

Decision 82 05 067 May 17, 1982

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of Application of)
Sergey da Silva for certificate of)
public convenience and necessity to)
operate passenger ferry vessel on)
Lake Tahoe service between Ski-Run)
Marina, South Shore and Tahoe City,)
Homewood Marina, North Shore.)

Application 58742
(Filed March 15, 1979)

O P I N I O N

Statement of Facts

By this application Sergey da Silva seeks a certificate of public convenience and necessity to operate ferry vessels in regularly scheduled seasonal transportation of persons and their baggage, including recreational equipment, for compensation between points on the south shore and points on the north shore of Lake Tahoe, all within the State of California. In addition, sightseeing cruises to Emerald Bay would be operated from the south shore. Plans have been scaled down since filing.

Sergey da Silva is the president and principal organizer of Lake Tahoe Waterborne Systems, Ltd. (T.W.T.). As of December 1, 1978, he indicated a net worth of \$1,125,200. Approximately concurrently with the filing of this application da Silva filed Articles of Incorporation with the State of Nevada to form a corporation to operate this business. Effective March 21, 1979, T.W.T. was the resulting corporation. It is authorized to issue 500,000 shares of common stock with a par value of \$1.00 per share. On July 10, 1981, the California Secretary of State issued T.W.T. a Certificate of Qualification to transact intrastate business in California. Its principal place of business is in Stateline, Nevada.

Since mid-1979 T.W.T. has been operating a 57-foot modified Cruis-Ader twin-hull passenger yacht powered by two diesel engines in this service. This two-deck craft has a capacity of 80 passengers using individual aircraft-type seats. It is operated by a crew of three, including the helmsman, a passenger attendant, and a deckhand. Baggage storage areas are sufficient to accommodate overnight luggage as well as skis or other sport equipment. It is planned also to transport bicycles. The passenger compartments are heated. An on-board snack bar serves sandwiches, cocktails, and soft drinks. There are separate men's and women's restrooms with built-in sinks, cabinets, and mirrors. The vessel has a substantial sewage-holding tank capacity.

The boat is equipped with an electronic navigation system consisting of two Data Marine sonar systems providing depth readings and forward horizontal scanning. A JRC radar system is designed to allow "blind" navigation under extremely foul weather conditions. It is backed up by a Raytheon radar system, automatic pilot system, and battery-operated radio direction finder, as well as ship-to-shore radio. Twin turbo chargers added to each engine increase efficiency at high altitudes and reduce emissions. A fuel capacity of 520 gallons allows operation for a full day with substantial reserve capacity. The twin hulls are constructed each with 10 watertight compartments. Each compartment is equipped with automatic bilge pump and heat and excessive moisture sensors. The engine compartments are protected by central fire extinguishers. The vessel has been certified by the U.S. Coast Guard to be in compliance with all safety and operation requirements.

T.W.T. proposes the following schedule:

(1)	<u>January through April</u>	<u>June through September</u>
Depart Timber Cove	7:45 a.m.	7:45 a.m.
Arrive Sunnyside	9:00 a.m.	9:00 a.m.
Depart Sunnyside	4:30 p.m.	6:00 p.m.
Arrive Timber Cove	6:00 p.m.	7:00 p.m.

Operative: Monday through Saturday
Fares: One-way \$8.00; round-trip \$16.00

(2)	<u>June through October</u>
Depart Timber Cove to Emerald Bay and return	11:30 a.m.
	1:30 p.m.
	3:30 p.m.

Operative: Daily
Fares: \$10.00

On January 14, 1982 a second vessel was ordered. Essentially, it will be a duplicate of the first. When delivered it is anticipated that it will be put into operation on a circuit run: Sunnyside to Timber Cove, to Homewood, to Sunnyside.

In 1979 the City of South Lake Tahoe was designated by the Office of Planning and Resources to be the lead agency with respect to preparation of an Environmental Impact Report (EIR) for the project as required by the California Environmental Quality Act and its implementing guidelines. After proceeding through preparation of one EIR in 1979, changes in the base of operations forced preparation of another study. Samuel J. Cullens and Associates of Sacramento prepared the final EIR. Following long and exhaustive consideration to assess the potential impacts upon the natural and cultural environment, and of the mitigation conditions proposed, and after extensive consultation with the numerous agencies involved (including this Commission), and public hearings, the final EIR was considered and adopted by the city council of the City of South Lake Tahoe at a formal

hearing on June 16, 1981. The council's Notice of Determination was sent to the State Clearinghouse, where, after 45 days, on July 30, 1981, it became final. The Clearinghouse assigned it number (SCH) 79042328.

Discussion

The first issue to be resolved is that of our jurisdiction. This application seeks authorization for the operation of two distinct classes of vessel operation in California. One is a ferryboat operation in which passengers will embark and disembark at separate destinations connected by vessel transportation. The second is a vessel sightseeing excursion operation in which passengers embark and disembark at the same place, the transportation having merely carried them in a loop. Over the first class of vessel operation we have jurisdiction; over the second we do not except with respect to insurance. ✓

The proposed ferryboat service, which is the primary subject of this application, would operate on the waters of Lake Tahoe totally within that area of the lake which lies within the borders of the State of California, and would transport persons and their baggage between terminal docking facilities at the Sunnyside Resort in Sunnyside (just south of Tahoe City), and at Timber Cove Marina (just west of the City of South Lake Tahoe).

This Commission has jurisdiction over all vessels operating in the public service on a regular schedule between points within the State of California.^{1/}

^{1/} Public Utilities (PU) Code § 1007 provides 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, within points in this State, without first obtaining from this Commission a certificate of public convenience and necessity.

NOTE: Under § 903(j) of Title 49, U.S. Code, ICC jurisdiction over interstate vessel commerce was declared to be concurrent with State jurisdiction over intrastate portions of such commerce. By Public Law 95-473 (October 17, 1978, 92 Stat. 1466), the Water Carriers Act was repealed, ending ICC's concurrent jurisdiction. Since the ICC previously shared jurisdiction with the State and Public Law 95-473 makes no mention of the desirability of total deregulation of vessel commerce, and since the legislative history of Public Law 95-473 shows no intent to preclude continued State jurisdiction, in our opinion we still retain intrastate jurisdiction.

On the other hand, the proposed sightseeing excursion service to Emerald Bay from Timber Cove Marina and return falls within the "loop exemption" established in Golden Gate Scenic SS Lines v Public Utilities Commission (1962) 57 Cal 2d 373, 19 Cal Rptr. 657, and is not subject to regulation by the Commission under Division 1, Part 1 of the Public Utilities Code. However, while T.W.T. is not a water carrier subject to our jurisdiction in its sightseeing excursion service with respect to certification and rates, it does intend to operate for-hire vessels in this State. As such, it is required to abide by the insurance requirements set out in PU Code §§ 4660-4669 prior to commencing operations.^{2/} Unlike PU Code § 1007 which defines a water carrier coming within our public utility jurisdiction as one which engages in "transportation...between points in this State", PU Code § 4660 refers only to "transportation...in this State." We have held that the omission in PU Code § 4660 of the words "between points" is meaningful and that the liability insurance requirements were meant to apply to all operators of passenger vessels within this State including those not falling within Division 1, Part 1 of the PU Code. The applicant is in the latter category (Alaska Tour & Marketing Services, Inc., Decision 93799 dated December 1, 1981 in Application 60824).

^{2/} PU Code § 4660 defines a for-hire vessel operator as one who operates a "for-hire vessel for the transportation of persons for compensation in this State", and PU Code § 4663 requires such person to obtain liability insurance to cover such operation.

The liability insurance requirements are therefore applicable to both the ferryboat service and the sightseeing excursion service, and must be met before commencing operations. These requirements are set forth in General Order (GO) 121-A.

This application was noticed in the Commission's Daily Calendar for March 19, 1979 and the proposed service has been the subject of repeated hearings before the city council of the City of South Lake Tahoe. No protests to the application have been received. Considering the lack of protest as well as the opportunity for interested parties to have been heard during the extensive EIR process and local hearings, a hearing before this Commission is deemed unnecessary, and the application will be processed ex parte.

Our rules of procedure state that the Commission is the lead agency for implementation of the California Environmental Quality Act of 1970 (as amended) in certification proceedings involving vessels; however, because of the extensive local interests involved the City of South Lake Tahoe was designated by the Office of Planning and Resources to be the lead agency in preparation of an EIR for this project. Our staff participated substantially in the preparation. Our review leads us to conclude that the project will provide transportation alternatives in the Tahoe Basin and will result in a net overall improvement of air quality because of the elimination of a substantial number of auto trips.

In acting upon applications for certificates, the Commission considers all relevant facts which might influence its determination on whether public convenience and necessity

require issuance of a certificate. Certificates will be granted or denied on the basis of whether the public interest is served. While the term "public convenience and necessity" has no precise meaning and cannot be defined to fit all cases, broadly speaking it is synonymous with the public interest. In the context of a passenger vessel ferry service the Commission normally looks to the following five factors in considering the merits of an application for such authority:

1. The adequacy and quality of the service proposed.
2. The financial, business, and technical ability of the applicant to carry on the proposed operation to serve the public at reasonable rates.
3. The good faith and willingness of the applicant to assume responsibility for service at all times and under all conditions.
4. The willingness of the applicant to abide by the law and Commission rules.
5. A public requirement for the service proposed.

Looking to the first factor, from the considerable material provided by the applicant and from the final EIR, it appears reasonably certain that the service proposed is fully adequate for present demand and for the immediate future. A second vessel already ordered should handle prospective expansion to Homewood and Tanoe City. The vessel at hand is safe, well designed, and energy efficient. The service on balance appears tailored to provide transportation service of a unique class and quality adequate to meet the satisfaction of the Commission.

In satisfying the second factor, da Silva has provided evidence in the form of Profit and Loss Statements showing a substantial net profit before taxes on his operations in 1980.^{3/} Da Silva also provided evidence of a substantial personal net worth. The type vessel selected for the operation appears to be well-suited for the operation. While the preliminary operations to date alone would provide inadequate foundation to judge the reasonableness of the proposed rates, the fares proposed, \$8.00 one way and \$16.00 round trip for the approximate 34-mile trip, generally compare with the \$6.50 one way and \$13.00 round-trip passenger ferry fares for the 42-mile round trip authorized by the Commission in 1979 for Catalina Passenger Service Inc. operating between Newport Beach and Avalon on Santa Catalina Island (Catalina Passenger Service, Inc. (1979) 2 CPUC 2d 273). Considering all the circumstances we find the proposed fares reasonable.

T.W.T.'s provision of satisfactory service in the last several years, while operating in part under conditional permits from the City of South Lake Tahoe, is the best evidence of the good faith and willingness of the applicant to serve.

Applicant has cooperated fully during the lengthy processing of this application and in meeting the EIR requirements imposed by law. Admittedly, part of its operations during this period were without PUC sanction. In general certificates have been denied where it appeared that the applicant had operated previously as a carrier in violation of law (re Garofalo & Elwell (1933) 38 CRC 701). However, we have also held that a certificate

^{3/} Operations through August 1981 continue to be profitable.

could issue, notwithstanding the unlawful character of an applicant's prior operations, where establishment of the service was clearly required by public convenience (re Gilboy (1942) 44 CRC 457). In this case the general service to be provided is one contemplated in the long range plans of the California Tahoe Regional Planning Agency, in that it will reduce vehicular miles traveled in the area and provide additional recreational uses for the lake with resultant benefit to the economy of the area. The fact that applicant has persisted and continued to pursue certification over the extended time involved, at considerable expense, securing Coast Guard and local operating permits for the majority of the service, and in the main abiding by Commission and local regulatory rules demonstrates applicant's willingness to abide by the law and Commission rules.

Finally, apart from the fact that regional planning studies contemplate waterborne transit for the area, the favorable public response and profitable operations on a restricted basis to date both indicate existence of a public requirement for such ferry service and its feasibility.

From the foregoing we conclude that the applicant has demonstrated that public convenience and necessity require the ferry service proposed. Accordingly, we will authorize it.

Findings of Fact

1. The proposed passenger ferry service would operate on the waters of Lake Tahoe within that part of the lake within California, and would transport passengers and their baggage between points within the State for compensation.

2. The proposed sightseeing excursion service operating from the south shore of Lake Tahoe to and from Emerald Bay is transportation over a loop and falls within the "loop exemption" established by the courts.

3. Applicant has demonstrated that public convenience and necessity require establishment of the proposed passenger ferry service operating on Lake Tahoe between points within the State.

4. Applicant has demonstrated the requisite fitness to provide a passenger ferry service on Lake Tahoe between points within the State.

5. The proposed fares are reasonable.

6. The EIR adopted by the lead agency for the project, the City of South Lake Tahoe, found that the proposed project would provide additional mass transit alternatives in the Tahoe Basin and would result in a net overall improvement of air quality by eliminating a substantial number of vehicle trips.

Conclusions of Law

1. The Commission under PU Code § 1007 has jurisdiction over the proposed passenger ferry operations, but except as to its limited jurisdiction under PU Code §§ 4660, et seq. over accident liability protection, the Commission has no jurisdiction over the proposed sightseeing excursion operations.

2. The application as it pertains to passenger ferry operations should be granted as set forth in the ensuing order.

3. A public hearing is not necessary.

Only the amount paid to the State for operative rights may be used in rate fixing. The State may grant any number of rights and may cancel or modify the monopoly feature of these rights at any time.

O R D E R

IT IS ORDERED that:

1. A certificate of public convenience and necessity (VCC-53) is granted to Lake Tahoe Waterborne Systems, Ltd. (applicant), a corporation, authorizing it to operate as a common carrier by vessel, as defined in PU Code §§ 211(b) and 238, between the points and over routes set forth in Appendix A, to transport passengers, their baggage, and recreational equipment.

2. Applicant shall:

- a. File with the Transportation Division written acceptance of this certificate within 30 days after this order is effective.
- b. Establish the authorized service and file tariffs and timetables within 120 days after this order is effective.
- c. State in its tariffs and timetables when service will start; allow at least 10 days' notice to the Commission; and make timetables and tariffs effective 10 or more days after this order is effective.
- d. Comply with General Orders Series 87, 104, 111, 117, and 120.
- e. Maintain accounting records in conformity with the Uniform System of Accounts.

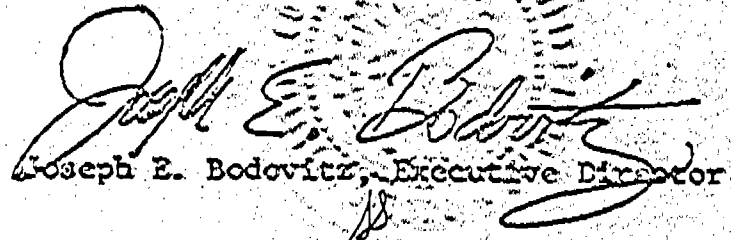
3. Should applicant continue the sightseeing excursion service proposed for authorization in this application, applicant is placed on notice that it will be required to comply with the insurance requirements of General Order Series 121 and that applicant shall not continue the service unless and until applicant has satisfied the insurance requirements.

This order becomes effective 30 days from today.

Dated MAY 17 1982 , at San Francisco, California.

JOHN E. BRYSON
President
RICHARD D. GRAVELLE
LEONARD M. GRIMES, JR.
VICTOR CALVO
PRISCILLA C. GREW
Commissioners

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


Joseph E. Bodovitz, Executive Director

ALJ/md

Appendix A

LAKE TAHOE
WATERBORNE SYSTEMS, LTD.
(a corporation)
VCC-53

Original Page 1

Lake Tahoe Waterborne Systems, Ltd., by the certificate of public convenience and necessity granted by the decision noted in the margin, is authorized as a vessel common carrier corporation to transport passengers, their baggage, and recreational equipment only between Timber Cove Marina and Sunnyside Resort on Lake Tahoe.

Issued by California Public Utilities Commission.

Decision 82 05 067, Application 58742.

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