

ORIGINAL

Decision 84 10 030 OCT 17 1984

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ISLAND EXPRESS, INC., a  
California corporation,

Complainant,

vs.

H. TOURIST, INC., a  
California corporation, doing  
business as CATALINA CRUISES,

Defendant.

Case 84-06-062  
(Filed June 21, 1984)

Graham & James, by David J. Marchant,  
Attorney at Law, for complainant.  
Hegarty, Pougiales, Loughran & Gulseth,  
by Edward J. Hegarty, Attorney at Law,  
for defendant.  
Javier Plasencia, Attorney at Law, and  
Vahak Petrossian, for the Commission  
staff.

O P I N I O N

Introduction

Complainant Island Express, Inc. (Island Express) is a transportation service presently providing helicopter service between the mainland and Santa Catalina Island (Catalina). Additionally, Island Express has pending before this Commission an application for the institution of a high-speed passenger vessel service to Catalina.

Defendant H. Tourist, Inc. (H. Tourist) has a certificate of public convenience and necessity (CPC&N) from the Commission<sup>1/</sup> granting it the right to operate as a common carrier of passengers by vessel between either the Port of Los Angeles (San Pedro) or the Port of Long Beach and various points on Catalina. Both scheduled and nonscheduled services are authorized. No restrictions, limitations, or specifications for vessels are set out in H. Tourist's certificate.

At the time its initial CPC&N was issued, H. Tourist's predecessor operated two vessels each with a speed of 20 knots. One held 149 passengers, the other held 49. When the certificate was amended and transferred to H. Tourist in 1979, H. Tourist was operating six vessels, each with a speed of 16 knots. Five had a 700-passenger capacity, one held 100 passengers.

In mid-1984, H. Tourist leased the "Klondike" for two to six months and added it to its fleet. Unlike the other vessels the Klondike has a catamaran-type hull, holds up to 148 passengers, and has a top speed of 28 knots.

H. Tourist filed new timetables with us for service by the "Klondike" on June 20, 1984 and began the service on July 6, 1984, under tariffs then in effect. In the meantime, Tourist filed an application for an ex parte order allowing it to charge higher rates for the Klondike's service. We granted the application by Decision (D.) 84-07-148<sup>2/</sup> dated July 18, 1984 and H. Tourist began assessing the higher fares on July 26, 1984.

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1/ Initially granted to Harbor Carriers, Inc. by D.76496 dated December 2, 1969 and amended and transferred to H. Tourist, Inc. by D.90388 dated June 5, 1979.

2/ Complainant has filed an application for rehearing of this decision.

In our decision, we noted that Island Express had protested H. Tourist's application. We stated:

"Island does not question the reasonableness of the proposed fare increase but objects to the operation of the new catamaran service. Island alleges that Tourist's new catamaran service requires a certificate of public convenience and necessity and that Tourist should be required to submit a Proponent's Environmental Assessment.

"Island filed a complaint in Case (C.) 84-06-62 requesting a cease and desist order against Tourist's catamaran operation. The complaint is the proper proceeding to raise the environmental and public convenience and necessity issues. This rate proceeding will not consider whether Tourist should operate the catamaran service but only whether the proposed fare is reasonable and justified." D.84-07-148, slip opinion, p.3.

Thus, this is the first proceeding in which we have considered the issues of environmental impact and public convenience and necessity. To accomplish this, a hearing was held before Administrative Law Judge Colgan in the Commission's Courtroom in Los Angeles on July 26, 1984. The case was submitted on August 13, 1984 when simultaneous post-hearing briefs were filed by Island Express, H. Tourist, and the Commission staff (staff).

According to the uncontested record and stipulation of the parties, Island Express's president, J. Jay Feinberg, is also president of a corporation which operates three of Catalina's major hotels. Feinberg contacted H. Tourist occasionally from 1979 through 1983 to inquire whether H. Tourist would be willing to initiate a "high-speed, premium-type vessel service" between

Long Beach and Catalina. No action was forthcoming. Feinberg formed Island Express in 1982 in order to initiate a high-speed helicopter service between Long Beach and Catalina.

In December 1983, Island Express filed an application with this Commission for authority to provide a high-speed premium-type service with Surface Effect Ship (SES) vessels to supplement its air service. The application was dismissed as incomplete. It was refiled on May 31, 1984. This time the application contained the Proponent's Environmental Assessment (PEA) which staff had found lacking in the initial application.

Meanwhile, shortly after Island Express's first application was filed, Feinberg was advised (in January 1984) that H. Tourist would operate a high-speed vessel in the summer of 1984 between the Port of Long Beach and Avalon.

Thus complainant requests our issuance of a cease and desist order prohibiting H. Tourist's operation of the catamaran until it has filed (1) an application for a new CPC&N or for a modification of its current certificate; (2) a formal application to increase its fares; and (3) a PEA in accordance with our Rule 17.1 (Title 20, California Administrative Code, Section 17.1).

#### Discussion

##### 1. Need for a New CPC&N or Modification of Current Certificate

In its brief, Island Express cites a 1941 Railroad Commission (our predecessor) decision for the proposition that a common carrier must obtain a CPC&N from the Commission before "enlarging or altering the character of its operations" and must show that public convenience and necessity require such change

or increase. We must point out that that decision goes on to explain that: "[I]t would be most unusual for the Commission to create an operative right and then arbitrarily limit the amount of business which could be conducted pursuant to it." Application of Vernon B. Bradbury, et al. (1941) 43 CRC 631, 636.

Clearly, the import of that decision is that enlarging or altering the character of operations occurs only when there is a fundamental change beyond mere growth in customer numbers or vehicle numbers. With regard to the present matter, the question becomes whether the use of a catamaran that takes about 70% as much time to make the crossing and holds 148 passengers (as opposed to the 100- and 700-passenger capacity of H. Tourist's other vessels) constitutes such a fundamental alteration or enlargement of the operations.

A further case cited by Island Express for this same proposition, Application of Motor Transit Co. (1924) 24 CRC 807, states:

"Enlargement of operative rights and territory served, in the absence of the authority conferred by certificate of public convenience and necessity granted by this Commission after proper application, is illegal." (Emphasis added.) (24 CRC 807, 821.)

In the matter before us, the operative rights and territory served have been granted by the broad CPC&N granted to H. Tourist and we do not view the catamaran's size or speed or the increase from six to seven vessels as a fundamental alteration or enlargement of operations. Furthermore, the increased amenities (e.g. fancier seats, carpeting, noise

insulation) offered to customers does not, at least in the present context, have any bearing on the fundamental operations. Thus, Island Express's contention that H. Tourist needs to seek a new CPC&N or a modification of its present one in order to operate the catamaran is unfounded.

2. Reasonable Interpretation of  
H. Tourist's CPC&N

The certificate we issued to H. Tourist does not specify vessel types. Island Express suggests that such specification must be implied lest H. Tourist reinstitute the service of the S.S. Catalina,<sup>3/</sup> without addressing any environmental issues. Although there may be implicit limitations on the types of vessels which H. Tourist could employ without changing the fundamental nature of its service, we find it unnecessary to speculate about such circumstances since they are not before us in the present matter.

3. Reasons for Restricting  
H. Tourist's CPC&N

Island Express correctly contends that the Commission has the right to impose restrictions on existing certificates. It then claims that we should place such a restriction on H. Tourist in this case. The suggested restriction is one which would require H. Tourist to obtain Commission approval before the institution of its "high speed premium type service on either a temporary or permanent basis" and which would "limit

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<sup>3/</sup> A very large vessel (2,200-passenger capacity) which once served Catalina, but has not been in service for several years. Its owner, S.S. Catalina Steamship Co., was informed that environmental issues would have to be addressed before this Commission will consider reinstating service.

H. Tourist's current certificate to the provision of basic ferry service with vessels that are comparable to the ones that it has been utilizing for the last 10 years."

Island Express argues that such restriction is necessary because H. Tourist has "awesome financial strength" and thus "money will be no object" if and when H. Tourist decides to embark upon high-speed, premium-type service in the Catalina market. To explain the practical consequences it believes will flow from these alleged facts, Island Express reminds us that it has an application before this Commission to operate a high-speed, premium-type service to Catalina, and states that it anticipates a lead time of 14 to 16 months to prepare for the institution of such service. Island Express speculates that if H. Tourist is not restricted, it could institute a great deal of direct competition before Island Express could get started and thereby "frustrate the startup service" of Island Express.

Additionally, says Island Express, such competition could "circumvent and frustrate the Commission's established policy of encouraging new carriers to enter a market to provide a competitive service" and could have a "chilling effect" on new applicants. Island Express goes on to claim that it is "not afraid of competition and does not seek special protection", but just wants H. Tourist restricted in order to "help preserve the marketplace into which ISLAND EXPRESS seeks entry".

We are not persuaded by these claims. No evidence substantiates their veracity and we know of no precedence in our case law for restricting the activities of one carrier in order to give another a chance to catch up. We would not be promoting the best interests of either the parties here or

the public if we were to prohibit one operator's "high-speed premium-type service" for 14 to 16 months so that we could then determine whether another was qualified to provide a similar service.

4. Compliance with CEQA  
and Rule 17.1

Island Express also claims that the California Environmental Quality Act (CEQA), California Public Resources Code Sections 21000, et seq., and our Rule 17.1 would be violated if H. Tourist were not required to submit environmental data to us regarding its catamaran service.

CEQA requires that, with certain exceptions, an environmental impact report or a negative declaration must be prepared for each proposed "project". Project is defined, in relevant part, by Section 21065(c):

"Project" means the following:"

\* \* \*

"(c) Activities involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies."

The issue thus becomes whether H. Tourist's starting to use a catamaran is or should have been an activity requiring issuance of a separate certificate. We have already said it is not, explaining that there has been no fundamental change in H. Tourist's operation which would warrant issuance of a new or amended certificate.

Consequently, Rule 17.1, which is our rule for carrying out CEQA, is not relevant and complainant's Rule 17.1 claim regarding H. Tourist's need to file a PEA for a new project is misplaced.



Conclusion

Although the complaint claimed that H. Tourist violated Public Utilities Code Section 1007 by failing to file a formal application to increase its fares, Application 84-06-061, which we decided in D.84-07-148, has made this issue moot. Since we find none of Island Express's claims to be meritorious, we cannot grant the relief requested.

Findings of Fact

1. The CPC&N held by H. Tourist regarding vessel service between either the Port of Los Angeles (San Pedro) or the Port of Long Beach and various points in Catalina has no restrictions, limitations, or specifications for vessels.

2. The issue of whether there are implicit limits to the types of vessels covered by H. Tourist's CPC&N is not before us in this proceeding.

3. The Commission has the right to impose restrictions on existing certificates.

Conclusions of Law

1. H. Tourist's CPC&N permits service by a catamaran with the speed and capacity of the catamaran, Klondike.

2. H. Tourist need not apply for a new certificate or a modification of its present certificate to operate the Klondike.

3. There is no legal or equitable basis for this Commission to restrict H. Tourist's activities so that it cannot operate the Klondike.

4. The operation of the catamaran, Klondike, does not constitute a new project as that term is used in CEQA and the Commission's Rule 17.1.

5. Neither CEQA nor Rule 17.1 is violated by H. Tourist's failure to file environmental information regarding its operation of the catamaran, Klondike, with this Commission.

O R D E R

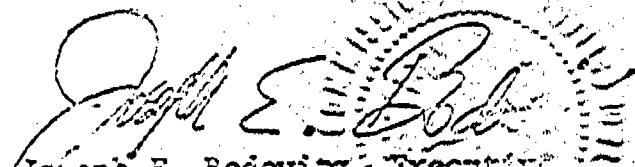
IT IS ORDERED that Case 84-06-062 is denied.

This order becomes effective 30 days from today.

Dated OCT 17 1984, at San Francisco, California.

VICTOR CALVO  
PRISCILLA C. GREW  
DONALD VIAL  
WILLIAM T. BAGLEY  
Commissioners

I CERTIFY THAT THIS DECISION  
WAS APPROVED BY THE ABOVE  
COMMISSIONERS TODAY.

  
Joseph E. Bodovitz, Executive Director