

MAIL DATE

12/7/98

Decision 98-12-029

December 3, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In re Application for Rehearing of
Resolution TL-18864 Granting Marin
Airporter Route Revision Request For
an Additional Service Point at the
Embassy Suites Hotel in San Rafael.

A.98-10-014
(Filed October 1, 1998)

D. H. HALL

ORDER DENYING REHEARING OF RESOLUTION TL-18864

Marin Airporter (Marin) sought Commission approval through the Route Revision Docket (RRD) procedure to add to its scheduled bus services a passenger stop at the Embassy Suites Hotel in San Rafael. In a letter dated May 22, 1998, Rudy Ortiz, General Manager of the Embassy Suites, informed staff that as of July 1, 1998, Santa Rosa would no longer be permitted access to hotel property. In a separate communication, Mr. Ortiz further informed staff that he wished to have Marin Airporter serve the hotel, as it was able to provide more frequent service than Santa Rosa. Notice of the RRD appeared on the Commission's Daily Calendar on July 3, 1998. During the 30-day protest period, Santa Rosa Airporter/Airporter Inc. (Santa Rosa) filed a protest to Marin's application. In a letter dated July 8, 1998, Phoebe Nicolette, president of Santa Rosa, set forth several grounds for the protest which focused on the process by which the Embassy Suites selected the carrier it will allow to operate on its property.

Based on the foregoing set of facts, staff recommended that Marin's RRD application be granted, notwithstanding Santa Rosa's protest. At its regularly scheduled meeting on September 17, 1998, the Commission adopted

Resolution TL-18864 which authorized Marin's route revision. On October 1, 1998, Santa Rosa filed an Application for Rehearing of Resolution TL-18864, in which it claims its procedural due process rights were violated.

Santa Rosa claims that its procedural due process rights were violated when the Commission granted Marin's RRD without requiring Marin to file a formal application. According to Santa Rosa, it has been a longstanding policy of the Commission to grant RRDs only if there is no opposition.¹ Santa Rosa claims that in this case, when the Commission granted Marin's RRD notwithstanding the protest filed by Santa Rosa, there was a complete departure from the manner in which the Commission previously handled RRDs. Santa Rosa claims that as the procedural change was unannounced, it had no notice that it would have only its protest to make its showing in opposition to the RRD. Santa Rosa declares that its procedural due process expectation was that before the RRD was granted, it would have the right to produce evidence at a hearing.

Santa Rosa further states that if a full hearing record had been developed, or if it had included all of the grounds available to it to urge the Commission to deny the RRD, it would have included in its Protest the following points:

1. That at the present time, MARIN AIRPORTER currently enjoys a NEAR-MONOPOLY in the Marin County-SFO full-sized airport bus market - estimated to be 80-PLUS PERCENT based on revenue; and 90-PLUS PERCENT based upon the unrestricted geographical service points in Marin County.

¹ In support of this claim, Santa Rosa attached a letter from Paul Wuerstle, Manager of the Carriers Branch of the Rail Safety and Carriers Division, to attorney William D. Taylor regarding an RRD filed by Santa Rosa Airporter. In the letter, Mr. Wuerstle states: "Route revision docket matters are normally disposed of by a Commission resolution either granting or dismissing the request. However, in view of the unresolved protest, the staff believes it is appropriate for Santa Rosa Airporter to pursue its request by formal application to the Commission. In declining to handle this matter under the RRD procedure, we are not making a judgment as to the merits of the request. Rather, we believe the RRD procedure was intended for use in noncontroversial matters."

2. MARIN AIRPORTER'S efforts to institute regular service at the Embassy Suites developed only after the PROTESTANT, SANTA ROSA AIRPORTER, commenced its service to the Embassy Suites, with the inference that this service was more to stifle competition than to serve the public.

3. Common sense would indicate that before aggravating the current competitive imbalance in MARIN AIRPORTER'S favor [the NEAR-MONOPOLY 80-Plus percent revenue/90-Plus percent geography] that the Commission join RRD #502 with the current Santa Rosa Application [A98-09-001], for a complete review of the factual situation in Marin County, and how best to achieve the Commission policy of enhanced competition.

(Santa Rosa Application, p. 5.)

Santa Rosa's allegations of due process violations are not persuasive and fail to establish legal error. The RRD process is used to make minor modifications to a passenger stage corporation's certificate of public convenience and necessity. While Santa Rosa is correct that the RRD procedure is generally used for noncontroversial matters, Santa Rosa has failed to demonstrate any "mid-case procedural change" in handling these matters. Normally, if a protest to an RRD has merit, staff declines to process the RRD "ex parte" and instructs the applicant to file a formal complaint before the Commission. In this case, Santa Rosa's protest was without merit and simply failed to raise any issues relevant to granting Marin's RRD. There was no need to consider these same concerns again in the context of a formal application by Marin.

Additionally, Santa Rosa's claim that it would have included additional arguments against granting the RRD but for the alleged mid-case procedural change is also without merit. Rule 44.2 of the Commission's Rules of Practice and Procedure requires a protestant to state the facts constituting the

grounds for the protest, the effect of the application on the protestant, and the reasons the protestant believes the application, or a part of it, is not justified. The burden is on the protestant to demonstrate why the application is not justified. Santa Rosa should have included all available grounds against granting the RRD in its initial protest. Moreover, Santa Rosa's "additional" arguments merely regurgitate those stated in its protest.

Santa Rosa is also incorrect that its procedural due process expectation is that it would be able to present evidence at a hearing. Santa Rosa cites no authority for that proposition. The decision to hold an evidentiary hearing is based on the content of the protest, and filing a protest does not insure that an evidentiary hearing will be held. (Rule 44.4.) Nothing in Santa Rosa's protest justifies an evidentiary hearing in this case. To require an evidentiary hearing under these circumstances would be an exercise in futility which due process of law does not require.

Finally, Santa Rosa's request that Marin's RRD application be consolidated with Santa Rosa's application for authority to amend its passenger certificate (A.98-10-001) is not properly raised in the context of an application for rehearing, and accordingly should be denied.

No legal or factual error has been demonstrated and Santa Rosa's application for rehearing should be denied.

THEREFORE, IT IS ORDERED that Santa Rosa's application for rehearing of Resolution TL-18864 is denied.

This order is effective today.

Dated December 3, 1998, at San Francisco, California.

RICHARD A. BILAS
President

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