“Testimony to Nevada Senate Committee on Transportation on S.B. 183”
by Anastasia P. Boden

March 12, 2015

Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
(916) 419-7111

www.pacificlegal.org

INTRODUCTION

The right to earn a living for oneself and one's family is one of America's most revered constitutional rights—and many define the American Dream in exactly this way. Yet Certificate of Public Convenience and Necessity (CPCN) laws, like NRS § 706.391, deprive would-be entrepreneurs of this right for the sole purpose of protecting interest groups from fair competition.

Unlike ordinary occupational licensing laws, which ostensibly exist to make sure that applicants are fit to practice their trade, CPCN laws allow government agencies to deny applications for new businesses for reasons wholly unrelated to protecting the public. Competitors can object to applications without alleging that the applicant presents any threat to the public health or safety, and that protest triggers a hearing requirement that is often insurmountable. For this reason, the laws have sometimes been termed "the Competitor's Veto." These licensing requirements present a barrier to entry that reduces the availability of services to consumers, drives up prices, suppresses innovation, and impedes economic opportunity. And in a field like the motor carrier industry—which features relatively low start-up costs, and would otherwise make a prime opportunity for unskilled or inexperienced workers—the consequence can be particularly inhumane: obstructing economic opportunity for precisely those people who need it most.

Nevada's licensing requirements for common carriers are no different. They are designed to prevent legitimate competition and they stifle the economic liberty of entrepreneurs to the detriment of the public at large. Such laws are not only unjust—they are unconstitutional.

I. THE HISTORY OF CPCN LAWS

The CPCN was invented in the late nineteenth century to regulate the railroad industry.[1] At that time, the government granted railroads certain monopoly characteristics, and railroads, in return, agreed to abide by certain regulations which were often expensive to comply with. This arrangement raised the specter of new businesses entering the market and choosing not to comply with those inefficient requirements, and that possibility was thought to deter private investment in public services.[2] Because CPCN laws strengthened government's power to compel all railroads to comply with government regulation, proponents of those laws saw them as encouraging private investment in public utilities.

Whatever the merits of this rationale, it applies only to public utilities. It does not apply to industries like the taxi, limousine, or moving industry, which have low start-up costs, are not themselves considered public utilities, and do not significantly compete with public utilities like railroads. Moreover, those justifications do not apply to industries which, unlike railroads, may vary widely in the types of services they provide. Yet CPCN laws in those industries persist.

Some have argued that CPCN laws are simply an investigative tool, whereby existing firms help the government agency police the industry by providing it with expertise about the necessary qualifications for running a business. But this argument overlooks the obvious conflict of interest involved in allowing existing firms to decide who may enter the market to compete against them. Moreover, it ignores the fact that in many CPCN schemes—including

---

[1] *See* William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*, 79 COLUM. L. REV. 426, 428 (1979).

[2] *See* Timothy Sandefur, *A Public Convenience and Necessity and Other Conspiracies Against Trade: A Case Study from the Missouri Moving Industry*, 24 GEO. MASON U. C.R. L.J. 159, 165 (2014).

Nevada's—the existing firms are not actually required to provide *any* information, let alone legally admissible evidence, relating to the applicant's skills or public safety.

Litigation from states that have Competitor's Veto laws corroborates the argument that CPCN requirements are not used to protect the public, but instead to block legitimate competition. Evidence from a lawsuit filed by Pacific Legal Foundation (PLF) against Missouri shows that from 2005-2010, whenever a CPCN application was filed requesting permission to operate a moving company, that application was protested by an existing firm.[3] All 106 of these objections were based on the argument that the applicant would compete with an existing business; not one alleged that the applicant was unskilled or would be dangerous to the public, nor was there any evidence that the state denied an application out of concerns for public safety during that time. Moreover, where applicants amended their application to request permission to operate in a small, rural area—meaning they would present less competition—the protestant invariably withdrew its protest, which undermines any argument that the protesting firm was concerned about public safety.

Likewise, not one of the 114 protests filed in Kentucky between 2007 and 2012 alleged that the applicant would present any danger to the public, nor did the Kentucky Transportation Cabinet deny an application on that basis.[4] Instead, every protest was lodged, and every application was rejected, on the basis that the new firm would compete with those already operating.

---

[3] Sandefur, *A Public Convenience and Necessity and Other Conspiracies Against Trade*, *supra*, n.2 at 183.

[4] Timothy Sandefur, *State "Competitor Veto" Laws and the Right to Earn a Living: Some Paths to Federal Reform* (forthcoming) (on file with author).

PLF will uncover how often and under what circumstances CPCNs are granted or denied in Nevada in its pending lawsuit against Nevada Transportation Authority (NTA),[5] but as of 2015, there were just 45 licensed limousine companies, 41 licensed moving companies, and 10 licensed taxi companies in the state—which has a population of over 2.8 million people.[6] The case of Ron and Danell Perlman may therefore be illustrative. When the Perlmans applied for permission to expand their business in Nevada, a competitor intervened—which subjected them to a hearing before NTA. There was no allegation that the Perlmans were unqualified. Yet after two years, the Authority denied the Perlmans' application on the basis that the couple could not demonstrate a need for additional limousine services, and that they would therefore compete with and "adversely affect" existing businesses.[7]

In states with Competitor's Veto laws, entrenched businesses have every reason to resist change. Thus, today, CPCN laws exist in some form in the motor carrier industry in at least 31 states. Yet the purposes for these laws, if they were ever valid, are no longer tenable. And these laws' continued existence causes substantial harm to consumers in the form of higher prices and reduced innovation, while forestalling the dreams of entrepreneurs across the United States.

II. THE HARM CAUSED BY CPCN LAWS

CPCN laws harm both consumers and entrepreneurs. Even if applications for CPCNs are approved (which they rarely are), the hearing requirement is by itself a substantial barrier to entry for entrepreneurs that drives up the cost of starting a business. Like many states, Nevada requires

---

[5] *Wilson-Perlman v. Mackay*, No. 2:15-cv-00285 (D. Nev. filed Feb. 18, 2015).

[6] Nevada Transportation Authority, Active Certificates, *available at* http://tsa1.nv.gov/ActiveCertificates.asp (last visited Mar. 9, 2015).

[7] *See In re Application of Ronald M. Perlman d/b/a/ Reno Tahoe Limousine for expansion of authority*, Nevada Transportation Authority, Docket 12-09001 (2014).

any business organized as a corporation to be represented at such hearings by an attorney.[8] But hiring a lawyer is expensive, and gathering the information necessary to prove that one's business is "necessary" is lengthy and burdensome. Ron and Danell Perlman, for example, waited two years to get a decision on their CPCN application. That application was ultimately denied. But even in cases where the CPCN is granted, the hearing requirement itself raises the price of doing business in the state, thereby hampering economic growth.

Evidence from other states shows that applications for CPCNs are rarely granted, as existing businesses have an obvious incentive to utilize the Competitor's Veto procedure to block new competition. And as licenses to operate a business become rarer and harder to get, there is less availability of services, lower quality services, and higher prices.

Research in the 1970s and 1980s showed that barriers to entry raised prices for intrastate household goods services by anywhere between 25 and 40 percent,[9] and were not associated with any increase in quality.[10] Data from cities that have reduced barriers to entry into the taxicab market likewise show that CPCN laws raise costs to consumers.[11] After Indianapolis lifted its cap on the number of taxicab permits available, the number of cabs nearly doubled, fares decreased by an average of 7 percent, waiting times were almost halved, and complaints

---

[8] *In re Discipline of Schaefer*, 117 Nev. 496, 509 (2001).

[9] Dennis A. Breen, *The Monopoly Value of Household-Goods Carrier Operating Certificate*, 20 J.L. & ECON. 153, 178 (1977).

[10] Edward A. Morash, *Entry Controls on Regulated Household Goods Carriers: The Question of Benefits*, 13 TRANSP. L.J. 227, 240 (1984).

[11] *See*, *e.g.*, Mark W. Frankena & Paul A. Pautler, *An Economic Analysis of Taxicab Regulation* 101 (FTC Bureau of Economics Staff Report, May 1984).

diminished.[12] Other countries have also reported that significant innovations were introduced after deregulation,[13] and findings from other sectors of the transportation industry also show that CPCN laws tend to raise prices, stifle innovation, and restrict economic opportunity.

By eliminating normal, competitive pressures, Competitor's Veto laws reduce existing companies' incentive to improve. And where businesses can bar innovators from entering the market, they deny consumers access to new and improved services from others. We can never know the kinds of innovations that would have resulted in a truly competitive market. And because some entrepreneurs will be deterred from even applying for a CPCN, we can not even know for certain the amount of businesses that have been suppressed.

III. NEVADA'S CPCN LAW

Under Nevada's CPCN requirement, once an application for a CPCN is filed, NTA provides notice to the public of the application and "any affected person" has an opportunity to intervene.[14] The protesting party has no obligation to provide any factual information relating to the applicant's qualifications or skills.[15] If a protest is lodged, NTA schedules an administrative hearing.[16] If no interventions are filed, the Authority can dispense with the hearing and decide

---

[12] Adrian T. Moore & Tom Rose, *Regulatory Reform at the Local Level: Regulating for Competition, Opportunity, and Prosperity*, Reason Foundation Policy Study No. 238 at 15-16 (1998).

[13] Sean D. Barrett, *Regulatory Capture, Property Rights and Taxi Deregulation: A Case Study*, 23 ECON. AFF. 34 (2003); Organization for Economic Development Policy Roundtables, *Taxi Services: Competition and Regulation* 2007 at 7 (2008); Jason Soon, *Taxi!!: Reinvigorating Competition in the Taxi Market*, Centre for Independent Studies Issue Analysis, No. 7 at 9 (May 1999).

[14] NAC § 706.155.

[15] NAC § 706.397.

[16] *Id.*

whether to grant or deny the application based on whether the applicant is "financially fit and otherwise capable of providing safe transportation."[17]

In the event of a hearing, NTA not only considers whether the applicant is fit, willing, and able to provide its service, but in addition, the applicant must prove that:

> (1) the proposed operation will be consistent with the legislative policies set forth in NRS § 706.151, including "foster[ing] sound economic conditions in motor transportation," and "discourag[ing] any practices which would tend to increase or create competition that may be detrimental to the traveling and shipping public and the motor carrier business" in Nevada;
>
> (2) the proposed operation will not unreasonably and adversely affect other carriers operating in the same territory;
>
> (3) the proposed operation will benefit and protect the safety and convenience of the traveling and shipping public and the motor carrier business in Nevada;
>
> (4) the proposed operation will be provided on a continuous basis;
>
> (5) the market will support the applicant's proposed business;
>
> (6) the applicant has paid all required fees and costs.[18]

Thus, if a competitor protests an application, not only is the applicant required to prove that it will not harm its competitors, it is required to prove that it will *benefit* its competitors. Failure to prove *any one* of these criteria is grounds for NTA to deny a certificate. Protestants are permitted to testify and offer evidence against the applicant.[19]

---

[17] NAC § 706.155.

[18] NRS § 706.391(2).

[19] NAC § 706.397.

The statute lacks definitions of crucial terms within these factors; criteria like "foster sound economic conditions," "unreasonably and adversely affect other carriers," and "the safety and convenience of . . . the motor carrier business " are not explained in any statute, regulation, or case law. This lack of definition means that applicants are left with little guidance on how they could prove that their businesses "foster sound economic conditions," are "convenient" to the public or their competition, or will "benefit" and not "adversely affect" other carriers. And regulators are given wide latitude to interpret what these terms mean.

While the precise meaning of many terms are unclear, it is at least clear that these factors are inherently biased towards existing businesses, and many are totally unrelated to the public health or safety. The requirement that applicants prove that they will not adversely affect their competitors is particularly problematic—given that *any* new company will have some effect on the market for its goods. And an application can be denied on those grounds alone. Thus, though the statute contains a perfunctory disclaimer that "the creation of competition" is not "by itself" grounds for denying an application,[20] NTA is empowered, if not required, to deny applications on the basis that the new company will harm existing ones.

Additionally, applicants are required to prove that there is a market for their services.[21] It is usually an entrepreneur's perception that his or her service is needed that causes them to seek to enter the market. Yet, the only way to demonstrate that this need exists—particularly in the case of new and innovative products—is to try. The market allows entrepreneurs to discover whether their services are needed through experimentation. But Nevada's CPCN law denies

[20] NRS § 706.391(2)(c).

[21] NRS § 706.391(2)(f).

entrepreneurs that experiment. Thus, the requirement that applicants prove that there is a public "necessity" for their services requires them to prove something that cannot be proven in advance.

IV. CPCN LAWS AND THE CONSTITUTION

The Due Process Clause forbids states from imposing occupational licensing requirements that are not related to an applicant's skill in practicing the trade. The Supreme Court first made this pronouncement in *Dent v. West Virginia*,[22] in which it upheld a licensing requirement for doctors on the basis that the training and education standards were "appropriate to the calling or profession, and attainable by reasonable study or application."[23] The Court warned that requirements that lack such a relationship would unconstitutionally "deprive one of his right to pursue a lawful vocation."[24]

Likewise, the Ninth Circuit—the federal Court of Appeals that governs Nevada—struck down a licensing law for pest-control workers because it required extensive training in the use and storage of pesticides, even where the individual did not work with pesticides. This requirement applied only to persons who worked with certain kinds of pests—including mice, rats, and pigeons—and not others, even though those exempted were most likely to encounter pesticides in their work. The court found this irrationality to be strong evidence of economic protectionism, and ruled that without any relation to the common good, "economic protectionism for the sake of economic protectionism" is unconstitutional.[25] This precedent is controlling in Nevada.

---

[22] 129 U.S. 114 (1889).

[23] *Id.* at 122.

[24] *Id.*

[25] *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008).

CPCN laws have no connection to a person's fitness or capacity to practice, and therefore no relationship to protecting the public. In 1932, the Supreme Court struck down a law very similar to Nevada's because it prohibited new ice-delivery businesses without a CPCN and allowed existing companies to block new firms from competing. That law did not protect the public; instead it "shut out new enterprises, and thus create[d] and foster[ed] monopoly in the hands of existing establishments, against, rather than in aid of, the interest of the consuming public."[26]

Last year, a federal court in Kentucky affirmed that CPCNs that stifle economic opportunity in order to protect existing businesses lack the rational connection to protecting the public that the Due Process Clause requires.[27] First, that state's CPCN requirement did nothing to prevent property damage—existing laws already made property damage illegal. Moreover, experienced, skilled movers who were unlikely to damage property could be, and often were, denied CPCNs without regard to their qualifications.[28] Nor did the Competitor's Veto process decrease administrative costs, because "when a protest is filed, the Cabinet *must* hold a hearing," thus actually increasing costs.[29] The record further showed that consumers never objected to new companies starting—it was only existing companies who used the law to block new competition. After dispensing with the state's other rationales for the Competitor's Veto procedure, the court concluded that it served instead only the unconstitutional goal of economic protectionism.[30] That

---

[26] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 278 (1932).

[27] *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 697 (E.D. Ky. 2014).

[28] *Id.*

[29] *Id*.

[30] *Id.* at 701.

ruling affirms what the Supreme Court has held for years; to operate a business, and as in that case, a transportation firm, one need only be qualified and abide by public safety laws.

CONCLUSION

Government may use licensing laws to protect the public from dishonest or dangerous practices. It may not use those laws to protect a favored few against legitimate competition from new entrepreneurs. Nevada's licensing requirement under NRS § 706.391 is therefore an unconstitutional restriction on the right to earn a living. That's why we at Pacific Legal Foundation have filed a lawsuit against the members of the NTA challenging the constitutionality of this law.

CPCN laws that allow existing businesses to trigger a burdensome, time-consuming, and often insurmountable public hearing requirement for new applicants are irrational. The justifications on which they were based are no longer tenable—especially as applied to taxi, limousine, and moving companies. And allowing competitors to protest, or government to deny, applications for new businesses for the purpose of preventing competition is unconstitutional. These laws aren't related to protecting the public—they harm the public by causing lower supply, increased prices, decreased quality, and loss of innovation. And they are illegal, because they violate the promise of economic liberty that the Constitution secures.