Decision **PROPOSED DECISION OF COMMISSIONER FLORIO**
(Mailed 3/4/2016)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to examine whether the current procedures for processing applications to obtain or transfer a passenger stage corporation certificate, to acquire or control a passenger stage corporation, and to establish a zone of rate freedom should be revised.	Rulemaking 09-12-001 (Filed December 3, 2009)

DECISION DENYING THE PETITION FOR MODIFICATION OF DECISION 15-05-029

Summary

On September 24, 2015, Daniel W. Baker (Mr. Baker) filed a Petition for Modification of Decision 15-05-029, seeking changes to the California Public Utilities Commission's (Commission) processing of applications for Zone(s) of Rate Freedom for Passenger Stage Corporations. Specifically, Mr. Baker requests the Commission remove the fixed 15 percent Zone of Rate Freedom range, to be replaced by a Zone of Rate Freedom that allows for reasonable fare adjustments by an applicant. In addition, Mr. Baker requests the Commission remove the requirement that limits the informal processing of Zone of Rate Freedom requests, through the Executive Director or his/her designee, to the carrier's application for initial fares.

We have carefully considered the arguments presented by Mr. Baker. This ~~decision~~Decision denies the Petition for Modification. With respect to modifying the 15 percent Zone of Rate Freedom, we deny Mr. Baker's request. The 15 percent range for adjustment is reasonable and provides flexibility for Passenger Stage Corporations to adjust fares. To allow a less fixed, "reasonable" standard may unjustly impact affected travelers or competitors and delay the process for approval of Passenger Stage Corporation and Zone of Rate Freedom applications.

This ~~decision~~Decision denies Mr. Baker's request to allow all Zone of Rate Freedom applications for Passenger Stage Corporations to be approved through the recently-adopted informal structure. The current process, established in Decision 15-05-029, is reasonable and provides an efficient, streamlined, and flexible process for applicants while ensuring safety and reasonable fares for the riding public.

This proceeding is closed.

1. Background

On May 7, 2015, the Commission adopted Decision (D.) 15-05-029, modifying the procedures for processing Passenger Stage Corporation (PSC) applications and Zones of Rate Freedom (ZORF). The Commission also adopted revisions to Rule 3.3 of the Commission's Rules of Practice and Procedure and ordered the Chief Administrative Law Judge to submit the Rule changes to the California Office of Administrative Law for approval and publication in the California Code of Regulations.

D.15-05-029 concluded the Commission's rulemaking proceeding Rulemaking (R.) 09-12-001. The Commission opened R.09-12-001 on December 3, 2009, in order to address two concerns: (1) the statutory revisions initiated by the Legislature in Senate Bill 1840 (chaptered on September 29, 2006) that removed

the requirement for the Commission to consider market effects upon competitors when licensing new PSCs; and (2) addressed the ongoing need to simplify regulatory procedures. The Order Instituting Rulemaking (OIR), and the Preliminary Scoping Memo, found therein, solicited comments on the following issues:

1. Under a simplified process, what criteria should the Commission use to prescribe territories, airports, and other specific points on a PSC certificate?
2. Are any changes to the requirements to operate PSC service specializing in the transportation of children and infants necessary?
3. Should the Commission establish a simplified process for granting approval to acquire or control a PSC pursuant to Section 854?
4. Should an applicant for PSC authority be required to serve notice of its application to any parties?
5. Under what circumstances, if any, should a protest to a PSC application be entertained, and how should it be resolved?
6. How should the concerns of a public transit operator be addressed when a PSC applicant intends to operate over the same or a similar route, possibly using the same stops, as the public operator?
7. Should a city, or a county in the case of an unincorporated community, be afforded an opportunity to object to the grant of PSC authority, in whole or in part, due to concerns over proposed stop points, traffic congestion, or other safety related issues?
8. Should the current formal application process used to grant a ZORF be revised?
9. What, if any, amendments to the Rules are required to implement any changes to the application process?

We received comments from SuperShuttle of San Francisco, Inc. (SuperShuttle) and Daniel W. Baker. Both parties commented on issues now related to the

Petition for Modification (Petition), stating that the current ZORF provisions should be retained. SuperShuttle noted that fare reductions should be allowed with a notice of one day; Mr. Baker contended the 10-day notice period is appropriate.

On May 27, 2014, Commissioner Michel Florio issued an Assigned Commissioner's Ruling, which proposed direct changes to the Commission's Rules of Practice and Procedure and sought additional public comment. The proposed changes were subject to public comment pursuant to Government Code Sections 11346.6 and 11351, and the California Code of Regulations, Title 1, Sections 1-120. Notice of the proposed changes was published in the California Regulatory Notice Register on June 20, 2014. In addition, the Ruling was mailed to all persons on the service list of this proceeding, as well as the service list used by the Commission to distribute potential changes to the Commission's Rules.

As directed in the Assigned Commissioner's Ruling, the Administrative Law Judge (ALJ) published the proposed amendments in the California Regulatory Notice Register on June 20, 2014, in accordance with California Government Code §§ 11346.4 and 11351, and California Code of Regulations, Title 1, §§ 1-120. As required, the publication started the 45-day public comment period on the text of the regulations. The comment window closed on August 4, 2014.

On August 6, 2014, ALJ Colbert, based upon a request from Mr. Baker, granted a limited extension of time to file comments. ALJ Colbert extended the comment period until August 8, 2014, at 5:00 p.m.

Two parties filed comments on the proposed amendments to Rule 3.3: Goodin, MacBride, Squeri & Day, LLP (Goodin MacBride) and Mr. Baker. Mr.

Baker filed both Comments and "Further Comments." Commenters did not take issue with most of the proposed amendments to Rule 3.3.

Among other issues, Mr. Baker commented that the new requirement of providing a list of "existing competitors who offer the same or substantially similar services" would be overly burdensome and would cause applicants to identify thousands of competitors. In addition, similar information – such as a description of similar competitive services offered – is typically included in the application for a ZORF.

In response to the comments received, the Assigned Commissioner modified the proposed rule amendments. Such changes were sufficiently related changes, as defined by Title 1, California Code of Regulations, Section 42. The new text of Rule 3.3 was again published, as part of an Assigned Commissioner's Ruling, on December 5, 2014.

The changes included one item tangentially related to the ZORF issues that are the subject of Mr. Baker's Petition for Modification. The Commission proposed an amendment to Rule 3.3(a)(5), now stating:

> ~~(6)~~ (5) ~~A statement of the rates or fares proposed to be charged and rules governing service.~~ A list of the base fares to be charged, and a statement indicating whether or not the applicant is aware of and identification of existing competitors who offer the same or substantially similar services. In addition, all proposed discounted fares must be disclosed as part of this list. Applications for certificates need not contain tariffs, but shall indicate the level and nature of proposed rates and rules, as required herein, and may refer to tariffs on file with or issued by the Commission.[1]

[1] The specific changes are shown in double strikethrough (~~double strikethrough~~) and double underline (double underline) format. The original additions and deletions are shown in strikethrough (~~strikethrough~~) and single underline (single underline) format.

Written comments on the changes were allowed for 15 days. Both parties to the proceeding and interested persons had the opportunity to comment. No additional comments were submitted to the Commission.

The Proposed Decision of ALJ Colbert 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 Rules and Practice and Procedure. Comments were filed on April 23, 2015 by SuperShuttle. Mr. Baker did not file comments on the ~~proposed decision~~Proposed Decision.

SuperShuttle requested that the requirements of Section 1032 not be applied to applications to amend existing PSC certificates, as such requirements would be burdensome and were not adequately noticed in the Proceeding. SuperShuttle noted that the Proposed Decision should be revised to exclude applications to amend existing PSC certificates from the requirements of Ordering Paragraph 2.

The Commission agreed and revised Ordering Paragraphs 2 and 5 to exclude applications to amend existing PSCs. In addition, SuperShuttle alerted the Commission to typographical errors, which were corrected. No party filed reply comments.

On September 24, 2015, Mr. Baker filed the Petition for Modification. No party filed a response to the Petition.

2. Relief Requested

Mr. Baker asks the Commission to modify the requirements of D.15-05-029 that relate to Zones of Rate Freedom as found in Ordering Paragraph 11, which currently states:

> 11. A passenger stage corporation certificate application may include a request to establish a Zone of Rate Freedom which will allow fare adjustments of not more that 15% above and below the

> carrier's initial fares. The Executive Director or his or her designee is authorized to grant such requests. All other requests for a zone of rate freedom shall be made by a formal application to the Commission.

Mr. Baker urges the Commission to amend Ordering Paragraph 11 to read:

> 11. A passenger stage corporation certificate application may include a request to establish a Zone of Rate Freedom which will allow reasonable fare adjustments above and below the carrier's fares. The Executive Director or his or her designee is authorized to grant such request. Petition for Modification at 5.

Mr. Baker states that it would be an error to allow a ZORF window to be based on a percentage because: (1) no notice was given to the public regarding the change; (2) no ZORFs in the past 15 years have been based on percentages; and (3) Commission staff would be unable to accurately verify percentages instead of whole numbers. Mr. Baker states "[t]he alternative of filing with the Commission for a whole number ZORF is more practical, less costly, and more feasible than the Fixed 15%." Petition for Modification at 4.

Mr. Baker additionally contends that the words "initial fares" should be eliminated from Ordering Paragraph 11, because the language would limit the new ZORF procedures to applications for initial fares, while in practice applicants will seek ZORFs for old and existing tariff fares and for new ZORFs that exceed the 15 percent threshold, through the formal application process.

3. Legal Standard and Discussion

Public Utilities (Pub. Util.) Code Section 1708 grants the Commission authority to "rescind, alter, or amend any order or decision made by it. Any order rescinding, altering, or amending a prior order or decision shall, when served upon the parties, have the same effect as an original order or decision." In order to make any changes to a decision or order the Commission must provide

proper notice to the parties and an opportunity to be heard. Pub. Util. Code § 1708.

We note that modifying an existing decision is an extraordinary remedy that must be exercised with care and in keeping with the principles of res judicata since "Section 1708 represents a departure from the standard that settled expectations should be allowed to stand undisturbed." 4 CPUC 2d 139, 149-150 (1980); see also D.15-05-004.

Rule 16.4 of the Commission's Rules of Practice and Procedure governs the filing of petitions for modification. Rule 16.4 contains both procedural and substantive requirements.

We begin our analysis by examining the requirements of Rule 16.4. Rule 16.4(b) provides specific instruction to petitioners:

> A petition for modification of a Commission decision must concisely state the justification for the requested relief and must propose specific wording to carry out all requested modifications to the decision. Any factual allegations must be supported with specific citations to the record in the proceeding or to matters that may be officially noticed. Allegations of new or changed facts must be supported by an appropriate declaration or affidavit.

Mr. Baker complied with the Rule 16.4(b) requirements by concisely stating the requested relief and by including specific wording in the Petition for Modification. Mr. Baker did not allege new or changed facts. Additionally, Mr. Baker, a party to the proceeding, complied with the procedural requirements of Rule 16.4 by filing and serving the Petition on all parties to the proceeding and doing so within one year of the effective date of the decision. See Rule 16.4(c),(d), and (e). No responses were filed to the Petition. We remind Petitioner that "[f]iling a petition for modification does not preserve the party's appellate rights; an application for rehearing (see Rule 16.1) is the vehicle to request rehearing and

preserve a party's appellate rights." Rule 16.4(a). Since Mr. Baker complied with the requirements of Rule 16.4, the Commission may now address Mr. Baker's proposed modifications to Decision 15-05-029.

We reject Mr. Baker's allegation that a ZORF allowance based on percentages, in particular a 15 percent window, was not introduced in the Rulemaking or subject to public comment and that its implementation "would be a disaster," is "impractical, not feasible and a mistake." Petition at 3-4.[2]

Regarding the notice, we first highlight the title of this proceeding "Order Instituting Rulemaking to Examine Whether the Current Procedures for Processing Applications . . . to Establish a Zone of Rate Freedom Should be Revised." The Commission's OIR contemplated such a change and mentioned the use of percentages to calculate ZORFs. See OIR at 12 (stating "some [ZORFs] are based on a percentage, for example, 20% above and below the initial fares."). Later in the OIR, the Commission directly asked parties the following question: "Should the Commission establish a standard ZORF that applies to all carriers, perhaps based on a percentage?" OIR at 12. As noted, above, Mr. Baker provided comments to the OIR. Mr. Baker's comments noted that ZORF applications should remain formal.

More importantly, the Commission reiterated the ZORF amendments in the Proposed Decision, which mailed on May 7, 2015. As provided by Rule 14.3, parties were allowed and encouraged to file comments on the Proposed Decision.

[2] Commission staff has processed applications utilizing the procedures found in D.15-05-029 without issue. See e.g., D.16-01-005 and D.16-01-007.

Mr. Baker did not file comments. Instead, Mr. Baker elected to pursue to the extraordinary remedy of petitioning for modification.[3]

Even though Mr. Baker did not address ZORF concerns prior to the issuance of the Decision, we will comment on his concerns that a percentage-based ZORF is impractical, infeasible, and a mistake. With regards to the difficulty Commission staff may face when calculating ZORFs based on percentages, we note that computation of the Low and High ZORF fares requires the use of a calculator or an Excel formula to ensure accuracy. With such technology, the tallying of a Low and High fare based on a percentage requires the same number of keystrokes as it would to compute a fare based on whole numbers.[4] Despite Mr. Baker's allegations, Commission staff is fully capable of multiplication and imposing a percentage-based ZORF would not be a disaster.[5]

As stated in the Decision, a 15 percent range for ZORFs "is reasonable in light of the existence of competition, and that giving ten days' notice of prospective fare changes (both increases and decreases) to the Commission and the public would enable a PSC to respond to changing market conditions without unfairly surprising customers or competitors." Decision, p. 28. Our changes

[3] We also note that a major component of this Proceeding involved modifying Rule 3.3 of the Commission's Rules of Practice and Procedure. To amend the Rule, the Commission published a Notice of Proposed Regulatory Action in the California Notice Register, which provides more notice to the public of Commission activity than a typical Commission proceeding. As required by State law, any interested person was allowed to comment on the Rule changes.

[4] Under the old approach the window was calculated by: Regular +/- $25.00. The new approach is simply: Regular x 1.15/0.75.

[5] Commission staff notes that the chart included by Mr. Baker to the Petition for Modification, which is intended to demonstrate the difficulties that staff will have in computing ZORFs, corr ectly computes only one of the High and Low ZORF fares. Petition, p. 4. The example fares should read, as follows:⊥

(L)	(R)	(H) ⊥
25.50 (4.65)	30	34.50 (34.65)⊥
42.50 (7.50)	50	57.50 ⊥
97.75 (97.175)	115	132.25 (132.825)⊥

meet the requirements of Section 454.2 of the Public Utilities Code, which allows the Commission to grant reasonable ZORFs.

While Mr. Baker's request that the Commission allow "reasonable fare adjustments," not based on whole numbers or percentages, would also satisfy the Legislative requirement, we believe that the imposition of a reasonableness standard would contradict an underlying purpose of this proceeding – simplifying the Commission's regulatory procedure. Under Mr. Baker's proposal, Commission staff and the Executive Director would be required to determine the reasonableness of a proposed ZORF on a case-by-case basis, which would increase the amount of time required to approve applications. The Commission's current structure has already determined that a 15 percent ZORF is inherently reasonable and therefore has removed a step in the approval process, allowing a more efficient and streamlined processing of applications.

The Commission believes that Mr. Baker's second request, to eliminate the words "initial fares" from Ordering Paragraph 11, is not necessary because applicants may still apply for ZORFs related to old and existing fares. Mr. Baker states "[t]he restriction in Paragraph 11 to make the ZORF limited to 'initial fares' should not be included in Paragraph 11 because ZORFs can be and have been applied for numerous times for old and existing fares." Petition at 5. We agree that ZORFs have been applied for old and existing fares, but we clarify that the current Ordering Paragraph 11 does not eliminate the possibility for such requests. The Ordering Paragraph states:

> 11. A passenger stage corporation certificate application may include a request to establish a Zone of Rate Freedom which will allow fare adjustments of not more that 15% above and below the carrier's initial fares. The Executive Director or his or her designee is authorized to grant such requests. All other requests for a zone of

> rate freedom shall be made by a formal application to the Commission.

As it is currently applied, an application for a ZORF related to old and existing fares, or for one that exceeds the 15 percent window, is not barred by the Commission, but rather should be made by a formal application to the Commission. When a carrier seeks greater pricing flexibility, it may submit a formal application for approval by Commission vote. If the initial fares requirement was to be eliminated, and Mr. Baker's changes imposed, a PSC could continually apply for new ZORFs and continually drive up fares without full Commission review. The procedure approved in D.15-05-029 gives PSC applicants a choice on filing, and ensures that the Commission responds to modern market conditions without sacrificing our duty to protect the safety and welfare of the traveling public.

After careful review of the Petition for Modification we find no basis to change our findings and conclusions in D.15-05-029. The Decision reached the correct result, and we affirm it. Mr. Baker has not demonstrated good cause to modify D.15-05-029.

4. Comments on Proposed Decision

The proposed decision of Commissioner Florio 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 Rules of Practice and Procedure. ~~Comments were filed on _____, and reply~~No comments were ~~filed on _____ by _____~~received.

5. Assignment of Proceeding

Michel Florio is the assigned Commissioner and W. Anthony Colbert is the assigned ALJ in this proceeding

Findings of Fact

1. Mr. Baker did not demonstrate good cause to modify Decision 15-05-029 with regard to Zones of Rate Freedom.

2. The process implemented in Decision 15-05-029 is reasonable, ensures the safety of the traveling public, and helps streamline the Commission's process for granting or denying Passenger Stage Corporation Applications.

Conclusions of Law

1. Mr. Baker's Petition for Modification of Decision 15-05-029 should be denied.

2. This order should be made effective immediately.

O R D E R

IT IS ORDERED that:

1. The Petition for Modification of Decision 15-05-029 by Daniel W. Baker is denied.

2. Rulemaking 09-12-001 is closed.

This order is effective today.

Dated _____, at San Francisco, California.

Document comparison by Workshare Compare on Wednesday, March 30, 2016 2:58:32 PM

Input:	
Document 1 ID	file://d:\jt2\Desktop\R0912001 Florio Comment Dec 2-16-16.docx
Description	R0912001 Florio Comment Dec 2-16-16
Document 2 ID	file://d:\jt2\Desktop\R0912001 Florio Agenda Dec Revision 1 2-16-16.docx
Description	R0912001 Florio Agenda Dec Revision 1 2-16-16
Rendering set	Standard

Legend:	
Insertion	
~~Deletion~~	
~~Moved from~~	
Moved to	
Style change	
Format change	
~~Moved deletion~~	
Inserted cell	
Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

Statistics:	
	Count
Insertions	50
Deletions	6
Moved from	0
Moved to	0
Style change	0
Format changed	0
Total changes	56