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Decision 98-02-008 February 4, 1998

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Application of Red & White Ferries, Inc., for a Certificate of Public Convenience and Necessity to Establish and Operate Unscheduled Vessel Common Carrier Service Between Navigable Points on the San Francisco Bay, San Pablo Bay, the Oakland Estuary, Suisun Bay and all Navigable Tributaries up to the Sacramento and Stockton Areas and for Interim Operating Authority.

**ORIGINAL**

Application 97-07-042  
(Filed July 29, 1997;  
amended September 12, 1997)

Application of Red & White Ferries, Inc., for a Certificate of Public Convenience and Necessity to Establish and Operate Scheduled Vessel Common Carrier Service Between Richmond on the one hand and San Francisco Ferry Building Pier ½ and Fisherman's Wharf Ferry Terminal 43½ on the other hand.

Application 97-10-020  
(Filed October 1, 1997)

**INTERIM OPINION**

**Summary**

This decision grants Red & White Ferries, Inc.'s (Red & White) request for a certificate of public convenience and necessity (CPCN) to operate vessel common carrier service for the unscheduled transportation of passengers and their baggage between navigable points on San Francisco Bay, San Pablo Bay, the Oakland Estuary, Suisun Bay, and all navigable tributaries up to the Sacramento and Stockton areas; and for scheduled service between Richmond on the one hand, and San Francisco Ferry Building Pier ½ and Fisherman's Wharf Ferry Terminal Pier 43½ on the other. Red & White's request for a vessel common carrier certificate to transport passengers and their baggage to, from and between berthed or anchored vessels, and to transport property, is not granted *ex parte*, but will be set for hearing.

### Background

In Decision (D.) 97-06-066, the Commission approved a settlement agreement (Settlement) among the Attorney General of the State of California (Attorney General), Crowley Maritime Corporation and its subsidiary Red and White Fleet, Inc.,<sup>1</sup> and Pier 39 Limited Partnership and its subsidiaries and affiliates Blue & Gold Fleet and Blue & Gold Fleet, L.P. Under the terms of the Settlement: (1) Red and White Fleet, Inc. transferred its operating authorities for water taxi and transport of property by vessel to Crowley Launch and Tugboat Co.; (2) Red and White Fleet, Inc. sold most of its assets and operations to Blue & Gold Fleet which then transferred all of its assets and operations to Blue & Gold Fleet, L.P. (Blue & Gold); and (3) Red and White Fleet, Inc. divested to Fisherman's Wharf Bay Cruise Corporation (FWBCC), a new entity and affiliate of applicant herein, the trade name "Red and White," three vessels, and its leasehold interest in Pier 43½ at Fisherman's Wharf in San Francisco.

The Settlement was intended to address the Attorney General's concern that Blue & Gold Fleet's acquisition of Red and White Fleet, Inc.'s assets and operations 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.<sup>2</sup> The partial divestiture to FWBCC was to allow it to become a competitor to Blue & Gold.

The Commission approved the Settlement in June. In July, Red & White filed Application (A.) 97-07-042 seeking a CPCN to operate vessel common carrier service for the unscheduled transportation of passengers and their baggage and/or freight between navigable points on San Francisco Bay, San Pablo Bay, the Oakland Estuary, Suisun Bay, and all navigable tributaries up to the Sacramento and Stockton areas, including to, from and between berthed or anchored vessels. At the time A.97-07-042

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<sup>1</sup> Red and White Fleet, Inc. and Red & White Ferries, Inc. are not affiliated.

<sup>2</sup> D.97-06-066, Attachment 1 (Settlement), p. 1.

was filed, Red & White had already begun providing unregulated charter and Bay tour service under the Red & White name.

In presenting its A.97-07-042 request, Red & White cited its operational and financial qualifications, and D.97-06-066 and the Settlement in support of the public convenience and necessity, requesting *ex parte* treatment and interim operating authority during its pendency.

On August 22, 1997, Blue & Gold filed its protest of effectively every request in Red & White's application. The protest notes that Blue and Gold's operating authority (VCC-77) is as extensive geographically as the authority being sought by Red & White. Indeed, Blue & Gold's CPCN as a vessel common carrier lists authority for scheduled service on nine Bay Area routes,<sup>3</sup> unscheduled service throughout the Bay and its tributaries, and emergency service when requested by the Golden Gate Bridge, Highway and Transportation District. Blue & Gold is the principal player in regulated passenger service on the Bay.

On September 10, 1997, Red & White filed its Reply To and Motion to Strike Protest, and Blue & Gold followed on September 19, 1997 with its Response to Applicant's Motion to Strike Protest under Rule 45(f). All filings were timely.

On September 12, 1997, Red & White amended its application, seeking emergency interim operating authority to provide daily scheduled passenger ferry service between Richmond and San Francisco for the duration of the Bay Area Rapid Transit (BART) strike. In an all-party conference call the same day with the Assigned Administrative Law Judge (ALJ), Blue & Gold's counsel stated its position that it would not oppose a grant of emergency limited operating authority as requested for the duration of the strike. The end of the BART strike was announced very shortly thereafter and the issue became moot.

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<sup>3</sup> Attachment 3 to D.97-06-066: SF/Angel Island; SF/Sausalito; SF/Tiburon; SF/Alcatraz; SF/Stockton; SF/Angel Island/Vallejo; SF/Sacramento/Stockton; SF/Alameda; and Alameda/Angel Island.

On October 1, 1997, Red & White filed A.97-10-020 seeking a CPCN to operate scheduled passenger service between Richmond on the one hand, and San Francisco Ferry Building Pier ½ and Fisherman's Wharf Ferry Terminal Pier 43½ on the other. Red & White would make two morning round trips and two evening round trips on weekdays, and one morning and one evening round trip on weekends. At the same time, it filed a Motion for Limited Protective Order to protect its Exhibit F, "Projected Carrier Operating Income," which was granted by a Ruling of the Commission's Law and Motion ALJ on November 4, 1997. As before, Red & White sought *ex parte* treatment and interim authority during the pendency of its request. Several exhibits and much of the supporting narrative are identical between A.97-07-042 and A.97-10-020.

A.97-10-020 was not protested. By ALJ's Ruling issued November 21, 1997, A.97-07-042 and A.97-10-020 were consolidated.

#### Discussion

In determining whether to grant Red & White's request for a passenger ferry CPCN, we first examine the issue of public convenience and necessity for unscheduled passenger service, then for scheduled passenger service, and then whether Red & White demonstrates fitness to perform the passenger services sought. Note, however, that the public convenience and necessity test can be considered as encompassing fitness as well.<sup>4</sup> We will address separately the request for authority to transport passengers and their baggage to, from and between berthed or anchored vessels, and to transport freight.

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<sup>4</sup> "Public convenience and necessity is a test which encompasses a broad view of the needs of the particular class of public concerned, as well as the requirement that the applicant for a certificate establish reasonable fitness and financial responsibility to conduct the proposed service." (*Pacific Towboat and Salvage* (1982) 9 CPUC2d 482.)

**Public Convenience and Necessity — Unscheduled Passenger Service**

Much of Red & White's A.97-07-042 case for public convenience and necessity rests on the proposition that the Settlement anticipated its entry into the regulated market as a competitor to Blue & Gold. Indeed, Red & White would argue that to have been the major point behind the Settlement, and to thwart that entry now would be to unravel the very basis of the Settlement. So it is to the Settlement and the Commission's decision validating it that we look first.

The Attorney General was concerned lest Blue & Gold Fleet's acquisition of Red and White Fleet, Inc., destroy competition in the marketplace, and that marketplace consists of both unregulated Bay tour and regulated point-to-point services:

"The State, after an investigation conducted by its Attorney General, has concluded that the Acquisition...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..."

"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 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. Thus, 'competition' in the passenger ferry market consists of bidding for municipal contracts."

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' Settlement, p. 1.

' D.97-06-066, p. 20.

' D.97-06-066, p. 22.

So, while the Attorney General saw the problem to be especially acute in the unregulated Bay tour market, and while he keyed on services operating to and from Fisherman's Wharf, the effects would be felt strongly in the various other point-to-point ferry service markets as well.

The Attorney General's solution was to ensure that sufficient assets would reside in a second provider to represent a competitive check on Blue & Gold:

"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 close."

The plan was first to foster a vigorous unregulated Bay tour market, with the new entrant moving from that foundation into the regulated market, competing for the Alcatraz, Vallejo, and Alameda routes:

"The Attorney General states that since the ferry routes are regulated services, the Attorney General's Office focused on the unregulated Bay tour market."

"The Alcatraz market consists of ferry service to Alcatraz Island National Park. This service is currently provided by R&W Fleet [now Blue & Gold] 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."

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\* Settlement, p. 2.

\* D.97-06-066, p. 20.

\* D.97-06-066, p. 22.

"Finally, the Attorney General believes that the divested assets may provide the basis for a competitor capable of competing with Blue & Gold [Fleet,] L.P. for the Alcatraz and other ferry routes."<sup>11</sup>

The Attorney General would be careful to endorse only a viable competitor:

"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."<sup>12</sup>

That competitor was to be FWBCC:

"The new competitor, identified as Fisherman's Wharf Bay Cruise Corporation, was approved by the Attorney General and is unaffiliated with the applicants."<sup>13</sup>

"R&W Fleet will sell assets to a new competitor identified as [FWBCC]."<sup>14</sup>

It was recognized that FWBCC would not emerge as a full competitor in the regulated market immediately, in part because it would need a CPCN before it could offer point-to-point ferry services. Its major opportunities would have to await the bidding windows on the U.S. Park Service's Alcatraz contract, and the City of Vallejo and City of Alameda contracts, all of which are due to expire in 1998. At least initially, FWBCC's business would consist primarily of Bay cruise and charter services which are entirely outside of the Commission's jurisdiction.

The Settlement does accomplish what the Attorney General intended:

"The Settlement resolves the Attorney General's concerns about the anticompetitive implications of [Blue & Gold] Fleet's acquisition of [Red and White] Fleet while still allowing R&W Fleet to sell its assets. The Settlement accomplishes this by modifying the transaction proposed in

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<sup>11</sup> D.97-06-066, p. 20.

<sup>12</sup> Settlement, p. 5.

<sup>13</sup> D.97-06-066, p. 12.

<sup>14</sup> D.97-06-066, Finding 21.a [sic].

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 [Fleet,] L.P."<sup>15</sup>

In D.97-06-066, the Commission considered the Attorney General's concerns and endorsed his solution, recognizing that the Settlement would preserve (but not guarantee) continued Red & White/Blue & Gold competition. The Commission agreed that competition in the vessel common carrier market is in the public interest and that FWBCC is an appropriate entity to provide such competition:

"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."<sup>16</sup>

"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' competitors for the three markets. ... 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. 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."<sup>17</sup>

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<sup>15</sup> D.97-06-066, p. 12.

<sup>16</sup> D.97-06-066, p. 21.

<sup>17</sup> D.97-06-066, pp. 22-23.



"The Settlement will not adversely affect competition in the passenger ferry, Alcatraz, or Bay tour markets."<sup>12</sup>

Commission approval of the acquisition in D.97-06-066 was predicated not only on divesting assets, but on using those assets to compete against Blue & Gold in the vessel common carrier market. Having the Alcatraz, Vallejo, and Alameda contracts all due to expire in 1998 underscores the importance of there being more than one qualified provider available to compete in the regulated market. Not having a second provider to compete would be contrary to the public convenience and necessity. In this regard, Red & White now seeks to execute the Commission's intent in D.97-06-066.

Separate and distinct from whether additional competition is needed and was anticipated, we also see an important benefit from the additional capacity Red & White would bring to the point-to-point ferry market on the Bay. In A.97-10-020, Red & White refers to the loss of the San Francisco Bay Bridge in the October 17, 1989 Loma Prieta earthquake, and the emergency ferry service between Richmond and San Francisco it engendered. In the immediate aftermath of Loma Prieta, Bay Area traffic suffered disruption of immense proportions. Scheduled and unscheduled ferry service was a major contributor to removing vehicles from traffic-jammed highways, and getting Bay Area workers to and from their jobs so they could to keep the Bay Area's wheels of commerce turning. During the days following the earthquake, we issued emergency supplemental operating authority to Harbor Carriers, Inc. (predecessor to Red and White Fleet, Inc.) for additional scheduled and unscheduled ferry service between San Francisco and the Port of Oakland and between San Francisco and the Port of Richmond," and between San Francisco and Alameda Gateway and San Francisco and

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<sup>12</sup> D.97-06-066, Finding of Fact 33.

<sup>13</sup> D.89-10-042, October 23, 1989.

the Berkeley Marina.<sup>20</sup> Had there not been available capacity above the pre-Loma Prieta demand, the traveling public would have suffered even more greatly than it did.

Blue & Gold raises several other points related to the public convenience and necessity in its protest: (1) the quality and quantity of service Blue & Gold is already providing; (2) whether the public's needs could be met by existing carriers' capacities; (3) whether Red & White's market entry will have detrimental effects on Blue & Gold; and (4) the geographic scope of Red & White's request, coupled with a lack of showing of demand for service to any specific points.

In arriving at a finding that Blue & Gold was fit to assume the Commission-regulated operations of Red and White Fleet, we did indeed observe and comment on Blue & Gold's favorable service record.<sup>21</sup> Likewise, we noted that the additional vessels Blue & Gold acquired from Red and White Fleet would increase its capacity and further enhance its service levels. But we have already discussed how we view the potential for competition in the point-to-point ferry market as beneficial to the public convenience and necessity, and how that concern led the Attorney General to pursue and the Commission to approve the Settlement, and in D.97-06-066 to endorse a new competitor to Blue & Gold. Our decision to certificate Red & White does not and need not rely on poor service by Blue & Gold.<sup>22</sup>

There is no evidence to show that existing capacity is either sufficient or insufficient to carry as many passengers as desire to travel (although, in times of emergency, demand may well outstrip supply). Even if sufficient current capacity were shown, however, that would not lead to a finding that there is no public benefit to adding capacity. In fact, we believe that promoting competition will benefit the public,

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<sup>20</sup> D.89-11-031, November 3, 1989.

<sup>21</sup> D.97-06-066, pp. 16-17.

<sup>22</sup> "PU Code § 1007 only requires an affirmative finding. It is not necessary to make a negative finding about the service provided by other carriers" (*Harbor Carriers, Inc.* (1985) 18 CPUC2d 110, 121.)

certificating an additional carrier will enable that competition, and with the competitive carrier in this instance will come increased capacity in the form of additional vessels.

And, Blue & Gold's protest notwithstanding, to certificate Red & White does not require that we find that its market entry will have no detrimental effects on Blue & Gold. It is well-established that the Commission will not limit vessel common carrier entry to protect incumbents from competition, and will permit competition whenever to do so is not adverse to the public interest.<sup>20</sup>

Blue & Gold objects to the geographic scope of Red & White's request, coupled with a lack of showing of need for any specific points or routes. The protest also notes, however, that, "Geographically, [Blue & Gold's] operating authority is as extensive as the authority being sought by applicant..." Thus, the extent of authority Red & White desires is not exceptional. For the unscheduled passenger service Red & White proposes to provide, Blue & Gold cites no requirement that the carrier justify demand on each possible route, nor do we know of such a requirement. And there are reasons for not arbitrarily limiting the geographic area: competitive flexibility, and the burdens and delays of applying anew for each incremental addition. Any artificial limitation we were to place on Red & White that potentially prevented it from accepting unscheduled passenger business that Blue & Gold could take would make that much more difficult Red & White's financial and operational maturity as a competitor. That would run contrary to our goal of promoting competition. And the Commission has found itself on more than one recent occasion in the uncomfortable position of granting vessel carrier authority *nunc pro tunc* when providers were unable to submit their applications

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<sup>20</sup> *Pacific Towboat and Salvage* (1982) 9 CPUC2d 475, 486, D.82-07-110; and *Harbor Bay Maritime* (1993) 43 CPUC2d 465, D.92-03-040.

in time to meet their contractual obligations on scheduled routes." Granted, there are differences as between scheduled and unscheduled service, but were Red & White to face that limitation in the unscheduled market where lead times can be measured in days, it would simply lose the business.

We conclude that the public convenience and necessity require Red & White to offer the unscheduled passenger vessel service for which it requests authority in A.97-07-042.

**Public Convenience and Necessity - San Francisco/Richmond Scheduled Service**

In A.97-10-020, Red & White seeks a CPCN to operate scheduled passenger service between Richmond on the one hand, and San Francisco Ferry Building Pier ½ and Fisherman's Wharf Ferry Terminal Pier 43½ on the other, and between Pier ½ and Pier 43½. Red & White would make two morning round trips and two evening round trips on weekdays, and one morning and one evening round trip on weekends. It does not propose to transport freight on this route.

In support of the public need for San Francisco to Richmond scheduled service, Red & White cites demand, local support, and commute and travel benefits.

According to the application, the emergency ferry service between San Francisco and Richmond that was established immediately after the Loma Prieta earthquake saw ridership of almost 1,000 passengers daily while the Bay Bridge was closed, dropping to between 300 and 400 daily after the bridge reopened. Service was discontinued in March, 1990, and the route has remained unserved since that time.

A letter from Penterra Company (Penterra) included in Exhibit G paints a glowing picture of growth prospects in the Richmond Marina Bay area that Red & White would tap. Penterra points to the Richmond Redevelopment Agency and the

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\* *Blue & Gold Fleet* D.94-07-066: "Prospective applicants must be aware that the Commission cannot, in the proper exercise of its power, grant operating authority on short notice, except in the direst of circumstances. To do so would subvert the open public process to which the Commission adheres." See also, *Blue & Gold Fleet* D.91-07-049, and *Blue & Gold Fleet* D.95-10-012.

State Enterprise Zone, 2.3 million square feet of new offices that have existing construction approvals, with tenants ranging from high-tech to government, and several thousand residential units. Penterra's letter also calls attention to an additional one million square feet including an EPA laboratory building in the U.C. Berkeley Marina Bay Field Station, and an additional 800,000 square feet of space to be developed within the next decade. It also mentions several other projects expected in the future. Penterra believes that Red & White has the potential to tap a large number of employee commute trips between these developments and San Francisco. "In conclusion," Penterra writes, "a link between Marina Bay, Ferry Point and San Francisco will help accomplish the goals for the State Enterprise Zone and Richmond Redevelopment Agency's charge and mitigation requirements under Measure C for the State of California."

Red & White also includes in Exhibit G three more supporting letters from Richmond groups. The Richmond Chamber of Commerce states, "Your presence would go a long way in complementing our economic development strategies." Ladbroke Racing and the Richmond Museum Association both offer encouragement, writing of regional opportunity and the community and environmental benefits Red & White would foster.

Lastly, the application describes in general terms the advantages ferries bring by offering a commute alternative to the automobile: reduced number of auto commute trips resulting in cleaner air and less traffic congestion, a modal alternative to BART and AC Transit, comparable transit times, and a greater focus than other modes on the waterfront community.

Red & White has included in Exhibit C (Rates and Rules Governing Service) to A.97-10-020 its proposed fares. They do not appear to be out of the range we would expect for such service.

We conclude that the public convenience and necessity require Red & White to offer the San Francisco/Richmond scheduled passenger vessel service for which it requests authority in A.97-10-020.

### **Fitness for Passenger Service**

In approving the Settlement, we noted that we had already received some indication of FWBCC's fitness:<sup>\*</sup>

"...[A]pplicants provided information demonstrating that the new competitor has sufficient financial and technical resources to be a viable competitor against Blue & Gold [Fleet,] L.P..."

That observation, while helpful, is not a sufficient basis for finding FWBCC affiliate Red & White's fitness here. Instead, we turn to the showing included with each application. Scheduled and unscheduled vessel common carrier services require very similar fitness qualifications of the provider, and indeed, the two applications rely on considerable common discussion to support fitness. To be found fit overall, Red & White must be determined to be both operationally qualified and financially qualified. Within operations, safety is of paramount importance.

In both applications Red & White lists the qualifications of its four key personnel. They are the President and General Manager, Executive Vice President for Marketing, Chief Financial Officer, and Port Captain. Each has considerable marine industry-connected experience, much of which, in fact, comes from performing similar duties with the old Red and White Fleet. We agree that they are fully qualified.

In the transaction following the Settlement, FWBCC acquired from Red and White Fleet its "Red and White" name, three vessels, Red and White's leasehold interest in Pier 43½, and its equipment, signage, and ticket booth operations at Fisherman's Wharf. Since that time, it has been using those facilities to provide unregulated Bay tour and charter services under the Red and White name. The three vessels were noted in the Settlement and in our decision approving it as being suitable for operation on the Bay:

"[The three vessels transferred shall be] in good operating condition [ , meaning] that on the date the sale closes, each vessel being sold will

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<sup>\*</sup> D.97-06-066, p. 24.

have on board all certificates required under applicable federal, state and local law for the vessels' current service in the Red and White Fleet."<sup>2</sup>

"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."<sup>3</sup>

In addition, the CPCN we issue will require, "No vessel shall be operated unless it has met all applicable safety requirements, including those of the United States Coast Guard."

All vessels to be used will be operated under the supervision of Red & White's experienced Port Captain by experienced masters and crew, many of whom worked for the old Red and White Fleet.

Red & White has no long-term debt or assets; it will lease its equipment and vessels on an as-needed basis from FWBCC. Red & White represents that it had \$25,000 in the bank at the time the applications were filed. For the San Francisco/Richmond run, it will borrow from FWBCC and/or a commercial bank the resources needed to cover initial operating losses, and it anticipates operating profitably in 1998.

Blue & Gold raises three protest points related to fitness: (1) Golden Gate Scenic Steamship Corporation, shown as the owner of the three vessels but not otherwise identified in A.97-07-042, would more properly be the applicant; (2) Red & White has not made a showing of docking rights, other than at Pier 43½; and (3) the vessels Red & White would use are not available because they are in daily use for unregulated Bay tour service.

In its Reply, Red & White identifies Golden Gate Scenic Steamship Corporation as parent of both FWBCC and Red & White. With that clarification, we see that under

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<sup>2</sup> Settlement, pp. 4-5.

<sup>3</sup> D.97-06-066, footnote 19.

Public Utilities (PU) Code § 211,<sup>2</sup> any of the three affiliates (Golden Gate Scenic Steamship Corporation, FWBCC, Red & White) could have been designated and applied for the CPCN herein. Red & White has been so designated and is properly before us.

FWBCC obtained docking rights to Pier 43½ as part of the acquisition anticipated in the Settlement, and currently uses that location as its operating hub for Bay tours and charters. It will have available to it the various public piers, and may negotiate for landing rights to other, private sites, in the same way any other regulated or unregulated carrier would. It specifically notes, for example, that it plans to use San Francisco Ferry Building Pier ½ for its San Francisco/Richmond scheduled service. While we could impose an explicit restriction against providing regulated service to or from any sites to which it does not have proper right of access, we find that unnecessary and will not do so.

Red & White's three vessels are sufficient in number to conduct the regulated passenger operations it proposes in A.97-07-042 and A.97-10-020. We will leave it up to Red & White to schedule its vessels to balance its regulated versus unregulated obligations, or to find alternatives if needed. It may, e.g., choose to utilize slack vessel time, obtain additional boats by lease or purchase, cut back on unregulated operations, or adjust its operations in some other way. Also, the proposed tariff attached to A.97-07-042 as Exhibit C, Rates & Rules Governing Service, Cal P.U.C. No. 1, Rule 6, states, "The carrier reserves the right... to decline service when vessels are not available." It has properly not included this reservation in its proposed tariffs for San Francisco/Richmond scheduled service. We also note that with its CPCN may come the opportunity to bid on the Oakland and Vallejo contracts which expire in 1998, and those runs are provided using vessels owned by the Cities.

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<sup>2</sup> PU Code § 211 states, "Common carrier includes: ...(b) Every corporation or person, owning, controlling, operating, or managing any vessel used in the transportation of persons or property for compensation..."



We conclude that Red & White is fit to provide passenger vessel service as requested in A.97-07-042 and A.97-10-020.

#### **Water Taxi and Transport of Property by Vessel**

Many of the bases that support our finding of public need for Red & White's scheduled and unscheduled passenger service do not likewise apply to water taxi service and transport of property by vessel. For example, the Settlement dealt only with passenger services, and our decision approving the Settlement did not extinguish Red and White Fleet's water taxi and transport authorities but rather transferred them to Crowley Launch and Tugboat Co., an affiliate, where they reside today. There has been no contention that these services become critical in facilitating commerce or relieving congestion in times of emergency (e.g., the BART strike, or the Loma Prieta earthquake).

Moreover, Red & White has not attempted to respond to Blue & Gold's protest that its passenger vessels are unsuitable for transporting general freight, and are too large and expensive to operate in the transport of passengers, baggage and/or freight to and from anchored or berthed vessels. As Blue & Gold notes, all three vessels are shown on their U.S. Coast Guard Certificates of Inspection<sup>\*</sup> as being certified for passenger service.

The inapplicability of the Settlement to water taxi service and transport of property by vessel, coupled with Red & White's lack of an affirmative showing and its silence in response to Blue & Gold's protest in this area, leave us with insufficient evidence on the record to judge the merits of its request. There are factual matters in dispute that can only be resolved through the receipt of additional evidence. It would therefore not be appropriate to grant *ex parte* Red & White's A.97-07-042 request for a vessel common carrier certificate for water taxi service and the transport of property.

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<sup>\*</sup> A.97-07-042, Exhibit E.

### **Blue & Gold's Protest and The Need for Hearings**

Blue & Gold protested A.97-07-042 in its entirety, requesting a hearing at which it would show:

- "1. A grant of this application could jeopardize the continued ability of protestant to provide its full array of vessel common carrier service in San Francisco Bay and its tributary waters;
- "2. There are no demonstrated public benefits to be derived from a grant of the application; and
- "3. The public convenience and necessity do not require grant of this application."

In its Reply To and Motion to Strike Protest, Red & White contends that Blue & Gold's protest should be stricken because it fails to raise legitimate grounds for either denying A.97-07-042 or holding evidentiary hearings, as required by the Rules of Practice and Procedure, Rule 44.2.\* We disagree and will deny Red & White's motion to strike. The protest does cover each of the points required by Rule 44.2 and will be judged on its merits.

We have examined the contentions in Blue & Gold's protest and conclude that each is either unsupportable with respect to unscheduled passenger vessel common carrier service, or would not lead us to deny passenger authority even if substantiated. Public convenience and necessity and Red & White's fitness to provide the service have been demonstrated. Were we to grant hearings on this authority, it would but cost

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\* Rule 44.2 provides, "A protest must state the facts constituting the grounds for the protest, the effect of the application on the protestant, and the reasons the protestant believes the application, or a part of it, is not justified. If the protest requests an evidentiary hearing, the protest must state the facts the protestant would present at an evidentiary hearing to support its request for whole or partial denial of the application."

Red & White valuable time and both parties resources which could better be put to use providing service, with little prospect that Blue & Gold would prevail.

In reaching our conclusion, we have drawn in part on D.97-06-066 and the Settlement. Blue & Gold was a party in the proceeding that led to that decision, and Blue & Gold's parent and affiliate were parties to the Settlement. Blue & Gold has thus had a hand in developing that record.

Red & White's A.97-10-020 seeking a CPCN to operate scheduled passenger service between Richmond and San Francisco was not protested. Red & White has shown that the public convenience and necessity require the service, and that it is fit to serve. A public hearing is not needed.

We agree with Blue & Gold that the record before us is insufficient to decide Red & White's request for water taxi and transport of property authority. An affirmative showing is lacking, and there are still factual matters that are in dispute. We will need further evidence before concluding that the public convenience and necessity and Red & White's fitness justify issuing the water taxi and transport of property authorities requested in A.97-07-042.

PU Code § 1007 provides in relevant part:

"No corporation or person shall begin to operate or cause to be operated any vessel for the transportation of persons or property, for compensation, between points in this state, without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation... The commission may, with or without hearing, issue the certificate as prayed for, or refuse to issue it, or issue it for the partial exercise only of the privilege sought, or issue it for operation between certain points only, and may attach to the exercise of the rights granted by the certificate such terms and conditions as, in its judgment, the public convenience and necessity require."

Accordingly, we will grant to Red & White *ex parte* the authority it requests for unscheduled and scheduled passenger vessel common carrier service. We will set Red & White's request for water taxi and transport of property authority for hearing.

### **Findings of Fact**

1. Blue & Gold filed a timely protest of effectively every request in Red & White's A.97-07-042 to provide unscheduled service.

2. Red & White's A.97-10-020 to provide scheduled service between San Francisco and Richmond, and between San Francisco Ferry Building Pier ½ and Fisherman's Wharf Ferry Terminal Pier 43½, was not protested.

3. Shortly after Red & White amended A.97-07-042 to seek emergency interim operating authority for daily scheduled passenger ferry service between Richmond and San Francisco for the duration of the BART strike, the end of the strike was announced and the issue became moot.

4. The Settlement was intended to foster competition in the unregulated Bay tour and regulated ferry market by ensuring that sufficient assets would reside in a second provider to represent a competitive check on Blue & Gold.

5. FWBCC was intended to be the new Bay tour and ferry service provider contemplated in the Settlement.

6. FWBCC and Red & White are affiliates. Golden Gate Scenic Steamship Corporation is the parent of both FWBCC and Red & White.

7. For purposes of the Settlement, the regulated ferry market includes, but is not limited to, the Alcatraz, Vallejo, and Alameda ferry routes.

8. In D.97-06-066, the Commission considered the Attorney General's concerns and endorsed his solution, recognizing that the Settlement would preserve (but not guarantee) continued Red & White/Blue & Gold competition.

9. The Attorney General in proposing the Settlement, and the Commission in approving it, recognized that FWBCC would not emerge as a full competitor in the regulated market immediately, in part because it would need a CPCN before it could offer point-to-point ferry services. FWBCC's major opportunities would have to await the bidding windows on the U.S. Park Service's Alcatraz contract, and the City of Vallejo and City of Alameda contracts, all of which are due to expire in 1998.

10. Commission approval of the acquisition in D.97-06-066 was predicated not only on divesting assets, but on using those assets to compete against Blue & Gold in the vessel common carrier market. In this regard, Red & White now seeks to execute the Commission's intent in D.97-06-066.

11. Competition in the passenger vessel common carrier market on San Francisco Bay is in the public interest. Not having a viable alternate provider to compete in the regulated scheduled and unscheduled passenger ferry market would be contrary to the public convenience and necessity.

12. There is an important public benefit from the additional capacity Red & White would bring to the point-to-point passenger ferry market on the Bay.

13. The geographic extent of the authority Red & White requests in A.97-07-042 is not exceptional.

14. For the unscheduled passenger service Red & White proposes to provide, there is no requirement that the prospective carrier justify demand on each possible route.

15. The emergency passenger ferry service between San Francisco and Richmond that was established immediately after the Loma Prieta earthquake was discontinued in March, 1990, and the route has remained unserved since that time.

16. There is both current demand and a potential for future growth in the Richmond Marina Bay area that Red & White's San Francisco/Richmond scheduled passenger service would tap.

17. Red & White's San Francisco/Richmond passenger ferry service would benefit the public by providing an alternative mode of travel between those points.

18. Scheduled and unscheduled passenger vessel services require very similar fitness qualifications of the provider.

19. Red & White provides unregulated charter and Bay tour service on San Francisco Bay.

20. The vessels Red & White proposes to use will be operated under the supervision of its experienced Port Captain by experienced masters and crew.

21. The information Red & White sets forth in A.97-07-042 and A.97-10-020 shows that its key personnel are fully qualified to provide the passenger vessel services it proposes to offer.

22. The three vessels Red & White proposes to use were noted in the Settlement and in the Commission's decision approving it as being suitable for operation on San Francisco Bay.

23. Red & White's three vessels are sufficient in number to conduct the regulated operations it proposes in A.97-07-042 and A.97-10-020.

24. Red & White has docking rights at San Francisco's Pier 43½, and may negotiate for landing rights to other public and private landing sites in the same way any other regulated or unregulated carrier would.

25. Red & White is financially and operationally fit to provide unscheduled and San Francisco/Richmond scheduled passenger vessel service.

26. Many of the bases that support our finding of public need for Red & White's scheduled and unscheduled passenger service do not likewise apply to water taxi service and transport of property by vessel.

27. Red & White has not responded to Blue & Gold's protest that its passenger vessels are unsuitable for transporting general freight, and are too large and expensive to operate in the transport of passengers, baggage, and/or freight to and from anchored or berthed vessels.

28. The contentions in Blue & Gold's protest are either unsupportable with respect to unscheduled passenger vessel common carrier service, or would not lead us to deny passenger authority even if substantiated.

29. Blue & Gold was a party in the proceeding that led to D.97-06-066, and Blue & Gold's parent and affiliate were parties to the Settlement. Blue & Gold has had a hand in developing the record in that proceeding.

30. Public convenience and necessity and Red & White's fitness to provide the passenger services sought in A.97-07-042 and A.97-10-020 having been demonstrated, granting hearings on this authority would cost Red & White valuable time and both

parties resources which could better be put to use providing service, with little prospect that Blue & Gold would prevail.

#### Conclusions of Law

1. Red & White is properly an applicant for the authority requested in A.97-07-042 and A.97-10-020.
2. PU Code § 1007 requires that Red & White obtain a CPCN before it may offer the services proposed in A.97-07-042 and A.97-10-020.
3. Blue & Gold's protest covers each of the points required by Rule 44.2 and should be judged on its merits. Red & White's motion to strike Blue & Gold's protest should be denied.
4. Red & White's A.97-07-042 amendment seeking emergency interim operating authority to provide daily scheduled passenger ferry service between Richmond and San Francisco for the duration of the BART strike should be dismissed as moot.
5. To certificate Red & White does not require a finding that Blue & Gold provides poor service, or that Red & White's market entry will have no detrimental effects on Blue & Gold.
6. A public hearing is not needed to ascertain whether the public convenience and necessity and Red & White's fitness justify issuing the passenger vessel authority requested in A.97-07-042 and A.97-10-020.
7. Red & White is fit to provide passenger vessel service as requested in A.97-07-042 and A.97-10-020.
8. The public convenience and necessity require that Red & White offer the unscheduled passenger vessel service for which it requests authority in A.97-07-042.
9. The public convenience and necessity require that Red & White offer the San Francisco/Richmond scheduled passenger vessel service for which it requests authority in A.97-10-020.
10. Red & White Fleet should be granted *ex parte* a certificate of public convenience and necessity to perform vessel common carrier operations in the transportation of passengers and their baggage between navigable points on San Francisco Bay, San

Pablo Bay, the Oakland Estuary, Suisun Bay, and all navigable tributaries up to the Sacramento and Stockton areas; and for scheduled service between Richmond on the one hand, and San Francisco Ferry Building Pier ½ and Fisherman's Wharf Ferry Terminal Pier 43½ on the other hand, and between San Francisco Ferry Building Pier ½ and Fisherman's Wharf Ferry Terminal Pier 43½.

11. A hearing will be needed before a conclusion may be reached as to whether the public convenience and necessity and Red & White's fitness justify issuing the water taxi service and transport of property authorities requested in A.97-07-042.

12. The order that follows should be made effective immediately so that Red & White may begin offering the services it proposes without delay.

### **INTERIM ORDER**

#### **IT IS ORDERED that:**

1. A Certificate of Public Convenience and Necessity is granted to Red & White Ferries, Inc., (Red & White) authorizing it to operate as a common carrier by vessel, as defined in Public Utilities (PU) Code §§ 211(b) and 238, between the points and over the routes set forth in VCC-81 appended hereto, to transport persons and their baggage.

2. As a condition of this grant of authority, Red & White shall:

- a. File with the Commission's Rail Safety & Carriers Division written acceptance of this authority within 30 days after the effective date of this order.
- b. File tariffs and begin offering the authorized service within 120 days after the effective date of this order. Tariffs shall become effective 10 days after filing, and shall state the date service will begin.
- c. Comply with General Order Series 87, 104, 111, and 117.
- d. Maintain accounting records in conformity with the Uniform System of Accounts.



- e. Remit to the Commission the Transportation Reimbursement Account fee required by PU Code §§ 403 and 421 et seq. when notified by mail to do so.
  - f. File with the Commission's Rail Safety & Carriers Division evidence of compliance with all safety rules and regulations of the United States Coast Guard, including evidence that the vessels to be used have been inspected and certified for the operations authorized in this decision.
3. Red & White's motion to strike Blue & Gold Fleet, L.P.'s protest is denied.
4. Blue & Gold Fleet, L.P.'s protest is granted in part and denied in part, as set forth herein.
5. Red & White's First Amendment to Application 97-07-042 and Request for Interim Operating Authority is dismissed as moot.
6. This proceeding shall remain open for hearings and a further decision on whether to grant Red & White's Application 97-07-042 request for authority to transport passengers and their baggage to, from and between berthed or anchored vessels, and to transport property.

This order is effective today.

Dated February 4, 1998, at San Francisco, California.

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

T/MM

Appendix VCC-81

Red & White Ferries, Inc.  
(a corporation)

Original Title Page

CERTIFICATE  
OF  
PUBLIC CONVENIENCE AND NECESSITY  
AS A VESSEL COMMON CARRIER  
VCC-81

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

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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.  
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Issued under authority of Decision 98-02-008, dated  
February 4, 1998, of the Public Utilities Commission of  
the State of California in Applications 97-07-042 and 97-10-020.

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

Red & White Ferries, Inc., 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 carriage by vessels, for the transportation of passengers and their baggage, 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" or "charter" basis. The term "on-call", as used herein, refers to service which is authorized to be rendered dependent on the demands of passengers. The term "charter," as used herein, refers to service in which the vessel is engaged, for a specified charge, by a person or group of persons for the exclusive use of said person or group of persons. The tariffs shall show the conditions under which each authorized "on-call" or "charter" service will be rendered and the transportation shall not be performed on an individual fare basis.
- c. The tariffs and timetables shall show the conditions under which each authorized scheduled service will be rendered. All of the stop points shall be described in the timetable filed with the Commission.

Issued by California Public Utilities Commission.

Decision 98-02-008, Applications 97-07-042 and 97-10-020.

SECTION II.

A. Scheduled Service

Richmond - San Francisco

Commence from Richmond Harbor, in the City of Richmond, then over the San Francisco Bay waters to the vicinity of the San Francisco Ferry building and to Fisherman's Wharf Pier, San Francisco.

This route authorizes the transportation of passengers and their baggage between the Ferry Building and Fisherman's Wharf.

B. Non-Scheduled Service

Between navigable points on the Bays of San Francisco, San Pablo, and Suisun, Oakland Estuary, and all navigable tributaries northerly to the Sacramento and Stockton areas.

Issued by California Public Utilities Commission.

Decision 98-02-008, Applications 97-07-042 and 97-10-020.