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Decision No. 88406 JAN 24 1978 ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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| APPLICATION OF SCENIC AIRLINES, INC. FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY SO THAT SCENIC AIRLINES, INC. CAN OPERATE AS A PASSENGER AIR CARRIER BETWEEN PALM SPRINGS AIRPORT AND PALOMAR AIRPORT ON A SCHEDULED BASIS. | Application No. 57294 (Filed May 12, 1977) |

Stroock & Stroock & Lavan, by Ronald L. Katsky, Attorney at Law, for applicant.
Brobeck, Phleger & Harrison, by Robert N. Lowry, Attorney at Law, for protestant.
William C. Bricca, Attorney at Law, and James R. Panella, for the Commission staff.

## O P I N I O N

Scenic Airlines, Inc. (Scenic), a Nevada corporation, seeks a certificate of public convenience and necessity (certificate) to operate as a passenger air carrier from Palm Springs to Palomar and return to Palm Springs, California. The distance from Palm Springs Airport (PSP) to Palomar Airport (CRQ) is approximately 90 miles. The application is protested by Borrego Springs Air Lines (BSA), dba Sun Aire, which operates as a passenger air carrier between Lindbergh Field, San Diego (SAN), and PSP pursuant to authority granted by D.80484 dated September 12, 1972.

BSA contends that if Scenic's application is granted it would have a serious economic impact on BSA through the diversion of passengers from its SAN-PSP service. It contends that the public need for service in the San Diego-Palm Springs market is presently more than adequately filled by its service, and states that by D.87436 dated June 7, 1977, the Commission denied the application of Air California for authority to operate between SAN and PSP, finding that the operation by Air California of its proposed service would seriously endanger the ability of BSA to continue to maintain its service between those two points.

After proper notice, a hearing was held in Los Angeles on August 23 and 24, 1977 and the matter was submitted on the latter date.

The president of Scenic testified for Scenic. Its vice president and general manager, and its president testified for BSA. An associate transportation engineer employed by the Commission testified for the Commission staff.

Exhibits 1 through 21 were received in evidence.

Scenic is an air taxi operator duly licensed by the Federal Aviation Administration (FAA) and holds FAA Air Taxi Certificate No. 19-WE-12. It has provided scheduled Nevada intrastate and Nevada-California interstate service since 1969, presently operating interstate between Las Vegas, Nevada, and the California cities of Long Beach, Palm Springs, and South Lake Tahoe, at each of which Scenic maintains bases and ticketing offices. A copy of Scenic's current schedule is attached to its application (Exhibit 7) as Exhibit D. The names and addresses of its officers and directors and a summary of the aeronautical and business experience of its principal officers is attached to the application as Exhibit E.

Scenic proposes to operate aircraft presently owned or leased by it as set forth in Exhibit G to the application. It proposes to operate what amounts to an extension of its Las Vegas (LAS)-PSP route, to operate one round-trip flight each day (there is to be no intermediate airport service), departing PSP at 7 p.m. and arriving CRQ at 7:30 p.m., with return flight departing CRQ at 7:45 p.m. and arriving at PSP at 8:15 p.m.

Its proposed tariff, including proposed rates, rules, and regulations, is attached to its application as Exhibit H. It proposes to charge $22.22 plus 8 percent tax, or $24 for adults, and 66-2/3 percent of this amount for children, as a one-way fare. It will use its existing base and ticket office facility at PSP, and at CRQ it plans to use Golden West Airlines facilities, with Golden West Airlines as its handling agent.

Exhibit I attached to its application sets forth a forecast of traffic, revenues, and expenses during the first year of operation. It anticipates a net loss for the first year of $10,829 and a net profit at the end of the second year of $18,367, for a net two-year profit of $7,538.

There is no possibility that Scenic's proposed air service between Palm Springs and Palomar may have a significant effect on the environment; its aircraft are small, quiet, meet all environmental air quality and noise standards and the proposed route will add only one takeoff and landing a day at PSP and CRQ.

Scenic has on file with the Commission, PUC File No. A1871, evidence of insurance as required by the Commission. The financial statements of Scenic are attached to the application as Exhibit J.

Scenic's good standing certificate of the Secretary of State of the State of California is attached to its application as Exhibit C. It does not maintain a principal place of

business in California, but its statutory agent for service of process is C. T. Corporation, 700 South Flower Street, Los Angeles, California 90017.

The president of Scenic referred to communications expressing interest in air service between CRQ, PSP, and LAS, and testified that the area north of San Diego, in the vicinity of CRQ, is being developed more rapidly than any other part of San Diego County, and there is a need for air service between CRQ and PSP for the travel agencies and residents of that area.

He testified that the distance between SAN and CRQ is approximately 40 miles, and from SAN to PSP is approximately 100 air miles, for a total of 140 miles; the distance from CRQ to PSP is only 90 air miles; so that one traveling from the vicinity of CRQ to PSP would travel only 90 miles from CRQ, but would travel 140 miles by way of SAN, causing inconvenience and the consumption of unnecessary energy.

He testified that there are approximately 175,000 people in an area 10 to 15 miles surrounding CRQ. He stated that the contemplated schedule would be one flight per day, departing PSP at 7 p.m., arriving at CRQ at 7:30 p.m., leaving CRQ at 7:45 p.m., and arriving PSP at 8:15 p.m. The fare would be $22.22 plus 8 percent tax, for a total of $24 per adult person each way.

He testified that Scenic now has the aircraft set forth in Exhibit G to its application (Exhibit 7) and in addition has two additional Fairchild-Swearingen Metroliner II (SWM) aircraft, registration Nos. N64SA and N65SA, and intends to use an SWM, which has a 19-passenger capacity, if the certificate is granted.

This witness testified that its flight from LAS to PSP has achieved a 40 percent load factor, its flight from LAS to Long Beach has attained a 35 percent load factor, using 9-passenger aircraft on occasion, and its flight from LAS to Lake Tahoe has not reached a 40-percent load factor.

He testified that if the traffic did not warrant using a 19-passenger aircraft from CRQ to PSP, a smaller aircraft able to carry 9 passengers would be substituted. He stated that the new fares from LAS to PSP commencing October 1 will be $32, making a total of $56 from CRQ to LAS if there is a stopover in PSP, but that the through fare would be $48, $24 of which he would apportion to the flight from CRQ to PSP, and $24 to be apportioned to the flight from PSP to LAS, even though the distance and flying time for the latter is twice that of the former. He stated that it was his opinion that each day there would be an average of 7½ to 10 passengers traveling each way between CRQ and PSP for a total of 15 to 20 passengers per day.

Prior to the introduction of evidence, the associate transportation engineer for the staff stated that instead of the recommendation set forth in the staff report (Exhibit 10) that Scenic be given a temporary certificate for one year, it would be better if the Commission would issue an interim order granting a temporary certificate to be effective upon the effective date of the order and extending to March 31, 1979; that this case be continued to December 12 and 13, 1978; that prior to November 15, 1978, Scenic provide all parties with a report of the load factor for the period from the beginning of service to October 31, 1978; that the monthly load factor data required to be provided to the Commission staff be provided within thirty days after the last day of each such month.

The staff witness testified that CRQ is approximately 31 miles from SAN. He testified that it was his opinion that CRQ and SAN served different markets and that the diversion of passengers away from BSA to Scenic by the granting of the certificate would be negligible, i.e., not measurable statistically.

The staff's conclusions and recommendations as set forth in Exhibit 10 are:

1. Scenic will capture only a negligible fraction of the Palm Springs-San Diego market. If its service to CRQ is to survive, it will have to create a new clientele near that airport, and the service will have to be supported by on-board passengers between CRQ and LAS.

2. The large Marine Corps basic training base near Oceanside may provide such a clientele. Through service to LAS enhances the possibility of cultivating such a clientele for both LAS and PSP.

3. For this reason, Scenic should be given a chance to develop the market near Carlsbad; however, the lack of evidence of existing need precludes a recommendation for a permanent certificate.

4. There will be no significant detrimental effect on the environment because of Scenic's operations and the company's liability insurance is in effect.

5. The staff recommends that Scenic be given a temporary certificate of public convenience and necessity for one year to fly passengers between CRQ and PSP.

The staff witness testified that his conclusion that the large Marine Corps Base may provide the necessary clientele to enable Scenic to be successful was based on mere belief and no other basis in that he had no knowledge of the population of the base, the relative income of the persons assigned to that base, or how many would utilize the service of Scenic.

The staff witness testified that even though he believes that SAN and CRQ serve different markets, he assumed for the purpose of providing evidence concerning this matter that both airports served the same market, in which case he stated that by the addition of one flight from that area to PSP, there would be more passengers, and BSA's load factor would improve instead of decline. He stated that the increase in number of passengers would occur because experience has shown that there is usually such an increase when an additional flight is added to a schedule. He stated that adding a flight to depart from the San Diego area at 7:45 p.m., 75 minutes later than BSA's 6:30 p.m. departure, would attract additional passengers.

He stated that if 10 percent of BSA's traffic would be diverted to Scenic, if other factors remained substantially the same, and if the effect would be to increase BSA's loss, his opinion was that the certificate should not be granted at this time.

The vice president and general manager of BSA testified that BSA uses a 19-passenger capacity SWM on its flight between SAN and PSP; a 50 percent load factor is necessary for profitable operation, and such a load factor is seldom achieved; its passengers consist primarily of businessmen and commuters, but in the wintertime many of its passengers are tourists.

He testified that when BSA makes a reservation for a passenger, it takes the passenger's telephone number for emergency purposes, and that he compared the telephone prefixes so taken during the period January 1 through June 30, 1977, and determined that 10 percent of the passengers came from an area as near to or nearer to CRQ than SAN. He stated that this area consisted generally of Oceanside, eight miles from CRQ and 35 miles from SAN; Vista, six miles from CRQ and 40 miles from SAN; Del Mar, 16 miles from CRQ and SAN; Poway, 20 miles from CRQ and SAN; Escondido, 11 miles from CRQ and 28 miles from SAN; and

Encinitas, 9 miles from CRQ and 20 miles from SAN. He stated that it was his opinion that if the certificate is granted, that this passenger business would be lost to BSA and the present loss now being experienced by BSA would be increased because its income would be reduced and its business fixed costs would remain the same.

The president of BSA testified that the application was protested because the granting of a certificate would cause BSA additional loss and make it more difficult for BSA to earn a profit on its operation in the future.

This witness testified that the load factor has increased in its operation during the last three years when he has been president, but the loss has increased each year over the last three years. He stated that the reason the loss has increased is probably because BSA has acquired better equipment and is attempting to upgrade its service. He stated that if the loss continues and it does not appear economically feasible to continue the operation, the operation would probably be abandoned.

Discussion

First, we desire to disabuse BSA of any notion that in Application of Air California (D.87436, supra), the Commission determined that the maintenance of the intrastate passenger air network requires that BSA be protected from competition. That decision explicitly states to the contrary.[1/] The Commission found therein that the only air service between SAN and PSP was being offered by BSA, that Air California's proposed operation would not be economically viable in and of itself and because of the provisions of Section 2769.5 of the Public Utilities Code the maintenance of Air California's proposed service between SAN and PSP is not reasonably assured. The Commission then stated, "To that extent the continued operation by SunAire (BSA) is important to the maintenance of the intrastate passenger air network to the benefit of the people of this state, its communities, and the State itself." (Emphasis added.)

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1/ D.87436 at Page 14:

"Standing alone, the proposition that SunAire would retire from providing air service between SAN and PSP, and between those points and Borrego Springs as well, would not deter us from awarding a certificate to AirCal to conduct its proposed service where it has been shown, as the case here, that its proposed one daily round trip will increase the passenger traffic and will accommodate two-thirds of the total passenger traffic between those points. A certificate of public convenience and necessity does not award a monopoly in perpetuity to the holder nor does it insure that the airline's operations under that certificate will be profitable."

Looking through all of the rhetoric, it is not difficult to perceive what this application is really all about. Scenic desires to improve its load factor on operations between PSP and LAS. The logical way to accomplish this is to extend that route to some California point. CRQ is an airport serving an area where there is potential traffic for LAS and which is 31 miles from major airline service to LAS. Service to and from LAS over the route CRQ-PSP-LAS should be an economically viable operation for Scenic. That the service between CRQ and PSP over that route is considered by Scenic to be incidental to the service to and from LAS is readily apparent from its proposed schedule. If the service to and from PSP were the principal consideration of Scenic, the proposed schedules would provide for mid-day departures and arrivals at PSP rather than at late evening. When viewed in that light the contention that Scenic's proposed operation would be competitive with that of BSA's has little foundation.

The proposition that as much as 10 percent of BSA's traffic between SAN and PSP will be diverted to Scenic seems somewhat far-fetched considering that (1) between 80 and 90 percent of PSP traffic is during a nine-month period during which BSA provides a minimum of 52 flights per week and Scenic would provide 14; (2) BSA's schedules provide for service throughout the day between 7:30 a.m. and 7:00 p.m. permitting a passenger to fly to a destination, transact business, and return in the same day, whereas Scenic's proposed operation between 7:30 p.m. and 8:15 p.m. would not provide such service; (3) BSA's schedules provide for prime-time mid-day arrivals and departures at PSP whereas Scenic's schedule calls for late evening arrival and departure; (4) interline traffic with trunk line carriers is available to BSA at SAN whereas it is not available at CRQ; and (5) Scenic's proposed fare between PSP and CRQ is higher than BSA's fare between PSP and SAN.

We agree with the staff's estimate that Scenic will capture only a negligible fraction of the Palm Springs-San Diego County market, and that the survival of Scenic's proposed service to CRQ would be entirely dependent upon its LAS-CRQ and LAS-PSP traffic combined with a small amount of PSP-CRQ traffic. Certainly an operation between CRQ and PSP would not be an economically viable one, except when conducted as a segment of a longer route, such as the route CRQ-PSP-LAS proposed by Scenic.

Scenic's operations between LAS and CRQ and between LAS and PSP do not require a certificate from this Commission. The service between CRQ and PSP is a segment on the proposed route of CRQ-PSP-LAS. In Swift Aire Lines, Inc. (1973) 75 CPUC 780, 787 we held, "Unless compelling reasons are set forth why it would not be in the interests of the people, the communities, or the State, the public should be entitled to be transported between any points on any route operated by an airline." No compelling reasons have been presented herein.

The staff recommends the issuance of a temporary certificate to Scenic with the proviso that the carrier submit monthly reports of load factors. We see no necessity for the issuance of a temporary certificate. The service does not depend so much upon Scenic obtaining traffic between CRQ and PSP as much as it depends upon the carrier obtaining traffic between CRQ and LAS and between PSP and LAS.

Findings

1. Scenic is a Nevada corporation in good standing in the State of California and is an air taxi operator duly licensed by the FAA.

2. Scenic has provided scheduled Nevada intrastate and Nevada-California interstate service since 1969, and presently operates interstate between Las Vegas, Nevada, and the California cities of Long Beach, Palm Springs, and South Lake Tahoe, at each of which Scenic maintains bases and ticketing offices.

3. Scenic proposes to operate a 19-passenger SWM aircraft on a one-flight-per-day schedule departing PSP at 7 p.m., arriving CRQ at 7:30 p.m.; departing CRQ at 7:45 p.m., and arriving PSP at 8:15 p.m., as an extension of its LAS-PSP flight now in existence, at a fare of $22.22 plus 8 percent tax, for a total of $24 per adult each way.

4. Scenic intends to use its existing base and ticket office facility at PSP and plans to use Golden West Airlines facility with Golden West Airlines as its handling agent at CRQ.

5. Scenic has on file with the Commission evidence of insurance as required; has had sufficient business experience in the field of air operations; has the financial stability to perform the operation as requested; and could economically give adequate service between PSP and CRQ over the routing CRQ-PSP-LAS.

6. Scenic has established that there is a need for the service it intends to provide and that the operation would be economically feasible.

7. BSA operates, and for many years has operated, a passenger air carrier service between SAN and PSP and renders an adequate service to those communities.

8. The operation proposed by Scenic will not divert any significant traffic between PSP and SAN from BSA and will not impair the ability of BSA to continue to provide service between PSP and SAN.

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.

10. Public convenience and necessity require the operation by Scenic as proposed.

The Commission concludes that the application should be granted.

Scenic 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.

## O R D E R

IT IS ORDERED that:

1. A certificate of public convenience and necessity is granted to Scenic Airlines, Inc., a corporation, authorizing it to operate as a passenger air carrier, as defined in Section 2741 of the Public Utilities Code, 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. By accepting the certificate applicant is placed on notice that it will be required, among other things, to file annual reports of its operations and to comply with the requirements of the Commission's General Orders Nos. 120-Series and 129-Series.

(b) Within one hundred twenty days after the effective date of this order, applicant shall establish the authorized service and file tariffs, in triplicate, in the Commission's office.

(c) The tariff filings shall be made effective not earlier than five days after the effective date of this order on not less than five days' notice to the Commission and the public, and the effective date of the tariff filings shall be concurrent with the establishment of the authorized service.

(d) The tariff filings made pursuant to this order shall comply with the regulations governing the construction and filing of tariffs set forth in the Commission's General Order No. 105-Series.

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

Dated at San Francisco, California, this 24th day of JANUARY, 1978.

Robert Batinovich
President

William Symons Jr.

Vernon L. Sturgeon

Richard D. Gravelle

Claire T. Dedrick
Commissioners

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Appendix A SCENIC AIRLINES, INC. Original Page 1

Scenic Airlines, Inc. by this certificate of public convenience and necessity, is authorized to operate as a passenger air carrier between the following airports:

CRQ - PSP

Conditions:

1. No aircraft having more than 30 revenue passenger seats or a payload of more than 7,500 pounds shall be operated.

2. Service between CRQ and PSP shall be provided with a minimum of one round trip on each of five days per week.

3. The following airports shall be used:

| Symbol | Location | Name |
|---|---|---|
| CRQ | Carlsbad | Palomar Airport |
| PSP | Palm Springs | Palm Springs Municipal Airport |

Issued by the California Public Utilities Commission.

Decision No. 88406, Application No. 57294.