

Decision No. 92455

DEC 2 - 1980

ORIGINAL ID-23

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application)
of PACIFICO CREATIVE SERVICE)
(California), Inc., a California)
corporation, for a certificate)
of public convenience and)
necessity for passenger sight-)
seeing service in Alameda, Contra)
Costa, Los Angeles, Marin, Fresno,)
Mariposa, Merced, Monterey,)
Orange, Sacramento, San Diego,)
San Francisco, San Joaquin, San)
Mateo, Santa Clara, Santa Cruz,)
Solano, Sonoma, Stanislaus,)
Tuolumne, and Yolo Counties.)

Application No. 58739
(Filed March 14, 1979;
amended December 3, 1979)

J. Mark Lavelle (Dolphin Tours),
Complainant,

v.

Pacifico Creative Service, Inc.
and Japan Air Lines Company, Ltd.,
Defendants.

Case No. 10732
(Filed April 11, 1979)

(See Appendix A to proposed report for appearances.)

O P I N I O N

(COMPLAINT PHASE)

This decision in the complaint phase of this proceeding deals with issues relating to whether defendant Pacifico Creative Service, Inc. (Pacifico), a Hawaii corporation, is operating unlawfully as a passenger stage corporation for some of its sightseeing

tours and should be ordered to cease from those operations unless the Commission grants it a certificate. The background of Pacifico's business and the facts are covered in the proposed report of Administrative Law Judge Donald C. Meaney, attached to this decision.

With the exception of the modification of one finding and the deletion of one conclusion, this decision adopts the proposed report as the decision of the Commission, as augmented by the discussion, findings, conclusions, and ordering paragraphs herein.

Essentially, the proposed report concludes that some of Pacifico's "optional tours" (as that term is explained in the proposed report) are passenger stage routes. It also determines that Japan Air Lines (JAL) should be dismissed as a defendant. Pursuant to our rules, Pacifico and some of the other parties^{1/} filed exceptions to the proposed report, and replies to the exceptions. Those of sufficient importance will be discussed here.

Contempt Issues

Exception One of Pacifico is directed to the absence in the proposed report of any reference to requests on the part of Pacifico for sanctions against Dennis B. Natali, attorney at law, for unprofessional and abusive remarks in the closing brief filed by Natali on Dolphin Tours' (Dolphin) behalf. Similarly, Exception Two complains of the omission of any discussion of possible contempt for certain conduct of Lavelle during the course of the proceeding. Pacifico argues that both Natali and Lavelle should be held in contempt and fined.

^{1/} Interested parties and protestants in Application No. 58739 were allowed to file briefs and exceptions as amici curiae.

The subject was not discussed in the proposed report only because an ALJ has no power on his own to initiate a contempt proceeding. He informed us by other means of the conduct and requested our advice on what action we wished to take.

Natali's closing brief was previously the subject of a protesting letter from Laurence A. Short and Dale C. Andrews, attorneys for JAL, dated May 13, 1980. In that letter, JAL's attorneys complained of the same language which is the subject of Pacifico's Exception One. Specifically, the brief calls a Commissioner "Ayatollah" and one of the defendant's attorneys the "liar/lawyer". The letter then details numerous instances in which the brief goes beyond the record.

We have reviewed the brief and have found the letter to be substantially correct in that references to matter not of record are made in the brief. While the use of such matter is not proper, we choose (as did the ALJ) to ignore it in deciding the case rather than to deal with its use as possible contempt. The previously quoted language is another matter. The state of relations between Iran and the United States renders the use of "Ayatollah" in reference to a Commissioner a crass personal insult. The impropriety of "liar/lawyer" is self-evident.

There is no excuse for this sort of abusive language in a brief. In a hearing, tempers can flare and unfortunate exchanges can occur. Even these, in extreme cases, may support contempt action. But the writing of a brief should allow an attorney some time for detached analysis. Here, for example, the last day of hearing was February 9, 1980. Natali's brief is dated May 1, 1980 and was filed on May 6, 1980. Some real rancor is involved when an attorney can submit a brief between two and three months

after the close of a proceeding and choose the sort of language of which complaint is made. (Although the issues are sharply drawn we see nothing in the opening briefs to provoke such a response.)

In addition, the matter is worsened by Natali's failure to make any sort of retraction since that time. We have no choice but to conclude that he intends to let his remarks stand, which is, at the very least, callous, and at the most, intended as daringus to do anything about them. We have prepared an order to show cause on why Natali should not be held in contempt.

Pacifico's comments on Lavelle concern a letter which he sent on August 2, 1980, to Edward E. Tanner, the Commission's Director of Transportation Division, concerning the conduct of the proceeding. This letter concerned a meeting between Tanner and Lavelle, which Lavelle apparently interpreted as resulting in an understanding that the Commission would direct the ALJ to issue a proposed report.^{2/} The Director of Transportation Division answered by letter that this interpretation should not be placed on the meeting. Copies of Lavelle's letter were sent to the Commissioners and the ALJ, but not to the other appearances in this proceeding.

Then on August 15, 1980 Lavelle wrote another letter to Tanner. Again, copies went to the Commissioners and the ALJ, but not to the other parties. The letter contains one paragraph calling into question the honesty of Commission proceedings in this case. It then launches into more than two pages of policy

^{2/} The Commission directed the ALJ to do so, but on its own initiative and without reference to Lavelle's moves. The Director of Transportation Division has no authority to authorize a proposed report.

considerations on why the Commission should find in Dolphin's favor on the issues concerning Pacifico's bus operations.^{3/}

Rule One of the Commission's Rules of Practice and Procedure reads:

"Any person who signs a pleading or brief, enters an appearance at a hearing, or transacts business with the Commission, by such act represents that he is authorized to do so and agrees to comply with the laws of this State; to maintain the respect due to the Commission, members of the Commission and its Administrative Law Judges; and never to mislead the Commission or its staff by an artifice or false statement of fact or law."

We deem the second paragraph of Lavelle's letter to violate Rule One in that it questions the honesty of our proceedings in intemperate language. We will be glad to investigate alleged improprieties in our procedures and will attempt to right any wrongs. Lavelle's letter contains no particulars, and the paragraph referred to is simply an unwarranted outburst.^{4/}

^{3/} The ALJ informed us that he did not rely on the contents of the letter in reaching his conclusions in the proposed report. We, likewise, do not rely on the letter in reaching our decision.

^{4/} "The question DOLPHIN long ago placed before this Commission was very simple. We did not ask whether or not certain nonelected PUC officials would like to second-guess the Legislature and unilaterally implement, on behalf of JAPAN AIR LINES, a new 'loophole' bus policy that will necessarily lead to the destruction of the backbone of our State PUC-regulated passenger transportation system, the passenger stage corporation. Nor did DOLPHIN ask for 12 days of arduous, expensive Administrative Law Judge hearings as 'window dressing' or a phoney 'show of due process' designed to cover-up a prearranged 'fixed' decision made by other PUC officials prior to any evidence or public record in the DOLPHIN vs JAL proceedings. DOLPHIN asked for justice and common sense." (Lavelle's August 15, 1980 letter, page one, paragraph three.) (Emphasis by the author.)

A more serious Rule One violation concerns Lavelle's policy arguments. Although the letter was not addressed to the Commission, copies were sent to all Commissioners and the ALJ, but not to the parties of record. Lavelle had previously sent unsolicited newspaper matter to the ALJ, who complained of it in a letter to Dennis J. Woodruff, a lawyer formerly retained by Lavelle to represent Dolphin in this case. The ALJ wrote to Woodruff requesting him to instruct Lavelle to cease sending such matter, and explain to Lavelle the problems with ex parte communications. Woodruff subsequently informed ALJ Meaney by telephone that he had done so. We therefore believe that Lavelle, prior to sending his August 15, 1980 letter, was on notice that ex parte communications were improper.

Should we also issue an order to show cause regarding Lavelle? A strong argument can be made for us to do so; however, we will be content with a formal warning. The review, here, of his conduct, and our opinion of it, constitutes sufficient reproof in this instance. He is admonished, however, of our power under California Constitution, Article XII, Section 6, and Public Utilities Code Sections 312, 701, and 2113 to punish for contempt, and our willingness to exercise this power if necessary.

Other Exceptions by Pacifico

Before proceeding to analyze certain exceptions of Pacifico, a general comment concerning exceptions is in order.

The ALJ's proposed decision is 58 pages long, in typewritten form, and includes 14 findings and 11 conclusions. Pacifico's "exceptions" document consists of 125 pages, plus appendices, and a total of 30 exceptions. Exceptions are not for the purpose of rebriefing the entire case, or for presenting us with an extensive litany of ingenious corollaries to arguments previously advanced. We deem a detailed reply to each exception unnecessary. Exception 26 is, in particular, inappropriate. It consists of a series of six "points" which are hypotheticals unnecessary to the result.

Exception 6 objects to Finding 12 in that it lists the Marriott's Great America tour and the Santa Cruz-Roaring Camp tour among the routes for optional tours. Pacifico points out that the record establishes that these tours were terminated after March 1979. A check of Pacifico's exhibit references shows that this is apparently the case. Finding 12 will be modified to delete those tours.

Exception 7 concerns citation of certain cases as previous instances in which we issued certificates for passenger stage carriers which neither own nor lease their own equipment. (Report, footnote 11.) Pacifico is correct that O'Connor Limousine Service, Inc. (Decision No. 90154, April 10, 1979, Application No. 56580) is incorrectly cited. Also, while the exact form of the lease in Golden Gate Sightseeing (Decision No. 90106, April 10, 1979, Application No. 57095) is not entirely clear from a reading of the decision (per-trip or long-term), the operation in Golden Gate differs enough from the facts here that it is not an appropriate citation. The case of David W. Kean (Decision No. 84763, August 5, 1975, Application No. 55636) is sufficiently in point. While the decision uses the word "lease" and not "hire" or

"charter", the discussion indicates that the size of the vehicle would be determined by the number of participants. Thus, the decision appears to employ the word "lease" differently from the way it was used in the proposed report.^{5/} The remainder of the citations are correct.

The point is: even if only one or two companies (including complainant Dolphin), rather than several, have been afforded inconsistent legal and regulatory treatment, we should come to grips with the problem. No finding or conclusion needs modification because of our agreement with some of Pacifico's criticism of the citations.

Exception 15 asserts that the proposed report invents a new concept in "coining" the term of "special events broker". When not lifted from context, the phrase can be seen as nothing more than descriptive language in the ALJ's discussion of In Re Crary (1966) 65 CPUC 545. Perhaps he should not have injected the word "broker" since Crary did not rely on that concept. Crary is correctly distinguishable from this present case because no regular routes or fixed termini were involved. Again, no finding or conclusion needs to be altered.

Exception 22 attacks the proposed report's reliance, inter alia, on Greyhound Lines, Inc. v Santa Cruz Travel Club (1966) 65 CPUC 559 in determining that certain Pacifico routes are of the passenger stage category. The various Public Utilities Code sections concerning passenger stage service do not specify how often a route must be run to determine that it is "regular" (Section 226). That determination is left to the Commission. In Santa Cruz Travel we found that the defendant was not running passenger stage routes because of lack of frequency, but said (65 CPUC 568):

^{5/} See footnote 3 of the proposed report.

"...a frequency of operation between the same termini or over a particular route of once or more every nine days will warrant further investigation to determine if Travel Club is operating as a passenger stage corporation in violation of Section 1031 of the Public Utilities Code."

Pacifico is correct to the extent that this language does not make nine a magic number and that other factors should be considered. We do not regard Santa Cruz Travel as obsolete, however.

The short answer to Pacifico's contentions is that (at least after deleting the Marriott's Great America and Santa Cruz-Roaring Camp tours from Finding 12) there are no borderline cases. The three remaining tours are run year-round; and during the peak summer season they are each run a few times a week, sometimes with more than one bus. Questionable cases, such as the wedding tour, were not found to be passenger stage routes.

The last exception by Pacifico which deserves specific comment is Exception 17, which claims that the proposed report first perceives a regulatory crisis and then proposes to solve it by placing the entire burden for it on Pacifico (exceptions, page 77).

This exception relies to a great extent on a direct misstatement of the proposed report's discussion. Pacifico states (exceptions, page 77):

"The PROPOSED REPORT acknowledges that the result recommended therein represents a major change in interpretation of the scope of passenger stage corporation regulation, and recognizes that this dramatic change in regulatory policy will provoke a 'short-term regulatory crisis'. See PROPOSED REPORT, at 50."

Other than the quoted phrase "short-term regulatory crisis", the language is that of the author of the exceptions. The proposed report at this point analyzes Penal Code Sections 654.1 et seq. and determines that if we were to hold Pacifico to be simply a tour broker-promoter-organizer (as Pacifico advocates) and to hold that the charter-party carriers hired by Pacifico are the passenger stage carriers for the regular routes, Pacifico would be operating in violation of Penal Code Section 654.1, and,

"...at least a short-term regulatory crisis would result. Pacifico and other ground operators would have to cease selling and operating any optional tours until we could conduct the necessary proceedings to determine which charter-party carriers should be certified for what routes. (Under our ruling that Pacifico is the carrier, Pacifico must cease from conducting such transportation but the problem of an investigation of multiple carriers [the charter-party carriers hired by Pacifico] is obviated.) Such a ruling would also be tantamount to a determination that Dolphin and other similar companies (see footnote 11) had been issued their certificates in error, and an investigation would be necessary to ascertain whether certificates for the nonequipment operators should be canceled and possibly reissued in favor of one or more charter-party operators." (Proposed report, pp. 50-51.)

The proposed report then proceeds to detail other difficulties associated with holding Pacifico to be only a tour organizer.

The proposed report most emphatically does not acknowledge that "the result recommended therein represents a major change in the interpretation of the scope of passenger stage corporation regulation..." (Pacifico's exceptions, supra).

Quite the opposite: a fair reading of the report shows that it interprets applicable constitutional and statutory provisions consistently with previous cases.

In this exception and in Exception 30,^{6/} Pacifico seems to have lost sight of what kind of proceeding Case No. 10732 is. It is a complaint case filed pursuant to Public Utilities Code Section 1034^{7/} and the applicable sections of Division 1, Chapter 9, Article 1 of the Code. It is not a Commission investigation or a rulemaking proceeding in which we act in a quasi-legislative capacity (cf. Wood v PUC (1971) 4 Cal 3d 288). There is no rule of law or statute which requires Dolphin, or any other complainant, to complain against any and all possible defendants who may be engaged in conduct similar to Pacifico's.^{8/} Such a requirement would impose an unconscionable investigatory burden on a complainant in many instances. Similarly, in enacting the

^{6/} Which complains that there is no discussion leading up to Ordering Paragraph 2, a cease and desist order, and suggests that Pacifico is singled out from several ground operators for special treatment.

^{7/} "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." (Emphasis added.)

^{8/} We have held on several occasions that class-action rules do not apply to our proceedings, but class-action principles concern who may become a plaintiff or a complainant, not who is a necessary party-defendant.

various sections of the Public Utilities Code authorizing complaints by aggrieved parties on subject matter within our jurisdiction, the Legislature must be taken as recognizing the finite resources of this Commission, and the fact that we can seldom discover and investigate, on our own, every violation of law which merits our attention.

It should be clear from this decision and the adopted proposed report that the Commissioners, and the ALJ as well, are aware that this decision affects an entire industry of tour agencies and ground operators serving the needs of foreign tourists. We do not wish any decision on our part to impact that industry adversely. Recognizing that the code sections regulating passenger stage corporations were enacted many years ago and without relation to the problems of large numbers of foreign tourists, we are willing to work with persons in that industry toward modernization of those statutes. Meanwhile, however, we cannot ignore the law. Regarding Pacifico in particular, we affirm the intent of Ordering Paragraph 3 of the ALJ's proposed report, that Pacifico's application for a certificate of public convenience and necessity should be restored to our calendar and set for hearing. We intend to process that application expeditiously.

Exceptions by Other Parties

We have reviewed exceptions and replies filed by the staff, Dolphin, JAL, and certain interested parties in Application No. 58739 acting as amici curiae in Case No. 10732. We deem the discussion in the proposed report, as augmented in this decision, sufficient to deal with the issues in Case No. 10732.

Exceptions filed by amici curiae Franciscan Lines (Franciscan) concern policy ramifications which allegedly will flow from this decision. We are not indifferent to Franciscan's concerns, but a complaint case is not the format for dealing with policy matters not essential to disposing of the particular issues raised by the complaint. As we stated in answer to certain of Pacifico's exceptions, this proceeding is not a Commission investigation.

Franciscan and others who believe that the passenger stage or charter-party statutes, in their existing form, no longer suit modern operating conditions, are welcome to make their views known to us directly, but outside this proceeding.

In this connection, we will strike Conclusion of Law 11. We agree with the discussion (pages 50-51) concerning the possible results of finding that Pacifico is only a tour organizer; but since we do not reach that result, a conclusion on that subject is unnecessary.

Findings of Fact

1. The proposed report of ALJ Donald C. Meaney was filed and served on the parties on August 29, 1980. Exceptions, and replies to exceptions, were filed by Pacifico, Dolphin, JAL, and certain amici curiae. The staff filed a statement of position.

2. Pacifico's Marriott's Great America tour and its Santa Cruz-Roaring Camp tour ceased to be offered on a regularly scheduled basis prior to this case's submission.

3. Conclusion of Law 11 is unnecessary to the disposition of the issues in this proceeding.

Conclusions of Law

1. Finding of Fact 12 of the proposed report should be modified by deleting reference to the Marriott's Great America tour and the Santa Cruz-Roaring Camp tour.

2. By separate order, we should issue an order to show cause concerning the possible contempt of Dennis J. Natali, for the reasons reviewed in the opinion section of this section.

3. No order to show cause regarding contempt concerning J. Mark Lavelle need be issued.

4. Conclusion of Law 11 should be stricken.

5. Except as augmented by the opinion section of this decision, and as indicated in Conclusions of Law 1 and 4, no modification of the proposed report is necessary, the exceptions to it should be overruled, and it should be adopted as our decision.

O R D E R

IT IS ORDERED that:

1. Finding of Fact 12 of the Administrative Law Judge's proposed report is modified to read:

"12. Optional tours consist of bus transportation with narration in Japanese. The following optional tours have been shown to be conducted for compensation over the public highways of this State on a regularly scheduled basis between fixed points of interest and over routes with no substantial variation (from San Francisco):

Yosemite National Park
Three bridges and bay cruise
Monterey - Carmel."

2. Conclusion of Law ~~12~~ is stricken. al

3. Other exceptions to the proposed report are overruled.

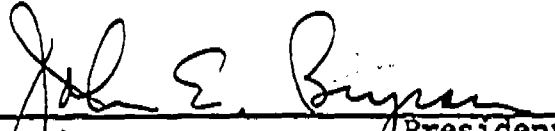
4. Except as augmented by the opinion section of this decision and as modified by this order, the proposed report of Administrative Law Judge Donald C. Meaney is adopted as our decision in Case No. 10732, and the ordering paragraphs therein shall be effective concurrently with the effective date of this order.

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


Dated DEC 2- 1980, at San Francisco, California.

Commissioner Vernon E. Sturgeon, being necessarily absent, did not participate in the disposition of this proceeding.

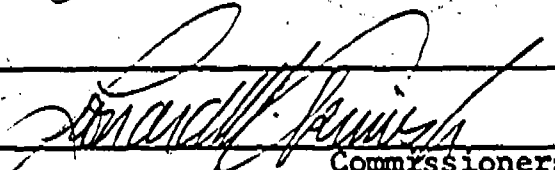
Commissioner Claire T. Dedrick, being necessarily absent, did not participate in the disposition of this proceeding.



President



Commissioners



Commissioners

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application)
of Pacifico Creative Service)
(California) Inc., a California)
corporation, for a certificate)
of public convenience and)
necessity for passenger)
sightseeing service in Alameda,)
Contra Costa, Los Angeles,)
Marin, Fresno, Mariposa, Merced,)
Monterey, Orange, Sacramento,)
San Diego, San Francisco, San)
Joaquin, San Mateo, Santa Clara,)
Santa Cruz, Solano, Sonoma,)
Stanislaus, Tuolumne, and Yolo)
Counties.)

Application No. 58739

J. MARK LAVELLE (DOLPHIN TOURS),)
Complainant,)
v.)
PACIFICO CREATIVE SERVICE, INC.)
and JAPAN AIR LINES COMPANY, LTD.,)
Defendant.)

Case No. 10732

(See Appendix A for appearances.)

PROPOSED REPORT OF
ADMINISTRATIVE LAW JUDGE DONALD C. MEANEY
(COMPLAINT PHASE)

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PROPOSED REPORT OF
ADMINISTRATIVE LAW JUDGE DONALD C. MEANEY
(COMPLAINT PHASE)

Introduction

In recent years tourism by persons from Japan to the United States in general and to California in particular has increased markedly. Providing tours and services for Japanese nationals visiting California has become a good-sized industry. Among such tours are various types of bus or van operations with Japanese or bilingual (Japanese and English) narration. The methods of operating these tours present questions concerning what authority from this Commission is necessary to conduct them.

In Application No. 58739 filed March 14, 1979, Pacifico Creative Service (California) Inc. (Pacifico California) applies for a certificate of public convenience and necessity for passenger stage service of the sightseeing variety in various northern California counties. The application was filed because questions were raised concerning the status of Pacifico California's existing operations. Therefore, in the application, Pacifico California also seeks a determination that its present and proposed operations do not require a certificate. Pacifico California's position at the end of the complaint phase of this proceeding is essentially that it filed the application for protective purposes should the Commission rule against its contention that no certificate is necessary. Pacifico California also filed an amendment to the application on December 3, 1979 which modified its request for some of the proposed tours.

Then on April 11, 1979, J. Mark Lavelle, doing business as Dolphin Tours (Dolphin) filed Case No. 10732 against "JALPAK, Pacifico Creative Service, Inc.,...and Japan Air Lines" (as the

caption reads, in part). This complaint was answered by Japan Air Lines (JAL) and separately by Pacifico Creative Service, Inc., a Hawaii corporation (Pacifico Hawaii). The complaint alleges that the defendants are engaged directly or indirectly in unlawful passenger stage operations in California.

The application and complaint were consolidated. JAL filed a motion to dismiss as to itself which was denied in Decision No. 91048 (November 30, 1979). We found that while the complaint contained certain irrelevant matter and certain allegations regarding alleged attempts to monopolize the Japanese tourist market which are beyond our jurisdiction, it also alleged with adequate specificity that JAL participates in a passenger stage operation not certified by the Commission. We further decided that the issue of whether JAL is engaged exclusively in foreign commerce could not be determined by a motion to dismiss.

It is to be noted from the above recital that whereas Pacifico California is the applicant in Application No. 58739, Dolphin's complaint was answered (separately) by JAL and Pacifico Hawaii. Pacifico California, apparently an inactive company at this time, is a wholly owned subsidiary of Pacifico Hawaii. Apparently, at the time of the filing of the complaint, Dolphin was not aware of the existence of two Pacifico corporations, nor that JALPAK is not the name of a company but a trademark (discussed more fully below). When read as a whole, the complainant's allegations against JALPAK are reasonably assumed to be directed against Pacifico Hawaii, since that defendant was specifically named in the complaint while Pacifico California was not. The fact that Pacifico California is not named in the complaint and is not a party does not render the complaint

defective since all the activities complained of are those of Pacifico Hawaii, and since, if necessary, we may enter an order against Pacifico Hawaii directing it not to use its wholly owned subsidiary for the purpose of evading any order.^{1/}

Hearings were conducted on the complaint.^{2/} On the final day of hearing the Administrative Law Judge (ALJ) ruled that because of serious questions concerning whether a certificate is necessary, the application phase of this proceeding would be placed off calendar until a decision on the complaint phase was issued. Dolphin had objected to this procedure but withdrew its opposition on the final hearing day.

In the course of the hearings a disagreement arose between Dolphin and the other parties regarding the scope of the complaint. This concerned whether the complaint embraced the practice of selling prepackaged tours in Japan which include bus transportation in this country, as distinguished from selling additional tours to Japanese tourists over-the-counter in California after they arrive here, such tours not being part of any original package arrangement sold in

^{1/} For brevity, we will therefore use "Pacifico" to refer to Pacifico Hawaii, the active corporation.

^{2/} The hearings were held before Administrative Law Judge Meaney in San Francisco on December 11, 12, and 13, 1979, and February 5, 6, 7, 8, 11, 13, 14, 15, and 19, 1980. Closing briefs were received on April 25, 1980. Parties appearing in the application phase of the proceeding as protestants were permitted to file amicus curiae briefs in the complaint phase.

Japan. The ALJ ruled that based on the language in the complaint, the defendants had fair notice only that Dolphin wished a determination on issues involving the additional tours sold in the United States. We affirm this ruling.

Regarding the tour business, the activities of Japan Creative Tours (JCT), a company owned in part by JAL, became a factor in the case. JCT was not named in the complaint nor did it enter an appearance.

Facts

Dolphin holds passenger stage authority from this Commission pursuant to Decision No. 89731 dated December 12, 1978 (Application No. 57596) and Decision No. 90270 dated May 8, 1979 (Application No. 58261). Dolphin is authorized to conduct sightseeing service with Japanese language narration to various points of interest in northern California. Dolphin's headquarters is in San Francisco.

As Dolphin presently operates, it does not own or lease^{3/} any equipment. It sells individual fare tours, such as a single day San Francisco-Yosemite National Park tour, and charters equipment as necessary to accommodate the passengers. Dolphin furnishes bilingual guides; the bus company from whom it charters the bus furnishes the driver.

^{3/} The term "lease" refers to a long-term equipment lease which is a substitute for purchasing equipment. The terms "charter" or "hire" refer to renting a bus for an individual trip or a series of specific trips. The record does not disclose that there are any hybrid forms of such arrangements which could possibly blur the distinction between leasing, on the one hand, and chartering or hiring, on the other.

The testimony of Lavelle indicates that when he first conceived of Dolphin's operation, he contacted the Passenger Operations Branch of this Commission's Transportation Division and was told he needed a passenger stage certificate.

While Dolphin runs several certificated tours from San Francisco to various northern California points of interest, it is not a large operator if the total number of tourists from Japan who take bus tours are counted. Lavelle's market research shows that for 1979, between 250,000 and 300,000 Japanese nationals^{4/} visited the San Francisco area; apparently, the other parties do not dispute this estimate. Dolphin, from March 1, 1979 through December of 1979 carried 3,443.

The evidence demonstrates that almost all the Japanese who travel to California from Japan^{5/} take one or more bus tours. This occurs because if a Japanese tourist purchases a package tour that includes air fare, hotel accommodations, and tours, the air fare is much more reasonable. The exhibit material and the associated testimony shows that all the package tours to California include bus sightseeing tours to one or more destinations. In addition, it is standard practice for the tours arriving in San Francisco in

4/ Unless otherwise indicated, the term "Japanese" is used in this opinion to refer to citizens of Japan who come to the United States as tourists, and not to United States citizens of Japanese ancestry.

5/ Not all of them arrive in San Francisco directly from Japan or return directly to Japan from San Francisco. There are multi-destination tours, but all of the tours originate and ultimately terminate in Japan.

daylight hours to include a "city tour" which is combined with the transfer from the airport to the hotel. In other words, the arriving passengers are given a tour of the city lasting a few hours on their way to the hotel.

The tours included in the package are paid for as part of the whole tour price. Payment is made in Japanese currency prior to departure from Japan.

Additionally, Pacifico and other similar companies offer optional tours. These are advertised in Japan but are sold only after arrival in the United States and paid for in dollars. The evidence on what promotion of these tours takes place in the United States was in dispute, but we believe it was shown that while certain color brochures (in Japanese) are distributed in Japan and the principal promotional effort concerning such tours is made there, sales efforts regarding such tours continue in the United States through making information available to those who wish it, and, of course, by way of actually selling the tours in the United States for dollars.

Pacifico conducts operations in other states and other countries either directly or through subsidiaries. Pacifico is known in the trade as a "ground operator" or "receptive agent". It does not own or lease any buses. The function of Pacifico and other ground operators with which it competes is to serve the needs of those traveling to the United States from Japan on package tour arrangements. (There are also ground operators dealing with other nationalities, and this type of business is not unique to California or to the United States.)

Some ground operators are strictly independent businesses. Pacifico is, however, connected with JAL. It was stipulated (Tr. 273) that this corporate connection is as follows:

1. JAL owns 50.2 percent of JCT stock;
2. JCT owns 30 percent of the stock of Pacifico Hawaii; and
3. Pacifico Hawaii owns 100 percent of Pacifico California.

The parties disputed how much control JAL, a Japanese corporation with many overseas air routes, exercises over its subsidiaries. This problem will be reviewed later in this opinion.

JCT, also a Japanese corporation, is known in the business as a tour wholesaler. Its function is to put together package tours in Japan. It deals with local Japanese tour agencies which are the retailers, and not directly with individual members of the public. The tours are promoted under the name JALPAK, which a registered trademark of JAL, used with JAL's permission by JCT and Pacifico.^{6/} JCT distributes JALPAK brochures, etc., to the Japanese tour retailers. Such brochures include descriptions of specific optional bus tours from San Francisco to outlying points of interest within California (discussed in more detail below).

Pacifico maintains offices in and conducts operations in Los Angeles and San Francisco. Its Los Angeles operations were not developed in detail, but the record indicates that the methods of operation in San Francisco and Los Angeles are similar.

^{6/} The assertion in JAL's opening brief (footnote, page 8) that the JALPAK logo is used only in advertising in Japan for tours sold there is contrary to the evidence. See photographic exhibits of Pacifico California's ticket counters and of the uniforms worn by its personnel.

The record develops in detail the duties of Pacifico as a ground operator which we will review briefly. Every facet of it is not free from dispute, but the preponderance of the evidence supports the following summary.

It is essentially the function of Pacifico to actually conduct the package tour for a group arriving here from Japan. This includes arranging ground transportation. It also encompasses meeting the group at the airport, where it has a booth. One Pacifico employee is allowed in the customs area to assist arriving group members. Pacifico furnishes Japanese-speaking guides aboard the buses. It conducts group briefings at the hotel, upon arrival, in order to acquaint the tourist with the area, and to inform them of certain problems and customs they may encounter in the United States. The record demonstrates that a ground operator is especially important in handling a group tour of persons from a different part of the world who do not understand the language and customs of the country they are visiting.

The parties dispute whether the briefing sessions are used to promote optional tours. We believe it was shown that while the briefings are not for that purpose, information on them is given on request.

From the viewpoint of an individual Japanese tourist, then, the system works as follows: he (she) consults a retail tour agency in Japan and is shown JCT JALPAK brochures and those of competitors. If he selects a JALPAK group tour to California he makes a fixed prepayment (in yen) for the tour. In addition to his tickets, etc., he is given brochures which include descriptions of optional tours available in California, which may be purchased after arrival, in dollars. He is flown here aboard a JAL aircraft. When

he gets to the airport and debarks, he is received by Pacifico employees wearing uniforms with emblems with the legend JALPAK and which include the design of the JAL logo below the word JALPAK. (See photographs; Exhibits 72, 73, 74, and 75.) He and other members of the group are placed aboard chartered buses to be transferred to the hotel. If the arrival is in the daytime, the transfer is combined with a city tour with Japanese narration by a Pacifico employee. He is assisted by Pacifico personnel in checking into a hotel. A briefing session is held. Pacifico employees assist members of the group with their scheduling to make sure they do not miss the bus tours which are prepaid (unless they elect not to go). Such employees also sell optional bus tours which were not included in the prepaid package, collecting for them in dollars. Pacifico charters buses as necessary for both the prepackaged and the optional tours and furnishes Japanese-speaking guides. The drivers are furnished by the bus company. Lastly, Pacifico personnel assist at check-out and departure.

Pacifico procures its bus transportation from charter-party carriers. In the San Francisco area it uses Franciscan Lines, Inc. (Franciscan), Falcon Charter Service, Inc. (Falcon), and Eastshore Lines, Inc. (Eastshore). Pacifico pays these companies monthly on a mileage basis. At the same time, however, Pacifico collects fares for optional tours on an individual basis from members of JALPAK tour groups who wish to take such additional tours.^{7/}

^{7/} It was previously the practice of Pacifico to fill up empty seats on its tour buses by selling over-the-counter on a space available basis to individuals wishing a Japanese-narrated tour and who were not part of a JALPAK tour. This practice was terminated in 1977, and we consider any separate issues concerning this method of operation to be moot.

At the time of the hearings in this case, Pacifico promoted and conducted the following optional tours:

- Yosemite
- East Bay (Three bridges and bay cruise)
- Marriott's Great America
- Monterey - Carmel
- Santa Cruz - Roaring Camp
- Sacramento (October through March only)
- Napa Wine Country (October through March only)
- Reno (May through September only)
- "Western Country" (Tahoe, Virginia City, Reno; May through September only).

The San Francisco city tour is not used as an optional. There used to be a night tour of the city but this was terminated when the practice of selling over-the-counter to non-JALPAK customers was terminated (see footnote 7). Pacifico is considering resuming the tour.

There is also a "wedding tour" which is handled specially because careful prearrangements for the church (in Sausalito) must be made. It is an optional but is reserved prior to departure from Japan. It is then paid for in dollars on arrival in the United States. The evidence is indefinite on how often this tour is run.

Optional tours are less than half of the business.

Pacifico handled approximately 9,000 passengers in 1978. According to Mr. Toyonari Yanagase, Pacifico's Northwest Regional Manager, who is headquartered in San Francisco, about 40 percent of the total take at least one optional tour. The witness testified that while he and other regional managers may suggest routes, the final decision regarding routing and fares is made in Tokyo by the JCT planning department. The witness added, however, that he had been instructed to obey local law and would not have to await

approval (from the Hawaii office or JCT) to terminate any operation found not to be in accordance with law (Tr. 353-357).^{8/}

Frequency of tours varies seasonally. There is a summer peak, particularly in August. The record is not clear on the exact number of optional tour passengers on any particular route during the on-season or off-season. The minimum number of passengers for an optional tour is ten. The evidence does, however, establish the route frequency and the fact that, with only rare exceptions for specialized groups, the tour routes do not vary. Mr. Keko Miyamoto, operations manager of Pacifico in San Francisco, subpoenaed by Dolphin, testified in part, as follows (Tr. 284-288):

"Q [By Mr. Lee, counsel for Dolphin]: Let us think now about the Yosemite tour.

"A \$65 including the lunch and Japanese-speaking guide, sightseeing tour.

"Q The \$65 cost, is that a cost today?

"A Yes.

"Q Is that cost of each person?

"A Yes.

"Q And that cost is paid for at the hotel; is that correct?

"A Yes.

"Q Does the Yosemite tour follow the same route every time?

^{8/} The testimony of the witness indicates that he reports to the general manager in Hawaii. It is not clear whether Yanagase deals directly with JCT personnel in the planning department in Tokyo. In any event, it is clear that Yanagase does not have ultimate authority for route planning or fares, and that JCT makes these decisions.

"A Yes.

"Q And I would like to clarify that.

"Do you pick the passenger up at the hotel where he is staying?

"A Where the group stays?

"Q Yes.

"A Yes.

"Q So that the route might vary if the group is staying at the St. Francis because then the tour would start at the St. Francis; but if the group is staying at the Hilton, it would start at the Hilton?

"A Exactly.

"Q But other than where the tours start, does the tour follow the same route each time, the Yosemite tour?

"A Yes.

"Q Let's talk about the high season; the high season, I believe, is August and September, is that correct?

"A Yes.

"Q Calling your attention to August and September, 1979. I am going to ask for each of the tours that you have described. . . .

"How many passengers went on optional tours during August and September, 1979? Do you understand?

"A I understand what you saying.

"Q How many took the Yosemite tour during that time?

"ALJ MEANEY: The two months put together?

"MR. LEE: Yes, let's try that.

"THE WITNESS: I don't know exact figures at this moment.

"MR. LEE: Q Approximately? Maybe it would be easier, how many per week during those two months?

"ALJ MEANEY: Average?

"THE WITNESS: In the case of Yosemite?

"MR. LEE: Q Yosemite.

"A To my knowledge, probably heaviest season in the year to Yosemite, three to four times a week.

"Q Three to four times a week a tour was conducted?

"A Yes, to Yosemite in the heaviest month.

"Q How many passengers were on each tour approximately?

"A I don't know.

"Q Does it vary?

"A It varies.

"ALJ MEANEY: What would be the minimum?

"THE WITNESS: Minimum is 10.

"ALJ MEANEY: What would be the maximum?

"THE WITNESS: It depends on the size of the bus, your Honor.

"ALJ MEANEY: How large would the largest tour to Yosemite be?

"What would be the largest bus you would want?

"THE WITNESS: Well, I know that sometimes it gets up to three bus size. It depends on the groups coming from Japan.

"Sometimes there are big groups, JALPAK big groups, with more than a hundred.

"ALJ MEANEY: To Yosemite?

"THE WITNESS: No, from the travel tour.

"ALJ MEANEY: What would be your largest tour to Yosemite during the on-season?

"How many people?

"THE WITNESS: I would say about three busloads.

"ALJ MEANEY: You are talking about minibuses?

"THE WITNESS: Large full-size buses, your Honor.

"ALJ MEANEY: So you are talking about maybe a hundred people?

"THE WITNESS: Yes, your Honor.

"MR. JOHNSON [counsel for Pacifico]: But again, Keko, answer the Judge's question. How many passengers in a single bus?

"THE WITNESS: In a single bus, mostly 47-seaters.

"ALJ MEANEY: I was trying to get an average so that then he could answer Counsel's questions by just how many tours there are because he was having trouble computing people per week.

"So I thought perhaps if we went minimum and maximum, then you could ask how many tours per week.

"MR. LEE: I think we have established the minimum and maximum.

"Q Is the minimum for all optional tours 10?

"A Yes.

"Q And is the maximum for any of the optional tours however many passengers want to go on a given day?

"A Yes.

"Q And that might be as many as three buses?

"A Yes. . . .

"Q During the high season, 1979, approximately how many tours were conducted, [East] Bay cruises, average per week?

"A About three to four.

"About the same as Yosemite?

"A I should say about three as average.

"ALJ MEANEY: Yosemite was what, about three a week?

"THE WITNESS: Three, three to four services to Yosemite, your Honor.

"MR. LEE: Q And is the Bay Cruise-East Bay tour, does that follow a regular route?

"A Yes.

"Q Does it follow the same route each time?

"A Yes.

"Q Calling your attention to the Monterey-Carmel tour, does that follow a regular route?

"A Yes.

"Q The same route each time?

"A Yes.

"Q And during the on-season 1979, approximately how many per week of the Monterey-Carmel tours were conducted?

"A About one.

"Q All right. How about the Sacramento, Napa Wine Country you said were conducted only from October to March, is that right, during the off-season?

"A That's right.

"Q All right. During 1979 during the off-season, approximately how many per week of that tour?

"A I hesitate to say, but it doesn't attract too many people and no participants yet.

"Q All right. Fine.

"ALJ MEANEY: You haven't run it at all yet?

"THE WITNESS: Not yet, your Honor.

"MR. LEE: Q How about -- let's think about the Western Country, Tahoe, Reno, Virginia City tour, does that also follow a regular route?

"A Yes, Mr. Lee.

"Q The same route each time?

"A Yes, Mr. Lee.

"Q Did that operate during the on-season in 1979?

"A To my knowledge, I have operated the two or three tours from April to September."

See also the testimony of Hidenori Seki, called by Dolphin, who was formerly a tour guide for Pacifico (1977 to June 1979). He testified that the city tours, originating at the San Francisco International Airport and terminating at various hotels in San Francisco, were always the same route: from the airport to Twin Peaks, then to Golden Gate Park, then to the Golden Gate Bridge, then to Fisherman's Wharf, then to the hotel. The time would be adjusted to accommodate the flight, but the route remained the same. (Tr. 119-121.)

Those who select optional tours are not necessarily placed aboard separate buses from the prepackaged customer, although it is possible for a guide to tell one from the other by inspecting the ticket folder (Seki, Tr. 113-134). In any event, there was always a preplanned route supplied to the tour guide, which he handed to the driver (Tr. 121-122).

The city tour^{9/} route, described above, varies only by way of the hotel termination point; otherwise it is fixed. Other

^{9/} While this name was used for descriptive purposes, the tour originates at the San Francisco International Airport in San Mateo County and passes through that county as well as one or more cities in it in addition to San Francisco. Thus the exception from passenger stage requirements in Public Utilities Code Section 226, first paragraph, is inapplicable.

routes are equally definite. The "JALPAK '78" brochure (Exhibit 39, as translated from Japanese), lists the following optional tours from San Francisco:

"FROM SAN FRANCISCO

"Three Bridges and Bay Cruise (1 day sightseeing. \$35. Children: \$28. Lunch included. Operates with 12 or more.)

"Departure from San Francisco. Tour of the three bridges spanning San Francisco Bay--Bay Bridge, San Rafael Bridge, and Golden Gate Bridge. Board sightseeing boat at Fisherman's Wharf for Bay Cruise. Along the way, you may inspect the University of California and go shopping in Sausalito.

"Santa Cruz--Roaring Camp (1 day sightseeing. \$40. Children: \$32. Lunch included. Operates with 15 or more.)

"Departure from San Francisco. Travelling south along the beautiful coastal Route 1, you visit the Paul Masson Winery, famous even in California for its wines. After the winery tour you may sample the wines of your choice, then on to Roaring Camp's Cowell Redwood Garden with trees rising as high as 130 m. Tour also includes a circle trip through the trees on the 1890 SL (railroad).

"Tour of Yosemite National Park (1 day sightseeing. \$65. Children: \$52. Lunch and dinner included. Operates with 12 or more.)

"Departure from San Francisco. Yosemite is one of the most popular of America's National Parks: a deep valley in the western Sierra Nevada Range. Morning tour of El Capitan and Bridal Veil Falls. After lunch, your day will be full of such sights as Yosemite Falls, which drops 740 m., or cliffs and peaks carved by glacial erosion.

"Marriott's Great America (1 day sightseeing. \$35. Children: \$28. Lunch included. Operates with 15 or more.)

"Departure from San Francisco. First stop at Eastridge Shopping Center, newly built in San Jose. Then on to Marriott's Great America, a large-scale amusement park completed in 1976. A thrilling jet coaster (roller-coaster), plus delightful side-shows and rides will give you pleasant memories.

"Monterey/Carmel and Mystery Spot (1 day sightseeing. \$40. Children: \$32. Lunch included. Operates with 15 or more.)

"Departure from San Francisco. Some 20 minutes away from Santa Cruz by car in the depths of the forest: the Mystery Spot that has become famous recently. Strange and unusual phenomena, in which you can sense an abnormal magnetism, take place before your very eyes. Having been astounded by strange happenings, you visit the beautiful West Coast towns of Monterey and Carmel."

Tours from other points of origin are also listed. It is clear that all fares are per capita. See also translations of operational tours in Exhibits 66 and 67. The presidents of Falcon, Franciscan, and Eastshore (witnesses for Pacifico) stressed in their testimony that specialized groups are accommodated and side trips are arranged for them.^{10/}

^{10/} These witnesses testified as to their overall operations for all ground operators, not simply regarding their work for Pacifico.

There was some disagreement over the responsibility of the tour guide on the bus versus that of the bus driver. We believe the evidence demonstrates that the guide, as an employee of the tour company, is responsible for the tour, but the driver, as an employee of the bus company, has ultimate responsibility for the bus. The tour company decides upon the route and destination; the tour guide informs the bus driver of this. The guide may order a deviation from the route to visit an additional point of interest but the evidence does not establish that this is common practice. The driver, as the person ultimately responsible for the safety of the passengers and the equipment, may decide (over the objection of the tour guide) that weather or road conditions require detours or even cancellation of all or part of a tour. The tour guide has no authority to tell the driver how to handle or physically operate the bus. On the other hand, the bus driver has no authority to interfere with the tour selected, except as necessary because of operating conditions or equipment problems. (See testimony of the presidents of Falcon, Franciscan, and Eastshore and that of James Mulpeters, general manager of Gray Line in San Francisco.)

Issues Presented

The facts clearly show that the Commission must determine whether it has afforded Dolphin and Pacifico inconsistent regulatory treatment. On the one hand, Dolphin was advised by the Transportation Division that even though it was not the owner of equipment, in order to conduct tours on regular routes it would need a passenger stage certificate. Dolphin complied. Meanwhile, an entire industry of considerable size involving Pacifico and other similar ground operators has grown up. Such operators sell individual tickets, in California, to members of groups

arriving from overseas, for bus tours. In the case of passengers doing business through such ground operators, the transportation is by charter-party carriers, and at least in Pacifico's case, in full-sized buses.

Additionally, the ground operators handle an even greater volume of persons who participate in prepackaged tour arrangements sold overseas. Precise questions relating to the prepackaged transportation may not be completely decided here because of the scope of the complaint, but the problem can hardly escape the Commission's ultimate consideration.

First, we should determine whether there is any meaningful factual or legal distinction between Dolphin's operation and Pacifico's which justifies our requiring a certificate for Dolphin but not for Pacifico. This includes an examination of Pacifico's arguments regarding foreign commerce.

If no meaningful legal or factual distinctions may be made, then we must decide, consistently, how both Dolphin and Pacifico should be treated. Are both of them, or neither, conducting a passenger stage operation? If the answer is "both", then we must order Pacifico to cease and desist from any regular route service until it has obtained a certificate from this Commission. If neither are conducting a passenger stage-type business, then the complaint fails, and, in addition, the Commission

should take action (by way of initiating another proceeding) to determine whether Dolphin and other similar nonequipment operators^{11/} holding certificates should be considered passenger stage carriers, or whether such certificates should be revoked as having been issued in error.

Although the charter-party carriers are not defendants in this matter, the above issue is intertwined with the question of what sort of transportation various charter-party carriers are furnishing Pacifico or Dolphin. This is the case because one facet of deciding whether Pacifico is a passenger stage corporation is to determine (assuming regular routes and fixed termini are involved) whether the Legislature, given the facts involving Pacifico California's operations, intends that Pacifico or the underlying carrier or carriers should be required to hold certificates for the routes.

Lastly, assuming again that neither Dolphin, nor Pacifico, nor others similarly situated qualify as passenger stage corporations but should be considered promoters and brokers of tours, then what is the effect of Penal Code Sections 654.1, 654.2, and 654.3 on their operations, and does this require any action on the part of the Commission?

^{11/} The following decisions which granted passenger stage certificates concerned companies which did not propose to own or lease any of their own equipment: Southern Calif. Commuter Bus Service, Inc., D.83367, A.54544 (Aug. 27, 1974); David W. Kean, D.84763, A.55636 (Aug. 5, 1975); SFO Airporter, Inc., D.87881, A.57482 (Sept. 20, 1977); Golden Gate Sightseeing Tours, Inc., D.90106, A.57095 (Mar. 27, 1979); O'Connor Limousine Service, Inc., D.90154, A.56580 (Apr. 10, 1979); Dennis Felso, D. 90985, A.58214 (Nov. 6, 1979); and Mark B. Anderson, D.91207, A.59043 (Jan. 8, 1980).

This proceeding includes a voluminous record and extensive briefs. The various contentions of the parties which follow are, necessarily, drastically abbreviated.

Foreign Commerce Issue

Pacifico places great emphasis on its contention that its operations, including the operational tours, are within the stream of foreign commerce and therefore not subject to intrastate regulation. Pacifico believes that the movements of Japanese tourists are an "integral" part of international movement, and are "intrinsicly" linked to that movement (citing, generally, Baltimore Shippers and Receivers Ass'n. v Public Utilities Commission (N.D. Cal 1967) 268 F Supp 836; United States v Yellow Cab Co. (1947) 332 US 218; and certain California cases).

While Pacifico correctly states the law, it misapplies the facts in this case to it. There is no integral, let alone any "inextricable" connection between any international movement and any of the optional^{12/} tours. The use of the word "optional" by JCT and Pacifico is not window dressing. This is proved more strongly than by any one other fact that approximately 60 percent of the JALPAK tourists elect to take no optional tours. No one who does not choose to take any such tours is penalized in any way (such as losing discounts). And although Pacifico maintains close contact with its tour members, they are not prevented from choosing an alternate company for supplementary touring, or renting cars or using public transportation.

^{12/} Again, for emphasis, the status of the prepackaged tours sold in Japan is not an issue in this particular proceeding.

There is no authority for the proposition that because JCT performs the basic planning for such tours in Tokyo or because the principal advertising is done there, that the optional tours become "inextricably" part of any international movement. And while Pacifico currently offers the tours only to JALPAK tourists, the evidence demonstrates that there are no through-ticketing arrangements with any interstate or foreign carriers as far as the optional tours are concerned.

Status of JAL, JCT, and Pacifico

Assuming arguendo that the optional tours constitute passenger stage service, are any of the other defendants engaged with Pacifico in performing such transportation?

Dolphin's complaint raises issues of whether the remaining defendants "aid and abet" Pacifico. We must determine whether JAL or JCT are engaged jointly with Pacifico in performing any unlawful transportation movements in California, or whether an agency relationship exists, and not whether they "aid and abet" Pacifico. While this Commission may enjoin illegal passenger stage activity, it is for the appropriate state court, upon prosecution by the proper authorities, to convict a person or corporation of criminal violations of the Public Utilities Code. "Aiding" and "abetting" are terms used exclusively in criminal law and procedure, and those who "aid and abet" are "accessories" to crimes. (Penal Code Sections 30 and 659; see Black's Law Dictionary, Fourth Edition.) This is no bar to our disposing of all the substantive issues within our jurisdiction, since, if joint operation is involved, or if we find that one defendant is the agent of another, all appropriate parties may be enjoined from participating in the operation of unlawful transportation movements.

Dolphin maintains that just because JAL's air operations are in the stream of foreign commerce, this does not mean that JAL cannot be engaged in intrastate bus operations in California. With this general statement we agree. We must, however, determine whether JAL does, in fact, engage in such activity directly or indirectly.

Dolphin's opening brief argues (page 28):

"The activities of Japan Air Lines demonstrate a consistent and longstanding pattern of aiding Pacifico's illegal passenger stage corporation operations in California. The corporate connection between Japan Air Lines and Pacifico is extremely close. Japan Air Lines owns 50.2% of Japan Creative Tours, which in turn owns 30% of Pacifico Creative Service. Exhibit 45. Furthermore, another 30% of Pacifico is owned by its president, who is on leave from Japan Air Lines. Exhibit 45. Japan Air Lines permits Japan Creative Tours and Pacifico to utilize its corporate logos and trademarks in promoting sightseeing tours. Exhibit 61. The testimony shows that Pacifico does business only with Japan Creative Tours, Record at 359, and that the tours almost exclusively utilize Japan Air Lines for their transportation. Record at 507. In addition, Japan Creative Tours tells Pacifico what tours to run, Record at 504, and approves any agreements between Pacifico and hotels, restaurants, and bus companies. Record at 505. In short, the assistance rendered to Pacifico by Japan Air Lines is voluminous. To halt effectively the illegal passenger stage corporation operations of Pacifico, the aid being rendered by Japan Air Lines must be terminated. There is no question that the Public Utilities Commission has the authority to order Japan Air Lines to cease and desist from continuing its assistance to Pacifico's illegal activities."

JAL argues that Pacifico's reliance on these corporate connections is insufficient and does not demonstrate that JAL engages in any acts which prove the allegations against it in the complaint^{13/} concerning the operation of passenger stage service. JAL's brief states:

"A review of the utter paucity of evidence presented by complainant leads without contradiction to the dual conclusions that JAL's initial statements to the Commission concerning the nature of its activities in California were correct and that complainant's allegations were groundless.

"Although the complaint case consumed eleven days of hearings it is a simple matter to summarize the few references to JAL that constitute complainant's entire case. In the course of complainant's case he showed that certain brochures contain JAL's logo as well as the JALPAK logo (Transcript at 63, 84 and 156). Mr. Seki, a former PCS bus driver and Dolphin witness, had never heard anyone state that it was their belief that JAL and PCS were one and the same (Transcript at 150). Mr. Miyamoto, a PCS employee and Dolphin witness, formerly worked for JAL as a flight attendant and had to cease working for JAL because of a back injury. Mr. Miyamoto understood the fact that JAL owns some stock in JCT (Transcript at 254-55). Mr. Ueno, Vice President of PCS and a Dolphin witness, stated that PCS is not a JAL subsidiary, that he is on leave of absence from JAL, but that 100% of his pay comes from PCS, that he does not plan to return to JAL, and that he would rather quit than return to JAL (Transcript

^{13/} See our order denying JAL's motion to dismiss for a review of the complaint's allegations in more detail (Decision No. 91084, November 30, 1979).

at 414-19). Mr. Takigawa, President of PCS and a witness of Dolphin, does not consult with JAL before his company begins new tours (Transcript at 506). Incredibly, the above facts constitute complainant's entire case against JAL. Moreover, complainant's own testimony was devoid of any reference to JAL even though complainant previously submitted sworn affidavits and pleadings alleging JAL activities. Clearly the evidence presented by complainant establishes no direct or indirect passenger stage activities by JAL, no rationale for the application of the alter ego doctrine, and no other illegal activities undertaken by JAL. In fact, these issues -- the ones that complainant had alleged were the crux of his case -- were not even addressed during hearing." (JAL brief, pages 7-9, footnote omitted.)

JAL's own evidence on this subject, briefly summarized, shows that JAL does not involve itself in Pacifico's operations. The group tours are met at the airport by Pacifico's personnel; JAL personnel supply flight arrival times and information as to whether a JCT group is aboard (which is a service performed for other ground operators). After the members of the group leave the airport they are looked after entirely by Pacifico. JAL has no employees on the buses as guides and does not make any of the bus arrangements. Pacifico employees deal with JAL employees during the stay of a particular group only if an airline-related problem, such as lost baggage, arises. When the group is leaving San Francisco for another United States destination prior to returning to Japan, Pacifico and not JAL handles the arrangements.

JAL points out that Yukio Takigawa, president of Pacifico, who was called as a witness by JAL and examined at great length by the parties on Pacifico's operations, testified that he made his decisions independently of JAL because, as president of an independent company, he has an obligation to the stockholders of Pacifico.

We believe the evidence demonstrates that JAL is not a passenger stage corporation itself^{14/} nor is it participating jointly as one of several principals in the operation of a passenger stage corporation^{15/} nor can it be shown that either JCT or Pacifico are the agents of JAL.

Dolphin places considerable reliance on the sales promotional evidence it introduced concerning JAL, JCT, and Pacifico. The evidence shows that not only JCT (in its JALPAK brochures) makes use of the JAL logo and the JALPAK trademark, but that Pacifico uses the logo and the JALPAK name for identification purposes. It was also shown by the defendants, however, that joint advertising and joint tour promotion between airlines and tour companies are practices of the industry and not peculiar to JCT and the defendants. Other airline logos are used in tie-in type advertising. There is no legal basis for finding that joint promotion, of itself, means joint control and management of a tour.

It would be naive in the extreme to ignore the fact that JAL, JCT, and Pacifico, interrelated as they are, cooperate with each other for their mutual benefit. (It was shown, for example, that all JALPAK tour air transportation is on JAL except on routes which JAL does not fly or in cases of equipment failure.) Since JAL owns 50.2 percent of JCT's stock, and since

14/ Nor did Dolphin try to prove that JAL is independently operating a passenger stage service. See opening statement of attorney Lee for Dolphin, Tr. 26-30.

15/ It should be remembered that at this point we are assuming the existence of passenger stage service on Pacifico's part to analyze JAL's activities.

JCT owns 30 percent of the stock of Pacifico Hawaii, which, in turn owns 100 percent of Pacifico California, JAL is in a position to influence, albeit indirectly, Pacifico's business. But the law requires more than such general influence before it can be found that JAL is operating the bus tours complained of as a joint principal with Pacifico, or that Pacifico is the agent of JAL.

It has been held that even the business of a wholly owned subsidiary, despite the financial and commercial domination by the parent corporation, is not the business of the parent, although the subsidiary may act as the agency of the parent in one or more respects. However, such a principal-agent relationship does not follow merely from the fact of the parent-subsidiary status so long as the subsidiary remains a legally separate and independent entity (Favell-Utley Realty Co. v Harbor Plywood Corp. [D.C. Cal 1950] 94 F Supp 96), and the mere ownership of stock in a domestic corporation by a foreign corporation does not constitute the transaction of business by the foreign corporation within the state. (Farbstein v Pacific Oil Tool Co. (1932) 127 Cal App 157, 15 P 2d 766.) Here, while it is clear that JAL does business in California as an airline, and its airline business and indirect corporate connections to Pacifico are sufficient for us to assert jurisdiction over JAL procedurally (Hitt v Nissan Motor Co. [D.C. Fla 1975] 399 F Supp 838) this does not mean at the same time that JAL jointly does business with Pacifico as a passenger stage corporation.

The evidence in this proceeding also falls short of meeting the agency test, and shows that, if anything, Pacifico's position vis-a-vis JAL is analogous to an "independent contractor",^{16/} which, in rendering services, "exercises an independent employment or occupation, and represents his employer only as to the results of his work, and not as to the means whereby it is accomplished... The chief consideration which determines one to be an independent contractor is that the employer has no right of control as to the mode of doing the work contracted for." (Green v Soule (1904) 145 Cal 96, 99; 78 Pac 337.) As Witkin comments:

"The most significant factor tending to show employment is the right of the employer to control the details of the work; and conversely, freedom from such control tends to establish the relationship of independent contract. (See Rest.2d, Agency §220(2)(a); Green v. Soule (1904) 145 C. 96, 99, 78 P. 337, supra, §10; Housewright v. Pac, Far East Line (1964) 229 C.A.2d 259, 267, 40 C.R. 208 [where some evidence of control, error to direct verdict on theory of independent contract]; Tieberg v. Unemp. Ins. App. Bd. (1970) 2 C.3d 943, 946, 88 C.R. 175, 471 P.2d 975, infra, §21; 75 A.L.R. 725; 41 Am.Jr.2d, Independent Contractors §6 et seq; Seavey §84.)

"The general supervisory control of any owner is quite different from control over details of the work. '[T]he owner may retain a broad general power of supervision and control as to

^{16/} This term is used for descriptive and comparative purposes. There is no evidence that Pacifico holds franchises from JAL or has any formal contractual arrangement with JAL. Pacifico has a tour-handling contract with JCT to act as ground operator in Hawaii, Guam, New York, Las Vegas, Los Angeles, and San Francisco (Exhibit 47, pages 8-10).

the results of the work so as to insure satisfactory performance of the independent contract - including the right to inspect..., the right to stop the work..., the right to make suggestions or recommendations as to details of the work..., the right to prescribe alterations or deviations in the work... - without changing the relationship from that of owner and independent contractor....' (McDonald v. Shell Oil Co. (1955) 44 C 2d 785, 790, 285 P 2d 902.)" (Witkin, Summary of California Law, page 651; emphasis by the author.)

Construed most favorably in favor of the complainant, the evidence regarding JAL shows that (1) corporate connections exist as previously outlined; (2) these connections give JAL the power of general influence over JCT and Pacifico; (3) JCT, not JAL, plans and sells tours in Japan to tour retailers who in turn sell them to the public; (4) the tour brochures and other advertisements include the optional tours; (5) to a lesser extent, promotion of the optional tours continues in the United States because Pacifico's employees furnish information on request to JALPAK tour members; and (6) Pacifico actually runs the tours. JCT, it will be recalled, not JAL, plans the tours in Tokyo.

We have also analyzed cases dealing with the alter ego doctrine and find no basis for determining that Pacifico is the alter ego of JAL. While there is a corporate connection, Pacifico does not act for JAL and is not in the same business as JAL, nor is there any evidence that it must account for its profitability to JAL.

We conclude that there is no substantive basis upon which this complaint can be maintained against JAL, and we will order JAL dismissed as a party defendant. Much of Dolphin's presentation

against JAL is to the effect that the very existence of the interlocking corporate structure of JAL, JCT, and the Pacifico companies is, as such, an unfair and unreasonable threat to Dolphin and other similarly situated independent tour operators. Allegations in the complaint indicate this, and numerous remarks by Lavelle and his attorneys during the course of the proceeding could be cited. In its closing brief, Dolphin argues (pages 49-50):

"The Commission must issue an order forbidding Japan Air Lines from continuing its aid to Pacifico's illegal operations. This is essential to ensure the complete eradication of illegality.

"A broad cease and desist order directed at JAL is also necessary to reassert California's authority over foreign corporations. What we have in the instance of JAL is a company that feels it can operate with impunity. It knows full well that its subsidiary Pacifico is in fact operating as a passenger stage corporation without being properly certified. JAL apparently feels that it can insult the PUC, step on the toes of any federal or state regulatory agency, without concern for prosecution, just because it is a monolith from Japan.

"What JAL is seeking to do is basically destroy the tourist industry here in San Francisco by means of a monopoly which was not granted it, and operating that monopoly in such a way as to be a total detriment to the other legal, competitive companies. American companies cannot compete legally with the companies operating with impunity illegally here in the United States. The attitude and the smugness with which the witnesses testified clearly indicates that they feel no remorse about their conduct, though it be illegal, or the economic disaster which will be created in the tour industry if companies like Pacifico, through its parent company JAL, are allowed to operate in the manner in which they have operated.

"Economically, we are courting disaster here in the United States, not only because of the balance of trade deficit with Japan, but also because there are very few trade policies protecting U.S. businesses, as there are in Japan. An American company cannot set up shop in Japan without complying with stringent ownership regulations. That is not the case in the U.S. Anyone from any country can open up shop and commence business. Therefore, the result is that we have a country, such as Japan, which has strong trade protectionist policies, protecting its national industries, including the tour industry, and we do not have the same here in the United States. This is detrimental to our country, our citizens and our businesses.

"Japan is a country that is economically successful due to the economic assistance and power of the United States, and due to its own nationalistic and protectionist policies. We do not have these policies in this country. We are a benign and generous country, who seems to do more for other countries than we do for ourselves. Even when other countries protect their own industries against American competition, we fail to take similar action, and as a result we slip farther down the economic ladder while others climb up. If we allow this to continue, we deserve to be in second or third or fourth place economically."

These are arguments that should be addressed to a court with antitrust jurisdiction, or perhaps to Congress or the State Department. While we recognize our responsibilities under Northern California Power Agency v PUC (1971) 5 Cal 3d 370, we are not an antitrust forum as such, and issues relative to alleged violations of federal and state antitrust laws should be tried in the appropriate court and not before this Commission. While Northern California Power tells us to take anticompetitive factors into account in reaching our determinations, it does not invite us to exceed our

jurisdiction in the process of doing so. The issue of whether a foreign airline attempts unlawfully to monopolize the tour market by way of a corporate connection with a tour company which competes against "independents" is not a question within our regulatory framework but one to be decided by the appropriate court under the applicable statutes. (Cf. Foremost International Tours v Qantas Airways (1975) 575 F. 2d 381, cert. den. 429 US 816.)

Finally, as to the specific passenger stage routes complained of, it is not necessary for the protection of the public for our regulatory purposes to enjoin anyone but the actual operator or operators of illegal operations. With such an injunction, either the movements cease or we may initiate contempt proceedings and seek other methods of enforcement, including criminal prosecution. In this regard, however, we should briefly analyze the relationships of the Pacifico companies, to determine whether both, or only one of them, should be found to be the operator of the optional tours.

This question can only be answered with reference to JCT and its relationship to Pacifico. The record establishes beyond any reasonable doubt that although JCT only owns 30 percent of the stock of Pacifico Hawaii (which, in turn, owns 100 percent of Pacifico California) Pacifico is dominated by JCT, which retains the right to control and manage it, and Pacifico's places of business, at least in California, function as little more than field offices of JCT.

According to witness Miyamoto, the operations manager for Pacifico, Pacifico is "the local touring company" for JCT. (Tr. 256.) Pacifico's regional manager Yanagase testified that 100 percent of Pacifico's business is from JCT (Tr. 350-359).^{17/} The testimony of the various Pacifico personnel, called by Dolphin, makes it clear that Pacifico does not solicit business from other sources.

^{17/} Pursuant to an agreement. See footnote 16.

Yanagase reports to Pacifico's general manager Takigawa in Honolulu, but even Takigawa has no final authority over the tours, which are planned in Tokyo by JCT. Yanagase and other managers may make recommendations.

Witness Ueno, a vice president of Pacifico, whose office is in Los Angeles, testified that he is a former employee of JAL who took a leave of absence to join Pacifico (Tr. 414-418). He is paid by Pacifico, but he testified that when he left JAL he was "assigned" to Pacifico by JCT (Tr. 419). Several other employees, he said, are on leave from JAL and working for Pacifico in the same way. (See also the testimony of witness Takigawa, Tr. 482-484.) The interrelationship of personnel might not be enough of itself to regard JCT as the dominating entity, but the testimony establishes that basic business decisions concerning the tours are made by JCT, leaving to Pacifico the execution of the plans (which includes selecting the bus companies to run the routes).

Inescapably, Pacifico is the agent of JCT. As can be seen from our previous discussion of the law of agency, the right of control, rather than its actual exercise, is enough, and JCT clearly has that.

If JCT were a party to this case, we would have to consider whether to enjoin JCT, as well as Pacifico, from operating any unlawful passenger stage routes. The fact that JCT is not a party presents us with no legal problem regarding terminating such operations. JCT apparently has no personnel of its own stationed in the United States, and no assets here. In California it acts solely through Pacifico. Thus, an order against Pacifico, the actual operator, is all that is necessary to be legally effective.

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This does not mean that if all or part of Application No. 58739 is granted, the certificate must be held jointly. If the actual operator of the route is certificated (even if that company is the agent of another) we have complete regulatory control of the routes, rates, quality of service, safety, etc. by our jurisdiction over the actual operator.

The Optional Tours
As Passenger Stage Routes

The first paragraph of Public Utilities Code Section 226 reads:^{18/}

"'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 except those, 98 percent or more of whose operations as measured by total

^{18/} The remaining paragraphs deal with exceptions not relevant to this proceeding.

route mileage operated, are exclusively within the limits of a single city or city and county, or whose operations consist solely in the transportation of bona fide pupils attending an institution of learning between their homes and such institution."

There is no controversy that the transportation is over public highways, or that it is for compensation.

Section 1035 establishes the motor vehicle transportation of persons between two points not within a single city is presumed to be an act of operating as a passenger stage corporation if individual fares are charged. In this regard we consider it obvious that the compensation at which the legislation is directed is that paid by the ultimate consumer, not what may change hands between middlemen. The facts establish that the "optional" tours are advertised on a per capita basis and fares are collected on that basis, in dollars, in California.

The evidence also establishes that regular routes are involved concerning the following optional tours:

Three bridges and bay cruise
Santa Cruz - Roaring Camp
Yosemite

Marriott's Great America
Monterey - Carmel and Mystery Spot.

There is also a wine country and Sacramento tour, but at least at the time the evidence was taken, this was run infrequently. The evidence is inconclusive about the frequency of the wedding tour.^{19/}

^{19/} There is also a Tahoe-Reno-Virginia City tour, but this is interstate and beyond our jurisdiction. The "City Tour", conducted upon arrival from the airport, does not include "optional" transportation.

We have previously held that to be considered in the passenger stage category, transportation must occur at least once every nine days (Greyhound Lines, Inc. v Santa Cruz Travel Club (1966) 65 CPUC 559).

The witnesses from Franciscan, Falcon, and Eastshore testified to some route deviation for Pacifico and other similar ground operators to accommodate the needs of special groups (e.g., an industrial group which might want to visit a factory). This testimony, taken together with the testimony of witnesses called by Dolphin, does not indicate anything but occasional and insubstantial variations of this sort. And although the starting times are not fixed, this is not a requisite for passenger stage service. We have certificated many on-call operations. Nor can we consider as a substantial variation from a route the fact that each tour might not pick up passengers from exactly the same hotels. Thus it is clear that regular routes are involved.

Section 226, regarding the type of transportation, is written in the disjunctive ("between fixed termini or over a regular route") so that meeting one of the two criteria is enough. However, we believe that the frequently run tours meet both criteria. The points of interest of each tour are fixed. Research discloses no case either way on this precise point, but the better interpretation is to regard the most distant regularly visited point of interest on a sightseeing tour (if the other requisites of passenger stage carriage are fulfilled) as a terminus. Section 226 does not distinguish between classes of passenger stage carriage (sightseeing and other) and the intent of Section 226 is to declare a bus operation to be of the passenger stage category if there are fixed points, regardless of whether all of the transportation is round trip. The purpose of the disjunctive phrasing in Section 226 is to prevent evasion of passenger stage requirements by constant route changes between the fixed points.

Nor can it be contended that no common carriage is involved. It is true, as Pacifico states in its opening brief that the definition of the term "common carrier" is "unfortunately circular" (brief, page 56) in that Section 226 states that a passenger stage corporation includes "every corporation or person engaged as a common carrier" (if the other requisites are fulfilled) while Section 211(c) defines "common carrier" to include "every 'passenger stage corporation' operating within the state." However, this is not the first time the problem of common carriage has been presented. A common carrier may dedicate its operation and facilities to "the public or any portion thereof" (Sections 207, 211, and 216(a)). As SFO Airporter, 24-Hour Express, and Nob Hill Limousine Service state in their joint closing brief (pages 26-27):

"The passenger stage corporation certificate issued to Lavelle, dba Dolphin Tours, in Decision No. 89731, Application No. 57598, is restricted to sightseeing tours 'conducted in the Japanese language only.' In A C Cal Spanish Tour Service, the Commission granted the applicant a passenger stage corporation certificate to conduct sightseeing tours 'limited to foreign speaking visitors'. (Decision No. 85084, Application No. 55285.) SFO and 24 Hour limit their services to airline passengers. Nob Hill restricts its holding out to four specific sightseeing tours. Overnight Motor Express restricted its common carrier service solely to the carriage of movie film. (Overnight Motor Express v. Steele & Thomas, 60 CPUC 533.) Garment Carriers, Inc., under Decision No. 62337, on Application No. 42707, held out and provided transportation only for hanging garment shipments. In Greyhound Lines v. P.U.C., 67 Cal. Rptr. 97, 68 Cal. 2d 406 (1968), the court held that a utility may deliberately dedicate itself to

serve a limited territory and that such limitations are valid. The Commission, in Investigation of J & R Warehouse & Service Co., Inc., found that a warehouseman that limited its facilities to storers of candy only was holding out its services to a portion of the public and was acting as a public warehouseman without the required authority. (Decision No. 78361, Case 9026.) It is evident that the sightseeing service of PCS was offered to and provided 'the public or any portion thereof', as defined by the Code and decisions of the Commission and courts. Dedication to the public may be measured by:

'* * * by distances and routes (cf. Atchison etc. Ry. Co. v. Railroad Commission, supra, 173 Cal. 577, 160 P. 888), by the nature of the service rendered (cf. Pacific Telephone etc. Co. v. Eshleman, supra, 166 Cal. 640, 137 P. 1119), by the extent of the service rendered (cf. Del Mar Water, etc. Co. v. Eshleman, supra, 167 Cal. 666, 140 P. 591, 948), and by a myriad of other conceivable yardsticks. The various indicia of dedication are not uniformly applicable to different utilities nor uniformly useful in answering different questions.' (Greyhound Lines, Inc., v. P.U.C., 67 Cal. Rptr. 97.)

"A purveyor of a public service 'is not bound to undertake a service different from that which he has professed to render.' Pacific Telephone etc. Co. v. Eshleman, 166 Cal. 640, 699, 137 P. 1119, 1142. In the instant proceeding, PCS has dedicated its service to a portion of the public that desires sightseeing trips that 'are conducted in the Japanese language only' or 'narrated in the Japanese language'."

Lastly, we consider any argument to the effect that no passenger stage movements are involved because Pacifico pays the charter bus operators on a per-bus or mileage basis to be illogical. See our comment, above, on the method of charging the ultimate consumer as being the subject of Section 1035. Further, if such method of payment could defeat the passenger stage requirements (when the other requisites are present) who would want or need a passenger stage certificate? Any bus company operating on an "on call" basis or a service in which scheduled runs may be canceled unless a minimum number of reservations are made could split its business into separate tour and bus companies. The tour company would sell per capita tickets and charter buses from the bus company, thus evading passenger stage regulation.^{20/} This practice would probably become widespread, if for no other reason than to avoid rate regulation, and the code sections regarding passenger stages would become, at least in part, dead letters.

Who Is the Passenger Stage Operator?

In this section we will consider Pacifico's contentions that it is no more than a tour promoter and organizer and a travel agent.

In determining Pacifico's status, we must also analyze that of the underlying charter-party carriers. Pacifico does not argue that the charter-party carriers rather than itself are performing passenger stage movements, since Pacifico contends that no passenger stage service is involved. Our analysis in the preceding

^{20/} And rendering Penal Code Sections 654.1 et seq. meaningless. See discussion, infra.

section shows that for some of the tours, at least as far as the optionals are concerned, such movements clearly exist. It would be patently illogical for us to decide that while the movements are present, no one can be found to be the carrier.^{21/} We will therefore analyze the responsibilities of Pacifico and the charter-party carriers.

Pacifico's contention is that under Public Utilities Code Section 226, it cannot be found to be engaged in the "ownership, control, operation, or management" of any "passenger stage".^{22/} Clearly, it owns none, but we must consider "control", "operation", and "management" as related to this case.

We have previously discussed the responsibility of the tour guide versus the bus driver (page 20). Pacifico, having selected the route, gives the route to the guide, who, as Pacifico's employee, informs the driver of it. The driver must maintain this route to the extent that operational conditions permit. The guide may order a deviation from the route, though this is seldom done. Thus, in a nutshell, a tour company, such as Pacifico, through its agent the tour guide, has the ultimate responsibility and authority for

21/ No charter-party carrier is a defendant in the complaint phase of this proceeding. If we determine that they are conducting unlawful passenger stage service, institution of another proceeding in which they are defendants or respondents is necessary for action to be taken against them.

22/ "'Passenger stage' includes every stage, auto stage, or other motor vehicle used in the transportation of persons, or persons and their baggage or express, or persons or baggage or express, when such baggage or express is transported incidental to the transportation of passengers." Public Utilities Code Section 225.

the tour, while the bus company, through its agent the driver, bears final responsibility for safety of the passengers and the equipment and the actual physical operation of the vehicle.

If the requisites for passenger stage transportation exist (Section 226), who is the operator of the route? One technical solution is to decide that Pacifico "controls" and "manages" the transportation, while the underlying charter-party carriers "own" and "operate" the buses performing the transportation, and that, therefore, Pacifico plus any and all charter-party carriers actually running the route must hold the certificate jointly.

Were we to interpret Section 226 in this manner, the Legislature would have to act promptly to eliminate the regulatory confusion created. On some routes, Pacifico plus as many as three or four companies, each with a different "piece of the action", would have to hold the certificate jointly, and since carriers might change by routes, separate certificates with different joint operators would be necessary. Such an interpretation would not only affect Pacifico, but several other ground operators, Dolphin, and all others holding passenger stage routes who do not own or lease their own equipment. (See footnote 11.) Enforcement problems would be compounded because "everyone's responsibility is no one's responsibility". And whose costs would be relevant in setting rates?

Such a construction of Section 226 is unreasonable. The legislative intent behind Section 226 is for us to determine which company or individual is providing the ultimate consumer with a system of transportation for passenger stage purposes. This intent appears in the California Constitution, Article XII, Section 3, which reads:

"Private corporations and persons that own, operate, control, or manage a line, plant, or system for the transportation of people or property, the transmission of telephone and telegraph messages, or the production, generation, transmission, or furnishing of heat, light, water, power, storage, or wharfage directly or indirectly to or for the public, and common carriers, are public utilities subject to control by the Legislature. The Legislature may prescribe that additional classes of private corporations or other persons are public utilities." (Emphasis added.)

We conclude that Pacifico, not the various charter-party carriers, owns, operates, controls, and manages^{23/} a "system for the transportation of people" within the meaning of Article XII, Section 3, even though it owns no equipment and leases none, and we further conclude that under Section 226, Pacifico "controls" and "manages" the passenger stage routes previously enumerated.^{24/} All the promotion is JCT's or Pacifico's. The routes are selected by JCT, but Pacifico carries out JCT's plans by scheduling the tours, hiring buses, and providing Japanese-speaking tour guides. When a tour commences, the guide, not the bus driver, is in charge of it. The bus operator may interfere only to the extent that safety or operational problems require him to do so; otherwise, he must follow the instructions of the tour guide.

^{23/} While Pacifico meets all four requirements, it should be remembered that Article XII, Section 3 reads "own, operate, control or manage."

^{24/} To avoid redundancy we will not mention at each point in the discussion that the prepackaged tours sold in Japan are not the subject of this analysis and that we are concerned only with the optional tours.

This interpretation is consistent with our recent line of cases granting passenger stage certificates to certain individuals or companies although they neither own nor lease their own equipment (see footnote 11). Dolphin itself is one such company.

Pacifico, therefore, is not simply a broker or a travel or tour promoter-organizer. In Greyhound Lines v Santa Cruz Travel Club (1966) 65 CPUC 559, defendant was found not to be a passenger stage corporation because of the infrequency of the transportation. We rejected the contention, however, that it was only a broker.

"2. Travel Club is not a broker which has sold transportation by a charter-party carrier on an individual-fare basis in violation of Section 5401 of the Public Utilities Code, as it has purchased the charter-party transportation for its own account and resold the transportation to its own members and others. In Webster's Third New International Dictionary, pp 281-82, a broker is defined as:

"... b: An agent middleman who for a fee or commission negotiates contracts of purchase and sale...between buyers and sellers without himself taking title to that which is the subject of negotiation and usu. [usually] without having physical possession of it. . . ."

The problem surfaced again in Tours/San Francisco, _____ CPUC _____, Decision No. 89729, Applications Nos. 55877 et al. (December 12, 1978) in which Tours/San Francisco contended that its sightseeing routes did not require certification because its function was organizing tours and employing chartered vehicles, while charging group fares. The Commission rejected such contentions, stating (slip opinion, page 42):

"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."

The opinion distinguishes In re Crary (1966) 65 CPUC 545 (cited by Pacifico), in which the defendants were operating as a special events broker (arranging transportation for athletic events, etc.).

Pacifico argues in this connection that it offers not simply transportation, but a package of services, of which transportation is a part. This idea may have merit concerning the prepackaged tours, which include air fare, etc., but in regard to the optional tours, such a contention suggests that the tail should wag the dog. As can be seen from a review of the "Facts" section of this opinion and the appropriate exhibits, the optionals are sold separately, as bus tours to points of interest. The furnishing of a guide cannot sensibly be considered anything other than an integral part of the sightseeing transportation. (Thus, the Commission's holding in Construction etc. In Administering the Passenger Charter-Party Carriers Act (1963) 60 CPUC 581 is inapplicable.)

This result is unaltered by Penal Code Sections 654.1, 654.2, and 654.3, and, for reasons which we will outline, these Penal Code sections make a finding that the charter-party carriers should hold the certificates undesirable from a regulatory standpoint.^{25/}

^{25/} Issues relative to these sections were not raised during the hearing; however, the ALJ encountered these code sections and their legislative history in the course of preparing this opinion. He therefore issued an ALJ ruling on July 25, 1980 allowing the parties to file supplementary briefs on the subject. These were received in August. Some of the interested parties in the application phase filed supplementary amicus briefs.

Section 654.1 reads:

"It shall be unlawful for any person, acting individually or as an officer or employee of a corporation, or as a member of a copartnership or as a commission agent or employee of another person, firm or corporation, to sell or offer for sale or, to negotiate, provide or arrange for, or to advertise or hold himself out as one who sells or offers for sale or negotiates, provides or arranges for transportation of a person or persons on an individual fare basis over the public highways of the State of California unless such transportation is to be furnished or provided solely by, and such sale is authorized by, a carrier having a valid and existing certificate of convenience and necessity, or other valid and existing permit from the Public Utilities Commission of the State of California, or from the Interstate Commerce Commission of the United States, authorizing the holder of such certificate or permit to provide such transportation."

Section 654.2 enumerates certain exceptions not relevant to the facts in this proceeding. Section 654.3 provides that violations of Section 654.1 are misdemeanors, with certain minimum penalties.

The history of this legislation is as follows: in 1933, the Legislature enacted a Motor Carrier Transportation Agent Act, setting forth detailed provisions regulating, supervising, and licensing transportation brokers. The provisions were amended in 1935. The Act generally regulated the sale by brokers, etc. of transportation for compensation.^{26/} It defined "motor carrier transportation agent" as:

^{26/} The entire text of the 1935 version is appended to the ALJ's July 25, 1980 ruling.

"...a person who, acting either individually or as an officer, commission agent, or employee of a corporation, or as a member of a copartnership, or as a commission agent or employee of another person or persons, sells or offers for sale, or negotiates for or holds himself out as one who sells, furnishes or provides, transportation over the public highways of this State when such transportation is furnished, or offered or proposed to be furnished, by a motor carrier as defined in this act."

A reading of the entire Act indicates that its purpose was personal and financial responsibility of ticket brokers, rather than the regulation of transportation movements (such regulation being the subject of other code sections).

Then in 1947 the Legislature repealed the entire Act and concurrently enacted the three Penal Code sections mentioned above. (Stats. 1947, Ch. 1215, p. 2724, § 2.)^{27/}

Considering the language of Penal Code Section 654.1 and its history, the question presented on this record is whether, if we came to the conclusion that Pacifico is simply a tour broker/promoter/organizer, it would be operating in violation of Section 654.1. After considering the arguments in the supplementary briefs, we conclude that the answer is "yes".

Pacifico restates its "package of services" argument which we have analyzed and have found unmeritorious as to the optional tours.

^{27/} There was no concurrent re-enactment of ticket broker or travel agent financial responsibility legislation. In 1974, however, the Legislature enacted a broader legislative scheme regulating financial responsibility of "travel promoters" (Bus. & Prof. Code Sections 17540-17540.13).

It then argues that Section 654.1 was directed against unregulated carriers (i.e., those with no authority at all from the Commission), contending that the section specifically allows a tour promoter to hire a charter-party carrier to serve its needs (even for fixed routes). We reject this interpretation as unreasonable. If such a construction were followed, any tour promoter could sell tickets individually and run a regular route by use of a charter-party carrier, and many companies operating existing passenger stage routes could simply split into "tour" and "charter party" companies and avoid passenger stage requirements. The history of Section 654.1 does not indicate any legislative intent to create such an inviting loophole.

The proper and reasonable interpretation of Section 654.1 is that the language forbidding sale of transportation except when the "transportation is to be furnished or provided solely by, and such sale is authorized by, a carrier having a valid and existing certificate of convenience and necessity, or other valid and existing permit" (from the Public Utilities Code or the Interstate Commerce Commission) means that a person or corporation such as a tour promoter must use the correct class of carrier to provide the transportation. Thus, if there is no passenger stage route involved, the seller may hire a charter-party carrier (or the interstate equivalent, for interstate transportation) but if the transportation involves a California intrastate passenger stage route, the seller must either be its own passenger stage carrier for that route or use a carrier certificated to run the desired route.

We also reject Pacifico's arguments that the repeal of the Motor Carrier Transportation Agents Act demonstrates an intent to deregulate tour promoters and regulate the underlying carriers

instead. The subject of the Act was financial responsibility, not, as such, transportation movements. The Legislature did deregulate (until 1974; see footnote 27) as far as financial responsibility was concerned. In place of such deregulation, it substituted Penal Code Sections 654.1 et seq., designed to control sale of transportation in a somewhat different manner.

Pacifico contends that So. Cal. Commuter Bus v Zappitelli (1975) 78 CPUC 226, 233, holds Penal Code Sections 654.1 et seq. inapplicable to complaint proceedings before this Commission. The issue in that case was whether certain language in Section 654.2 could be used to create an exception to passenger stage requirements for share-the-ride commuter service,^{28/} and we held it could not because the section was not enacted for that purpose. The discussion at 78 CPUC 233 must be taken in this context.

We have reviewed the remainder of Pacifico's citations on this subject and find that they are not sufficiently in point to require discussion.

Thus, if we were free to determine that the charter-party carriers, rather than Pacifico and the other similar ground operators, are the passenger stage operators in fact situations such as this, and if we indeed made such a ruling, at least a short-term regulatory crisis would result. Pacifico and other ground operators would have to cease selling and operating any optional tours until we could conduct the necessary proceedings to determine which charter-party carriers should be certified for what routes. (Under our ruling that

^{28/} The case antedates specific legislation on the subject. See Public Utilities Code Section 226, fourth paragraph, and Section 5353(h).

Pacifico is the carrier, Pacifico must cease from conducting such transportation but the problem of an investigation of multiple carriers is obviated.) Such a ruling would also be tantamount to a determination that Dolphin and other similar companies (see footnote 11) had been issued their certificates in error, and an investigation would be necessary to ascertain whether certificates for the nonequipment operators should be canceled and possibly reissued in favor of one or more charter-party operators.

How many of the charter-party carriers would want to operate the routes under rate regulation and other strictures of passenger stage requirements? If some of them did not, we would be unable to assist Pacifico or Dolphin, or other similar companies, by certifying them (unless they purchased or leased their own equipment) because we would have found them to be tour promoters only.

Economic and practical problems would arise. The record demonstrates a pronounced difference between on-season and off-season demand for sightseeing bus service. If one of the charter-party carriers alone is issued a certificate for a certain route, it would most likely have difficulty fulfilling peak demand requirements. It is unlikely in the extreme that the carrier would staff itself and equip itself for the peak demand; that would be an excessive investment on a year-round basis and costs would be driven up. Thus, the peak demand might not be served, prompting competitive applications.

An illustration: X Bus Company, holds a certificate for sightseeing from San Francisco to Carmel-Monterey, and serves one or more ground operators on this route. It understandably does not staff itself for the peak season because the overhead, year round, would be too high. The result is that the ground operators cannot reserve enough equipment for the Carmel-Monterey tour. This prompts

Y Company and Z Company to apply for certificates on the same route. The applications are supported by the ground operators. Since, because of the equipment shortage in the peak season, the existing carrier cannot perform the service "to the satisfaction of the Commission" under Public Utilities Code Section 1032 (or to anyone else's satisfaction, for that matter), two more certificates are issued.

This process could continue and involve other routes until we would have come full-circle; the same transportation system that we now have exists except that we have issued a lot of paper and have subjected all the bus companies to fare regulation. Further, since costs and revenues of the bus companies vary, we wind up with multiple fare levels for the same tour. Thus, with no compensating advantage, we substitute a clumsy, bureaucratic system for a more simple, flexible one in which price competition between the charter-party carriers plays a part, and which can meet peak traffic demands without excessive fixed costs.

On the other hand, with a determination that Dolphin, Pacifico, etc. require certificates for passenger stage routes, the system, while not perfect, functions more in consideration of the needs of the marketplace. We will also most likely need to issue fewer certificates, since each ground operator runs several routes and uses several carriers. Excessive fixed costs on the part of one charter-party carrier are avoided. Fare regulation is necessary but at least one ground operator can charge the public the same fare for the same tour regardless of which carrier it uses.

The parties have put forward numerous facets of the basic contentions discussed in the preceding opinion. We have reviewed all such matter, and the accompanying citations, and believe the above discussion to be sufficient.

Findings of Fact

1. Complainant Dolphin Tours (Dolphin) is a passenger stage corporation conducting certain sightseeing tours with Japanese narration under its certificate. It is headquartered in San Francisco.

2. Defendant Japan Air Lines (JAL) is an international air carrier whose routes include San Francisco and Los Angeles.

3. Japan Creative Tours (JCT), not a party to this proceeding, is a tour wholesaler doing business in Japan with its headquarters in Tokyo. It markets package tours to tour retailers in Japan, who, in turn, sell them to the Japanese public. The tours include air transportation on JAL (except when JAL does not fly to the destination), some meals, accommodations, and, at least in the case of tours to San Francisco and Los Angeles, presold nonoptional sightseeing bus transportation with Japanese narration to various points of interest in California. Such tours are part of the package price and are paid for in yen by the tourist, prior to departure from Japan.

4. Defendant Pacifico Creative Service, Inc., functions as a "ground operator" for JCT, as that term is explained in the Facts sections of this decision.

5. The corporate connections between JAL, JCT, Pacifico, and Pacifico California are as follows:

JAL owns 50.2 percent of JCT's stock;
JCT owns 30 percent of Pacifico's stock;
Pacifico Hawaii owns 100 percent of Pacifico California.

6. JAL's business is as an airline and not as a tour company. By its corporate connections it exercises general business influence

over JCT and indirectly over Pacifico but the evidence does not show that it controls, retains the right to control, or manages JCT or Pacifico.

7. JAL permits JCT and Pacifico to use its JALPAK trademark and participates in tie-in advertising with JCT and Pacifico. Such advertising is customary in the tour industry.

8. JCT dominates Pacifico by sending Pacifico 100 percent of its tourist business, by its planning of the packaged tours in Tokyo, and by interlocking personnel arrangements and assignments. Pacifico is the agent of JCT in executing the plans of the tours conceived by JCT, and the offices of Pacifico in San Francisco and Los Angeles function as field offices of JCT.

9. JCT also markets "optional tours" in Japan by promoting them there, and by selling them to JALPAK tourists after they arrive in the United States through its agent Pacifico, which, while it is not primarily responsible for the marketing efforts of the optional tours, promotes them to a certain extent by furnishing information on request to JALPAK tour members.

10. Pacifico is in charge of arranging ground transportation for JALPAK tour groups at various destinations. In the case of San Francisco and Los Angeles, Pacifico charters buses for airport transfer purposes as well as both prepackaged and optional tours.

11. JALPAK tour members pay for optional tours separately for each tour, on a per capita basis, in dollars, after arrival in the United States, except for the "wedding tour", which is paid for in

Japan because of advance reservation problems. JALPAK tour members do not lose discounts and are not otherwise penalized if they elect to take no optional tours.

12. Optional tours consist of bus transportation with narration in Japanese. The following optional tours have been shown to be conducted for compensation over the public highways of this State on a regularly scheduled basis between fixed points of interest and over routes with no substantial variation (from San Francisco):

Yosemite National Park
Three bridges and bay cruise
Marriott's Great America
Monterey - Carmel
Santa Cruz - Roaring Camp.

13. Optional tours are less than half of Pacifico's business. Approximately 60 percent of the JALPAK tourists coming to California take no optional tours here.

14. During a bus tour (optional or otherwise) the division of responsibility between the tour company and the tour guide, on the one hand, and the bus company and the bus driver, on the other hand, is as set forth in the last paragraph of the Facts section of this decision.

Conclusions of Law

1. The subject of this complaint is the optional tours, as that term is explained in the opinion, and not the bus transportation promoted and sold as part of prepackaged tours which are paid for prior to departure from Japan.

2. The evidence does not establish that JAL individually owns, controls, operates, or manages, or participates jointly with any other defendant in owning, controlling, operating, or managing any passenger stage corporation in the State of California, or that

any defendant acts as the agent of JAL in owning, controlling, operating, or managing any passenger stage corporation within this State and JAL should be dismissed as a defendant.

3. The optional tours planned and promoted by JCT and sold and operated by Pacifico are not integrally or intrinsically linked to any international transportation movement or movements. Such tours, insofar as the routes are solely within the State of California, are intrastate transportation subject to regulation under the laws of this State.

4. Northern California Power Association v PUC (1971) 5 Cal 3d 370 did not confer the powers of an antitrust court on this Commission. While we must consider the anticompetitive effects of our decisions, we have no jurisdiction to conduct an antitrust lawsuit, to find that unlawful monopolies exist, or to enjoin or dissolve such alleged monopolies.

5. This Commission is not a court with criminal jurisdiction, and since it has no power to find anyone guilty of being a principal in an alleged crime, neither can it determine who are accessories to such alleged crimes.

6. Pacifico is the agent of JCT in conducting the optional tours. The fact that JCT is not a party to this proceeding does not render the complaint defective or our orders ineffective for our own regulatory purposes, since an order directed against the actual operator of any unlawful transportation is legally sufficient to terminate such movement.

7. The optional tour routes set forth in Finding of Fact 12 are passenger stage routes.

8. Regarding such routes, Pacifico, not the charter-party carriers hired by it, owns, operates, controls, and manages, a

"system for the transportation of people" within the meaning of the California Constitution, Article XII, Section 3, although Pacifico neither owns or leases any of its own vehicles, and Pacifico "controls" and "manages" such routes within the meaning of Public Utilities Code Section 226.

9. Regarding such routes, Pacifico is a common carrier (Public Utilities Code Sections 207, 211, 216(a), and 226) and a passenger stage corporation (Section 226).

10. The optional tours are not a "package of services."

11. Assuming the law allowed this Commission to determine the charter-party companies to be the passenger stage carriers, rather than Pacifico, regulatory considerations, as discussed in the opinion, would make this result undesirable.

O R D E R

IT IS ORDERED that:

1. Japan Air Lines is dismissed as a defendant.
2. Pacifico Creative Service, Inc., a Hawaii corporation shall cease and desist from promoting, selling, and conducting "optional tours" over the routes set forth in Finding of Fact 12 without first obtaining a certificate of public convenience and necessity from this Commission, and shall not make use of its subsidiary, Pacifico Creative Service (California) Inc., for such purposes unless a certificate of public convenience and necessity is obtained for such routes from this Commission in the name of Pacifico Creative Service (California) Inc.

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3. Proceedings in the complaint phase of this proceeding are terminated. Application No. 58739 shall be restored to calendar at a time and place to be set.

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

Dated August 29, 1980, at San Francisco, California.

/s/ DONALD C. MEANEY

Donald C. Meaney
Administrative Law Judge

APPENDIX A

LIST OF APPEARANCES

Richard J. Lee and Dennis Natali, Attorneys at Law, for J. Mark Lavelle (Dolphin Tours), complainant in Case No. 10732 and protestant in Application No. 58739.

John F. McKenzie, Robert Katayama, and Eldon M. Johnson, Attorneys at Law, for Pacifico Creative Service, Inc., defendant, and Pacifico Creative Service (California) Inc., applicant; Laurence A. Short and Dale C. Andrews, Attorneys at Law, for Japan Air Lines, defendant.

Warren N. Grossman, Attorney at Law, for Gray Line Tours Company; William Davis Taylor, Attorney at Law, for Nob Hill Limousine Service, Tours, Ltd. and 24 Hour Airport Express Inc.; Richard M. Hannon, Attorney at Law, for The Gray Line, Inc. and California Parlor Car Tours Company; Earl R. Steen, for Japan Travel Bureau International Inc.; Steven G. Teraoka, Attorney at Law, for San Francisco Bay Tours, Inc., and Los Angeles Sightseeing Tours, Inc.; James H. Lyons, Attorney at Law, for Orange Coast Sightseeing Company; Dennis E. Richardson, for Franciscan Lines, Inc.; James S. Clapp, Attorney at Law, for O'Connor Limousine Service, Inc. and Lorrie's Travel & Tours, Inc.; and Dennis Natali, Attorney at Law, for California Mini Bus and A-1 Limousine; protestants and interested parties in Application No. 58739. (NOTE: Some protestants and interested parties filed amicus curiae briefs in Case No. 10732.)

Robert Cagen, Attorney at Law, and Richard O. Collins, for the Commission staff.

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JOHN E. BRYSON, President
RICHARD D. GRAVELLE, Commissioner
LEONARD M. GRIMES, Commissioner

We concur:

The attached order, as was the proposed report, contains nothing but what was recommended to the Commission by the assigned ALJ. While we will sign the order, we are compelled to make additional comment.

We are not motivated to issue the Order to Show Cause with respect to Dennis J. Natali for his novel characterization of us. The similar action with respect to defendant's counsel may be another matter, but our preference would be to allow the California Bar Association to review the record in this matter and decide through its disciplinary proceedings whether or not Mr. Natali should have sanctions imposed upon him.

This proceeding, as reflected by the record, is a shining example of why the Commission should not be engaged in regulating sightseeing services in California. The business, by its very nature, is dog-eat-dog competition. The marketplace, unrestricted by government regulation, but subject to the appropriate anti-trust laws enforced through the judicial system, is the proper forum for these competitors to do battle.

The members of our state legislature should be clearly apprised of the record in this matter so that they will understand our frustration in dealing with an industry that we are unable to control and that simply does not fit the mold of public utility regulation.

We strongly urge that we use this proceeding as the backdrop for a strong effort in 1981 to extricate the Commission from the snake pit of sightseeing regulation.



JOHN E. BRYSON, President



RICHARD D. GRAVELLE, Commissioner



LEONARD M. GRIMES, Commissioner

San Francisco, California
December 2, 1980