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Decision No. 89729 DEC 12 1978

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of TOURS/SAN FRANCISCO for a certificate of public convenience and necessity to operate PASSENGER SERVICE between DOWNTOWN AIRLINES TERMINAL and INTERMEDIATE POINTS.	Application No. 55877 (Filed August 20, 1975)
THE GRAY LINE, INC., a California corporation, Complainant, vs. TOURS/SAN FRANCISCO, a Partnership, RONALD J. RATTI, DONALD L. FASSETT, and JAMES D. KAVANAUGH, Defendants.	Case No. 9993 (Filed October 17, 1975)
THE GRAY LINE, INC., a California corporation, Complainant, v. RONALD J. RATTI, Defendant.	Case No. 10091 (Filed April 28, 1976; amended May 20, 1976)

Dennis B. Natali, Attorney at Law, for Tours/ San Francisco, applicant in A.55877 and defendant in C.9993; Ronald J. Ratti, defendant in C.9993 and C.10091; and Donald L. Fassett and James D. Kavanaugh, defendants in C.9993.
Richard M. Hannon, Attorney at Law, for The Gray Line, Inc., protestant in A.55877, and complainant in C.9993 and C.10091.
Dooley, Martin, Anderson & Pardini, by David M. Dooley, Tevis P. Martin, and David B. Franklin, Attorneys at Law, for Associated Limousine Operators of San Francisco, Inc., protestant in A.55877, and limited intervenor in C.9993.
James B. Brazil, Attorney at Law, City Attorney's office, for the City and County of San Francisco, interested party in A.55877 and C.9993,
Victor Meneses, for A.C. Cal. Spanish Tour Service; Eugene R. Levval, for California Taxicab Owners Association; James A. Drucker, for Franciscan Lines; Manfred Louis Lazarus, for Union Square Limousines, Ltd.; Brian Keith Willson, for Airport Limousine Service; Lawrence J. Dul Becco, for VIP Limousine Service; Charles L. O'Connor, for Yellow Cab Co.; George H. Pens, for DeSoto Cab Co.; William Harris and William G. Lazar, for Luxor Cabs; James Strachan, for International Brotherhood of Teamsters; and Voncile B. Ralph, for himself; interested parties in A.55877 and C.9993.
Mary Carlos, Attorney at Law, R. E. Douglas, and Masaru Matsumura, for the Commission staff.

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Statement of Facts

San Francisco, the legendary "Baghdad by the Bay" is one of the most cosmopolitan cities in the United States, and with matchless views of one of the world's largest land locked harbors continues to be a mecca for travelers from all over the world. In 1975 alone, over two and a quarter million visitors came and partook of its delights.[1/] For those visitors unwilling or unable to strike out on their own, the city's tour guide services offer a variety of pleasures. Among these services the oldest and most widely known tour operator is The Gray Line, Inc. (Gray Line). Tracing its derivations and sightseeing operations back to 1915, Gray Line currently holds certification from this Commission to exclusively operate certain designated Bay Area sightseeing tours originating in the city of San Francisco (see Decision No. 66165 dated October 15, 1963 in Application No. 45707). At times relevant here, Gray Line used 63 buses and the services of between 140 and 150 drivers (during the peak sightseeing season) to transport approximately 420,000 per capita sightseeing passengers on their tours. In 1975 the sightseeing operation portion of Gray Line's business produced $3,658,233 in revenue. Gray Line's success has not gone unnoticed. Over the years others, offering sightseeing tour services essentially duplicative of those offered by Gray Line, have sought entry into the Bay Area sightseeing tour business, albeit unsuccessfully - largely as a consequence of the application of Section 1032[2/] of the Public Utilities Code, being unable to prove a failure by Gray Line

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1/ Source: San Francisco Convention & Visitors Bureau Annual Report.

2/ Section 1032 of the Public Utilities Code, in part as relevant here, states:

> "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."

to serve the territory to the satisfaction of the Commission. The instant proceeding pertains to the efforts and qualifications of another would-be entrant seeking certification.

Early in 1975 Donald L. Fassett (Fassett), James D. Kavanaugh (Kavanaugh), and Ronald J. Ratti (Ratti), all former San Francisco taxicab drivers, joined together to enter the sightseeing business. In March 1975 the three approached the San Francisco Police Department to determine what authority would be required were they to offer the public sightseeing tours by means of taxicabs. In discussions with the Police Permit Bureau this plan was refined to contemplate use of limousines and maxi-buses on tours which would extend beyond the limits of the city of San Francisco. The local authorities thereupon referred the three to this Commission. At this Commission, Ratti and certain of his associates engaged in an extended series of impromptu, mostly exploratory, discussions with Transportation Division staff and a Commission principal counsel concerning their venture. Early in the discussions Ratti introduced a brochure of proposed tours. From the discussions Ratti concluded that, if the three restricted activities to those of organization and brokerage of tours, utilizing independent charter-party carrier permit holders to provide the actual transportation for their tour clients, they would not require Commission authority; but that if they determined to operate limousines and mini-buses themselves in an integrated service embracing both the organization brokerage and the transportation, they would require passenger stage certification. In May 1975 the three formed a partnership under the name of Tours/San Francisco (Tours) to provide visitors to San Francisco "a personalized tour of the city in limousines and maxi-buses". On May 31, 1975 before obtaining any authorization from this Commission, Tours commenced operations out of the Downtown Airline

Terminal, offering the general public three tours[3] plus a "Special Grand Opening Tour".[4] Initially it is asserted that operations commenced utilizing independent charter-party carrier permit holders to provide the actual transportation, but at some time in June or early July 1975 Tours switched to vehicles rented by Ratti and driven by Fassett and Ratti. Tours has operated continuously since May 1975 except as will be subsequently noted.

In the meantime, however, the ongoing discussions between Ratti, his associates, and members of the Passenger Operations Branch of the Commission staff had focused upon the matter of offering per capita individual fare transportation to the public. The three partners were advised that it appeared that they were operating in a passenger stage capacity and that therefore they would require certification as a "passenger stage corporation" (see Section 226 of the Public Utilities Code). Consequently, early in July 1975 under the name of Tours/San Francisco, the three attempted to file with this Commission an application for a certificate of public convenience and necessity to operate a passenger stage corporation. On July 11, 1975 the Commission Docket Office, by a letter signed by the Executive Director of the Commission, returned the attempted application, pointing out certain deficiencies in the content as well as lack of requisite intended notice to potentially interested parties, and requested that it be brought into compliance with the requirements set forth in the Rules of Practice and Procedure of this Commission before resubmission.

3/ The three tours, respectively of one, two, or four hours duration, were offered at $4.00, $8.00, and $16.00 per person. Tours offered in the brochure, were the prospective client alone or less than five persons, to arrange a full group or to base the tour price on an hourly rate of $20.00. The first 2 tours were confined to the city of San Francisco; the third included Sausalito.

4/ The "Special Grand Opening Tour" at $25.00 included mini-bus transportation to the wine country and the Valley of the Moon.

On July 18, 1975 Ratti filed an application in his own name for a charter-party carrier permit, listing one Cadillac limousine to be used in that service.[5/]

On August 5, 1975 Ratti resubmitted the revised passenger stage application for Tours together with the $75 filing fee. Again, additional data was required to obtain compliance, but finally on August 20, 1975 the passenger stage application, assigned No. 55877 (complete with a July 1975 statement of operations (showing "Drivers Commissions" and "Limo Expense")), was accepted for filing. The application stressed the avowed intention of the applicant to utilize only limousines and maxi-buses converted to natural gas power in this service, although in its subsequent operations no such converted vehicles appear to have been used. The tours listed in the application were for a duration of one, two, four, and five hours, at $4, $8, $16, and $25, respectively,[6/] and differed somewhat from those set forth in the earlier brochure. All tours included a stop at Vista Point on the north side of the Golden Gate Bridge; tours three and four proposed covering other Marin County points of interest.

5/ On October 23, 1975 Ratti was issued Charter-Party Carrier Permit No. TCP-601 to operate a 1967 Cadillac 7-passenger sedan (Lic. No. ZZZ223).

Thereafter, on December 30, 1975 he requested (1) addition of 2 vehicles: a 1971 Cadillac 9-passenger sedan (Lic. No. 07183X) and a 1974 Plymouth 8-passenger sedan (Lic. No. 268LYJ), to his permit, and (2) authority to use additional unspecified vehicles to be rented or leased on an "as needed" basis (with waiver of the 20-day Commission filing requirement) from two rental-lease agencies. Addition of the two additional specified vehicles to Ratti's permit was authorized on February 24, 1976 in writing, and Ratti was informed by a representative of the staff that his request to utilize "as needed" rental or leased vehicles was denied.

6/ A later version of the brochure actually used in 1976 by Tours varied considerably from the initial brochure tour descriptions and from the tour descriptions contained in the application. Prices in 1976 also differed, having been increased to $5, $10, and $20, respectively, for the first three tours and to $35 for the Wine Country tour. No approval of these changes in the tours

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The application evoked a number of letters from limousine operators and taxi companys,[7] and from the Gray Line, all protesting or questioning the need for additional certification. Accordingly, on November 5, 1975 the application was set for formal hearing on December 16, 1975.

Meanwhile, Tours, as noted above, had been in full operation, purporting to act as a "broker" selling tours on a per capita basis[8] to the general public, and then assertedly using the services of out-of-town independent charter-party carriers and city limousine permit holders to provide the actual transportation. However, in addition to using independent charter-party carriers, and in part as a consequence of difficulties experienced in obtaining transportation from charter-party carriers,[9] Ratti himself leased vans from

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6/ (Continued)

or the rates charged was ever sought or obtained from the Commission. In addition, the tours offered in 1976, utilizing maxi-vans promised "never more than 14 people on these tours". The application was silent on number of passengers although service was offered utilizing both maxi-vans and limousines. The earlier brochure used when service commenced in May 1975 stated "we recommend five passengers per tour group" for limousine tours.

7/ Including: Ishis Limousine Service, DeSoto Cab Co., Luxor Cab Co., Associated Limousines of San Francisco, and California Taxicab Owners Association.

8/ About 100 tours were sold in June 1975 alone.

9/ It is Ratti's contention that late in July and early in August 1975 Tours experienced difficulty in obtaining transportation from Walker Brothers, Mike El Cord, and Lorrie's Tours. Ratti ascribes these difficulties to pressure assertedly exerted by Gray Line. Although repeatedly approached by Ratti and his associates, beginning in June 1975, Gray Line declined to appoint Tours as its agent, considering that Tours was operating in an illegal manner without authorization, actually in competition with Gray Line, and would only "short stop" legitimate business to at least three established Gray Line agents in the immediate area of the airline terminal building. Additionally, Gray Line and its associate, Associated Limousines of San Francisco, declined to charter buses to Tours for unauthorized tours. Ratti contends that this refusal to provide equipment was an illegal boycott - "a conspiracy".

rental lease agencies such as Trans-Rent-A-Car, provided his own drivers, including himself and Fassett, and operated these leased vehicles to provide the transportation - this about the same time that Tours' application for a passenger stage certificate had been accepted on August 20, 1975; before he had obtained his own charter-party carrier permit on October 23, 1975 to operate his own 1967 Cadillac 7-passenger limousine in charter service, and well before he had even applied on December 30, 1975 for additional vehicle authority, or authority to rent or lease on an "as needed" basis.

Aware of the continuing unauthorized operation by Tours by observation from its offices adjacent to the Downtown Airlines Terminal, Gray Line - prefatory to filing a formal complaint with the Commission - employed Pinkerton Agency undercover operatives to obtain actual evidence of per capita operation. Based upon its own observations and sworn affidavits of three Pinkerton operatives, Gray Line on October 17, 1975 filed a formal complaint before this Commission, alleging that Tours and the three partners, Ratti, Fassett, and Kavanaugh, were holding themselves out to provide, and in fact were providing, passenger stage transportation services to the general public without a certificate of public convenience and necessity from this Commission in violation of Section 1031 of the California Public Utilities Code, maligning the goodwill and trade reputation of Gray Line. Gray Line requested this Commission to order defendants to immediately cease and desist from these acts. The complaint also asked dismissal of Application No. 55877.[10/]

10/ Tours filed a late answer to the complaint on December 4, 1975 denying all the material allegations made by Gray Line, and asserted as an affirmative defense essentially that Tours' services were not covered under the PUC "passenger stage corporation" definition; that its services differed from those of Gray Line; and that Gray Line's services were inadequate and that Gray Line was either incapable or unwilling to provide specialized and personalized service.

Approximately one month later, on November 18, 1975, after noting that Section 1031 of the Public Utilities Code provided in relevant part that: "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, ...", and finding that based upon the allegations and verified statements of the complainant, good cause existed for granting the requested relief, the Commission relied upon its authority under Section 1034 of the Public Utilities Code,[11/] and issued Decision No. 85140 ordering the defendants to cease and desist from offering and providing passenger stage service pending resolution of Application No. 55877. The complaint and its related matters, assigned No. 9993, were ordered consolidated with Application No. 55877, and set for further proceedings December 16, 1975.

The day before the Commission issued its cease and desist order to defendants, Fassett visited James J. Mulpeters (Mulpeters), president of Gray Line, and offered to utilize Gray Line buses and limousines to provide the transportation for any of Tours' tours if Gray Line would withdraw its request for a cease and desist order from the Commission. When told by Mulpeters that the matter would have to be referred to the Gray Line attorneys, Fassett assertedly told Mulpeters that an answer would be required by 5 p.m. of that same day or Tours would proceed to go into "Phase 2". Mulpeters then told Fassett "You might as well go into Phase 2." What Phase 2 was was not then explained. The next evening - the same day the

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11/ Public Utilities Code Section 1034: "When a complaint has been filed with the commission alleging that any passenger stage is being operated without a certificate of public convenience and necessity, contrary to or in violation of the provisions of this part, the commission may, with or without notice, make its order requiring the corporation or person operating or managing such passenger stage, to cease and desist from such operation, until the commission makes and files its decision on the complaint, or until further order of the commission."

Commission's cease and desist order issued - there was an evening public relations reception conducted by the "We Like Visitors Committee" of the San Francisco Convention and Visitors Bureau. At these periodically scheduled receptions, awards are issued to various individuals, such as cab drivers, policemen, etc., nominated by visitors on Bureau-provided forms as individuals who have afforded outstanding service to the visitor during his stay in the city. At the November 18, 1975 reception six awards were made - one to Ratti. Following the presentation Ratti called a press conference to announce that Tours had filed a 5 million dollar antitrust suit against Gray Line. Presumably this introduced Phase 2.

On November 24, 1975 Kavanaugh issued a press release asserting in part that "a hastily written order from D. W. Holmes, president of the Public Utilities Commission, was served on Tours/ San Francisco" insisting that Tours "cease and desist from offering and providing passenger stage service...", and stating that Tours "has decided to challenge the P.U.C. order and is continuing 'business as usual'".

On December 8, 1975 Tours filed a motion for an ex parte stay of the cease and desist order issued by the Commission. On December 9, 1975 the hearing officer denied the motion, noting that since defendants held no operating authority to offer or provide passenger stage authority, defendant's legitimate interests could not be harmed by continuance of the order as issued pending resolution of the application and ordered the combined application - complaint matter to proceed to hearing on December 19, 1975 as previously scheduled.

Public hearings, appropriately noticed, were held on the application and related matters in San Francisco before Adminstrative Law Judge John B. Weiss on December 16 and 29, 1975, February 17, April 6, 7, and 8, and July 6, 7, 8, 9, 12, 13, 14, 15, and 16, 1976.

The consolidated matters (including Case No. 10091) were submitted upon receipt of concurrent briefs on September 10, 1976.[12/]

At conclusion of the first day of hearing the matters had to be continued because of other commitment by Tours' counsel. Accordingly, the ALJ reminded the defendants in the complaint matter that "the cease and desist order continues in effect"; that "any further operations will be looked at adversely", and instructed defendants' attorney in their presence to "give them a rundown of just the Commission's powers in this under the code sections applicable...and of the consequences under a contempt proceeding, should it continue". The attorney for Tours stated "I have informed my clients of the implications of the cease and desist order completely." During hearing on December 29, 1975 Fassett was asked by his attorney whether he had obeyed the cease and desist order, and responded: "Yes sir, we have." Subsequently on cross-examination he was asked if he understood that the order had told him to stop operating on a per capita basis and he responded: "Yes, I believe I understood that." That same hearing day, Ratti, when questioned as to how Tours had operated previous to December 16, 1975, stated: "We were operating as a tour company...giving tours." Describing the operation further he stated: "Well, we were operating as a broker and having some of the work done by other limousine drivers, and doing some of the work ourselves." Ratti then testified that after December 16, 1975

12/ All briefs were received by September 10, 1976 except for that of Tours. On September 8, 1976 Tours' attorney, as a consequence of a time conflict with a jury trial matter, requested an extension of time to deliver his clients' brief. In the absence of ALJ Weiss, the Assistant Chief ALJ of the Commission granted extension to September 15, 1976. This date was subsequently extended to September 20, 1976 on which date the Tours' brief was submitted. While it would have been preferable to have deferred submission to all briefs so as to have concurrent submission, the ALJ has found no advantage taken by Tours' attorney to direct rebuttal to the brief of either of the other parties.

(when they were warned by the ALJ) they had ceased these operations pursuant to the cease and desist order of the Commission.[13] Ratti and Fassett testified of partially successful attempts by Tours to become, in effect, a de facto agent of Gray Line by unilaterally selling tours to visitors at Gray Line's prices and then sending the people over to the Gray Line boarding area next door with Tours' vouchers.[14]

13/ At conclusion of the December 29, 1975 hearing Tours moved again to stay the cease and desist order in effect, contending that Ratti believed from his conversation with representatives of the Public Utilities Commission that he was operating within the law, even though he was providing a passenger stage service; that livelihoods were at stake; and that defendants had all expected to operate until the Commission ruled upon the application - which expectation it candidly admitted was the purpose of earlier requests for delays (i.e., Fassett's October 28, 1975 request for 90 days to answer Case No. 9993, and Tours' December 8, 1975 request to stay ex parte the cease and desist order). The ALJ denied the motion.

14/ It was Ratti's testimony that this referral practice had its genesis in a June 1975 verbal agreement between Mulpeters and Ratti to the effect that when Tours could not handle all its business, Gray Line would accept the surplus. Mulpeters flatly denied any such agreement, testifying that the interlude during which Gray Line accepted Tours' referrals vouchered by Tours occurred between mid-December 1975 and early February 1976 when - after Tours had ceased per capita operations purportedly in compliance with the cease and desist order - Tours sold some tourists Gray Line tours and sent the tourists over unannounced. In order to avoid inconveniencing these tourists Gray Line assertedly accepted their Tours vouchers, provided the transportation they had paid for, and then billed Tours for the transportation, allowing a commission. This practice continued, Mulpeters testified, until early February when Gray Line obtained evidence that Tours had resumed per capita operations on their own. Accordingly, on February 9, 1976 Mulpeters wrote Tours that Gray Line would no longer accept Tours' orders drawn on Gray Line (see Exhibit 33). Exhibits 27-A through 27-B, introduced into evidence by Tours, tend to bear out Mulpeters' testimony. Exhibits 27-B through 27-E show that between mid-December 1975 and early February 1976, 59 Tours ticket vouchers were honored by Gray Line to cover transportation for 82 persons with commissions paid

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About February 1, 1976, from his vantage point near the airline terminal, Mulpeters observed that Tours had again resumed per capita operations, and again Gray Line employed Pinkerton operatives to obtain evidence. Based upon Mulpeters' observations and the affidavits of the Pinkerton operatives, Gray Line on February 13, 1976 filed an affidavit and application for an order to show cause why defendants should not be punished in the manner provided by law for each and every contempt of the Commission's cease and desist order, asserting that the defendants in Case No. 9993 had initially and were again offering and in fact providing a per capita passenger stage service in direct violation of both the cease and desist order of November 18, 1975 and the presiding ALJ's admonitions after the hearing began December 16, 1975. Affidavits in support of the application for a show cause order in re contempt were executed by Pinkerton operatives Bowen and Gantert.

On February 17, 1976 an order to appear April 6, 1976 to show cause why defendants should not be found guilty of contempt and punished accordingly for wilful disobedience of this Commission order in Decision No. 85140 dated November 18, 1975 was issued by ALJ Weiss. We affirm the issuance of the Order to Show Cause issued by the ALJ. Personal service was made upon Ratti and Fassett; however, Kavanaugh had disappeared. Accordingly, on March 15, 1976 substituted service was made upon Kavanaugh's attorney, Dennis B. Natali (Natali), attorney of record of all defendants in these consolidated proceedings.

14/ (Continued)

Tours by Gray Line. Exhibit 27-A shows that 21 vouchers covering transportation for 43 persons incurred after February 9, 1976 were honored by Gray Line, but no commission was paid. Under the circumstance of no commission being paid, Tours appears to have abruptly ended referrals to Gray Line.

On April 6, 1976 Tours filed with the ALJ an amendment to its application seeking to add two additional tours to its initial four: Tour No. 5 to the wine country, and Tour No. 6 to Monterey - Carmel.[15/] The amendment was signed by Ratti and Fassett (and by Natali - as attorney for applicant). When queried about the third partner Kavanaugh, the Tours' attorney stated that Kavanaugh had voluntarily removed himself from the partnership approximately two months earlier and that Kavanaugh had dropped out of the proceedings as an applicant and principal although the finalization of his partnership interest had not yet occurred. Assertedly, Kavanaugh had gone on vacation, reportedly to South America. Being advised by the attorney that before he left Kavanaugh had been advised of the pending show cause order in re contempt, the ALJ ruled that Kavanaugh had had constructive notice in that during the February 17, 1976 hearing (before Kavanaugh left) the ALJ had stated on the record that he would issue an order to show cause as of that date, and defendants' attorney had responded: "For the record, I will waive notice of that."

In beginning the hearing April 6, 1976 on the order to show cause in re contempt issues, the ALJ noted that Public Utilities Code Section 2113 provides that disobedience of a Commission order is contempt punishable by the Commission in the same manner and extent as contempt is punishable by courts of record. At this point defendants' attorney orally moved to request what he asserted were his clients' constitutional rights to a trial by jury on the contempt issues, citing 29 Cal Jur 2d 499, and Codispoti v Pennsylvania

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15/ On brief and during the hearing (see Transcript pp. 1461-1463) applicant stated that it was "seeking the right to conduct tours pursuant to its application and amendment thereto," by means of vehicles which would carry 45 passengers or more, or in the alternative, limitation to mini- or maxi-buses capable of transporting 15 or less. However, neither the application nor the amendment thereto mentions use of full-size buses.

((1974) 418 US 506) as authority for the request.[16] After hearing arguments from the parties to the proceeding and noting that there is no explicit provision in the Public Utilities Code for this Commission to provide jury trials and that this Commission has not in the past provided jury trials, the ALJ made his ruling. The ALJ noted first that this Commission has power to punish for contempt where its orders are disobeyed, and second, that this power to punish may be exercised in several ways. Then, stating that he considered the contempt issues at bar as coming within the context of the "petty" classification set forth in Re Morelli ((1970) 11 CA 3 819, 850),[17] he ruled to deny the motion for a jury trial and ordered the contempt hearing to proceed. We affirm the ALJ's denial of the request for a jury trial.

On April 26, 1976 Gray Line filed a second formal complaint before this Commission, alleging that the record adduced to that date in the consolidated proceedings (Application No. 55877, Case No. 9993, and the Order to Show Cause) established that Ratti, operating in conjunction with Tours, Fassett, and Kavanaugh, had offered and had

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16/ Defendant's attorney noted that under Section 2112 of the Public Utilities Code, if an individual is found to have failed to comply with a Commission order, he is guilty of a misdemeanor which is punishable by a fine not exceeding $1,000, or by imprisonment in a county jail not exceeding one year, or by both. In Codispoti, supra, each of the two contemnors were found guilty of multiple contempts for which consecutive sentences were imposed totaling several years. The U.S. Supreme Court reversed, holding that in the case of post-verdict adjudications of various acts of contempt committed during trial, the Sixth Amendment requires a jury trial if the sentences imposed aggregate more than six months, even though no sentence for more than six months was imposed for any one act of contempt.

17/ In Re Morelli, supra, the California Supreme Court held that there was no right to a jury trial where the maximum penalty for contempt was five days in jail and a $500 fine, thus placing the matter within the "petty" classification. In the case at bar, under Section 2113 of the Public Utilities Code, the Commission may punish to the extent provided under Section 1218 of the Code of Civil Procedure, which in turn provides for imposition of a fine not to exceed $500, or imprisonment not exceeding 5 days, or both, for those adjudged guilty of a contempt.

sold transportation on a per capita basis in violation of Sections 1031, 1032, and 5401 of the Public Utilities Code; and Gray Line accordingly requested this Commission to cancel, revoke, or suspend Ratti's charter-party carrier permit TCP-601. Gray Line thereafter on May 20, 1976 amended its second complaint to ask additionally that this Commission also order Ratti "to cease and desist from contracting, agreeing, arranging to charge or demanding or receiving compensation by itself, its brokers or agents for any transportation offered and afforded which shall be computed, charged, or assessed on an individual fare basis." Ratti on June 23, 1976 filed an answer to the amended complaint, denying the allegations. This additional complaint, as amended, was numbered Case No. 10091, set for hearing July 6, 1976, and consolidated for hearing by the ALJ with the other matters involving Ratti then before the Commission.

Meanwhile, on May 3, 1976 the Teamsters Union had struck the Gray Line in a labor dispute, effectively shutting down its tour operations at the beginning of the peak summer tourist season in San Francscio. (This labor dispute continued until settlement was eventually reached on November 14, 1976 and Gray Line tour services resumed.) The removal of approximately sixty Gray Line buses from the tour scene during the period of the strike had the immediate effect of encouraging numerous individuals to enter the void. Operating owned, rented, leased, or chartered limousines, mini-buses, vans, or regular buses, and offering per capita tour services imitating those of Gray Line, unsanctioned by any state or local regulatory body (in some instances merely holding a city business license, at inflated prices usually well above the rates authorized Gray Line by this Commission, these individuals proliferated and profited, skimming the cream off the tourist sightseeing trade while the bonanza lasted. In this milieu while many visitors did get to see the Bay Area and were satisfied by the illegal substitute service; others were "ripped off" by unscrupulous and inexperienced operators. These illegal operations have continued through the date of submission of these proceedings.

Discussion

Considering the voluminous transcript and the necessarily interlocking nature of much of the evidence in this consolidated proceeding, and for ease of consideration and disposition, we have prepared a separate Summary of Testimony arranged in four segments; one each for the relevant and material testimony under the application, each of the two complaint matters, and the Order To Show Cause In Re Contempt. This Summary of Testimony appears as Appendix A to this order.

Our discussions of the evidence and our conclusions are also compartmented into these same four segments.

Application No. 55877 - Discussion

The granting or withholding of a certificate of public convenience and necessity to operate a passenger stage over any public highway in this State is an exercise of the power of the State to determine whether or not the rights and interests of the general public would be advanced by the issuance of the certificate. While many considerations may enter into the determination, the public interest is paramount. Certificates are not granted merely to accommodate the need or desire of an applicant to operate (Coast Line Stages, Inc. (1942) 44 CRC 415), or upon the ground that the applicant desires to establish a service in competition with an existing carrier (David L. Peters (1925) 26 CRC 344), even where coupled with the financial and business ability to operate such a service (C.A. Schlageter (1923) 23 CRC 193). The words "public interest" where used in the context of a passenger stage operation usually require close examination of the following factors in considering an application:

1. A public requirement for the service proposed;
2. The adequacy and quality of the service proposed;
3. The financial, business, and technical ability of the applicant to carry on the proposed operation to serve the public at reasonable rates;
4. The good faith and willingness of the applicant to assume responsibility for service at all times and under all conditions; and

5. The willingness of the applicant to abide by the law and Commission rules.

However, where as here, certification would permit passenger stage operation in a territory already served by another certificated carrier, other considerations enter. Early California regulatory history reflects the development of a policy that the public interest would be best served by responsible agencies, and that such agencies, when they have developed territories, become established, and render adequate and satisfactory service to the public, should receive consideration as against applicants whose principal showing upon the issue of public convenience and necessity was a desire to enter the transportation field over established routes (see A. W. Brandt (1918) 15 CRC 40, United Stage Co. (1919) 16 CRC 428, H. A. Folk (1919) 17 CRC 631, C. A. Schlageter (1923) 23 CRC 193, David L. Peters (1925) 26 CRC 344, and James T. Agajanian (1931) 36 CRC 621).[18/]

The role of the certificate of public convenience and necessity in protecting existing carriers who perform adequately was explained by the California Supreme Court in Motor Transit Co. v Railroad Commission (1922) 189 C 573, at 580, where the court stated:

> "It is in the interest of the public that the service rendered by public utilities be adequate and of good quality and the rates as low as possible commensurate with good service and a reasonable return to the owner. The certificate of public convenience and necessity is the means whereby protection is given to the utility rendering adequate service at a reasonable rate against ruinous competition. The person or corporation obtaining a certificate must operate at the times and in the manner prescribed by such certificate, thus furnishing uniform and efficient service to the public. If anyone else would be at liberty to operate without such certificate he might operate at his own pleasure and only

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18/ In which decision, at page 625, the Commission stated: "It is a well established principle of this Commission that where an existing utility is providing a reasonable and adequate service it should be afforded protection against a competitor with whom the business would be divided."

> under favorable conditions, thus making it impossible for the holder of a certificate to successfully carry on his business. It is the public interest in efficient service which is being safeguarded by the requirement of a certificate."

In 1931 the Legislature chose to go further in protecting passenger stage corporations by amending the third sentence of Section 54½ of the Public Utilities Act (substantially the same as Section 1032 of the present Public Utilities Code) to qualify the authority of the Commission to grant certificates to passenger stage corporations when the proposed operation would be in a territory already being served by a certificate holder. As relevant here, Section 1032 reads 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."

In the first case thereafter in which Section 54½ was considered by the Commission, Re Failer's Inc. (1933) 38 CRC 880, writ denied,[19] despite the plain language of the statute, the Commission, after rehearing, took the position that where public convenience and necessity required that there be more than one carrier in the field, the Commission in the past had permitted competition; and in the future must be unlimited in its power so to do.[20]

19/ In Failer's, the applicant sought certification to offer a new and different service from the service, found satisfactory, of the existing carrier. The existing carrier offered a charter service only in the contested area and had declined to provide passenger stage service because of an asserted lack of business.

20/ However, in Failer's the Commission recognized that: "It is proper that when public convenience and necessity require the inauguration of a new stage service, any existing operator within the territory should be first in right to undertake such a service."

Subsequently, in the Tanner cases (Tanner Motor Tours, Ltd. (1966) 66 CPUC 299 and So. Cal. Sightseeing Co. (1967) 67 CPUC 125, writ denied), the Commission concluded, respectively, that although a passenger stage corporation may not have been providing adequate service prior to an application by a competing carrier to serve the same area, Section 1032 of the Public Utilities Code requires that the Commission must be satisfied that the existing carrier will not provide satisfactory service in the future before it may grant a new certificate to the competing carrier; and that the last sentence of Section 1032 of the Public Utilities Code precludes, as a matter of law, the granting of an application by a carrier seeking to enter a territory served by an existing carrier, unless the existing carrier will not provide service to the satisfaction of the Commission.

Finally, in Franciscan Lines (1972) 73 CPUC 62, modified by 73 CPUC 166, writ denied,[21] the Commission determined that in keeping with the spirit of Section 1032, it should allow an existing service to remedy its shortcomings rather than grant another certificate. The Commission also addressed the contention that if Section 1032, as applied in an administrative hearing, served to prohibit the issuance of a certificate once public convenience and necessity had been established, the statutory section might be in conflict with the federal Sherman and Clayton Antitrust Acts as

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21/ In the Franciscan cases Franciscan sought sightseeing certification in a territory largely already served by Gray Line although some tours essentially had been eliminated or were not actively promoted. After initially finding that Section 1032 was not applicable in that the proposed service was "different", the Commission granted rehearing to "decide the case under both the letter and spirit of Section 1032" noting the difficulty in certificate of service, which in most respects paralleled and directly competed with Gray Line, merely to obtain a certain few additional tour points. The consequent Commission decision rescinded certification to Franciscan and ordered Gray Line to update its tariff and submit a plan to better inform the public of its service. Franciscan then petitioned for rehearing. By the final decision that petition was denied and the Commission clarified its earlier decision by adding certain conclusions.

well as California's Cartwright Act, and therefore unlawful and void on its face. Noting its responsibility sua sponte under Northern California Power Ass'n. v PUC (1971) 5 C 3d 370, to consider antitrust issues involved, and to make appropriate findings and conclusions demonstrating "considerations of overriding importance" where Commission policy inhibits or restricts competition, the Commission concluded that when the anticompetitive policy expressed by Section 1032 is statutory rather than regulatory, the Commission had to assume that the Legislature acted on sufficient ground, as the Commission lacks jurisdiction to disregard clear provisions contained in the Public Utilities Code.

These same considerations necessarily restrict this Commission today. While sightseeing service by its very nature is a recreationally oriented operation, essentially different from a strictly public transportation service, and therefore perhaps less reflective of that notion of essentiality to the general public welfare which is inherent in the underlying concept of public convenience and necessity, the Legislature nonetheless saw fit by definition to include it within those sections of the article of the Public Utilities Code applicable to passenger stage regulation. Therefore, the strictures of Section 1032 placing a restriction upon competition (which strictures are found in no other certification sections of the Code), absent unwillingness to perform by the existing certificated carrier, are applicable to all passenger stage corporations, whether the application be for sightseeing or conventional passenger stage authority. The same authorization is required from this Commission whether the service be sightseeing or general public transportation. It is not our function to second guess the Legislature; as noted in Franciscan, supra, we are bound to follow its dictates. If it is bad law it should not be construed away, but rather it should be legislated away. It is against this restrictive regulatory backdrop that we consider the instant application.

Throughout the hearing in the instant proceedings applicants have stressed what they term "the anticompetitive nature of the tourist [transportation] industry in this area". While conceding that Sections 1031 and 1032 of the Public Utilities Code limit entry and restrict competition by tightly restricting the circumstances under which an applicant can qualify to receive a certificate of public convenience and necessity, they both argue and act against application of these sections to themselves. On the one hand, they cite Northern California Power Agency, supra, and Thompson Brothers Inc. (1972) 73 CPUC 195, a shipping case, as authority for a special recognition of the "need for a diversity in the type of services that are offered" in the Bay Area tourist sightseeing industry, asserting that they offer a different, "unique and needed" service not presently offered by Gray Line, and service that Gray Line assertedly has given no indication it will provide, and that this different service would result in no distraction of business from Gray Line. On the other hand they proceed, and continue to act, operating with disdainful disregard of the Public Utilities Code Section 1031 requirement that one not operate until one first obtains from the Commission a certificate of public convenience and necessity; and defying - under transparent subterfuge and artful polemics - the Commission's cease and desist order against continued interval operations, after having "decided to challenge the PUC order, and...continuing 'business as usual'" (see our discussion under Order To Show Cause In Re Contempt).

Addressing first applicants' arguments insofar as they apply to the Section 1032 strictures, we can only repeat, recognizing as we have above that our jurisdiction to issue certificates of public convenience and necessity is limited by Section 1032, that it would be an idle act to evaluate the factors for or against competition here. Having concluded that the Code section provides that there can be no competition unless the existing certificated carrier will not provide service to the satisfaction of the Commission, it is therefore irrelevant to consider evidence of

whether there should be competition. We cannot find on the basis of this record that the Gray Line service is unsatisfactory to the Commission. The minor service deficiencies alleged by Tours' witness on the subject, a striking Gray Line driver, were substantially termed by him to be "miscellaneous griping". Apart from one specific instance in a 9-year period when he had to obtain a relief bus because of a brake problem, and assorted windshield wiper, air conditioning, and clutch reminiscences, the testimony was generally unspecific. In sightseeing cleaning is always a problem. The totality of his testimony reflected what one would anticipate to be the normal range of maintenance problems experienced by any transportation company. However, we do not construe Section 1032 to mean that sporadic minor service or maintenance deficiencies in certain operations by an existing operator is a reasonable basis to open the door to competition throughout that territory. Such an analysis would fly in the face of the legislative act that is clearly anticompetitive in nature (Franciscan Lines (1972) 73 CPUC 166, at 169).

Examining next applicants' contentions that their service is unique, distinct, or different from that of Gray Lines and therefore would not be competitive or distractive of business to Gray Line, we reject the applicants' contentions. Apart from the mode of transportation used, we do not find any significant degree of difference in the service. Tours began these proceedings asking to use ten limousines and ten maxi-vans. In practice they used both. The vehicles were to be propaned power; none ever were. Gray Line uses approximately sixty-three 45 to 53 passenger motor coaches, although on some sixty occasions in the first 6 months of 1976 it also utilized chartered maxi-vans for smaller groups. Tours during the proceedings indicated they would prefer an open certificate without vehicle limitations as it would be useful to use full size buses on some special occasions. Tours stressed the versatility of maxi-vans as being able to negotiate Lombard Street ("The Crookedest Street") and certain Sausalito hill streets, offering a tour more intimate with the scenery, and one more personalized. Gray Line stresses the comforts of a

full-sized bus including air conditioning, air suspension rides, and reclining seats (in 75 percent of its buses). Both have more customized vehicles planned although Gray Line had ten late model coaches actually in process of being converted to glass tops. Tours leases or rents maxi-vans although were it certified it would make more permanent purchase arrangements. Gray Line has the largest maintenance yard of its type in the west supplied through its affiliate, Greyhound. Tours utilizes non-union drivers,[22] some employees, some not; all paid in cash by the tour without payroll withholding on the theory apparently that all are independent contractors. Gray Line has a regular list of 75 drivers, an extra list of 40 to 45, and a summer peak supplementary list of another 30; all union drivers, all with 4 weeks training. The testimony was inconclusive over the merits of limousines and vans versus motor coaches. Witness Alhadeff, a 25-year Gray Line veteran on strike against Gray Line, testified when called by Tours as an adverse witness that Gray Line had "done very well in providing service for the people when there wasn't a strike", and when asked to comment on the use of mini-buses to service tourists testified "I think mini buses are no good for sightseeing", stressing the visibility and comfort of a bus, but conceded that a lot of people were very happy with mini-buses.[23]

We find no substantial difference insofar as language capabilities are involved. Both Tours and Gray Line offer tours conducted in foreign languages for extra fees. In the one example detailed of language facility that involving witness Shirai, a Japanese businessman, the witness testified that while he was told about the tour in Japanese at time of buying the ticket, the actual tour was conducted in English. A Gray Line witness described one "narrated" tour for 40 German-speaking deaf tourists:

22/ Ratti testified that Tours, if certified, "would more than likely use our present employees to drive", and that they would be paid "basically" the same rate of pay they were then making ($5 per hour on July 15, 1976 on a net basis).

23/ The distinction between mini- and maxi-buses or vans is that of passenger capacity. A mini transports 11 passengers; a maxi 13.

When comparisons are made between the tours listed in the latest Tours' brochure (Exhibit No. 26-B) and the current Gray Line brochure (Exhibit No. 45), there is no substantial difference in the scope of the territory each covers in their duplicative tours;[24] however, the components are shuffled. Tours' No. 3 "Grand Tour", their 4½-hour $20 tour accounting for the majority of their business, in essence is a combination of Gray Line's No. 1 "De Luxe City Tour", a 3-hour $6 tour, and Gray Line's No. 12 Muir Woods - Sausalito tour, a 3½ hour $5.95 tour except that the Gray Line includes the 50¢ Muir Woods admission fee - dropped early in 1976 by Tours. Therefore, the tourist can take the 2 Gray Line tours lasting 6½ hours (AM and PM) for $11.95 including one admission fee, compared to 4½ hours touring with Tours for $20. The wine country and Monterey - Carmel tours offered by Tours and Gray Line are essentially the same as to content and time, differing only as to the price. Tours proposes $35 and $45, respectively, and Gray Line charges $17 and $22.50. How does Tours obtain any business when its prices are so much higher than Gray Line's? There was evidence in the testimony of witnesses Doran and Wellhofer of interlocking or reciprocal 15 percent commission arrangements whereby Tours and a number of the smaller downtown tourist class hotels exchange commissions; Tours directing newly arrived tourists at its "information booth" at the Downtown Airline Terminal to these hotels, with the hotels touting Tours' sightseeing. Tours also has "arrangements" with bell captains and desk clerks (see the testimony of witnesses Welsh and Asher), while Gray Line usually operates through formal booths in the lobby of the larger hotels.[25] With obvious

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24/ As Exhibit No. 45 evidences, Gray Line offers a number of tours covering additional areas for which Tours does not here request certification, but essentially all of Tours' requested territory is within the territory certificated to Gray Line.

25/ While Gray Line has also paid some informal "commissions", on a periodic basis, to bell captains in some hotels, primarily for its customers it relies upon its sales or organization, including local agents, and convention bureau, as well as extensive membership in travel organizations - distributing 50,000 copies of a sales manual to travel agents worldwide and about 1½ million brochures (see Exhibit No. 45) annually.

reference to the downtown airlines location, witness Mulpeters stated that Tours could stay in business before the strike "because I think he catches the people before they find out they can buy the tour for $6 instead of $20". Interestingly enough, evidence was presented which further indicates that competition does not necessarily result in a better deal for the public. One of the results of untrammeled competition is exemplified by testimony on the extremely competitive state of the tour business in our nation's capital, Washington, D.C., where there are several tour companies operating. In Washington the selling agents play the companies against another, with the result that commissions have gone as high as 50 percent, raising the price on tours considerably - which the passenger tourist pays for.

Having concluded above that Gray Line service is not unsatisfactory to this Commission and that the applicant's proposed passenger stage service is not different, unique and needed, from that presently provided by Gray Line, we are precluded by the provisions of the last sentence of Section 1032 from issuing a certificate of public convenience and necessity. However, even though the applicants have failed to show that their proposed service is not essentially a duplicative service to that of Gray Line and propose to operate within the same territory, we will comment briefly upon at least certain of the fitness factors most applicable to Tours' application in the context of the traditional public interest examination.

We are adversely impressed by the failure of the applicants to exhibit integrity and ability in the financial and business aspects of their operation. In particular their shrouded, unorthodox and frequently chimerical practices are unacceptable. The strange admixture of Ratti's TCP operation and Tours seems one incapable of separation. The two are inextricably bound up in each other. We agree with the staff that there is no identifiable difference between the two. Ratti so controls Tours that the actions of Tours are

actually those of Ratti TCP-601, and vice versa. Ratti's conduct of business: no records are maintained if indeed they are made at all; payments in cash; a judgment proof stance apparently personally adopted; disdainful disregard of the law even after it is clarified to him, etc., all evidence an irresponsibility not consonant with the right of the general public for fitness in those who would operate a public utility. When called to account Ratti changes testimony with aplomb, pleads ignorance, mistake of understanding, press of business, forgetfulness, that everyone else is lying, and that the world is out to get him. The peculiar practice of a cash payroll without payroll withholding also requires comment. Federal and state laws require certain withholding unless those hired are bona fide independent contractors. Ratti and his associates at no time demonstrated any foundation, much less substance, for a belief that Tours' employees could be anything other than employees in the usual context of the word. From the very beginning of regulatory jurisdiction by this Commission it has been held that it is the obligation of an applicant for a certificate of public convenience and necessity to give satisfactory assurance of honest and prudent management (In re Oro Electric Corp. (1912) 1 CRC 253, at 257) whether the intent is to compete with an existing utility or to occupy entirely new territory. Even though applicants engaged the services of competent counsel at an ill-defined point in November 1975, they nonetheless continued to utterly disregard the law. Apart from continuing illegal operations in face of a cease and desist order, illegal renting of vans for use in transportation (see our discussion under Order To Show Cause In Re Contempt), applicants early in 1976 utterly disregarded Section 491 of the Public Utilities Code (which specifies that no changes shall be made in rates or services except after 30-day notice to this Commission and to the public) and unilaterally placed into effect a 25 percent increase in its major tour, the Grand Tour, and a

40 percent increase in its wine country tour. Applicants are not "babes in the woods". They were not timid to seek information and legal advice from Commission staff personnel in the past. As the record amply indicates, they are masters at picking and choosing what information they would accept and what they would ignore.

In conclusion on the application, apart from the Section 1032 obstacle to certification in this instance, to certificate the applicants in view of the record in this proceeding would be a travesty and not in the public interest. It would serve to reward a would-be carrier which chooses to operate as a law unto itself, flouting authority, encouraging lawlessness in others by its success, all at the expense of the unsuspecting public under a fraudulent guise of asserted legitimate operation under the Public Utilities Code. We conclude that Tours/San Francisco, Ronald J. Ratti, Donald L. Fassett, and James D. Kavanaugh have failed to demonstrate the requisite fitness to be awarded a certificate of public convenience and necessity to operate a passenger stage corporation, and we will deny the application.

Application No. 55877 - Findings

1. Tourism is increasing year to year in the San Francisco Bay Area.

2. Gray Line equipment, facilities, training, and operations serving the sightseeing aspect of this tourism are adequate.

3. Tours possesses no certificated passenger stage authority from this Commission.

4. Nonetheless, Tours began passenger stage operations from its inception in May-June 1975, and since has provided and continues to provide passenger stage service in the form of regularly conducted sightseeing tours on an individual fare basis utilizing limousines and rented "mini/maxi" vans, all in violation at all times of Section 1031 of the Public Utilities Code, and in defiance since November 18, 1975 of the cease and desist order contained in-

Decision No. 85140 issued November 18, 1975. (See Findings and Conclusions - Case No. 9993, and Order To Show Cause In Re Contempt.)

5. Tours' service provides directly competitive sightseeing tours, including essentially the same points of origin and points of interest, in the same territory as that served by Gray Line, a passenger stage corporation certificated by this Commission to provide sightseeing service in that territory.

6. The operation provided by and/or proposed by Tours is at most only superficially unique, distinct, or different from that provided by Gray Line.

7. While Tours uses them exclusively and Gray Line only supplementarily, there has been no conclusive showing that limousines and/or "mini/maxi" vans are safer or more suitable than full-sized buses for the sightseeing operations at issue here.

8. Tours has raised fares and changed its tours without filing and publication, all in violation of Section 491 of the Public Utilities Code.

9. The fares charged by Tours are and have been in excess of those charged by Gray Line for comparable tours.

10. There is no real distinction between Tours, the partnership, and Ratti, the partner and holder, since October 17, 1975, of Charter-party Carrier of Passengers Permit No. 601.

11. The provisions contained in the last sentence of Section 1032 of the Public Utilities Code apply to the instant proceeding and would serve to preclude certification of this applicant.

12. Notwithstanding, Tours/Ratti have failed to demonstrate that degree of fitness, responsibility, good faith, and willingness to abide by the law and Commission rules requisite for an applicant to merit certification to serve the general public.

13. Public convenience and necessity does not require the granting of the operative authority which applicant seeks by Application No. 55877.

Application No. 55877 - Conclusion

The application should be denied.

Case No. 9993 - Discussion

The issues presented by this complaint are:

1. Whether or not the defendants - in violation of Section 1031 of the Public Utilities Code - have operated as a passenger stage corporation without having secured from this Commission a certificate declaring that the public convenience and necessity require such operation, and

2. If so, should defendants be prosecuted for their violations?

The test of passenger stage corporation operations is set forth in the provisions of Section 226 of the Public Utilities Code. As relevant to the instant factual situation, if one regularly or with some degree of frequency, provides vehicular transportation for persons for compensation between fixed termini or over a regular route on the public highways partly within and partly outside a municipality, one is operating a passenger stage corporation. Such operation requires prior certification by this Commission before one may legally operate (Section 1031 of the Public Utilities Code).

From the considerable evidence presented in these consolidated proceedings, we conclude that the defendants, Tours, Ratti, Fassett, and Kavanaugh, amply meet this test, and that almost from the beginning of their venture they have knowingly and wilfully operated a passenger stage corporation in violation of Section 1031. Defendants advertised a number of sightseeing tours in and out of San Francisco, during 1975 using that brochure introduced into evidence as Exhibit No. 3. They sold tickets on an individual fare basis to individuals not part of any preformed group, at the price quoted in the brochure. They then assembled or arranged a varied-sized group of such individuals to take on the tour. Finally, they provided transportation, initially amongst

themselves; next partially through assorted independent charter-party carriers; then using their own limousines and rented vans; and later, under guise of Ratti's TCP-601, using vehicles belonging to Ratti and Fassett, as well as unauthorized rented vans. All this was done during the period of this complaint without having first obtained the requisite certificate of public convenience and necessity from this Commission.

Examination of just one of the tours offered by defendants demonstrates the validity of our conclusions. Defendants offered a comprehensive Bay Area tour, their Tour No. 3. Admittedly, it was the mainstay of defendants' business. It was offered daily, and frequently was conducted a number of times during any one day. Daily or frequent operation, even though at varied hours, suffices to class an operation as regular, bringing it within the purview of the statute. Defendants, using their own and/or vehicles rented by them, and at times vehicles chartered by them from bona fide charter-party permittees, provided the transportation. The fact that defendants may have at times used chartered vehicles does not prevent them from being a passenger stage corporation if the other indicia of elements of operation as a passenger stage corporation are present (Greyhound Lines, Inc. v Santa Cruz Travel Club, Inc. (1966) 65 CPUC 559). Defendants provided the tour for compensation. The quoted price for Tour No. 3 was $16 per person, and that amount was demanded and received from individual customers. Thus, here the defendants sold the tour on an individual fare basis. (It should be noted that the terms "compensation" and "individual fare basis" are not synonymous, and that an individual fare is but one form of compensation embraced within the term "compensation" (Van Loben Sels v Smith (1950) 49 CPUC 290, 293-294)). Furthermore, when fares for transportation are demanded and received on an individual fare basis, the provision of transportation is presumed to be an act of operating as a passenger stage corporation (Section 1035 of the Public Utilities Code). Defendants operated the tour from the area of the Downtown

Airlines Terminal in San Francisco, departing and returning to that location. In addition, apart from covering San Francisco sights, on Tour No. 3 defendants transported their customers over public highways well beyond the city limits of San Francisco to the "Italian Riviera atmosphere of Sausalito". Such transportation, partly within and partly outside a city and county (but well over 2 percent outside the city and county), over a regular route, brings the transportation within the scope of Section 226 of the Code. It should be noted that minor deviations from the route on sightseeing tours within metropolitan areas do not serve to make a tour over other than a regular route (Tanner Motor Livery (1930) 35 CRC 22).

Defendants vacillate between a full denial that they operate as a passenger stage corporation, and a position that if they have so operated it was either by reason of a "mistake of understanding", or with unofficial sanction by the Commission staff. We do not accept defendants' assertions that their tour tickets were sold on an other than individual fare basis. Witnesses Cochran and Blakesley each testified as to how each had purchased an individual ticket from Tours' personnel for Tour No. 3 for $16. Each testified of having observed other individuals similarly being sold tickets. Subsequently, when each tour was to depart, each witness learned that other individuals had been assembled to go along; ten on the Cochran tour and seven for the Blakesley tour. Ratti readily agrees that he sold Cochran his ticket; Ratti's wife sold Blakesley his. On September 14, 1975 and September 29, 1975, respectively, Cochran and Blakesley were transported along with the others assembled for each approximately 4-hour tour (although the tour routes were reversed). Neither witness was a member of any preformed tourist or tour group. Any reader of the brochure would conclude that he was offered a tour for $16. That is precisely what both witnesses received. In these circumstances there can be no question but that the fares demanded and received were on an individual fare basis; a mode of operation reserved for certificated passenger stage operators.

While the Tours' brochure did not represent how or by whom the tour transportation was to be provided, the operation was owned, controlled, operated, and managed by defendants. At the times Cochran and Blakesley were taken on their tours, defendants, none of them, held any authority or permit whatsoever from this Commission to provide transportation. Nonetheless, vans were rented from Trans-Rent-A-Car by defendants and defendants conducted the tours and provided the transportation.

Defendants were aware of what they were doing. For months before they had been exhaustively talking to the staff about their operation. In late June 1975 attention in these discussions had focused upon the per capita aspect of their ongoing operations, and they were advised to file a passenger stage application to become legal. Early in July 1975 Ratti attempted to do so and in the process of conforming his application to the rules he learned that the application would require notification to competition, probably a hearing, and that a decision on the application would take time. Meanwhile, as a result of separate but concurrent talks ending in June with the Legal Division's Mr. Rosenthal, Ratti had concluded that if Tours were to operate as a "broker", as Ratti characterized it, Tours could not itself transport customers legally pending decision on the application. Ratti also concluded that Tours could purchase the transportation through Commission authorized charter-party carriers.[26] Ratti

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26/ However, this conclusion is tenuous if not outright wrong. The term "broker" in the context of passenger transportation is not defined in our Code although it is defined in the Business and Professions Code under Section 17540.1. There it relates only to air and sea transportation. Most recently in Decision No. 84763 dated August 5, 1975 in Application No. 55636, the Commission in effect rejected the brokerage concept approach in a situation where applicant proposed organizing a very limited number of extended wine country sightseeing tours, selling tickets including transportation, some lodging, meals, admissions, etc., and then chartering vehicles from licensed carriers to provide transportation. We found that the elements of the proposed operation were clearly those of a passenger stage corporation

(Continued)

knew some of these. Tours then attempted using some charter-party carriers. After encountering some problems, Ratti determined to get a charter-party permit for himself, concluding that he would then use his own limousine to transport for Tours. Accordingly, on July 18, 1975 Ratti applied for a permit. It was not issued until October 23, 1975. In the interval between July 18, 1975 and October 23, 1975 Ratti was acutely aware that neither he nor Tours had any authority to operate as either a passenger stage corporation or as a charter-party carrier. Ratti himself frequently visited the Commission awaiting the permit issuance and even indulged in a signing session with then Executive Director Johnson when it was issued. We find defendants' assertions that during the interval only independent charter-party carriers were used not credible. We also find their assertions that only a "few uses" were made of Ratti's vehicles - uses allegedly made in the "mistaken belief" that Ratti could operate pending approval of the applied for TCP permit - not credible. Furthermore, defendants were unable to produce any records to substantiate use of independent charter-party permittees. Nor did defendants produce a single permit holder to corroborate Ratti's vague recollections (although defendants subpoenaed other witnesses on far less crucial aspects). But defendants do admit that the Cochran and Blakesley tours were conducted in rented vans before Ratti held a charter-party permit.

26/ (Continued)

as defined by Section 226 of the Public Utilities Code, and concluded that a passenger stage certificate would be required. But contrast In re Crary ((1966) 65 CPUC 545), where defendants set up a limited brokerage-type operation utilizing bona fide independent charter-party carriers for transportation to theatre and sporting events with a limited clientele where no passenger stage corporation had obtained a certificate of public convenience and necessity, and Greyhound Lines Inc. v Santa Cruz Travel Club Inc. ((1966) 65 CPUC 559) where a public educational, recreational, and social club purchased charter-party transportation for its own members on an infrequent basis to special events. The Club was admonished not to sell sightseeing transportation over a route certificated to a passenger stage corporation.

Defendants' efforts to answer the mass of evidence against them and to rebut the presumption of passenger stage operation without certification, efforts largely borne by Ratti, were with certain exceptions, of limited credibility. The answers were frequently evasive and contradictory, and fluctuated between precise recall and vagueness. Ratti tried strenuously to bend dates to his advantage, trying to create the impression that certain meetings, practices, and events happened later than they did, but the correlative records of this Commission on the filing dates for the applications for both the passenger stage certificate and the charter-party permit do not support him, and the testimony of Cochran and Blakesley refute him as to when defendants were providing their own transportation. We do not accept Ratti's testimony that Mr. Rosenthal, after reference to the Tours' brochure, researched the matter and found defendants' operation perfectly legal. Mr. Rosenthal testified - without challenge on cross - that when Ratti came to see him Ratti offered to show him a brochure, but that he declined to read it. We accept Rosenthal's version. It would not be credible to accept that experienced Commission counsel, after reference to the Tours' brochure, could find the operation to be anything other than a passenger stage operation. We also credit Rosenthal's testimony that at all times Ratti was told: "To the extent that you want to be conducting tours and employing other people, you cannot be doing the hauling yourself." Overall, Ratti's testimony was a kaleidoscope of endless variations, artfully designed for the most part to avoid responsibility whenever it appeared to fix. Defendants attempted to make much of the refusal by Gray Line to appoint Tours an agent or to charter Gray Line buses to Tours. We know of no legal requirement which would require Gray Line to appoint anyone as an agent. Furthermore, while Gray Line holds a Class A charter-party carrier certificate from this Commission, no charter-party carrier should knowingly permit its buses to be used by another party in violation of Section 1031 of the Code (Greyhound Lines, Inc. v Santa Cruz Travel Club, Inc., supra).

In view of our conclusions, the question thereupon arises whether or not this Commission, pursuant to the provisions of Section 2101 of the Public Utilities Code, should direct its General Counsel to enter suit against the defendants in the name of the people of the State of California in the appropriate superior court to seek punishment for the defendants for their commission of a misdemeanor in knowingly and wilfully violating provisions of Section 1031 of the Public Utilities Code (seeking imposition of an appropriate fine in the instance of defendant Tours, and of an appropriate fine and/or imprisonment in the instance of the named individual defendants as provided by Section 1037 of the Public Utilities Code).

It is our considered determination that we will not at this time do so. While we have concluded that defendants did in fact operate a passenger stage operation without certification in violation of Section 1031, and although we have also concluded that this operation was knowing and wilful, and not by any reason of "mistake of understanding", we cannot conclude with any requisite degree of certainty that there was not some informal and unofficial sanction given or inferred to defendants that they might continue operations pending resolution of their passenger stage application finally filed on August 20, 1975. It was Ratti's unrebutted testimony that in July 1975 Mr. Astrue told them that he "saw nothing wrong" with the way we were going to operate, and he advised us to continue to operate until he so notified us. Ratti further testified that late in September 1975, when the passenger stage nature of the operation was well apparent, Astrue again told Ratti that Tours could continue to operate pending a resolution by the Commission of the application. Considering that defendants had in fact had numerous meetings with Astrue and Donati of the Passenger Operations Branch, and apparently filed the requisite application for passenger stage certification at the suggestion of these Commission employees, we cannot believe that Astrue and Donati were

unaware of developments in the Tours' operation.[27] During the extended hearings the staff had ample opportunity to have subpoenaed Astrue and Donati, who had since retired[28] to have them appear and rebut applicants' testimony. But the staff did not do so, nor did the staff address the matter on brief.

For these reasons we conclude that up until we issued our cease and desist order on November 18, 1975, defendants could possibly have entertained some degree of misunderstanding as to whether or not this Commission would act against them were they to continue in operation pending a decision on the merits of their application. However, on November 18, 1975 our cease and desist order removed the possibility of any such misunderstanding. Events following the issuance of our cease and desist order on November 18, 1975 will be treated in the Discussion - Order To Show Cause In Re Contempt. However, in view of our resolution of the contempt matters therein, we will not also proceed under Section 2101 as to the violations of Section 1031 which occurred after November 18, 1975 and throughout these hearings, and seek punishment as provided under Section 1037 of the Code.

Case No. 9993 -Findings

1. Tours was in 1975 a partnership owned, controlled, operated, and managed by partners Ratti, Fassett, and Kavanaugh.

2. The probability of the nascent Tours operation being a passenger stage operation subject to the certification requirements of Section 1031 of the Public Utilities Code was made clear to the defendants by August 1975.

27/ By September Gray Line was gathering evidence, having retained Pinkerton operatives, to substantiate a formal complaint before this Commission.

28/ Astrue retired December 30, 1975; Donati retired June 10, 1976.

3. Tours possesses no certificate authority or any other operating authority from this Commission, although after detailed and extensive discussion with individuals on the Commission staff in August 1975 Tours applied for authority to operate as a passenger stage corporation.

4. In early to mid-1975, and thereafter, Tours caused to be published and distributed a brochure of its services listing four regularly offered sightseeing tours; each tour description being followed by the legend "Price per person", and listing an individual fare price for that tour.

5. One of the four tours listed in the Tours' brochure was Tour No. 3, a comprehensive sightseeing tour to various points of interest in the city of San Francisco and on a route between San Francisco, Sausalito, and return, with a "Price per person" listed at $16.

6. Tour No. 3, with a route extending more than 2 percent beyond the limits of the city and county of San Francisco, is within the jurisdiction of this Commission.

7. On September 14, 1975 Tours charged and collected an individual fare in the amount of $16 for Tour No. 3 from Cochran and transported him on that tour in a van rented for that purpose by Ratti. There were nine other individuals on the same tour, several of whom also had been charged $16 on an individual fare basis for the tour.

8. On September 29, 1975, Tours charged and collected an individual fare in the amount of $16 for Tour No. 3 from Blakesley and transported him on that tour in a van rented for that purpose by Ratti. There were six other individuals on the same tour.

9. Neither Cochran nor Blakesley were a member of any preformed tour group associated for the tour either took.

10. Until October 23, 1975 Ratti possessed no operating authority of any kind from this Commission.

11. There exists uncertainty whether prior to the issuance of the cease and desist order contained in our Decision No. 85140 on November 18, 1975, Tours and the partners therein may have been led to reasonably believe there existed an informal quasi-sanction to their operation of a passenger stage sightseeing corporation pending a decision on the merits of their Application No. 55877 for passenger stage certification.

Case No. 9993 - Conclusions

1. Defendants are a passenger stage corporation as defined by the provisions of Section 226 of the Public Utilities Code.

2. Defendants violated and continue to violate Section 1031 of the Public Utilities Code by operating as a passenger stage corporation without first having secured a certificate of public convenience and necessity from this Commission.

3. This Commission should not enter suit against defendants as provided by Section 2101 of the Public Utilities Code for the Section 1031 violation prior to November 18, 1975.

Order To Show Cause In Re Contempt - Discussion

We concluded in our discussion under Case No. 9993 that defendants Tours, Ratti, Fassett, and Kavanaugh had almost from the start of their venture operated a passenger stage service. On November 18, 1975 we issued Decision No. 85140 in Case No. 9993 ordering these defendants to cease and desist from continuing to offer and provide passenger stage service pending resolution of the Tours' application for certification.

There is no question from the consolidated record in these proceedings but that defendants continued operations after November 18, 1975. Fassett flatly admitted that after the issuance of the cease and desist order they continued "business as usual", stating by way of justification that with mouths to feed "you don't worry a little bit about state laws...." A press release was issued on November 24, 1975 stating "TOURS/SAN FRANCISCO has decided to challenge the P.U.C. order, and is continuing 'business as usual'", and referred inquiries to Kavanaugh. Ratti subsequently admitted that prior to the December 16, 1975 hearing defendants were operating as a tour company, "Giving tours". Fassett confirmed that on the first day of the hearing, December 16, 1975, they operated. Ratti further admitted that after the 2-week moratorium following the December 16, 1975 hearing, when "the financial burden became too heavy", they had resumed operations in substantially the same manner as before, but that subsequently the operations were substantially "refined", explaining that the refinements were either small refunds to some tour participants or extensions to some tours. However, it is defendants' basic position that because Ratti's Charter-party Carrier of Passengers Permit No. 601 was used after October 17, 1975 to provide the transportation, the operation is not a passenger stage operation, and that because sales are not made on an individual fare basis, but on a time and mileage basis, they cannot be conducting business as a passenger stage corporation. According to defendants, Tours simply acts as a broker organizer, gathering together enough individuals to form a tour group, determining what the costs for that tour group would be by using time, material, costs, and mileage plus a small reasonable

profit, and then dividing that total amount by the number of individuals it was proposed to take on that tour, charging each tour participant accordingly, and then hiring a charter-party permittee authorized by this Commission, namely Ratti TCP-601, to take the tour out.

The question now before us, therefore, is whether or not these acts by the defendants after November 18, 1975 served to violate the cease and desist order. As set forth hereafter, we conclude that defendants have deliberately and wilfully violated the order and are in contempt of this Commission.

It must be remembered that at no time has Tours itself held any authority whatsoever from this Commission. Ratti, Fassett, and Kavanaugh are the partners who own, control, operate, and manage Tours. Both Ratti and Fassett use their own limousines, as well as rented maxi-vans, to transport persons on tours. When so used, each of these vehicles becomes a "passenger stage". A "passenger stage" is defined in part under Section 225 of the Public Utilities Code as including:

> "...every stage, auto stage, or other motor vehicle used in the transportation of persons, ..."

Section 226 of the Public Utilities Code in part provides:

> "'Passenger Stage Corporation' includes every corporation or person engaged as a common carrier, for compensation, in the ownership, control, operation, or management of any passenger stage over any public highway in this state between fixed termini or over a regular route..."

Ratti and Fassett themselves drive, or furnish employees to drive, the tours.

It is true that Ratti, since October 17, 1975, has held Charter-party Carrier of Passengers Permit No. 601, which permit, during the period October 17, 1975 to February 24, 1976, authorized him to offer and provide his limousine only in charter service so long as he continued to faithfully comply with the rules and regulations of this Commission. On December 30, 1975 Ratti applied to add two additional limousines, one belonging to Fassett and a second belonging to Ratti's wife, to his permit. He also requested approval to use day-to-day rental equipment. The use of this rental equipment was at no time approved.

Furthermore, we do not credit Ratti's testimony that he was not told by Hunt (as testified to by Hunt), immediately after the decision was passed to Hunt from Gibson on January 19, 1976, that his request to use unspecified rental vehicles was not being approved. The Commission amendment adding the two limousines to his permit dated February 24, 1976 authorized nothing beyond the three limousines. On April 13, 1976 Krug wrote Ratti advising that "You may be using vehicles...that have not been listed with the Commission", and concluded "The only vehicles which you may operate under your charter-party authority are the vehicles listed on your permit." Notwithstanding, Ratti has and continues extensively to utilize vans.

But the identities of Tours and of Ratti TCP-601 are one as we determined in our discussion under Application No. 55877. Ratti so completely dominates Tours that the actions of Tours are those of Ratti, and the two entities, Tours and Ratti TCP-601, are so inextricably intertwined as to be one. Ratti ran both entities on a cash basis out of his pocket until early in 1976 when separate bank accounts were finally established. The employees are interchangeable, being used both to serve Tours and to drive. We conclude that the assertion of the Commission staff, expressed on final brief, that when Ratti uses the personal pronoun "I", there is no differentiation in his mind between Tours and TCP-601, is well-founded. Tours pays Ratti to take out a tour and Fassett signs the check. Ratti then uses Fassett to drive for TCP-601, paying Fassett in cash. If Fassett uses his limousine (now listed under Ratti's TCP-601), Ratti pays Fassett an additional sum.

The Section 1031 requirement of the Public Utilities Code of Commission certification before passenger stage operation may commence cannot be evaded by the maladroit subterfuge of in-house chartering. The law requires passenger stage certification when the overall purpose of the complete enterprise is to offer and provide a sightseeing service over the public highways of this State both within and without a city between fixed termini or over a regular route for compensation; whether or not the compensation demanded is on an individual fare basis. Were this attempt at evasion accepted, it would mean that any individual who

could obtain a charter-party permit could merely set up another entity, or have a spouse or an associate set up the second entity, and have that second entity sell tours and assemble a group, thus doing by this ruse or subterfuge indirectly what is forbidden of a charter-party permittee, his agent, or broker,[29] rendering the passenger stage sections of the Public Utilities Code feckless, if not a nullity.

Furthermore, the assertion by defendants that they do not operate on a per capita basis, but that their fares are always based upon time and mileage factors, is not supported by the evidence and fails to withstand analysis. The Tours brochure, after recommending five passengers per tour group, states that "If you are traveling alone or your group is less than five we will arrange a full group before your departure, or base the price on an hourly rate of $20." (Emphasis added.) Looking again at Tour No. 3, the "Price per person" is stated to be $16. The evidence is uncontradicted that on February 4, 1976, February 8, 1976, and March 8, 1976, respectively, Bowen, Gantert and his wife, and Majewski, purchased a seat or seats at $16 per person and were taken on the purchased tour. Bowen and the Ganterts were conducted in Ratti's limousine; Majewski in a rented van. Apart from the driver there were seven individuals on each of the Bowen and Gantert tours; twelve on the Majewski tour. Neither Bowen nor the Ganterts received a refund nor was there any extension to their tours. Majewski received no refund although his tour, listed as of "approximately 4 hours", took about 5 hours. There was no representation to Majewski that this longer period was to compensate for the excess passengers over five, nor would it have been a pro-rata compensation for the extra seven passengers. Nor are we impressed - other than adversely - by the 24

29/ Section 5401 of the Public Utilities Code provides in part:

> "...it shall not be lawful for a charter-party carrier of passengers to directly or through his agent or otherwise, or for a broker, to contract, agree, or arrange to charge or demand or receive compensation for the transportation offered or afforded which shall be computed, charged, or assessed on an individual fare basis..."

individual vouchers entered into evidence as Exhibit 25, which purportedly "clearly indicated that different charges were made to different people depending upon the aforementioned factors which were considered by the applicant in determining the charter group cost." Of these vouchers, 15 relate to Tour No. 3. Of these 15, 2 vouchers are not probative in any way; one being a no charge, and another associated with an air discount. The remaining 13 vouchers indicate nothing which relates the number of persons in the alleged charter group, leaving only speculation to determine the basis for the voucher prices. However, the vouchers for the No. 3 tour indicate per individual charges for the $16 tour ranging from $8 to $34. Indeed, 2 vouchers listed 8 persons on each (3 in excess of the recommended tour group); on one the per person charge was $16; on the second, $34 per person. Eight of the remaining vouchers were for "special" tours. On one 2 persons were transported from the Hilton Hotel to the airport; another showed 6 persons charged $30 (or $5 each) for a 1-hour tour listed on the brochure for $4 per person. Two vouchers were no charge. One voucher provided a 1½-hour tour for 1 adult for $30; another evidenced that 2 persons were charged $20 (or $10 each) for the $4 1-hour city tour; another that 6 persons were charged $30 (or $5 each) for the same $4 city tour. Others were unexplained. We conclude that many of these "random" vouchers on the surface would appear to substantiate Gray Line's assertion that at times Tours charges whatever the traffic would bear.

However, even more damaging to defendants' time-mileage factor assertions was the complete inability of defendants, despite repeated requests and asserted efforts made during the course of the hearings, to discover and produce corroborative documentation, although General Order No. 98-A, binding upon Ratti as a TCP operator, requires a TCP operator to maintain specific records. All that was presented were Ratti's hazy, vague, varied, and approximate estimates of group costs, and statements of refunds made in some cases of unspecified small amounts, or tour extensions left to the discretion of the driver - with the guideline to make sure everyone was satisfied. Contrasted to this self-serving evidence from Ratti, where we had tour participants testify,

the evidence was always that the tour was at the per person rate quoted in the brochure without the application of any refund or extension gimmickry. We cannot conclude that meaningful time-mileage factors were applied. It is clear Ratti was all things to this venture and that he determined tour fares on an individual fare basis. It is one thing for a group to be charged a time and mileage based flat rate and for them to apportion this cost amongst themselves, and it is quite another for the carrier to make the apportionment and then to assess the charges individually (In re Crary (1966) 65 CPUC 545).30/ In the instant proceeding no matter how we view the evidence we return to the same result - each tour participant is required to pay Tours on an individual fare basis. Before issuance of the cease and desist order Cochran and Blakesley were both charged the brochure price of $16 for Tour No. 3. After the cease and desist order Bowen, the Ganterts, and Majewski were also charged the brochure price of $16 for the same tour. The tour "group" put together by Tours varied in size, but the price did not per individual.

From the evidence we must conclude that defendants, with some small variations and innovations which cannot affect the conclusions we reach, have offered and provided for compensation, a sightseeing tour service on a regular basis over routes essentially duplicative of those for which another passenger stage corporation has been certified, employing in part an in-house fiction using Ratti's TCP-601, but for the most part utilizing unauthorized rented vans driven by defendants or their employees, and that these operations after November 18, 1975, as before, meet the tests of a passenger stage corporation as set forth in Section 226 of the Public Utilities Code.

30/ The instant factual situation is not that in In re Crary (1966) 65 CPUC 545, where defendants were operating as a special events broker utilizing a limited clientele to set up trips to specific events such as baseball games, movies, and concerts, using bona fide charter-party carriers on routes where no passenger stage corporation had been granted a certificate of public convenience and necessity.

It follows that defendants' operation after November 18, 1975, as a passenger stage corporation is violative of our cease and desist order. The defenses urged to justify the operation utterly fail to excuse defendants' disobedience of the cease and desist order. For almost all this period defendants have been served by counsel and if there were questions relative to the meaning or extent of the order it was their responsibility to seek clarification rather than embark upon a wilful and deliberate flaunting of that order. For these violations they are guilty of contempt and will be punished accordingly.

Before addressing the sanctions to be meted out to the contemnors, we turn to two final contentions of the defendants. First, defendants assert that Gray Line by these complaints is selectively seeking enforcement of the Public Utilities Code against only the defendants, and that this involvement of this Commission, a state agency, to enforce the law constitutes an unconstitutional selective enforcement denying them equal protection of the laws. However, their recitations of cases are ample in rhetoric but sparing in details of purposeful invidious discrimination by this Commission. As was stated by the California Supreme Court in Murguia v Municipal Court (1975) 15 C 3d 286, at 297:

> "As these authorities teach, an equal protection violation does not arise whenever officials 'prosecute one and not [another] for the same act' (cf. People v Montgomery, supra, 47 Cal App. 2d 1, 13, 117 P 2d 437); instead, the equal protection guarantee simply prohibits prosecuting officials from purposefully and intentionally singling out individuals for disparate treatment on an invidiously discriminatory basis."

In Murguia the court discussed the fundamental distinction between "deliberate invidious discrimination" and "non-arbitrary selective enforcement" indicating that it is only the former that is proscribed by the equal protection clause. It quoted Oyler v Boles (1962) 368 US 448 as follows:

> "[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or arbitrary classification. Therefore grounds supporting a finding of equal protection were not alleged." (15 C 3d at 456; emphasis added.)

Commission records evidence contempt actions being sustained against airlines (Air Cal. v Pac. Southwest Airlines (1969) 70 CPUC 218), water companies (Ben Smits (1967) 66 CPUC 791), railroads (Southern Pacific Co. (1968) 68 CPUC 245), radio paging utilities (Decision No. 83298 dated August 12, 1974 in Case No. 9651), and individuals operating as passenger stage carriers without authority (Decision No. 86046 dated June 29, 1976 in Case No. 9385). Unlike the situation in Murguia, here defendants have failed to show any facts or affidavits tending to evidence a planned pattern of discriminatory enforcement of the Public Utilities Code against the defendants.

Second, we address the contention of defendants that here they have a constitutional right to a trial by jury on the contempt charge. This demand, timely made, was rejected by our Administrative Law Judge during the hearing. We find his ruling to be correct and adopt it as our own. However, in view of the first impression aspect of their demand and recent developments in this regard, a review of the issue is called for.

We note that the offense of contempt traces back under our English legal heritage to offenses against the sovereign and his courts. Modified, today in this country contempts are offenses against the state; a despising of the authority, justice, or dignity of a court. A violation of a law does not, per se, constitute contempt, but as relevant here, violation or disobedience of an order issued by a court, a judicial officer, or a body such as this Commission, having the requisite jurisdiction and exercising judicial functions[31] is contempt.

The contempt power is exercised by proceeding against one who fails to comply with an order for two purposes: (1) to vindicate the dignity of the public interest by punishment of contemptuous conduct, and (2) coercion to compel a contemnor to do what the law requires of him. While the distinctions today between criminal and civil contempt are frequently hazy, it may generally be said that where the primary

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31/ Under the Constitution and statutes of this State the Public Utilities Commission is possessed of broad and comprehensive powers; it has wide administrative powers, legislative power, such as fixing of rates of public utilities, and judicial powers. (People v Western Air Lines, Inc. (1954) 42 C 2d 621, at 630.)

character and purpose of the proceeding is deterrent, seeking to preserve the court's authority and to punish for disobedience of an order, the contempt proceeding is criminal; where the primary character and purpose are remedial, looking toward the future to provide a remedy and to coerce compliance with an order, the contempt proceeding is civil. Either class of contempt necessarily including an element of offense against the authority, justice, or dignity of a court, it is therefore said that any contempt is at least quasi-criminal in nature and the accused should possess most of the substantial rights of a person accused of a crime, including the presumption of innocence, the burden of proving the alleged guilt beyond a reasonable doubt, and the application of the rules of evidence governing a criminal trial.

The power to punish for contempt, while generally regarded as being an essential and inherent element in judicial authority, is also a power granted by the federal and state constitutions, and in some jurisdictions including California, by statute. Although Article III, Section 2 of the United States Constitution, provides in part that "the trial of all Crimes, except in Cases of Impeachment, shall be by jury", and the Sixth Amendment provides in part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed", and the Fifth and Fourteenth Amendments forbid both the federal government and the states to deprive any person of "life, liberty, or property without due process of law", in a long line of cases extending down to 1968, the United States Supreme Court had consistently held that criminal and civil contempt prosecutions were outside the jury trial guarantees. Then, in Bloom v Illinois (1968) 391 US 194, the court reexamined the broad rule that all criminal contempts could be constitutionally tried without a jury. Noting the potential for abuse in exercise of summary power to imprison for contempt, the court held that since serious criminal contempts are so nearly like other serious crimes they too are within the constitutional guarantees, and that only petty contempts may be tried without a jury. Without defining limits to petty offenses,

the court held that alleged criminal contemnors must be given a jury trial unless the legislature has authorized a maximum penalty within the petty offense limit, or where the legislature has imposed no maximum penalty, the penalty imposed by the court is within that limit.[32] In a companion case to Bloom, Dyke v Taylor Implement Co. (1968) 391 US 216, the court again held that an alleged criminal contemnor in state prosecutions must be given a jury trial unless the State Legislature has authorized a maximum penalty within the petty offense limit, or, if the legislature has made no judgment about the maximum penalty that can be imposed, unless the penalty actually imposed is within that limit. Still not defining limits on "petty" punishments, the court borrowed from an earlier case to find "it is clear that a six month sentence is short enough to be 'petty'."[33]

32/ In Bloom, petitioner, his timely motion for a jury trial being denied, was convicted on a criminal contempt charge for filing a spurious will for probate. Illinois had no maximum punishment for criminal contempt convictions. Bloom was sentenced to 24 months, a conviction affirmed by the Illinois Supreme Court. The U.S. Supreme Court, noting the absence of a legislatively imposed maximum penalty, looked to the sentence actually imposed as the best measure of the seriousness of the offense. Having found in Duncan v Louisiana (1968) 391 US 145 that "a crime punishable by two years in prison is...a serious crime and not a petty offense", the Court reversed and remanded for a jury trial.

33/ In Dyke, the maximum penalty that Tennessee statutes permitted the chancellor to impose was ten days in jail and a fine of $50. Relying upon its finding in Cheff v Schnackenberg (1966) 384 US 373, that a six-month sentence is short enough to be "petty", the Court found that petitioners had no federal constitutional right to a jury trial.

Following Bloom and Dyke, the Supreme Court's decisions moved toward a demarcation line between serious and petty contempts. In Codispoti v Pennsylvania (1974) 418 US 506, the Court held that where either a penalty over six months imprisonment is authorized by statute, or where the penalty actually imposed exceeds six months, the contemnor must be afforded a jury trial. In Muniz v Hoffman (1975) 422 US 454, the Court addressed the situation where the imposition of a fine unaccompanied by imprisonment may require a jury trial. While noting the Court's past reference in relating to a demarcation line between serious and petty to the relevant rules and practices followed by the federal and state regimes, including the disposition of petty offenses under 18 USC Section 1(3) which defines petty offenses as those crimes "the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both", the court in referring to the $500 limit, stated it "accorded it no talismanic significance" and affirmed a $10,000 fine against a labor union for violation of an injunction. The court stated that it was not tenable to argue that the possibility of a $501 fine would be a serious risk to a large corporation or a labor union. Finally, in Douglas v First National Rlty. Corp. (1976) 543 F 2 894, the Court of Appeals for the District of Columbia concluded that in searching for the demarcation line between serious and petty offenses where the punishment is a fine, one must consider the kind of contemnor involved, finding that a $5,000 fine against an individual contemnor, absent a jury trial, cannot be assessed. Declining to remand for a jury trial, the Court adjusted the fine downward to $500 and affirmed the District Court.

In California both the Penal Code and the Code of Civil Procedure contain provisions defining certain acts which they respectively denounce as contempts of court (see Sections 166 and 1209, respectively). Essentially speaking, contempts found under the Penal Code are misdemeanors, and therefore criminal, whereas contempts found under the Code of Civil Procedure are civil offenses; a codification distinction which apparently serves to elude the technical theoretical distinction between punitive, i.e., criminal in nature, and remedial, i.e., civil in nature, classifications of contempt.

In Bridges v Superior Court (1939) 14 C 2d 464, the California Supreme Court, in reviewing a contempt proceeding brought under Sections 1209 et seq. of the Code of Civil Procedure, wherein the petitioner had contended he had been deprived of his constitutional right to a trial by jury, in part commented as follows: "A respondent in contempt proceedings is not entitled to a trial by jury except where a jury trial is expressly provided for by statute, and then only in the particular cases to which the statute applies". The court, after noting that "It has been the universal practice in this state from its earliest history to try proceedings in contempt by the court without a jury", subsequently noted that "The power of the court to punish summarily for contempt has existed from the earliest period of the common law and is not within the application of constitutional provisions guaranteeing a trial by jury, or providing against depriving persons of their liberty without due process of law."

In Pacific Telephone and Telegraph Co. v Superior Court (1968) 72 C Rptr 177, a decision contemporary with Bloom and Dyke, the Court of Appeal, in issuing a writ of prohibition restraining a lower court from enforcing its order that a contempt proceeding brought under the Code of Civil Procedure be tried by a jury, concluded that Bloom and Dyke supported Bridges, and held that contempt proceedings brought under the Code of Civil Procedure as distinguished from contempt proceeding prosecuted under the Penal Code, are not criminal actions or proceedings, but are a special proceeding, criminal in character, and are not for punishment of an offense against the State, but are intended to implement inherent power of court to conduct business of court and to enforce its lawful orders. Noting that Section 1218 of the Code of Civil Procedure provides a maximum fine of $500, or 5 days in prison, or both, the Court concluded that "measured by Duncan, Bloom and Dyke, there is no doubt that a contempt charged under the provisions of Section 1209 of the Code of Civil Procedure is a petty offense and that the person so charged has no federal constitutional right to a jury trial."

More recently, in Re Morelli (1970) 11 CA 3d 819, at 850, another Code of Civil Procedure contempt matter, the Court of Appeal, noting that the contempt proceeding at issue was quasi-criminal in nature, and that the maximum penalty was limited to 5 days in jail and a $500 fine, concluded "This placed the matter, under constitutional considerations, within the 'petty' classification", and denied a petition for writ of habeas corpus to secure release of one found guilty of contempt for failing to appear at a deposition proceeding. Since Morelli, its holdings that contempts charged under the Code of Civil Procedure are petty offenses and that defendants therein have no constitutional rights to a jury trial, have been relied upon in Hawk v Superior Court (1974) 116 C Rptr 713 (see note 25), and in Inter. Molders & Allied Wkrs. v Superior Court (1977) 138 C Rptr 794, at 805.

From the foregoing it is clear under the law that where a contempt adjudication carries a statutory maximum penalty of six months or less imprisonment, a fine of $500, or both, the contempt comes within the "petty" classification and the contemnor is not entitled to a jury trial. Proceeding as we do here under the provisions of Section 2113 of the Public Utilities Code, we have jurisdiction to punish "every public utility...or person which fails to comply with any part of any order...of the commission...for contempt in the same manner and to the same extent as contempt is punished by courts of record." Section 1209 of the Code of Civil Procedure in part provides that "disobedience of any lawful judgment, order, or process of the court" is a contempt of the authority of the court. Section 1218 of the Code of Civil Procedure provides in part that if the contemnor be adjudged guilty of the contempt, "a fine may be imposed upon him not exceeding five hundred dollars ($500), or he may be imprisoned not exceeding five days, or both."

Two matters remain before proceeding to the findings, conclusions, and order in this matter.

Defendant Kavanaugh, the Commission was informed during the hearing on April 6, 1976, had not been involved actively in the Tours partnership, or personally, for approximately 2 months preceding that day of hearing. We were informed that on or about February 17, 1976

Kavanaugh had removed himself from the partership itself, although he had not executed the necessary documents to finalize that withdrawal as of April 6, 1976. On February 17, 1976, Kavanaugh, as well as Ratti and Fassett, was represented in hearing by counsel Natali and all defendants were advised from the bench by ALJ Weiss that a formal written Order To Show Cause In Re Contempt would issue as of that day, notice being waived by counsel for defendants. Thereafter, Natali advised Kavanaugh of the general implications of this order. All defendants were formally served personally except for Kavanaugh who was constructively served by notice to his attorney after personal service could not be achieved as a consequence of Kavanaugh's disappearance. Accordingly, Kavanaugh will not be held responsible for events and actions of the Tours partnership or personally after February 17, 1976.

The second remaining matter involves consideration of the financial abilities of the defendants. Ratti, Fassett, and Kavanaugh are the partners who constitute Tours, and as such they hold very substantial undivided assets in the partnership name, stated under oath at various points in the hearing to be $40,000 in cash and $15,000 in a bank. The venture has been very successful financially, as the applicants during the hearing on Application No. 55877 repeatedly asserted throughout the extended hearing, and nothing has been submitted since to this Commission to evidence any change in the applicants' financial ability to undertake and sustain the very substantial investments which would be required to permanently operate such a passenger stage operation were a certificate to be granted by this Commission. Despite allegations thinly denied or evaded that Ratti, for one, is "judgment proof" by virtue of holding no assets in his own name, we conclude from the entirety of this record that all three defendants are not indigents. In contempt cases imprisonment to enforce collection of fines is one option open to this Commission, and it may properly be used where there is an ability to pay and a contumacious offender (In re Siegal (1975) 45 CA 3d 843 at 847). Therefore, the "Hobson's choice" referred to by the Court in In re Antazo (1970) 3 C 3d 100 at 104) is not present here, and there would be no invidious discrimination

on the basis of wealth consideration in violation of the Equal Protection Clause of the Fourteenth Amendment in our providing judgment for additional punishment in the form of imprisonment for nonpayment of a fine.

Order To Show Cause In Re Contempt - Findings

1. Based upon allegations and verified statements contained in Case No. 9993 filed October 17, 1975 by Gray Line that defendants Tours, Ratti, Fassett, and Kavanaugh were holding out to provide, and in fact providing, passenger stage transportation for the general public between San Francisco and Muir Woods and return without having obtained a certificate of public convenience and necessity to do so from this Commission, all assertedly in violation of Section 1031 of the Public Utilities Code, on November 18, 1975 this Commission issued Decision No. 85140 wherein defendants Tours, Ratti, Fassett, and Kavanaugh were ordered immediately to cease and desist from operation as a passenger stage corporation except as pursuant to certification by this Commission, and setting the issue for hearing on December 16, 1975 in San Francisco. Said order has never been set aside, canceled or revoked, and is still in force and effect.

2. A certified copy of Decision No. 85140 was served on November 18, 1975 by registered mail upon each of the defendants at San Francisco, and the defendants, each of them had personal knowledge of the making of such order and its contents.

3. On December 8, 1975 defendants requested an ex parte stay of the cease and desist order. The following day, December 9, 1975, ALJ Weiss, concluding that inasmuch as defendants had no operating authority to offer or provide passenger stage authority, and that no showing of harm to any bona fide legitimate interest of defendants had been made, denied the request, ordering the issue to hearing on December 16, 1975.

4. Hearing on the cease and desist order, consolidated with Application No. 55877 and Case No. 9993, began December 16, 1975 and after one day was necessarily continued to subsequent dates.

5. During the hearing, on December 16, 1975, defendants were warned by the ALJ that the provisions of the cease and desist order would continue until a decision was reached by the Commission, and that any further operations would be viewed adversely. Additionally, defendants' attorney was directed to advise his clients of potential consequences of disobedience.

6. On February 13, 1976 there was filed with this Commission the application and affidavit of Mulpeters, in which in substance it was alleged that defendants Tours, Ratti, Fassett, and Kavanaugh, notwithstanding the provisions of the cease and desist order contained in Commission Decision No. 85140, and with full knowledge of the contents and provisions thereof, subsequent to the date of that order, and notwithstanding the admonitions of ALJ Weiss during the public hearing December 16, 1975 - repeated at the public hearing December 29, 1975 - warning defendants against continued unauthorized service, failed and refused to comply with said cease and desist order in that defendants continued to operate passenger stage services ordered discontinued in Decision No. 85140. The affiant further alleged and identified admissions on the hearing record made by defendant Fassett of continued operation between November 18, 1975 and December 16, 1975. Affiant also submitted additional affidavits of other individuals alleging therein facts supporting allegation of continued unauthorized passenger stage service by defendants on both February 4, 1976 and February 8, 1976.

7. Upon said application and affidavits for an Order to Show Cause being filed by Mulpeters, ALJ Weiss on February 17, 1976 regularly made and issued an order requiring defendants to appear on April 6, 1976 in the Commission courtroom in San Francisco, and then and there to show cause, if any each had, why each defendant should not be found guilty and punished accordingly for wilfully disobeying the order of this Commission.

8. Said Order to Show Cause, together with a copy of the application and affidavits upon which it was based, was personally served upon defendants Ratti and Fassett on February 19, 1976, and

constructively served upon defendant Kavanaugh by substituted service upon his attorney of record in this proceeding, Natali, on March 15, 1976; personal service upon Kavanaugh being impossible in that defendant Kavanaugh had disappeared leaving no forwarding address.

9. From inception in 1975 until on or about February 17, 1976 Tours was a partnership owned, controlled, operated, and managed by partners Ratti, Fassett, and Kavanaugh. On or about February 17, 1976, Kavanaugh ceased active participation in the affairs of the partnership, and thereafter partners Ratti and Fassett conducted its affairs.

10. Tours possesses no certificate authority or any other operating authority from this Commission, although in August 1975 Tours applied for a certificate of public convenience and necessity to operate as a passenger stage corporation. This application, No. 55877, is still pending.

11. In early to mid-1975, and thereafter, Tours caused to be published and distributed a brochure of its services listing four regularly offered sightseeing tours; each tour description being followed by legend "Price per person", and listing an individual price for that tour.

12. One of the four tours listed in the Tours brochure was Tour No. 3, a comprehensive sightseeing tour to various points of interest in the city of San Francisco and on a route between San Francisco, Sausalito, and return, with a "Price per person" listed at $16.

13. Tour No. 3, embracing a route extending more than two percent beyond the limits of the city and county of San Francisco, is within the jurisdiction of this Commission.

14. During the period between November 18, 1975 and December 16, 1975, defendants Tours, Ratti, Fassett, and Kavanaugh operated or caused to be operated limousines belonging to one or more of the partners and/or rented vans, as common carriers, for compensation, over a regular route on the public highways of this State between San Francisco, Sausalito, Muir Woods, and return, soliciting passengers on an individual fare basis, and by such operation regularly conducted sightseeing tours over routes certified to another passenger stage corporation.

15. On February 4, 1976 defendants Tours, Ratti, Fassett, and Kavanaugh operated or caused to be operated a Cadillac limousine bearing California License No. 07183X belonging to Ratti, as a common carrier, for transportation over the public highways of this State between San Francisco, Muir Woods, Sausalito, and return, of Bowen, having charged and collected an individual fare in the amount of $16 from Bowen. There were six other passengers transported on the tour with Bowen. The sightseeing tour was No. 3.

16. On February 8, 1976 defendants Tours, Ratti, Fassett, and Kavanaugh operated or caused to be operated a Cadillac limousine bearing California License No. 07183X belonging to Ratti, as a common carrier, for transportation over the public highways of this State between San Francisco, Muir Woods, Sausalito, and return, of Mr. and Mrs. Gantert, having charged and collected individual fares in the amount of $16 each from the Ganterts. There were seven passengers transported on the tour. The sightseeing tour was No. 3.

17. On March 8, 1976 defendants Tours, Ratti, and Fassett operated or caused to be operated a Plymouth Voyager van bearing California License No. 856 NVI owned by the Morris Plan of California, registered to Aero Rent-A-Car, Inc., and rented by Ratti, as a common carrier for transportation over the public highways of this State between San Francisco, Muir Woods, Sausalito, and return, of Majewski, having charged and collected an individual fare in the amount of $16 from Majewski. Majewski is a Commission employee who utilized the pseudonym of Joe Schillone in this instance. There were eleven other passengers transported on the tour with Majewski. The sightseeing tour was No. 3.

18. On October 23, 1975 defendant Ratti obtained from this Commission an annual charter-party carrier of passengers permit, Permit No. 601.

19. Defendants Tours, Ratti, Fassett, and Kavanaugh thereafter wrongfully utilized Ratti's TCP-601 as a subterfuge in attempting to give a cover of legitimacy to Tours' operations, and in attempting to evade and subvert the requirements of Section 1031 of the Public Utilities Code for passenger stage certification before operation.

20. Defendant Ratti dominates Tours, and so utilizes his TCP-601 that the operations of the two entities, Tours and TCP-601 are indistinguishable and are considered one operation.

21. Notwithstanding the cease and desist order of this Commission contained in Decision No. 85140 issued November 18, 1975, and with full knowledge and notice of said order and of the contents thereof, and at times subsequent to the effective date thereof, defendants Tours, Ratti, Fassett, and Kavanaugh have wilfully failed and refused to comply with the terms thereof, and have continued to engage in business as a passenger stage corporation for compensation, operating or causing to be operated a passenger stage, or stages, as defined by Section 225 of the Public Utilities Code, over the public highways of the State of California, to wit: between San Francisco, Sausalito, Muir Woods, and return, providing sightseeing transportation particularly:

(1) During the period between November 18, 1975 and December 16, 1975; and

(2) On the 4th day of February 1976; and

(3) On the 8th day of February 1976; and

(4) On the 8th day of March 1976;

without first having obtained therefor from this Commission a certificate declaring that public convenience and necessity requires such operation as required by Section 1031 of the Public Utilities Code.

22. Each and all of the acts mentioned in the foregoing paragraph Sections 1(1), 1(2), 1(3), and 1(4), inclusive, are in violation of Decision No. 85140 of this Commission; that the failure and refusal of defendants Tours, Ratti, Fassett, and Kavanaugh, (except as to Kavanaugh in the instance of paragraph Section 1(4)), to cease and desist from performing the matters and things set forth in paragraph Sections 1(1), 1(2), 1(3), and 1(4), inclusive, and in each of said paragraphs, were and are and was and is in violation and disobedience of said Decision No. 85140; that all of said violations of such decision were and each of them was committed with full knowledge and notice thereof upon the part of said defendants Tours, Ratti, Fassett, and Kavanaugh, (except as to Kavanaugh in the instance of paragraph Section 1(4)); that said order

of the Commission was at all times mentioned herein, and in said paragraphs Section 1(1), 1(2), 1(3), and 1(4), inclusive, of said conclusions, and in each of said paragraph sections, and now is, in full force and effect; that said defendants Tours, Ratti, Fassett, and Kavanaugh have violated said order of said Commission with full notice and knowledge of the contents thereof and with the intent on their part to violate the same; and that at the time said Decision No. 85140 was rendered and at the time of the effective date thereof, said defendants Tours, Ratti, Fassett, and Kavanaugh were able to comply and have been at all times since and were at the time of said violations and each of said violations of said decision, able to comply therewith, and with the terms thereof.

23. Proceeding as we do here within the jurisdiction given this Commission by the provisions of Section 2113 of the Public Utilities Code, utilizing Sections 1209(5) and 1218 of the Code of Civil Procedure, this contempt proceeding under federal and state constitutional considerations is within the "petty" classification and under California law is considered a civil offense proceeding.

24. Defendants have failed to show any facts or produce any affidavits tending to show a planned case of discriminatory enforcement of the Public Utilities Code against themselves.

25. Ratti, Fassett, and Kavanaugh are not indigents.

Order To Show Cause In Re Contempt - Conclusions

1. The failure of said defendants Tours, Ratti, Fassett, and Kavanaugh to comply with the cease and desist order contained in Decision No. 85140 of this Commission, and their continuing to operate as a passenger stage corporation and as a common carrier of passengers, as aforesaid, is in contempt of the Public Utilities Commission of the State of California and its order.

2. Defendants Tours, Ratti, Fassett, and Kavanaugh have no constitutional right to a jury trial in this contempt proceeding.

3. Defendants Ratti, Fassett, and Kavanaugh should be punished for their wilful contempts of this Commission.

Case No. 10091 - Discussion

By Section 5378 of the Public Utilities Code, this Commission is vested with authority to cancel, revoke, or suspend a permit to operate as a charter-party carrier of passengers for, among other things, violation of any of the provisions of the Passenger Charter-party Carriers' Act, as well as for violation of any order or requirement of the Commission pursuant to the Act. Reasonable fitness to conduct a charter-party carrier operation is requisite to continued possession of such authority. In Decision No. 84731 in Application No. 55299 dated August 5, 1975, the Commission commented in this regard as follows:

> "In the Commission's view 'reasonable fitness' connotes more than mere adequacy or sufficiency in training, competency, or adaptability to the appropriate technical and vocational aspects of the service to be rendered. It also includes an element of moral trustworthiness, reliance, and dependability. The standards must be based on the interests of the public as distinguished from the interests of the applicant, and the burden rests with the applicant to demonstrate that he is reasonably fit to be entrusted with a renewal of Commission authority."

It is also a well-established principle of this Commission that operating authority will not be granted upon a showing resting upon unlawful operations (20th Century Delivery Service (1948) 48 CPUC 78, 84), although exceptions may be carved out where the public interest so requires (Holiday Airlines (1966) 66 CPUC 537, 542-43).

In the instant complaint the overwhelming weight of the credible evidence reflects a fundamental underlying contempt for both the law and this Commission on the part of Ratti. This conclusion is amply discussed in other portions of this consolidated matter and will not be repeated here. Elsewhere herein we also concluded that because of the very persuasive control and influence of Ratti in the management control and operations of Tours, and the patently unlawful utilization of his charter-party carrier permit as a subterfuge to provide passenger stage services in a territory already served by a certificated carrier, the two entities - Tours and Ratti TCP-601 - are in reality but one entity.

The evidence, in part exemplified by the unrebutted testimony of Cochran and Blakesley, shows unlawful operation, whether measured by either passenger stage or charter-party carrier law, in September 1975, albeit such unlawful operations are shielded to some degree from punitive retribution now by possible earlier staff indiscretions. However, any possible excuse ended and this flimsy shield disappeared after issuance November 18, 1975 of our cease and desist order contained in Decision No. 85140. And once the issues were joined in hearing, continued operation can only be construed as wilful defiance. But Ratti, in association with his partners, chose to continue the passenger stage operation, under the guise of economic necessity initially, and thereafter under the developed artifice of using Ratti's charter-party carrier permit. However, the evidence provided by Bowen, Gantert, and Majewski of sightseeing tour transportation being provided each for compensation demanded and received on an individual fare basis, as discussed at length in Case No. 9993 and the Order To Show Cause In Re Contempt discussions, demonstrates at the very least extensive operation of Ratti's TCP-601 in violation of Section 5401 of the Public Utilities Code.[34] Standing alone, such persistent and deliberate flaunting of the clear provisions of the law under which he asserts he operates, is sufficient reason to cancel, revoke, or suspend his charter-party carrier permit under Section 5378 of the Public Utilities Code. But there is more.

34/ "Charges for the transportation to be offered or afforded by a charter-party carrier of passengers shall be computed and assessed on a vehicle mileage or time of use basis, or on a combination thereof, which charges may vary in accordance with the passenger capacity of the vehicle, or the size of the group to be transported, but it shall not be lawful for a charter-party carrier of passengers to directly or through his agent, or otherwise, or for a broker, to contract, agree, or arrange to charge or to demand or receive compensation for the transportation offered or afforded which shall be computed, charged or assessed on an individual fare basis...." (Section 5401.)

After application, but before receiving his charter-party carrier permit on October 23, 1975, Ratti operated. As discussed elsewhere, we do not believe his at times asserted confusion over when he could commence operation. But he operated, using not only the single limousine for which he had sought authorization by his charter-party application, but also using unauthorized daily rental maxi-mini vans, to transport his clients. Any operation, utilizing any vehicle, before issuance of the permit violated Section 5371 of the Public Utilities Code.[35/] After issuance of his permit to operate, a permit limited to the use of a single named limousine, Ratti continued to operate using rented vans. Ratti was aware he had no authorization to use rental vans. His October 23, 1975 permit contained the following condition, among others, to his operation:

> "(3). . . No vehicle shall be operated by said carrier unless it is named in the carrier's most recent application for authority on file with this Commission."

Thereafter, at the end of the listed conditions there is typed the vehicle or vehicles authorized, stating the year, make, type, ownership status, and license number of each vehicle. Furthermore, as evidence of this knowledge is the fact that on December 30, 1975, Ratti applied to Hunt to amend his permit to add two additional named limousines and unspecified rental vehicles. Although the two additional named limousines were approved Ratti's request to utilize unspecified rental vehicles was orally denied. We credit Hunt's version of what happened to the amendment application, including Gibson's instruction "why not use these reasons to tell Mr. Ratti 'no'", and referring to Section 5375

35/ "No charter-party carrier of passengers excepting transit districts, transit authorities or cities owning and operating local transit systems themselves or through wholly owned nonprofit corporations shall engage in transportation services made subject to this chapter without first having obtained from the Commission a certificate that public convenience and necessity require such operation, except that certain specific transportation services as defined in Section 5384 may be conducted under authority of an annual permit issued by the Commission." (Section 5371 and Section 5384 provides for permits under (b) to "Carriers using only vehicles under 15-passenger seating capacity and under 7,000 pounds gross weight.")

of the Public Utilities Code as authority to attach conditions. Accordingly, we find that on or about January 19, 1976, Ratti was told by Hunt that use of additional rental vehicles had been denied. Furthermore, Ratti also learned when he received his amended permit about February 24, 1976 that his authority was limited to the three limousines named as authorized at the foot of the first page of the permit. Lastly, in this regard, Krug's April 13, 1976 letter to Ratti clearly placed Ratti on notice not to use unauthorized vehicles. Despite the fact of this notice Ratti continued to operate vans in his charter-party carrier business. On March 8, 1976 Majewski was taken on his tour in a Voyager 12-passenger van rented to Ratti by Aero Rent-A-Car, Inc. On July 14, 1976 Tours was observed using a number of vans, and Ratti confirmed in his testimony that at this time he was utilizing six to eight rented maxi-vans daily in his TCP activities related to Tours.

Ratti has also violated the provisions of Section 5385 of the Public Utilities Code which prohibit operation of any vehicle without the distinctive identifying symbol prescribed by the Commission. General Order No. 98-A, received by Ratti October 23, 1975 when he received his permit clearly delineates the requirements, including size and positioning of these symbols on <u>both</u> passenger stage and charter-party carrier vehicles. Bowen, Gantert, and Majewski all testified that they did not see any identifying symbols on the vehicles used to transport them on each's tour. Yet Bowen and Gantert were transported on a vehicle authorized to Ratti for charter-party operation. Majewski was transported on a rented van used by Ratti in his TCP operation with Tours. The photographs of the van used in the Majewski transportation, photographs taken while on the tour, fail to show any symbols on the rear or side of the van (see Exhibits Nos. 16 and 17).

Part 13 of General Order No. 98-A sets forth the Commission requirements that charter-party carriers must keep and maintain records of all transportation provided, including dates, mileage, route, charge computation, hours, itinerary, driver, etc.[36] Ratti was unable to produce any such records during the course of the hearing although he was given ample opportunity to do so. His explanation was that while they were made, they were not retained. In this same regard we must note the conduct of his operation without regard for either federal or state statutes pertaining to withholding taxes and social security deductions from wages paid drivers. Ratti employs drivers but pays flat sums in cash for these services performed without withholding taxes or payment of social security taxes. These practices are violations of Title 26 U.S.C.A., Sections 3101 et seq., and 3402, as well as Section 18806 of the California Revenue and Taxation Code. This blithe disregard for authority and law appears to be characteristic of the haphazard approach to business which characterizes Ratti. As noted by the Commission staff, he conducts all his business in a haphazard fashion and when called to account throws up a blizzard of excuses, pleading ignorance of requirements or law, mistake of understanding, or pressure of business. It would be grossly unfair to those who do comply with the law and regulations to allow Ratti to operate as a law unto

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36/ And Section 5411 of the Public Utilities Code provides:

"Every charter-party carrier of passengers and every officer, director, agent, or employee of any charter-party carrier of passengers who violates or who fails to comply with, or who procures, aids, or abets any violation by any charter-party carrier of passengers of any provision of this chapter, or who fails to obey, observe, or comply with any order, decision, rule, regulation, direction, demand, or requirement of the Commission, or of any operating permit or certificate issued to any charter-party carrier of passengers, or who procures, aids or abets any charter-party carrier of passengers in its failure to obey, observe, or comply with any such order, decision, rule, regulation, direction, demand, requirement, or operating permit or certificate, is guilty of a misdemeanor and is punishable by fine of not more then five hundred dollars ($500) or by imprisonment in the county jail for not more than three months, or both."

himself, deriving an unfair competitive advantage over other carriers which accept and adhere to the constraints of regulation designed to protect the general public. As noted initially, "reasonable fitness" includes an element of moral trustworthiness, reliance, and dependability; standards based on the interests of the public, not the carrier. We agree with our staff that Ratti has utterly failed to evidence reasonable fitness and we will immediately revoke TCP-601. Failure to do so would result in Commission regulations becoming a mockery and serve as an example whereby those who flaunt Commission rules are rewarded, and those who comply with Commission rules are penalized. This would not serve the public interest and would, indeed, impair our ability to administer responsible regulation.

Case No. 10091 - Findings

1. Defendant Ratti dominates Tours, and so utilizes his TCP-601 permit that the operations of the two entities, Tours and Ratti TCP-601, are indistinguishable and are considered one operation and entity.

2. Defendant Ratti provided charter-party carrier service in association with Tours before obtaining his charter-party carrier permit, thereby violating Section 5371 of the Public Utilities Code.

3. Defendant Ratti received his charter-party carrier permit on October 23, 1975, which permit authorized charter use of one specifically owned limousine. His charter-party carrier permit, on February 24, 1976, was amended to authorize use of two additional specified limousines.

4. Defendant Ratti was informed orally, on or about January 19, 1976, that permission to utilize rented vans was denied, and his amended permit to add two additional specified limousines was issued to him on February 24, 1976.

5. At no time has Tours held any Commission authority or permit authorizing operation of any passenger carriage.

6. By providing charter-party carrier service to Bowen, Gantert, and Majewski in February and March 1976 directly or through the agency of Tours, or as a broker, for compensation demanded, received, and computed on an individual fare basis, defendant Ratti violated Section 5401 of the Public Utilities Code.

7. By providing charter-party carrier services to Majewski on March 8, 1976 utilizing an unauthorized rented van, after having been informed that his application to utilize rented vehicles had been denied, defendant Ratti wilfully violated the express conditions contained in his permit, and by so doing violated Section 5401 of the Public Utilities Code.

8. By utilizing rented vans daily in his charter-party carrier operation associated with the Tours operation on July 14, 1976, and at other times thereabouts, defendant Ratti deliberately disregarded the oral notice of about January 19, 1976 provided by Hunt, the written advisement provided by his amended permit dated February 24, 1976, and Krug's letter of April 13, 1976 cautioning against use of unauthorized vehicles.

9. By operating vehicles in charter-party carrier service without the distinctive symbolization required by Section 5385 of the Public Utilities Code, and delineated explicitly in Commission General Order No. 98-A received by Ratti earlier, defendant Ratti violated Section 5385 when he utilized limousines and a rented van all without such distinctive symbolization in transporting Bowen, Gantert, and Majewski.

10. By not maintaining the set of records reflecting information on each charter performed as required under Part 13 of General Order No. 98-A, defendant Ratti has failed to comply with the requirements of this Commission imposed on charter-party carriers, thereby violating Section 5411 of the Public Utilities Code.

11. By not withholding from wages of his employee drivers, defendant Ratti has violated Title 26 U.S.C.A., Sections 3101 et seq., and 3402, as well as Section 18806 of the California Revenue and Taxation Code.

Case No. 10091 - Conclusions

1. Ronald J. Ratti by virtue of his habitual and wilful disregard, disdain, and violation of the law, this Commission, and its regulations has demonstrated that he lacks the requisite fitness required of a charter-party carrier permit holder.

2. The Commission should immediately revoke the Charter-party Carrier of Passengers Permit, File No. TCP-601, held by Ratti.

O R D E R

A. Application No. 55877

IT IS ORDERED that Application No. 55877 is denied.

B. Case No. 9993

IT IS ORDERED that the cease and desist order contained in Decision No. 85140 dated November 18, 1975 in this matter, wherein Tours/San Francisco, Ronald J. Ratti, Donald L. Fassett, and James D. Kavanaugh, and each of them, were ordered to cease and desist from offering and providing passenger stage services over the public highways of the State of California except pursuant to certification by this Commission, is made permanent.

C. Order To Show Cause In Re Contempt

Ronald J. Ratti and Donald L. Fassett having appeared in person and by counsel, and James D. Kavanaugh having appeared by counsel, and each having been given full opportunity to answer the Order to Show Cause dated February 17, 1976, and to purge himself of his alleged contempt,

IT IS ORDERED that said Ronald J. Ratti, Donald L. Fassett, and James D. Kavanaugh as to each of the following counts:

Count 1: During the period between November 18, 1975 and December 16, 1975, and

Count 2: on the 4th day of February 1976, and

Count 3: on the 8th day of February 1976,

and that said Ronald J. Ratti and Donald L. Fassett as to the following count:

Count 4: on the 8th day of March 1976,

have each been guilty of contempts of the Public Utilities Commission of the State of California in disobeying its order made November 18, 1975 in Decision No. 85140, in failing and refusing to desist from operation as a passenger stage corporation as defined in the Public Utilities Code, and as a common carrier of passengers, for compensation, over the public highways in

California between San Francisco, Sausalito, Muir Woods, and return, without first having obtained from the Public Utilities Commission a certificate of public convenience and necessity authorizing such operations, as required by the Public Utilities Code; and

IT IS HEREBY FURTHER ORDERED that for said contempts of the Public Utilities Commission and its order, as aforesaid, the said Ronald J. Ratti be punished by a fine of Five Hundred Dollars ($500) and five (5) days' imprisonment for each of the above four (4) counts; and the said Donald L. Fassett be punished by a fine of Three Hundred Dollars ($300) and three (3) days' imprisonment for each of the above four (4) counts; and the said James D. Kavanaugh be punished by a fine of Three Hundred Dollars ($300) and three (3) days' imprisonment for each of the above first three listed counts; said fines to be paid to the Executive Director of the Public Utilities Commission of the State of California within five (5) days after the effective date of this Opinion and Order, and their supportive Findings and Conclusions, and said imprisonments to be served consecutively in the county jail of the city and county of San Francisco, State of California; and

IT IS HEREBY FURTHER ORDERED that the execution of that above-stated portion of our order providing imprisonments will be stayed as to the contemnor; provided that, any contemnor, i.e., Ronald J. Ratti, Donald L. Fassett, or James D. Kavanaugh, provides the Executive Director of the Public Utilities Commission, within five (5) days after the effective date of this order, with a sworn affidavit that his participation in the passenger stage corporation operations has ceased and that his participation in said operations will not be reinstated without his first securing a certificate of public convenience and necessity authorizing such operations from this Commission in conformity to the provisions of the Public Utilities Code.

IT IS HEREBY FURTHER ORDERED that in default of the payment of the aforesaid fines on the part of a contemnor, said contemnor be committed to the county jail of the city and county of San Francisco, State of California, until such fines be paid or satisfied in the proportion of one (1) day's imprisonment for each One Hundred Dollars ($100) of said fines that shall so remain unpaid; and such additional sentences shall be served consecutively to any other jail sentences arising out of this order.

IT IS HEREBY FURTHER ORDERED that the Executive Director of the Public Utilities Commission, upon this Opinion and Order, and their supportive Findings and Conclusions, becoming effective, and five (5) days thereafter having lapsed without his receipt of the aforesaid affidavit from a contemnor, prepare an appropriate order or orders of arrest and commitment, in the name of the Public Utilities Commission of the State of California, for the imprisonment of such aforesaid contemnor, or contemnors, who have not timely provided the aforesaid affidavit, in the county jail of the city and county of San Francisco, State of California, for the period of twenty (20) days for Ronald J. Ratti, twelve (12) days for Donald L. Fassett, and nine (9) days for James D. Kavanaugh, said order or orders of arrest and commitment to be directed to the sheriff of the city and county of San Francisco, and to each of which shall be attached and made a part thereof a certified copy of this Opinion and Order, and their supportive Findings and Conclusions; and

IT IS HEREBY FURTHER ORDERED that the Executive Director of the Public Utilities Commission, if the aforesaid fines are not paid within the time specified above, prepare an appropriate order or orders of arrest and commitment, in the name of the Public Utilities Commission of the State of California, for the imprisonment of each such contemnor who has not paid his fines in the county jail of the city and county of San Francisco, State of California,

as hereinabove directed, said order or orders of arrest and commitment to be directed to the sheriff of the city and county of San Francisco, and to each of which shall be attached and made a part thereof a certified copy of this Opinion and Order, and their supportive Findings and Conclusions.

D. Case No. 10091

IT IS ORDERED that charter-party carrier of passengers permit, File No. TCP-601, to operate a charter-party transportation service, is hereby revoked on the effective date of this order.

IT IS FURTHER ORDERED that the Executive Director of the Public Utilities Commission cause personal service of this Opinion and Order, and their supportive Findings and Conclusions on Ronald J. Ratti, Donald L. Fassett, and James D. Kavanaugh.

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IT IS FURTHER ORDERED that the effective date of this Opinion and Order, and their supportive Findings and Conclusions, as to each contemnor, shall be thirty days after the date of service upon him.

Dated at San Francisco, California, this 12th day of DECEMBER, 1978.

I dissent.
See separate opinion.
Richard D. Gravelle

I dissent
Robt Batinovich

[redacted]
William Symons, Jr.
Vernon L. Sturgeon
Claire T. Dedrick

Application No. 55877 - Summary of Testimony

In direct support of its application, Tours introduced testimony from 15 witnesses: 3 principals or employees of Tours, 4 Gray Line or associated venture employees adversely called as applicant's witnesses under provisions of Section 776 of the Evidence Code, and 8 so-called "public witnesses."

Witnesses Fassett and Ratti: Principals in the Tours' venture, both testified at length about the history, background, and resources of the enterprise, placing emphasis upon an allegedly bilingual staff, special accommodation for blind, deaf, and otherwise handicapped persons desiring tours (an interest subsequently expanded to embrace personalized service to all the general public interested in sightseeing), and peripheral services to the public, as well as the assertedly ample financing[1/] available to the fledgling enterprise.

1/ Ratti's testimony on July 14, 1976 relating to funds assertedly available to Tours was that there was a "verbal understanding" with the Mitsubishi Bank for a possible $75,000-$100,000 loan for vehicles and that Tours had a checking account balance of $15,000 at that same bank. The next day, July 15, 1976, Ratti testified that the bank would lend approximately $200,000; his father would finance another $50,000 if needed; and that Tours has another $40,000 "excess cash" on hand in a safe under Ratti's control at Tours' air terminal facility. There is considerable question as to whether this $40,000 is Ratti's money, a loan to Tours, or Tours' money. Throughout all these consolidated proceedings, in Ratti's testimony the distinction between Ratti personally and Tours, the applicant, was at best badly blurred. Ratti's personal finances are open to considerable conjecture. During the proceedings Ratti was questioned about an inferred judgment proof stance, but he could not recall if any judgments were outstanding against him personally. However, after initially repeatedly responding: "Not that I know of", "It is possible", "I don't know", "Not that I can recall", to numerous questions concerning postulated law suits and/or judgments against him personally, Ratti subsequently admitted that he recognized some of them and that he was a defendant in some. Ratti also admitted that title to his home at 96 Oliver Street had been "in part" changed to his father's name and that the 3 vehicles listed on his TCP-601 were in his wife's and Don Fassett's name.

A mass of frequently conflicting and contradictory testimony was presented, primarily by Ratti,2/ relating to Tours' mode of operation at different times. Much of this testimony is summarized in the summarizations of Ratti's and other testimony contained herein under Case No. 9993, Case No. 10091, and Order To Show Cause In Re Contempt. Sufficient to state here is that it established, among other things, that Tours sells tour tickets to individuals, thereafter assembling these ticket individuals with others at departure times to attempt making up a payload, and then, utilizing Ratti's limousines or rented vans, and in some apparently few instances, chartered limousines from certain TCP holders, conducts the tour. Tour employees frequently drive for Ratti. This procedure was followed even before Ratti received a TCP permit to operate his single Cadillac limousine on October 23, 1975, and continues with only an approximate 2-week interruption in the last half of December 1975 despite the fact that Ratti never received Commission authority to use rented vehicles of any type. At various times and to varied degrees, gimmickry was resorted to in attempts to lend some color of legitimacy or of compliance with Commission orders or the Public Utilities Code. Such gimmickry includes making small refunds and varying of the length of some tours purportedly to bring tour rates under a time and mileage umbrella, but almost no records were ever introduced to substantiate any woof and warp to the fabric of this alleged panacea. There was much testimony asserting the adoption of a purported

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2/ Ratti's attorney, noting that his client's testimony covers approximately 5 of the 14 volumes taken in this consolidated proceeding, suggests that Ratti's testimony relating to the organization of Tours be taken in its entirety, conceding that "There is no question regarding any single sentence or paragraph or even page is taken out of context, Mr. Ratti's testimony would appear to be contradictory."

"broker-organizer" stance by Tours to be used in association or conjunction with Ratti's TCP permit status.

Ratti testified in detail of Gray Line's denial of agent status to Tours and of an asserted "boycott" by Gray Line and city based charter-party carriers—both forcing Ratti and Tours to jump the gun and operate without authority. As time went on and seeking mitigation or further excuse for unsanctioned operations, Ratti presented evidence of approximately 10 other sightseeing entrepreneurs who sought advantage out of the Gray Line strike from May 3, 1976, to November 14, 1976, to blatantly advertise3/ and charge on a per capita basis in the posture of passenger stage operators without requisite authority from this Commission, and without any ostensible interference from this Commission's enforcement arm. The detailed summary of Ratti's testimony relating to the conversations with the Commission staff over efforts to seek certification is set forth hereafter in Case No. 9993.

Both Fassett and Ratti contended that antitrust considerations cannot be avoided in this application; and that in view of the significant growth of the tourist industry in San Francisco, there exists a public need for the type of unique personalized service Tours asserts it can provide. In that Gray Line assertedly has given no indication that it will provide such service, Section 1032 of the Public Utilities Code does not serve to preclude issuance of a passenger stage certification to Tours, according to the two witnesses. They further contend that under the thrust of the holding in Northern California Power Agency v PUC (1971) 5 C 3d 370) competition would advance the public interest in this instance, and accordingly the Tours' application should be granted.

3/ Brochures advertising these tours by these entrepreneurs were entered into evidence as exhibits in a number of instances.

Witness Michael Friddle (Friddle): Blind, Friddle is a part-time employee of Tours employed to organize tours for the blind and disabled, and testified of a "massive public relations program" whereby braille and large print brochures are being sent to blind organizations.4/ In July 1975 Friddle telephoned Gray Line with reference to a tour and while not refused admission to the tour, he felt discouraged to take it in that he had been asked if he had a guide to accompany him.

Witness Yosa Shirai (Shirai): A Tokyo businessman tourist testified of his pleasure in being assisted in choosing a tour by a Japanese-speaking Tours' employee (John Mark Lavelle), who also gave him hotel information. However, the tour actually taken by Shirai was conducted in English.

Witness Julia Holter (Holter): A quadriplegic, Ms. Holter testified that she had been told by Gray line that she would have to be accompanied by an attendant to take a tour. Subsequently, at the instigation of Tours, she again telephoned Gray Line, purportedly regarding a tour for a group of handicapped. She learned that Gray Line would take the group but would not lift the individuals on and off the bus at each stop on the tour.

Witness Robert S. Welsh (Welsh): A Jack Tar Hotel bell captain, Welsh told of his selling Tours tickets to 20 or 25 people a day during the Gray Line strike without complaints. Welsh admitted receiving a 10 percent commission from Tours for each sale. He gets none from Gray Line as Gray Line has an agent in the Jack Tar lobby.

Witness Petrina Doran (Doran): Manager of one of the Tracy chain hotels (see Wellhoffer testimony summary below), Doran testified of tourists "extremely pleased" by Tours'

4/ No copies of such brochures were produced.

service and that some had been also delighted to receive a partial refund of the fare after completing the tour.

Witness Chester A. Rhodes (Rhodes): A 12-year employee of the San Francisco Convention and Visitors Bureau, Rhodes testified that the Bureau's statistics reflect a substantial increasing flow of visitors to San Francisco over the 1970-1975 period, a flow that continued in 1975 despite the 1974-1975 recession.5/ The Bureau's figures, as contained in the statistical exhibits, show a 5.3 percent increase in the total number of visitors and convention participants staying in San Francisco hotels and motels in 1975 over 1974, and a 9.6 percent increase in their expenditures. Approximately $12.7 million of these expenditures in 1975 were spent in sightseeing. Gray Line received $3,658,233 of this amount in 1975.6/

Witness Uwe Wellhoffer (Wellhoffer): General manager of 5 downtown "economy" hotels in the Tracy chain, renting 50 percent of his rooms to tourists during the summertime tourist period, Wellhoffer provided primarily hearsay evidence purportedly derived from his managers, including witness Doran (see above), that Tours treated tourists well. It must be noted that the Tracy chain pays Tours a 15 percent commission for tourists

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5/ Exact comparisons with years before 1974 are not valid as methodology and components in the statistical base were changed. Nonetheless, it is apparent that there has been a substantial increase in both the numbers of tourists and in their expenditures.

6/ We take official notice of the passenger revenue—exclusive of charter and racetrack revenue—submitted by Gray Line in its 1975 annual report to this Commission.

referred to the Tracy chain (80 were referred in the first half of 1976).

Witness Susan Asher (Asher): A desk clerk at the Mark Hopkins Hotel, since the strike at Gray Line began, Asher has referred people to Tours, receiving a 10 percent commission for each referral. Gray Line's agent is at the Avis desk at the hotel; however, Asher intended on her own to continue referrals to Tours after the strike ended. Asher testified of favorable comments from tourists who were referred to Tours.

Witness George Coleman (Coleman): Long-term doorman at the Clift Hotel, Coleman testified as to tour companies: "I just love them all", and related that he had referred some tourists to Tours as well as to Gray Line, sometimes receiving a gratuity from both. He had been impressed when one family group mentioned having received a partial rebate after taking a tour with Tours.

Adverse witness Mulpeters: Mulpeters, queried regarding major cities being served by a single sightseeing company, testified that San Francisco,7/ Los Angeles, and San Diego were in that category. He asserted that the effect of open competition elsewhere has been to substantially raise the cost of tours to the tourists, noting the experience in Washington D.C., where tour rates substantially increased as a consequence of selling agents playing one sightseeing company against another to jack up commissions which then must be passed on to tourists. Mulpeters asserted that the "visitor" statistics of the San Francisco Convention and Visitors Bureau required "interpretation" (in that the figures were based on airport arrivals and hotel reservations which serve to camouflage the extent of purely business visits included in those statistics as opposed to convention and tourism business.8/ Mulpeters did agree

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7/ Mulpeters noted certain exceptions vis-a-vis San Francisco such as A.C. Cal Tours (Spanish-speaking tours only), Highway Tours (out of San Mateo), and a second San Mateo based passenger stage corporation run by a John Jenkins.

8/ So that, for example, even the Gray Line attorney, Mr. Hannon, who comes in frequently during the year from Phoenix on matters before the PUC, would be counted each visit as a "visitor".

that there is a steady increase year to year in the tourism business in San Francisco which he estimates as being between 5 and 9 percent. However, he also testified that San Francisco's convention potential is severely handicapped because of a lack of adequate convention facilities, so that considerable business is lost to other California cities, naming Anaheim as an example.

Adverse witness Beryl Diller (Diller): A vice president of Holiday Tours, Inc., Diller described its business as that of a "group receptive operator"; an organization providing host services for pre-formed groups from airport arrival transportation to chartered tours (from Gray Line and other bus companies) while the groups are in the city. He testified that the only per capita business operated was nightclub tours exclusively within San Francisco.

Adverse witness James C. Fulton, Jr. (Fulton): An employee handling nightclub tour sales for Holiday Tours, Fulton provided no testimony material to these proceedings.

Adverse witness David Smith (Smith): A subpoenaed 9-year Gray Line teamster driver on strike against Gray Line at the time he testified, Smith without specification termed some of his underlying comments to applicant's investigator as "miscellaneous griping". To his knowledge Gray Line had been able to handle its business although there were times it could have used more buses. From personal experience he testified of mechanical problems from time to time. When tied down to specifics, he was sometimes contradictory; however, there were air conditioning problems and "once or twice" a windshield wiper failed when it was misty. More seriously, he stated that at times brakes appeared unsafe and not to his liking ("...maybe 2 or 3 times in my whole career that has happened"), but that on only 1 occasion he ever had to call a relief bus for

a brake problem. He told of clutch and other problems necessitating relief. His attempts to quantify mechanical problems experienced were at variance. He discussed cleaning problems at length stating that spasmatically he would have to take out a dirty bus on tour (more frequently on hotel pickups after concluding another tour). Drivers do not as a contract matter clean buses, and sweepers could not always keep up, the public's "sloppy" habits being what they are.

In its case against the application, protestant Gray Line, through its witness Mulpeters, asserted that Gray Line was capable of handling any existing or future demand for tours and sightseeing in the area. Mulpeters noted load factors of 39.6 and 38.2 for the 2 most popular and utilized tours—the 3-hour deluxe city tour involving 662 buses and the 3½-hour Muir Woods-Sausalito tours involving 259 buses.9/ Mulpeters told of membership in the Gray Line Association with worldwide contacts; of distribution of over 1½ million color printed sales brochures annually describing its tours; described its bus fleet of 63 vehicles; and told of an additional 10 49-53 passenger MC-7 airconditioned, sightseeing coaches being converted to glass tops for the San Francisco sightseeing business (delivery having been delayed because of the strike). He introduced evidence of the tours and prices offered, display advertising, and sales booths in hotels in San Francisco, pick-up

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9/ Figures for the month of September 1975.

service, and described Gray Line's maintenance program[10/] including washing and cleaning of the buses. Mulpeters testified of interpreter service available for groups at $10 per hour (describing 1 "narrated" tour for 40 German-speaking deaf tourists!), and told of the services provided Handicapped Horizons, the recreation center for the handicapped, the Salvation Army, and the Silver Crest Committee; services including transportation of handicapped children to their summer home in La Honda, and arrangement of tours. Mulpeters refused to concede that use of a smaller van could provide more personalized or better tours over use of a full-size bus and stated that the driver is the key to an enjoyable tour. However, where individuals desire the use of vans as tourist vehicles, Gray Line will accommodate them (Gray Line chartered vans through Associated Limousines approximately 40 times in the first 6 months of 1976). It seldom has utilized its tariff right to cancel for less than 6 fares, but has utilized limousines from Associated Limousines to take out as few as 1 tourist. Asked why Tours and Ratti could stay in business before the Gray Line strike if there was no need for additional tour services in San Francisco, Mulpeters answered "Because I think he catches the people before they find out they can buy the tour for $6 instead of $20", and ascribed the practice of certain hotels in calling upon Ratti's service as a reciprocal practice arising out of Ratti's referral of lodging business to these hotels for a 15 percent commission.

10/ Maintenance of Gray Line equipment is performed by the Greyhound Lines, Inc. (Greyhound) facility in San Francisco, currently employing approximately 110 mechanics, and servicing buses for both Gray Line and Greyhound. Before the motor rebuilding facilities were removed to Chamblee, Georgia, there were about 220 mechanics at the facility. The maintenance yard as it remains is still the largest of its type west of the Mississippi.

Case No. 9993 - Summary of Testimony

Gray Line's Position

In support of its initial October 17, 1975, allegations in Case No. 9993 that defendants were unlawfully operating a passenger stage business in that they were operating a sightseeing service on an individual fare basis without requisite public convenience and necessity certification from the Public Utilities Commission, all in violation of Public Utilities Code Section 1031, Gray Line introduced 3 witnesses; the president of Gray Line and 2 Pinkerton operatives.

Witness Mulpeters: Testifying of having first learned of Tours' operation early in June 1975 from some copies of Tours' brochure, Mulpeters also told of an initial meeting with Ratti on June 16, 1975, when Ratti came to the Gray Line offices and unsuccessfully sought appointment as a Gray Line agent and possible chartering of Gray Line buses to Tours. Mulpeters testified that thereafter, from his office vantage point adjacent to the airlines terminal from which Tours was operating, he became well aware of how Tours was operating, and that subsequently he obtained the services of Pinkerton operatives to verify the fact that Tours was operating a sightseeing business on a per capita basis. Mulpeters related how Ratti's initial visit was followed by others as Ratti unsuccessfully continued attempts to establish some business relationship. On cross-examination Mulpeters was extensively examined on the unfruitful negotiations by Ratti to arrange a charter relationship. Mulpeters testified that: "We just don't charter our buses to somebody to operate per capita service"; that it was his understanding that Tours wanted to "short-stop" Gray Line's sightseeing business,

using chartered Gray Line buses to conduct Tours' unauthorized tours. Mulpeters also testified that at no specific time did defendant specifically ask for a vehicle. The visits became more acrimonious after the filing of a protest letter with the Commission by Associated Limousines, an act which Ratti attributed to Mulpeters.11/ At an October 21, 1975, meeting with Ratti and Kavanaugh, Mulpeters told Ratti that Tours was selling per capita sightseeing transportation without a Commission certificate. Ratti assertedly responded that he was operating as a broker. When told that there were no code provisions permitting broker handling of passenger transportation, Ratti then contended that Tours was operating as a travel agency, but was unable to name any appointments as such. On November 17, 1975, Fassett visited and told Mulpeters that he wanted Gray Line to withdraw its protest to the Tours' application and the request for a cease and desist order or Tours would go into "Phase 2". As earlier noted, Fassett's demand was denied. (On November 18, 1975, the Commission Cease and Desist Order was issued.) Shortly thereafter, on November 24, 1975, Gray Line received through the mail a Tours' envelope containing a copy of what purported to be a Tours' press release dated November 24, 1975. This press release (Exhibit No. 12 in this proceeding) advised (1) of a 5-million-dollar antitrust suit to be filed by Tours against Gray Line, (2) of the Public Utilities Commission Cease and Desist Order to Tours, and (3) that Tours had "decided to challenge the PUC order and is continuing 'business as usual'."

Witness Gerald Cochran (Cochran): A Pinkerton operative, Cochran testified of

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11/ Mulpeters testified that about 1965 or 1966 Gray Line sold 20 limousines and permits to individual drivers who formed Associated Limousine Service, sometimes still called Gray Line Limousine Service. The president of Associated Limousine, Martin Levy, on August 30, 1975, filed a protest to the Commission against the alleged illegal Tours' operation. Mulpeters testified that the decision to protest was made by Associated Limousine, as far as he could surmise, but that Levy did not tell Mulpeters of it.

having made a tour reservation by telephone one day, arriving the next day at the airline terminal, September 14, 1975, personally purchasing a single $16 ticket from Ratti for Tour No. 3, receiving a receipt, observing others approach and purchase tickets for the same tour, and then as part of an assembled group of 10 passengers being taken on a 4-hour tour in an orange colored late model GMC van (subsequently ascertained to have been rented from Trans Rent-A-Car by Ratti).12/

Witness Paul T. Blakesley (Blakesley): A Pinkerton operative, Blakesley similarly testified that on September 29, 1975, he had purchased a ticket for Tour No. 3 for $16 from Mrs. Nanette Ratti at the Tours' Downtown Airlines Terminal booth. Assembled later along with 6 others at departure time, he was taken for the 4-hour tour over the same route as in Cochran's tour (but with the route reversed) in a GMC van, License No. 634-HDT Cal., a van subsequently determined to have been rented by Ratti from Trans Rent-A-Car.13/

Gray Lines also relies upon the cross-examination testimony of Fassett to establish that Tours operated on a per capita basis:

Witness Fassett: When questioned whether Tours was an operator or a broker, Fassett testified:

"But the question was that as a tour broker we would be able to do this type of grouping... Well, we probably are an operator, and we are also a broker. Both ways... We always were."

12/ Trans Rent-A-Car, at times relevant herein did not have a TCP permit from this Commission.

13/ According to affidavits filed as part of Gray Line's October 17, 1975, complaint, and as testified to by him in cross-examination on April 6, 1976, Blakesley also had taken a 2-hour tour on September 9, 1975, in a different vehicle provided by tours. Additionally, the Gray Line complaint contained an affidavit by another Pinkerton operative, one Kathleen Stevens, who attested that on September 13, 1975, she too purchased a 4-hour tour on an individual basis and subsequently was taken on the tour. (Stevens was not called as a witness at the hearing.)

and:

"Well, the way our understanding was, when people came in to our office we can sell them a ticket, and when a group of people have gotten together then they can be given a tour."

Asked then: "...wouldn't you agree that the service that is provided as reflected by Exhibit 3 (the Tours' brochure), you always sell tickets to individuals?" The answer was: "Yes."

Defendants' Position

In rebuttal evidence to the initial October 17, 1975, Gray Line complaint, defendants relied primarily upon 2 witnesses; the thrust of their defense being that they had strenuously attempted to properly structure their business so as not to be violative of the Public Utilities Code and that they had tried to work with Gray Line.

Witness Ratti: Obviously linchpin of the Tours' operation, Ratti testified at considerable length on all phases of these consolidated matters (approximately 5 volumes of transcript).14/ On issues relating to the initial complaint, Ratti testified of being referred late in May 1975 to the Public Utilities Commission of Officer Martindale of the permit office of the city and county of San Francisco and of subsequent numerous meetings with Messrs. Astrue and Donati and counsel Rosenthal of the Commission staff concerning the Tours' operation; meetings which revolved around "...exactly what we had to do and what permits we had to obtain, and exactly how we had to operate to be legal." Assertedly, he initially brought along the Tours' brochure (Exhibit No. 3 to these proceedings) to show the staff. We concluded

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14/ Ratti himself acknowledged his primary role and testified that "I oversee the operation and see that the structure of the company stays in an upright position", and after a fashion, classified himself as the "General Manager".

from these meetings that if Tours acted as only a tour organizer and "...then used authorized PUC charter-party carriers, we would be legal." Ratti testified that Rosenthal, after "lengthy discussion on it and some research he did on some of his law books, he came up with the opinion we were perfectly legal to operate under the scope of this brochure, providing we used licensed P.U.C. holders..."15/ Ratti testified that in July 1975 Astrue "saw nothing wrong with the way we were going to operate, and he advised us to continue to operate until he so notified us." Ratti asserted that Tours thereupon used the Walker Brothers, Mike L. Cord, International Limousine Service, and Lorrie's Tours, all PUC charter-party permit holders, and Tony Ruiz, Mr. Hollingsworth, Mr. Sullivan, Mr. Bernsley, and Mr. Maseraki, all city permitted limousine operators. However, Ratti could produce no records pertaining to their use.

It was Ratti's further assertion that late in July or early August 1975, at a meeting with Astrue, Donati, and Rosenthal, the staff objected to certain of the permit holders being used by Tours, and thereafter Tours was advised to apply for a passenger stage certificate which action it then took. Thereafter, Ratti testified that early in September when it became apparent that Tours was operating at least in part as a passenger stage corporation

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15/ At another point Ratti testified that in response to specific questions put to Rosenthal he had learned that "under a passenger stage, why, that would allow me then to sell the tickets and in fact give the tour, much like Gray Line and Greyhound is doing now" and "on our charter-party permit I would be regulated to give the tour only as a charter-party, and not sell on a per capita basis, which I advised him at the time that I had no intention of doing."

without certification,16/ Astrue told Ratti that Tours could continue operations until they heard otherwise; that they could continue to operate, whether it be as somewhat of a passenger stage or charter-party operator, "until your permit is filed with the PUC and heard in front of the Commission and turned down." Ratti went on to state: "and that is exactly what we have been doing up until the last reminder you gave us to cease and desist until we resumed court today." (Referring to the admonition against continued operation given by the ALJ at the close of the December 16, 1975, hearing day.)

At one point Ratti testified variously as to when Tours began utilizing Ratti's TCP permit to run tours. At first he asserted that it was "when this general boycott had hit us...probably the beginning of August, approximately." When reminded by his attorney that he did not receive his TCP permit until October 23, 1975, Ratti then--in response to a specific question from the ALJ as to when he began operations under his charter-party permit--asserted that he did not conduct tours as an "alleged charter-party permit holder" prior to actually having been granted such permit.

At another point in his testimony, Ratti agreed that he personally had sold the

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16/ Ratti testified that "at one of the meetings [with Astrue], one of them was exactly for that. He wanted to know, were we selling on a per capita basis. And I said yes we were." Ratti also testified that Donati at one of the meetings also stated "It looks like you are probably doing a certain portion of staging along with your charter partying." To which Ratti said he answered, "Yes, it looks that way to me also. Of course, it's been that way ever since we opened up."

September 14, 1975, ticket to Cochran, the Pinkerton operative, and that it was his wife Nanette who probably sold the September 29, 1975, ticket to Pinkerton operative Blakesley, and that the van or vans used by Ratti to provide the Cochran and Blaksley tours were rented to Ratti from Trans Rent-A-Car. But it was by Exhibit No. 21, a letter dated December 30, 1975, directed to the Public Utilities Commission and signed by Ratti as holder of TCP Permit No. 601, that Ratti first asked authority from the Commission to rent or lease vehicles to be used under his permit, and for authority to waive the 20-day waiting permit.17/

Later in the proceedings, Ratti testified of explaining to Rosenthal of how Tours would charge for its tours. One method would be that "we would get a group of people together, whether it be 2 people or 8 people, and depending on how many people we got together, we would then divide that amount of people into the amount of money we needed to show a reasonable profit. And also pay the owner or operator of a charter party permit to take that tour out." The second method was "to figure out exactly what our time, material, cost, and mileage were, and to divide that into the amount of people that we proposed to have on a tour. And then, have a reasonable figure that would amount to the amount we needed to take that group of people and pay the charter-party carrier."

In relation to the existence of any Tours-Gray Line business relationship or working arrangements, Ratti testified in complete opposition to Mulpeters' subsequent testimony. It was Ratti's testimony that the June 1975 meetings between Mulpeters and him

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17/ Exhibit No. 21 was sponsored into evidence by Ratti.

had produced a "verbal agreement" to the effect that "...any of the people that I [Ratti] cannot handle or carry, would he handle them on his tour and his buses, and he told me he would, and the only thing we had to do was to send a voucher over with those people, and we would then be billed later." Ratti further stated that it was agreed that Tours could use its equipment if Gray Line had none available ["In the event you (Mulpeters) could not take the people, we would arrange the tours on our equipment, or someone else's, whether it be other charter-party carriers and PUC holders."] The inference being that Tours had tacit consent from Gray Line to compete. Elsewhere, Ratti testified that Mulpeters subsequently "would not accept it [the agreement] on a daily basis and would not accept it on a prolonged term", but "would accept it when it is convenient for him."18/

It was Ratti's testimony that Mulpeters had been agreeable to chartering buses to Tours when they were available, but that in practice he could never get a bus. Ratti cited one instance in October 1975 when he was unsuccessful through Gray Line's Mr. Beck in chartering a bus to take 35 people for a wine country tour. In later testimony Ratti asserted that that Mulpeters only objection to the 2 companies working together was that if Tours were to sell Gray Line tours then Tours would not sell anyone else's tours; that the 2 outfits "...are not going to be competing against each other." Ratti stated that in the latter part of June 1975 Tours sold Gray Line tours on Tours' vouchers but that within a week the customers were refused by Gray Line and Tours had to refund the money. Consequently, Tours ceased selling Gray Line tours.

18/ Gray Line invoices (Exhibits Nos. 27-A - 27-F) sponsored into evidence by Ratti to cover a period after December 16, 1975. No invoices were introduced to demonstrate any tour transportation provided Tours' clients by Gray Line before December 16, 1975.

Witness Rosenthal: An assistant General Counsel of the Commission, but at the time relevant here a principal counsel, Rosenthal was called by the staff and testified that during 1975 he had been contacted by Ratti some 4 to 6 times--all before the end of June 1975. Rosenthal testified that Ratti left him with the impression that Ratti intended to organize tours in the stance of a "Travel Promoter" (Rosenthal's term); that he did not wish to conduct the transportation himself, but would hire charter-party carriers. Rosenthal told Ratti: "To the extent that you want to be conducting tours and employing other people, you cannot be doing the hauling yourself." Rosenthal asserted that he had declined to read the Tours' brochure Ratti brought in and had advised Ratti to hire legal counsel after Ratti's visits went on. Later, Rosenthal recalled that Ratti asked some questions about operations were he to have a vehicle, but did not remember whether Ratti ever asked for information as to how to obtain a certificate of public convenience and necessity. Rosenthal testified that he did not indicate to Ratti that it was permissible to operate as a passenger stage while the Commission was considering one's application for operating authority; but prior to approval of such application, Rosenthal told Ratti that the PUC had no jurisdiction over people who organized tours, only over those who carried the people.

Order To Show Cause In Re Contempt - Summary of Testimony

Gray Line's Position

In support of its contention that defendants should be punished for their asserted contempt of the Commission in continuing to offer and provide passenger stage service without Commission certification after (1) issuance of the cease and desist order contained in Decision No. 85140 dated November 18, 1975, and (2) the admonition of the hearing officer to defendants at the public hearings on December 16, 1975, and December 29, 1975, to the point that defendants cease and desist from all unauthorized service, Gray Line relied upon the testimony of 4 witnesses: 2 defendants and general partners of Tours and 2 Pinkerton operatives.

Witness Ratti: Gray Line, the staff, and defendants each rely in part upon Ratti's extensive testimony on the contempt issue; each party finding support for its contentions. A summary of Ratti's relevant testimony on this issue appears subsequently here under "Defendants' Position".

Witness Fassett: This Tours principal read a prepared statement into evidence (Exhibit No. 2) which stated in relevant part:

> "When we received the cease and desist order, we felt that our continuation of business 'as usual' was more directly involved in helping the people first and knowing that when you heard our true story here today, you too would realize that the needs of the people go on, regardless of what decision is made here today."

On cross-examination, Fassett, in response to the question: "Why did you continue to offer the service in spite of the fact that a cease and desist order had been issued?"[19] responded:

19/ Before being permitted to answer this line of questioning, Fassett had been apprised of his Fifth Amendment rights by his attorney at the direction of the presiding ALJ and had elected "to answer any and all questions on cross-examination concerning any facet of Tours' business." Defendant's attorney, objecting to the questions on grounds of relevancy (and being overruled) stated: "I think the fact is they have admitted they have operated in violation of the cease and desist order."

"Well, we felt that our continuing our business was by far a more important service to the people to whom we feel obligated and compelled to serve, more so than a cease and desist order which was, we feel, quite far away from the front lines of what we were fighting for."

Fassett went on subsequently to state:

"Well, when you have families to feed, Mr. Hannon, you don't worry a little bit about state laws, especially when you know you are doing right."

And when asked on cross-examination during the December 16, 1975, hearing if Tours had provided service "today" under Tours/SF and if it had individuals come in and buy a ticket to go on their vehicle, Fassett testified to both questions:

"Yes, we did."

Witness Robert W. Bowen (Bowen): A Pinkerton operative, Bowen testified that having telephoned the prior day for information, on February 4, 1976, he went to the Tours' booth at the airlines terminal, awaited his turn while Ratti made a sales pitch for a wine country tour to 2 individuals, and then in his turn purchased a 4-hour Tour No. 3 ticket for $16. While waiting to depart on the tour, Bowen testified of observing a sale of another $16 ticket. Shortly later, Bowen stated that Fassett drove the 7 persons assembled (2 Mexican nationals, an English couple, an Australian, another American, and Bowen) on the tour in Ratti's Cadillac limousine, Lic. No. 07183X California.

Witness Dick Gantert (Gantert): Pinkerton's assistant-manager and Northern California director of investigation, testified of having phoned for a reservation for 2 one day, and the following day, February 8, 1976, purchasing 2 No. 3 4-hour tours for $32 ($16 each) at the terminal from Tours' employee Mark Lavelle. Gantert testified that he and his wife went out on the tour, being driven by Fassett in Ratti's Cadillac limousine Lic. No. 07183X California.

The Staff's Position

The staff, in support of the Gray Line contention that defendants should be punished for contempt of the Commission for continuing to operate as a passenger stage service after issuance of the Commission's cease and desist order, in addition to its forementioned reliance upon Ratti's extensive testimony summarized under "Defendants' Position", introduced the testimony of 2 witnesses: one a representative of the Commission's License and Compliance Section, and the other a leasing company executive.

Witness Majewski: A staff transportation analyst whose duties involve investigation work, Majewski testified that on March 8, 1976, under the pseudonym of "J. Schillone" he went to the airlines terminal booth of Tours and purchased from Ratti a $16 ticket for Tours' No. 3 tour, observing 3 people selling tickets to other individuals. Majewski's receipt (Exhibit No. 15) bore the number 07866 and carried the stamped in legend:

"This tour is conducted by authorized PUC charter-party carriers. Tours/ San Francisco acts only as the broker organizer."

Later that day Majewski returned to the terminal on time to take the tour, again observing other individuals purchasing tickets. 12 persons were on Majewski's tour which was driven by Fassett in a Plymouth 1978 Voyager 12-passenger van, License No. 856 NVI, California. Majewski sponsored Exhibits Nos. 16 and 17 in this proceeding, each a color photograph, respectively of the right side and of the rear, of the blue-colored van; photos assertedly taken while at a stop on the tour. In the photographs no TCP markings appear on the right side or the rear of the vehicle. Majewski testified that he subsequently visited

Aero Rent-A-Car, Inc. and ascertained that the van used in the tour was registered to Aero Rent-A-Car, Inc., legal owner being the Morris Plan of California.

Witness Chester Hollenbeck (Hollenbeck): Subpoenaed president of Aero Rent-A-Car, Inc., Hollenbeck produced a record of Aero Rent-A-Car, Inc.'s Invoice No. 119629 (Exhibit No. 18-A) which purports to cover the March 8, 1976, rental of a van, License No. 856 NVI California, to "Donald Fassett" employed by "Tours of SF", on a "Tours of SF" credit card. Hollenbeck testified that Ratti had a TCP permit and that as a "matter of convenience" the account was labeled "Tours of SF" for charge account records and that Ratti had instructed Aero Rent-A-Car, Inc. to send billings to Tours.

Hollenbeck also produced a log in and return record of Aero Rent-A-Car, Inc's. (Exhibit No. 18-B) covering part of the month of March 1976 and reflecting an entry covering the Invoice No. 119629 rental to Fassett on March 8, 1976. Hollenbeck testified that he knew he had received payment from Ratti in March 1976; that sometimes a payment was by cashier's check and sometimes by other checks, but the witness could not recall whether or not any of the payment checks in March 1976 were by Tours' checks to Ratti endorsed over by Ratti to Aero Rent-A-Car, Inc.

Defendants' Position

Ratti's extensive testimony relevant to the contempt issue, both on direct and on cross-examination, is an important source of each party's evidence on the issue. The defense depends heavily upon it to support their contentions that (1) they operated solely as a broker-organizer and did not charge on a per capita basis;

(2) that they acted in reliance upon the advice of PUC representatives; and (3) that selective application and enforcement of the Public Utilities Code and related state laws by Gray Line through the Public Utilities Commission serves to deprive them of their constitutional rights of equal protection and due process.

Witness Ratti: Testifying as to the "capacity or fashion" of the Tours' operation prior to December 16, 1975, Ratti stated "Well, we were operating as a tour company... Giving tours." When asked to define more precisely what was being done, he stated "Well, we were acting as a broker and having some of the work done by other limousine drivers and doing some of the work ourselves." Ratti testified that they stopped these operations after the December 16, 1975 hearing in obedience to the Commission's November 18, 1975 Cease and Desist Order. But then, several months later on July 8, 1976, under cross-examination he admitted that while they had ceased operating for awhile "out of respect for Examiner Weiss", they commenced operating again after several weeks (about the first of 1976) when "the financial burden became too heavy"; resuming operations in substantially the same fashion as before, merely "refining" the operation. Ratti stated that he was familiar personally with and had handled all aspects of the various tours—driving, lecturing, organizing, and selling.

Ratti presented much evidence in both direct and cross-examination as to the mode of operation. He readily admitted that Tours did not always charge the same amount per individual per tour, but asserted that they used time and mileage as well as variables in the length of the tour as factors in determining the charge. Ratti gave vague, inconclusive, and, at times,

evasive answers to questions directed to specifics regarding the components assertedly used to determine charges, summarizing that there were "many, many methods that I have tried to make it convenient and economical for everyone involved." He testified that Tours did not retain daily manifest records beyond the day of the tour. When pinned down to break even points on the various tours, he "approximated" and "guesstimated" the following:

	Limousine	Van
Tour No. 1	$15	$20
Tour No. 2	$20-$25	$35
Tour No. 3	$55	$80
Tour No. 4	$100	$150
Tour No. 5	$100+	-

The original brochure (Exhibit No. 3) used through most of the first year of operation stated that the "price per person" for the various tours was as follows: Tour No. 1—$4, Tour No. 2—$8, Tour No. 3—$16, and Tour No. 4—$25. This brochure recommended 5 passengers per tour group and carried this statement: "If you are traveling alone or your group is less than 5 we will arrange a full group before your departure, or base the price on an hourly rate of $20.00"

In July 1976 Ratti testified that Tours had adopted a new brochure the first week in June 1976. This latter brochure (Exhibits Nos. 26-A - 26-B) described the tours as "Maxi-Van Tours"[20] and stated that "there are never more than 14 people on our tours so you are assured of a personalized tour. The brochure stated a

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20/ At this point in time, Ratti was using 6 to 8 rented maxi-vans daily in his charter business to Tours, although he held no authority to use rental units.

tour "price" for each tour as follows: Tour No. 1—$5; Tour No. 2—$10; Tour No. 3—$20;[21] Tour No. 4—$35,[22] and Tour No. 5—$45. The new brochure, listing Fassett and Ratti as "Owners/Partners", including the following statement in the text:

> "Tours/San Francisco acts as the organizer/broker for these tours. Our company has access to PUC charter-party permits and as such conducts these tours with fully insured vehicles that meet with the PUC specifications. All prices are based on the time and mileage factors, NOT a capital or per person charge."

In July 1976 Ratti testified that while Tours had stopped its earlier practice of refunding to some individual tourists a small portion of the tour price after conclusion of their tours, in some other instances it was still, at times, extending tours without any increase in price. Ratti also asserted that Tours had ceased "any close cases of selling on a per capita basis" although he had trouble defining what these might have been.[23] Subsequently, he denied that Tours had ever even offered a per capita tour.

21/ In the new brochure Tour No. 3 had been expanded to include Muir Woods and the time for the tour extended to 4½ hours.

22/ When asked why the price on Tour No. 4 was increased $10 from $25 to $35 in the new brochure, Ratti answered "It is known as inflation".

23/ Ratti's theme was that tour charges to individuals varied "on each tour and on each week and on each month", but he was unable to produce any records to substantiate his assertions that time and mileage factors were computed and applied to determine charges. As to expanding tours, when asked to explain how they determine how far to go and how much to expand, Ratti testified:

> "Well, that is really left up to each individual driver. The only instructions that I give them is that it is an expanded tour and to expand to the limit where everyone is satisfied. It may be 10 minutes. It may be 3 hours."

In apparent exemplification of the disparity in Tours' pricing, Ratti sponsored a sampling of 24 Tours' receipts from over a period of October 1, 1975, to July 7, 1976, but was unable to produce corresponding tour manifests.[24] Those of the receipts issued beginning in April 1976 bore 2 stamped statements:

(1) "All charges are approximate and are based on vehicle mileage and time of use", and

(2) "This tour is conducted by authorized P.U.C. charter-party carriers. Tours/ San Francisco acts only as the broker organizer."[25]

In some cases the price per person exceeded that shown on either brochure; Ratti's explanation was that "all of our prices are approximate." Ratti further testified that by mid-July 1976 he was using 6 to 8 rented maxi-vans daily on the Tours' business.

Ratti's extensive testimony setting forth the defense's contention that they cannot be found in contempt in that they acted in reliance upon the opinions, statements, and representations of PUC representatives is intermixed and included in the summary of Ratti's testimony in that section of this Statement of Facts headed Case No. 9993. Also relevant here to that aspect of the

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24/ Making it impossible to determine who the alleged charter-party permittee was who ran the tour or how many persons were on the tour.

25/ Although Ratti testified that he began using these stamped statements on vouchers "roughly" the first part of 1976, 4 out of the 18 1976 vouchers introduced into evidence as Exhibit No. 25 did not bear either legend. Exhibit No. 15, Majewski's voucher dated March 8, 1976, bore only the second legend.

contempt issue is the testimony of witness Rosenthal (similarly summarized under Case No. 9993).[26]

Addressing defendants' primary defense of the contempt issue,[27] that selective application of offenders and enforcement of the Public Utilities Code and related state laws on the part of Gray Line through the Public Utilities Commission serves to deprive defendants of their constitutional rights of equal protection and due process, defendants relied upon the testimony of 5 witnesses: Ratti, Hollenbeck, Mulpeters, Holland, and Alhadeff:

> Witness Ratti's testimony and that of witness Mulpeters relating to Ratti's attempts to sell Gray Line tour tickets, become a Gray Line agent, and to obtain Gray Line buses, are summarized under Case No. 9993 in this Statement of Facts.
>
> In addition, in support of the primary defense, Ratti testified that Associated Limousine Service, linked with Gray Line, had rented maxi-vans for tours--the inference being that Gray Line because of its 15 percent piece of the gross of Associated knew and did not complain to the PUC. The defense further asserted that Holiday Tours, linked as an agent to Gray Line, sold and conducted per capita nightclub tours during the period of the Gray Line strike, not using Gray Line buses, but using different vehicles--all with the knowledge of Gray Line and without Gray Line complaint to the PUC. Similarly, Hawaiian Holidays Inc., assertedly linked to Holiday Tours, and from

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26/ The arguments and defenses asserted by defendants in some instances tend to apply with inextricable reference to different of the issues and are referenced in this fashion to avoid repetition.

27/ In the words of defense counsel: "This is the very thrust of my defense of the contempt citation."

their correspondence sharing a common telephone number, arranged during the strike for city tours to go on using transportation other than Gray Line and continued to offer nightclub tours on a per capita basis—all without complaint from Gray Line to the PUC.

Ratti also presented testimony and in some instances introduced into evidence brochures of other entities operating per capita including: Jal-Pak (Japan Air Lines), Lorrie's Tours, Joy-Pak, Visit USA, Native Sons, Ito Tours, Sanae (Exhibit No. 24-D), AC-Cal Spanish Speaking Tours, City Tours (Exhibit No. 24-G), Golden Gate Tour & Convention Services (Exhibits Nos. 24-H and 24-I), and Ciao Charter (Exhibit No. 35). The defense asserted that the fact that Gray Line had not formally protested these (particularly against influential Japan Air LInes), while choosing to file complaints against Tours, is significant of a pattern of enforcement discrimination.

Witness Hollenbeck: As relevant to this issue, Hollenbeck testified that Associated Limousine Service had, as recently as July 12, 1976, rented a Dodge maxi-van from Aero Rent-A-Car, Inc. and that he had been told "...they needed it in their business for some tours."

Witness Mulpeters: As relevant to this issue, Mulpeters testified that Gray Line sold its limousines and their permits about 12 years ago to some 20 individual drivers who in turn formed Associated Limousine Service. Mr. Martin Levy is their president. Gray Line has an agreement with Associated Limousine Service whereby in exchange for 15 percent of Associated Limousine Service's gross it acts as a sales and promotion agent and handles accounting for the drivers. On those occasions where there are only 3 or 4 persons for a tour, making it uneconomical

to utilize a full-sized bus, Gray Line has sent them on the tour using a hired Associated Limousine Service's limousine. On approximately 40 occasions in the first half of 1976 where it had had requests from a customer for small groups of 10 or 12, Gray Line hired a van to give the private tour, but does this only upon specific request.28/

Mulpeters testified that during the strike, it had been returning checks on prepaid orders to travel agencies advising them of the strike, except for the nightclub tours in San Francisco, and that the company had not instructed its local agents and employees to refer prepackaged tours to any other touring company, nor did the company know what Holiday Tours was doing other than continuing to operate its nightclub tours (which do not leave the city and county of San Francisco). Mulpeters further stated that until the strike ended his company would not take further complaint action.

Witness Arthur T. Holland (Holland): A Gray Line dispatcher furloughed for the strike duration, Holland (called as a witness by defendants) testified of operating during the strike under the name "Golden Gate Tour & Convention Service", offering per capita tours using 45-passenger buses and maxi-vans chartered from various entities. Golden Gate Tour & Convention Service offered city tours for $8.00, Muir Woods tours for $9.00, and Monterey-Carmel tours for $38.00. The only operating authority held was a San Francisco business permit. Holland told of a proliferating competition including U.S. Bureau of Travel, Lorrie's Tours, Ruiz's Tour and Travel, and Holiday Tours (the latter offering nightclub tours in San Francisco). 7 trips weekly to Muir Woods were run and numerous Monterey-Carmel tours.

28/ Mulpeters testified that Associated Limousine Service has 5 minibuses which Gray Line charters from time to time.

Witness Frank Alhadeff (Alhadeff): A partner of Holland in Golden Gate Tour & Convention Service, Alhadeff testified that he and Holland had pursued the permit-certification aspect to the point of getting the information needed, which, not being to their liking, resulted in dropping the attempt as being "so much of a hassle" in that they intended to cease operations anyway as soon as the Gray Line strike ended.

Case No. 10091 - Summary of Testimony
The Position of Gray Line and the Staff

In support of the Gray Line request that we find that the transcript and record of these consolidated proceedings through April 8, 1976, clearly evidence repeated violations of the Public Utilities Code, particularly Section 5401, so as to require cancellation, revocation, or suspension of Ratti's charter-party permit, File No. 601, Gray Line and the staff rely upon the testimony of witnesses Ratti, Fassett, Bowen, Gantert, Majewski, Mulpeters, Cochran, Blakesley, Hunt, and Krug as noted in the following summaries on each issue.

On the issue of Ratti operating as a TCP carrier before having a permit, both the Gray Line and the staff place emphasis in particular upon Ratti's conflicting testimony as to when he first conducted tours (see the fourth paragraph of Ratti's summarized testimony under Defendants' Position, Case No. 9993). In addition, in subsequent testimony in July 1976, Ratti on cross-examination admitted he had rented the vans used in September 1975 for the Blakesley and Cochran tours and ran the tours because "I just assumed upon paying the fee on the TCP Charter-party that I had authorization to operate" (the fee was paid July 18, 1975; the permit was issued October 23, 1975), but on April 7, 1976, Ratti testified that "... I was calling on a daily basis to find out exactly when the permit was ready. And when it was ready, I picked up the permit and had Secretary Johnson sign it." (The thrust being: why would Ratti find it necessary to call daily to find out if the permit were ready if by merely filing an application and paying the fee he had obtained authority to operate in the interim?)

The thrust of the Section 5401 charge relating to the sale of per capita tours by Tours, with Ratti's posture as the dominant principal (see Footnote 29) is based upon the testimony of witnesses Mulpeters, Cochran, and Blakesley as summarized under Gray Line's Position, Case No. 9993; the testimony of witnesses Bowen, Gantert, and Majewski as summarized under the positions of Gray Line and the staff, Order To Show Cause In Re Contempt; and the testimony of Ratti as summarized under Defendants' Position, Order To Show Cause In Re Contempt.

Gray Line and the staff rely upon the direct and cross-examination testimony of Ratti at various points in the consolidated proceedings to support their charges that Ratti violated Commission regulations, including the requirements of General Order No. 98-A, and other laws. Ratti's testimony relevant to these charges was that Tours would pay Ratti $45 per tour for use of his limousine and $75 per tour for use of a maxi-van; that although daily records were made (a "running log"), exact mileage and time records for each tour were not kept "per se"; that Ratti paid the drivers varied amounts[29/] in cash on a net basis, without taxes or social security withholding, depending upon the vehicle to be driven and whether the passengers would be handicapped or require a foreign language tour; that Ratti used Tours' employees and others to drive; and that Ratti could produce virtually no records of any kind. Ratti also testified that it was not until approximately February 1976 that he set up separate bank accounts for Ratti TCP-601 and Tours.

29/ For example, approximately $30 for Tour No. 3 and approximately $50 for the wine country tour utilizing a limousine.

The assertion that Ratti used unauthorized rented maxi-vans almost from the start of the Tours' operation was based upon testimony of witnesses Ratti, Cochran, Blakesley, Majewski, Hollenbeck, Hunt, and Krug. Ratti's testimony relevant to this issue is summarized in the fifth paragraph, Defendants' Position, Case No. 9993, as well as numerous statements relating to use of vans under his TCP-601 permit including his mid-July admission that he was then using 6 to 8 rented maxi-vans daily in his TCP activities in relation to Tours.[30] The Cochran and Blakesley testimony is summarized under Gray Line's Position, Case No. 9993; The Majewski and Hollenbeck testimony under the Staff's Position, Order To Show Cause In Re Contempt, and the Hunt and Krug testimony summarizations follow:

> Witness Thomas P. Hunt (Hunt): A Commission transportation analyst, Hunt testified of Ratti's filing a December 30, 1975, letter request (Exhibit No. 21) requesting (1) addition of 2 specified limousines to his permit and (2) authority to use additional unspecified vehicles to be rented as needed from Aero Rent-A-Car, Inc. and Trans Rent-A-Car with waiver of the 20-day waiting period. Hunt told how the addition of the 2 specified limousines was routinely authorized, but that he had pointed up the improbability of approval of the unspecified rentals in view of the regulatory problems such a practice would create; of how he had referred the matter through the Commission transportation director who had returned the referral, answering the posed question by instructing Hunt "Why not use these reasons to tell Mr. Ratti 'No'", and referring Hunt to Section 5375 of the Code as authority. Hunt recalled that about "...the time the reply from Mr. Gibson was received" (January 19, 1976) he told Ratti during one of Ratti's visits that the request to use unspecified rental units had been denied. On February 24, 1976 Ratti was sent a formal amendment to his

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30/ July 14, 1976, transcript, page 1361 lines 16-19.

TCP-601 which authorized only the addition of the 2 specified limousines to his permit. Hunt testified that Ratti had been given a copy of General Order No. 98-A (which among other regulatory matters sets forth the TCP identification required for display on vehicles used in charter-party service and also details the records permit holders are required to set up and maintain). Hunt also testified that in December Ratti had discussed with him the possibility of using stickers or removable decals on the front and rear bumpers.

Witness Louis Krug (Krug): Successor to Hunt at the Commission permit desk, Krug testified of sending an April 13, 1976 letter to Ratti (Exhibit No. 32) advising that "...you may be using vehicles...that have not been listed with the Commission." and concluding with "The only vehicles which you may operate under your Charter-party Authority are the vehicles listed on your permit."

The staff's contention that Ratti operated and continues to operate vehicles in his TCP service without the TCP identification required under General Order No. 98-A was based upon the testimony of witnesses Cochran, Blakesley, Bowen, Gantert, Majewski, and Mulpeters. Witness Cochran stated that he had looked but had seen no identification or markings on the orange GMC van used to take him on his September 14, 1975, Tours' tour. Witness Blakesley testified that he observed no markings on the GMC van used on his September 29, 1975, tour. Witness Bowen could recall no identification markings on the limousine used on his February 4, 1976, tour stating that that there was only a license plate on the rear of the vehicle. Witness Gantert could recall no identity markings on the limousine used to conduct the Gantert's tour on February 8, 1976. Witness Majewski testified that there were no markings whatsoever on the

rented 12-passenger van used on his March 8, 1976, tour and his testimony was supported by Exhibits Nos. 16 and 17, color photographs taken on the tour which clearly show no TCP identification on the rear or right side of the vehicle. Witness Mulpeters testified that on July 14, 1976, at approximately 3 p.m. he had observed 6 vans being used by Tours at the curb on O'Farrell Street outside the Hilton Hotel,[31] and that as he watched, 2 vans were loaded with passengers by Tours' personnel, but neither of the 2 vans used bore any TCP identification.

The Position of Defendant Ratti

Ratti, asserting that virtually all the arguments and defenses which he raised during his voluminous testimony in these consolidated proceedings are inextricably intertwined and apply to all issues, including those in Case No. 10091, asks that his testimony be considered in that light here. We agree, and will not here repeat specific references to particular summarizations made elsewhere, but will here cover only the thrust of the rebuttal and/or defense testimony.

To the issue of TCP operation before authorization on October 23, 1975, the primary thrust of Ratti's testimony is that the alleged Gray Line "boycott" dried up all his sources of uncommitted TCP operators, forcing Ratti personally to operate before his permit was approved, and furthermore that he believed he could operate in the interim pending formal approval of his permit application once he had paid the application fee.

To the issue of Ratti's role as the dominant partner of Tours in charging per capita, it is Ratti's contention that Tours is and has been merely an organizer of charter groups; that while

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31/ Mulpeters took the license numbers of these vans.

there has been a learning period, they merely would gather a group,[32] determine what the basic charge would be, and divide that charge up among the group. If people were added to the group, they initially made refunds; or if the group were smaller, they charged more. Later, assertedly, they expanded the tour or made refunds to some. Charges assertedly were all approximate. Ratti contends that the subsequent, or mid-1976, brochure carried the stamped legends that charges were based upon time and mileage, and that this proves Tours did not charge per capita. Ratti points to the 24 separate receipts (Exhibit No. 25) introduced into evidence as clear indication that different charges were made to different people depending upon different factors considered in determining the charter group cost.

Ratti's testimony relating to his asserted failure to obey Commission regulations, including General Order No. 98-A, and other laws, was to the point that he simply has no records to substantiate time and mileage assertions relating to individual vouchers on each charter, as well as other aspects of his TCP business. His answers to questions were frequently equivocal, i.e., "it is very possible", "I could not really accurately determine who", "It probably does", but "I am not saying that it does", "roughly", "Exactly when we used that I really cannot tell you, except the fact we have in the past used that method", and "approximately"; all summed up and excused in the revelation that things had been run "a little loose."

32/ In response to a question as to what criteria were used to determine whether or not the collection of customers constituted a "group", Ratti testified "It's always a group", explaining that if tickets were sold to eight different people "we would sell them on the basis as a group."

In response to specific questions, however, Ratti readily stated that he paid his charter drivers (some employees of Tours--including Fassett; others not) in cash, and that he made no withholding for social security or other taxes.

To the issue of use of unauthorized rental maxi-vans made both before and after obtaining a TCP, Ratti denied any intentional violations. He admitted that he had rented and used the maxi-vans utilized in the September 1975 Cochran and Blakesley tours, asserting, however, that he had been under the impression initially that he could operate once he had paid his TCP application fee (but not explaining how a limousine permit could cover maxi-vans), that: "I believe I did operate on one or two occasions...but shortly thereafter found out that I was then supposed to wait for a certain certificate...so it was a mistake on my part having that thinking..." Similarly, Ratti subsequently testified that when operations were resumed about the first of January 1976, he continued to operate rented maxi-vans after filing the December 31, 1975, application to use rented vehicles under his charter-party permit after his conversations with Hunt, since "After the 20 days had expired, he told me that it had become automatic that I would be able to use whatever vehicles I had listed on my application or letter that had to be attached to my application." Ratti denied ever having received a copy of General Order No. 98-A from Hunt[33/] and asserted that no one from the Commission ever informed him in any way, by means of

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33/ Ratti did not deny that he had received copies of General Orders Nos. 98- and 115-Series at the time of filing his original application in July 1975 for authority to operate as a charter-party carrier of passengers, but he did deny that Hunt had ever given him a copy of General Order No. 98.

personal conversation, by means of a telephone call, or by means of letter or any other type of communication, that he could not use leased vehicles.

In response to the TCP identification issue, Ratti testified in direct opposition to the Gray Line and staff witnesses, asserting that he always used TCP identification, usually stickers. With regard to the vans used from 375 O'Farrell Street on July 14, 1976, by Tours, Ratti asserted that "they had TCP stickers on the front and in the back and Mr. Mulpeters is lying."