

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D. C.

ORDER NO. 1645

IN THE MATTER OF:

Application of PAYNE TRANSPORTATION, )	Served February 1, 1977
INC., Trading As HISTORIC TOURS for )	
Certificate of Public Convenience and)	Application No. 959
Necessity to Perform Special )	
Operations <u>1/</u> )	Docket No. 349

By Application No. 959, filed July 30, 1976, as amended August 20, 1976, Payne Transportation, Inc. (Payne), trading as Historic Tours, seeks a certificate of public convenience and necessity to transport passengers, over irregular routes, as described in Order No. 1601, which order is, by reference, incorporated herein. Generally, Payne proposes two types of operations, a regularly scheduled, round-trip, commuter service between the Williamsburg Square and Wickford developments near Lorton, Va., on the one hand, and, on the other, specified points in the District of Columbia, 2/ and three sightseeing tours beginning and ending at various motels located along U. S. Highway 1 between junction Interstate Highway 495 and Ft. Belvoir, Va. Both types of service would be provided in one 1976, air conditioned, van with a seating capacity of 12 persons, including the driver.

With respect to the commuter service, applicant would originate service at approximately 7:15 A. M. on weekdays (excluding holidays), with door-to-door pickups at Williamsburg Square, then traverse Virginia Highway 642 to junction Interstate Highway 95, then over Interstate Highway 95 to the District of Columbia, picking up additional passengers at the Wickford development, and discharging passengers at L'Enfant Plaza, First Street and Constitution Avenue, N. W., the Department of Labor Building, and Third Street and Constitution Avenue, N. W. Evening service would commence at approximately 5:00 P. M. in the reverse direction. Mrs. Ackley T. Payne would drive the van during these hours. Applicant estimates that eight commuters initially would use the service on a regular basis, and the remaining three seats would be available to occasional riders. Round-trip fares would be \$1.80 per day or \$9 a week, and witnesses supporting the application state that no public commuter service is now available. Applicant has been providing this service on an irregular basis without appropriate authority as so-called "trial-runs".

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1/ Order No. 1601 inadvertently referred to Gary Payne, an individual, as the applicant herein. The title of this proceeding has been revised to reflect applicant's approved corporate name.

2/ Service from and to the Wickford development was first proposed at the public hearing on this matter, and the application has not been amended to include this operating proposal.

Sightseeing tour #1 would be offered on weekdays with pickups at various motels occurring between 9:15 A. M. and 9:45 A. M. This tour would include visits to various shrines and museums for an adult fare of \$15. 3/ Sightseers would be returned to their motels between 3:00 P. M. and 4:00 P. M. Tour #2 is an evening tour to be conducted between 8:00 P. M. and 11:00 P. M., exclusive of pickup and delivery time, for an adult fare of \$10. Tour #3 begins at 10:00 A. M. on Saturdays and Sundays and lasts for approximately eight hours. It includes several stops in the District of Columbia, Olde Town Alexandria, and Mt. Vernon, Va., and a cruise on the Potomac River for an adult fare of \$22. Mr. Ackley T. Payne would drive the van on all tour schedules.

Applicant submits that the proposed tour operations are unique because of their starting time. Assertedly, no evening service is presently available, and existing morning tours begin at 7:00 A. M. or 8:00 A. M., which may be inconvenient for some prospective tourists. No public witnesses testified in support of this part of the application. Affidavits, identical in content, were submitted by the proprietors of Mt. Vee Motel, Pines Motel and Mt. Vernon Happy Inn, indicating their feeling that there is a need for applicant's service. The affidavits, however, lack any meaningful details concerning the number of persons who might use the service and can be accorded little weight. Applicant asserts firm commitments from six motels to promote its tours in return for commissions varying in amount from 20 to 30 percent of the appropriate ticket price. Approximately eight other motels may also promote these tours, but the record does not reflect any unequivocal expression of such interest. Payne is unaware of what other carriers may be providing similar tour service, but believes that its schedules would not conflict with those of existing operations.

With respect to Payne's financial situation, only a projection of revenue and revenue deductions has been submitted. No balance sheet or other financial data were submitted with the application. Payne projects annual revenues of \$4,752 from commuter operations based on maximum vehicle capacity being achieved each day, and \$26,313 from tour operations, assuming 2,100 passengers at an average fare of \$12.53 after commissions. Estimated annual expenses (excluding income tax) total \$28,744, and include salaries (\$15,996), fuel (\$1,250), 4/ insurance (\$1,500), and vehicle payments (\$2,640).

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3/ Fares for children on each tour would be 50 percent of the corresponding adult fare.

4/ See page 40 of the hearing transcript. The estimated cost of fuel in Exhibit H-1 is \$564, an allocation admitted by applicant to be insufficient. Subsequent calculations by the staff of the Commission indicates that applicant would probably spend approximately \$2,100 a year for fuel on commuter operations alone.

## DISCUSSION AND CONCLUSIONS

The Compact, Title II, Article XII, Section 4(b) provides that a certificate of public convenience and necessity shall be issued by the Commission if it finds "... that the applicant is fit, willing, and able to perform such transportation properly and to conform to the provisions of this Act and the rules, regulations, and requirements of the Commission thereunder, and that such transportation is or will be required by the public convenience and necessity; otherwise, such application shall be denied." Pursuant to this mandate, the Commission must affirmatively conclude (a) that applicant is operationally and financially fit to perform the proposed service, (b) that it will conform to lawful regulatory requirements, and (c) that there is a public need for the service which need is not being met by existing authorized carriers. We find that the evidence of record establishes a public need for the proposed commuter service, but that in all other respects applicant has failed to meet its required burden of proof. The application perforce must be denied.

Turning first to the issue of public convenience and necessity, there appears to be significant public support for the commuter operation, and it is undisputed that comparable service is not now available. The same cannot be said, however, with respect to the proposed sightseeing operations. The record is devoid of any probative evidence concerning operations by existing carriers, and we are officially aware that several certificated sightseeing operators hold authority duplicative of that sought herein. Other than the unsupported allegation that applicant's tours would be offered on noncompetitive schedules, no showing has been made that Payne's tours would fill any void in existing service. Moreover, the only public support for this service was in the form of affidavits significantly lacking in probative detail. We are mindful that sightseeing operations do not tend to generate repetitive and readily identifiable customers, and that supporting witnesses, therefore, are not expected to appear in large numbers. Nevertheless, this practical problem of evidence production cannot totally obviate the Commission's statutory responsibility. Accordingly, we have no choice but to conclude that Payne has failed to show that the present or future public convenience and necessity require the proposed sightseeing operation.

The Commission is also of the opinion that applicant has failed to establish its fitness to conduct the proposed operations. With respect to financial fitness, the absence of a balance sheet or any data concerning applicant's capital structure precludes any rational analyses of Payne's economic capabilities. Were the Commission to authorize only the commuter operation for which a need has been found, Payne would incur an annual net loss of approximately \$10,000, even assuming a full load on every schedule. Obviously, this alternative is not economically feasible. Also assuming, arguendo, that there was a need for the tour

operations, there is no evidence to support applicant's optimistic revenue projection, and it has already been shown that actual expenses would exceed those anticipated by Payne,<sup>5/</sup> Our concern over this aspect of fitness is heightened by the lack of any evidence concerning applicant's ability to sustain some loss during its initial operating period. <sup>6/</sup>

The Commission is also concerned about the number of empty "deadhead" miles that would be incurred in the proposed operation. Payne's vehicles would run empty from the District of Columbia to Lorton every morning after the commuter run, and would run empty each afternoon in the reverse direction to pick up commuters for the outbound schedule. To this extent alone, applicant would suffer approximately 330 empty miles each week with a correspondingly adverse effect upon energy resources, the environment, and the economics of operation. In addition, Mr. Ackley T. Payne would be required to drive a total of approximately 76 hours a week to meet the proposed tour schedules. We note that the United States Department of Transportation, Bureau of Motor Carrier Safety, has determined that drivers of "passenger vehicles" for hire cannot safely operate in excess of 60 hours per week, <sup>7/</sup> and we believe that the excessive number of hours involved in this proposal would not be consistent with the public interest. Accordingly, we conclude that the proposed transportation service is not operationally feasible.

Finally, we note that evidence adduced at the hearing establishes that applicant has been transporting passengers for compensation under the guise of performing "trial runs." Such operations were conducted after applicant was aware of pertinent regulatory requirements and after applicant's request for temporary authority had been denied. <sup>8/</sup> Such flouting of the Compact indicates applicant's unwillingness to conduct its operations in accordance with applicable law, and the Commission so finds. Applicant will be ordered to cease and desist from conducting unlawful operations unless and until an appropriate certificate of public convenience and necessity therefor is in effect.

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<sup>5/</sup> For example, see footnote 4, supra.

<sup>6/</sup> In this connection, we note that applicant's president testified that the company was already having difficulty paying non-operating expenses. If the Commission authorized commuter service only, it would be necessary to prescribe a daily rate approximately four times that proposed by applicant. Whether commuters would wish to pay such rates is a question on which we express no opinion.

<sup>7/</sup> See 49 CFR 395.

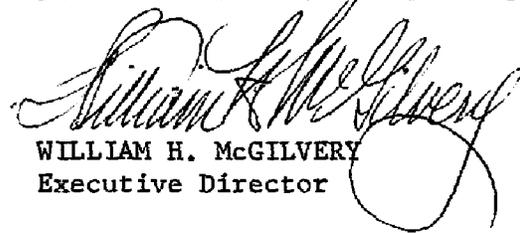
<sup>8/</sup> See Order No. 1601.

THEREFORE, IT IS ORDERED:

1. That Application No. 959 of Payne Transportation, Inc., trading as Historic Tours, be, and it is hereby, denied.

2. That Payne Transportation, Inc., trading as Historic Tours, be, and it is hereby, directed to cease and desist from engaging in the transportation for hire of persons between any points in the Metropolitan District unless and until an appropriate certificate of public convenience and necessity is in effect therefor.

BY DIRECTION OF THE COMMISSION:

  
WILLIAM H. MCGILVERY  
Executive Director

STRATTON, Commissioner, dissents:

Although I find no legal flaw in this decision, I think it is too narrow a reading of both "public convenience and necessity" and "fitness".

As to public need, there is no dispute about the demand for the commuter service proposed here. So far as sightseeing goes, the most that can be said is that potential demand at the level required to sustain the sightseeing operation is speculative. On this point I am prepared to accept the applicant's judgment, born of 30 years' experience in the sightseeing business, that the sightseeing revenue potential is there.

Both the commuter service and the specialized sightseeing operations contemplated by this application would fill demonstrated voids. No other applicant has come forward to contest this application, and it seems to me that if this family enterprise is willing to undertake the risk it ought to be given the opportunity to do it.

As to fitness, it is admittedly difficult for a regulator to restrain his indignation when advised of extra-legal operations as we were in this case. On the other hand, it is also difficult to withhold compassion for the fledgling entrepreneur caught up in the coils of the regulatory process where his very livelihood is held in thrall for months

at a time as we struggle with record-building and decision-making. Thus, I think the "moral" issue is at least a stand-off. As regards financial fitness, while it is true that no balance sheet was presented in this case, one can be constructed from the record. If the proceeds of the \$10,000 loan on the applicant's home are taken into consideration, there are adequate current assets to sustain this operation for several months during which time the question of success or failure can be resolved in the only finally determinative arena - the real world.

Therefore, I would grant the authority sought in this case subject, perhaps, to a prescription of somewhat higher fares for the commuter operation, which, on the basis of the record, appears incapable of generating revenues sufficient to cover its incremental costs.

## II.

This is not the first, nor, I suspect, will it be the last application which this Commission will receive from a young, struggling business trying to carve a special niche in the huge and varied transportation market in this metropolitan area. In my view the Commission should adopt a more generous approach to these cases in favor of allowing these experiments to be undertaken. In the final analysis this decision seems to do no more than protect the applicant from the consequences of what we might view as bad business judgment. But this benevolence also deprives the public of the chance to subscribe to these services. Perhaps more importantly, it frustrates the vigor and creativity that the marketplace alone can stimulate.