

ORIGINAL

Decision No. 87094

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of BIRDIE AIRLINES, INC., a Delaware corporation, doing business as LOS ANGELES HELICOPTER AIRLINES, for a certificate of public convenience and necessity to provide scheduled passenger air service between Los Angeles International Airport, Hollywood-Burbank Airport, downtown Los Angeles and the City of Commerce.

Application No. 54554  
(Filed January 3, 1974)  
Petition for Modification  
(Filed May 30, 1975)  
Second Petition for  
Modification and Extension  
(Filed July 19, 1976)

Steven Ellis and Wallace S. Fingerett,  
Attorney at Law, for applicant.  
Wallace S. Fingerett, Attorney at Law,  
for Pacific Seaboard Airlines, Inc.;  
P. Patrick Mann, for City of Inglewood;  
John H. Aldrich, for Kentwood Home  
Guardians; and Henry R. Voss, for  
Golden West Airlines; interested  
parties.  
Elmer Sjostrom, Attorney at Law,  
Raymond De Marco, and Richard  
Brozosky, for the Commission staff.

O P I N I O N

By Decision No. 83453 dated September 17, 1974 Birdie Airlines, Inc. (Birdie), doing business as Los Angeles Helicopter Airlines, was granted temporary authority, to expire September 1, 1975, to operate a passenger air carrier, as defined in Section 2741 of the Public Utilities Code, between the points and over the routes set forth in Exhibit A attached to Decision No. 83453, to wit, between Los Angeles International Airport (LAX) and Hollywood-Burbank Airport (BUR), City National Bank Heliport in downtown Los Angeles, and Holiday Inn Heliport in Montebello;

between BUR and City National Bank Heliport in downtown Los Angeles and Holiday Inn Heliport in Montebello; and between City National Bank Heliport in downtown Los Angeles and Holiday Inn/Heliport in Montebello. No fixed wing aircraft were to be operated and all points were to be served with a minimum of one flight on each of five days a week.

By Decision No. 83728 dated November 19, 1974, Decision No. 83453 was modified to permit Birdie to use the Los Angeles Hilton Heliport instead of the City National Bank Heliport in downtown Los Angeles.

By Decision No. 84875 dated September 3, 1975 the temporary certificate granted Birdie by Decision No. 83453 as modified by Decision No. 83728 was extended to September 1, 1976.

By Decision No. 85589 dated March 16, 1976 the Commission found that Birdie had no evidence of insurance on file with the Commission as required by General Order No. 120-C and Public Utilities Code Section 2764 and ordered that the temporary certificate of public convenience and necessity formerly granted to Birdie was suspended, and by Decision No. 86205 dated August 3, 1976, approximately four and one-half months after Decision No. 85589, the Commission found that Birdie had on file with the Commission evidence of liability insurance in accordance with General Order No. 120-C and Public Utilities Code Section 2764 and reinstated its temporary certificate of public convenience and necessity.

By its application filed July 19, 1976, which it entitled "Petition for Modification and Extension", it changed the caption from application of Birdie Airlines, Inc., etc., to application of Los Angeles Helicopter Airlines, Inc. (formerly Birdie Airlines, Inc.), etc., and stated that its name had been changed in Delaware, the state of its incorporation. It requested

that its temporary certificate be extended ex parte to September 1, 1977 and that its application for a permanent certificate of public convenience and necessity (certificate) be placed on calendar for public hearing. Its request for a further extension of its temporary certificate was not granted and the case was set down for hearing.

Birdie was a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, was authorized to do business in California on April 12, 1972, and did business in this State under the fictitious name of Los Angeles Helicopter Airlines. On November 20, 1975 it amended its certificate of incorporation in Delaware to change its name to Los Angeles Helicopter Airlines, Inc. (LAHA). By letter dated November 27, 1975, Birdie gave notice of the name change to the Secretary of State of California.

On August 2, 1976 its right to do business in California was forfeited for nonpayment of taxes and has not been reinstated. As of October 29, 1976 it was not authorized to do business in California under either name.

In its application filed July 19, 1976 the applicant is LAHA, formerly Birdie. It does not appear that Birdie has complied with Section 6403.3 of the Corporations Code pertaining to the change of a foreign corporation's name and has placed itself in the position of having the name of LAHA but not ever authorized to do business in California under that name, and it no longer has the name of Birdie under which it was authorized to do business in California before forfeiture of that right on August 2, 1976.

Birdie's proposed minimum schedule and fares between the points served is set forth in Exhibit B to its application.

In its application filed January 3, 1974, Birdie alleges that:

(1) It possesses the necessary business experience in the field of air operation to provide the proposed service efficiently and economically.

(2) It proposes to provide the scheduled air passenger service between the points applied for, utilizing Bell Helicopter Model 47J2 equipment. Initially, it proposes to utilize two Bell helicopters, Serials Nos. N-2098-SN2850 and N-8442E-SN1817, respectively. The equipment is designed for day and night operations and is equipped for VFR as prescribed in Federal Aviation Regulation 135, although Birdie initially proposes to operate only during daylight hours. As backup equipment, it owns a Hughes Model 300 helicopter, which is equipped to carry two passengers and a pilot. All of its equipment has current, valid, airworthiness certificates and its pilots maintain current licenses for the operation of equipment owned by it, pursuant to the regulations of the Federal Aviation Administration.

(3) It has obtained local authority to serve all of the points which are the subject of its application and is presently conducting operations at such points. In addition, it has arranged for counter facilities for ticketing and check-in at both Los Angeles International Airport and Hollywood-Burbank Airport. Also, passenger ticketing will be available on board utilizing airline ticket stock.

(4) Its flight equipment is maintained in accordance with its operations manual which has been approved by the Federal Aviation Administration. Daily and weekly maintenance is performed by and under the personal supervision of its vice president of operations, who is an FAA certified airframe and power plant

mechanic, Certificate No. 1499410. In addition, in accordance with its operations manual, heavy maintenance of its flight equipment is performed by Utility Helicopters, Inc., Long Beach, California, an FAA certified maintenance base.

(5) It maintains insurance protection against liability for bodily injury and property damage, pursuant to the California Public Utilities Code. It has the financial ability to provide the proposed service and anticipates that its proposed operations will result in a profit.

(6) Its service will have virtually no effect on the environment. First, it has in the past operated between the points applied for and others on a charter and on-call basis, so that the proposed service will result in no significant increase in operations between those which already exist. Secondly, its operations are specifically designed to alleviate automobile traffic congestion between the points applied for, as well as parking congestion at such points. Thirdly, the noise level of such flight equipment is considerably below that of ground transportation vehicles such as buses and trucks. It utilizes the most modern power plants available, which have been designed to minimize the amount of noise and air pollution caused by air operations.

(7) Its equipment utilizes an average of 15 gallons of fuel for each flight-hour of operation. The fuel consumption on such equipment is equivalent of one gallon for every four minutes, or a total fuel usage of two gallons for an eight-minute trip between Los Angeles International Airport and Hollywood-Burbank Airport. Its estimates indicate that the average fuel consumption for an automobile traveling between the same two points would be at least two gallons. Since its equipment is designed to carry three

passengers and the purpose of its service is to eliminate the need for automobile travel between the points applied for, the total effect of its operations will be a very substantial fuel savings to the community.

(8) The institution of the proposed service is not a "project" as defined within the scope of Rule 17.1 of the Commission's Rules of Practice and Procedure.

Public hearings were held in Inglewood on October 28, and in Los Angeles on October 29, 1976 before Examiner James D. Tante. The applicant<sup>1/</sup> and the Commission staff stipulated that the matter may proceed as to all issues except the environmental impact issue, and if the application is denied the matter would be concluded; but if the application is not denied, there would be an interim decision and further hearings to determine whether the application should be granted or denied based upon the effect of the activity on the environment. The stipulation was approved and the matter was submitted on October 29, 1976.

Eight members of the public made statements and a letter from a member of the public who was not present was read into the record. All of the statements were in opposition to the granting of a certificate. The principal basis for opposition was the noise observed as a result of Birdie's past operation. Two persons stated that they complained of the noise to a Mr. Ross, an employee of Birdie, who stated that the particular helicopter referred to was not Birdie's but that of someone else.

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<sup>1/</sup> The word "applicant" will be used hereafter to include Birdie and LAHA unless otherwise indicated.

One of such persons, a licensed pilot, observed the helicopter by using binoculars and another took photographs and both were sure that Mr. Ross' statement was incorrect. Other statements in opposition were based on lack of need and the risk of harm involved.

Martin J. Cooper, professor of remedies and a practicing attorney at law; Holly Douglas, a commercial helicopter pilot; Steven Ellis, president of Birdie and LAHA; Robert M. Terry, the sole stockholder and chairman of the board of Pacific Seaboard Airlines (Pacific); and Eugene Liboff, a C.P.A.; testified for Birdie. Vahak Petrossian, an associate transportation engineer, and Terry R. Mowrey, a financial examiner, testified for the Commission staff. P. Patrick Mann, its environmental standards manager, testified for the city of Inglewood.

Exhibits 1, 3, 4, 5, 6, 7, 8, 16, 17, and 18 were received in evidence. Exhibits 2, 9, 10, 11, 12, 13, 14, and 15 were marked for identification only.

Decision No. 83453 dated September 17, 1974 granted Birdie temporary authority to operate and stated in part:

"The reasons for the granting of a temporary certificate at this time instead of a permanent one are: (1) although Los Angeles Airways has not operated a service since 1970, and the expectation of it reinstating service would appear to be somewhat less than certain, the certificate issued by the CAB has not been revoked; (2) Los Angeles Airways transported substantially more passengers than projected by applicant yet went bankrupt; this casts doubt on the economic feasibility of the proposed service;

and (3) although the projected expenses for the operation appear to be reasonable, and the projections of traffic are lower than the passengers actually transported by Los Angeles Airways, the level of fares proposed by applicant necessary for profitable operations may be too high to attract the number of passengers projected.

"The evidence shows conclusively that there is a need for the proposed service, that it will not have any significant effect upon the environment, and that applicant is ready, willing, and able to conduct the proposed operation...."

Applicant argued that the above three issues were the only unresolved issues in the case and the Commission has a duty and an obligation to confine the hearing to the above three issues; and that the question of environmental impact has been resolved and is no longer an issue in the case. At the time of the hearing the applicant had not operated for approximately eight months and did not have any authority to operate as its temporary authority had expired September 1, 1976. The examiner properly ruled that applicant's contention was without merit and that all matters relevant to an application for a permanent certificate, including the question of environmental impact, were in issue.

Applicant's president testified that by this present application it requests authority to operate between LAX, BUR, and a place in Los Angeles to be designated at a later time which might be the premises of the Ambassador Hotel.



He testified that at the present time applicant is \$250,000 in debt and this indebtedness could be settled for the cash sum of \$76,000. The staff financial report (Exhibit 1) states that Birdie's accounting records are not current and have not been kept properly but it appears that through December 31, 1975 Birdie has incurred losses approximating \$300,000 and at the time it suspended operations in February 1976 it had approximately \$400,000 in outstanding liabilities.

Applicant's evidence showed that Pacific Seaboard Airlines, Inc. (Pacific) is a newly formed California corporation, the stock of which is wholly owned by its chairman of the board of directors, Robert M. Terry. Mr. Terry has the financial ability to do so and, under certain circumstances not adequately defined, will provide \$300,000 in cash as operating capital for Pacific. It is also anticipated that an additional \$500,000 will be provided through the sale of debentures by Pacific but there was no evidence to indicate the possibility of success of such an endeavor. Mr. Terry and Pacific have entered into an agreement with LAHA which provides generally that in the event that LAHA is awarded the certificate requested in this application and is able to obtain its necessary licenses and the equipment necessary to operate, Pacific will buy all of the outstanding stock of applicant. The contract was not offered in evidence and the provisions are unclear. For failure to pay its franchise tax, the powers, rights, and privileges of a foreign corporation to do intrastate business in California are forfeited (Section 23301, Revenue Code). Its contracts are voidable at the instance of any party other than the corporation (Section 23304, Revenue Code). Therefore, any contract entered into by applicant during the time it was not authorized to do business in California would be voidable by Mr. Terry or Pacific and unenforceable by applicant.

Applicant's president testified that applicant would need 3,000 passengers per month in order to make a profit and believed that it would be able to transport that number in a very short period of time. Applicant has never transported that number of passengers before and there was no evidence, other than the statement of its president, from which it could be determined either that applicant would make a profit transporting 3,000 passengers per month, or that it was likely that it would have 3,000 passengers per month. Applicant's president testified that the most passengers it has ever transported in one month was 927 in January of 1976, but Exhibit 1 shows that in January 1976 it transported 466 and not 927 passengers, and the highest number of passengers it has transported in any one month was 659 in October 1975. Applicant did not present a pro forma profit and loss statement, or any evidence to show what its income, expenses, and profit or loss would be for any given period.

The staff financial report (Exhibit 1) contains the following:

"After reviewing applicant's previous consistent operating losses, staff accountant has no indication that the proposed operation will prove economically feasible.

"Assuming this Commission entertains applicant's request in light of the facts presented on the corporate status and, assuming that the sales agreement between LAHA and Pacific is consummated together with the new capital and the new owner's guaranteed financial commitment, it is recommended that a temporary certificate of one year be granted."

The staff financial examiner testified that the assumptions referred to have not been documented and there is no verification that the facts assumed will become a reality.

Applicant's president testified that applicant's air taxi commercial operator (ATCO) certificate from the Federal Aviation Administration (FAA) was voluntarily surrendered in August 1976; that on October 1, 1976 it made application for reinstatement of the ATCO certificate and that such reinstatement should be accomplished without any problem. The passenger operations branch staff report (Exhibit 4) shows on page 11 that on August 5, 1976 Birdie's ATCO certificate was canceled. The exhibit further states that applicant filed an application with the FAA for an ATCO certificate on October 14, 1976.

Applicant's president testified that applicant had interline agreements with certain major passenger air carriers through its affiliation with the Air Traffic Conference of America and the International Air Transport Association, but no documentation was offered to substantiate the statement. Exhibit 4 states that it "...does not have interline ticketing, baggage, or joint fare agreements with any passenger air carrier."

Its president testified that applicant has operating authority to LAX and BUR. Exhibit 4 states that it does not have operating authority at LAX, but may receive such operating authority after payment of all back debts, and that it does not have operating authority at BUR, but may receive such operating authority if its certificate is granted. Applicant admits that it does not have operating authority at any place in or near downtown Los Angeles.

Its president testified that applicant has placed orders for two Bell 206B, one Alouette 3, and one Sikorsky S62 helicopters, all with turbine equipment, and now owns two Sikorsky S55B helicopters which it plans to convert to turbine engines in order to eliminate a certain amount of noise. Thereafter, he testified that applicant has not actually placed an order for the purchase of the helicopters but merely knows where such helicopters are available for sale, and further stated that in the event that those helicopters were sold prior to it being able to purchase them, there are many used helicopters for sale.

Its president testified as to the owners of the stock in applicant, and that Pacific did not own any of its stock at the present time. He admitted that in an application of LAHA, Application No. 56814, he stated that Pacific Seaboard Airlines wholly owned LAHA, but testified that the statement was inaccurate.

The evidence presented by applicant consisted of oral testimony with little or no basis to establish the validity of such testimony. The evidence presented by the staff, including that set forth in Exhibits 1 and 4, appeared to be as a result of a broad investigation, conducted over a recent period, without inaccuracies, and entitled to substantial probative effect. In Exhibit 4 on page 1, the Transportation Division of the Commission recommends that the application be denied. It states that it believes that Birdie has had ample opportunity to operate under a temporary certificate and to demonstrate the feasibility of its operations but has been unable to do so.

Applicant's Exhibit 16, a letter to it from a Los Angeles city councilman dated April 26, 1976, and Exhibit 17, a letter from the Los Angeles Area Chamber of Commerce to applicant dated April 16, 1976, were introduced in evidence for the purpose of showing the need of the service for which applicant seeks a certificate. The exhibits are of little value in proving need except to set forth that the writers believe that such service would be desirable. Applicant introduced no other evidence, except evidence of its prior activity, to show the need for the service it intends to provide.

Section 704 of the Public Utilities Code (Section 704) provides in part:

"...no foreign corporation, other than those which by compliance with the laws of this State are entitled to transact a public utility business within this State, shall henceforth transact within this State any public utility business, ... No license, permit, or franchise to own, control, operate, or manage any public utility business or any part or incident thereof shall be henceforth granted or transferred, directly or indirectly, to any foreign corporation which is not at present lawfully transacting within this State a public utility business of like character."

The uncontroverted evidence shows and applicant admits that Birdie was a foreign corporation which changed its name to LAHA in Delaware, the place of incorporation, and as a foreign corporation, neither Birdie nor LAHA was, at the time of the hearing, authorized to do business in California. Section 704 deprives the Commission of the authority to grant the application for a certificate even if the applicant was otherwise

entitled to the granting of the application. Applicant's argument that it will agree to a certificate being issued subject to its being reinstated and authorized to do business in this State is not justified by the evidence and inconsistent with the provisions of Section 704. (Also see Albers Bros. Milling Co. (1928) 31 CRC 851.)

At the time of the hearing the applicant's temporary certificate had expired, depriving it of authority to continue operating, and due to financial difficulty it had ceased operations in February 1976 and had not operated for seven months; so it was not, at the time of the hearing, transacting within California a public utility business of like character as required by Section 704 for the issuance of a certificate.

Section 854 of the Public Utilities Code provides:

"No person or corporation, whether or not organized under the laws of this State, shall, after the effective date of this section, acquire or control either directly or indirectly any public utility organized and doing business in this State without first securing authorization to do so from the commission. Any such acquisition or control without such prior authorization shall be void and of no effect. No public utility organized and doing business under the laws of this State shall aid or abet any violation of this section."

If the applicant obtains a certificate, it is anticipated that Pacific will endeavor to purchase all of its existing capital stock, now owned by several persons. This Pacific may not do without Commission approval, which may or may not be granted, causing further uncertainty as to the possibility of success of

the operation. Furthermore, trafficking in certificates is against the public interest. (Advanced Electronics (1969) 69 CPUC 275.)

In awarding certificates for passenger air carrier operations, Section 2753 of the Public Utilities Code provides in part:

"...the commission shall take into consideration, among other things, the business experience of the particular passenger air carrier in the field of air operations, the financial stability of the carrier, the insurance coverage of the carrier, the type of aircraft which the carrier would employ, proposed routes and minimum schedules to be established, whether the carrier could economically give adequate service to the communities involved, the need for the service, and any other factors which may affect the public interest."

An applicant for a certificate has the burden of establishing that public convenience and necessity require the proposed service (Pacific Southwest Airlines (1967) 67 CPUC 727).

In determining whether or not to grant a certificate the Commission considers such factors as: (1) public requirement for the service; (2) adequacy of existing service; (3) adequacy of proposed service; (4) quality of proposed service; (5) revenue requirements and rates; (6) technical feasibility; (7) technical competence and financial integrity of the operator; (8) economic feasibility of the proposed operations; and (9) present operations. (Silver Beehive Tel. Co. (1970) 71 CPUC 304.)

In determining whether air carriers should be granted a certificate the Commission is required to consider the public need for the proposed service, the air carrier's business experience in the field of air passenger air carrier operations, its financial stability, insurance coverage, the type of aircraft it will utilize, its proposed routes and minimum schedules, whether it can economically provide adequate service, and any other factors which may affect the public interest. (Trans Sierra Airlines (1971) 71 CPUC 788.)

Where the only testimony as to public convenience and necessity is vague, indefinite, and unconvincing, and amounts to but little more than an assertion of the applicant's desire for a certificate, the application should be denied. (William Callahan (1941) 43 CRC 481.)

When the financial showing of an applicant for a certificate is not satisfactory in that the controlling and responsible factor would be a holding company not subject to the jurisdiction of the Commission, the application should be denied. (C. D. Gulick (1925) 26 CRC 312.) Where the financial showing made by a prospective utility disclosed that it could not survive independently of its parent company, to grant a certificate would be adverse to the public interest. (Woodside Oaks Water Company (1955) 54 CPUC 435.)

Unless an applicant for a certificate can show that its financial position is strong enough to overcome deficiencies in the capital structure, the certificate will be denied. (R. T. Aldridge (1963) 61 CPUC 715.)



The Commission should be slow to exercise its power to issue certificates when invoked by an applicant, which would commence utility operations under such a financial burden as to impair its possibility of success. (Cordova Water Company (1954) 53 CPUC 552; Monroe Wells (1955) 54 CPUC 219; J. DeVaney (1965) 64 CPUC 65.)

The Commission should not grant a certificate on the mere hope or assumption that a service, once established, may develop business. (A. L. Bridgham (1929) 33 CRC 103.)

After hearing and submission of the matter, and three weeks after the preparation of the proposed opinion by the presiding officer, by letter dated January 12, 1977 the applicant notified the Commission that the application "is hereby withdrawn". The request was opposed by the staff by memorandum dated January 28, 1977. The request is denied.

#### Findings

1. Birdie was a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and was authorized to do business in California on April 12, 1972 and did business in this State under the fictitious name of Los Angeles Helicopter Airlines. On November 20, 1975 it amended its certificate of incorporation in Delaware to change its name to LAHA, and by letter dated November 20, 1975 it gave notice of a name change to the Secretary of State of the State of California, but it has not complied with Section 6403.3 of the Corporations Code pertaining to the change of a foreign corporation's name. On August 2, 1976 Birdie's right to do business in California was forfeited for non-payment of taxes and has not been reinstated.

2. Applicant, whether it be Birdie or LAHA, is prevented from being issued a certificate by reason of Section 704 of the Public Utilities Code.

3. In the event a certificate is granted as requested by applicant, Pacific intends to purchase all of the outstanding capital stock of applicant so the acquisition of the certificate would in fact be for Pacific as the owner of applicant, and not for the present owners of applicant. An applicant should not be granted a certificate merely for the purpose of transferring it to another entity, either directly or indirectly.

4. Applicant has not been able to establish by the evidence that there is a need for the service that it intends to provide, or that it has the necessary business experience or ability to conduct the proposed service, or that it has or can obtain the financial stability, or the insurance, or the aircraft necessary to provide the service for which it seeks a certificate. It has presented no proposed routes or minimum schedules to be established, and has not proved that it can economically give adequate service to the community involved, and has not established the economic feasibility of the operation.

5. Applicant does not have an ATCO certificate from the FAA, does not have interline agreements with major passenger air carriers, does not have operating authority at LAX or BUR, and does not have operating authority at any place in or near downtown Los Angeles.

The Commission concludes that the application for a certificate of public convenience and necessity to provide scheduled passenger air service between Los Angeles International Airport, Hollywood-Burbank Airport, downtown Los Angeles, and the cities of Commerce or Montebello, or any of the said points, should be denied.

O R D E R

IT IS ORDERED that the application of Birdie Airlines, Inc., a Delaware corporation, doing business as Los Angeles Helicopter Airlines, by that name, or by the name of Los Angeles Helicopter Airlines, Inc. (formerly Birdie Airlines, Inc.), is denied.

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

Dated at San Francisco, California,  
this 15<sup>th</sup> day of March, 1977.

Robert Bateman  
President  
William Sproule, Jr.  
Thomas Sturgeon  
Leonard Ross  
Richard D. Russell  
Commissioners