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ORIGINAL

Decision No. 90334 MAY 22 1979

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

UNIVERSAL MARINE CORPORATION,)

Complainant,)

vs.)

SAN PEDRO MARINE, INC.,)

Defendant.)

Case No. 10603
(Filed June 20, 1978)

Application of San Pedro
Marine, Inc. for a certificate
of public convenience and
necessity as a common carrier
by vessel in the Los Angeles
and Long Beach Harbors.

Application No. 58111
(Filed May 19, 1978)

Knapp, Stevens, Grossman & Marsh, by Warren N.
Grossman and Wesley G. Beverlin, Attorneys
at Law, for Universal Marine Corporation,
complainant and protestant.
Robert M. Popenev and E. A. Tharpe, Attorneys
at Law for San Pedro Marine, Inc., defendant
and applicant.
James H. Lyons, Attorney at Law, for H-10 Water
Taxi Company, Ltd., intervenor, and interested party.

O P I N I O N

Applicant San Pedro Marine, Inc. (San Pedro) seeks a certificate of public convenience and necessity, pursuant to Section 1007 of the Public Utilities Code^{1/} (Code), to conduct vessel common carrier operations in the transportation of packaged oils and lubricants, parts, freight, and stores (1) between the ports of Los Angeles and Long Beach, on the one hand, and, on the other, all docks, wharves, ships, points, and places within the Los Angeles/Long Beach

1/ All references are to the Public Utilities Code unless otherwise specified.

"1007. (a) 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, but no such certificate shall be required as to termini between which any such corporation or person is lawfully operating vessels in good faith under this part as it existed prior to August 17, 1923, under tariffs and schedules of such corporations or persons, lawfully on file with the commission. Every applicant for such a certificate shall file in the office of the commission application and evidence in the form required by the commission. The commission may, with or without hearing, issue the certificate as prayed for, or refuse to issue it, or issue it for the partial exercise only of the privilege sought, or issue it for operation between certain points only, and may attach to the exercise of the rights granted by the certificate such terms and conditions as, in its judgment, the public convenience and necessity require.

"(b) Any corporation or person which owns or controls, and any corporation or person which operates, any watercraft propelled by steam, gas, fluid naphtha, electricity, or other motive power under the burden of five tons net register for the transportation of persons or property for compensation between points in this state on January 1, 1975, may, on or before April 1, 1975, file with the commission an application for a certificate of public convenience and necessity for the type of service performed by the vessel. The commission shall issue such certificate authorizing such service without further proceedings.

"(c) The provisions of this section shall not be applicable to any vessel under the burden of five tons net register."

Harbor, and (2) between all docks, wharves, slips, points, and places within the Los Angeles/Long Beach Harbor, on the one hand, and, on the other, marine installations and rigs, ships, and vessels located at points offshore south off Oceanside to north off Santa Barbara. San Pedro presently conducts marine service activities consisting of servicing ships at anchor in the Los Angeles/Long Beach Harbor, with bulk oil; servicing ships up to 20 miles offshore south to Oceanside and north to Santa Barbara; and servicing ships at dock in the Los Angeles/Long Beach Harbor. San Pedro alleges that said activities are exempt from the requirements of obtaining a certificate of public convenience and necessity under Sections 212 and 238 of the Code.^{2/}

2/ "212. 'Common carrier' does not include: (a) Any corporation or person owning, controlling, operating, or managing any vessel, by reason of the furnishing of water transportation service between points upon the inland waters of this State or upon the high seas between points within this State for affiliated or parent or subsidiary companies or for the products of other corporations or persons engaged in the same industry, if such water transportation service is furnished in tank vessels or barges specially constructed to hold liquids or fluids in bulk and if such service is not furnished to others not engaged in the same industry.

"(b) Any corporation or person who operates any vessel for the transportation of persons for compensation, between points in this State if one terminus of every trip operated by the corporation or person is within the boundaries of a U.S. military reservation and is performed under a contract with an agency of the federal government which specifies the terms of service to be provided; and provided that the corporation or person does not perform any service between termini within this State which are outside of a U.S. military reservation. For the purposes of this subdivision, the conditions of this exemption shall be reviewed by the Public Utilities Commission annually as of the first day of January of each year.

"(c) Any corporation or person owning, controlling, operating, or managing any recreational conveyance such as a ski lift, ski tow, J-bar, T-bar, chair lift, aerial tramway, or other such device or equipment used primarily while participating in winter sports activities."

(Continued)

San Pedro alleges that public convenience and necessity require its services because: (1) The requirements for varied types of marine services in the Los Angeles/Long Beach Harbor are increasing along with the increase in ship traffic, which increased business is not, in large portion, within the capabilities of its two competitors; (2) San Pedro at this time provides the only service to ships outside the Harbor; (3) San Pedro has the only boat capable of going to ships at anchor during stormy weather; and (4) San Pedro

2/ (Continued)

"238. (a) 'Vessel' includes every species of water craft, by whatsoever power operated, which is owned, controlled, operated, or managed for public use in the transportation of persons or property, except rowboats, sailing boats, and barges under 20 tons dead weight carrying capacity.

"(b) Nothing in this code except those provisions relating to the regulation of rates shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities. This subsection shall apply only in the case of commodities, in bulk which are loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count. For the purpose of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel.

"(c) Nothing in this code except those provisions relating to the regulation of rates shall apply to the transportation by water of liquid cargoes in bulk in tank vessels designed for use exclusively in such service."

can handle large and heavy parts up to 15-ton crane capacity and approximately 70-ton boat capacity.

Universal Marine Corporation (Universal) protested the application and filed its complaint against San Pedro. H-10 Water Taxi Company, Ltd. (H-10) filed as an intervenor in the complaint matter and as an interested party in the application.

In its complaint Universal alleges that it presently holds authority from this Commission to conduct operations as a vessel common carrier in the performance of freight transportation and water taxi services in the Los Angeles/Long Beach Harbor pursuant to Decision No. 86732, dated December 7, 1976, in Application No. 56366. Universal holds authority to conduct vessel common carrier operations as defined in Sections 211(b)^{3/} and 238 of the Code for the transportation of passengers and freight in conjunction with barges equipped with cranes between vessels at anchor and shore points in the Harbor, said water taxi services to be conducted subject to the following conditions: (1) Water taxi service will be offered only to and from ships during a single stay in port when the vessel(s) also receive(s) freight transported on San Pedro's barges equipped with cranes; and (2) no vessel shall be operated unless it has met all applicable safety requirements, including those of the United States Coast Guard. By an interim decision (Decision No. 88783) Universal was authorized to perform boarding party operations and

3/ "211. 'Common carrier' includes:"

* * *

"(b) Every corporation or person, owning, controlling, operating, or managing any vessel engaged in the transportation of persons or property for compensation between points upon the inland waters of this State or upon the high seas between points within this State, except as provided in Section 212. 'Inland waters' as used in this section includes all navigable waters within this State other than the high seas."

unrestricted water taxi operations in vessels under the burden of five tons net register. By Application No. 57692, filed November 17, 1977, Universal sought to conduct unrestricted vessel common carrier operations. Universal alleges that: (1) San Pedro holds no authority from the Commission to provide vessel common carrier operations; (2) for approximately 10 months prior to the complaint, San Pedro has provided uncertificated water taxi service, carrying vessel lubricant oils and ship's stores to ships and oil rigs both inside and outside the Los Angeles/Long Beach Harbor; (3) San Pedro's operations run as high as 35 runs per month and involve stores runs which have weighed as much as 70 and 80 tons; and (4) although San Pedro contends its lubricant oil operations are exempt from regulation and that heretofore it performed its other stores operations without knowledge of the requirement that a certificate of public convenience and necessity was required, its president was advised on February 4, 1978, during his testimony at the hearing on Universal's Application No. 57692 and Case No. 10345, H-10's complaint against Universal, of the nature of its for-hire operations. He was advised to retain competent legal counsel for the purpose of deciding whether proper operating authority should be sought. San Pedro continued its operations, whereupon Universal informed the Commission staff of the continued operations. San Pedro was admonished to cease and desist from providing common carrier water transportation without the necessary authority. (Exh. OSC-4.) Even though San Pedro filed Application No. 58111, it continues to render stores operations and bulk lube oil transportation to customers on a common carrier basis. Universal alleges that: (1) This is a deliberate and flagrant disobedience of the Commission's prior admonishments to San Pedro to cease and desist its water common carrier operations until it has obtained the requisite authority. Universal also alleges that the public convenience and necessity do not now, nor will they in the future, require the water common carrier services proposed by San Pedro; and (2) said services have caused and continue to cause Universal severe financial loss.

Universal seeks an immediate cease and desist order prohibiting San Pedro from operating for-hire vessel common carrier service to any ship or oil rig until such time, if ever, that it obtains a certificate of public convenience and necessity; that a prompt hearing be given on the complaint; and that a permanent cease and desist order be issued against San Pedro.

In its answer San Pedro admits that: (1) It holds no authority from the Commission to provide vessel common carrier operations; (2) since approximately August, 1977, it has provided transportation service carrying lubricant oils and ship's stores to ships and oil rigs both inside and outside the Los Angeles/Long Beach Harbor; (3) said operations have run as high as 35 runs per month and, on one occasion, have involved stores which have weighed as much as 70 tons, although said figures are substantially in excess of the average number of runs per month and average load per run; and (4) it has continued to perform lube oil and stores operations. It denies all other allegations.

On June 28, 1978, an Order To Show Cause (OSC) in Case No. 10603 was issued by the Administrative Law Judge (ALJ) to San Pedro to appear on July 10, 1978, to show cause why it should not be ordered to cease and desist its operation until such time as it obtains a certificate of public convenience and necessity.

A hearing was held on the OSC on July 10, 1978 in Los Angeles before ALJ Bernard A. Peeters. No order was issued based on the July 10, 1978 hearing. Rather, consolidated hearings on the complaint and application were had on September 20-22, 1978 in Los Angeles before the same ALJ. On the last day of hearing, Universal filed a Petition For A Proposed Report and renewed its Motion For A Cease And Desist Order. The matters were submitted subject to the filing of a joint late-filed exhibit and concurrent briefs due 45

days after the last transcript is filed. The date was subsequently extended to December 22, 1978. Said exhibit and briefs have been timely filed and the matter is ready for decision. We do not authorize the issuance of a Proposed Report, nor will we issue a restraining order.

The Issues

Universal believes the issues to be:

A. Case No. 10603

1. Does the evidence demonstrate that San Pedro is performing for-hire vessel common carrier activities without having first obtained a certificate of public convenience and necessity?

2. Does the evidence demonstrate that San Pedro has performed, and continues to perform, such uncertificated for-hire vessel common carrier operations knowingly and in flagrant disobedience of the law and Commission admonitions?

3. If the answers to the first two issues are in the affirmative, what sanctions or penalties should be imposed upon San Pedro?

B. Application No. 58111

1. Does the Commission have jurisdiction over San Pedro's vessel common carriage of lubricant oils?

2. Do San Pedro's prior unauthorized vessel common carrier operations render it unfit to now hold vessel common carrier authority?

3. Does the evidence justify the conclusion that Universal and H-10 are unable to satisfy shipper demand for water taxi services and that the public convenience and necessity require the services sought to be performed by San Pedro?

4. Does the evidence justify a grant of authority to applicant as sought?

San Pedro expresses the issues as follows:

1. Is San Pedro fit and deserving to be the holder of a certificate of public convenience and necessity?

2. Does San Pedro have the present ability and capacity to provide all services for which it is requesting authority?

3. Has there been a substantial increase in the volume and size of vessels in the Los Angeles/Long Beach harbor areas, and a substantial increase in demand for vessel carrier services?

4. Are the needs of the public being met by the existing carriers?

5. Does San Pedro provide unique services not made available by the existing carriers?

6. Will substantial financial harm or destruction of business befall Universal or H-10 if San Pedro is granted a certificate?

The essential issues are:

1. Did San Pedro have reasonable cause to believe it could conduct its operations without prior authority from the Commission so long as no passengers were transported?

2. Does the for-hire transportation of lubricating oils in 450-gallon tote tanks^{4/} loaded on the deck of a vessel specifically designed to carry such tanks exempt such transportation from regulation as contemplated by Sections 212 and 238 of the Code?

3. Does San Pedro provide a unique marine vessel service not provided by Universal and H-10 in the Los Angeles/Long Beach Harbor area?

4. Do public convenience and necessity require the services offered by San Pedro?

5. Does San Pedro have the ability, experience, equipment, and financial capability to perform the service for which it seeks authority?

6. If San Pedro is granted the authority sought, will such certification result in irreparable harm to Universal or H-10?

^{4/} Steel tanks four feet square and five feet high with a 450-gallon capacity.

The Evidence

At the hearing on the OSC the parties entered into stipulations as follows:

1. That San Pedro has transported ship's stores for compensation since February 7, 1978 to the present date to ships at anchor in the Los Angeles/Long Beach Harbor for Harbor Ships Supply on a weekly basis averaging approximately 25-26 runs per month.
2. That a review of San Pedro's ledger, inspected pursuant to a subpoena duces tecum, shows that the following revenues were earned for the transportation of ship's stores and lubricating oils in 1978 for the months indicated:

| <u>Ship's Stores</u> | | <u>Lube Oils</u> | |
|----------------------|-----------|------------------|--|
| \$ 0 | January | \$ 21,386 | |
| 10,478 | February | 18,720 | |
| 10,219 | March | 26,758 | |
| 9,140 | April | 29,314 | |
| 12,130 | May | 24,104 | |
| 11,550 | June | 15,737 | |
| 7,855 | July | 27,366 | |
| 9,255 | August | 21,089 | |
| 7,395 | Sept.1-19 | 10,547 | |
| Totals | \$78,012 | \$195,021 | |

3. That San Pedro holds no operating authority from the Commission.

San Pedro presented the affidavit of its president (Exh. OSC-5), who was not available for the hearing, and the testimony of two ships' agents who were familiar with the water taxi operations in the Los Angeles/Long Beach Harbor at the hearing on the OSC. Later, the president testified in person at the consolidated hearings.

The ships' agents testified that they used San Pedro during 1978 primarily because: (1) No other operator in the Harbor has the capability to handle lube oil in bulk for servicing ships; and (2) the restraining order against Universal in effect during most of the year required them to seek other operators who could meet their requirements. Furthermore, the witnesses stated that it was more economical, from a time and charge standpoint, to use San Pedro when one of their ships required bulk lube oils and stores, rather than two operators.

CSC-5 shows that San Pedro relied upon a conversation on or about August 25, 1976, between its attorney at the time and a member of the Commission's staff that San Pedro would not require any operating authority from the Commission to deliver lube oils in packages and in bulk by vessel to other vessels and oil rigs in the Los Angeles/Long Beach Harbor so long as no passengers were transported (Exh. A to Exh. CSC-5). The exhibit also shows that the transportation of stores began around August 1977, but that sometime in May or June of 1977 San Pedro's president had conversations with Universal's vice president Mr. Houchen, informing him of the intention to haul ship's stores and that all this information was again put forth at the hearings on Universal's Application No. 57692 on or about February 4, 1978 at which the president testified.

At the consolidated hearing on the complaint and application, on September 20, 1978, Mr. Houchen, vice president of Universal, testified in rebuttal, that the conversations around May or June of 1977 concerned the transportation of lube oils, not ship's stores. San Pedro's president, who was called by Universal under Section 776 of the Evidence Code, testified at the consolidated hearings that he received no complaints from either H-10 or Universal after the hearings in February. His first notice of any objection was on or about April 27, 1978 when a member of the Commission's staff, Mr. Frank Aylesworth, contacted him and informed him he would have to cease

and desist his operations until a certificate of public convenience and necessity was obtained. Whereupon San Pedro contacted its attorney (a different attorney than the one who initially advised it with respect to not having to obtain a certificate). The second attorney contacted several members of the Commission's staff in San Francisco requesting a temporary extension. Nothing further was heard until the following week when Mr. Aylesworth, a member of the staff, informed him that it would be all right to continue operations until further communication from the Commission. Mr. Aylesworth, appearing under a subpoena at the hearing on the consolidated matters, testified that he had no memory of having told San Pedro that it could ignore the cease and desist notice delivered by the staff. Exhibit S-1, a Progress Report on the staff's investigation of San Pedro, shows that San Pedro agreed that it needed a certificate of public convenience and necessity to handle ship's stores, but disagreed that it needed such certificate to handle the lube oils because the oil was handled in a tank vessel. The ship's registry is as a freight vessel, however (joint late-filed exhibit). The report also shows that the staff investigator, after being unsuccessful in obtaining a signature from San Pedro on the cease and desist notice because of the above difference, was advised not to press for the signature until word was received from the San Francisco headquarters. Exhibits OSC-3 and OSC-4 are letters dated June 2, and June 8, 1978, respectively, from the law office of Knapp, Stevens, Grossman & Marsh to the Commission's Compliance and Enforcement Branch requesting staff action with respect to San Pedro's operations; and the staff's reply pointing out that it had previously informally requested San Pedro to cease and desist carrying passengers and/or ship's stores until it had obtained a certificate of public convenience and necessity, and that such an application had been filed by San Pedro.

Other evidence adduced at the consolidated hearings consisted of testimony and exhibits presented by Universal through its president (Mr. Budai); the president of San Pedro (Mr. Yankovich), who sponsored 11 exhibits plus 3 exhibits introduced by San Pedro's counsel; and Mrs. Seehorn, president and general manager of H-10, who sponsored two exhibits.

Mr. Yankovich's further testimony shows that San Pedro started hauling ship's stores soon after its boat, the "Vickie Ann" was put in service to haul lube oils (July, 1977). The boat was specifically designed to haul lube oils in tote tanks because, as such, it did not have to meet the stricter Coast Guard requirements for a tanker class vessel. Mr. Yankovich stated that his first attorney had advised him that San Pedro could haul any kind of freight so long as it did not transport passengers. It has been transporting stores and lube oils ever since. The operations consist of using San Pedro's tank trucks to pick up lube oil from various refineries and to deliver it under contract with the refineries to consignees on land, ships at the dock, and to ships at anchor inside the harbor as well as ships and oil rigs outside the breakwater. The latter deliveries are made with the "Vickie Ann". The lube oil is pumped from the tank trucks into the tote tanks, and loaded aboard the "Vickie Ann" by crane. Ship's stores, however, can be, and are handled along with the lube oils. Generally, when the "Vickie Ann" is carrying both ship's stores and lube oils at the same time, both are destined to a single vessel. The ship's stores business comprises about one fourth of the total revenue derived from the "Vickie Ann".

In response to a question regarding handling of stores shipments, Mr. Yankovich responded:

"A. No, I don't believe we could handle much more of the stores jobs.

"We are handling more and more lube oil jobs, and I don't believe we could increase our stores business any more than it is right now.

"Q. Are you saying that you couldn't even do what you were doing back in July 6, 1978?

"A. There is a possibility.

"I don't believe we could do 30 to 40 stores jobs now, no, I can't.

"ALJ PEETERS: And the reason for that is what?

"THE WITNESS: Our lube oil business is increasing.

"ALJ PEETERS: In other words, you are saying you do not have the capacity to handle more stores jobs because you are concentrating on your lube oil business, is that correct?

"A. Yes, definitely our main business is lube oil, and I would always take lube oil because we have a contract with companies, and they have to service the accounts."

* * *

"If we can help our customers at times when we can handle a few extra stores, we will do it, but I have no idea of increasing the stores business.

"I will completely go out of the stores business and concentrate on lube oil if there is enough business just for lube oil, gentlemen." (RT 438-440.)

Further questioning of Mr. Yankovich with respect to the handling of ship's stores and whether he intended to buy or lease another boat to handle such shipments elicited the following answer:

"A. Absolutely not." (RT 442.)

Three public witnesses appeared on behalf of San Pedro. Essentially their testimony was to the effect that: (1) There is a need for more water taxi operations in the Los Angeles/Long Beach harbor; (2) time and immediate response are of the essence in servicing their ships, since delay in a ship's departure is very costly; (3) San Pedro has a unique operation in that it is the only carrier in the harbor capable of handling lube oil shipments in bulk; (4) all of them had used and are using both Universal and n-10 as well as San Pedro; and (5) from their standpoint, the more carriers that are available the better it is for them.

Exhibit D-11 contains San Pedro's current, unaudited, financial statements. It shows that, for the 11 months ended June 30, 1978, San Pedro had retained earnings of \$177,241.07; a current ratio of 2.6 to 1, and an operating profit, before income tax, of \$105,049.10 for the period of August 1, 1977 to June 30, 1978, and \$6,871.91 for the month of June, 1978. Exhibit D-13 is a copy of the General Manager's Report for the Port of Los Angeles. It presents various statistics pertaining to the growth of the Port which indicate that the Port has grown quite rapidly in recent years and show a steady growth from 1930 through 1977.

Universal's president, Mr. Budai, testified that his company suffered not only the loss of its ship's stores business to San Pedro, but also the lube oil business it had, during the period Universal was operating under our temporary restraining order (TRO). Exhibit C-1 lists 6 vessels and 2 barges that Universal uses in its harbor operations. Exhibit C-2 is a list of "jobs" involving the transportation of small loads of ship's stores between September 7 and 21, 1978 right after Universal began full operations again after our TRO had been lifted. The tabulation breaks down into 21 taxi operations involving personnel and, 16 small stores shipments. Exhibit C-3 is a letter from the U.S. Coast Guard setting forth restrictions on the barge Unimar 02 which, among other things, shows that no bulk liquids may be carried. Mr. Budai stated that Universal transports lube oils in 55-gallon drums and small containers on its barge and smaller vessels; that bids have been sought for the construction of tote tanks; and that Universal is in the process of expanding its fleet. On cross-examination Mr. Budai stated that: (1) No contracts have been entered into for the construction of the tote tanks; (2) there is a definite requirement for the transportation of lube oils in bulk in the Los Angeles/Long Beach Harbor; (3) Universal has no equipment capable of transporting lube oils in bulk; (4) the requirements for water taxi service in the Harbor have been increasing; and (5) since the TRO was lifted, Universal's business has been very busy.

Mrs. Jeanne M. Seenorn, president of H-10, testified as an interested party in San Pedro's application and presented two exhibits pertaining to the construction of a new vessel in connection with H-10's fleet expansion. It is a 50-foot, steel-hulled vessel capable of handling 49 passengers and 6 tons of freight or, approximately 10-12 tons of freight without passengers. Delivery is planned for September, 1978. Outfitting and testing are planned for October with the vessel being put into service shortly thereafter. H-10 has already signed a contract for the materials for a sister ship. Construction will start when the sea trials of the first vessel are completed and it is determined that the design is satisfactory. It is not H-10's intention to engage in the transportation of lube oils in bulk, although Mrs. Seehorn recognizes that there is a need for such transportation in the Harbor. She testified that H-10 has experienced a slow but steady growth over the years.

Discussion

Universal argues that a cease and desist order should be issued against San Pedro as a matter of law. San Pedro has knowingly operated without a certificate at least since February 7, 1978, if not before, when it was put on notice by the ALJ during the hearing on Case No. 10345 of its probable illegal operations; and certainly since the staff's admonishment to cease and desist. (Exn. OSC-4 and S-1.) Universal argues that not to issue the cease and desist order would be contrary to the law, and cause Universal irreparable harm.

San Pedro argues that a hearing on the OSC is in the nature of a hearing in equity; that the Commission must balance the equities between the parties; and that Universal, while aware of the uncertificated operations of San Pedro since February 7, 1978, if not before, sat on its rights by not filing a complaint until June 20, 1978, and therefore cannot now insist on a cease and desist order, especially

when it would involve considerable loss of business to San Pedro and the laying off of two or three employees.

We have had occasion recently to rule on the argument that a cease and desist order is in the nature of equitable relief.^{5/} In Goodall's and Lewis, as here, the parties did not come into court with clean hands; although the remedy sought was an equitable one, the relief was not in equity but in the law, viz., the filing of an application. San Pedro has filed an application which has now been heard. We cannot ignore constitutional and statutory provisions pertaining to matters cognate and germane to the regulation of utilities which place a duty upon the Commission to enforce them and see that they are obeyed. (Brotherhood of R.R. Trainmen v Southern Pacific Company (1930) 35 CRC 183.) It is undisputed that San Pedro has transported ship's stores without the requisite authority from this Commission, which is contrary to the requirements of Section 1007 of the Code.^{6/} The record shows that San Pedro commenced the transportation of lube oils under the color of authority from its prior attorney and a member of the Commission's staff. While advice given by the staff to the public is intended to be helpful, it does not bind the Commission, nor can it be considered as Commission action or policy since the Commission can only act as a body and in a formal manner. Reliance

^{5/} D.88252, dated 5-16-78, in C.10482, Goodall's Charter Bus Service, Inc. v Marr-Lorr, Inc., dba Dolphin Charter Company, et al.;
D.89354, dated 9-6-78, in C.10543, C.D. Lewis, dba Orange Blossom Lines v James Warfield.

^{6/} See Footnote 1.

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upon staff advice cannot be used as an estoppel against the Commission. We do take note that San Pedro, apparently acting in good faith and reliance upon its attorney's advice, commenced vessel transportation of lube oils without authority from this Commission. The same cannot be said with respect to its transportation of ship's stores. San Pedro's president was made aware that at least the transportation of ship's stores required prior authority from the Commission, if not the transportation of lube oils. The answer to the first issue is therefore no. However, it would not be in the public interest to order San Pedro to cease and desist its operations at this time in view of our disposition of these matters.

Is the for-hire transportation of lubricating oils in 450-gallon tote tanks loaded on the deck of a vessel specifically designed to carry such tanks exempt transportation as contemplated by Sections 212 and 238 of the Code? Our answer is no.

An analysis of the two sections upon which San Pedro is relying reveals their limitations to "tank vessels or barges specially constructed to hold liquids or fluids in bulk" and "in tank vessels designed for use exclusively in such service". The facts clearly indicate that San Pedro's vessel, the "Vickie Ann", is not a "tank vessel or barge specially constructed to hold liquids or fluids in bulk." Instead the "Vickie Ann" is classified by the U.S. Coast Guard as a freighter and in fact carries freight (ship's stores) in addition to the containerized lube oils in varying quantities.

Sections 212 and 238 do not address themselves to portable containers of any size or quantity; but, rather, establish "tank vessels or barges" as the only receptacle-conveyances exempted from the general regulatory provisions of the Code. The reasonable and common sense interpretation of the "tank vessel" requirement is a vessel which is itself a floating tank or series of tanks separated by valves or baffles. Although the "Vickie Ann" was constructed under Coast Guard regulations to transport bulk lube oils, Commander Wadman indicated that the "Vickie Ann", while it could not be classified as a tank vessel because it was not constructed with integral tanks built into the hull, is classified as a freight vessel authorized to carry bulk liquid cargo. (Joint late-filed exhibit.) Thus, the "Vickie Ann" is not a tank vessel as contemplated by Sections 212 and 238 and its use to transport lube oils in bulk is subject to regulation under the Code.

With respect to the uniqueness of San Pedro's marine vessel service which is not provided by either H-10 or Universal our answer must be in the affirmative.

Mrs. Seehorn of H-10 very definitely said that her company does not provide such service (transportation of bulk liquids), and has no intention to do so, even though she recognized there has been such a need for many years. Universal's equipment - the two barges and the "Orca" - while capable of carrying liquids in bulk in tote tanks, is restricted under current Coast Guard regulations from performing such transportation with the barges and/or its steel-hulled crew boat, the "Orca". The "Vickie Ann" is a steel-hulled vessel, constructed according to Coast Guard regulations for the transportation of liquids, in bulk containers. Thus, this being the only vessel in the Los Angeles/Long Beach Harbor authorized to perform such transportation, San Pedro does offer a unique service not offered by the other operators.

Whether or not public convenience and necessity require the services of San Pedro has to be answered in the affirmative in view of the facts of this case.

First, as we determined above, San Pedro provides a unique service not provided by the other operators. Second, H-10's president, and a competitor of San Pedro, observed that there has been a need for the transportation of lube oils in bulk for several years, but nobody provided the service until San Pedro started it. Third, the public witnesses indicated that it is a necessary and more economical service and that it tends to lessen the time required to service their ships while at anchor. We are of the opinion that public convenience and necessity require the bulk lube oil vessel transportation service performed by San Pedro.

With respect to the transportation of ship's stores, San Pedro's services are not particularly unique. The testimony shows that for a specific vessel with unusual loading conditions San Pedro's "Vickie Ann" can load and off load more conveniently than Universal's barge. This is an isolated instance which, in our opinion, does not make San Pedro's handling of ship's stores unique. If there is any uniqueness involved, other than the bulk oil transportation, it is that the "Vickie Ann" is restricted from carrying passengers at any time. The other operators are not so restricted. However, this fact does not lessen the importance of efficient operations such as when a ship requires both bulk lube oils and stores. The shipping public should not be required to hire two different operators under such circumstances if the one operator has the capability to handle both shipments. The fact that another operator is required to transport the boarding party and crew to and from the ship does not militate against the efficient operation of transporting the bulk oil and ship's stores on one vessel at one time to the same destination. Such operations are in the public interest. We are of the opinion that the public convenience and necessity require San Pedro's bulk oil transportation by the "Vickie Ann" and also the transportation of ship's stores, but only when the ship's stores are destined to the same place to which the bulk lube oil is being delivered.

The evidence is clear that San Pedro not only has the ability, experience, equipment, and financial capability to perform the service for which it seeks authority, but it has the actual capability as demonstrated by its operations. Our answer, therefore, to the fifth issue is in the affirmative.

Will the granting of a certificate to San Pedro cause irreparable harm to Universal and/or H-10? We do not believe this will happen. First, we are restricting the certificate which we will grant to prohibit the transportation of passengers, and to provide that no ship's stores may be transported except in conjunction with a shipment of bulk lube oils, both being delivered to a single destination at the same time. Second, Exhibit C-2 shows that Universal has been able to generate sufficient business to keep its vessels fully occupied after the lifting of the TRO in spite of San Pedro's presence and competition in the Harbor. H-10's president stated that it does not intend to provide a bulk lube oil service, and that its business shows a steady growth over the years, including the time that San Pedro was operating. Furthermore, San Pedro has only one vessel, whereas the other operators have several. With the increasing business in the Harbor, it is difficult to see how one vessel will be able to take away such an amount of business from the other two operators, who have several vessels each and are adding to their fleets, as to cause them irreparable harm. We do not believe that such harm will befall Universal and H-10 as a result of our granting a certificate to San Pedro.

No other issues require discussion.

Findings of Fact

1. Universal holds a certificate of public convenience and necessity granted by Decision No. 89353 in Application No. 57692.
2. Universal operated in compliance with the restrictions of a TRO from August 16, 1977 to September 6, 1978.
3. San Pedro, in good faith and reliance upon advice of its former counsel started transporting lube oils in bulk on the "Vickie Ann", a ship specifically designed for this purpose, to ships at anchor inside and outside the Los Angeles/Long Beach Harbor and to drilling rigs along the coast prior to February 7, 1978.

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4. San Pedro commenced transporting ship's stores in conjunction with its lube oil shipments, after Universal was placed under our TRO.

5. San Pedro holds no operating authority of any kind from the Commission.

6. San Pedro is the only vessel operator in the Los Angeles/Long Beach Harbor with the capability to transport lube oils in bulk in tote tanks to ships at anchor inside and outside the Harbor and drilling rigs.

7. Tote tanks are portable steel containers holding 450 gallons of a liquid commodity.

8. The vessel "Vickie Ann" is classified as a "freighter" by the U.S. Coast Guard, and is not authorized to carry passengers.

9. Sections 212 and 238 of the Code refer to a vessel which has been designed and built as a tanker, which is itself a floating tank or series of tanks separated by valves or baffles.

10. The testimony of public witnesses, the complainant, and H-10 shows that San Pedro is the only operator capable of transporting lube oils in bulk in tote tanks by vessel to ships at anchor in the Los Angeles/Long Beach Harbor, and that there has been considerable and continuing growth in water taxi requirements in the Harbor.

11. While public convenience and necessity do not require the transportation of ship's stores to ships at anchor or drilling rigs by San Pedro, it is in the public interest to combine such shipments with lube oil shipments in bulk when both are delivered to the same destination at the same time.

12. San Pedro has the ability, experience, equipment, and financial resources to perform the transportation of lube oils in bulk in tote tanks to ships at anchor in the Los Angeles/Long Beach Harbor and drilling rigs along with ship's stores at the same time.

13. Los Angeles/Long Beach Harbor has shown steady growth since 1930.

14. Universal and H-10 are expanding their fleets to keep up with the growth of business in the Harbor.

15. H-10 does not intend to engage in the transportation of lube oil in bulk in tote tanks.

16. Universal is negotiating for the construction of tote tanks, but has not entered into any agreement for their construction and purchase.

17. It can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.

18. The granting of the restricted certificate of public convenience and necessity to San Pedro will not cause irreparable harm to Universal nor to H-10.

Conclusions of Law

1. The complaint should be dismissed.
2. Universal's motion and petition should be denied.
3. The transportation by vessel of lube oil in bulk in tote tanks is not exempt transportation pursuant to Sections 212 and 238 of the Code.
4. Public convenience and necessity require the transportation of lube oils in bulk in tote tanks by vessel to ships at anchor inside and outside the Los Angeles/Long Beach Harbor and to drilling rigs.
5. A certificate of public convenience and necessity for the transportation of lube oils in bulk in tote tanks and ship's store by vessel to ships at anchor inside and outside the Los Angeles/Long Beach Harbor and to drilling rigs should be granted to San Pedro with restrictions, as follows: (1) No passengers are to be transported on the "Vickie Ann"; and (2) ship's stores may not be transported unless they are in conjunction with a shipment of lube oil in bulk in tote tanks, both being delivered to the same destination at the same time.

San Pedro is placed on notice that operative rights, as such, do not constitute a class of property which may be capitalized

or used as an element of value in rate fixing for any amount of money in excess of that originally paid to the State as the consideration for the grant of such rights. Aside from their purely permissive aspect, such rights extend to the holder a full or partial monopoly of a class of business. This monopoly feature may be modified or canceled at any time by the State, which is not in any respect limited as to the number of rights which may be given.

O R D E R

IT IS ORDERED that:

1. Case No. 10603 is dismissed with prejudice.
2. Universal Marine Corporation's motion for an immediate cease and desist order and its petition for a Proposed Report are denied.
3. A certificate of public convenience and necessity is granted to San Pedro Marine, Inc., a corporation, authorizing it to operate as a common carrier by vessel, as defined in Sections 211(b) and 238 of the Public Utilities Code, between the points and places, and subject to the restrictions, set forth in Appendix A of this decision.
4. In providing service pursuant to the authority granted by this order, San Pedro Marine, Inc. shall comply with the following service regulations. Failure to do so may result in a cancellation of the authority.
 - (a) Within thirty days after the effective date of this order, San Pedro Marine, Inc. shall file a written acceptance of the certificate granted. San Pedro Marine, Inc. is placed on notice that if it accepts the certificate it will be required, among other things, to comply with the insurance requirements of the Commission's General Order No. 111-Series.

- (b) Within thirty days after the effective date of this order, San Pedro Marine, Inc. shall file tariffs, in triplicate, in the Commission's office.
- (c) The tariff filings shall be made effective not earlier than ten days after the effective date of this order on not less than ten days' notice to the Commission and the public.
- (d) The tariff filings made pursuant to this order shall comply with the regulations governing the construction and filing of tariffs set forth in the Commission's General Order No. 117-Series.
- (e) San Pedro Marine, Inc. shall maintain its accounting records on a calendar year basis in conformance with the applicable Uniform System of Accounts or Chart of Accounts as prescribed or adopted by this Commission and shall file with the Commission, on or before March 31 of each year, an annual report of its operations in such form, content, and number of copies as the Commission, from time to time, shall prescribe.

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

Dated at San Francisco, California, this 22nd day of MAY, 1979.

Commissioner Claire T. Dedrick, being necessarily absent, did not participate in the disposition of this proceeding.

John E. Boyer
President

Vernon L. Sturgeon

Richard D. Howell

Leonard J. ...
Commissioners

kd

Appendix A

SAN PEDRO MARINE, INC.
(a California corporation)

Original Page 1

San Pedro Marine, Inc., by the certificate of public convenience and necessity granted by the decision noted in the margin, is authorized to conduct operations as a vessel common carrier as defined in Sections 211(b) and 238 of the Public Utilities Code for the transportation of lube oil, in bulk, in tote tanks;* parts; freight; and stores between:

1. The ports of Los Angeles and Long Beach, on the one hand, and, on the other, all docks, wharves, ships, points, and places within the Los Angeles/Long Beach Harbor.
2. All docks, wharves, ships, points, and places within the Los Angeles/Long Beach harbor, on the one hand, and on the other, marine installations and rigs, ships, and vessels located at points south offshore off Oceanside to points north off Santa Barbara.

subject to the following restrictions:

1. No passengers shall be transported.
2. Parts, freight, and ship's stores may be transported only in connection with a shipment of lube oil, in bulk, in tote tanks when both are delivered to the same destination at the same time.
3. No vessel shall be operated unless it has met all applicable safety requirements, including those of the United States Coast Guard.

* Steel tanks four feet square and five feet high with a 450-gallon capacity.

(END OF APPENDIX A)

Issued by California Public Utilities Commission.

Decision No. 90334, Application No. 58111.