimum.

On August 4, 1976 Gray Line filed A.56672 which seeks a declaratory order finding that Gray Line is presently certificated to perform passenger stage operations under its present authority for an evening sightseeing tour to the Newport Beach-Balboa area, debarking from the bus and boarding a vessel for an evening cruise of the Newport Beach harbor.

Gray Line interprets its certificate of public convenience and necessity as its authority to perform this service as granted by Decisions Nos. 81036, 84076, and 85023 specified in Appendix A, under Item 450 that reads as follows:

ITEM NO. 450

Los Angeles-Newport Beach-Disneyland: From Los Angeles along the most appropriate or convenient route to Anaheim, thence to Santa Ana, thence to Newport Beach, thence to Disneyland, returning to Los Angeles along the most appropriate or convenient route.

Gray Line stated that should the Commission find it does not have the requisite authority, Gray Line then requests that the following authority be issued:

ITEM NO. 515

From Los Angeles along the most appropriate convenient route to Newport Beach returning to Los Angeles along the most appropriate and convenient route.

NOTE: (1) A pleasure boat tour of Newport-Balboa Bay shall be provided as part of this tour. (2) An optional dinner at an appropriate restaurant within the Newport Beach area may be provided as part of this tour.

On August 6, 1976 Orange Coast Sightseeing Co. (Orange Coast) mailed its protest of A.56634 on the basis the proposed service would be in direct competition with its Tour No. 1. Orange Coast's Extended Tour No. 1 leaves Anaheim at 11:00 a.m. daily, visits Lion Country Safari, Mission San Juan Capistrano, Dana Point, and then "...continues for 15 miles along the Pacific Ocean Shore...a delightful journey with enroute views of Laguna Beach (California's leading art colony), Corona Del Mar, Newport Beach, and return to Anaheim." (Exhibit 3.)

These matters were consolidated for hearing before Examiner Phillip E. Blecher. Hearings were held on October 18 and December 13, 1976. These matters were submitted on the latter date.

Evidence

Applicant produced four witnesses associated with the tourist trade in north Orange County. Applicant testified, and also called Gray Line's vice president of marketing and the president of Orange Coast as adverse witnesses. Gray Line produced no other evidence either as protestant or in support of its application. Orange Coast's president also testified directly in opposition to applicant.

The evidence shows the following:

1. Gray Line has never had and does not now have a tour including a cruise of Newport Harbor.
2. Orange Coast does not now offer a tour including such a cruise. Orange Coast last offered a cruise of Newport Harbor in 1969 as part of its Tour No. 1 which left Buena Park at 7:45 a.m., included a 45-minute water tour around Balboa and Lido Islands, and continued on to Mission San Juan Capistrano. This cruise was discontinued when Lion Country Safari opened.
3. No one now offers or ever has offered a night water cruise of Newport Harbor.
4. There are no tours departing from anywhere in Orange County after 11:00 a.m.
5. Exhibit F of the application, a pro forma profit and loss statement for the proposed tour on a unit basis shows a pre-tax gross profit of \$110.50 on gross income of \$450 based on 25 trips per month. The expenses and gross profit would vary depending on the actual number of trips per month.
6. Applicant may operate the tour even if the number of passengers is less than the requested minimum of 30.
7. Applicant is proposing a point-to-point operation from Anaheim to Newport Beach, with no intermediate sightseeing stops.
8. There are many inquiries every week by Orange County hotel guests concerning available evening activities.
9. Applicant has received requests for tours of Newport Harbor since 1969.
10. A night tour of Newport Harbor would be a valuable tour to Orange County hotels.
11. A need exists for an evening tour from the Anaheim area.

12. The proposed tour would be a good attraction in the Anaheim area.

13. There is a need for a night tour from the Buena Park area.

14. There are no complaints about the sightseeing and tour service of any of the parties.

15. When Lion Country Safari opened, Orange Coast filed a timetable and tariff with this Commission deleting the Newport Harbor cruise and adding Lion Country Safari. Its certificate for Tour No. 1 allowed a sightseeing stop in Newport Beach, but did not mention a cruise. The same tour required at least three other attractions which are not now being served by Orange Coast.

16. Gray Line's A.56672 indicates in paragraph V that it has recently undertaken an evening sightseeing tour and water cruise at Newport Harbor, and that there has recently arisen a public demand for such service. Its testimony indicates no study of this tour's feasibility was ever made, nor was this service ever instituted.

17. Orange Coast has not observed any demand for a bus tour in connection with a Newport Harbor cruise and no passengers or sales agents ever made inquiries about or expressed a desire for such a tour to its president.

18. Gray Line and Orange Coast do not have authority to operate a point-to-point sightseeing tour exactly as proposed by applicant.

19. Gray Line and Orange Coast have no plans to operate a Newport Harbor cruise in the immediate future.

20. Orange Coast is willing to operate such a cruise if there is a need.

21. All parties presently hold passenger stage corporation certificates from this Commission.

Discussion

Both protestants maintain they have sufficient authority under their existing certificates to perform the proposed service. They maintained that the last sentence of Public Utilities Code Section 1032 is applicable, as the authority requested is in a territory already being served. Section 1032, as far as pertinent, reads as follows:

"...the Commission may, after hearing, issue a certificate to operate in a territory already served by a certificate holder...only when the existing passenger stage corporation...serving such territory will not provide such service to the satisfaction of the Commission."

Orange Coast also maintains that applicant has failed to sustain its burden of proving public convenience and necessity for the proposed service. We shall consider this issue first because if this burden was not sustained, there is no need to consider the applicability of Section 1032's competition clause quoted above.

Applicant presented four witnesses with knowledge of the tourist and convention business. They all indicated that they had been frequently asked about nighttime activities in the Anaheim-Buena Park area, and believed that the proposed tour would be popular with guests in the area. They unanimously supported the applicant's proposed service. Applicant's financial ability, experience, and qualifications to provide this service are uncontroverted.

Orange Coast raised the threat of competition created by applicant's proposed service. But we see no threat when there is no competing evening sightseeing water cruise of Newport Harbor. (Nor is there a similar daytime cruise presently offered.) The ethereal argument concerning the saturation of the tourist market (if the tourists take a night tour, it is one less day tour they will take) has no persuasive value, particularly when no evidence was adduced to support this theory.

Thus, we find that applicant has met its burden regarding public convenience and necessity. The same cannot be said of Gray Line, as it offered no evidence in support of its request for the same service, and we shall not consider it further.

Protestants' primary arguments are: (1) that each presently has the authority to render the service proposed by applicant; and (2) the portion of Section 1032 quoted above is applicable to protect protestants by barring the granting of applicant's request. These arguments are interdependent because if the protestants have the authority being sought, they are entitled to the protection of Section 1032. Conversely, if they do not have such authority, Section 1032 avails them nothing as there would be no territory already being served by a certificate holder as required by this section. In dealing with the specialized passenger stage service of sightseeing tours, we have previously held the word "territory" used in Section 1032 means the attractions included in the tour, not the routes used or the area involved. (Ray E. Evans and Ruth O. Evans, dba Tramway Transportation and Sightseeing Tours, D.85765 dated May 4, 1976 in A.55981.) Further, if the requested service is dissimilar to that presently provided, and there is no other service identical

to that being requested, the competition clause of Section 1032 is inapplicable. (Orange Coast Sightseeing Co. (1969) 70 CPUC 479; Evans, supra.)

Neither protestant has point-to-point authority from Anaheim to Newport Beach and return, with or without a Newport Harbor cruise, and with or without a night tour. Further, Orange Coast concedes it does not have the exact authority requested. Neither does Gray Line, which has authority to serve Newport Beach only from a Los Angeles origination. Thus, neither protestant operates, nor has the authority to operate, the proposed tour under its existing certification. For these reasons the competition clause of Section 1032, supra, is inapplicable.

One other argument merits comment. Orange Coast maintains that granting this request would amount to a selective chipping away of its authority. If this service is granted, what is there to prevent someone from seeking authority from Anaheim to any other single point served by it until all the desirable sightseeing points are individually granted, thus diluting its certificate? The answer is that there is nothing to prevent this occurrence, which is proper under the standards set out here and in D.85765, supra. If such point-to-point tours are desirable for others, why would they not be desirable for an existing carrier, such as Orange Coast? Orange Coast already has a similar point-to-point tour to Lion Country Safari. To uphold Orange Coast's contention would bar any competing certification to any sightseeing attraction on or near the route served by an existing carrier, whether or not the existing carrier stops at, drives by or through, or includes the specific attraction as one among many on an authorized tour. Nor does dilution occur,

as the existing carrier has an equal right to seek such point-to-point tours. We do not believe the legislative intent was to bar competition, but to foster it, within the statutory guidelines. This is what we are attempting to accomplish.

Findings

1. Applicant has sufficient equipment, experience, and financial resources to perform the proposed service.

2. Applicant has met the burden of proving public convenience and necessity for the purposes of a sightseeing tour.

3. Public convenience and necessity require that the service proposed by applicant be certificated.

4. Gray Line has not met the burden of proving public convenience and necessity for its proposed direct service between Los Angeles and Newport Beach.

5. Gray Line does have authority to operate as a passenger stage corporation from Los Angeles through Anaheim and Santa Ana to Newport Beach and Disneyland as specifically stated under Item 450 in Appendix A of Decisions Nos. 81036, 84076, and 85023. This authority does not restrict Gray Line from making stopovers at various points named in Item 450 for sightseeing, boat cruises, or to visit points of interest.

6. The tour proposed by applicant is substantially different from any existing service, as there presently is no authorized point-to-point service from Anaheim to Newport Beach for a harbor cruise and return.

7. Neither Gray Line nor Orange Coast has the existing authority to offer a service identical to that proposed by applicant.

8. The requested service is not in a territory already being served by a certificate holder since no certificate holder presently has authority to offer a service substantially similar to applicant's proposal.

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

Conclusions

1. The application of Stuart Alan Messnick, dba The Co-Ordinators, should be granted in accordance with his application.

2. The application of The Gray Line Tours Company should be denied.

3. Because the proposed service is so unlike any service being performed and is not in a territory already being served by a certificate holder, the last sentence of Section 1032 is inapplicable.

4. Because their existing authorizations do not permit point-to-point service from Anaheim to Newport Beach for a harbor cruise and return, Gray Line and Orange Coast do not have the requisite authority to operate the tour proposed by applicant.

Stuart Alan Messnick, dba The Co-Ordinators, is placed on notice that operative rights, as such, do not constitute a class of property which may be capitalized or used as an element of value in rate fixing for any amount of money in excess of that originally paid to the State as the consideration for the grant of such rights. Aside from their purely permissive aspect, such rights extend to the holder a full or partial monopoly of a class of business. This monopoly feature may be modified or canceled at any time by the State, which is not in any respect limited as to the number of rights which may be given.

For convenience in describing applicant's complete authority the order which follows will provide for the issuance of a new certificate in appendix form and the revocation of the certificate presently held by Stuart Alan Messnick.

O R D E R

IT IS ORDERED that:

1. A certificate of public convenience and necessity is granted to Stuart Alan Messnick, dba The Co-Ordinators, a sole proprietorship, authorizing him to extend operations as a passenger stage corporation, as defined in Section 226 of the Public Utilities Code, in accordance with the terms of his application herein, between the points and over the routes set forth in Appendix A of this decision.

2. In providing service pursuant to the authority granted by this order, applicant shall comply with the following service regulations. Failure so to do may result in a cancellation of the authority.

- (a) Within thirty days after the effective date of this order, applicant shall file a written acceptance of the certificate granted. Applicant is placed on notice that if he accepts the certificate he will be required, among other things, to comply with the safety rules administered by the California Highway Patrol, the rules and other regulations of the Commission's General Order No. 98-Series, and the insurance requirements of the Commission's General Order No. 101-Series.
- (b) Within one hundred twenty days after the effective date of this order, applicant shall establish the authorized service and file tariffs and timetables, in triplicate, in the Commission's office.
- (c) The tariff and timetable filings shall be made effective not earlier than ten days after the effective date of this order on not less than ten days' notice to the Commission and the public, and the effective date of the tariff and timetable filings shall be concurrent with the establishment of the authorized service.

- (d) The tariff and timetable filings made pursuant to this order shall comply with the regulations governing the construction and filing of tariffs and timetables set forth in the Commission's General Orders Nos. 79-Series and 98-Series.
- (e) Applicant shall maintain his accounting records on a calendar year basis in conformance with the applicable Uniform System of Accounts or Chart of Accounts as prescribed or adopted by this Commission and shall file with the Commission, on or before March 31 of each year, an annual report of his operations in such form, content, and number of copies as the Commission, from time to time, shall prescribe.

3. The certificate of public convenience and necessity granted in paragraph 1 of this order shall supersede the certificate of public convenience and necessity granted by Decision No. 84186, which certificate is revoked effective concurrently with the effective date of the tariff filings required by paragraph 2(b).

A. 56634, 56672 km *

4. The application of The Gray Line Tours Company for authority to operate direct service between Los Angeles and Newport Beach is denied.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 1st day of MARCH, 1977.

Robert Bateman
President
William Synovis, Jr.
Vernon S. Stegman
B. Ross
Charles D. Shamba
Commissioners

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Appendix A

Stuart Alan Messnick
doing business as
THE CO-ORDINATORS

Original Title Page

CERTIFICATE

OF

PUBLIC CONVENIENCE AND NECESSITY

Showing passenger stage operative rights, restrictions, limitations,
exceptions, and privileges applicable thereto.

All changes and amendments as authorized by the Public Utilities Commission
of the State of California will be made as revised pages or added original pages.

Issued under authority of Decision No. 870.34,
dated MAR 1-1977, of the Public Utilities
Commission of the State of California, in Application No. 56634.

Appendix A

Stuart Alan Messnick
doing business as
THE CO-ORDINATORS

Original Page 1

SECTION 1. GENERAL AUTHORIZATIONS, RESTRICTIONS, LIMITATIONS,
AND SPECIFICATIONS.

The certificate hereinafter noted supersedes all operative authority heretofore granted to Stuart Alan Messnick, doing business as The Co-Ordinators.

Stuart Alan Messnick, doing business as The Co-Ordinators, by the certificate of public convenience and necessity granted by the decision noted in the margin, is authorized to transport passengers (Route 1) between certain points named herein in Buena Park, Anaheim, and Santa Ana, on the one hand, and San Ysidro, California, on the other hand, and intermediate points for tour stops only over and along the routes described herein; and (Route 2) between the Service Area as herein described, on the other hand, and Newport Beach, on the other hand; subject however, to the authority of this Commission to change or modify this authority at any time and subject to the following provisions:

- (a) Motor vehicles may be turned at termini and intermediate points, in either direction, at intersections of streets or by operating around a block contiguous to such intersections, in accordance with local traffic regulations.
- (b) When route descriptions are given in one direction, they apply to operation in either direction unless otherwise indicated.
- (c) All service herein authorized shall be limited to the transportation of single-day, round-trip passengers only.
- (d) Service on Route 1 shall be performed subject to a minimum of eight (8) passengers.

Issued by California Public Utilities Commission.

Decision No. 87034, Application No. 56634.

SECTION 1. GENERAL AUTHORIZATIONS, RESTRICTIONS, LIMITATIONS,
AND SPECIFICATIONS. (Continued)

- (e) Service on Route 2 shall be performed subject to a minimum of thirty (30) passengers.
- (f) No passengers on Route 1 shall be transported except those having point of origin and destination at one of the following points:
 - (1) LeBaron Hotel and Holiday Inn, Buena Park.
 - (2) Sheraton Motor Hotel, Disneyland Hotel, Quality Inn Hotel, Hyatt House Hotel, The Boxoffice, and Howard Johnson's Hotel, Anaheim.
 - (3) Saddleback Inn, Santa Ana.

This restriction shall not prevent stopovers for the purpose of permitting sightseeing passengers to visit various points of interest along the route as noted herein.

- (g) Carrier shall not pick up or discharge passengers on Route 2 except within the limits of the specified service area as hereinafter set forth. This restriction shall not prevent stopovers for the purpose of permitting sightseeing passengers to visit various points of interest along the route as noted herein.
- (h) Carrier on Route 1 shall make stopovers at San Juan Capistrano, San Clemente, and San Onofre as points of interest.
- (i) Carrier on Route 1 is permitted to make a stopover at San Diego for rest and meals only.
- (j) Carrier shall not transport any baggage except hand-carried items of the passengers.

Issued by California Public Utilities Commission.

Decision No. 87034, Application No. 56634.

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Appendix

Stuart Alan Messnick
doing business as
THE CO-ORDINATORS

Original Page 3

SECTION 2. SERVICE AREA.

ROUTE 2 - PICKUP SERVICE AREA - Applicable only for Route 2. The portion of Orange County bordered by Los Angeles County on the north, State Highway 55 on the east, Knott Avenue in Orange County on the west, and the Pacific Ocean on the south.

Issued by California Public Utilities Commission.

Decision No. 87034, Application No. 56634.

SECTION 3. ROUTE DESCRIPTIONS.

ROUTE 1 ANAHEIM, SANTA ANA—SAN YSIDRO

Commencing at Crescent Avenue, LeBaron Hotel, Buena Park, over the most appropriate and convenient streets and freeways to pick up passengers at Holiday Inn, Buena Park; Sheraton Motor Hotel, Disneyland Hotel, Quality Inn Hotel, Hyatt House Hotel, The Boxoffice, and Howard Johnson's Hotel, Anaheim; and Saddleback Inn, Santa Ana, continue over the most appropriate streets and freeways to San Juan Capistrano, San Clemente, San Onofre, San Diego, and to San Ysidro.

ROUTE 2 ANAHEIM—NEWPORT BEACH

Commencing at the terminal located at 304 East Katella Way, Anaheim, thence east on Katella Way, south on Interstate Highway 5, California Highway 55 and to the junction of California Highway 55 and Washington Street in Newport Beach where the passengers will disembark from the buses and board a vessel for an evening sightseeing tour of the Newport Beach Harbor.