

Decision 98-09-003 September 3, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Red & White Ferries, Inc. (VCC-81) for a Certificate of Public Convenience and Necessity to Establish and Operate Scheduled and On-Call Vessel Common Carrier Service between the Aircraft Carrier Hornet Docked in Alameda on the one hand and San Francisco Ferry Building Pier ½ and Fisherman's Wharf Ferry Terminal Pier 43½ on the other hand.

ORIGINAL

Application 98-05-017
(Filed May 11, 1998)

OPINION

Summary

This decision grants authority for Red & White Ferries, Inc., (Red & White) to establish and operate scheduled vessel common carrier service between the aircraft carrier USS Hornet docked in Alameda on the one hand and San Francisco Ferry Building Pier ½ and Fisherman's Wharf Ferry Terminal Pier 43½ on the other hand, and to revise its currently-effective tariffs for nonscheduled service between those points (SF/Hornet ferry service). Red & White's Certificate of Public Convenience and Necessity (CPCN) is amended to reflect scheduled SF/Hornet ferry service. No CPCN amendment is needed for Red & White to provide nonscheduled SF/Hornet ferry service. Red & White shall file tariffs including rates and timetables. Red & White's Motion to Dismiss the application is denied; its Motion for Limited Protective Order is granted.

Background

In Decision (D.) 98-02-008, the Commission certificated Red & White (VCC-81) to provide vessel common carrier service for the nonscheduled transportation of passengers and their baggage between navigable points on San

Francisco Bay and vicinity, and scheduled service between Richmond and San Francisco. Red & White has not yet begun its Richmond/San Francisco service. Red & White affiliate Fisherman's Wharf Bay Cruise Corporation presently provides nonregulated charter and San Francisco Bay sightseeing tour service under the name Red & White Fleet.

According to the application, the Aircraft Carrier Hornet Foundation (Hornet Foundation) has asked Red & White to provide ferry transportation between San Francisco and the aircraft carrier USS Hornet docked in Alameda. Hornet Foundation is a nonprofit entity created to convert USS Hornet into an air, sea and space museum which it anticipates opening to visitors in July, 1998.

Red & White will provide a minimum of two scheduled trips per day in each direction from July through September. Tickets will be sold on a round-trip basis only and will include the Hornet museum admission charge which Red & White will collect and remit to Hornet Foundation. Passengers will not be allowed to buy one-way tickets or tickets that do not include museum admission. Red & White will also provide on-call nonscheduled service to and from San Francisco to groups of 200 or more at hourly rates the same as those established in D.98-02-008 for nonscheduled service. Unlike scheduled service rates, nonscheduled rates do not include admission to the Hornet museum.

Red & White asks the Commission to determine that under the "loop exemption" described in various Commission decisions it should not be required to obtain a CPCN before providing the services described. Should the Commission determine that a CPCN is necessary, however, it requests authority be granted expeditiously through an *ex parte* decision in light of the impending opening of the Hornet museum. Red & White also asks that it not be required to include in its tariffs the rates for service. The application attaches a proposed

tariff, including rates for both scheduled and nonscheduled service, should the Commission determine both a certificate and tariffs to be necessary.

Notice of the application appeared in the Commission's Daily Calendar on May 13, 1998, and Red & White provided notice to others as required in the Commission's Rules of Practice and Procedure, Rule 21(k). The Commission has not received protests or responses.

Discussion

Public Convenience and Necessity

Red & White intends to provide SF/Hornet service with the same vessels and key personnel it employs for its nonregulated Bay tour and charter services and its other, Commission-regulated operations. In granting a certificate in D.98-02-008, we discussed fully Red & White's qualifications as a potential vessel common carrier and concluded that it is financially and operationally fit to provide both nonscheduled and scheduled passenger service. Red & White refers to those qualifications for this application, noting that the same personnel and vessels will be used to provide service to USS Hornet. One additional vessel, *Harbor King*, has been added to its fleet since that time. Current Coast Guard certificates for all four vessels have been provided as Exhibit D to the application. Red & White has docking rights at Fisherman's Wharf Ferry Terminal Pier 43½ and has use of San Francisco Ferry Building Pier ½ in San Francisco, and will use docking facilities provided by Hornet Foundation in Alameda. Red & White is fit to provide the service it proposes.

Hornet Foundation estimates that its museum will draw approximately 450,000 visitors annually. Of those, about 150,000 will take Red & White's proposed ferry service from San Francisco. In its April 12, 1998 letter to Red & White (Exhibit E to the application), Hornet Foundation describes in glowing terms its expectations that the USS Hornet will become a premier tourist

attraction, special events platform and youth learning center. Hornet Foundation points out the benefits ferry service would offer in promoting attendance while at the same time reducing traffic congestion and air pollution, particularly given the difficulties of moving people in and out of Alameda.

Red & White touts the environmental benefits ferries foster as an alternative to highway transportation. Given the number of annual visitors to the Bay Area, direct water transportation is clearly the most efficient means of transporting San Francisco visitors and local residents alike to the museum. Without ferry service, most would be forced to take cars or busses, both of which tend to increase traffic congestion and air pollution and could dissuade potential attendees.

We conclude Red & White's proposed scheduled and nonscheduled service will indeed serve the public convenience and necessity.

Red & White's Current Non-scheduled Authority

Red & White's current CPCN authorizes it to provide "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," on both on-call and charter bases. In issuing that certificate by D.98-02-008, we expressly did not grant Red & White authority to transport passengers to and from anchored or berthed vessels, but rather stated our need for additional information to be provided through evidentiary hearings. Red & White later withdrew that portion of its request. The question may now arise whether service to USS Hornet, arguably a "berthed vessel," is appropriate given our earlier determination. The service Red & White proposes to offer in A.98-05-017 is decidedly different from the water-taxi service contemplated in A.97-07-042 which gave rise to D.98-02-008. While the application here is not entirely clear whether the docking facilities Hornet

Foundation will provide in Alameda are piers, docks, platforms, or of a similar fixed-landing nature, it is clear that the USS Hornet should be regarded as a permanent or semi-permanent fixture on the Alameda waterfront in contrast to the docked or berthed vessels that are the usual origins or destinations for water-taxi service. Further, one of the major questions we sought to explore was whether Red & White's vessels might be too large and expensive to operate in the transport of passengers to and from anchored or berthed vessels. Given point-to-point service and the high passenger volumes that Red & White and Hornet Foundation project, that concern does not arise in the application before the Commission today. We thus observe that Red & White's nonscheduled SF/Hornet ferry service falls within the scope of its currently-effective CPCN. All it need do is file the revised nonscheduled service tariff provisions for this specific route as it proposes.

Red & White's Motion to Dismiss

On June 18, 1998, Red & White filed its Motion to Dismiss A.98-05-017 on the grounds that a CPCN is not required for the proposed service.

Public Utilities (PU) Code § 1007 provides:

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...

In *Golden Gate Scenic Steamship Lines, Inc. v. Public Utilities Commission*, 57 C.2d 373 (1962), the Court held that the Commission does not have the authority under PU Code § 1007 to require a CPCN for a vessel transporting persons for compensation starting at a San Francisco wharf, carrying the passengers in a

continuous loop around the Bay without touching or stopping any other point, and returning to the point of embarkation.

In subsequent decisions the Commission has from time to time addressed and refined its policy in this area, sometimes widening, sometimes narrowing what is now referred to as the "loop exemption."

In *Harbor Carriers, Inc.*, D.81850, 75 CPUC 529 (1973), the Commission on rehearing determined that the purpose of a vessel stop in terms of the passenger's intentions, conduct or length of stay is irrelevant in determining an alleged loop exemption. Red & White points to *Alaska Tour & Marketing Services*, D.93799 (excerpted at 7 CPUC 2d 302 (1981)), in which the Commission broadened the loop exemption to include cruise ship voyages during which the passenger may temporarily off-board, leaving his baggage, only to return and complete his trip to the point of origin.

Then, in D.85-08-038, *H. Tourist, Inc., dba Catalina Cruises v. Island Passenger Service Corporation*, 18 CPUC 2d 527 (1985), the Commission set forth the criteria under which it would evaluate future loop exemption claims:

As we made clear in the *Alaska Tour* cases, our decision on rehearing in *Harbor Carriers* went beyond good legal analysis in categorizing *all* transportation which allows passengers to disembark as transportation 'between points in this State' and, therefore, within our jurisdiction under Section 1007. Clearly the circumstances of the disembarkation must be considered. Certainly for the loop exemption to apply any off-boarding must be temporary. Furthermore, if there is any off-boarding it becomes necessary to look at the type of service offered in order to determine whether the loop exemption applies.

In order to avoid the promotion of uncertainty regarding this matter, we set forth, as a guideline, some factual circumstances which generally should be made to appear for a vessel not to be within the purview of Section 1007.

Conclusion of Law #2: The loop exemption to Section 1007 should not apply unless the vessel's operations meet all of the following criteria:

- (a) The vessel's trip begins and ends at the same point and is continuously in force during the interim.**
- (b) At any stop en route called for in the trip, the passengers, or any of them, may remain aboard.**
- (c) At any stops en route the vessel shall be standing by and continuously be available to the passengers who may have gone ashore.**
- (d) There shall be no change in the entity or composition of the passengers during the vessel's operation from the point of origin to its return thereto.**

In its Motion to Dismiss A.98-05-017, Red & White acknowledges that it may not meet all of these criteria:

In comparing Applicant's proposed service to the guidelines established in *Catalina Cruises*, the one difference that emerges is that Applicant's vessels may not be standing by and continuously available for passengers who have gone ashore. With respect to the other three factors, Applicant's service will begin and end at the same point, passengers can remain on-board the vessel, and all passengers who visit the museum via Applicant's proposed service must return by Applicant's vessels.

While Applicant's vessels may not be continuously standing by while passengers are visiting the museum, it is unclear from *Catalina Cruises* what specific legal point or Commission policy turns on such a factor. In that decision, the Commission did not explain why requiring a vessel to stand-by while passengers have gone ashore is a key element in exempting service from section 1007 regulation and Applicant does not believe such a requirement should be applied in the instant case, particularly when the

circumstances and duration of passengers off-boarding Applicant's vessels to visit the USS Hornet Museum are considered.

While Red & White may meet some of the criteria, it has not unambiguously established from information in the application and/or the wording in the Motion to Dismiss whether it meets *any* criterion except (b). With respect to (a), Red & White has not precluded in its application, Motion or tariffs the possibility that passengers may, e.g., originate at San Francisco Ferry Building Pier ½ and later return directly or indirectly to Fisherman's Wharf Ferry Terminal Pier 43½. Red & White acknowledges it may not meet (c). Concerning (a) and (d), it is not ruled out that the vessel may depart to conduct other business after dropping passengers off at USS Hornet, and the same or another vessel may return later to pick up those passengers, or that passengers may elect to embark on the first trip of the day to USS Hornet and return on the last.

With this Motion, Red & White implicitly suggests that we revisit in this *ex parte* proceeding the criteria we earlier established after hearing in *Catalina Cruises*, or grant an exception for SF/Hornet ferry service. We decline to do either.

The Need for Tariffed Rates

In its application, Red & White requests that it not be required to file rates for service to the USS Hornet, stating, "It is Applicant's understanding that the Commission does not require the current operator of ferry service to/from Alcatraz Island to include rates for such service in its tariffs and Applicant believes that its proposed service is similar in nature." The application does not further explain the similarity Red & White sees, nor does it provide any additional rationale, argument or citation beyond this single sentence to support the request. We are left to surmise what similarity Red & White intends.

Although the request and supporting sentence appear in the application section otherwise dealing exclusively with its loop exemption request, it is unlikely Red & White refers to an Alcatraz loop exemption, since Red & White presumably is aware that Blue & Gold Fleet, L.P., (Blue & Gold) the Alcatraz ferry operator, does not enjoy a loop exemption for Alcatraz service. Blue & Gold does in fact have a CPCN which specifically authorizes San Francisco/Alcatraz scheduled and non-scheduled service. If the perceived similarity is a common claim to the loop exemption, it is inapplicable here because neither carrier is so exempted.

Perhaps Red & White relies on the fact that only round-trip tickets are available to Alcatraz, and a primary purpose for visiting both Alcatraz and USS Hornet is/will be tourism. If so, Red & White does not explain how those circumstances argue against filing rates, and, other than the loop exemption claim we have already rejected, no such arguments are apparent.

Or perhaps Red & White sees a similarity between the fact that Alcatraz is federally held (under the National Park Service) while USS Hornet is or was federal government property (the record does not define USS Hornet's present ownership status). If so, its position fails under that comparison as well.

Blue & Gold assumed San Francisco/Alcatraz service from the former Red and White Fleet, Inc., (no direct relation to the applicant herein) which was the successor to Harbor Carriers, Inc. In D.85-06-105 (18 CPUC 2d 110) the Commission rejected Harbor Carriers' position that the Commission was pre-empted from asserting jurisdiction over service to Alcatraz. Harbor Carriers held (and Blue & Gold as its successor in interest still holds) a 15-year contract expiring at the end of 1998 with the United States Secretary of the Interior (Secretary) to provide San Francisco/Alcatraz service. By the contract, the

federal government exerted authority over some aspects of the service, including rates. The contract states,

...[San Francisco/Alcatraz ferry service] shall be subject to the approval of the Secretary and shall be subject to the regulations and requirements of any governmental agencies having jurisdiction over the type of operation to be conducted by [Harbor Carriers] pursuant to the proposed contract. To the extent that there is a conflict between the requirements of other governmental agencies and the requirements imposed by the Secretary under the contract, the Secretary's requirements under the contract shall control...

All rates and prices charged to the public by [Harbor Carriers] for accommodations, services, or goods furnished or sold hereunder shall be subject to the regulation and approval by the Secretary...

In analyzing the issue, the Commission made several pertinent observations:

As a general rule, the mere condition of federal ownership does not remove the land from state jurisdiction. See *Kleppe v New Mexico* (1976) 426 US 529, 544. Congress retains the power to enact legislation affecting the federal land which will override conflicting state regulation, but in the absence of such legislation, the state and its agencies remain free to act in a manner that does not actually conflict with the existing federal authority over the land. (426 US at 543.)

When transportation service is provided entirely on federal property, pursuant to authority delegated by Congress, the Supreme Court has held that a certificate of public convenience and necessity may not be required by the state where the property is located. (*Universal Interpretive Shuttle Corp. v Washington Metropolitan Area Transit Comm'n* (1968) 393 US 186.)

In the case of the Alcatraz service, Congress has granted the Secretary of the Interior broad authority over Alcatraz and more

generally over the Golden Gate National Recreation Area. (16 USC 460 bb *et seq.*) But unlike the service described in *Universal Interpretive Shuttle Corp.*, the Alcatraz service originates and terminates on property that is not owned by the federal government. Under such circumstances the Commission is not pre-empted in the entirety of its jurisdiction, and it retains the power to act in areas that do not conflict with the authority of the Secretary or interfere with the Secretary's ability to carry out the authority delegated to him by Congress.

Accordingly, we will reissue Harbor's San Francisco-Alcatraz authority in the form requested by Harbor in its amended application. As demonstrated in the previously quoted portions of the contract, the Secretary has specified or reserved authority to specify many of the details of the Alcatraz service. (18 CPUC 2d 113 *et seq.*)

Red & White's proposed service will not be provided entirely on federal property. Nor has it established that it will operate, as does Blue & Gold, under a contract pursuant to which the federal government will exert its authority over rates to the exclusion of state jurisdiction. In short, we see no federal aspect in Red & White's SF/Hornet proposal which acts to analogize it with Blue & Gold's SF/Alcatraz service.

PU Code § 486 provides that every common carrier shall file with the Commission and shall print and keep open to the public inspection schedules showing its rates, fares, charges, and classifications. PU Code § 493(a) prohibits common carriers from transporting persons or property until their schedules of rates, fares, charges and classifications have been filed and published. Red & White has included rates in its proposed tariffs (Exhibit C, Rates and Rules Governing Service), and we will order them filed as a condition of the authority to be granted in this order.

Red & White's Motion for Limited Protective Order

On May 11, 1998, Red & White filed its Motion for Limited Protective Order to cover financial information submitted under seal in support of its ability to render the proposed service pursuant to Rule 21(i). The motion states grounds under General Order 66-C for granting the relief requested and is unopposed. The protective order will be granted consistent with our usual practice.

Senate Bill 960 Rules and Procedures

In Resolution ALJ 176-2993 (May 21, 1998), the Commission preliminarily categorized this as a ratesetting proceeding, and preliminarily determined that hearings would not be necessary. No protests have been received and there is no known opposition. There is no apparent reason why the application should not be granted to the extent set forth in the order that follows. We conclude that it is not necessary to disturb our preliminary determinations.

Findings of Fact

1. Hornet Foundation plans to convert USS Hornet into a floating air, sea and space museum docked in Alameda. Hornet Foundation has asked Red & White to provide passenger ferry service between San Francisco and USS Hornet.
2. Red & White's proposed SF/Hornet ferry service will provide a direct and efficient form of transportation that offers traffic and environmental benefits when compared with alternative travel modes.
3. There is public demand for the SF/Hornet ferry service Red & White proposes to offer.
4. Red & White intends to provide SF/Hornet service with the same vessels and key personnel it employs for its nonregulated Bay tour and charter services and its other, Commission-regulated operations.

5. Red & White is financially and operationally fit to provide SF/Hornet ferry service.

6. Red & White does not meet one or more of the criteria set forth in D.85-08-038 as necessary to qualify it as eligible for the loop exemption to PU Code § 1007.

7. There is no known opposition to granting the application, and no need to hold a hearing.

Conclusions of Law

1. SF/Hornet ferry service is properly regarded as point-to-point transportation under PU Code § 1007.

2. PU Code § 1007 requires that Red & White obtain a CPCN before it may offer scheduled SF/Hornet ferry service.

3. Red & White's Motion to Dismiss A.98-05-017 should be denied.

4. Red & White's nonscheduled SF/Hornet ferry service falls within the scope of its currently-effective CPCN and no further certification is required.

5. The public convenience and necessity require that Red & White offer SF/Hornet ferry service.

6. Red & White is required under PU Code §§ 486 and 493(a) to file with the Commission and print and keep open to the public inspection schedules showing its rates, fares, charges, and classifications for SF/Hornet ferry service.

7. Red & White's request for a limited protective order for the financial information submitted under seal in support of this application should be granted.

8. The Commission having found that a hearing is not needed, the rules and procedures of Article 2.5, Senate Bill 960 Rules and Procedures, do not apply to this proceeding pursuant to Rule 6.6.

9. The order that follows should be made effective immediately so that Red & White may begin offering service without delay.

ORDER

IT IS ORDERED that:

1. Red & White Ferries, Inc., (Red & White) is authorized to establish and operate scheduled vessel common carrier service between the aircraft carrier USS Hornet docked in Alameda on the one hand and San Francisco Ferry Building Pier ½ and Fisherman's Wharf Ferry Terminal Pier 43½ on the other hand, and to revise its currently-effective tariffs to show vessel common carrier service between those points (SF/Hornet ferry service). Red & White's current Certificate of Public Convenience and Necessity (CPCN) is amended by replacing Original Page 2 with First Revised Page 2 included as Appendix VCC-81 to this decision.

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 and the revised CPCN within 30 days after the effective date of this order.
- b. File tariffs, including rates and timetables, and begin offering the authorized service within 120 days after the effective date of this order. Tariffs shall become effective not sooner than 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.

3. Red & White's Motion to Dismiss Application (A.) 98-05-017 is denied.
4. Red & White's request not to be required to file rates for SF/Hornet ferry service is denied.
5. The financial information submitted under seal as an attachment to Red & White's Motion for Limited Protective Order shall remain under seal for a period of one year from the date of this order. During that period it shall not be made accessible or disclosed to anyone other than Commission staff except on the further order or ruling of the Commission, the assigned Commissioner, the assigned Administrative Law Judge, or the Administrative Law Judge then assigned as Law and Motion Judge. If Red & White believes that further protection of this information is needed after one year, it may not later than 30 days before the expiration of this limited protective order file a motion stating its justification for further withholding the information from public inspection, or for such other relief as the Commission's rules may then provide.
6. A.98-05-017 is granted in part and denied in part as set forth above.
7. This proceeding is closed.

This order is effective today.

Dated September 3, 1998, at San Francisco, California.

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

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.

*San Francisco - USS Hornet

Commence from the aircraft carrier USS Hornet docked in Alameda, then over the San Francisco Bay waters to San Francisco Ferry Building Pier ½ and Fisherman's Wharf Ferry Terminal Pier 43 ½, San Francisco.

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.

*Revised by Decision 98-09-003, Application 98-05-017.