

ORIGINALDecision No. 58056

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of RUSSELL G. LEWIS for)
 a certificate of public convenience)
 and necessity for the operation of) Application No. 40097
 an excursion and sight-seeing serv-)
 ice by vessel between points in San)
 Francisco Bay and other bays and)
 waterways.)

Graham, James & Rolph by Boris H. Lakusta, for
 Russel G. Lewis, applicant.
 Vaughan, Paul & Lyons by John G. Lyons, for
 The Harbor Tug and Barge Company and Harbor
 Tours, Inc.; Albert D. Elledge, for The
 Harbor Tug and Barge Company, protestants.
John D. Maata, for Western Greyhound Lines,
 interested party.
William R. Peters, for the Commission staff.

O P I N I O N

Russell G. Lewis seeks a certificate of public convenience and necessity to operate passenger vessels on San Francisco Bay and environs.

Duly noticed public hearings were held in this matter by Examiner Donald B. Jarvis on June 30, 1958 and July 1, 3 and 9, 1958. The matter was submitted subject to the filing of briefs and certain late-filed exhibits.

The original application sought authority "to operate an excursion and sightseeing service by vessel between Sausalito, on the one hand, and other bays and waterways which can be reached through the Golden Gate on the other; also between any combination of such points. ... Service ... [to] be performed on ... [a] non-scheduled basis to the extent that facilities and personnel are available, weather permitting." Permission to amend the application was twice granted during the proceeding. The application, as it now stands,

seeks authority to operate scheduled excursion and sightseeing service between Sausalito and Angel Island, San Francisco and Angel Island, and Sausalito and San Francisco. Lewis also proposes scheduled sightseeing services originating in San Francisco and Sausalito whereby the vessel would leave the dock, traverse the waters of San Francisco Bay, and return to the point of origin without touching land. Lewis also proposes an on-call service to supplement the scheduled ones.

It is necessary to resolve certain contentions raised by the parties before determining the merits of the matter.

Lewis contends that The Harbor Tug and Barge Company and Harbor Tours, Inc., are not proper parties protestant and that all evidence produced or elicited by them should not be considered by the Commission.

The question of who is a proper party protestant in an application proceeding depends upon the facts of the particular case at bar. In general this question is governed by Rule 46 of the Commission's Rules of Procedure, which provides as follows:

"In an investigation or application proceeding, or in such a proceeding when heard on a consolidated record with a complaint proceeding, an appearance may be entered at the hearing without filing a pleading, if no affirmative relief is sought, if there is full disclosure of the persons or entities in whose behalf the appearances is to be entered, if the interest of such persons or entities in the proceeding and the position intended to be taken are stated fairly, and if the contentions will be reasonably pertinent to the issues already presented and any right to broaden them unduly is disclaimed.

"A person or entity in whose behalf an appearance is entered in this manner becomes a party to and may participate in the proceeding to the degree indicated by the presiding officer."

The Harbor Tug and Barge Company holds a certificate of public convenience and necessity to conduct "a general launch, barge, tug and towboat business in 'on-call' service for the transportation of passengers between points on San Francisco and San Pablo Bays..." (Re Investigation by Commission, etc., 40 C.R.C. 493, 515.) It appeared as a protestant at the commencement of the public hearings before the application was amended. The original application sought operating rights akin to some of those held by Harbor Tug and Barge. As amended, the application still seeks authority to render "on-call" service to points for which Harbor Tug and Barge is certificated. Even if Lewis proposed only a scheduled operation in an area where Harbor Tug and Barge may only render "on-call" service, Harbor Tug and Barge should have the right to protest against the granting of a certificate for a competing service. The Commission is of the opinion that Harbor Tug and Barge is a proper party protestant in this matter.

The question of whether Harbor Tours, Inc., is a proper party protestant is entwined with certain contentions raised by it as well as by Harbor Tug and Barge. The record discloses that Harbor Tours is a wholly owned subsidiary of Harbor Tug and Barge. Harbor Tours conducts a sightseeing service by vessel from San Francisco whereby a boat leaves the dock, traverses the waters of San Francisco Bay without touching land, and returns to the dock from which it embarked. Harbor Tours does not hold a certificate of public convenience and necessity. It takes the position that, under the applicable statutes, no certificate is necessary for its operations and that, insofar as Lewis seeks to obtain a certificate for similar operations, it has standing to protest the award of such a certificate on the ground of lack of jurisdiction. The

Commission is of the opinion that the Examiner properly permitted Harbor Tours to appear as a protestant in this proceeding. (Re Star and Crescent Boat Company, 54 Cal. P.U.C. 64; see also Commercial Communications, Inc., v. Public Utilities Commission, 50 Adv. Cal. 448.)

The contention raised by Harbor Tug and Barge and Harbor Tours that the Commission has no jurisdiction over vessel sightseeing services which embark from a particular point, traverse California waters without touching land and then return to the point of origin, has no merit. The argument in support of this contention is primarily one of statutory construction. It is argued that Public Utilities Code Section 1007 provides in part as follows:

"No corporation or person shall begin to operate or cause to be operated any vessel for the transportation of persons or property, for compensation, between points in this State, without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation ..." (Emphasis added.)

Harbor Tug and Barge and Harbor Tours contend that the type of service here involved is not "between points in this State" and therefore there is no statutory basis under which it can be regulated. This point has been resolved against the contention of Harbor Tug and Barge and Harbor Tours on numerous occasions. In Re Star and Crescent Boat Company, 54 Cal. P.U.C. 64, it was stated at page 65 that:

"... It is our interpretation of Section 1007 of the Public Utilities Code that the phrase 'between points in this State' refers to the territorial extent of the operation, and does not mean that there must be two or more separate termini."

(See also re Frank E. Hubaty, Decision No. 51777 in Application No. 40461; Dal Grettenberg, Decision No. 56944 in Application No. 39808; Shearwater, Inc., Decision No. 53849 in Application No. 37865.)

Protestants Harbor Tug and Barge and Harbor Tours also contend that this Commission has no jurisdiction to grant Lewis a certificate of public convenience and necessity and accept the filing of a tariff with respect to the proposed rates and operations between San Francisco and Sausalito and these points on the one hand and Angel Island on the other hand, until applicant secures a franchise from the Department of Public Works pursuant to Streets and Highways Code Section 30800. The Department of Public Works was served with copies of the application and all amendments thereto. The Department of Public Works did not make an appearance in this proceeding but transmitted letters to this Commission directing attention to Streets and Highways Code Sections 30800 et seq. These letters have been made a part of the formal file herein.^{1/}

Sections 30800-30803 of the Streets and Highways Code provide as follows:

"30800. Jurisdiction and powers of department.
The department has exclusive jurisdiction and, except as provided in this article, may grant upon such terms, limitations, conditions, and restrictions and under such supervision as in its judgment are necessary or proper, franchises, privileges, or licenses for the construction or operation of toll bridges, toll roads, and toll ferries and for the taking and keeping of tolls from such bridges, roads, and ferries situated wholly or in part within the State.

"30801. License fee. The department shall require the grantee of any such franchise, privilege, or license to pay a license tax or fee of not less than ten dollars (\$10) or more than one hundred dollars (\$100) a month, the amount of which shall be fixed in the franchise.

^{1/} It should be noted that some of the operating rights sought herein might have been within the purview of Streets and Highways Code Section 30352 because of the proximity of the proposed operations to the San Francisco-Oakland Bay Bridge. Section 30352 was enacted to prevent any new competition with toll bridges constructed under the Toll Bridge Authority Act as long as any bonds issued thereunder remain outstanding and unpaid. However, the Department of Public Works, in the letters referred to above, has informed this Commission that there are no outstanding bonds on said San Francisco-Oakland Bay Bridge.

"30802. Regulation of tolls. The department may fix the rate of tolls, and from time to time regulate, modify, and change any such tolls which may be collected on any toll bridge, toll roads, or toll ferries which are built, constructed, or established pursuant to this article.

"30803. Hearing on toll rates; conclusiveness of findings. The rate of toll fixed, regulated, modified, or changed shall be determined by the department after hearing has been had thereon and a written finding rendered. Findings rendered by the department are conclusive as to the facts recited therein."

Serious questions are presented if these code sections are deemed applicable to the case at bar. The Commission is of the opinion that Sections 30800 et seq. of the Streets and Highways Code are not applicable to the facts here involved and that even if these code sections are considered to be applicable this Commission has jurisdiction to award a certificate of public convenience and necessity and accept the filing of a tariff in this matter if the facts so warrant.

Harbor Tug and Barge and Harbor Tours contend that the proposed service between San Francisco and Sausalito and these points on the one hand and Angel Island on the other hand constitutes a "toll ferry" within the purview of Streets and Highways Code Section 30800.

A "toll ferry" is merely a ferry for which a toll is charged. Whether a particular activity constitutes a "ferry" is a mixed question of law and fact. (Lake Tahoe Railway and Transportation Co. v. Roberts 168 Cal. 551; Canadian Pac. Ry. Co. v. United States, 73 F. 2d 831; Puget Sound Nav. Co. v. United States, 107 F. 2d 73; Commonwealth v. Rees, 10 Pa. County Court Reports 545; Mayor, etc., of the City of New York v. New Jersey Steam-Boat Transp. Co., 12 N. E. 435.)

The definition of "ferry" now found in Revenue and Taxation Code Section 1136 is the one generally used in this State. It reads as follows:

"A ferry is a place where passengers and freight are regularly transported by water between two fixed termini under authority of law so to do." (Emphasis added.) (See also Fortain v. Smith, 114 Cal. 494, 495, passengers and freight; People v. S. F. and A. R. R. Co., 35 Cal. 606, 617-18, persons and things; Griefitii v. Cave, 22 Cal. 535, 537, persons and property; Political Code, 1875, Sec. 3643, repealed; but see Vallejo F. Co. v. Solano Aquatic Club, 165 Cal. 255; Norris v. The Farmers' and Teamsters' Co., 6 Cal. 590; Streets and Highways Code Sec. 30582 [defini- tion limited to particular portion of Code].)

If this definition be here applied, the proposed operations between San Francisco and Sausalito and these points and Angel Island would not be a ferry because Lewis proposes to transport only persons and not property. In addition, the record discloses that Lewis proposes to use primarily a 65-foot-long vessel called the Blue Spirit. This boat does not resemble the traditional prototype of a ferryboat. It cannot accommodate motor vehicles. Lewis proposes in his operations to sell only round-trip tickets. With respect to the proposed service between Sausalito and San Francisco, Lewis proposes to have a short layover between trips and to honor the return portion of the ticket only on the return trip of the same vessel. The Commission finds and concludes that no part of applicant's proposed service is a "toll ferry" within the purview of Streets and Highways Code Section 30800.

However, even if a portion of Lewis' proposed operations be deemed to be a "toll ferry" under Streets and Highways Code Section 30800, there is nothing in the law which would deprive this Commission of jurisdiction in this proceeding.

Streets and Highways Code Section 30800 provides that the Department of Public Works may issue a franchise for the operation of a toll ferry. Section 30801 of that Code prescribes the limits of the license fee for said franchise, and Section 30802 provides that the Department of Public Works "may fix the rate of tolls and from time to time regulate, modify and change the tolls which may be collected on any ... toll ferries which are built, constructed or established pursuant to this article." Public Utilities Code Section 1007 provides in part that "No corporation or person shall begin to operate or cause to be operated any vessel for the transportation of persons or property, for compensation, between points in this State, without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation ...". A ferry is a common carrier and a public utility (Cal Const., Art. XII, Sec. 17, 23; Public Utilities Code Secs. 211, 216; Civil Code Sec. 2168.) This Commission has the right to supervise and regulate every public utility in the State. (Public Utilities Code Sec. 701.) This Commission has the duty to determine the just, reasonable and sufficient rate of a common carrier between any two points in the State. (Cal. Const., Art. XII, Sec. 19; Public Utilities Code Sec. 730; see also Sections 728, 729.)

In order to operate a toll ferry it is necessary to have both a certificate of public convenience and necessity and a franchise. (Public Utilities Code Sec. 1011; Golden Gate Ferry Co. v. Railroad Commission, 204 Cal. 305; People v. Northwestern Pacific Railroad Co., 20 Cal. App. 2d 120; 22 Cal. Jur. 2d, Ferries, Sec.6.)

The law is silent on whether the franchise or certificate is to come first.^{2/} Formerly, the public body which granted the franchise also determined whether or not public convenience and necessity existed and the rates to be charged. (Political Code, 1872, Sec. 2893, repealed; see also Henshaw v. Board of Supervisors of Butte County, 19 Cal. 150; Fall v. Paine, 23 Cal. 303.)

This Commission has the jurisdiction to entertain an application for the issuance of a certificate of public convenience and necessity to operate a toll ferry before the issuance of a franchise for the reasons which follow. One of the criteria in determining whether or not a ferry franchise should issue is the ability of the applicant to successfully conduct the proposed operation. A factor in evaluating the ability to operate under a franchise is the rates to be charged. This Commission is given authority to set and regulate rates for transportation companies by Article XII, Sections 20 and 22, of the California Constitution. A ferry is a transportation company as well as a public utility and common carrier. Sections 20 and 22 are self-executing. (People v. Western Air Lines, Inc., 42 Cal. 2d 621, 635 et seq.) While Streets and Highways Code Sections 30802 and 30803 purport to give the Department of Public Works jurisdiction over the rates of toll roads, bridges and ferries, it is difficult to see how these sections can have any effect, insofar as they apply to toll ferries, in the light of the Constitutional provisions cited above. "It is not and will not be questioned but that if the constitution has vested such power, it is not within the legislative power, either by its

^{2/} Public Utilities Code Section 1003 providing for preliminary orders pending the issuance of a franchise does not apply in this case because it refers to the utilities enumerated in Section 1001.

silence or direct enactment, to modify, curtail, or abridge this constitutional grant." (Western Assn. etc., R. R. v. Railroad Commission, 173 Cal. 802, 804; see also Hart v. Jordan, 14 Cal. 2d 288; 11 Cal. Jur. 2d, Const. Law Sec. 30.)

The establishing of prospective rates would seem to be proper before the issuance of a franchise. In addition, if public convenience and necessity does not exist, an applicant cannot operate a proposed service even if he has a franchise. Therefore, it would seem proper for this Commission to determine this question and grant or deny such a certificate prior to the issuance of a franchise. From the foregoing it should be understood that this Commission does not hold that an application for a certificate of public convenience and necessity must precede one for a franchise. The Commission does hold that it has jurisdiction to proceed on an application for a certificate prior to the issuance of a franchise.

Having thus determined that this Commission has jurisdiction over all matters presented by this application, the merits will now be considered.

As indicated, Lewis proposes to commence operations with a 65-foot vessel named the Blue Spirit. The Blue Spirit is certified and licensed by the United States Coast Guard to carry 49 passengers. If necessary, Lewis will augment his operations by leasing other vessels which are licensed and certified by the Coast Guard.

Lewis testified that he has approximately \$1,500 in cash; that he owns unencumbered the Blue Spirit which is worth \$40,000; that it has a mortgage value of \$15,000; and that he would mortgage the vessel to provide additional funds for the proposed service. For the past few years Lewis has used the Blue Spirit for charter fishing operations. Lewis has the requisite qualifications to operate

the Blue Spirit and he proposes to hire qualified crew members. Lewis testified that he would procure public liability insurance in any amount ordered by this Commission.

Public witnesses testified in behalf of Lewis. Some of these witnesses testified that they desired the proposed service and that they would use it in whole or in part. Several Sausalito businessmen testified that, in their opinion, the proposed service would be of financial benefit to them and their community. A member of the Marin County Board of Supervisors testified that the Board had adopted a resolution favoring this application; that the proposed service would help develop Angel Island, which is located in Marin County, as a recreational area for the County; and that the proposed service would be another factor to encourage tourists to visit Marin County. The managing director of the San Francisco Convention and Visitors Bureau testified that his agency supported the application with respect to the proposed service between San Francisco and Angel Island. The record indicates that the Sausalito Chamber of Commerce has gone on record as favoring the application.

The Commission takes official notice, with respect to this application, that Angel Island is located in San Francisco Bay; that during June 1958, Hospital Cove on said island was opened as a state park; and that at this time the only practical means of reaching the island is by boat.

The issues raised by the protestants were mainly legal ones and have heretofore been resolved. If the operating rights sought herein are granted, they would be of a substantially different character than those now held by Harbor Tug and Barge and any effect on Harbor Tug and Barge would be minimal. While Harbor Tours, Inc., had standing to appear in this proceeding as a protestant to raise certain legal points, it does not hold a certificate of public convenience and necessity and its operations cannot affect the result in this case.

The Commission finds that public convenience and necessity require that the application be granted to the extent hereinafter set forth.

The Commission has examined the rates proposed by Lewis and finds them to be reasonable. The Commission finds that Lewis has the financial ability to conduct the proposed operations.

The certificate hereinafter granted shall be subject to the following provision of law:

That the Commission shall have no power to authorize the capitalization of this certificate of public convenience and necessity or the right to own, operate, or enjoy such certificate of public convenience and necessity in excess of the amount (exclusive of any tax or annual charge) actually paid to the State as the consideration for the issuance of such certificate of public convenience and necessity or right.

O R D E R

A public hearing having been held and based upon the evidence therein adduced,

IT IS ORDERED that:

(1) A certificate of public convenience and necessity is granted to Russell G. Lewis authorizing him to operate as an operator of vessels for the transportation of persons as defined by Section 1007 of the Public Utilities Code for the transportation of persons between the points and at the rates more particularly set forth in Appendix A attached hereto and made a part hereof.

(2) In providing service pursuant to the certificate herein granted, applicant shall comply with and observe the following regulations:

(a) Within thirty days after the effective date hereof, applicant shall file a written acceptance of the certificate herein granted. By accepting the certificate of public

convenience and necessity herein granted, applicant is placed on notice that he will be required, among other things, to file annual reports of his operations and to comply with and observe the rules set forth in General Order No. 87. Failure to file such reports, in such form and at such time as the Commission may direct, or to comply with and observe the provisions of General Order No. 87, may result in a cancellation of the operating authority granted by this decision.

- (b) Within sixty days after the effective date hereof, and on not less than ten days' notice to the Commission and to the public, applicant shall establish the service herein authorized and file in triplicate, and concurrently make effective, tariff and timetable satisfactory to the Commission.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 24th day of February, 1959.

C. L. Fox
President
W. H. ...
...
Theodore ...
Everett ...
Commissioners

1. Russell G. Lewis, by the certificate of public convenience and necessity granted by the decision noted in the margin, is authorized to transport persons by vessel between the following points:

- (a) Commencing at San Francisco and traversing the waters of San Francisco Bay and the Pacific Ocean without touching land and thence returning to San Francisco.
- (b) Commencing at Sausalito and traversing the waters of San Francisco Bay and the Pacific Ocean without touching land and thence returning to Sausalito.
- (c) San Francisco on the one hand and Sausalito on the other hand.
- (d) San Francisco on the one hand and Angel Island on the other hand.
- (e) Sausalito on the one hand and Angel Island on the other hand.

2. Applicant shall sell only round-trip tickets for each of the operating authorities herein granted. Applicant's tariff shall provide that round-trip tickets between the points of San Francisco and Sausalito shall be valid only upon the return trip of the same vessel upon which the passenger embarked.

3. Before applicant commences operations under the certificate herein granted, he shall procure insurance in the amount of not less than \$100,000, issued by a company licensed to write such insurance in this State, against liability imposed by law upon him for the payment of damages for personal bodily injuries, including death resulting therefrom, on account of bodily injuries to, or death of, one person; and provide for protection in the amount of not less than \$1,000,000 against a total liability of applicant on account of bodily injuries to, or death of, more than one person, as a result of any one accident. Applicant shall keep said insurance in effect during the life of this certificate.

4. Applicant shall provide in his tariff and timetable for the following minimum service to be rendered under his certificate between May 15 and October 15 of each year:

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<u>Points of Service</u>	<u>Trips</u>
San Francisco - traverse Bay and Ocean - San Francisco	One trip daily, including Sunday
Sausalito - traverse Bay and Ocean - Sausalito	One trip daily, including Sunday
Sausalito to San Francisco and return	One trip daily, including Sunday
San Francisco to Sausalito and return	One trip daily, including Sunday
San Francisco to Angel Island and return	One trip on Saturday and Sunday, only
Sausalito to Angel Island and return	One trip on Saturday and Sunday, only

Applicant may, in addition to the foregoing service, provide in his timetable for additional scheduled trips and on-call service.

5. Applicant shall provide in his tariff for the following rates, which shall include all taxes: federal, state, and municipal.

San Francisco - traverse Bay and Ocean - San Francisco	Adults \$1.25 - Children \$0.65
Sausalito - traverse Bay and Ocean - Sausalito	" " " "
Sausalito to San Francisco and return	" " " "
San Francisco to Sausalito and return	" " " "
San Francisco to Angel Island and return	" 2.50 " 1.25
Sausalito to Angel Island and return	" " " "

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