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MAIL DATE
10/30/96

Decision 96-10-077

October 25, 1996

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation into)
the Passenger Stage Corporation)
Operations of Prime Time Shuttle)
International, Inc.)

Investigation 93-05-004
(Filed May 7, 1993)

Order Instituting Investigation and)
Order to show Cause why Prime Time)
Shuttle International, Inc.'s)
certificate of Public Convenience)
and Necessity should not be)
suspended or revoked.)

Investigation 95-07-001
(Filed July 6, 1995)

ORDER MODIFYING DECISION 96-08-034 AND DENYING REHEARING

On September 3, 1996, Prime Time Shuttle International, Inc. ("Prime Time") filed an application for rehearing of Decision (D.) 96-08-034 (August 2, 1996), as corrected and reissued by D.96-08-044 (both decisions jointly referred to as the "Decision"). The Commission's Safety and Enforcement Division ("S&E") filed a response in opposition to Prime Time's rehearing application on September 17, 1996.¹ Prime Time alleges that the challenged Decision is erroneous on two grounds: (1) that the \$100,000 fine assessed is unlawful, and (2) that the Commission has acted unlawfully due to its failure to require its staff to process diligently charter party applications filed by individuals wishing to act as subcarriers. Prime Time holds a certificate of public

¹ The S&E Division has been replaced by the Rail Safety/Carriers Division. For purposes of this decision reference will be made to the former S&E Division, which was the staff party in the proceeding.

convenience and necessity (CPCN) from the Commission to operate as a passenger stage corporation (PSC). It was the respondent in two consolidated investigations, I.93-05-004 and I.95-07-001. Pursuant to those investigations, we found, in D.96-08-034, that Prime Time violated (1) various provisions of the Public Utilities (PU) Code, (2) applicable rules of this Commission and of the Los Angeles International Airport (LAX), and (3) the terms under which Prime Time entered into a Commission approved 1993 settlement. Under that settlement, Prime Time had agreed to pay a fine of \$80,000 in five annual installments.

As to the LAX violations, we held in D.96-08-034 that Prime Time violated, and has continued to violate, the LAX rule that operators of ride-share van services use employee drivers, and not use independent contractors, in transporting passengers to or from LAX. We found that Prime Time's failure to comply with the LAX rule violated our General order (GO) 158-A.

We noted in the Decision that, consistent with statutory provisions, GO 158-A, and prior Commission precedent, a PSC can provide all or a substantial part of its passenger stage service through the use of nonemployee drivers only if those subcarriers hold charter-party permits, as required under GO 158-A. In addition, we held that Prime Time may not be exercising the requisite degree of control over its drivers pursuant to GO 158-A.

As a result of the above-noted violations, we revoked Prime Time's CPCN and fined the company \$100,000, in addition to the amount of the fine still owing pursuant to the 1993 OII settlement. The revocation, however, was stayed for 90 days. We held that if, during the period of this stay, Prime Time submits a suitable plan for bringing its operations into compliance with applicable LAX rules, we will extend the stay for a probationary period.

1. The Additional Fine of \$100,000 Imposed By D.96-08-034

Prime Time argues that the imposition of the \$100,000 fine is not justified by the facts or the law. We are not persuaded by Prime Time's claim. First, it has failed to provide any discussion or grounds that support its allegations of legal and factual error, as is required by Rule 86.1 of the Commission's Rules of Practice and Procedure.² Second, we find that the basis for the fine is legally and factually proper.

We provide the legal basis for the fine's imposition in footnote 31 of the Decision. There we note that the imposition of the fine is well within the specific penalty provisions contained in PU Code section 2100 et seq as well as PU Code section 701. We also note in footnote 31, that Prime Time's daily violation of the settlement of the 1993 OII is a 'continuing violation'. Therefore, each day's continuance is a separate offense. A penalty for each separate instance of unlawful action may be imposed pursuant to PU Code section 2108.

Although Prime Time does not set forth specific grounds that show factual error in the imposition of the fine, Prime Time nonetheless asserts that rehearing is warranted because the fine is unjustifiable since "it will cripple Prime Time, depriving it of resources essential to maintaining high quality, safe airport rideshare". Prime Time thus reargues in its application for rehearing its claims previously presented during the proceeding that it is operating a vastly underfunded public service enterprise

² "Applications for rehearing shall set forth specifically the grounds on which applicant considers the order or decision of the Commission to be unlawful or erroneous. Applicants are cautioned that vague assertions as to the record or the law, without citation, may be accorded little attention. The purpose of an application for rehearing is to alert the Commission to an error, so that error may be corrected expeditiously by the Commission." (California Code of Regulation, Title 20, section 86.1, also referred to as Rules of Practice and Procedure [March 1996], Rule 86.1.)

and has been doing so for years. It alleges that the fine and threat of revocation adopted by the Decision should be cancelled, otherwise the company and the airport rideshare service it renders daily to thousands of commuters will be destroyed.

We find Prime Time's arguments regarding its inability to pay the fine unpersuasive. Prime Time relies on financial data, including annual reports, to plead its case that it has experienced net operating losses since 1992. Questions were raised during hearings regarding that financial data because of inconsistencies between Prime Time's quarterly and annual reports. As a result, the Decision called for an audit, and Prime Time is currently in the process of providing explanations to staff of inconsistencies or discrepancies between the quarterly and annual reports that it has provided the Commission. We noted in the Decision that this process may disclose areas where further explanation or reconciliation is appropriate, for example, between Prime Time's tax returns and those reports.

Prime Time also alleges that the fine is unfair in light of the high costs that it has incurred as a result of the litigation involving the Commission and LAX. It claims that its legal fees and other out-of-court expenses incurred in defending those matters exceeded \$200,000 through March 31, 1996. In US v. Halper, 490 US 435 (1989), a case previously cited by Prime Time and discussed in the Decision, the Court agreed with a District Court that in some rare cases such as the one being heard, the disparity between an approximation of the Government's costs and damages and the respondent's statutory liability was sufficiently disproportionate that the sanction provided by a Congressional Act constituted a second punishment violative of double jeopardy. Thus, according to US v. Halper, a penalty must bear a rational relation to the sum of the Government's actual loss plus its costs. While the Commission has not actually assessed the costs expended for investigating and hearing this matter, it is arguable that the cost to the State is at a minimum the same as

Prime Time's, and most likely greater than the \$200,000 cited. Therefore, the \$100,000 fine, which is half of Prime Time's approximated costs of enforcement, avoids a double jeopardy problem.

We made it very clear in our Decision that the purpose for the fine is not retribution, but rather, to prevent further offenses and give Prime Time a fair and reasonable opportunity to rehabilitate itself. We also found that the the sanctions imposed are necessary in light of the continuing violation of Commission and LAX rules, even after the 1993 OII settlement. Nonetheless, in the Decision we lessened the impact of the fine by allowing Prime Time to wait until September 30, 1997 to begin payment of the first of four annual penalty installments. In conclusion, we find that the imposition of the \$100,000 fine is legally sound and amply supported by the facts in this case.

2. The Processing of TCP Applications.

Prime Time alleges that S&E has failed and continues to fail to process charter party applications fairly or with diligence. Prime Time asks that the Decision be modified to include language that orders Commission staff to process charter party applications more diligently in order to enable such applications to be granted within two weeks of filing. Prime Time previously asked that the staff be so instructed in its direct case, as well as in its comments to the proposed decision. We did not adopt Prime Time's request in the Decision. Prime Time has nevertheless reintroduced that argument in its rehearing application.

We reject Prime Time's request for modification of the Decision as to this issue for a number of reasons. First, Prime Time has failed to satisfy Rule 86.1 of the Commission's Rules of Practice and Procedure by not setting forth specifically the grounds on which it considers the Decision's failure to order

Commission staff to process TCP applications more quickly to be unlawful or erroneous. Second, the Decision recognized that there are currently pending several applications from drivers who intend to become charter-party subcarriers for Prime Time, and it stated that S&E is looking into those applications. It ordered S&E to process those applications consistent with the holdings in the Decision. However, it declined to set a deadline as Prime Time requested. (Decision, mimeo, at p. 86.) This is appropriate since it may take longer than the requested two week deadline to correct possible defects or ambiguities in the applications.

In any even this contention of Prime Time's is now moot in light of our issuance of a Resolution on this subject at the October 25, 1996 meeting.

3. Modification of the Decision's Conclusion of Law No. 35.

Although unrelated to Prime Time's rehearing application, we will take this opportunity to clarify ambiguous language in the Decision's Ordering Paragraph No. 9 and Conclusion of Law 35 regarding a possible rulemaking. That Ordering Paragraph refers to four subjects described in Conclusion of Law 35. However, Conclusion of Law 35 presently makes no mention of the four subjects. Those four subjects are covered under Section 7.8 of the Decision, however. Therefore, Conclusion of Law 35 will hereby be modified to read:

35. Several of the interpretations and concerns in today's decision prompt us to consider a new rulemaking to revise GO 158-A and GO 157-C. S&E, in coordination with our Legal Division, and consistent with the discussion in Section 7.8 of the foregoing opinion, should consult with interested persons and prepare such proposed changes as are deemed appropriate. (Emphasis added to indicate additional language.)

THEREFORE, for good cause shown, IT IS HEREBY ORDERED that:

1. Rehearing of D.96-08-034 is denied.
2. D.96-08-034 is amended as follows: Conclusion of Law 35 is hereby modified to read:

35. Several of the interpretations and concerns in today's decision prompt us to consider a new rulemaking to revise GO 158-A and GO 157-C. S&E, in coordination with our Legal Division, and consistent with the discussion in Section 7.8 of the foregoing opinion, should consult with interested persons and prepare such proposed changes as are deemed appropriate.

This order is effective today.

Dated October 25, 1996, at Sacramento, California.

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners

Commissioner Daniel Wm. Fessler,
being necessarily absent, did not
participate.