

Decision 99-05-050 May 27, 1999

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

In the Matter of the Application of Island Boat Service, a Corporation, for a Certificate of Public Convenience and Necessity to Operate as an "On-Call" Vessel Common Carrier between Points at and Offshore of Santa Catalina Island

Application 97-03-007  
(Filed March 5, 1997)

In the Matter of the Application of Island Navigation Company, Inc., doing business as Catalina Island Water Transportation Co., for Authority to Increase Rates of Fare and for an Ex Parte Interim Order Authorizing the Same.

Application 98-05-037  
(Filed May 21, 1998)

**O P I N I O N**

**Summary**

This decision approves a settlement agreement and closes a consolidated proceeding involving two passenger vessel applications. We accept Island Boat Service's (IBS) proposed amendment in Application (A.) 97-03-007, recasting as on-call and charter service the vessel common carrier authority it seeks, and we grant the application as amended. IBS and Island Navigation Company (Island Navigation) may not amend A.97-03-007 and A.98-05-037, respectively, to include Zone of Rate Freedom (ZORF) authority. We make permanent the interim authority previously granted Island Navigation to perform tendering service at contract rates.

## **Procedural History**

### **A.97-03-007**

IBS (VCC-80) filed A.97-03-007 on March 5, 1997, requesting authority to provide common carrier vessel services for the transportation of passengers, baggage, and supplies between points on and within one mile offshore of Santa Catalina Island. The initial application characterizes the services it seeks to operate as "tendering service," which is ship-to-shore vessel service for cruise ships visiting the island; "campsite charter service," a dedicated boat charter service to afford scouting and similar groups transportation to and from outlying campsites; and "private charter service," encompassing other charters (*i.e.*, exclusive engagements of vessels at a specified price) between island points. In Decision (D.) 97-06-112 we granted interim authority for IBS to provide tendering and campsite charter service to meet the peak seasonal need for such services, but deferred our final decision on the merits of the application.

Protests were initially filed by Island Navigation and the Commission's Rail Safety and Carriers Division (RSCD). RSCD subsequently withdrew its protest, as it was based upon potential safety concerns that were later dispelled. Island Navigation's protest was based upon allegations that IBS' previous conduct had violated the Public Utilities Code, but did not challenge IBS' operational or financial fitness to operate the service. As required by the settlement described below, Island Navigation has also withdrawn its protest (with prejudice and without reservation of the right to re-file), and the application is consequently unopposed now.

### **A.98-05-037**

Island Navigation (VCC-43) provides non-scheduled transportation of persons and hand-baggage between points and places on Santa Catalina

Island, between those points and places and vessels offshore, and between vessels. Under that authority, Island Navigation furnishes local Santa Catalina Island transportation services frequently referred to as water-taxi service and/or shoreboat service. In an unrelated late-1997 decision, we granted Island Navigation additional authority allowing it to provide scheduled and non-scheduled cross-channel services between Santa Catalina Island points and Dana Point and Long Beach on the mainland. At the time A.98-05-037 was filed, Island Navigation had not yet begun cross-channel service.

IBS filed a timely protest and both it and its parent corporation, Santa Catalina Island Company, appeared and were granted party status at a prehearing conference. By interim D.98-12-059 we granted Island Navigation *ex parte* virtually all of its A.98-05-037 request to increase and restructure rates. The only issue remaining is the final disposition of Island Navigation's interim authority to provide tendering service at contract rates. With IBS' having withdrawn its protest, and with its execution of the settlement agreement binding both it and Santa Catalina Island Company, A.98-05-037 is no longer opposed.

### **Consolidation**

A.97-03-007 and A.98-05-037 were consolidated by an assigned Commissioner's ruling on May 6, 1999.

### **Settlement and Accompanying Motion**

On January 25, 1999, IBS and Island Navigation filed a joint Motion for Approval of Settlement, attaching to it an executed settlement agreement between them (Appendix A to this decision) representing a mutually acceptable resolution of all issues raised by each in the other's application. The settlement provides:

- a) Each party shall withdraw its protest against the application of the other, and shall not initiate or maintain any related further action or comment before the Commission.
- b) The parties shall file a joint motion asking the Commission to amend IBS' A.97-03-007 to include an IBS request for authority to provide non-scheduled vessel common carrier service between vessels, between vessels and shore points, and between all points and places on and within three miles of Santa Catalina Island to transport passengers and their hand baggage, all in accordance with the descriptions of on-call and charter service in Attachment A to the settlement.
- c) The joint motion shall ask the Commission to amend IBS' A.97-03-007 and Island Navigation's A.98-05-037 to include requests by each for authority to establish a Zone Of Rate Freedom (ZORF) for all vessel common carrier service categories for which it is certificated or seeking certification.
- d) The joint motion shall ask the Commission to approve the settlement under Article 13.5 (Stipulations and Settlements) of the Rules of Practice and Procedure (Rules) and grant the operating authorities requested in the amended applications.
- e) Each party shall cooperate with the other and the Commission staff in developing tariff provisions applicable to vessel tendering services provided at contract rates.
- f) Each party shall provide the other with 30 days notice of any application to increase any rate or decrease or remove any restriction on minimum charges for non-scheduled service provided within three miles of Santa Catalina Island.

The settlement was executed by both parties and made effective as of January 15, 1999. The settlement's effectiveness was not made contingent on Commission approval.

Each party formally withdrew its protest of the other's application on January 25, 1999, "with prejudice and without reservation to re-file." Santa Catalina Island Company, which appeared in opposition to A.98-05-037 but had not filed a protest, nonetheless was explicitly included by name in the settlement and the protest withdrawal.

## **Discussion**

The settlement provides for the parties to withdraw their protests, and to file a joint motion seeking to amend their applications to add new and different authorities, and seeking Commission approval of the settlement. The settlement was not made contingent on the Commission's *approving* their motion or the authorities requested in it. They have in fact already implemented the settlement's major provisions in that each has made a filing withdrawing its protest, and together they have filed their joint Motion for Approval of Settlement. The actions the parties have agreed to take under the settlement do not require Commission approval, but what they ask for in their joint motion does. The issues before us are thus the issues set forth in the joint motion, and it is those we will address. The joint motion asks the Commission to (a) approve the settlement; (b) allow IBS' application to be amended to recast its certification request as on-call and charter service; (c) allow both applications to be amended to include requests for ZORF authority; and (d) approve the applications as they would be amended.

### **The Settlement**

Rule 51.1(e) states:

The Commission will not approve stipulations or settlements, whether contested or uncontested, unless the stipulation or settlement is reasonable in light of the whole record, consistent with law, and in the public interest.

In D.92-12-019, 46 CPUC2d 538, we further defined our policy as it applies to all party settlement proposals. As a precondition to approval the Commission must be satisfied:

- a) that the proposed all party settlement commands the unanimous sponsorship of all active parties to the instant proceeding;

- b) that the sponsoring parties are fairly reflective of the affected interests;
- c) that no term of the settlement contravenes statutory provisions or prior Commission decisions; and,
- d) that the settlement conveys to the Commission sufficient information to permit us to discharge our future regulatory obligations with respect to the parties and their interests.

IBS is the applicant in A.97-03-007, and (former) protestant Island Navigation is the only other party. Island Navigation is the applicant in A.98-05-037, and (former) protestant IBS and its parent Santa Catalina Island Company are the only other parties. All are bound by the settlement. Thus this is an uncontested settlement under the Rule 51(f) definition, as it commands the sponsorship of all parties in both proceedings.

The interests potentially affected are those of the applicants, their competitors and the public. Each applicant, in addition to representing its own interests, has successfully pursued the role of protector of competitive interests as against the other's application. With respect to the public's interests, we have noted that what the parties have agreed to do in the settlement (and in major part have already done) does not require Commission approval; the approvals required are those sought in the joint motion already filed pursuant to the settlement's terms. Thus the public's interest will be protected through our examination below of those requests.

After careful review, it is clear that no term of the settlement itself contravenes statutory provisions or prior Commission decisions. The approvals the parties seek through their already-filed joint motion are separable from the settlement, and we will address those requests below.

Through their actions as set in motion by this settlement, the parties are enabling us to consolidate and conclude two long-pending and contentious

proceedings. Their agreement to cooperate with one another and our staff in developing tariff provisions, together with the formal record, assures us of sufficient information to discharge our future regulatory obligations with respect to the parties and their interests.

The parties' settlement proposal is consistent with our criteria for all party settlements. We will approve it.

### **IBS' Request to Amend for On-call and Charter Authority**

The specific modifications sought by IBS essentially involve replacement of the distinctions originally made in the application among different types of charter service IBS proposes to operate with a simpler scheme requesting authority to provide non-scheduled vessel common carrier service between vessels, between vessels and shore points, and between all points and places on and around Santa Catalina Island. The types of services IBS proposes to provide are now identified as "on-call" and "charter" services. The geographical extent of the requested authority is expanded from within one mile to within three miles of the island.

As recast in the proposed amendments, on-call service refers to service which is "dependent of [sic] the demands of passengers," and charter service refers to service for which the vessel is engaged for a specified charge by a person or group of persons for exclusive use. The conditions under which each of these services will be rendered are to be established by tariff, and the basis upon which payment for these services is proposed to be made should be specifically described in that filing. These amendments to the application are acceptable to us as far as they go, for they conform more closely to our traditional approach to vessel common carrier regulation than the novel concepts described in the original one. A full description of the service approved is contained in IBS'

amended certificate of public convenience and necessity set forth in Appendix VCC-80 to this decision.

### **The Applicants' Requests to Amend for ZORF Authority**

IBS also proposes to modify its application by requesting authority to establish a ZORF for each category of service it seeks to operate, and to include its proposed rate structures. Granting this proposal would allow IBS to raise or lower its fares without our approval by an amount of up to ten percent from a baseline fare to be established in its passenger tariff, and to incorporate this mechanism in its basic operating authority.<sup>1</sup> Island Navigation also seeks to modify its application to establish a ZORF for each category of service, the terms of which would parallel those for IBS, *i.e.*, permitting variations of ten percent above and below standard fares established by tariff.

Belatedly incorporating these requests into the applications for operating authority is not an acceptable method for obtaining our approval in this instance. We have recently expanded the availability of the ZORF mechanism beyond passenger stage carriers to include vessel common carriers, but we have retained the requirement that a ZORF will be allowed only where there is substantial competition, to insure that the device is not misused where competition does not exist. See Pub. Util. Code § 454.2 and D.98-12-016. As there is no showing here regarding the competitive environment in which the proposed ZORFs would be employed, there is an insufficient basis for granting the applicants' requests. More importantly, if we were to permit the applicants

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<sup>1</sup> The rate structures it proposes are hourly and daily for private charters; flat rates for "campsite charters"; and contract rates with variations such as hourly, daily, per-passenger, or per-manifested passenger rates, depending upon the negotiated arrangement with the particular ocean-going shipping client.



to obtain approval for ZORFs in this manner, we would deny other persons, including competitors, any notice of these applicants' intentions. In effect these new requests, which are quite different from those in the originally filed applications for expanded operating authority, would be invisible to persons who may be interested and may wish to be heard. For precisely such reasons Rule 51.1(a) specifies that,

Resolution [of a Commission proceeding under a settlement] shall be limited to the issues in that proceeding and shall not extend to substantive issues which may come before the Commission in other or future proceedings.

The applicants' motion to amend their applications to include requests for ZORFs plainly extends to a new substantive issue that was not envisioned in either of the original applications, and should not be addressed as proposed. The applicants should file their proposals for ZORFs in separate applications which demonstrate that there is a basis for granting that tariffing flexibility.

### **IBS' Motion to Dismiss**

IBS has moved to dismiss the portion of its application which pertains to authorization of the tendering service, on the grounds that such service is not common carriage and therefore does not require Commission approval. In a ruling on October 5, 1998, Administrative Law Judge Ryerson took this motion under submission pending conclusion of the evidentiary phase and submission of A.97-03-007.

With the amendment of the application and deletion of the language relating to rate structures this motion will become moot, because the tendering service rubric will no longer be included. Moreover, as a species of charter service, tendering service is not exempt from our jurisdiction. (*Harbor Carriers,*

*Inc.*, 72 CPUC 518, 525 (1971)). By filing a tariff for such service, IBS will hold itself out as offering its ship-to-shore service to any cruise ship operator or other customer (regardless of the rate structure utilized), and the traditional common carrier standard of dedication of property to public use will be met. We therefore deny the motion to dismiss.

### **Need for Hearings**

By Resolution ALJ 176-2994, the Commission pursuant to Rule 6.1 preliminarily determined A.98-05-037 to be a ratesetting proceeding expected to go to hearing. On September 23, 1998, the assigned Commissioner issued his Scoping Ruling confirming the category and need for hearing. No hearings have been held in either application. Considering the content of the proposed settlement, the parties' withdrawal of their opposition to both applications, and the fact that the two proceedings present common issues of both fact and law, the assigned Commissioner on May 6, 1999 issued a ruling consolidating the two applications into one proceeding and reversing his earlier determination that a hearing is needed in A.98-05-037. We confirm the assigned Commissioner's revised Scoping Ruling determination. There is no material fact in dispute and no opposition to either application. The consolidated proceeding may now be decided without hearings.

### **Comments on Draft Decision**

Pub. Util. Code § 311(g)(1) provides that the draft decision must be served on all parties and subject to at least 30 days public review and comment prior to a vote of the Commission. § 311(g)(2) provides that this 30-day period may be reduced or waived upon the stipulation of all parties in the proceeding. All parties in the proceeding have stipulated to reducing the waiting period. By stipulation of the parties, comments were allowed to be filed no later than

10 days following the mailing of the draft decision, and reply comments were not permitted.

Comments were received only from IBS, and were directed at three issues in the draft decision that could create inconsistencies with earlier Commission decisions. First, IBS asks that we strike the first sentence of Paragraph I. c. of Appendix VCC-80 in the draft decision, which would restrict the tariffs for on-call service to hourly or per diem rates, regardless of the number of passengers transported. Second, IBS asks that we strike the second sentence of the same paragraph, which would prohibit IBS from collecting individual fares from such passengers. Third, IBS requests clarification of the tariff requirements relating to non-scheduled ship tendering service performed at contract rates.

IBS cites three reasons in support of the first request. First, IBS argues that the proposed restriction conflicts with the rate structures proposed by IBS in A.97-03-007 and the amendments proposed in the settlement agreement. Second, the proposed restriction conflicts with the actual rate structure that Island Boat Service has established in its Local Passenger Tariff No. 1 on file with the Commission pursuant to the interim authority granted by the Commission in D.97-06-112. Finally, the restriction is inconsistent with paragraph 1 of the order in the Draft Decision, because that paragraph approves the amendment of the IBS application, which does not contain the restriction regarding the structure of on-call rates.

In D.98-12-050 we eliminated language that would have restricted Island Navigation from performing local Santa Catalina Island service on an individual fare basis. Our intent is to allow equal opportunity to IBS in providing the same type of service. The draft language would prevent that result. We have therefore deleted the first sentence of paragraph I. c. from Appendix VCC-80 in the final decision.

The second sentence of paragraph I. c. would also create inequality between the current operators of local Santa Catalina Island service. Island Navigation's certificate contains no restriction against collecting individual fares from passengers, and neither should IBS'. IBS is currently operating such service under the terms of Interim D.97-06-112, as corrected by D.97-07-004. It is our intent that it may continue to do so. We have therefore deleted the second sentence of Paragraph I. c. from Appendix VCC-80 in the final decision.

IBS' request for clarification essentially calls for an advisory opinion concerning the prospective form, content, and legality of tariffs which must be filed pursuant to our order. This we decline to do. The contemplated tariffs would be essentially the same as those for equivalent services which have already been filed by Island Navigation. We have approved the concept of providing tendering services at contract rates, but we cannot foresee what differences will exist between respective carriers' contracts, nor whether the terms of any particular tariff will survive a challenge based upon allegedly discriminatory effect. We have therefore not modified the decision in response to this comment.

### **Findings of Fact**

1. IBS is a vessel common carrier certificated by this Commission.
2. IBS initially filed an application for authority to provide vessel common carrier services for the transportation of passengers, baggage, and supplies between points on and within one mile offshore of Santa Catalina Island. These services are in the nature of charter services.
3. Island Navigation filed a protest to IBS' application.
4. IBS and Island Navigation have executed a written settlement agreement, which they have asked this Commission to approve.

5. The settlement agreement's effectiveness was not made contingent on Commission approval. The parties have already implemented its major provisions in that each has formally withdrawn its protest and together they have filed their joint Motion for Approval of Settlement.

6. Through the joint Motion for Approval of Settlement, IBS seeks to alter its application from that for approval of "tendering service," "campsite charter service," and "private charter service" to one asking for approval of "on-call" and "charter" services. The extent of the proposed operations is expanded from one mile to three miles offshore of Santa Catalina Island.

7. Through the joint Motion for Approval of Settlement, each party also seeks to modify its application by adding a request to establish a ZORF for each category of service for which it is certificated or seeking certification. The issue of authorizing a ZORF was not initially included in either application before the joint motion was filed.

8. A.97-03-007 and A.98-05-037 are unopposed, and there is no need to hold evidentiary hearings.

### **Conclusions of Law**

1. IBS' motion to modify A.97-03-007 to request authority to provide non-scheduled vessel common carrier service in the form of on-call and charter service should be granted.

2. The applicants' motion to modify their respective applications by adding requests for ZORFs should be denied because such modifications would add to each application a substantive issue that should be addressed in separate applications in order to satisfy due process requirements.

3. The settlement agreement binds all parties in this proceeding, namely, IBS, Island Navigation, and Santa Catalina Island Company.

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

5. The proposed settlement satisfies the preconditions for approval of an all party settlement, in that:

- a. all parties in both proceedings join in its sponsorship;
- b. the sponsoring parties are fairly reflective of the affected interests;
- c. no term of the settlement contravenes statutory provisions or prior Commission decisions; and
- d. the settlement conveys sufficient information to permit us to discharge our future regulatory obligations with respect to the parties and their interests.

6. The settlement agreement should be approved.

7. IBS' motion to disraiss the portion of its application which pertains to authorization of the tendering service should be denied as moot.

8. A.97-03-007, as amended, should be approved.

9. Island Navigation's interim authority granted in D.98-12-059 to provide tendering service at contract rates should be made permanent.

10. To promote the public interest in timely establishing new services for the peak 1999 travel season, the order that follows should be made effective immediately.

## O R D E R

**IT IS ORDERED** that:

1. That portion of Island Boat Service's (IBS) and Island Navigation Company's (Island Navigation) Motion for Approval of Settlement in which IBS seeks to amend Application (A.) 97-03-007 to request authority to provide non-scheduled vessel common carrier service in the form of on-call and charter service is granted.

2. That portion of IBS' and Island Navigation's Motion for Approval of Settlement in which they seek to amend A.97-03-007 and A.98-05-037 to request Zone of Rate Freedom authority is denied.

3. IBS' Motion to Dismiss Section 5(a) of A.97-03-007 is denied as moot.

4. A.97-03-007, as amended, is approved. IBS is authorized to provide vessel common carrier service as delineated in Appendix VCC-80 attached to this decision.

5. As a condition of this grant of authority, IBS shall, within 30 days after the effective date of this order, file with the Commission's Rail Safety & Carriers Division written acceptance of the revised certificate of public convenience and necessity and tariff modifications to implement it. The modified tariffs shall become effective 10 days after filing.

6. The interim authority granted to Island Navigation in Decision 98-12-059, Ordering Paragraph 2, in A.98-05-037 to provide tendering service at contract rates is made permanent.

7. The executed settlement agreement between IBS and Island Navigation included with this decision as Appendix A is approved.

8. The assigned Commissioner's revised Scoping Ruling determination that no hearings are required in A.98-05-037 is confirmed.

9. A.97-03-007 and A.98-05-037 are closed.

This order is effective today.

Dated May 27, 1999, at San Francisco, California.

RICHARD A. BILAS  
President  
JOSIAH L. NEEPER  
Commissioner

Commissioner Henry M. Duque, being necessarily absent, did not participate.

**APPENDIX A**

**SETTLEMENT AGREEMENT**

This Settlement Agreement (the "Agreement"), effective January 15, 1999, is made by and between Island Boat Service, a California corporation ("IBS" as defined below) and Island Navigation Company, Inc., a California corporation ("Island Navigation" as defined below) in accordance with the definitions, recitals, terms and conditions set forth below.

**RECITALS**

WHEREAS, on or about March 5, 1997 IBS filed the "IBS Application" (as defined below) requesting, among other things, that the Commission grant IBS a Certificate of Public Convenience and Necessity to operate as a vessel common carrier between all points and places at and off-shore of Santa Catalina Island, California;

WHEREAS, on or about April 18, 1997 Island Navigation filed with the California Public Utilities Commission a protest of the IBS Application (the "Island Navigation Protest" as defined below) requesting, among other things, that the Commission deny the IBS Application;

WHEREAS, on or about May 21, 1998 Island Navigation filed the "Island Navigation Application" (as defined below) requesting, among other things, that the Commission restructure the rates and pricing structure for the non-scheduled vessel common carrier services that Island Navigation provides at and off-shore of Santa Catalina Island, California;

WHEREAS, on or about June 25, 1998 IBS filed with the California Public Utilities Commission a protest of the Island Navigation Application (the "IBS Protest" as defined below) requesting, among other things, that the Commission deny the Island Navigation Application; and

WHEREAS, the Parties wish to resolve all claims which they have asserted against one another in the IBS Protest and the Island Navigation Protest, to enter into a stipulation regarding the non-scheduled vessel common carrier service operating authority requested by IBS in the IBS Application, as amended, and the rate modifications requested by Island Navigation in the Island Navigation Application, and to enter into a settlement agreement that the Parties shall present to the California Public Utilities Commission for approval in accordance with Article 13.5 (Stipulations and Settlements) of the Commission Rules of Practice and Procedure.

**AGREEMENT**

NOW, THEREFORE, in consideration of the mutual promises hereinafter set forth and of other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereto, intending to be legally bound hereby, do agree as follows:



## APPENDIX A

### 1.0 Definitions

1.1. The term "**Commission**" means the California Public Utilities Commission and its staff employees.

1.2. The term "**IBS**" means Island Boat Service, a California corporation; the Santa Catalina Island Company, a Delaware corporation; Two Harbors Enterprises, Inc., a Delaware corporation and all of its corporate parents; current and former subsidiaries; divisions; allied or affiliated companies; predecessors; successors; assigns; and their past, present and future officers, directors, employees, representatives, shareholders, agents and attorneys.

1.3. The term "**IBS Application**" means the Application filed with the California Public Utilities Commission by IBS on or about March 5, 1997, in respect to which the Commission has assigned docket number A9703007, together with any and all amendments or modifications thereto, including, without limitation, the amendments and modifications proposed by IBS to the Commission at the Prehearing Conference in this matter held on December 18, 1998 and those amendments and modifications identified in paragraph 9.0 of this Agreement.

1.4. The term "**IBS Protest**" means the Protest filed with the California Public Utilities Commission by IBS on or about June 25, 1998 in respect to the Island Navigation Application, together with any and all amendments or modifications thereto.

1.5. The term "**Island Navigation**" means Island Navigation Company, Inc., a California corporation; Catalina Island Water Transportation Co., a California corporation; Catalina Adventure Tours, Inc., a California corporation; Catalina Glassbottom Boat, Inc., a California corporation; West Coast Navigation, a California corporation; and all of its corporate parents; current and former subsidiaries; divisions; allied or affiliated companies; predecessors; successors; assigns; and their past, present and future officers, directors, employees, representatives, shareholders, agents and attorneys.

1.6. The term "**Island Navigation Application**" means the Application filed with the California Public Utilities Commission by Island Navigation on or about May 21, 1998, in respect to which the Commission has assigned docket number A9805037, together with any and all amendments or modifications thereto, including, without limitation, the amendments and modifications identified in paragraph 10.0 of this Agreement.

1.7. The term "**Island Navigation Protest**" means the Protest filed with the California Public Utilities Commission by Island Navigation on or about April 18, 1997 in respect to the IBS Application, together with any and all amendments or modifications thereto.

1.8. The term "**Party**" or "**Parties**" means either or both IBS and Island Navigation, as defined in this Agreement.

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1.9. The term "Person" means an individual, a corporation, a partnership, an association, a proprietorship, an insurer, a joint venture, a trust or any other entity or organization, any federal, state or local government or quasi-governmental body or political subdivision or any agency or instrumentality thereof.

### **2.0 CPUC Proceedings**

2.1. Within five (5) business days after the Parties' execution of this Agreement, IBS shall dismiss the IBS Protest with prejudice and without costs. IBS shall not initiate or maintain any complaint, protest or other administrative proceeding, either formal or informal, before the Commission arising from or relating to the Island Navigation Application, including, without limitation, the amendments and modifications identified in paragraph 10.0 of this Agreement, or arising from or relating to the IBS Protest. IBS shall provide no additional comment to the Commission arising out of or relating to the Island Navigation Application.

2.2. Within five (5) business days after the Parties' execution of this Agreement, Island Navigation shall dismiss the Island Navigation Protest with prejudice and without costs. Island Navigation shall not initiate or maintain any complaint, protest or other administrative proceeding, either formal or informal, before the Commission arising from or relating to the IBS Application, including, without limitation, the amendments and modifications to the IBS Application proposed by IBS to the Commission at a Prehearing Conference in respect to the IBS Application held by the Commission on December 18, 1998 and those amendments and modifications identified in paragraph 9.0 of this Agreement, or arising from or relating to the Island Navigation Protest. Island Navigation shall provide no additional comment to the Commission arising out of or relating to the IBS Application.

### **3.0 Parties To Agreement**

This Agreement confers rights and benefits on the Parties and is not intended to confer any right or benefit upon any other Person or entity. No Person or entity other than the Parties shall have any legally enforceable right under this Agreement. All rights of action for any breach of this Agreement are reserved to the Parties.

### **4.0 No Assignment**

4.1. IBS warrants that it has not and will not in any manner assign, transfer, convey or sell, or purport to assign, transfer, convey or sell to any Person or entity any rights, actions, causes of action, chose in action, claim or protest against Island Navigation, or part thereof, arising out of or relating to any protest or claim that is the subject of this Agreement, including, without limitation, the IBS Protest. IBS warrants that it will not in any way voluntarily assist any other Person or entity in the establishment of any such right, action, cause of action, chose in action, claim or protest against Island Navigation relating to the Island Navigation Application or the IBS Protest.

4.2. Island Navigation warrants that it has not and will not in any manner

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assign, transfer, convey or sell, or purport to assign, transfer, convey or sell to any Person or entity any rights, actions, causes of action, chose in action, claim or protest against IBS, or part thereof, arising out of or relating to any protest or claim that is the subject of this Agreement, including, without limitation, the IBS Protest. Island Navigation warrants that it will not in any way voluntarily assist any other Person or entity in the establishment of any such right, action, cause of action, chose in action, claim or protest against IBS relating to the IBS Application or the Island Navigation Protest.

### **5.0 Attorney's Fees**

IBS and Island Navigation each shall bear its own attorneys' fees, costs and expenses arising out of and/or connected with the IBS Application, Island Navigation Protest, Island Navigation Application, and IBS Protest, and the negotiation, drafting and execution of this Agreement.

### **6.0 Enforcement of Agreement**

If any Party to this Agreement brings an action to enforce its rights under this Agreement or because of the breach of covenant, condition or provision hereof, or for any other relief, the prevailing party shall be entitled to recovery of its costs and expenses, including court costs and attorneys' fees, if any, incurred in connection with such suit, including appeals therefrom.

### **7.0 Complete and Final Agreement; Amendments to Agreement**

This Agreement constitutes a final, integrated agreement among the Parties hereto and shall supersede all earlier discussions or agreements concerning the subject matter of this Agreement. No prior or contemporaneous agreements, oral or written, respecting such matters which are not specifically incorporated herein shall be deemed in any way to exist or bind any Party. This Agreement is the product of negotiation among the Parties with each Party represented by counsel. Each Party represents and warrants that it enters into this Agreement of its own free will and without duress of any kind or nature. No representation, warranties or promises have been made or are relied upon by any signatory hereto other than as set forth herein. No representation or promise pertaining to this Agreement or the subject matter thereof shall be binding upon any of the Parties, except as expressly stated in this Agreement. No claimed additions to or modifications or amendments of this Agreement, or any claimed waiver of any of its terms or conditions, shall be effective unless in writing and signed by the Party against whom the same may be asserted.

### **8.0 Commission Approval of Settlement**

Within two (2) business days after the Parties' execution of this Agreement, the Parties shall file with the Commission a joint motion in each of the IBS Application and the Island Navigation Application proceedings requesting that the Commission approve this Agreement in accordance with Article 13.5 (Stipulations and Settlements) of the Commission's

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Rules of Practice and Procedures. Among other things, the motion shall request the Commission (1) to grant the operating authority requested by IBS in the IBS Application, as amended, and (2) to restructure the non-scheduled vessel common carrier services as requested by Island Navigation in the Island Navigation Application. The motion shall also request, the Commission to apply Article 13.5 (Stipulations and Settlements) in each of the IBS Application and Island Navigation Application proceedings. Island Navigation hereby stipulates that it has no opposition to the non-scheduled vessel common carrier service requested by IBS in the IBS Application, as amended. IBS hereby stipulates that it has no opposition to the rate structures for non-scheduled vessel common carrier service requested by Island Navigation in the Island Navigation Application, as amended.

### **9.0 Modifications to IBS Application**

Concurrently with the request for approval of this Agreement under Rule 51.1 of the Commission's Rules of Practice and Procedures (see paragraph 8.0), IBS shall request the Commission to modify and amend the IBS Application as described below. Island Navigation hereby stipulates to the amendments and modifications set forth below:

9.1. That IBS be granted authority to provide non-scheduled vessel common carrier service between vessels, and between vessels and shorepoints and between all points and places on and within three miles of Santa Catalina Island to transport passengers and their hand baggage, in accordance with the description of "on-call" and "charter" service provided in Attachment A, attached hereto.

9.2. That IBS be granted authority to establish a Zone of Rate Freedom for each category of vessel common carrier service in respect to which it has requested operating authority, allowing IBS to alter its fares ten percent (10%) above or below standard fares to be established by IBS without prior Commission approval for such fare increases or reductions;

### **10.0 Modifications to Island Navigation Application**

Concurrently with the request for approval of this Agreement under Rule 51.1 of the Commission's Rules of Practice and Procedures (see paragraph 8.0), Island Navigation shall request the Commission to modify and amend the Island Navigation Application as described below. IBS hereby stipulates to the amendments and modifications set forth below:

10.1. That Island Navigation be granted authority to establish a Zone of Rate Freedom for each category of vessel common carrier service in respect to which it has obtained vessel common carrier operating authority from the Commission, allowing Island Navigation to alter its fares ten percent (10%) above or below standard fares established by Island Navigation without prior Commission approval for such fare increases or reductions.

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### 11.0 Confidentiality

The terms of this Agreement and the consideration therefor are confidential. No Party, its counsel, or any party in privity to such Party shall in any way use or refer to this settlement or this Agreement, any of its terms, or its negotiations, execution, implementation or communications generated in connection therewith in any proceeding, except: (a) as may be required or necessary to enforce the terms of this Agreement; (b) as required by law; (c) as may be necessary for regulators, accountants or auditors; (d) as may be necessary for the Parties to obtain approval of this Agreement by the Commission pursuant to Article 13.5 of the Rules of Practice and Procedure of the California Public Utilities Commission.

### 12.0 Communication Among the Parties

All notices, demands, or other communication to be provided pursuant to this Agreement shall be in writing and sent by telecopy or overnight delivery service, costs prepaid, to the Parties and their counsel at the addresses set forth below, or to such other address as the Parties may designate in writing from time to time:

IBS:

President  
Island Boat Service  
150 Metropole Avenue  
P. O. Box 2385  
Avalon, California 90704  
Telephone: (310) 510-2000  
Facsimile: (310) 510-2300

with a copy to:

J. Wesley Skow  
Latham & Watkins  
505 Montgomery Street, Suite 1900  
San Francisco, California 94111  
Telephone: (415) 395-8059  
Facsimile: (415) 395-8095

Island Navigation

President  
Island Navigation Company, Inc.  
P.O. Box 1314  
Avalon, California 90704  
Telephone: 562-435-2068  
Facsimile 562-435-9464

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with a copy to:

John Elekes  
1 Von Karman Avenue, Suite 1260  
Irvine, California 92612  
Telephone: (949) 955-9222  
Facsimile: (949) 955-2983

### **13.0 Performance of Further Acts**

13.1. Each of the Parties shall execute and deliver all documents and perform all further acts that may be reasonably necessary to effectuate the provisions of this Agreement.

13.2. Each of the Parties agree to cooperate with the other Party and the staff of the Commission in developing a the structure of the tariff provisions applicable to the oceangoing vessel tendering services provided on contract rates to be determined in negotiation with individual oceangoing shipping companies which may use the service.

13.3. Island Navigation shall provide IBS with thirty (30) days notice of any application (a) to increase any or all of the rates for non-scheduled vessel common carrier service provided by Island Navigation at or within three (3) miles of Santa Catalina Island or (b) to decrease or remove any restriction on minimum charges for non-scheduled service provided by Island Navigation at or within three (3) miles of Santa Catalina Island.

13.4. IBS shall provide Island Navigation with thirty (30) days notice of any application (a) to increase any or all of the rates for non-scheduled vessel common carrier service provided by IBS at or within three (3) miles of Santa Catalina Island or (b) to decrease or remove any restriction on minimum charges for non-scheduled service provided by IBS at or within three (3) miles of Santa Catalina Island.

### **14.0 No Admission of Wrongdoing or Liability**

This Agreement is the result of a compromised settlement of disputed issues and is not, and shall not be construed as, an admission or concession of liability, non-liability or wrongdoing by any of the parties. All actions taken or statements made, whether orally or in writing, by the Parties or their representatives relating to their participation in this Agreement, including its development and implementation, shall be without value as precedent, and shall not be construed as a standard by which other matters may be judged. No evidence relating to the negotiation, terms or conditions of this Agreement is admissible in any future proceeding or litigation by one Party against another Party, except as necessary to enforce the terms of this Agreement.

### **15.0 Miscellaneous**

15.1. The singular number, when used herein, shall include the plural, and vice versa, as the context may require. The masculine, feminine, and neuter genders shall include

## APPENDIX A

such other genders as are appropriate.

15.2. This Agreement may be executed in counterpart originals, and all such counterparts shall constitute one instrument binding on the Parties in accordance therewith, notwithstanding that all Parties are not signatories to the original or the same counterpart.

15.3. Section titles or headings contained in this Agreement are included only for ease of reference and shall have no substantive effect.

15.4. This Agreement shall be executed in duplicate originals. Copies of the executed signature pages may be sent to each of the Parties by facsimile.

15.5. This Agreement was jointly drafted by counsel for each of the Parties and there is no presumption or construction against any Party hereto, each such Party expressly waiving the doctrine of *contra proferentum*.

15.6. This Agreement shall be construed in accordance with California law.

### **16.0 Applicability**

This Agreement and each of the terms and conditions contained herein are binding upon and for the benefit of IBS and Island Navigation, and their representatives, officers, directors, shareholders, servants, employees, attorneys, principals, agents, and their past, present, and future parent and subsidiary corporations, successors in interest, affiliated companies, transferees, heirs, executors, administrators and assigns.

### **17.0 Representations**

The Parties represent and warrant that:

17.1. They are corporations duly organized and validly existing in good standing under the laws of one of the states of the United States;

17.2. They took all necessary corporate or legal actions to duly approve the making and performance of this Agreement and that no further corporate or other approval is necessary;

17.3. The making and performance of this Agreement will not violate any provision of law or of their respective Articles of Incorporation or Bylaws;

17.4. They read this Agreement and know the contents hereof, that the terms hereof are contractual and not by way or recital, and that they signed this Agreement of their own free acts; and

17.5. In making this Agreement, they obtained the advice of legal counsel.





**APPENDIX A**

**ATTACHMENT A**

**Non-Scheduled Vessel Common Carrier Operating Authority  
for Island Boat Service, a Corporation (VCC-80)**

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

Island Boat Service, a corporation, shall be authorized to conduct common carrier services by vessels, for the transportation of passengers and their baggage and property, between points as shown in Section II, 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. Non-scheduled 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 of 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 tariff shall show the conditions under which each authorized "on-call" or "charter" service will be rendered.
- C. The rates for each category of nonscheduled service that Island Boat Service is authorized to provide shall be subject to a Zone of Rate Freedom allowing Island Boat Service to alter its fares ten percent (10%) above or below standard fares to be established by Island Boat Service in its passenger tariff without prior Commission approval for such fare increases or reductions.

**II. NON-SCHEDULED SERVICE**

Between vessels and shorepoints and between all points and places on and within three miles of Santa Catalina Island to transport passengers and their hand baggage.

**III. PROPOSED RATE STRUCTURES**

**A. Private Charter**

IBS intends to perform Private Charter service on hourly and daily rates and to describe in its passenger tariff the conditions under which it will provide Private Charter service.

**APPENDIX A**

**B. Campsite Charter**

IBS intends to perform Campsite Charter service on flat rates, which include the services of vessel and crew regardless of the number of passengers transported, for Campsite Charter service and to describe in its passenger tariff the conditions under which it will provide Campsite Charter service.

**C. On-Call Ocean-going Vessel Tendering**

IBS intends to perform On-Call Ocean-going Vessel Tendering service at contract rates determined in negotiations with individual ocean-going shipping clients (including, for example, hourly rates, daily rates, per-passenger rates, or per-manifested passenger rates) and to describe in its passenger tariff the conditions under which it will provide On-Call Ocean-going Vessel Tendering service.

Appendix VCC-80

Island Boat Service  
(a corporation)

First Revised Title Page

CERTIFICATE  
OF  
PUBLIC CONVENIENCE AND NECESSITY  
AS A VESSEL COMMON CARRIER  
VCC-80

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

Island Boat Service, 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 as shown in Section II, 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. Non-scheduled 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.

SECTION II. NON-SCHEDULED SERVICE

Between vessels and shorepoints and between all points and places on or within three miles of Santa Catalina Island to transport passengers and their hand baggage.