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Decision 97-06-066 June 11, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of RED AND WHITE FLEET, INC., a California corporation, to transfer to BLUE & GOLD FLEET, a Delaware Limited Partnership, its certificate of public convenience and necessity to operate as a common carrier by vessel (VCC 13), (with minor exceptions) and to sell, assign, or otherwise transfer property necessary or useful in the performance of its common carrier by vessel service, and for BLUE & GOLD FLEET, a Delaware Limited Partnership, to accept such certificate, as well as the existing Blue and Gold Fleet certificate, and to issue evidence of indebtedness, execute leases, and to otherwise create security interests on the property to be transferred.

ORIGINAL

Application 95-12-071
(Filed December 21, 1995)

Edward J. Hegarty, Attorney at Law, for Red & White Fleet, Inc.; Steven H. Herman, Attorney at Law, for Blue & Gold Fleet and Blue & Gold Fleet, L.P.; and Law Offices of Mitchell Chyette, by Mitchell Chyette, Attorney at Law, for Blue & Gold Fleet, applicants.
Office of the Attorney General by John G. Donhoff, Jr., Deputy Attorney General, interested party.
Mitch Matsamura, for Rail Safety and Carriers Division.

TABLE OF CONTENTS

Subject	Page
OPINION.....	3
I. Summary Of Decision	3
II. Description of the Applicants	4
III. Overview of Application 95-12-071	8
IV. Procedural Background	9
V. The Settlement Agreement.....	12
VI. Standard of Review for the Settlement Agreement.....	14
A. Fitness of Crowley and Blue & Gold L.P.	16
1. Position of the Parties	16
2. Discussion.....	18
B. Affect of the Settlement on Competition.....	19
1. Position of the Parties	19
2. Discussion.....	21
C. Issuance of Debt and the Encumbrance of Utility Property.....	25
1. Position of Applicants.....	25
2. Discussion.....	26
VII. Conclusion	31
VIII. Compliance with PU Code Section 311(d).....	32
Findings of Fact	32
Conclusions of Law.....	38
ORDER.....	40
 Attachment 1	
 Attachment 2	
 Attachment 3	

- Blue & Gold L.P. will use the \$25,500,000 in debt for the following purposes: (1) purchase the R&W Fleet's assets and operations specified in the Settlement for \$16,400,000 in cash; (2) pay \$3,690,000 in legal and other costs associated with the purchase of R&W Fleet assets and operations; (3) buy-out the lease on two vessels acquired from R&W Fleet and re-engine these two vessels at a cost \$2,905,000; (4) refinance \$1,260,000 in existing B&G Fleet debt; and (5) obtain \$1,000,000 in working capital.

This decision grants applicants' request to engage in the above series of transactions on the condition that Blue & Gold L.P. shall not raise rates for ferry services in order to recover costs for interest and depreciation associated with the excess of the purchase price of R&W Fleet assets over their book value.

II. Description of the Applicants

R&W Fleet is a California corporation that operates as a vessel common carrier under the jurisdiction of the Commission. The stock of R&W Fleet is owned by Crowley Maritime Services which is a wholly owned subsidiary of Crowley Maritime Corporation. R&W Fleet operates 10 vessels which it uses to provide the following services.

- Ferry service (commuter, mid-day, and weekend) between Tiburon on the one hand, and the Ferry Building and Fisherman's Wharf in San Francisco on the other hand.
- Ferry service between Fisherman's Wharf on the one hand, and Sausalito, Angel Island, and Alcatraz Island (Alcatraz) on the other hand.
- On-call water taxi and transportation of property.
- Regulated and nonregulated charters.
- Unregulated Bay sightseeing tours.

With minor exceptions, all of R&W Fleet's assets are used to provide both regulated and nonregulated services. The book value of R&W Fleet's assets at the end

OPINION

I. Summary Of Decision

This decision conditionally approves an all-party settlement (Settlement) between the Attorney General of the State of California (Attorney General) and the applicants Red and White Fleet, Inc., Blue & Gold Fleet, and Blue & Gold Fleet, L.P., (collectively referred to as "applicants"). Under the terms of the Settlement, applicants seek authority to engage in the following series of transactions:

- Red and White Fleet, Inc., (R&W Fleet) will transfer its operating authorities for water taxi and transport of property by vessel to Crowley Launch and Tugboat Co. (Crowley), an affiliated entity.
- R&W Fleet will sell most of its assets and operations to Blue & Gold Fleet (B&G Fleet).
- B&G Fleet will then transfer all of its assets and operations, including those acquired from R&W Fleet, to Blue & Gold Fleet, L.P. (Blue & Gold L.P.).
- To preserve competition in the San Francisco Bay (Bay) tour and ferry markets, R&W Fleet will divest to Fisherman's Wharf Bay Cruise Corporation, an independent third party, the trade name "Red and White," three vessels, and Pier 43-1/2 at Fisherman's Wharf.
- Blue & Gold L.P. will issue a promissory note in the amount of \$24,500,000, obtain a revolving line of credit in the amount of \$1,000,000, and deliver stock warrants to purchase 12-1/2% of the equity in Blue & Gold L.P. To secure its debt, Blue & Gold L.P. will encumber all of the assets acquired from R&W Fleet and B&G Fleet.

B&G Fleet leases Pier 39 in Fisherman's Wharf from the Port of San Francisco to provide Bay tour and passenger ferry services (see Figure 1). In addition, B&G Fleet uses the "public" Pier 1/2 adjacent to the Ferry Building, and facilities located at various other points, including Angel Island, Oakland, Alameda, and Vallejo. For 1996, B&G Fleet had a net loss of \$263,132 on total revenues of \$8,160,596.⁴ The book value of B&G Fleet's assets at the end of 1996 was \$4,167,153.⁵ The total number of passengers carried by B&G Fleet during 1996 was 1,122,000.⁶

Blue & Gold L.P. is a Delaware limited partnership authorized to transact business in California. Blue & Gold L.P. is an affiliate of B&G Fleet and will assume the assets and services of B&G Fleet. Like B&G Fleet, Blue & Gold L.P. is owned by Pier 39 Limited Partnership which also owns the PIER 39 Complex at Fisherman's Wharf.

⁴ B&G Fleet's income statement for 1996 shows "extraordinary losses" totaling \$342,109. Without these losses, B&G Fleet's net income for 1996 would have been a positive \$78,977.

⁵ The book value of B&G Fleet's property and equipment at year-end 1996 was \$2,169,831

⁶ During 1996 B&G Fleet's ferry service carried 60% of all passengers; unregulated Bay tour carried 38% of the passengers; and charters carried 2% of the passengers.

of 1996 was \$17,230,150.¹ During 1996, R&W Fleet carried 2,386,662 passengers² and earned a net income of \$2,771,664 on total revenues of \$19,126,122.

R&W Fleet leases Piers 41 and 43-1/2 in Fisherman's Wharf from the Port of San Francisco (see Figure 1). Pier 41 is used by R&W Fleet to provide ferry service to Alcatraz, while Pier 43-1/2 is used to provide both Bay tour and regulated ferry services for routes other than to/from Alcatraz. In addition to its own facilities in Fisherman's Wharf, R&W Fleet has access to the "public" Pier 1/2 adjacent to the Ferry Building (Pier 1/2), and to docking facilities in Tiburon, Sausalito, Angel Island, Alcatraz, Oakland, Vallejo, Stockton, and Sacramento. R&W Fleet's water taxi service is conducted from Pier 54 south of the Bay Bridge.

B&G Fleet is a California corporation that is owned by Pier 39 Limited Partnership. B&G Fleet operates as a vessel common carrier under the jurisdiction of the Commission and uses six vessels³ to provide the following services:

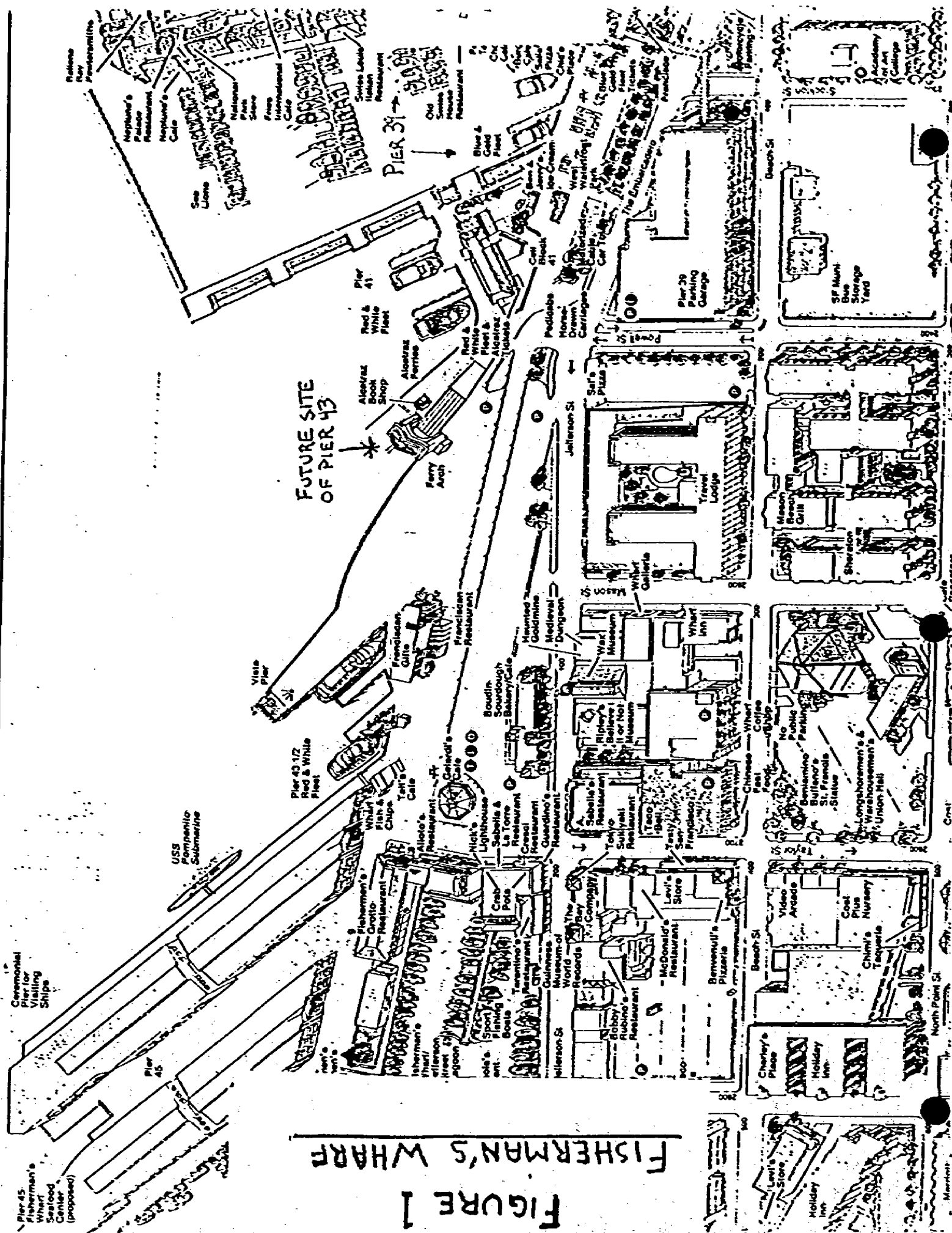
- Ferry service between the Alameda Gateway in Alameda and Jack London Square at the Port of Oakland (Alameda/Oakland) on the one hand, and Pier 1/2 and Pier 39 in Fisherman's Wharf (Pier 39) on the other hand.
- Ferry service between Vallejo on the one hand, and Angel Island and Piers 1/2 and 39 in San Francisco on the other hand.
- Chartered and scheduled Bay sightseeing services.

¹ The book value of R&W Fleet's property and equipment at year-end 1996 was \$4,784,676.

² During 1996 R&W Fleet's Alcatraz service carried 51% of all passengers; other ferry services carried 35% of the passengers; Bay tour carried 14% of the passengers; and water taxi carried no passengers. R&W Fleet did not provide passenger counts for its charters.

³ B&G Fleet owns four vessels and operates two more under contract, one each from the City of Alameda and the City of Vallejo. In 1997 Vallejo will take delivery of two new 300-passenger catamarans which B&G Fleet expects to operate under contract with Vallejo.

FIGURE 1
FISHERMAN'S WHARF



III. Overview of Application 95-12-071

In Application (A.) 95-12-071, applicants requested authority to consummate a transaction composed of three parts. First, applicants sought authority pursuant to §§ 851 et seq. and 1009 of the Public Utilities (PU) Code⁷ for B&G Fleet to purchase for \$20.5 million in cash almost all of R&W Fleet's assets, services, and authorities to operate as a vessel common carrier. With minor exceptions, no liabilities were to be transferred. The only assets, services, and authorities to be retained by R&W Fleet were those associated with water taxi and transport of property.

Second, applicants sought authority pursuant to §§ 851 et seq. and 1009 to transfer all of B&G Fleet's assets, services, and operating authorities to Blue & Gold L.P., including those that B&G Fleet had acquired from R&W Fleet. Blue & Gold L.P. would continue the regulated and unregulated services provided by R&W Fleet and B&G Fleet.

Finally, applicants sought authority pursuant to § 816 et seq. to issue a promissory note in the amount of \$26.4 million and to encumber property in order to provide collateral for the promissory note. The \$26.4 million was to be used by Blue & Gold L.P. to purchase R&W Fleet assets, refinance existing B&G Fleet debt, make capital improvements, and use for working capital.

Applicants asserted that there is no possibility that the transfers and transactions for which authority was sought would have a significant adverse effect upon the quality of the environment.

As described elsewhere in this decision, the authority sought in the application was substantially altered by the Settlement.

⁷ All references are to the PU Code unless otherwise stated.

IV. Procedural Background

A.95-12-071 was jointly filed by R&W Fleet, B&G Fleet, and Blue & Gold L.P. on December 21, 1995. Timely protests to the application were filed by Inlandboatmen's Union of the Pacific (IBU)⁸ and Harbor Bay Maritime, Inc. (HBM).⁹

A prehearing conference was held by assigned Administrative Law (ALJ) Kenney on March 27, 1996, during which HBM, IBU, and Hornblower Yachts, Inc. (Hornblower)¹⁰ filed appearances. On May 7, 1996, Hornblower withdrew its appearance and stated its support for the proposed transaction. The next day, IBU withdrew its protest and expressed support for the proposed transaction.¹¹

Opening testimony was filed by applicants and HBM on May 8, 1996. Subsequently, HBM, B&G Fleet, and the City of Alameda (Alameda)¹² entered into an agreement that provided HBM with access to Pier 43-1/2 in Fisherman's Wharf for regularly scheduled ferry service, charters, and special cruises in return for HBM's withdrawal of its protest. On May 16, 1996, HBM withdrew its protest and recommended that the Commission approve the application. HBM's withdrawal left the applicants as the only parties to the proceeding.

Applicants filed reply testimony on May 17, even though HBM, the only other party filing opening testimony, had effectively withdrawn its testimony. One day of evidentiary hearings was held on June 3, 1996. At the evidentiary hearings, a new

⁸ IBU represents the non-management employees of R&W Fleet. IBU also represents the deckhands of B&G Fleet for its ferry service between Vallejo and Pier 39.

⁹ HBM provides ferry service between the Harbor Bay Ferry Terminal in Alameda and Pier 1/2 in San Francisco.

¹⁰ Hornblower provides dinning cruises and charter services from Pier 33.

¹¹ IBU reached an agreement with applicants that IBU members would be employed by Blue & Gold L.P. once the application is approved (TR 1, p.5).

¹² The City of Alameda is the lead agency for the ferry service between San Francisco and Alameda/Oakland for which B&G Fleet is the contract operator.

appearance was filed by Adventure Cat.¹³ During the evidentiary hearings, Adventure Cat presented oral comments opposing the application and asked the Commission to grant Adventure Cat access to docking facilities in Fisherman's Wharf.

Opening briefs were filed by applicants and Adventure Cat on June 17, 1996, and reply briefs were filed on June 26. The case was submitted upon the receipt of late-filed exhibits on July 17, 1996.

On September 24, 1996, the Attorney General filed a petition for leave to intervene in opposition to A.95-12-071. In his petition, the Attorney General alleged that the merger of R&W Fleet with B&G Fleet would adversely affect competition in the markets served by these two companies. The Attorney General's petition was granted in an ALJ ruling dated October 2, 1996.

On September 26, prior to the issuance of a proposed decision, the applicants filed a petition to set aside submission of this proceeding in order to provide time for applicants to resolve the issues raised by the Attorney General without the necessity of litigating those issues. The petition to set aside submission was granted in an ALJ ruling dated September 30, 1996.

The applicants and the Attorney General were able to reach a settlement agreement (Settlement) which they submitted for the Commission's approval on February 18, 1997.¹⁴ Prior to filing the Settlement, the settling parties complied with Rule 51 pertaining to settlement agreements.¹⁵ In particular, the settling parties

¹³ Adventure Cat provides Bay tour and charter services from a pier located south of the Bay Bridge.

¹⁴ Rule 51.2 of the Commission's Rules of Practice and Procedure (Rule) requires a settlement to be submitted no later than 30 days from the last date of hearings (the Settlement was submitted more than eight months after the last date of hearings). However, this requirement was waived by the ALJ pursuant to Rule 51.10 in a ruling dated March 3, 1997.

¹⁵ Rule 51 does not apply to vessel common carrier proceedings. On February 18, 1997, the applicants and the Attorney General filed a joint motion asking that Rule 51 be applied to their settlement agreement. The motion was granted by an ALJ ruling dated March 3, 1997.

convened a conference for the purpose of discussing the Settlement on February 6, 1997. Prior written notice of the date, time, and place of the conference was furnished on January 28, 1997, to Adventure Cat, the only other party to the proceeding.

On February 20, 1997, Adventure Cat reached an agreement with the applicants which allowed Adventure Cat to rent a slip at Pier 39. On February 21, Adventure Cat withdrew its appearance and expressed its support for A.95-12-071. Adventure Cat's withdrawal left the Attorney General and the applicants as the only parties to the proceeding.

On January 27, 1997, a motion was filed by the Concerned Red & White Fleet Employees (Employees) for leave to intervene for the purpose of opposing the application. Applicants filed a response opposing the Employees' motion. On February 27, 1997, the assigned ALJ issued a ruling that denied the Employees' motion to intervene, but also encouraged the Employees to submit their views to the Commission. The Employees filed a second motion to intervene¹⁶ and hold evidentiary hearings on May 13, 1997. A joint response opposing the motion was filed by applicants and the Attorney General. The Employees' second motion was denied in a ruling by the assigned ALJ dated May 23, 1997.

In two letters dated March 13 and April 14, 1997, the Employees filed comments expressing their view that the Settlement is not in the public interest and should not be approved. Rebuttal to the Employees' comments was submitted by the Attorney General in two letters dated March 21 and April 22, 1997.

After filing the Settlement, applicants made several additional submissions for the purposes of (1) updating the record to reflect the effects of the Settlement and (2) providing information requested by the ALJ regarding the Settlement.¹⁷ The

¹⁶ The Employees' first motion to intervene was signed by nine individuals, while their second motion was submitted on behalf of ten individuals.

¹⁷ The last submission of applicants was on May 16, 1997, and contained the Declaration of Thomas C. Escher regarding the financial and technical qualifications of the new competitor, Fisherman's Wharf Bay Cruise Corporation.

Attorney General also submitted a declaration by its expert witness in support of the Settlement.

On April 16, 1997, HBM submitted a letter stating that Fisherman's Wharf Bay Cruise Co., the entity purchasing Pier 43-1/2 under the Settlement, would not allow HBM access to Pier 43-1/2 as contemplated by the agreement signed by HBM, B&G Fleet, and Alameda on May 15, 1996. HBM now requests that the Commission provide HBM with the same or equivalent access to Pier 43-1/2 as afforded in its agreement with B&G Fleet. The Attorney General opposes HBM's request for access to Pier 43-1/2, and suggests that HBM instead look to Blue & Gold L.P. to provide HBM with access to Fisherman's Wharf at Piers 39 or 41.

During the proceeding several letters were received from individuals opposed to A.95-12-071. Several government entities also wrote letters. In general, the government entities are either neutral towards A.95-12-071 or support the Settlement.

V. The Settlement Agreement

The Settlement¹⁵ resolves the Attorney General's concerns about the anticompetitive implications of B&G Fleet's acquisition of R&W Fleet while still allowing R&W Fleet to sell its assets. The Settlement accomplishes this by modifying the transaction proposed in A.95-12-071 so that R&W Fleet will divest some of its assets to a new competitor who will use these assets to compete with Blue & Gold L.P. The new competitor, identified as Fisherman's Wharf Bay Cruise Corporation, was approved by the Attorney General and is unaffiliated with the applicants.

Among the R&W Fleet assets to be sold to Fisherman's Wharf Bay Cruise Corporation are three vessels, R&W Fleet's leasehold interest in Pier 43-1/2, and the name, trademark, and colors of "R&W Fleet." These assets will be sold for \$3,600,000 in cash and had a book value of \$347,086 as of December 31, 1996. Along with the aforementioned assets, the new competitor will also acquire R&W Fleet's Bay tour

¹⁵ The Settlement is appended to this decision as Attachment 1.

operations.¹⁹ Fisherman's Wharf Bay Cruise Corporation does not presently hold and will not purchase from R&W Fleet any Commission certificate of public convenience and necessity (CPCN) and, at the time of purchase, will not conduct any business regulated by the Commission.

The R&W Fleet assets to be sold to B&G Fleet under the Settlement include seven vessels and R&W Fleet's leasehold interest in Pier 41. These assets will be sold for \$16,400,000 in cash and had a book value of \$4,549,572 as of December 31, 1996. Along with the sale of the aforementioned assets, R&W Fleet will also transfer its regulated passenger ferry operations to B&G Fleet, including ferry service to Alcatraz Island.

Since the Settlement requires the sale of the "R&W Fleet" name to the new competitor instead of being retained by R&W Fleet's water taxi and property businesses as contemplated in the application, the Settlement seeks authority to transfer R&W Fleet's water taxi and property operating authority to a sister corporation, Crowley.²⁰ No vessels will be transferred to Crowley.²¹

The final portion of A.95-12-071 affected by the Settlement is the amount and purpose of the debt that applicants seek to issue. More specifically, applicants now request authority to issue \$25,500,000 in debt instead of the \$26,400,000 requested in the application. Therefore, while the purchase price of the R&W Fleet assets to be acquired by B&G Fleet decreased by \$4.1 million (from \$20.5 million to \$16.4 million), the amount of requested financing has decreased by only \$0.9 million. The primary reasons for the relatively small decrease in the financing is that Blue & Gold L.P. is now asking for a

¹⁹ The three vessels to be sold to Fisherman's Wharf Bay Cruise Corporation are U.S. Coast Guard certified and suitable for providing Bay tour services.

²⁰ Crowley is a California Corporation.

²¹ When A.95-12-071 was filed, R&W Fleet was using three vessels to provide water taxi service. However, in 1996 R&W Fleet sold the three vessels. Notwithstanding the sale of these vessels, applicants still request the transfer to Crowley of R&W Fleet's CPCN to provide water taxi service and transport of property.

\$1.0 million revolving line of credit that was not sought in the application; and the restructuring of the deal as a result of the Settlement has resulted in an additional \$2.25 million in costs (primarily for legal fees, loan fees, and interest rate protection costs).

VI. Standard of Review for the Settlement Agreement

Rule 51.1 sets forth the standard for evaluating settlements. In particular, Rule 51.1(e) requires that the Commission shall not approve a settlement unless the settlement is: (1) reasonable in light of the whole record; (2) consistent with the law; and (3) in the public interest.

The Settlement is supported by every party in this proceeding, thus making it "all-party settlement." In D.92-12-019, the Commission stated its willingness to accept an all-party settlement as meeting the requirements of Rule 51.1(e) if the all-party settlement satisfies each of the following four conditions²²: (1) The settlement commands the unanimous sponsorship of all active parties to the proceeding; (2) The sponsoring parties are fairly reflective of the affected interests; (3) No term of the settlement contravenes statutory provisions or prior Commission decisions; and (4) The settlement conveys to the Commission sufficient information to permit it to discharge its future regulatory obligations with respect to the parties and their interests.

In the instant proceeding, we find that the sponsoring parties do not fairly reflect all affected interests since no sponsoring party reflects the interests of HBM, an entity whose interests are plainly affected by Settlement.²³ Therefore, our review of the Settlement must bypass the conditions we established in D.92-12-019 and focus directly on whether the Settlement satisfies the criteria of Rule 51.1(e).

Our determination of whether the Settlement satisfies the Rule 51.1(e) criteria must be made in the context of the ultimate issue before us in this proceeding, that is,

²² 46 CPUC2d 538, 550-551.

²³ Although the Employees express concern about the public's interest in competition, the public interest was fairly represented in this proceeding by the Attorney General.

whether to approve the transfer of R&W Fleet assets and services to Blue & Gold L.P. Our duty to approve or disapprove of the proposed transaction is rooted in the following sections of the PU Code:

Section 851: No public utility...shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its...plant, system, or other property necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, nor by any means whatsoever, directly or indirectly, merge or consolidate its...plant, system or other property, or franchises or permits or any part thereof, with any other public utility, without first having secured from the commission an order authorizing it to do so.

Section 854(a): No person or corporation...shall merge, acquire, or control either directly or indirectly any public utility organized and doing business in this state without first securing authorization to do so from the commission...Any merger, acquisition, or control without that prior authorization shall be void and have no effect.²⁴

Section 1009: Any right, privilege, franchise, or permit held or obtained by any person or corporation for the operation of vessels between points in this State may be sold, assigned, leased, transferred, or inherited as other property, only upon authorization by the commission.

In order to decide whether the Settlement meets the standards of Rule 51.1(e), we will first determine whether Crowley is fit to assume R&W Fleet's operations pertaining to water taxi and transport of property by vessel; and whether Blue & Gold L.P. is fit to acquire the other regulated services of R&W Fleet. If the answer is in the affirmative, we will then examine whether the Settlement adversely affects competition in the markets served by R&W Fleet and B&G Fleet. Assuming the Settlement does not adversely affect competition, the final matter is whether to approve the applicants'

²⁴ §§ 854(b) and (c) do not apply to vessel common carriers.

request to issue debt and encumber utility property in order to finance the proposed transaction. Each of these issues will be addressed in the same order as just listed.

A. *Fitness of Crowley and Blue & Gold L.P. to Acquire the Assets and Services of R&W Fleet*

1. *Position of the Parties*

Applicants assert that Crowley is fit to assume R&W Fleet's CPCN pertaining to water taxi and transport of property by vessel. According to applicants, R&W Fleet's parent corporation, Crowley Marine Services, Inc. has been engaged in the similar but unregulated businesses of ship assist and bunkering on the Bay since 1892.

Applicants also contend that Blue & Gold L.P. is fit to acquire the R&W Fleet assets and authorities specified in the Settlement. Upon consummation of the proposed transfer, applicants state that Blue & Gold L.P. will have adequate manpower, equipment, and facilities to keep its fleet operative and safe. Applicants note that B&G Fleet has over 15 years experience in the passenger vessel business on the Bay, and is and will be in full compliance with Commission and Coast Guard safety regulations.

Applicants state that Blue & Gold L.P. has the financial ability to provide the current services offered by R&W Fleet and B&G Fleet. To support this assertion, applicants provided financial projections which show that under existing rates, the combined operations of R&W Fleet and B&G Fleet will generate sufficient revenue to cover all expenses, service debt obligations, and earn a reasonable profit.

Applicants believe that Blue & Gold L.P.'s fitness to acquire R&W Fleet's assets and authorities is demonstrated by B&G Fleet's history of improving service to the public. For example, B&G Fleet has been able to increase patronage on its Vallejo and Alameda/Oakland routes by increasing marketing efforts and service reliability. The success of the Alameda/Oakland ferry service has resulted in demand exceeding supply to the point where B&G Fleet has had to leave people on the dock during summer months and holidays. With the acquisition of larger R&W Fleet vessels, Blue & Gold L.P. believes it can continue the growth trend experienced over the last several years.

In contrast to B&G Fleet's success with its ferry routes, applicants state that R&W Fleet's Tiburon and Sausalito ferry services have been plagued by equipment failures and service reliability problems. According to applicants, Blue & Gold L.P. will reestablish equipment and service reliability on the Tiburon and Sausalito routes by installing new engines in R&W Fleet's two catamarans.

Applicants assert that the divestment of assets to Fisherman's Wharf Bay Cruise Corporation will not affect the ability of Blue & Gold L.P. to provide services to the public. According to applicants, Blue & Gold L.P. will still operate a fleet of 13 vessels which will be more than adequate to provide all current regulated and non-regulated services operated by R&W Fleet and B&G Fleet.²⁵ In addition, Blue & Gold L.P. will still possess Piers 39 and 41 which have sufficient capacity for the services that Blue & Gold L.P. will provide from Fisherman's Wharf.

After the Settlement was submitted, three cities wrote letters in support of the agreement. Alameda and Tiburon support the Settlement on the basis that it will result in the re-engine of two vessels, and, consequently, improve the quality and reliability of ferry service to these cities. Vallejo states that approval of the Settlement is essential to the success of two new Vallejo-owned catamarans that will soon enter service. According to Vallejo, the two catamarans, due to their size, can only access Fisherman's Wharf using piers owned by R&W Fleet. Since Vallejo's ferry service is operated by B&G Fleet, Vallejo states that the sale of R&W Fleet to Blue & Gold L.P. is necessary to ensure Vallejo's ferry service to Fisherman's Wharf. Vallejo also states that it has federal funds to construct a new Pier 43 for public ferry service in Fisherman's Wharf, but that no clear right-of-way for the new pier will exist until the sale of R&W Fleet to Blue & Gold L.P. is concluded.

²⁵ Blue & Gold L.P. will also own but not operate a 14th vessel acquired from R&W Fleet (i.e., the Royal Knight).

2. Discussion

In any proceeding involving a change of utility ownership, whether by merger, acquisition, reorganization, or otherwise, our primary responsibility in reviewing the proposed transaction is whether the public will benefit from the transaction.²⁶ This responsibility means ensuring that the new operator is fully ready to perform its public utility duties at reasonable rates and in a competent manner.²⁷

Crowley, through its affiliation with R&W Fleet, has a long history of providing regulated services. In addition, another Crowley affiliate has been operating vessels on the Bay for more than a century. Because of this depth of experience, we are confident that Crowley is fit to assume R&W Fleet's CPCN pertaining to water taxi and transport of property by vessel.

B&G Fleet is also an experienced provider of vessel common carrier services, and has a track record of satisfactory service to the public. Indeed, B&G Fleet's record of service to the public is superior to that of R&W Fleet. For example, the City of Vallejo states that there has been a considerable improvement in ferry service to the city since B&G Fleet took over the service from R&W Fleet in 1994.²⁸ Given B&G Fleet's demonstrated ability to serve as a vessel common carrier, we find that Blue & Gold L.P. is fit to acquire the passenger ferry routes of R&W Fleet.

We also conclude that the divestiture of assets to the new competitor will leave Blue & Gold L.P. with sufficient equipment to carry on with the vessel common carrier activities presently conducted by R&W Fleet and B&G Fleet. Therefore, the R&W Fleet assets to be divested are not necessary for Blue & Gold L.P. to perform its duties to the public.

²⁶ D.94-01-041, 53 CPUC2d 116, at 119.

²⁷ D.90-07-030, mimeo, pp. 3-4.

²⁸ Application, Appendix M.

Although we find that Blue & Gold L.P. is competent to acquire R&W Fleet's CPCN for passenger ferry routes, we have reservations about Blue & Gold L.P.'s ability to operate R&W Fleet's services at rates that are reasonable. Our concern is discussed elsewhere in this decision.

We now turn to the effect of the Settlement on competition for both the regulated and unregulated services of the applicants.

B. Affect of the Settlement on Competition

1. Position of the Parties

Applicants assert that Blue & Gold L.P.'s acquisition of the majority of R&W Fleet assets and operating authorities will have negligible anticompetitive effects. For regulated services, applicants argue that each individual ferry route on San Francisco Bay operates in a different market from every other ferry route since the cross-elasticity of demand between ferry routes is minuscule. Applicants further argue that competition from other modes of transportation, such as private automobiles, Bay Area Rapid Transit (BART), bus companies, and van pools, will prevent Blue & Gold L.P. from earning monopoly profits. Applicants also state that Blue & Gold L.P.'s power in ferry markets will be further checked by public regulation, such as that exercised by the Commission, and by the threat of new entry into the market.

To support their assertion that the proposed transaction will not adversely affect competition, applicants note that neither the United States Department of Justice (DOJ) nor the Federal Trade Commission (FTC) have expressed concern regarding possible anticompetitive effects of the proposed acquisition. Both agencies were notified of the proposed merger as required by the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act).²⁹

²⁹ The HSR Act requires that prior to consummating acquisitions exceeding a certain size, both the acquiring firm and the acquired firm must (1) provide the FTC and the DOJ with specified information regarding the proposed transaction; and (2) observe a specific waiting period before consummating the acquisition (15 U.S.C. Section 18(a)).

The Attorney General believes that three distinct markets are affected by the merger of R&W Fleet with B&G Fleet: (1) ferry routes between Bay Area cities; (2) the Alcatraz ferry route; and (3) the unregulated Bay tour market. The Attorney General states that the originally proposed transaction would have created a near monopoly in the Fisherman's Wharf market for Bay tours and eliminated the only operator likely to be in a position to compete for the Alcatraz ferry route or the various municipal ferry franchises.

The Attorney General states that since the ferry routes are regulated services, the Attorney General's Office focused on the unregulated Bay tour market. According to the Attorney General, the critical asset necessary for a competitor in the Bay tour market is a docking facility located within Fisherman's Wharf that is of sufficient size to serve thousands of passengers per day. The Attorney General believes that Pier 43-1/2, which is to be divested as part of the Settlement, meets that need. The Attorney General further states that the vessels to be divested are designed for the tour and ferry routes currently served by the R&W Fleet, thus allowing the new competitor to begin operations immediately. The Attorney General also believes it is important that the R&W Fleet trade name and colors will be divested since these assets will confer instant public recognition and goodwill to the new competitor. Finally, the Attorney General believes that the divested assets may provide the basis for a competitor capable of competing with Blue & Gold L.P. for the Alcatraz and other ferry routes.

HBM filed testimony opposing the application on the basis that it would provide Blue & Gold L.P. with a monopoly on docking facilities in Fisherman's Wharf and thereby result in Blue & Gold L.P. having control of the Bay ferry market. After filing its testimony, HBM reached an agreement with B&G Fleet that resolved HBM's concerns by providing HBM with docking rights at Pier 43-1/2 in Fisherman's Wharf. The agreement terminated if and when a public ferry docking facility became available in the Fisherman's Wharf area.

On April 16, 1997, HBM submitted a letter stating that Settlement has resulted in HBM being denied access to Pier 43-1/2 as required by its agreement with B&G Fleet.

Therefore, HBM requests that the Commission allow HBM to have the same or equivalent access to Pier 43-1/2 as provided in its agreement with B&G Fleet.

The Employees assert that the Settlement should not be approved since they believe it will result in Blue & Gold L.P. obtaining a monopoly in each of the three distinct markets affected by Settlement: (1) the Bay tour market; (2) the passenger ferry market; and (3) the Alcatraz Island shuttle service market. To support their assertion, the Employees point out what they believe to be erroneous and contradictory statements made by the Attorney General in support of the Settlement.³⁰ The Employees also present several reasons why the new entrant will not be a viable competitor to Blue & Gold L.P. in any of the three markets affected by the Settlement.

Prior to the Settlement, a letter was received from the General Superintendent for the National Park Service. In his letter, the Superintendent states that the National Park Service has reviewed the application as it relates to Alcatraz ferry service, and the National Park Service is confident that Blue & Gold L.P. "will not be in a position to eliminate competitive bidding for the Alcatraz ferry service, nor be in a position to dictate fares, services, or any other aspects of the [Alcatraz] contract."

2. Discussion

In determining whether the Settlement is in the public interest, we have an obligation to consider the Settlement's impact on competition in both regulated and unregulated markets.³¹ We agree with the Attorney General that there are three markets potentially affected by the merger of R&W Fleet with B&G Fleet: (1) passenger ferry service between cities, (2) ferry service to Alcatraz Island, and (3) Bay tour.

³⁰ The Attorney General in his letter of April 22, 1997, asserts that there are no errors in his statements made in support of the Settlement.

³¹ "A clear line of cases specifies that competition is one of the factors bearing on the exercise of this Commission's discretion...This is true regardless of whether the effect is intrastate...interstate...or foreign." (D.91-05-028, 40 CPUC2d 159, 179.)

The passenger ferry market consists of ferry routes between San Francisco and various cities. Each route is usually served by one provider operating under an exclusive contract with a municipality.³² Thus, "competition" in the passenger ferry market consists of bidding for municipal contracts.

The Alcatraz market consists of passenger ferry service to Alcatraz Island National Park. This service is currently provided by R&W Fleet from Fisherman's Wharf under a 15-year exclusive contract with the National Park Service. Since this contract is due to expire at the end of 1998, "competition" in the Alcatraz market consists of bidding for the new contract to provide ferry service to Alcatraz beginning in 1999. The Alcatraz market is significant since it is the largest and most lucrative ferry route on the Bay.³³

The final market potentially affected by the Settlement is the Bay tour market which consists of sightseeing excursions along the Bay. The Bay tour market is dominated by R&W Fleet and B&G Fleet since most passengers for Bay tours are carried on R&W Fleet and B&G Fleet vessels embarking from Fisherman's Wharf. However, there are also several smaller providers of Bay tour services, including Adventure Cat and Hornblower Yachts.

We find that the Settlement does not adversely affect the fundamental competitive balance in the passenger ferry, Alcatraz, or Bay tour markets. Currently, each of the three markets is dominated by R&W Fleet and/or B&G Fleet. As a result of the Settlement, there will still be two potential "brand-name" competitors³⁴ for the three

³² Golden Gate Transit (GGT) uses its own vessels to provide ferry service between Marin County and San Francisco. GGT is restricted by its charter to providing service between Marin and San Francisco.

³³ Applicants believe that ferry service to Alcatraz is a nonregulated service. Since the Commission CPCN issued to R&W Fleet includes ferry service to Alcatraz, this decision assumes that ferry service to Alcatraz is under Commission jurisdiction.

³⁴ Although applicants intend to change the name "Blue and Gold Fleet" to "Blue & Gold L.P.," this will not significantly alter the underlying brand name of "Blue and Gold."

markets. Furthermore, the Settlement has no affect on the number or capabilities of other competitors for the passenger ferry, Alcatraz, and Bay tour markets.³⁵ Finally, the Settlement has no affect on competitive alternatives for passenger ferry, Alcatraz, and Bay tour services. For example, passenger ferry service will still compete with other modes of transportation (cars, buses, BART, etc.); and the Alcatraz and Bay tour services will still compete with a myriad of other tourist attractions (e.g., Pier 39, Cable Car rides, bus tours, museums, and more distant attractions such as Muir Woods, Sausalito, and Jack London Square).

We recognize that the Settlement promises "brand-name" competition only in the Bay tour market and not the passenger ferry and Alcatraz markets. But even today there is no guarantee of competition between R&W Fleet and B&G Fleet for the passenger ferry and Alcatraz markets. For example, R&W Fleet did not compete with B&G Fleet for the Alameda/Oakland ferry contract when it was put out to bid in 1994.³⁶ In essence, the Settlement preserves the status quo in the passenger ferry and Alcatraz markets by sustaining the existence of two potential "brand-name" competitors with the same wherewithal to compete in these markets as existed prior to the Settlement.

The only significant difference in the passenger ferry, Alcatraz, and Bay tour markets under the Settlement is that the two long-established brand-name competitors will switch places in terms of their assets. More specifically, R&W Fleet will switch from owning two piers and 10 vessels to owning one pier and three vessels; while B&G Fleet will experience almost the opposite effect, going from one pier and four vessels to

³⁵ Competition in the passenger ferry market is not confined to R&W Fleet and B&G Fleet since HBM is also a competitor in this market. For the Bay tour market, there are several competitors besides the applicants, including Adventure Cat and Hornblower Yachts. For the Alcatraz market, the letter from the Superintendent of the National Park Service states that ferry service to Alcatraz could be provided from points other than Fisherman's Wharf, including from property owned by the Park Service in San Francisco and Marin Counties. Accordingly, R&W Fleet's and B&G Fleet's possession of the piers in Fisherman's Wharf does not necessarily make them the only bidders for the Alcatraz ferry contract.

³⁶ Exhibit 10, Attachment 7.

two piers and ten vessels. We do not find that the competitors' switching places in terms of their assets will not adversely affect competition.

Although applicants provided information demonstrating that the new competitor has sufficient financial and technical resources to be a viable competitor against Blue & Gold L.P.,³⁷ we must assume the possibility of circumstances (e.g., going out of business) that might compel the new competitor to dispose of some or all of the "divested" assets it acquired from R&W Fleet. Under such circumstances, the divested assets may wind up in the hands of Blue & Gold L.P. which, depending on the conditions at the time, could be contrary to the intent of the Settlement. Accordingly, we shall require Blue & Gold L.P. to notify both us and the Attorney General if it acquires any of the R&W Fleet vessels sold to the new competitor and/or acquires a leasehold (or other ownership interest) in Pier 43-1/2. Upon receiving this notice, we shall take such action as we deem appropriate and necessary to protect the public interest.

We are not persuaded by HBM that applicants should be ordered to provide HBM with access to docking facilities in Fisherman's Wharf. HBM's request is premised on the transaction originally proposed in A.95-12-071 which HBM believes would have given Blue & Gold L.P. an unassailable monopoly on ferry routes due to its control of docking facilities at Fisherman's Wharf. However, the basis for HBM's request has disappeared as a result of the Settlement which keeps both R&W Fleet and Blue & Gold L.P. in Fisherman's Wharf, each with its own docking facilities that can be used to provide passenger ferry service.³⁸ Further, HBM's request should eventually be rendered moot by the construction of the new "public" Pier 43 by the City of Vallejo and the Port of San Francisco.

³⁷ Declaration of Thomas C. Escher, dated May 13, 1997.

³⁸ Applicants demonstrated that the new competitor has adequate capacity at Pier 43-1/2 to simultaneously provide both Bay tour and regulated passenger ferry services (Third Submission, pp. 2-3, Appendices 1 and 2).

C. Issuance of Debt and the Encumbrance of Utility Property

We previously determined that Blue & Gold L.P. is fit to acquire R&W Fleet and that Blue & Gold L.P.'s acquisition of R&W Fleet is not a threat to competition. We now turn to Blue & Gold L.P.'s request to issue debt, stock warrants, and encumber utility property in order to finance the transactions proposed by the applicants in the Settlement.

1. Position of Applicants

Blue & Gold L.P. states that it has arranged with GE Capital Corporation for a credit facility of \$25,500,000 composed of a promissory note in the amount of \$24,500,000 and a revolving line of credit in the amount of \$1,000,000. The proceeds from the debt are to be used for the following five purposes: (1) purchase the R&W Fleet assets and operations specified in the Settlement for \$16,400,000 in cash; (2) pay \$3,690,000 in legal and other costs associated with the purchase of R&W Fleet assets and operations; (3) buy-out the lease on two R&W Fleet catamarans and re-engine these two vessels at a cost \$2,905,000; (4) refinance \$1,260,000 in existing B&G Fleet debt; and (5) obtain \$1,000,000 in working capital to fund the combined operations of R&W Fleet and B&G Fleet.³⁹ To provide collateral for the debt, Blue & Gold L.P. seeks authority to encumber all of the assets acquired from R&W Fleet and B&G Fleet. Of the \$25,500,000 in total debt, Blue & Gold L.P. states that only \$4,936,176 relates to services subject to Commission regulation.⁴⁰

The promissory note of \$24,500,000 is for a term of 72 months and will have an interest rate, at Blue & Gold L.P.'s option, of either (a) a floating rate equal to the London Interbank Offering Rate (LIBOR) plus 3.85% per annum or (b) a fixed rate

³⁹ Although applicants' proposed use of the debt proceeds sums to \$25,255,000, or \$245,000 short of the amount of debt for which applicants seek Commission authority, the discrepancy is de minimis.

⁴⁰ Applicants state that since most of their revenue is from nonregulated operations, most of the proposed debt is likewise earmarked for nonregulated purposes.

equal to LIBOR plus 3.95%. A final balloon payment equal to 35% of the principal amount is due at the maturity of the loan.

The \$1,000,000 revolving line of credit will incur the following rate of interest and fees: (a) LIBOR plus 3.85% per annum on the amount borrowed; (b) 1/2 of 1% per annum on the average unused daily balance (payable monthly); and (c) an annual Commitment Fee of \$25,000. Principal and interest on the amounts borrowed are to be repaid monthly over the five-year term of the loan.

In order to obtain debt financing, Blue & Gold L.P. will provide GB Capital Corporation with detachable warrants to purchase 12-1/2% of the equity of Blue & Gold L.P.

Blue & Gold L.P. provided financial projections to demonstrate that the combined operations of R&W Fleet and B&G Fleet will generate sufficient cash flow to cover operating costs, service the debt obligation, and enable a reasonable profit. And even though Blue & Gold L.P. is purchasing R&W Fleet assets at a price substantially above their book value, applicants state that there will be no increase in fares to recover the excess of the purchase price of the assets over their book value. According to Blue & Gold L.P., rate increases are only contemplated to recover inflationary growth in operating costs that occur after the time of the purchase.

2. Discussion

Blue & Gold L.P. seeks our authority to issue debt, stock warrants, and encumber property pursuant to §§ 816-830. Section 816 authorizes the Commission to supervise and regulate public utilities' power to issue stocks, bonds, and other securities, or to create liens on utility property. Section 817 prescribes the purposes for which stocks, bonds, and other securities can be issued. Sections 818-825 generally prescribe the manner and form of Commission authorization which must be obtained before a utility may issue stocks, bonds, or engage in other securities transactions. Sections 826-827 discuss sanctions for noncompliance with these code provisions. Section 828 indicates that the State is not liable for payment resulting from any securities transactions of a public utility. Section 829 provides for the conditions under which the Commission

may grant exemptions from compliance with the provisions of this article. Section 830 requires public utilities to obtain Commission authorization before assuming any liability as guarantor, surety, or otherwise. Although Blue & Gold L.P. did not seek authority to encumber assets pursuant to § 851, this law is nonetheless applicable since it requires a utility to obtain the Commission's authorization prior to encumbering its property necessary or useful in the performance of its duties to the public.

We find that Blue & Gold L.P. has demonstrated a need for \$25,500,000 from external sources in order to finance the transactions and operations proposed in the Settlement. In determining whether to grant Blue & Gold L.P. authority to issue debt, stock warrants, and encumber utility property in order to obtain \$25,500,000, we must address six issues. First, Blue & Gold L.P. intends to use most of the debt proceeds for nonregulated purposes. The purposes for which utilities may issue debt are specified in § 817, and these purposes do not include the financing of nonregulated activities. On the other hand, § 829 provides us with discretion to grant exemptions from § 817 when such exemptions are in the public interest. In the case of Blue & Gold L.P., it would be unreasonable to withhold authorization to issue debt for nonregulated purposes since a substantial portion of Blue & Gold L.P.'s business is nonregulated. Accordingly, we shall authorize Blue & Gold L.P. to issue debt for nonregulated purposes pursuant to our authority under § 829.⁴¹ Our authorization in no way implies possible indemnification by ratepayers in the event Blue & Gold L.P. is not successful in its unregulated activities.⁴² Any losses resulting from nonregulated activities shall be borne by Blue & Gold L.P.'s shareholders.

⁴¹ We have previously used this discretion to authorize utilities to issue debt and equity securities for nonregulated purposes (see, for example, D.96-04-064 and D.90-01-052).

⁴² Blue & Gold L.P.'s allocation of debt between regulated and nonregulated purposes includes the presumption on applicants' part that we have no jurisdiction over ferry service to Alcatraz Island. Our authorization for Blue & Gold L.P.'s to issue debt should not be interpreted as our conclusion that we have no jurisdiction over Alcatraz ferry service.

The second issue is whether it is appropriate for Blue & Gold L.P. to encumber property used for regulated purposes in order to secure debt issued for nonregulated purposes. In deciding on this issue, we note that virtually all of Blue & Gold L.P.'s property will be used to provide both regulated and nonregulated services, thus making it impossible for Blue & Gold L.P. to avoid encumbering utility property to secure debt intended for nonregulated purposes. Accordingly, we shall use our discretion under §§ 829 and 853(b) to permit Blue & Gold L.P. to encumber its property for the purpose of obtaining debt to be used for nonregulated purposes. However, as required by § 851, Blue & Gold L.P. shall not sell any property necessary or useful in the performance of its duty to the public in order to repay debt without first obtaining our authority to do so. We consider all of the assets for which applicants seek authority under §§ 851 and 1009 to sell and/or transfer from R&W Fleet and B&G Fleet to Blue & Gold L.P. to be property necessary or useful by Blue & Gold L.P. in the performance of its duties to the public.

The third issue concerns Blue & Gold L.P.'s paying \$16,400,000 to acquire R&W Fleet assets with a book value of \$4,549,572. The excess of the purchase price over book value means that Blue & Gold L.P. will have higher interest and depreciation costs than did R&W Fleet for the same assets. Ultimately, Blue & Gold L.P.'s higher costs may cause it to raise fares for ferry services in order to recover these costs. To prevent this from occurring, we shall allow Blue & Gold L.P. to issue debt only on the condition that Blue & Gold L.P. agrees to not raise rates for ferry services in order to recover costs associated with the excess of the purchase price of R&W Fleet assets over their book value. This condition is consistent with our long-established practice that utility assets are to be valued at depreciated original cost at the time such assets are first dedicated to public service.⁴⁹ Our condition shall remain in effect for as long as Blue & Gold L.P.'s

⁴⁹ D.88-11-059 (29 CPUC2d 635, 640) and D.94-02-045 (53 CPUC2d 287, 290).

cost of service is used as the basis for selling rates.⁴⁴ To ensure compliance with our condition, Blue & Gold L.P. shall maintain accounting records that enable the ready identification of the book value of R&W Fleet's assets at the time of their purchase by B&G Fleet. Blue & Gold L.P. is also placed on notice that this decision does not find that Blue & Gold L.P. uses of the debt proceeds are necessary or reasonable for ratemaking purposes. These issues are normally tested in general rate cases or other ratemaking proceedings.

The fourth issue concerns Blue & Gold L.P.'s request to establish a revolving credit facility in the amount of \$1,000,000 for use as working capital. Section 818 prohibits utilities from using debt to fund operating expenses unless explicitly authorized by the Commission. We find that Blue & Gold L.P. has demonstrated a need for working capital, and we shall accordingly grant its request to establish a revolving credit facility of \$1,000,000 to use as working capital.⁴⁵ However, Blue & Gold L.P. is placed on notice by this decision that the proceeds from the other debt and equity approved herein shall not be used for general corporate purposes.

The fifth issue concerns Blue & Gold L.P.'s intention to use 100% debt financing to purchase R&W Fleet assets and operations. This would result in Blue & Gold L.P.'s capital structure changing from B&G Fleet's current 32% equity and 68% debt to 7%

⁴⁴ The rates for some ferry routes have been set based on the ferry operator's cost of service (D.94-04-076), while in other instances ferry operators have simply filed tariffs containing rates that were negotiated between the ferry operator and a municipality (D.95-10-012). Our condition that Blue & Gold L.P. shall exclude from its rates the interest and depreciation costs associated with the excess of the purchase price of R & W Fleet's assets over their book value applies to all rates under our jurisdiction, whether set directly by us or via negotiations with municipalities. However, our condition shall not apply to fares for service to Alcatraz Island since the National Park Service is confident that applicants will not "be in a position to dictate fares, services, or any other aspects of the contract" (letter of October 4, 1996, from the General Superintendent of the National Park Service).

⁴⁵ We routinely grant utilities authorization to issue revolving debt for use as working capital where there is a demonstrated need to do so (D.96-02-069, D.95-10-002, D.94-10-028, and D.91-07-038).

equity and 93% debt.” In the past we have discouraged high-debt financing due to the financial risks inherent in such financing arrangements.” Blue & Gold L.P. is placed on notice that we do not find in this decision that its capital ratios are necessary and reasonable for ratemaking purposes. These issues are normally tested in general rate cases or other ratemaking proceedings.

The final issue concerns whether Blue & Gold L.P.’s financing package complies with the competitive bidding rule set forth in Commission Resolution No. F-616. Since Blue & Gold L.P.’s financing package was privately placed with a specific lender, we find that it meets the following criteria stated in Exhibit A to Resolution No. F-616 for our granting an exemption from the competitive bidding rule: “Securities privately placed with specific lenders and bank term loans obviously must be negotiated...It is reasonable that these types of debt instruments should be exempt from the Competitive Bidding Rule.”

If Blue & Gold L.P. agrees to not raise fares for ferry services in order to recover costs for interest and depreciation associated with the excess of the purchase price of R&W Fleet assets over their book value, we will grant Blue & Gold L.P. authority to issue debt and warrants in accordance with the terms and conditions contemplated in the application as modified by the Settlement. If Blue & Gold L.P. accepts our

⁴⁶ Submission of Applicants to Update the Record in A.95-12-071 Pursuant to Administrative Law Judge’s Ruling of September 1996 Granting Petition to Set Aside Submission, Exhibits OO and PP.

⁴⁷ Even though we have discouraged high-debt financing, we have still authorized the issuance of debt under such circumstances (D.93-12-014, 1993 Cal. PUC LEXIS 701).

⁴⁸ Since the warrants to acquire 12-1/2% of Blue & Gold L.P.’s equity are part of the terms and conditions of the debt financing package, we shall consider the warrants as part of the “debt instrument [that] should be exempt from the Competitive Bidding Rule.”

conditional authorization, Blue & Gold L.P. shall remit fees totaling \$18,750 as required by § 1904(b).⁴⁹

VII. Conclusion

Rule 51.1(e) states that we shall only approve a settlement that is (1) reasonable in light of the whole record, (2) consistent with the law, and (3) in the public interest. We find that the Settlement is reasonable in light of the whole record and consistent with the law. However, to ensure that the Settlement is in the public interest, we shall approve the Settlement only on the condition that Blue & Gold L.P. shall not raise fares for passenger ferry service to recover interest and depreciation costs associated with the excess of the purchase price of R&W Fleet assets over their book value.⁵⁰

With our one condition, we shall authorize Blue & Gold L.P. pursuant to §§ 851 et seq. and 1009 to purchase or otherwise acquire those assets and operating authorities of R&W Fleet and B&G Fleet specified in the Settlement. We shall also authorize R&W Fleet to transfer its water taxi and property authorities to Crowley; and to divest to Fisherman's Wharf Bay Cruise Corporation those assets set forth in the Settlement which are currently used by R&W Fleet in the provision of public utility service. The

⁴⁹ Section 1904(b) states as follows: "The commission shall...collect the following fees...For a certificate authorizing the issue of bonds, notes, or other evidence of indebtedness, two dollars (\$2) for each one thousand dollars (\$1,000) of the face value of the authorized issue or fraction thereof up to one million dollars (\$1,000,000), one dollar (\$1) for each one thousand dollars (\$1,000) over one million dollars (\$1,000,000) and up to ten million dollars (\$10,000,000), and fifty cents (\$0.50) for each one thousand dollars (\$1,000) over ten million dollars (\$10,000,000)." Section 1904(b) also states that "no fee need be paid on such portion of any issue as may be used to...take over, refund, discharge, or retire...evidence of indebtedness on which a fee has theretofore been paid." Accordingly, Blue & Gold L.P. shall not be required to pay a fee on that portion of debt authorized herein that is used to retire B&G Fleet debt if a fee was previously paid on the B&G Fleet debt.

⁵⁰ Rule 51.7(3) states as follows: "The Commission may reject a...settlement...whenever it determines the...settlement is not in the public interest. Upon rejection of the settlement, the Commission may take various steps, including...[proposing] alternative terms to the parties to the settlement which are acceptable to the Commission and allow the parties reasonable time within which to accept such terms or to request other relief." As discussed elsewhere in this decision, applicants accepted the Commission's condition for approval of the Settlement.

CPCNs for Crowley and Blue & Gold L.P. are appended to this decision as Attachments 2 and 3. We shall further authorize Blue & Gold L.P. to issue debt, warrants, and encumber property pursuant to §§ 816 et. seq. and 851 et seq. We find that there is no possibility that the transactions we approve herein will have a significant adverse effect upon the quality of the environment.

We see no reason to delay the effective date of this decision.

VIII. Compliance with PU Code Section 311(d)

The proposed decision of the ALJ was issued on May 23, 1997, in accordance with § 311(d) and Rule 77.1. Once an ALJ's proposed decision is mailed, § 311(d) requires the Commission to wait 30 days before issuing its final decision, except that the 30-day period may be reduced or waived by the Commission in an unforeseen emergency situation or upon the stipulation of all parties to the proceeding.

On May 28, 1997, the Attorney General and the applicants filed a stipulation in which all the parties waived the 30-day waiting period required by § 311(d) as well as their right to file comments on the proposed decision as allowed by Rule 77.2. The parties submitted their stipulation in order to facilitate the Commission issuing its decision at the earliest possible date. Since no comments were received, we are issuing the decision as proposed after correcting certain errors and making other nonsubstantive changes.

On May 29, 1997, Blue and Gold L.P. submitted a letter stating its acceptance of our condition for our approval of the Settlement, that is, Blue and Gold L.P. agreed not to raise the fares for passenger ferry service in order to recover interest and depreciation costs associated with the excess of the purchase price of R&W Fleet assets over their book value.

Findings of Fact

1. A.95-12-071 was jointly filed by R&W Fleet, B&G Fleet, and Blue & Gold L.P. on December 21, 1995.
2. Notice of A.95-12-071 appeared in the Daily Calendar on December 28, 1995.

3. R&W Fleet and B&G Fleet are California corporations that operate as vessel common carriers under the jurisdiction of the Commission.

4. Blue & Gold L.P., a Delaware limited partnership qualified to transact business in California, proposes to operate as a vessel common carrier subject to the jurisdiction of the Commission.

5. Crowley is a California corporation that proposes to operate as a vessel common carrier under the jurisdiction of the Commission.

6. In A.95-12-071, applicants requested authority pursuant to §§ 851 et seq. and 1009 to sell most of R&W Fleet's assets and Commission operating authorities to B&G Fleet for a price of \$20,500,000. All of B&G Fleet's assets and operating authorities, including those acquired from R&W Fleet, were then to be transferred to Blue & Gold L.P.

Applicants also requested authority pursuant to § 816 et seq. to issue a promissory note in the amount of \$26.4 million for the purpose of: (a) financing the purchase of R&W Fleet assets and operating authorities by B&G Fleet; (b) installing new engines on two vessels acquired by B&G Fleet from R&W Fleet; and (c) use as working capital.

7. Timely protests to A.96-12-071 were filed by IBU and HBM.

8. A PHC was held on March 27, 1996, during which appearances were file by HBM, IBU, and Hornblower.

9. Hornblower and IBU withdrew their appearances on May 7 and May 8, 1996, respectively. When withdrawing their appearances, both parties expressed support for the application.

10. Written testimony was filed by applicants and HBM on May 8, 1996.

11. On May 15, 1996, HBM, B&G Fleet, and the City of Alameda signed an agreement that provided HBM with docking rights at Pier 43-1/2 for regularly scheduled ferry service, charters, and special cruises in return for HBM's withdrawal of its protest.

12. On May 16, 1996, HBM withdrew its protest and recommended that the Commission approve the application.

13. Applicants filed reply testimony on May 17, 1996.

14. One day of evidentiary hearings was held on June 3, 1996.

15. At the evidentiary hearings, Adventure Cat filed an appearance and presented oral comments opposing the application and recommending that the Commission grant Adventure Cat access to docking facilities at Fisherman's Wharf.

16. Opening briefs were filed by applicants and Adventure Cat on June 17, 1996, and reply briefs on June 26, 1996. The case was submitted upon the receipt of late-filed exhibits on July 17, 1996.

17. On September 24, 1996, the Attorney General filed a petition for leave to intervene to become a party in opposition to A.95-12-071. The Attorney General's petition was granted by an ALJ ruling dated October 2, 1996.

18. On September 26, 1996, the applicants filed a petition to set aside submission of the proceeding. The petition was granted by an ALJ ruling dated September 30, 1996.

19. The applicants and the Attorney General entered into a settlement which they submitted for the Commission's approval on February 18, 1997.

20. The settling parties convened a conference to discuss the Settlement on February 6, 1997. Prior written notice of the date, time, and place of the conference was furnished on January 28, 1997, to Adventure Cat, the only other party to the proceeding.

21. Under the terms of the Settlement, applicants seek Commission authority to carry out the following series of transactions:

a. R&W Fleet will sell assets to a new competitor identified as Fisherman's Wharf Bay Cruise Corporation. Among the assets to be sold to the new competitor are three vessels, R&W Fleet's leasehold interest in Pier 43-1/2, and the name, trademark, and colors of "R&W Fleet." The assets will be sold for \$3,600,000 in cash and had a book value of \$347,086 as of December 31, 1996. The new entrant will also acquire R&W Fleet's Bay tour operations.

b. R&W Fleet will sell most of its assets to B&G Fleet, including seven vessels and R&W Fleet's leasehold interest in Pier 41. These assets will be sold for \$16,400,000 in cash and had a book value of \$4,549,572 as of December 31, 1996. Along with the sale of the aforementioned assets, R&W Fleet will also transfer its regulated passenger ferry operations, including its ferry service to Alcatraz Island, to B&G Fleet.

c. R&W Fleet will transfer its water taxi and property operating authorities to a sister corporation, Crowley. No vessels will be transferred to Crowley.

d. Blue & Gold L.P. will acquire all of B&G Fleet's assets and operating authorities, including those assets and operating authorities acquired by B&G Fleet from R&W Fleet.

e. Blue & Gold L.P. will issue \$25,500,000 in debt to be used as follows: (i) acquire the assets of R&W Fleet for \$16,400,000 (ii) buy out the lease on two vessels acquired from R&W Fleet and re-engine these two vessels for a total cost of \$2,905,000; (iii) pay \$3,690,000 in out-of-pocket costs associated with the purchase of R&W Fleet assets and operations; (iv) refinance \$1,260,000 in existing B&G Fleet debt; and (v) obtain \$1,000,000 in working capital.

f. To secure the debt, Blue & Gold L.P. will encumber all of the assets transferred from B&G Fleet, including the assets B&G Fleet acquired from R&W Fleet.

g. As a condition for obtaining \$25,500,000 in debt financing, Blue & Gold L.P. will issue warrants to acquire 12-1/2% of the equity of B&G Fleet.

21. After filing the Settlement, applicants made four submissions for the purpose of (a) updating the record to reflect the effects of the Settlement and (b) providing information for the record regarding the Settlement that was requested by the ALJ. The Attorney General also submitted for the record a declaration in support of the Settlement.

22. On February 21, 1997, Adventure Cat withdrew its appearance and recommended that the Commission approve A.95-12-071.

23. The Employees filed two motions to intervene, the first on January 27, 1997, and the second on May 13, 1997. In their second motion, the Employees also requested evidentiary hearings. The Employees' motions were denied by the assigned ALJ in rulings dated February 27 and May 23, 1997.

24. In two letters dated March 13 and April 14, 1997, the Employees expressed their view that the Settlement is not in the public interest and should not be approved. The

Attorney General, in a letters dated March 21 and April 23, 1997, submitted rebuttal to the statements contained in the Employees' letters.

25. On April 16, 1997, HBM submitted a letter stating that the new competitor would not allow HBM access to Pier 43-1/2. HBM requests that the Commission allow HBM to have the same or equivalent access to Pier 43-1/2 as afforded in the agreement of May 15, 1996, signed by HBM, B&G Fleet, and Alameda.

26. HBM's original request for access to Pier 43-1/2 was premised on Blue & Gold L.P. acquiring a monopoly on ferry docking facilities in Fisherman's Wharf.

27. The Settlement does not provide Blue & Gold L.P. with a monopoly on ferry docking facilities in Fisherman's Wharf.

28. Crowley is fit to assume the Commission-regulated operations of R&W Fleet pertaining to water taxi and transport of property by vessel.

29. Blue & Gold L.P. is fit to assume the Commission-regulated operations of R&W Fleet and B&G Fleet pertaining to passenger ferry services.

30. The R&W Fleet assets to be divested to Fisherman's Wharf Bay Cruise Corporation are not needed by Blue & Gold L.P. to perform its duties as a vessel common carrier.

31. Circumstances may arise that compel Fisherman's Wharf Bay Cruise Corporation to dispose of some or all of the assets that it acquired from R&W Fleet as a result of the Settlement.

32. Blue & Gold L.P. may in the future acquire some or all of the R&W Fleet assets divested to Fisherman's Wharf Bay Cruise Corporation as part of the Settlement. Blue & Gold L.P.'s acquisition of these assets might be contrary to the intent of the Settlement.

33. The Settlement will not adversely affect competition in the passenger ferry, Alcatraz, or Bay tour markets.

34. B&G Fleet's purchase of R&W Fleet assets for \$16,400,000 is substantially in excess of the \$4,549,572 book value of these assets as of December 31, 1996.

35. Blue & Gold L.P. will have higher interest and depreciation costs for the assets acquired from R&W Fleet (via B&G Fleet) than did R&W Fleet for these same assets.

36. Blue & Gold L.P. agreed to not raise the fares for ferry services in order to recover interest and depreciation costs associated with the excess of the purchase price of R&W Fleet assets over their book value.

37. The National Park Service states that it has adequate authority and means to prevent Blue & Gold L.P. from charging unreasonable rates for ferry service to Alcatraz.

38. HBM has interests that are affected by the Settlement.

39. The Attorney General and the applicants are not fairly reflective of all interests affected by the Settlement.

40. Blue & Gold L.P. has a need for \$25,500,000 in external funds for the purposes set forth in the application as modified by the Settlement.

41. Section 816 of the PU Code provides that a public utility is under the jurisdiction of the Commission as to the issuance of debt and equity.

42. Blue & Gold L.P.'s request to issue debt is intended, in part, to finance activities not regulated by the Commission.

43. The money, property, or labor to be procured or paid for by the proposed financing are reasonably required for the purposes specified in the application as modified by the Settlement.

44. The proposed debt is for proper purposes.

45. The issuance of debt, stock warrants, and the encumbrance of utility property described in A.95-12-071, as modified by the Settlement, would not be adverse to the public interest provided that the applicants accept the condition in the following order.

46. By this decision the Commission does not find that Blue & Gold L.P.'s uses of the debt proceeds are necessary or reasonable for ratemaking purposes.

47. By this decision the Commission does not find that Blue & Gold L.P.'s cost of capital and/or capital ratios are necessary or reasonable for ratemaking purposes.

48. If Blue & Gold L.P. defaults on any provision of its financing arrangement with GE Capital Corporation, the Commission does not guarantee payment or any indemnification to GE Capital Corporation.

49. The Settlement, with the modification identified in this order, is reasonable in light of the whole record and in the public interest.

50. There is no possibility that the transactions requested in A.95-12-071, as modified by the Settlement, will have a significant adverse effect upon the quality of the environment.

51. All parties to this proceeding have waived the 30-day period specified in § 311(d) as well as their right to file comments on the proposed decision of the ALJ as allowed by Rule 77.2.

52. There is no reason to delay the granting of the authority requested.

Conclusions of Law

1. To be approved, a settlement must conform to the standards set forth in Article 13.5 of the Commission's Rules of Practice and Procedure.

2. Settlements, whether contested or not, should be reasonable in light of the whole record, consistent with the law, and in the public interest.

3. The settling parties have complied with Article 13.5 of the Rules regarding stipulations and settlements.

4. The Settlement does not meet the standards for the Commission's adoption of an all-party settlement set forth in D.92-12-019.

5. The Settlement is reasonable in light of the whole record, consistent with the law, and in the public interest.

6. Utility assets should be valued at their depreciated original cost at the time such assets are first dedicated to public service.

7. Blue & Gold L.P. should not be permitted to raise fares for passenger ferry services to recover costs for interest and depreciation associated with the excess of the purchase price of R&W Fleet assets over their book value. This condition should not apply to ferry service to Alcatraz Island.

8. This decision is not a finding on the value of the rights and properties to be acquired by Blue & Gold L.P.

9. Blue & Gold L.P. should not in the future be permitted to acquire the R&W Fleet vessels divested to Fisherman's Wharf Bay Cruise Corporation and/or a leasehold or ownership interest in Pier 43-1/2 without first informing the Commission and the Attorney General.

10. The proposed issuance of debt and warrants described in A.95-12-071, as modified by the Settlement, is for lawful purposes.

11. The money, property, or labor to be procured or paid for by the proposed debt is reasonably required for the purposes specified. Proceeds from the debt should not be used for purposes reasonably charged to operating expense or income except as authorized by the following order.

12. The issuance of debt authorized herein is exempt from the requirements of the Commission's Competitive Bidding Rule set forth in Resolution No. F-616.

13. The authorization to engage in the transactions in the following order is not a finding on the reasonableness of these transactions for the purpose of setting rates.

14. Applicants should pay the fee determined in accordance with § 1904. The fee computation will be based on the aggregate of \$25,500,000 in debt which Blue & Gold L.P. is authorized to incur in the order below less any fees paid on debt previously issued by B&G Fleet in the amount of \$1,260,000.

15. The transactions proposed in the application as modified by the Settlement do not require environmental review.

16. Crowley should be authorized to assume the public utility rights and obligations of R&W Fleet pertaining water taxi and transport of property by vessel.

17. Crowley should be authorized to adopt the tariff rates and schedules of R&W Fleet pertaining to water taxi and transport of property by vessel.

18. B&G Fleet should be authorized to assume the public utility rights and obligations of R&W Fleet except for those pertaining water taxi and transport of property by vessel.

19. B&G Fleet should be authorized to adopt the tariff rates and schedules of R&W Fleet except for those portions of R&W Fleet' tariffs pertaining to water taxi and transport of property by vessel.

20. Blue & Gold L.P. should be authorized to assume the public utility rights and obligations of B&G Fleet, including those rights and obligations of B&G Fleet that were assumed from R&W Fleet.

21. Blue & Gold L.P. should be authorized to adopt the tariff rates and schedules of B&G Fleet, including those portions of B&G Fleet's tariffs that were adopted from R&W Fleet's tariffs.

22. The obligations of Crowley and Blue & Gold L.P. to provide the Commission-regulated services for which they are granted authority by the following order should not lapse or expire except by a subsequent Commission order or by operation of law.

23. The application, as modified by the Settlement, should be granted to the extent set forth in the order which follows.

24. The Commission can act on this decision in less than 30 days following the issuance of the ALJ's proposed decision since all parties to this proceeding have waived the 30-day period contained in § 311(d).

25. This order should be made effective immediately.

O R D E R

IT IS ORDERED that:

1. The joint motion for adoption of the settlement agreement (Settlement) between the Attorney General of the State of California (Attorney General), and the applicants Red and White Fleet, Inc., (R&W Fleet), Blue & Gold Fleet (B&G Fleet), and Blue & Gold Fleet, L.P. (Blue & Gold L.P.), is granted.

2. Blue and Gold L.P. shall not raise fares for its passenger ferry services in order to recover costs for interest and depreciation associated with the excess of the purchase price of R&W Fleet assets over their book value at the time such assets are sold to B&G Fleet. This condition does not apply to ferry service to Alcatraz Island.

3. R&W Fleet, B&G Fleet, and Blue & Gold L.P. are authorized to engage in the series of transactions described in the application as modified by the Settlement.

4. Blue & Gold L.P. may issue a promissory note in the aggregate principal amount not to exceed \$24,500,000.

5. Blue & Gold L.P. may obtain working capital by entering into a revolving credit agreement and issuing a promissory note in the amount of \$1,000,000.

6. Blue & Gold L.P. may encumber its assets to secure the repayment of the debt authorized herein.

7. Blue & Gold L.P. may issue stock warrants to purchase 12-1/2 percent of the equity of Blue & Gold L.P. Such warrants, if exercised, shall not result in a transfer or control of Blue & Gold L.P. without prior authorization of the Commission.

8. Blue & Gold L.P. shall apply the proceeds of the debt authorized herein for the purposes set forth in the application as modified by the Settlement.

9. Blue & Gold L.P. shall file with the Commission copies of its financing agreement(s) no later than 15 days after the documents have been executed.

10. On or before the 25th day of each month, Blue & Gold L.P. shall file the reports required by General Order Series 24.

11. Blue & Gold L.P. shall notify the Commission and the Attorney General before it acquires a leasehold (or other ownership interest) in Pier 43-1/2 and/or any of the R&W Fleet vessels divested to Fisherman's Wharf Bay Cruise Corporation.

12. Blue & Gold L.P. shareholders shall hold California ratepayers harmless for any losses from the unregulated operations acquired from R&W Fleet and B&G Fleet.

13. The corporate identification number assigned to Crowley Launch and Tugboat Co. (Crowley) is VCC-76, which should be included in the caption of all original filings with this Commission, and in the titles of other pleadings filed in existing cases. Crowley's Certificate of Public Convenience and Necessity (CPCN) is appended to this order as Attachment 2.

14. Within 30 days from the date of this order, Crowley shall file with the Commission's Railroad Safety and Carriers Division (RSCD) written acceptance of the CPCN granted by this order.

15. Prior to operating any Commission-regulated services, Crowley shall file an advice letter containing tariffs adopting all the rates, rules, and timetables set forth in R&W Fleet's filed and then effective tariff schedules pertaining to water taxi and transportation of property by vessel. Crowley's tariffs shall be effective on filing and shall state when service will start or has started.

16. B&G Fleet, prior to operating any Commission-regulated services assumed from R&W Fleet, shall file an advice letter containing tariffs adopting all the rates, rules, and timetables set forth in R&W Fleet's filed and then effective tariff schedules except for those portions of R&W Fleet's tariffs pertaining to water taxi and transportation of property by vessel. B&G Fleet's tariffs shall be effective on filing and shall state when service will start or has started.

17. The corporate identification number assigned to Blue & Gold L.P. is VCC-77, which should be included in the caption of all original filings with this Commission, and in the titles of other pleadings filed in existing cases. Blue & Gold L.P.'s CPCN is appended to this order as Attachment 3.

18. Within 30 days from the date of this order, Blue & Gold L.P. shall file with the RSCD written acceptance of the CPCN granted by this order.

19. Prior to operating any Commission-regulated services, Blue & Gold L.P. shall file an advice letter containing tariffs adopting all the rates, rules, and timetables set forth in B&G Fleet's filed and then effective tariff schedules, including those portions of B&G Fleet's tariffs carried over from R&W Fleet's tariffs. Blue & Gold L.P.'s tariffs shall be effective on filing and shall state when service will start or has started.

20. Within 10 days after R&W Fleet has completed the transactions for which authority is granted by this order, R&W Fleet shall notify the Director of the RSCD in writing. R&W Fleet's CPCN and corporate identification number VCC-13 shall be revoked upon the Commission's receipt of this notice.

21. Within ten days after Blue & Gold L.P.'s acquisition of B&G Fleet is completed and effective, Blue & Gold L.P. shall notify the Director of the RSCD in writing. B&G Fleet's CPCN and corporate identification number VCC-51 shall be revoked upon the Commission's receipt of this notice.

22. Crowley and Blue & Gold L.P. shall:

a. Comply with General Orders Series 87, 104, 111, and 117.

b. Maintain accounting records in conformity with the Uniform System of Accounts.

- c. Remit to the Commission the fee(s) required by Chapter 2.5 of the Public Utilities Code.
- d. Comply with all the rules, regulations, and requirements of the United States Coast Guard, including applicable Vessel Traffic System requirements, in the operation of the services authorized by this order.
- e. Continue to operate the services authorized under this order until formally relieved of such responsibility by the order of this Commission or by operation of law.

23. The authority granted herein shall be deemed withdrawn if the transactions contemplated by the application, as modified by the Settlement, are not consummated with 12 months after the effective date of this order.

24. Blue & Gold L.P. shall pay a fee of \$18,750 required by § 1904(b). This fee shall be reduced by any fee(s) previously paid pursuant to § 1904(b) related to currently outstanding B&G Fleet debt in the amount of \$1,260,000.

25. The authority granted by this order to issue debt shall become effective when Blue & Gold L.P. pays the fees required by § 1904(b). In all other respects, this order is effective today.

26. This proceeding is closed.

This order is effective immediately.

Dated June 11, 1997, at San Francisco, California.

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners

Attachment 1

Settlement Agreement

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT (hereinafter "Agreement") is made and entered into as of the 6th day of February, 1997, by and among the STATE OF CALIFORNIA, acting by and through its Attorney General, Daniel E. Lungren (hereinafter the "State"); Crowley Maritime Corporation, its subsidiaries, successors, agents and assigns (hereinafter "Crowley Maritime"); Pier 39 Limited Partnership, its subsidiaries, successors, agents and assigns (hereinafter "Pier 39"); and Red & White Fleet, Inc. (hereinafter "Red & White Fleet"), a Crowley Maritime subsidiary, and Blue and Gold Fleet, a corporation controlled, and the majority of stock of which is owned, by Pier 39.

RECITALS:

A. Through an Asset Purchase Agreement dated December 15, 1995, entered into between the Red & White Fleet and the Blue & Gold Fleet, the Blue & Gold Fleet agreed to buy all or substantially all the assets of the Red & White Fleet (the "Acquisition"). Said Acquisition is scheduled to close after final approval by the California Public Utilities Commission ("CPUC") of the transfer, from seller to buyer, of certain ferry service operating certificates.

B. The State, after an investigation conducted by its Attorney General, has concluded that the Acquisition, and the resulting integration and consolidation of the assets and operations of the Red & White Fleet and Blue and Gold Fleet (collectively, the "Fleets") would tend substantially to lessen

competition and/or create a monopoly in the Bay tour and ferry markets serving San Francisco's Fisherman's Wharf, in violation of federal and state antitrust and unfair competition law. The Attorney General's contentions in this regard are hereinafter referred to as the "State Claims." Crowley Maritime, Pier 39 and the Fleets, on the other hand, maintain that the Acquisition is in compliance with federal and state antitrust and unfair competition laws.

C. On the basis of the State Claims, on September 24, 1996, the Attorney General filed a motion with the CPUC to oppose the Fleets' application to allow the Acquisition ("the CPUC Application"). The CPUC granted the Attorney General's motion to intervene for that purpose. The Fleets requested, and the Attorney General agreed, to delay further proceedings concerning the CPUC Application to allow settlement discussions between the Fleets, their parent entities and the Attorney General. The CPUC agreed to take the matter off calendar and await the outcome of the negotiations before taking the next step in examining the Application.

D. The State desires to resolve the controversy on terms that will preserve competition among Bay tour boat and ferry service operators in the Fisherman's Wharf area. Accordingly, the Attorney General has requested of Crowley Maritime, Pier 39 and the Fleets that they modify the Acquisition to allow Crowley Maritime to sell certain Red & White Fleet assets to a new entrant, who is not associated with Pier 39 and is approved by the Attorney General, before the Acquisition, as so modified, may

ATTACHMENT 1

E. Crowley Maritime, Pier 39 and the Fleets have agreed to comply with the Attorney General's request, and further, the parties have agreed to move the CPUC to adopt this Agreement, and compliance therewith, as a condition of approving the CPUC Application. As so conditioned, the Attorney General will support the CPUC Application. Neither Crowley Maritime, Pier 39 nor the Fleets, however, admit and each continues expressly to deny any liability in connection with the State Claims.

NOW, THEREFORE, in consideration of the foregoing, and of the mutual covenants set forth herein, the parties do hereby agree as follows:

I. DIVESTITURE

Crowley Maritime will offer for sale to potential buyers other than Pier 39 and Blue and Gold Fleet:

A. 1. Its leasehold title and interest in Pier 43 1/2, along with all appurtenances and equipment, including without limitation, all right, title and interest in the signage, ticket booths, ramps, and docks, located or in use at Pier 43 1/2 as of November 1, 1996;

2. The purchaser may condition its agreement to purchase the leasehold on the outcome of negotiations with the Port regarding issues related to assuming the Pier 43 1/2 lease. The parties agree they will not attempt to impair either the purchaser's or the Port's ability to negotiate about public ferry landing rights, the length of any lease extension or new lease,

or any other amendment to, or change in, leasehold terms that may be proposed in connection with the purchaser's application to the Port to operate at Pier 43 1/2.

If some accommodation for public ferry landings is successfully negotiated between the Port and the purchaser, and notwithstanding the foregoing, however, this Agreement shall not be construed or interpreted to prevent Pier 39 and/or Blue and Gold Fleet from attempting to obtain public ferry landing rights at Pier 43 1/2 on the same terms and conditions as may be granted to other ferry operators in respect to use of those public ferry landing rights;

B. The Red & White Fleet trade name, service and trade marks, and colors. Crowley Maritime shall condition the sale of these assets on the purchaser agreeing that Pier 39 will have 90 days from the closing date of the Blue and Gold Fleet purchase agreement with Red & White Fleet ("the closing" or "close") to eliminate the Red & White name and marks from the vessels and other real and personal property it acquires from Crowley Maritime. As a further condition of sale, Crowley Maritime shall also require the purchaser to agree to allow Pier 39 one year in which to repaint with new colors and signage the Red & White Fleet vessels and other real and personal property or, in the case of the vessels, as they undergo their scheduled maintenance in dry dock, whichever occurs first;

C. Up to three of the following Harbor and Royal class boats, in good operating condition: the Harbor Princess; the Harbor Queen; the Royal Prince; and the Royal Knight. "Good

ATTACHMENT 1

operating condition" shall mean that on the date the sale closes, each vessel being sold will have on board all certificates required under applicable federal, state and local law for the vessels' current service in the Red & White Fleet.

II. PROCEDURE

A. The assets to be divested must be sold by Crowley Maritime before or simultaneously with the closing; unless and until the divestiture set forth in Section I., above, is accomplished in its entirety, no part of the Acquisition may close.

B. Crowley Maritime will offer and negotiate the sale of the assets set forth in Section I. Pier 39 and Blue and Gold Fleet shall not be associated with the eventual purchaser through common ownership or control, and shall not have any connection with either offering the assets for sale or the choice of purchaser.

C. Crowley Maritime will select a purchaser from among those who express interest in buying the assets. The Crowley Maritime selection will be presented to the Attorney General for approval. The Attorney General will accept or reject the selected purchaser within a reasonable time on the basis of what the Attorney General believes is best in assuring vigorous competition in the Bay tour and ferry markets at Fisherman's Wharf. If a selection is rejected, Crowley Maritime may offer another selection from the same group of potential buyers, or it may solicit additional candidates.

D. Crowley Maritime will consult with the Attorney General about the procedures it plans to employ in tendering the assets for sale and conducting subsequent communications with potential purchasers; with a view to assuring the process will be fair and open. The Attorney General will be furnished a copy of the offering materials before their circulation to prospective purchasers, and with all written communications to and from prospective purchasers. The Attorney General shall, upon request, be furnished any other documents which may be material to the sale of the assets listed in Section I.

III. ATTORNEYS' FEES AND COSTS

Crowley Maritime and Pier 39 jointly and severally agree to pay the Attorney General's attorneys' and expert's fees and costs incurred in connection with the investigation of the subject Acquisition, through to the date this Agreement is executed, and thereafter in connection with any Agreement monitoring work that may be necessary, in the amount of \$50,000.00, by cashiers check or wire transfer payable to the California Department of Justice, within 10 days from the closing. Said payment is not intended to nor does it discharge any obligation imposed by statute for fees and costs Crowley Maritime, Pier 39 or the Fleets may incur in the future in connection with any action to enforce this Agreement.

IV. RELEASE

Upon the satisfaction of all of the parties' obligations under this Agreement, the State warrants, covenants and agrees

that the Attorney General, on behalf of the State, shall have waived and forfeited and thereupon be foreclosed from enforcing his rights to challenge the Acquisition. Except as regards this Release and provided all of the parties' obligations under this Agreement have been satisfied, upon the closing and the payment of fees and costs specified in Paragraph III, the Agreement will cease having any further force or effect.

V. ENFORCEABILITY OF THIS AGREEMENT

A. In the event the Attorney General believes either Crowley Maritime, Pier 39 or the Fleets have not complied with the terms of this Agreement, the Agreement may be enforced by motion presented by the State to a Federal District Court, filed with a complaint challenging the Acquisition. Notwithstanding the terms of the Release provided in Paragraph IV., above, Crowley Maritime, Pier 39 and the Fleets agree to the filing of said complaint and to the tolling of the statutes of limitations applicable to the State Claims challenging the Acquisition, as of the date this Agreement is signed.

B. Consistent with the Release, however, the filing of said complaint shall be solely for jurisdictional purposes to allow the Court to enforce this Agreement as a consent decree, and shall not be construed as authorizing the State to challenge the Acquisition *de novo* or to seek any relief with respect to the Acquisition, other than the relief provided for in this Agreement.

C. Crowley Maritime, Pier 39 and the Fleets agree to waive

any and all objections to entry of this Agreement as a consent decree, retroactive to the date this Agreement is signed, and to waive any objection to the Court's adoption of the Agreement as its Order. If the Court adopts this Agreement as a consent judgment, Crowley Maritime, Pier 39 and the Fleets will be bound by its terms in the same manner as if it were so entered on the date it was executed. All parties reserve their rights to seek to modify the consent judgment and order, as may be deemed just and equitable by the Court.

D. In addition and cumulative to the method of enforcement provided for in the just-preceding Paragraphs A and B, the Attorney General may seek to enforce this Agreement (1) by appropriate motion, petition or other action before the CPUC, and/or (2) as a contract between the parties, through injunctive and other equitable relief issued in and by the California Superior Court.

VI. GENERAL PROVISIONS

A. The parties acknowledge that this Agreement is made by way of settlement and compromise. No transaction made with reference to this Agreement shall be deemed to constitute an admission of fact or law by any party.

B. This Agreement: (a) constitutes a single, integrated written contract expressing the entire agreement of the parties hereto with respect to its subject matter; (b) may be amended only by a writing executed by the parties; (c) shall inure to the benefit of and be binding upon the parties and their respective

ATTACHMENT 1

successors and assigns and is not intended to confer upon any other person any rights or remedies hereunder, except to the extent expressly set forth; and, (d) may be executed in one or more counterparts, all of which together shall be deemed to be one instrument.

C. The Recitals set forth above are incorporated herein by reference and made a part hereof.

D. This Agreement is not confidential and shall be filed with the CPUC as a public document.

E. Nothing in this Agreement is intended to, nor shall it, impose any personal liability for monetary damages on the general partners of Pier 39 Limited Partnership.

IN WITNESS WHEREOF, this Agreement has been executed as of the day and year first above written.

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ATTACHMENT 1

A.95-12-071 /ALJ/TIM/jac

DANIEL E. LUNGREN,
Attorney General of the
State of California

By:

John G. Denhoff, Jr.
Deputy Attorney General
Attorneys for the
State of California

CROWLEY MARITIME CORPORATION

By:

Thomas Crowley
Thomas Crowley
Chairman

RED & WHITE FLEET, INC.

By:

Al Zurawski
Al Zurawski
Vice-President

PIER 39 LIMITED PARTNERSHIP

By:

Robert Moor
Robert Moor
General Partner

By:

Molly South
Molly South
General Partner

BLUE & GOLD FLEET

By:

Fred C. Arko, Jr.
Fred C. Arko, Jr.
President

Approved as to Form:

William P. Verdon
William P. Verdon, Esq.
Sr. Vice-President
and General Counsel

Approved as to Form:

Steven H. Herman, Esq.
Steven H. Herman, Esq.

A.95-12-071 /ALJ/TIM/jac

ATTACHMENT 1

DANIEL E. LUNGREN,
Attorney General of the
State of California

By:

John G. Donhoff, Jr.
Deputy Attorney General
Attorneys for the
State of California

CROWLEY MARITIME CORPORATION

Approved as to Form:

By:

Thomas Crowley
Chairman

William P. Verdon, Esq.
Sr. Vice-President
and General Counsel

RED & WHITE FLEET, INC.

By:

Al Zurawski
Vice-President

Approved as to Form:

PIER 39 LIMITED PARTNERSHIP

By:

Robert Moor
General Partner

Steven H. Herman, Esq.

By:

Molly South
General Partner

BLUE & GOLD FLEET

By:

Fred C. Arko, Jr.
President

Attachment 2

Crowley Launch and Tugboat Co.

VCC-76

ATTACHMENT 2

Appendix VCC-76

Crowley Launch
and Tugboat Co.
(a corporation)

Original Title Page

CERTIFICATE
OF
PUBLIC CONVENIENCE AND NECESSITY
AS A VESSEL COMMON CARRIER
VCC-76

Showing vessel common carrier operative rights, restrictions,
limitations, exceptions, and privileges.

All changes and amendments as authorized by
the Public Utilities Commission of the State of California
will be made as revised pages or added original pages.

Supersedes the authority heretofore granted
to Harbor Carriers, Inc., and its successor,
Red and White Fleet, Inc.,
by D.85-06-105, as amended.

Issued under authority of Decision 97-06-066, dated
6/11/97, of the Public Utilities Commission of
the State of California in Application 95-12-071.

Appendix VCC-76

Crowley Launch
and Tugboat Co.
(a corporation)

Original Page 1

SECTION I. GENERAL AUTHORIZATIONS, RESTRICTIONS, LIMITATIONS,
AND SPECIFICATIONS (continued).

This certificate supersedes all vessel common carrier operative authority granted to Red and White Fleet, Inc., and its predecessor, Harbor Carriers, Inc.

Crowley Launch and Tugboat Co., a corporation, by the certificate of public convenience and necessity granted by the decision noted in the foot of the margin, is authorized to conduct common carrier services by vessels, for the transportation of passengers and their baggage and property, between points on the San Francisco, San Pablo, and Suisun Bays, and on the San Joaquin, Sacramento, and Napa Rivers and the Petaluma Creek, and their navigable tributaries, subject to the following conditions:

- a. No vessel shall be operated unless it has met all applicable safety requirements, including those of the United States Coast Guard.
- b. Nonscheduled service shall be operated on an "on-call" basis. The term "on-call", as used, refers to service which is authorized to be rendered dependent on the demands of passengers. The tariffs and timetables shall show the terms and conditions under which services will be rendered.
- c. "On-call" service shall be performed at hourly or per diem rates which include the services of vessel and crew, regardless of the number of passengers transported. Transportation shall not be performed on an individual fares basis.

Issued by California Public Utilities Commission.

Decision 97-06-066, Application 95-12-071.

Appendix VCC-76

Crowley Launch
and Tugboat Co.
(a corporation)

Original Page 2

SECTION I. GENERAL AUTHORIZATIONS, RESTRICTIONS, LIMITATIONS,
AND SPECIFICATIONS (concluded).

- d. The authorization to transport passengers and their baggage is limited only to water taxi service.
- e. The authorization to transport property of less than 100 tons is restricted to points in San Francisco, San Pablo and Suisun Bays.
- f. The carrier is authorized to transport property of 100 tons or more to points in San Francisco, San Pablo, and Suisun Bays, and on the San Joaquin, Sacramento, and Napa Rivers and Petaluma Creek and their navigable tributaries.

Issued by California Public Utilities Commission.

Decision 97-06-066, Application 95-12-071.

(END OF ATTACHMENT 2)

Attachment 3

Blue & Gold L.P.

VCC-77

ATTACHMENT³

Appendix VCC-77

Blue & Gold Fleet, L.P.
(a limited partnership)

Original Title Page

CERTIFICATE

OF

PUBLIC CONVENIENCE AND NECESSITY

AS A VESSEL COMMON CARRIER

VCC-77

Showing vessel common carrier operative rights, restrictions,
limitations, exceptions, and privileges.

All changes and amendments as authorized by
the Public Utilities Commission of the State of California
will be made as revised pages or added original pages.

Supersedes the authorities heretofore granted
to Blue & Gold, a corporation
by D.91925, as amended, and
Harbor Carriers, Inc., and its successor,
Red and White Fleet, Inc.,
by D.85-06-105, as amended.

Issued under authority of Decision 97-06-066 , dated
June 11, 1997 , of the Public Utilities Commission of
the State of California in Application 95-12-071.

ATTACHMENT 3

Appendix VCC-77

Blue & Gold Fleet, L.P.
(a limited partnership)

Original Page 1

SECTION I. GENERAL AUTHORIZATIONS, RESTRICTIONS, LIMITATIONS,
AND SPECIFICATIONS.

This certificate supersedes all vessel common carrier operative authorities granted to Blue & Gold Fleet, a corporation, and Red and White Fleet, Inc., and its predecessor, Harbor Carriers, Inc.

Blue & Gold Fleet, a limited partnership, by the certificate of public convenience and necessity granted by the decision noted in the foot of the margin, is authorized to conduct common carriage by vessels, for the transportation of passengers and their baggage including bicycles, between the points described in Section II, subject to the following provisions:

- a. No vessel shall be operated unless it has met all applicable safety requirements, including those of the United States Coast Guard.
- b. Nonscheduled service shall be operated on an "on-call" basis. The term "on-call", as used, refers to service which is authorized to be rendered dependent on the demands of passengers. The tariffs and timetables shall show the conditions under which each authorized on-call service will be rendered.
- c. "On-call" service shall be performed at hourly or per diem rates which include the services of vessel and crew, regardless of the number of passengers transported. Transportation shall not be performed on an individual fares basis.

Issued by California Public Utilities Commission.

Decision 97-06-066, Application 95-12-071.

ATTACHMENT 3

Appendix VCC-77

Blue & Gold Fleet, L.P.
(a limited partnership)

Original Page 2

SECTION II. SERVICE POINTS (continued).

A. Scheduled Service

Between the points as described below, unless otherwise specified:

- S1. San Francisco - Angel Island State Park (1)
- S2. San Francisco - Sausalito (1)
(1) Carrier shall provide a minimum of one (1) trip per day in each direction from June 1 through September 10 of each year.
- S3. San Francisco - Tiburon (2)
- S4. San Francisco - Alcatraz Island (2)
(2) Carrier shall provide a minimum of two (2) trips per day in each direction from June 1 through September 10 of each year.
- S5. San Francisco - Stockton
Carrier shall provide a minimum of one (1) trip per week in each direction from April 15 through October 31 of each year.
- S6. San Francisco - Angel Island - Vallejo
Carrier shall provide a minimum of one (1) trip per weekday (Monday through Friday, inclusive) in each direction.
- S7. San Francisco - Sacramento - Stockton
Carrier shall provide a minimum of one (1) trip per weekend (excluding Independence and Labor Day weekends) in each direction.
- S8. San Francisco - Alameda (3)
(3) Between San Francisco Ferry Building and Pier 39 in San Francisco, on the one hand, and Port of Oakland and Alameda Gateway area, on the other hand.
- S9. Alameda - Angel Island (4)
(4) Between Jack London Square, Oakland and Alameda Gateway, Alameda, on the one hand, and Angel Island State Park, on the other hand.

Issued by California Public Utilities Commission.

Decision 97-06-066, Application 95-12-071.

ATTACHMENT³

Appendix VCC-77

Blue & Gold Fleet, L.P.
(a limited partnership)

Original Page 3

SECTION II. SERVICE POINTS (concluded).

B. Nonscheduled Service

Between any points on the shoreline of San Francisco Bay and its navigable tributaries.

This service shall include, but not limited to the following:

- N1. San Francisco - Angel Island State Park (5)
- N2. San Francisco - Tiburon (5)
(5) On 24 hours' notice, carrier shall provide service for 100 or more adult passengers, from September 11 through May 31 of each year.
- N3. San Francisco - Sausalito (6)
- N4. San Francisco - Alcatraz Island (6)
(6) On 24 hours' notice, carrier shall provide service for 40 or more adult passengers from September 11 May 31 of each year.

C. Emergency Service

At the request of the Golden Gate Bridge, Highway and Transportation District, (District), carrier may provide temporary scheduled and/or non-scheduled service between San Francisco and points in Marin County during an emergency affecting operation of the Golden Gate Bridge (Bridge) or of the District's ferry service. "Emergency" shall mean substantial traffic impairments on the Bridge or its approachways, or periods when vessels regularly used by the District for ferry service are inoperable. In conducting such emergency service, carrier may use its own docking facilities in San Francisco and any or all of the District's ferry docking facilities in San Francisco and Marin County.

Issued by California Public Utilities Commission.

Decision 97-06-066, Application 95-12-071.