



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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In the Matter of the Application of Accelar, Inc. to operate)
as a scheduled Passenger Stage Corporation between)
points in San Francisco, Marin, Sonoma, Napa, Alameda,)
Contra Costa, Solano, San Mateo, Santa Clara, Sacramento,) A.10-06-009
Yolo, Placer, El Dorado, San Joaquin, Stanislaus, Merced,)
And Fresno Counties in the State of California, and to)
Establish a Zone of Rate Freedom for its services.)
_____)

**BRIEF OF PROTESTANT SILVERADO STAGES, INC.
IN OPPOSITION TO ACCELAR, INC.’S APPLICATION FOR
PASSENGER STAGE CORPORATION AUTHORITY**

I

INTRODUCTION

Pursuant to the Scoping Memo of August 19, 2010, Silverado Stages, Inc. (Silverado) respectfully submits this Brief opposing the application of Accelar, Inc. (“Accelar” or “Applicant”) for Passenger Stage Corporation Authority (PSC). The Commission noted three issues in the Scoping Memo requiring resolution:

1. Does Applicant need a certificate of public convenience and necessity to provide the service as described in its application?
2. Does Applicant possess the technical capability to provide the Passenger Stage Corporation (PSC) services proposed?
3. Is Applicant financially qualified to provide the PSC services proposed?

II

HISTORY

Since 2008, Silverado Stages (PSC 9089) has been providing game day transportation for the general public between various points in Santa Clara and San Mateo Counties and AT&T Park in San Francisco on days in which the San Francisco

49ers play home games. The Silverado Stages service began when the public funded transportation, previously provided by SamTrans, was discontinued in response to Federal Department of Transportation rules forbidding public transit agencies from providing such service when private companies express interest in providing the service. As with the previously provided SamTrans service, the San Francisco 49ers organization does not contract for the service nor do they provide any compensation or subsidy for the Silverado Stages service.

On October 11, 2009, El Camino (TCP 102-A), colluded with the Jim Mercurio of the San Francisco 49ers and positioned two large motorcoaches at one of the stops serviced by Silverado during Silverado's approved game day fixed-route service and picked up 50-100 cash paying customers that were waiting for the scheduled Silverado buses to arrive. El Camino transported those customers to the AT&T stadium in San Francisco. As a result of this illegal action, the CPUC enforcement division issued a citation to El Camino and El Camino paid the \$1,000.00 fine.

El Camino is owned by Kumar Shaw whom is also the owner of Accelar. El Camino did not hold PSC authority in October, 2008 nor have they ever held PSC authority at any time before or after October, 2008. Kumar Shaw was the owner and operator of El Camino in October, 2008 and has remained in that capacity to date.

On October 22, 2009 the CPUC issued a Notice to Cease and Desist to El Camino ordering them to cease and desist advertising and operations. Shortly after receiving notification of the PUC investigation of their illegal operations in October, 2008, Kumar Shaw transferred the operation of his illegal fixed route scheduled service to Accelar, another company he owned.

Accelar began offering the service to the general public through their website '49erShuttle.com' and a cooperative advertising agreement with the San Francisco 49ers. Kumar Shaw describes Accelar as "...an internet company. We are like Expedia, providing on-line booking for travel services." (Evidentiary Hearing pg. 6)

Accelar, with no PUC authority of any kind, advertised their service through the San Francisco 49ers and the Accelar controlled website '49erShuttle.com'. Accelar contracted with El Camino and other bus companies to provide a fixed route service providing packages and 'transportation only' bus services exactly like those associated

with the AT&T Park service proposed in this Application. For the next two years, in an effort to circumvent CPUC rules and regulations, Accelar sold the packages and bus transportation, collected the proceeds, prepared the manifests, and contracted with El Camino and other bus companies to provide the buses.

Under the control of Accelar, Kumar Shaw operated his service right on top of or very near the established routes of Silverado and provided package and 'transportation only' services for the remaining five (5) 49er's home games in the 2009 season and for the entire 2010 season. This is despite the fact that the CPUC enforcement division had issued additional citations to 'Accelar' for their continuing illegal operations.

Accelar filed Application on June 15, 2010, seeking authority for Accelar to operate as a scheduled passenger stage corporation pursuant to Public Utilities Code Sections 1031 and 1032.

In the Application, Accelar proposes to establish a scheduled fixed route daily scheduled bus service in conjunction with special events held at several major sports venues in multiple locations from "...points located in [seventeen specified counties] to various sports venues, including Candlestick Park and AT&T Park in San Francisco, U.C. Berkeley's Memorial Stadium in Berkeley, The Oakland /Alameda County Coliseum in Oakland, and HP Pavilion in San Jose. Applicant will provide its services for sporting events, including but not limited to football games, baseball games, basketball games, ice hockey games, soccer games, concerts and other public events." (Application, pg. 4.)

Three separate protests to the Application were filed by Silverado Stages, Inc. (Silverado), Royal Coach, Inc. (Royal), and Bauer's Limousine Service, Inc. (Bauer's). All Protestants hold TCP and/or PSC authority. Each protestant raised issues related to the vagueness of the proposed service and the fitness of Accelar to operate a scheduled service.

A prehearing conference was held on August 4, 2010. An evidentiary hearing was held on January 26, 2011.

III

Argument

Accelar's application asks the CPUC to grant Accelar the authority to transport passengers as 1) part of a package and 2) as 'transportation' only. CPUC provisions currently exist which allow bus companies with Charter Party authority to transport passengers to and from special events as part of a package which includes admission to the event. Transportation only, as part of a fixed route scheduled service, requires PSC authority. Accelar currently has neither TCP authority nor PSC authority.

Accelar's application is for PSC authority to operate scheduled fixed-route service from multiple locations in numerous counties to multiple venues located in several different cities. Accelar does not include any specific dates and times of service in their application.

There are currently other carriers with the proper PSC authority that provide scheduled service to various sports venues and convention centers within the areas requested by Accelar. This protestant believes the demand for this type of service is being satisfied by the existing carriers and the ability of event promoters to contract charter bus services to move groups of attendees.

The PUC's General Order 158-A ("General Order") which details the rules and regulations pertaining to carriers with PSC authority clearly intends for PSC authority to be reserved for properly licensed 'carriers'. References are made throughout GO 158-A to provisions and requirements that only a 'carrier' could possibly comply. Accelar does not currently possess any type of passenger carrier authority nor do they own or operate any buses.

General Order 158-A sets forth rules and regulations governing passenger stage corporations. The General Order provides that shuttle drivers (as employees or independent owner-drivers) may hold authority of the operating carrier, but that regardless, they shall remain under the "complete supervision, direction and control of the operating carrier." (See Declaration of Steven C. Rice ("Rice Decl."), Ex. D at 6, PUC General Order 158-A, § 5.03.)

Courts have repeatedly referred to General Order 158-A's provisions that ***requires subcontracted carriers to operate under the "complete direction, supervision, and control" of the PSC.***

In *Kairy v. SuperShuttle*:

the court referred numerous times to the regulation (known as CPUC General Order 158-A, § 5.03) that permits the TCPs to be classified as either employees of the PSC, or as independent operators.

The *Kairy* court added that the PUC's authority extended to permitting the imposition of a "complete control" requirement on the activities of sub-carrier operators while permitting them to be classified as "independent" contractors.

Finally, the court found that "the PUC's regulations and decisions have determined that independent nonemployee status is permitted, notwithstanding the requirement that the passenger stage corporation exercise "complete supervision, direction and control" over the operations of the charter party licensee. [citing PUC General Order 158-A, § 5.03.] (See *Kairy, et al. v. SuperShuttle International, Inc., et al.*, 2009 U.S. Dist. LEXIS 121867 (ND Cal., Dec. 22, 2009) (Case No. 3:08-cv-02993)

A CPUC decision *In re Prime Time Shuttle Int'l, Inc.*, 67 CPUC 2d 437, 1996 WL 465519, *1 (Cal. P.U.C., Aug. 2, 1996) ("*Prime Time*") also addressed the provision for "complete supervision, direction and control of the operating carrier";

In *Prime Time*, the CPUC concluded that "consistent with statutory provisions, GO 158-A, and prior Commission precedent, a [passenger stage corporation] can provide all or a substantial part of its passenger stage service through the use of nonemployee drivers, so long as these sub-carriers hold charter-party permits, as required under GO 158-A." The clear holding in *Prime Time* was that, consistent with General Order 158-A, the PUC permits PSC carriers to use

nonemployee drivers and that they remain under the "complete supervision, direction and control of the operating carrier." *Id.* at *16; see also Rice Decl., Ex. D at 6, PUC General Order 158-A, § 5.03. It is clear from the regulations and the commission's decision in *Prime Time*, that the classification of drivers, and specifically whether nonemployee status is permissible in the context in which the operator has **complete control** (emphasis added) falls within the scope of the PUC's exercise of authority.

Accelar's application is absent of any details pertaining to how Accelar would 'completely supervise, direct and control' the sub-contracted carriers Accelar proposes to employ. No additional information in regards to this important requirement was provided during the Evidentiary Hearing. In fact, the Application and testimony during the Evidentiary Hearing make it perfectly clear that Accelar does not intend to comply nor do they have the capability of complying with the mandatory requirement to 'completely supervise, direct and control' their sub-contracted carriers.

In regard to the three issues noted in the Scoping Memo requiring resolution by the Commission:

A) Does Applicant need a certificate of public convenience and necessity to provide the service as described in its application?

Although no specific provisions could be found within the regulations, transportation packages that include admission to an event have always been allowed by the CPUC if the provider has the proper TCP authority. Providing 'transportation only' would require PSC authority. Accelar does not have any type of TCP or PSC authority.

B) Does Applicant possess the technical capability to provide the Passenger Stage Corporation (PSC) services proposed?

Section (b)(1) of the Public Utilities Code Section 1032(b) sets forth a list of requirements of which **all** must be met by the Applicant in order to be granted a PSC certificate:

Section 1032.(b) (1) Before a certificate is issued or transferred, the commission shall require the applicant to establish reasonable fitness and financial responsibility to initiate and conduct, or continue to conduct, the proposed or existing transportation services. The commission shall not issue or transfer a certificate unless the applicant meets '**all**' (emphasis added) of the following requirements:

(A) The applicant is financially and organizationally capable of conducting an operation that complies with the rules and regulations of the Department of the California Highway Patrol governing highway safety.

(B) The applicant is committed to observing the hours of service regulations of state and federal law, where applicable, for all persons, whether employees or subcarriers, operating vehicles in transportation for compensation under the certificate.

(C) The applicant has a preventive maintenance program in effect for its vehicles used in transportation for compensation that conforms to regulations of the Department of the California Highway Patrol, as described in Title 13 of the California Code of Regulations.

(D) The applicant participates in a program to regularly check the driving records of all persons, whether employees or subcarriers, operating vehicles used in transportation for compensation requiring a class B driver's license under the certificate.

(E) The applicant has a safety education and training program in effect for all employees or subcarriers operating vehicles used in transportation for compensation.

(F) The applicant agrees to maintain its vehicles used in transportation for compensation in safe operating condition and in compliance with applicable laws and regulations relative to motor vehicle safety.

(G) The applicant has filed with the commission a certificate of workers' compensation insurance coverage or statement required by Section 460.7.

(H) The applicant has provided the commission an address of an office or terminal where documents supporting the factual matters specified in the showings required by this subdivision may be inspected by the commission and the Department of the California Highway Patrol.

Accelar falls short in its Application and subsequent testimony and presentation of evidence in the requirement to meet 'ALL' of the requirements in the Section 1032.(b) (1)

Several other requirements are associated with obtaining PSC authority including:

Section 1032.1. (a) The commission shall not issue or transfer a certificate of public convenience and necessity pursuant to this article unless the applicant provides for a mandatory controlled substance and alcohol testing certification program as adopted by the commission.

Kumar Shaw testified that he has no intention of establishing any programs required by the rules and regulations pertaining to PSC operations including this one.

Kumar Shaw testified that Accelar has no operations staff which would normally be assigned the responsibility of complying with all safety and compliance requirements but has an agreement with El Camino (Kumar Shaw's bus company) to provide some of their game day operations services. (Evidentiary hearing pg. 62)

Kumar Shaw testified that Accelar's ability to comply with CPUC rules and regulations related to PSC authority would be relegated to the sub-carriers they employ to provide the Accelar proposed services. Kumar Shaw (the owner of Accelar) describes

Accelar's business model as being "...an Internet company. We are like Expedia, providing on-line booking for travel services." (Evidentiary Hearing pg. 6)

Nothing submitted in the Application or the evidentiary hearing explains how Accelar is going to comply with the mandate for Accelar to 'completely' supervise, direct and control the operating carriers they utilize to perform the proposed services in the Application except to say they were going to leave it up to the sub-carriers and the regulatory agencies –

Kumar Shaw testified that Accelar is going to "...rely on the PUC staff, CPSD staff, CHP to make sure they are going to follow through on making sure that only the carriers that meet the safety requirements are going to be given the authority, the charter party carrier authority, or the PSC authority. Accelar is not in the business of verifying that each and every driver hired by any of our subparty carriers, subcharter carriers has the appropriate license. We rely on those operators to make sure they do what they are supposed to do for them to be given the TCP license or the PSC license. (Evidentiary Hearing pg. 93-94)

General Order 158-A includes several rules and regulations governing the conduct of PSC authorized carriers:

§ 1.05 – LIABILITY INSURANCE REQUIREMENTS. Every passenger stage corporation shall comply with all provisions of General Order 101 Series.

No evidence was presented that would lead the commission to believe that the Applicant would be able to obtain the required \$5,000,000.00 in liability insurance to cover the operations of sub-contracted carriers.

§ 1.06 – "APPLICABILITY OF VEHICLE CODE. Every passenger stage corporation and their drivers shall comply with the provisions of the California Vehicle Code.

Other than stating that the Applicant would rely on the sub-contractor to comply with all regulations, the Applicant presented no evidence to show how the Applicant would insure compliance with this section. Kumar Shaw testified that Accelar does not have a Safety Director and that, if granted PSC authority, they would “take a look at what we need to do to comply with the regulations and staff the organization appropriately”. (Evidentiary Hearing Pg 61-62).

§ 4.01 – EQUIPMENT STATEMENT TO BE CURRENT. Every carrier shall maintain, on file with the Commission, an equipment list of all vehicles (owned or leased) in use under each certificate.

The Applicant has stated that they do not intend to own or lease any equipment therefore; they would not be able to comply with this requirement. This section requires the PSC authorized carrier to be a ‘carrier’.

§ 4.02 – SAFETY REQUIREMENT BEFORE OPERATION. All vehicles operated under each certificate shall comply with the requirement of the California Highway patrol and the Motor Carrier Safety Sections of Title 13 of the California Code of Regulations. Every carrier must inspect all vehicles and maintain proper documentation of such inspections.

The Applicant has stated that they plan to utilize sub-carriers only to provide the applied for service therefore, they would have to rely upon those sub-carriers to comply with this section. No evidence was presented to show how the Applicant would insure sub-carriers would comply with this section.

§ 4.04 –PSC NUMBER TO BE DISPLAYED ON VEHICLE.

No evidence was provided to show how Applicant intends to comply with this section. It is highly unlikely that sub-contractors only used occasionally by the Applicant could be compelled to place the Applicant's PSC identification on the sub-contractors equipment.

§ 5.02 DRIVER RECORD. Every carrier shall enroll in the "Pull Notice Program" of the Department of Motor Vehicles...

There is nothing in this section to exempt the Applicant from these provisions merely because they intend to only use subcarriers. The Applicant states they will have no equipment of their own and therefore, would not need to employ any drivers that would normally be part of the 'Pull Notice Program'.

Kumar Shaw testified: "Accelar is not in the business of verifying that each and every driver hired by any of our subparty carriers, subcharter carriers has the appropriate license." (Evidentiary Hearing pg. 94)

§ 5.03 – DRIVER STATUS. Every driver of a vehicle shall be the certificate holder or under the complete supervision, direction and control of the operating carrier and shall be:

- A. An employee of the certificate holder; or,
 - 1. An employee of a sub-carrier; or,
 - 2. An independent owner-driver who holds charter-party carrier authority and is operating as a sub-carrier.

The PSC holder is the 'operating carrier' and this section requires the Applicant to 'supervise, direct and control' the drivers utilized. Even in cases, such as this Applicant's, where the only drivers utilized will be those employed by sub-carriers. No evidence was presented to show how the Applicant intends to accomplish this requirement other than the

Applicant's testimony that "the sub-carrier would be expected to comply with the rules and regulations of the PUC".

§ 5.04 – ALCOHOLIC BEVERAGES AND DRUGS; USE BY DRIVER FORBIDDEN.

This rule...prohibits carriers from allowing drivers to consume or be under the influence of a drug or alcoholic beverage while on duty.

Again, the Applicant has testified that their only plan to insure compliance with this provision is to leave it up to their sub-contractors.

§ 6.01 – RECORDS. Every carrier shall institute and maintain in its offices, a set of records on the service it performs. Every carrier shall...maintain maintenance and safety records (including, but not limited to the records required in Sections 4.01 and 4.02), driver records (including, but not limited to, the records required in Section 5.02)

Applicant presented no evidence on how they were going to accomplish these requirements except to say they would leave it up to the sub-contractors.

Imbedded within most all sections of General Order 158-A is the underlying requirement that PSC authorized carriers be licensed 'carriers'. Accelar is not a carrier and has not made application to become a 'carrier'.

Accelar presented testimony from one existing client (Jim Mercurio of the San Francisco 49ers) and one prospective client (Damon Dukakis of IMG):

Mr. Mercurio testified that he was happy with the service provided by Accelar. He provided no testimony related to his knowledge of Accelar's ability to comply or

history of compliance with provisions of General Order 158-A, PUC Section 226, PUC Section 1032.

Mr. Dukakis testified that his company has an interest in the services Accelar has to offer. (Evidentiary Hearing pg. 39) He provided no testimony related to his knowledge of Accelar's ability to comply or history of compliance with provisions of General Order 158-A, PUC Section 226, PUC Section 1032.

Kumar Shaw testified that "We know how to work with PUC-accredited and licensed motor coach operators and how to put together the charter agreements and how to manage the logistics, working with a large number of operators providing those [transportation] services on game day." (Evidentiary Hearing pg. 36) He provided no testimony or evidence that Accelar has complied with the provisions of General Order 158-A, PUC Section 226, PUC Section 1032. Further, he provided no testimony that Accelar would be able to comply in the future.

Kumar Shaw testified that Accelar has a history of building websites and, other than the illegal transportation operations in the bay area during 2009 and 2010, he presented no evidence of providing transportation services in other parts of the country. Mr. Shaw would like the commission to believe that his company's dealings with other sports teams led to more than just building the web site.

C) Is Applicant financially qualified to provide the PSC services proposed?

Protestants were not allowed to review Accelar's finances nor any Pro Forma submitted in the Application (if any). Despite what may have been included in the Application, the Commission should weigh carefully the fact that Kumar Shaw is the owner of El Camino (TCP 102-A) and Mr. Shaw has recently filed for bankruptcy protection for that company. In the course of that filing Kumar Shaw has petitioned the bankruptcy court to vacate debts owed to numerous El Camino vendors. The El Camino bankruptcy filing is public knowledge available to CPUC investigators and this evidence alone should be sufficient to show that Kumar Shaw does not have the financial

wherewithal or qualifications to operate a successful transportation company. If he were to seek bankruptcy protection for a PSC authorized company in the future it would harm existing customers and it would have a devastating negative effect on consumer confidence in the transportation industry.

IV

Other Matters

The protestors in this matter have raised numerous issues related to the consequences of granting PSC authority to a transportation 'broker'. By Accelar's own admission, they will operate much like Expedia (an internet travel broker). No precedence exists to warrant the granting of this application. Doing so would establish a precedence allowing other uncontrollable entities the ability to acquire PSC authority in the future.

Evidenced by their inability to stop the illegal activities of El Camino and Accelar over the last 18 months, the CPUC does not have the enforcement resources capable of preventing Accelar (along with Kumar Shaw's other company, El Camino) from continued violations of existing CPUC rules, policies and regulations. Allowing Accelar to defer the responsibilities of complying with CPUC rules, policies and regulations to the subcontractors hired by Accelar would make it even more difficult if not impossible for the CPUC to regulate Accelar's activities. CPUC has previously ruled that carriers with PSC authority are responsible for the "complete supervision, direction and control" of the sub-carriers they employ. Any future complaints would require the CPUC to not only investigate Accelar but also the sub-carrier Accelar points to as the carrier responsible for compliance. The CPUC would continue to be incapable of holding Accelar to the high standards required of other PSC authorized carriers in place to insure public safety.

V

Conclusion

As defined in Public Utilities Code Section 226; Passenger Stage Corporation:

226. (a) "Passenger stage corporation" includes every corporation or person engaged as a **common carrier** (emphasis added), 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.

Section 226 and General Order 158-A clearly intend for PSC authority to be reserved for properly licensed **carriers**. References are made throughout GO 158-A to provisions and requirements that only a carrier could possibly comply.

PUC's own website defines the "Classic" PSC as: "**Carriers** charging individual fares are presumed to be PSC's..."

Kumar Shaw testified that Accelar is "...not a transportation company."
(Evidentiary Hearing pg. 66)

Kumar Shaw testified that Accelar is going to "...rely on the PUC staff, CPSD staff, CHP to make sure they are going to follow through on making...sure that only the carriers that meet the safety requirements are going to be given the authority, the charter party carrier authority, or the PSC authority. Accelar is not in the business of verifying that each and every driver hired by any of our subparty carriers, subcharter carriers has the appropriate license. We rely on those operators to make sure they do what they are supposed to do for them to be given the TCP license of the PSC license.
(Evidentiary Hearing pg. 93-94)

The commission should weigh all information before accepting any certificate from the Applicant as may be required by Section 1032.(b) (2):

With respect to subparagraphs (B) and (F) of paragraph (1), the commission may base its findings on a certification by the commission that an applicant has filed with it a sworn declaration of ***ability to comply*** and ***intent to comply*** (emphasis added).

and recognize that Accelar is incapable and unwilling to comply with this provision. Kumar Shaw's Application and all subsequent evidence and testimony confirms that he

does not feel Accelar should have to comply with 'any' of the rules and regulations pertaining to PSC operations because Accelar will not own any buses and will subcontract all their services to companies that do own buses.

Kumar Shaw should not be allowed to circumvent the intent behind the requirements of PSC related provisions and become a 'broker' of transportation services with the ability to operate without restriction and without the burden of responsibility required of PSC authorized carriers.

The areas proposed to be served in the Application are extremely vague with no specified dates of service or identification of the extent and/or frequency of proposed service. Applicant is asking for authority to establish service in those areas 'if and when' they determine a market opportunity exists and they choose to pursue it.

Kumar Shaw has a history of CPUC violations and instead of ceasing operations until his Application could be processed, (as would most legal operators that fear losing their authority because of repeated violations) and despite numerous orders to cease his illegal activities, he has continued to operate. Accelar has not paid any fines associated with citations issued by the CPUC and, because they have no PUC granted authority to lose, they have no fear of repercussions for their illegal activities. Their history reflects a substantial level of disrespect for CPUC rules and regulations. Accelar is clearly not operationally fit and able to perform the proposed scheduled service and abide by all the rules and regulations associated with such service.

As a matter of law, Accelar's application is completely unacceptable and its supporting evidence is insufficient. The issues raised by the Protestants are sufficient to deny Accelar its requested authority and there is nothing in Accelar's fitness and safety record to warrant the issuance of the requested authority.

VI

Recommendation

The Accelar application should not be granted. As a matter of law, Accelar's application is completely unacceptable and its supporting evidence is insufficient. The issues raised by the Protestants are sufficient to deny Accelar its requested authority. Accelar is not a properly licensed 'carrier' and the absence of sufficient evidence of

Accelar's fitness, ability to "supervise, direct and control " the sub-contractors it intends to utilized to provide 100% of the proposed service warrants the denial of the requested authority.

March 7, 2011

Respectfully Submitted,

/s/

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