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**PUBLIC UTILITIES COMMISSION**

505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3298

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12/28/18  
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December 28, 2018

**Agenda ID #17123**  
**Ratesetting**

TO PARTIES OF RECORD IN APPLICATION (A.) 14-10-015 AND A.15-01-005:

This is the proposed decision of Administrative Law Judge Karl J. Bemederfer. Until and unless the Commission hears the item and votes to approve it, the proposed decision has no legal effect. This item may be heard, at the earliest, at the Commission's January 31, 2019 Business Meeting. To confirm when the item will be heard, please see the Business Meeting agenda, which is posted on the Commission's website 10 days before each Business Meeting.

Parties of record may file comments on the proposed decision as provided in Rule 14.3 of the Commission's Rules of Practice and Procedure.

The Commission may hold a Ratesetting Deliberative Meeting to consider this item in closed session in advance of the Business Meeting at which the item will be heard. In such event, notice of the Ratesetting Deliberative Meeting will appear in the Daily Calendar, which is posted on the Commission's website. If a Ratesetting Deliberative Meeting is scheduled, ex parte communications are prohibited pursuant to Rule 8.2(c)(4)(B).

/s/ ANNE E. SIMON

Anne E. Simon  
Chief Administrative Law Judge

AES:avs  
Attachment

ALJ/KJB/avs

**PROPOSED DECISION**

Agenda ID #17123  
Ratesetting

Decision **PROPOSED DECISION OF ALJ BEMESDERFER** (Mailed 12/28/2018)

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

In the Matter of the Application of AVALON FREIGHT SERVICES, LLC, a limited liability company, for a certificate of public convenience and necessity authorizing service to transport freight by vessel on a scheduled basis between Port of Los Angeles, California on the one hand, and the Santa Catalina Island location of Avalon, on the other hand; and on a nonscheduled charter basis between Port of Los Angeles, California and Avalon, Two Harbors and all points on Santa Catalina Island, and between any points on Santa Catalina Island.

Application 14-10-015

And Related Matter.

Application 15-01-005

**DECISION REGARDING COMPETITION ISSUES**

**Summary**

Based on our determination that the Commission has no authority over the Lessor Santa Catalina Island Company, it is uncertain whether (a) operation of multiple carriers at Catalina

Island's Pebbly Beach dock would have public benefits; and (b) whether requiring AFS to enter a non-exclusive lease would result in competition in the Catalina freight services market. For those reasons and the other factors discussed below, approval of the Certificate of Public Convenience and Necessity (CPCN) for AFS is in the public interest.

## **1. Background**

### **1.1. Procedural Background**

For over 40 years, Catalina Freight Lines (CFL), a vessel common carrier (VCC) certified by the Commission to transport freight to and from Santa Catalina Island, was the only VCC delivering freight to the island on a regularly scheduled basis. It delivered the freight to a dock and warehouse located at Pebbly Beach in the City of Avalon pursuant to a lease and sub-lease from Santa Catalina Island Company (SCICO), the owner of the Pebbly Beach facilities. The lease and sub-lease expired on March 31, 2016.

On October 28, 2014, Avalon Freight Services (AFS) filed Application (A.) 14-10-015 seeking authority to operate scheduled vessel common carrier freight service from the Port of Los Angeles to Avalon, and on a nonscheduled charter basis between the Port of Los Angeles and Avalon, Two Harbors, and all points on Santa Catalina Island, and between points on Santa Catalina Island. On December 9th and 12th of 2014, CFL and Curtin Maritime Corporation (CMC) (respectively) filed protests to A.14-10-015. On December 23, 2014, AFS filed replies to the protests of CFL and CMC.

On January 8, 2015, CMC filed A.15-01-005 seeking authority to provide scheduled vessel common carrier freight service between the Port of Long Beach and all points on Santa Catalina Island, and between any points on Santa Catalina Island. On January 21, 2015, AFS and the Santa Catalina Island

Company (SCICO) executed a lease for the premises at Pebbly Beach and a sub-lease of the adjacent tidal waters and submerged lands for the term of April 1, 2016 to March 31, 2026. (The lease and sub-lease are hereinafter referred to collectively as the Lease.) On February 6, 2015, CFL filed a protest to A.15-01-005<sup>1</sup> however, CFL later supported CMC's request to provide competitive service.<sup>2</sup> AFS filed a response to the CMC application on February 12, 2015. As set forth in its response and in more detail below, AFS did not oppose the issuance of a CPCN to CMC. AFS did, however, disagree with CMC's proposal that the Pebbly Beach facility be used by multiple operators. On February 23, 2015, CMC filed a reply to the protest of CFL and the response of AFS.

On March 23, 2015, a joint prehearing conference was held in proceedings A.14-10-015 and A.15-01-005 at the California Public Utilities Commission (Commission) office in Los Angeles. In addition to identifying the issues, confirming the need for hearings, setting the schedule for the proceeding, and confirming the need for public participation hearings, the question of whether the two proceedings should be consolidated was addressed at the prehearing conference (PHC).

The Assigned Commissioner's Scoping Memo and Ruling Consolidating Proceedings (Initial Scoping Memo) was issued on May 28, 2015. In addition to

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<sup>1</sup> See *Protest of Catalina Freight Line, Inc. (VCC-058) in Opposition to Application of Curtin Maritime, Corporation for a Certificate of Public Convenience and Necessity to Establish and Operate Scheduled Vessel Common Carrier Service Transporting Freight between Port of Long Beach and all Points on Santa Catalina Island, California, and between any Points on Santa Catalina Island*, filed February 6, 2015, at 5-19.

<sup>2</sup> See Exh. No. CFL-214, *Direct Testimony of Richard Coffey in Support of Catalina Freight Line, Inc.'s Protests of the Applications of Avalon Freight Services, LLC and Curtin Maritime Corporation*, dated June 14, 2015 (Coffey Direct), at 30, 33.

consolidating AFS's and CMC's applications into the same proceeding, the Initial Scoping Memo set forth the scope of issues to be addressed, directed that evidentiary hearings be held, and adopted a schedule for the remainder of the Consolidated Proceedings that included a public participation hearing (PPH). The PPH in A.14-10-015 and A.15-01-005 was held in the main dining room of the Catalina Country Club in Avalon on June 8, 2015. The following morning, the ALJ conducted a brief site visit to the freight facility at Pebbly Beach.<sup>3</sup> Evidentiary hearings were held in the consolidated proceeding on July 13-15 in the Commission's Los Angeles offices.<sup>4</sup>

On March 6, 2016 the Commission issued Decision (D.) 16-02-024. That decision awarded CPCNs to both AFS and CMC; set rates for freight service between Catalina Island and points on the mainland at CFL's then-currently tariffed rates; and allowed both AFS and CMC to establish Zones of Rate Freedom for the services provided by each to Santa Catalina Island.

On April 6, 2016, CMC filed a request for rehearing of D.16-02-024. On April 27, 2017 the Commission issued D.17-04-042 (Rehearing Decision) granting rehearing of D.16-02-024. In the Rehearing Decision, the Commission cited *Northern California Power Agency v. Public Utilities Comm.* (1971) 15 Cal.3d 370 (NCPA) as the basis for its conclusion that the discussion of competition issues in the original decision was inadequate. The Rehearing Decision concluded that the Commission "did not sufficiently discuss the dock access issues and the resulting impact on competition in the Santa Catalina freight market."

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<sup>3</sup> SCICO employees as well as representatives of AFS, CFL, and CMC were at the site visit.

<sup>4</sup> On June 16, 2015, CMC filed a motion to join SCICO as a necessary party to the consolidated proceeding. On July 1, 2015, SCICO made a special appearance to file a response in opposition to CMC's motion to join SCICO as a necessary party. On July 9, 2015, by electronic mail, ALJ Farrar denied CMC's motion to join SCICO as a necessary party.

In a separate proceeding, on May 11, 2017 the Commission approved the transfer of the CPCN held by CFL to Pacific Maritime Freight, Inc. (PMF). The effect of this transfer was to authorize PMF to make scheduled freight deliveries to Catalina Island. Shortly thereafter, the ALJ granted PMF's motion to become a party to the present proceeding.

On July 11, 2017, the Commission held a second PHC to discuss the scope and set a timetable for resolution of the competition issues identified in the Rehearing Decision. Representatives of AFS, CMC and PMF attended the second PHC. On May 21st and 22d, 2018, evidentiary hearings were held. The parties filed briefs on June 25 and reply briefs on July 16th. The matter was deemed submitted on the filing of reply briefs.

## **1.2. Factual Background**

Santa Catalina Island is located approximately 26 miles off the coast of Long Beach, California. The City of Avalon is the only incorporated city on Santa Catalina Island. In addition to its approximately 4,000 permanent residents, Santa Catalina Island hosts over one million visitors per year. Because it is an island, food, fuel, water, household goods, vehicles, and other commodities required by residents and visitors must be brought to Santa Catalina Island by freight barge or lander vessel or by air cargo plane.

Although there is air service to Santa Catalina Island, it is expensive, and virtually all freight service to and from the island is by vessel. Approximately 90 percent of freight delivery to the Island is brought to the Pebbly Beach freight facility in an industrial section of Avalon south-east of Avalon Bay. The freight facility consists of a concrete docking facility and a freight operations yard and warehouse owned by SCICO. Eighty-eight percent of the land on Santa Catalina Island is owned by the Catalina Island Conservancy and eleven percent is owned

by SCICO, including virtually all the useable coastline and potential docking points. The remaining one percent is owned by the City of Avalon and various private individuals. Pebbly Beach appears to be the only place on the island where freight can be delivered without significant infrastructure investments.<sup>5</sup> The parcel of land on which the Pebbly Beach freight facility is located is owned by SCICO.<sup>6</sup> The boundary of the parcel on the waterside is the mean high tide line; the State of California owns the tidal waters and submerged lands below the mean high tide line. SCICO, the “upland owner,” holds a long-term lease to the tidal waters and submerged lands below the mean high tide line.

## 2. Discussion

### 2.1 Issues in the Proceeding

The Scoping Memo identified three issues for resolution in this proceeding, as follows:

1. Will the Avalon freight services market support more than one VCC??
2. Is it in the public interest for AFS to enter a long-term lease<sup>7</sup> with SCICO that precludes other VCCs from delivering freight to the dock at Avalon?

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<sup>5</sup> In January 2015, the Los Angeles City Harbor Department issued the Final Initial Study/Negative Declaration for Catalina Express’s proposed construction and AFS’s proposed activities at Berth 95 in the Port of Los Angeles and AFS’s proposed freight service to Santa Catalina Island. On June 29, 2015, the State Lands Commission voted to approve Calendar Item No. 98, Termination and Issuance of a General Lease-Commercial Use and Endorsement of Subleases, which was received into evidence in this proceeding as Exhibit CM-104.

<sup>6</sup> SCICO is also believed to be the largest employer, the largest landholder, and the holder of most of the land leases of the small businesses. (See Public participation Hearing Transcript, Vol. 1: Testimony of Avalon Mayor Ann Marshall, at 5, lines 6-7.)

<sup>7</sup> The Scoping Memo erroneously referred to a 40-year lease. The actual lease is for 10 years with two 5-year renewals.

3. If the answer to Question 2 is “yes” should AFS’s CPCN be revoked or suspended pending revision of the AFS/SCICO lease?<sup>8</sup>

In their briefs, the parties addressed an additional topic, the potential applicability of Section 626 of the Public Utilities Code to the lease between AFS and SCICO. The discussion in the briefs raises these additional questions:

4. Does Section 626 of the Public Utilities Code bar licensed VCCs from entering exclusive leases such as the one between AFS and SCICO?
5. If the answer to Question 4 is “Yes” is there an appropriate remedy within the Commission’s jurisdiction?

For reasons set out below, we first address the potential application of Section 626 to the facts of this case.

Section 626 of the Public Utilities Code:

On or after January 1, 2000, a public utility may not enter into any exclusive access agreement with the owner or lessor or a person controlling a property or premises served by the public utility, or commit or permit any other act, that would limit the right of any other public utility to provide service to a tenant or other occupant of the property or premises.

Is the Lease between SCICO and AFS that gives AFS an exclusive right to deliver freight to Pebbly Beach the kind of exclusionary arrangement barred by this statute?

To begin we note that to be an entity to which Section 626 applies, AFS must be a “public utility.” While it is commonly understood that any entity such as a VCC licensed by the Commission is a public utility, it is nonetheless useful to revisit the definition of a “public utility.” Section 216) (c) of the Public Utilities Code states:

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<sup>8</sup> This is clear error and should say: “If the answer to Question 2 is ‘No’....”

When any person or corporation performs any service for, or delivers any commodity to, any person, corporation, municipality, or other political subdivision of the state, that in turn either directly or indirectly, mediately or immediately, performs that service for, or delivers that commodity to, the public or any portion thereof, that person or corporation is a public utility subject to the jurisdiction, control, and regulation of the commission and the provisions of this part.

By this definition, AFS is clearly a public utility. It is a “corporation” that “delivers commodit(ies)” to SCICO which in turn delivers<sup>9</sup> those commodities to “the public,” namely, the residents of Catalina Island. As a public utility, AFS is subject to Section 626. But the question remains, does Section 626 bar a public utility such as AFS from entering an exclusive lease?

Section 626 prohibits public utilities from entering contracts that have the effect of excluding competitors from providing the designated service to the persons protected by the statute. But who are those protected persons? The statute is clear that the protected class consists of “tenant(s) or other occupant(s)” of the property to which commodities are delivered. However, the sole tenants or occupants of the Pebbly Beach warehouse are SCICO and AFS. Thus, by its very specific terms, Section 626 does not apply to the Lease.

Since we conclude that Section 626 does not apply to the Lease, we need not consider the further question of whether we have jurisdiction under Section 626 to order remedies.

We turn now to the question of competition in the Catalina freight services market. (Scoping Memo issues 2 and 3.) The parties gave contrasting testimony about the operational practicality of multiple freight deliveries to Pebbly Beach

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<sup>9</sup> To be precise, SCICO stores the goods in its warehouse at Pebbly Beach in segregated lots which the ultimate customers pick up using their own vehicles. For purposes of this decision, turning over the goods to the customer at the warehouse constitutes delivery.

and the ability of the market to support more than one VCC. The Pebbly Beach dock is approximately 20 feet by 64 feet.<sup>10</sup> Because of its small size, the Pebbly Beach dock can only accommodate docking and unloading of one freight vessel at a time. During low tides, freight vessels cannot unload freight at Pebbly Beach dock because the water adjacent to the dock is too shallow, or all or part of the dock is above the water line. If shared use of the dock turned out to be impractical or difficult (because the small dock only accommodates one vessel at a time and the dock is only accessible during certain tidal conditions) there would be adverse impacts on the quality and reliability of service provided to the public, rather than benefits for the public.

However, even if we view that testimony in the light most favorable to Curtin, that is, even if we conclude that freight deliveries from multiple carriers are operationally feasible and the market will support multiple carriers, we are left with the reality that we cannot compel SCICO to enter into leases with carriers other than AFS or permit freight deliveries by carriers other than AFS. It is uncontested that the Commission lacks jurisdiction over SCICO.<sup>11</sup> Accordingly, we cannot order SCICO to permit deliveries at Pebbly Beach by other VCCs.

Our only remedy would be to condition AFS's CPCN on AFS entering a non-exclusive lease with SCICO. But even if the Lease were re-written to make it non-exclusive. SCICO would still retain the power to deal only with AFS if it so chose and we would have no way to compel it to deal with the other licensed

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<sup>10</sup> Prepare Direct Testimony of Kris M. Wilhelm on behalf of Avalon Freight Services Exhibit AFS-5 at 3-4.

<sup>11</sup> Rehearing Decision at 6-8.

VCCs. In other words, SCICO could enter a non-exclusive lease with AFS, but decline to enter a lease with any other entity.<sup>12</sup>

On the other hand, if we imposed a non-exclusive lease condition on the CPCN issued to AFS, CMC and CFL would still have valid CPCNs without any condition that prevents them from signing an exclusive lease for facilities on Catalina Island. CMC or CFL could then enter an exclusive lease with SCICO for Pebbly Beach dock.

Therefore, it is not clear that imposing a non-exclusive lease condition on the CPCN for AFS would result in competition and therefore benefit the public.

In Decision D.16-02-024, our original decision in this case, we affirmed our longstanding commitment to the proposition that competition among VCCs generally improves service and lowers prices:

That Commission policy favors competition in the area of transportation is well established. Indeed, as noted by AFS, in Pacific Towboat and Salvage we concluded that "... in the transportation field, public convenience and necessity should be liberally construed, and that competition should be encouraged" and determined to "ensure that the fullest range of common carrier service is made available to the public."<sup>13</sup>

For that reason, we awarded CPCNs to both AFS and Curtin in that decision and encouraged them and SCICO to work together to find a means by which multiple VCCs could serve the needs of Catalina residents. SCICO chose instead to award an exclusive ten-year Lease to AFS, continuing its 40-year practice of leasing access to the Pebbly Beach facilities to a single VCC. While we retain and re-affirm that commitment to competition in this decision, for the

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<sup>12</sup> This is apparently what was done with CFL, the prior lessee, for several decades.

<sup>13</sup> D.16-02-024 at 21.

reasons spelled out herein, we cannot prevent SCICO from contracting with only one VCC for use of the Pebbly Beach facilities.

We also note that the Commission must approve the rates of any freight company operating at Pebbly Beach, which moderates the potential for adverse public impact from lack of competition.

Accordingly, for the reasons set forth above, we find that, despite the concerns about potential adverse impact on competition from SCICO's exclusive lease with AFS, it is still in the public interest to approve the CPCN for AFS. Because of this conclusion, it is unnecessary for us to decide whether the market will support more than one VCC.

#### The Rates Approved for AFS are Reasonable

CMC argues that the rates the Commission approved for AFS are unreasonable because they are too high. It argues that the maximum rate authorized for AFS' operations is not justified because those rates were not determined based on AFS' costs of service and do not reflect changes in market conditions since the time those rates were established. We note that the Commission approved the same rates for AFS and CMC, and when the matter was pending, CMC did not ask the Commission to approve lower rates for its service.

AFSs currently operates under a Zone of Rate Freedom (ZORF), that is, it may charge rates that fall within a band determined by the Commission to be reasonable. AFS must come to us for approval of any proposed rate increase. Indeed, the current rate cap reflects the rates that were in effect for a competitor – Catalina Freight Line -- that previously operated at the Pebbly Beach dock and still has a CPCN for freight service to the island. Catalina Freight Line's rates had not increased since at least 2004. By retaining that rate cap, we ensure that,

despite the lack of other carriers delivering freight to the Pebbly Beach dock, AFS is not permitted to charge higher rates than were previously charged by a competitor for such deliveries. There is no evidence that the currently authorized rates cause hardship to customers or result in excessive prices for freight service to the island. When the Commission approved AFS' rates, AFS had not yet provided service to Catalina, thus there was no data showing AFS' actual costs of service. For these reasons, we find that the rates approved for AFS are reasonable.

CMC notes that economic conditions may change over time and may warrant changes to rates. Absent a request for a rate change, the Commission has discretion to determine when it may be necessary to re-evaluate a carrier's rates. To evaluate whether conditions have changed and whether AFS' rates continue to be reasonable, we order AFS to file a rate case within 3 years of the date of this decision, so we can address that issue.<sup>14</sup>

### **3. Categorization and Need for Hearings**

In Resolution ALJ 176-3346, dated November 20, 2014, the Commission preliminarily categorized this proceeding as Ratesetting and preliminarily determined that evidentiary hearings were not necessary. Based on the record, we affirm that the categorization for this proceeding is Ratesetting. Evidentiary hearings having been held, we change the hearing determination to "necessary."

### **4. Comments on the Proposed Decision**

The proposed decision of the Administrative Law Judge (ALJ) in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's

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<sup>14</sup> For the same reasons, the Commission may have a need in the future to evaluate whether the rate cap authorized for CMC continues to be reasonable.

Rules of Practice and Procedure. Comments were filed by \_\_\_\_\_ on \_\_\_\_\_, and reply comments were filed by \_\_\_\_\_ on \_\_\_\_\_.

### **5. Assignment of Proceeding**

Commissioner Clifford Rechtschaffen is the assigned Commissioner and Karl J. Bemesderfer is the ALJ in these proceedings.

#### **Findings of Fact**

1. Freight is delivered to Catalina Island primarily by vessel common carrier service.

2. The primary delivery point for freight on Catalina is Pebbly Beach.

3. The facilities at Pebbly Beach consists of a partially submerged dock and an adjacent warehouse with parking for trucks and passenger cars.

4. The Pebbly Beach facilities are owned and operated by Santa Catalina Island Company.

5. The Pebbly Beach dock is approximately 20 feet by 64 feet.

6. The Pebbly Beach dock can only accommodate docking and unloading of one freight vessel at a time.

7. During low tides, freight vessels cannot access Pebbly Beach dock because the water adjacent to the dock is too shallow, or all or part of the dock is above the water line.

8. Effective April 1, 2016, the facilities at Pebbly Beach were leased on an exclusive basis for ten years to Avalon Freight Services.

9. In addition to the CPCNs for Avalon Freight Services and Curtin Maritime Corporation, the Commission has previously granted a CPCN to Catalina Freight Lines for vessel carrier service to Catalina Island.

10. The rate cap authorized for Avalon Freight Services and Curtin Maritime Corporation is consistent with rates that the PUC previously authorized for Catalina Freight Line.

### **Conclusions of Law**

1. Santa Catalina Island Company is not subject to the jurisdiction of the Commission.
2. Public Utilities Code Section 626 does not apply to the Lease between Santa Catalina Island Company and Avalon Freight Services.
3. The Commission favors competition in the provision of vessel common carrier freight service.
4. The Commission lacks authority to order Santa Catalina Island Company to allow other vessel common carriers access to the facilities at Pebbly Beach.
5. It is uncertain whether operation of multiple carriers at Pebbly Beach dock would have public benefits.
6. It is uncertain whether imposing a non-exclusive lease condition on the CPCN for AFS would result in competition and therefore benefit the public.
7. The requirement for Commission approval of rates for VCCs moderates the potential for adverse public impact due to lack of competition in use of the Pebbly Beach dock.
8. The Commission should refrain from revoking or suspending the license of a vessel common carrier that has operated lawfully and in accordance with the terms of its Certificate of Public Convenience and Necessity.

### **O R D E R**

1. Approval of the CPCN for Avalon Freight Services is in the public interest.
2. The rates authorized for Avalon Freight Services are reasonable.

3. Avalon Freight Services shall file a general rate case within 3 years of the date of this Decision.

4. Application (A.) 14-10-015 and A.15-01-005 is closed.

This order is effective today.

Dated \_\_\_\_\_, at Sacramento, California.