

Decision No. 92681 FEB 4 1981

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the matter of the application )  
of JOY-TAK, INC., for Class "B" ) Application No. 59096  
certificate to operate as a ) (Filed August 27, 1979)  
charter-party carrier of passengers, )  
San Francisco. (File No. B-11.) )

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applicant.

J. Mark Lavelle, for himself; Kazuhiro  
Nakagawa, Attorney at Law, for San  
Francisco Bay Tours; and N. Paul Morris,  
Attorney at Law, for O'Connor Limousine  
Service, Inc.; protestants.

Walter H. Walker and William D. Taylor,  
Attorneys at Law, for Nob Hill Limousine  
& Tours, Ltd., interested party.

O P I N I O N

Applicant, Joy-Tak, Inc. (Joy-Tak), which has been  
operating under a Section 5384(b) charter-party permit TCP 551-P for  
about five years, filed this application for a Class B charter-party  
certificate in order to use larger vehicles.

This matter was heard before Administrative Law Judge (ALJ)  
Meaney in San Francisco on April 3 and 4, 1980. Several protestants  
appeared. Closing briefs were received on May 30, 1980.

Applicant's Case

Joy-Tak has been in business for five years with a charter-party permit (Public Utilities Code Section 5384(b)<sup>1/</sup>) which allows statewide operation of 15-passenger seating capacity vehicles under 7,000 pounds gross weight. A Class B certificate, which Joy-Tak seeks, permits operation of larger vehicles, such as buses, to operate statewide from a "territory of origin" specified in the certificate (Section 5383). The territory of origin is determined by the Commission but in no case is it to exceed a radius of 40 air miles from the home terminal. (Section 5371.2.)

Ken Okura is president of Joy-Tak and owns forty percent of its stock. The other owners are all California residents. He testified that Joy-Tak's gross sales have grown from about \$30,000 to \$750,000. He now owns or leases about 30 vehicles. He anticipates that if the authority he requests is granted, his gross will increase to \$1 million and he will add ten additional vehicles.

Joy-Tak currently carries a combined single limit liability policy of \$1 million. Its year-end 1979 balance sheet (unaudited) shows assets of \$176,349, liabilities of \$56,218, and a stockholders' equity of \$120,131. The income statement for 1979 indicates gross revenue as \$753,891, total operating expenses as \$688,803, and "net income from operation" as \$65,088. From this was subtracted an "extraordinary item" of "loss of sales on buses" of \$3,821 leaving net income as \$61,267. Financial fitness is amply demonstrated.

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<sup>1/</sup> Unless indicated, all code references are to sections of the Public Utilities Code.

At the hearing, Joy-Tak stated that it wishes authority to carry 23 or fewer passengers and that transportation under its Class B certificate would be provided only to passengers who are part of groups from other countries which have prepaid for the transportation prior to arrival in the U. S.<sup>2/</sup>

Okura testified that in his opinion, tourism from Japan will continue to increase. His company serves several travel agencies dealing with foreign tourists, but 90 percent of his business is Japanese. No one, according to Okura, offers an operation that specifically caters to groups of about 20. He proposes to purchase certain oversize vans, primarily manufactured as large recreational vehicles, and modify them so that they are roomy, air-conditioned buses for 23 (or fewer) passengers. (See Exhibits 7 and 8.) These will be used to serve charter-party groups on tours from San Francisco.<sup>3/</sup> Okura believes this will be a more economical operation for groups of about 20 than using two of the existing vans, and also more comfortable. In answer to a question by the ALJ, Okura stated that (at the time of the hearing) 80 percent of his business was an airport transfer run combined with a "city tour", and the remaining 20 percent was local tours, primarily to Monterey-Carmel, Santa Cruz, or Yosemite.

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<sup>2/</sup> Because of this restriction of its request for authority, Nob Hill Limousine Service withdrew its protest and requested to be listed as an interested party.

<sup>3/</sup> Joy-Tak also operates under a permit in Los Angeles. No corresponding authority is requested for that location.

Case of Protestants

The protestants did not challenge Joy-Tak's financial fitness, but introduced evidence and testimony to show that Joy-Tak had not observed the restrictions of its existing authority and argued that there is enough of such evidence to demonstrate that Joy-Tak is likely to misuse its new authority, if granted. One protestant suggests the application is merely for the purpose of legalizing existing unauthorized operations.

This evidence mostly centers around Joy-Tak's use of oversized vehicles. There was disagreement over whether some correspondence from the Transportation Division caused Okura to believe that he could carry fifteen passengers plus a driver.<sup>4/</sup>

Even leaving aside occasions in which Joy-Tak carried fifteen instead of fourteen passengers, there are instances in which sixteen or seventeen were transported. The trip records of Joy-Tak were subpoenaed for March 1980.<sup>5/</sup> In that month there were entries that showed transportation of 16 passengers on three dates, and 15 passengers on three other dates. (Certain other loads in excess of 15 were referred to other carriers). There is also an April 1 entry for 16 passengers. Protestants argue that there is no reason to regard this as other than typical.

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<sup>4/</sup> Section 5384(b) allows the issuance of permits to carriers "using only vehicles under 15-passenger seating capacity and under 7,000 pounds gross weight." There can be no other sensible interpretation for "under 15" than fourteen or fewer passengers, plus the driver. A letter was sent to Okura from the Transportation Division which allegedly confused Okura about whether the section was being interpreted as 15 passengers plus the driver. Considering the clear wording of the statute, reliance should not have been placed on such an interpretation.

<sup>5/</sup> The hearings were conducted in April 1980. This particular month was therefore the subject of inquiry because of Okura's insistence that he had abandoned the practice of carrying excess passengers.

Protestants stress that carrying that many passengers is only half the problem; Section 5384(b) requires this class of carrier to use vehicles with a passenger seating capacity of under 15 and under 7,000 pounds gross weight. ✓

San Francisco Bay Tours, Inc. subpoenaed Hachiko Kogure, a former Joy-Tak driver, who testified he took more than 15 passengers to Monterey and Santa Cruz in a vehicle with seats for 17 passengers. He testified that on one occasion he told Okura that this was in violation of operating authority but that Okura told him not to worry about it because the PUC staff was not enforcing the requirements.<sup>6/</sup>

On cross-examination Okura testified that his vehicles were properly inspected for the PUC by the California Highway Patrol (CHP). The record developed, however, that the CHP inspection does not include seating capacity or gross weight. After much discussion about the weight of various vehicles, the ALJ ordered certain of Joy-Tak's vans to be weighed by a public weighmaster and the result filed as late-filed Exhibit 15. The weight certificate shows:

<u>Vehicle</u>	<u>Weight</u>
Fortibus #107	8,500 lbs.
Brougham #106	7,300 lbs.
Mercedes-Benz #104	8,320 lbs.

On brief, Joy-Tak states that the Brougham has been modified by removing seats so that it now meets the seating and weight limitations, and the other two vehicles have been taken out of service. No additional weighmaster's certificate on the modified Brougham was furnished, however.

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<sup>6/</sup> Efforts were made to impeach this witness for bias because of business differences between Okura and him. However, Okura did not resume the stand to deny or give a different version of this conversation.

Lastly, protestants point to the fact that Joy-Tak introduced no customer witnesses or other corroboration of Okura's claims for increased business, or the need for larger vehicles, or any evidence at all that existing Class B certificated charter-party carriers fail to meet public demand.

Discussion

We believe that this application should be denied because of failure to present a proper showing of public need (with or without the protestants' evidence) and also because the protestants have demonstrated that there is little likelihood we could depend upon Okura to use the larger vehicles strictly within the restrictions on authority which Joy-Tak itself requests.

Regarding the necessary showing for public need, Section 5375 reads, in pertinent part:

"The commission may, with or without hearing, issue or refuse to issue a permit or certificate. If the commission finds that public convenience and necessity require the proposed transportation service and the applicant possesses satisfactory fitness and financial responsibility to initiate and conduct the proposed transportation services, and will faithfully comply with the rules and regulations adopted by the commission with respect thereto, it shall issue the permit or certificate to conduct the requested operations, or may issue it for the partial exercise of the privilege sought, and may attach to the permit or certificate such terms and conditions as, in its judgment, are required in the public interest; provided also that the permit or certificate shall not require the filing or publication of time schedules or tariffs. . . ."

Additionally, Section 5375.1 requires that when an applicant desires to operate in a territory served by other certificate holders, a certificate shall not be granted unless it can be shown that the existing carriers are not providing service satisfactory to the Commission and adequate for the public.

These sections are similar to those governing entry into the passenger stage business (Sections 1031 and 1032). In that field we have recently stated that sightseeing "is a service less entitled to the strict territorial protectionism from competition and competitive factors which necessarily are accorded the 'natural' utility monopolies...". (Mexcursions, Inc., \_\_\_\_\_ CPUC \_\_\_\_\_ Decision No. 90155 dated April 10, 1979, Application No. 57763; cf. O'Connor Limousine Service, \_\_\_\_\_ CPUC \_\_\_\_\_, Decision No. 90154 dated April 10, 1979, Application No. 56580). We see no reason to adopt a contrary policy for charter-party certificates.<sup>7/</sup>

We have also recently held, however, that this policy "does not include the demise of the requirement that an applicant must demonstrate fitness to perform the proposed service" (Sanae Tomoyasu, \_\_\_\_\_ CPUC \_\_\_\_\_ Decision No. 92083 dated July 29, 1980, Application No. 58943), or that the application need no longer demonstrate need for the service (id., see also San Francisco-Yosemite Tours, \_\_\_\_\_ CPUC \_\_\_\_\_, Decision No. 91927 dated June 17, 1980, Application No. 57152).

The most glaring weakness in Joy-Tak's case is its failure to corroborate any of the statements or opinions of Okura as to the need for the proposed service. Joy-Tak's actual riders are foreign tourists, mostly from Japan. But, as we said in a similar circumstance (and in denying certification):

"Mr. Kinoshita [the operating partner] was the applicant's only witness. We recognize that it would be difficult to produce Japanese tourists as witnesses. Compare, however, Amador Stage Lines, Inc., \_\_\_\_\_ CPUC \_\_\_\_\_, Decision No. 91954 dated June 17, 1980, Application No. 59368, in which no passengers testified but the application was well supported by travel agency personnel and airline employees." (Sanae Tomoyasu, supra.)

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<sup>7/</sup> It should be stressed that (as previously mentioned) although Joy-Tak operates in the sightseeing field, according to Okura about 80 percent of the business is actually an airport transfer run combined with a city tour (for various tour companies).

Lastly, we must comment that Okura was a poor witness in his own behalf. Certain questions were answered evasively and his recall of events varied from specific to vague.

It is no unfair burden to require an applicant such as Joy-Tak to produce at least some customer or collaborative support for the application. This has been a usual part of an application unless there are no protestants.

Additionally, the lack of customer witnesses leaves us with no showing regarding Section 5373.1 (that the existing carriers fail to provide services which are satisfactory to the Commission and adequate for the public). Because of our policy announced in Mexcursions and O'Connor Limousine, supra, we have not been strict in the type of showing required, but we do not treat the section as a dead letter (as is suggested in Joy-Tak's opening brief).

The evidence of the protestants shows that (1) Joy-Tak has maintained in service three oversize vehicles at its San Francisco location, two of which are more than one thousand pounds overweight, (2) that it has carried 16 or 17 passengers, (3) that it was not until April 4, 1980 (during the hearings) that Okura, by way of memo (Exhibit 14) inaugurated a strict policy of not carrying more than 14 passengers. The number of violations in March and early April is significant because that month is part of the slow season for foreign tourists. Furthermore, since Joy-Tak arranged for other carriers to carry its oversize loads some of the time, it must be assumed that Joy-Tak understood that loads of 16 or 17 passengers were outside its authority.<sup>8/</sup>

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<sup>8/</sup> See previous discussion and footnote 4 regarding some misunderstanding flowing from Okura's dealings with the Transportation Division. For this reason we are not considering 15-passenger violations prior to the hearing.



Additionally, we were asked to take notice of J. Mark Lavelle v Joy-Tak, Inc., Case No. 10767. We have issued a decision in that case today. We found in that decision that Joy-Tak had, on its own initiative, terminated certain unlawful passenger stage routes in 1979. However, we entered orders against Joy-Tak, requiring it to cease using oversize vehicles, to cease from untruthfully representing in its publicity that its drivers are "screened" by the Commission, and to revise its fare schedules to clarify that it does not offer fixed-route transportation. ✓

We do not wish to frustrate competition in the charter-party field. At the same time, in this situation we have no way of enforcing the restrictions to which Joy-Tak claims it will adhere. If it is issued the Class B certificate, it will still have its Section 5384(b) permit. The Class B certificate will be restricted to pre-paid groups of foreign tourists; the permit will not. How could it be determined that, at any one time, the 23-passenger vehicles are being used for one purpose or the other? In our opinion, this could not be done; only strict self-policing would work, and Joy-Tak has not shown its capability in this regard.

We will deny the application without prejudice to the filing of a similar application after January 1, 1982. If such an application is filed we will consider, among other issues, whether Joy-Tak has demonstrated improvement at remaining within its authority. (This is not a statement that we favor, or disfavor, the filing of such an application.)

Findings of Fact

1. Joy-Tak presently holds a Section 5384(b) charter-party permit, and seeks a Class B certificate.
2. Ken Okura is president of Joy-Tak and owns 40 percent of its stock.
3. Joy-Tak's stated purpose in obtaining the Class B certificate is to offer charter-party service from San Francisco for groups of 23 passengers, maximum, in oversize vans which would be purchased or leased and modified for this purpose. Solicitation of business would be from tour organizations handling foreign package tours arriving from overseas.
4. During the course of the proceeding, Joy-Tak agreed to restrict the 23-passenger buses to the use mentioned in Finding 3. As a result, Nob Hill Limousine & Tours, Ltd. withdrew its protest.
5. At the time of the hearing in this application, Joy-Tak's San Francisco business, in volume, was composed 80 percent of an airport run combined with a "city tour", and 20 percent of local tours to other destinations.
6. Financial fitness has been demonstrated.
7. Joy-Tak has maintained, in San Francisco, three vehicles of more than 7,000 pounds in gross weight, two of which weigh more than 8,000 pounds. Until the hearing, it used these vehicles from time to time to carry more passengers than authorized under its Section 5384(b) permit.

8. While some communication between the Transportation Division and Okura may have confused Okura about his right to carry 15 passengers, the transportation of 16 or more passengers was knowingly performed in violation of Section 5384(b).

9. No customer witnesses were presented in support of the application, nor any evidence that existing Class B certificate holders in San Francisco do not provide adequate service.

10. In the J. Mark Lavelle v Joy-Tak, Inc. decision issued this date in Case No. 10767, we ordered Joy-Tak (a) not to reinstitute certain unlawful passenger stage operations; (b) to revise its publicity to clarify that it does not offer fixed-route transportation; (c) to cease representing that its drivers are screened or otherwise approved by this Commission, and (d) to cease using vehicles having a seating capacity greater than 15 passengers, or a gross weight of more than 7,000 pounds. ✓

11. If the application is granted, Joy-Tak will hold both a Section 5384(b) permit and a Class B certificate (charter-party). Joy-Tak's president, Okura, states he will restrict the use of 23-passenger vehicles to transportation for prepackaged and prepaid tour groups from foreign countries.

12. This restriction can only be enforced by self-policing on the part of Joy-Tak. The history of Joy-Tak's operations demonstrates that, at present, we cannot rely on Joy-Tak's self-policing efforts to prevent the use of 23-passenger vehicles in Joy-Tak's general business under its Section 5384(b) permit.


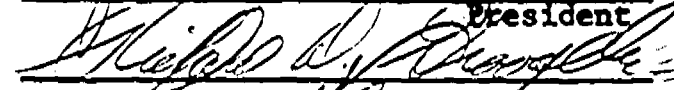
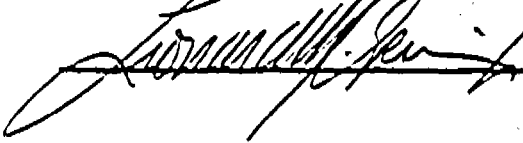
Conclusions of Law

1. Public need for the proposed service has not been demonstrated.
2. While Joy-Tak's evidence shows that it has financial fitness, the evidence of the protestants establishes that Joy-Tak does not have operational fitness to perform the proposed service.
3. The application should be denied without prejudice to the filing of an application after January 1, 1982. ✓

O R D E R

IT IS ORDERED that the application is denied without prejudice to the filing of an application after January 1, 1982. The effective date of this order shall be thirty days after the date hereof.

Dated FEB 4 1981, at San Francisco, California.

  
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President  
  
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Commissioners