

Decision 07-06-026 June 21, 2007

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of HARBOR BREEZE CORP. for authority to operate as a vessel common carrier in nonscheduled/on-call passenger ferry service between Long Beach, California and all points and places on Santa Catalina Island, and between all points and places at and between Long Beach and San Pedro, California; and to establish a Zone of Rate Freedom.

Application 06-05-011
(Filed May 9, 2006)

(See Appendix A for List of Appearances)

DECISION GRANTING APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY AS A VESSEL COMMON CARRIER

1. Background

On May 9, 2006, Harbor Breeze Corp (Applicant) filed this application to be licensed as a vessel common carrier providing on-call service between Long Beach and Santa Catalina Island, as well as water taxi service between Long Beach and San Pedro and points in between. The application was protested by two existing vessel common carriers (VCCs) who serve the Catalina market, Catalina Channel Express, Inc., Certificate No. VCC-52 (Express) and Pacific Adventure Cruises, Inc., Certificate No. VCC-78.

A prehearing conference (PHC) was held in San Francisco on August 14, 2006, at which Applicant and both protestors appeared through counsel. At the

hearing, Administrative Law Judge (ALJ) Karl Bemesderfer admitted two additional parties, Catalina Explorer Co., Inc. (Explorer) and Catalina Classic Cruises (Classic), both of whom are VCCs serving the Catalina market.

At the PHC, the following factual issues were identified:

1. Is there significant unmet demand for on-call service between Long Beach and Santa Catalina Island?
2. What effect will the entry of another on-call carrier into the Long Beach-Santa Catalina market have on existing service providers? In addressing this issue, parties should be prepared to introduce evidence regarding the size and composition of the existing market; seasonality; profitability of existing services; and cross-subsidization between scheduled and on-call services.
3. Is the Applicant qualified to provide the requested service? Protestors allege that the Applicant is currently ferrying passengers to Santa Catalina without a license and that certain of the factual representations made in the application are untrue.

On August 17, 2006, assigned Commissioner John Bohn issued his Scoping Memo which included the three factual issues identified at the PHC. Three days of evidentiary hearings were held January 22-24, 2007. The Applicant submitted its post-hearing brief on March 22, 2007 and the protestors submitted their reply briefs on April 6, 2007.

2. Discussion

The Commission has generally favored competition in the market for VCC services but each application for a new license in an existing market has to be examined in the light of specific facts about existing service in that market. Whether or not it is in the public interest to add an additional carrier to an existing market depends in large measure on those facts. With those considerations in mind, the scoping memo directed the parties to address two

specific factual questions about the market for ferry service from Long Beach to Catalina.

A second part of the public interest analysis is a consideration of the qualifications of the applicant and its fitness to serve the public. The scoping memo also directed the parties to address specific concerns regarding the applicant's history of providing unlicensed service between Long Beach and Catalina.

We address these specific issues and the ultimate public interest question in turn.

2.1. Is There Significant Unmet Demand For On-Call Service Between Long Beach and Catalina Island?

Approximately 90% of the passenger traffic between Long Beach and Catalina is handled by a single carrier, Express.¹ Express operates both regularly scheduled service 365 days a year² and on-call service during the peak season (June through September) and the shoulder months (April, May, October and November). During the winter months (December through March) Express operates only scheduled service twice a day.³ Because of the seasonality of the market, Express operates more vessels and makes more frequent trips between Long Beach and Catalina during the summer months, when traffic is heaviest.⁴ During the peak season demand sometimes exceeds Express's capacity and the other protestors who hold common carrier licenses from the Commission

¹ Reporter's Transcript (RT), Vol. 2, p. 265.

² *Id.* Vol. 3, p. 297.

³ *Id.* Vol. 3, pp. 336-7.

supplement the service provided by Express.⁵ If Harbor Breeze's application is granted, it will operate as an on-call common carrier, primarily during the peak season.

Applicant presented a series of witnesses who regularly transport groups from Long Beach to Catalina. The witnesses and their testimony were:

- Annie McCauley, President of Mountain and Sea Adventure Science Camps, who testified that having another on-call carrier would be very beneficial to her camp business⁶ and that from her perspective those who operate camps on Catalina need another transportation option between Long Beach and Catalina.⁷ Ms. McCauley testified that Express' high minimum charter fee sometimes made it difficult for her to use them.
- Reverend Willard May, President of Newport Campus Church Ministries (NCCM), an educational organization that arranges for students to travel to Gallagher's Cove on Catalina Island to study marine biology. Reverend May testified that he did not oppose the Harbor Breeze application because NCCM now uses its own vessels to transport students to and from Catalina Island.
- Michelle Manire, President of CTC Destination and Meeting Management in Long Beach, who testified that demand for transportation from Long Beach to Catalina has increased over the past 11 years, that Harbor Breeze is one of her preferred vendors, and that another transportation option between Long Beach and Catalina is needed and would provide land-based operators such as

⁴ Express Exhibit 2, p. 14.

⁵ *Ibid.*

⁶ *Id.* Vol. 1, p. 37.

⁷ *Id.* p. 40.

her company with increased flexibility in scheduling, more availability of transportation, and lower rates.⁸

- Lee Harrison, Executive Director of Camp Emerald of the Boy Scouts of America, a non-profit camping facility on Catalina that the Boy Scouts use for week-long camping programs, who testified that the number of Scouts who use this camp is increasing and that an additional transportation option was necessary to provide more flexible and frequent trips between Long Beach and the camp on Catalina.⁹
- Laurie Reynolds, Director of Operations for Destination Catalina, a mainland based company that brings corporate groups to the island, that from her perspective there is a clear need for an additional transportation option to the island.¹⁰

In addition to these witnesses, Applicant also presented the testimony of the owner of Harbor Breeze, Dan Salas. Mr. Salas testified that during the past five years he has from time to time provided transportation to Catalina on occasions when the existing licensed carriers were unable to meet the needs of groups seeking to go to the island. He testified that these groups sought him out and that he made his vessels available to them in order to help them avoid situations where they might have had to cancel trips to the island or experience extraordinary delays.¹¹

In rebuttal, Express presented the results of a survey of passenger traffic between Long Beach and Catalina conducted by the Catalina Island Chamber of

⁸ RT Vol. 2, pp. 176-185.

⁹ RT Vol. 3, pp. 343-349.

¹⁰ *Id.*, pp. 370-373.

¹¹ *See e.g.*, RT Vol. 1, pp. 30-31.

Commerce. The Chamber of Commerce survey demonstrated that the volume of passenger traffic between Long Beach and Catalina has declined from slightly over 700,000 visitors in 2000 to approximately 600,000 in 2006.¹² These actual passenger counts contradict the testimony of the Harbor Breeze witnesses and lend credence to the argument that there is little or no unmet demand for cross-channel services.

However, the passenger count alone is not a complete answer to the question of unmet demand. Passenger counts have to be viewed in the context of the number of VCCs serving the market at any given time. If the number of VCCs serving the cross-channel market has declined along with the number of passengers seeking carriage, it may still be true that there is unmet demand. One of Express' competitors, Catalina Cruises, ceased operations in September 2006. Another competitor, Catalina Explorer, experienced mechanical problems with its vessels from the spring of 2004 to the spring of 2005, during which time Harbor Breeze provided transport for groups that could not be carried by Catalina Explorer.¹³

The gross capacity numbers also have to be interpreted in terms of Express's chartering policies. Put simply, Express requires a guaranteed minimum charter fee because, for smaller groups, the cost of operations will exceed the sum of individual fares paid. For that reason, Express requires a minimum of 125 persons for a charter to Catalina.¹⁴ Each of the four smallest

¹² Express Exhibit 1.

¹³ TR Vol. 1, pp. 113-116.

¹⁴ TR Vol. 2, pp. 314-315.

vessels operated by Express has a capacity of 149 persons; the four remaining vessels have capacities of 198, 360, 383 and 450 persons, respectively.¹⁵ The four vessels operated by Applicant Harbor Breeze have capacities of 138, 149, 149 and 150 persons, respectively.¹⁶ If Harbor Breeze is issued a CPCN, it will compete for small to medium-sized charter business with the four smaller vessels operated by Express.

Finally, demand has to be analyzed in terms of its source and composition. Witnesses presented by Applicant testified that demand is growing for transportation to the island for campers and corporate groups. These types of groups like to use on-call service because their ultimate destinations may not be where the scheduled carriers dock and because their timetables may not coordinate well with the scheduled service.

The record also demonstrates that between 2004 and 2006, Applicant transported between 12 and 16 groups to and from Catalina as an unlicensed carrier. The inferences regarding Applicant's fitness to serve to be drawn from its unlicensed activities will be dealt with in Section 3, below. At this point, we consider only what inference to draw regarding unmet demand from the Applicant's history of supplying these services. In his testimony, Daniel Salas, president of the applicant, indicated that his per capita rate for carrying charter parties to the island was approximately equal to the rates being charged by

¹⁵ Express Exhibit 2, p. 12.

¹⁶ Application, pp. 3-4.

Express for similar services.¹⁷ His and other testimony established that these charters were arranged for parties that would otherwise have been stranded or would have had difficulty getting to the island in a timely fashion using other carriers. Since Salas was not competing with Express on the basis of price¹⁸ and other evidence has established that Express' vessels were significantly faster than Salas' vessels, it is a fair inference that Salas was filling an unmet need when he arranged these charters.

On the other hand, the record also indicates that in 2006 when Harbor Breeze relinquished trips it had booked but not yet performed, Explorer was able to perform those trips as scheduled.¹⁹

On balance, we conclude that there is a modest amount of demand for additional on-call charter service during the peak months, principally for small to medium-sized groups. However, it appears that most of this demand reflects either the temporary unavailability of a licensed carrier or a desire for more convenient service. "More convenient service" could be in the form of transportation at a more convenient time, or for a lower minimum charter fee,²⁰ or for a more convenient drop-off point on Catalina. As far as vessel capacity is

¹⁷ TR Vol. 3, pp. 388-89 Salas testified that when he took over charters that other carriers were unable to perform, he charged the customers the same price they had negotiated with the initial carriers.

¹⁸ Round-trip prices have increased substantially in 2007; see FN 21, below.

¹⁹ TRT Vol. 1, p. 127.

²⁰ Applicant proposes to have a minimum group size of 75 to charter one of its vessels (Application, p. 2); at present, Express requires a minimum of 125 to charter one of its vessels (FN 14, *supra*).

concerned, the licensed carriers have more than sufficient capacity on their vessels to serve all the existing demand.

2.2. What Effect Will the Entry of Another On-Call Carrier into the Long Beach-Santa Catalina Market Have on Existing Service Providers?

Because Express is the only VCC offering year-round daily scheduled service between Catalina and the mainland and carries more than 90% of the total ferry passengers between Catalina and the mainland each year, this question primarily concerns the effect the entry of Harbor Breeze would have on Express. To address this question, Express introduced an economic analysis provided by its expert witness, Dwight Duncan, a principal in the firm EconLit, which provides economic analyses to parties in litigation.

Mr. Duncan analyzed the economic consequences to Express of losing a portion of the summer and shoulder season business to Harbor Breeze. The main points of his testimony were contained in Exhibit E-2 and may be summarized as follows:

- Ferry business between Catalina and the mainland is highly seasonal.
- Operations during the summer months subsidize operations during the balance of the year.
- A relatively small reduction in business during the summer would transform Express from a money-making to a money-losing business.
- Express is most likely to respond to a loss of summer income by reducing scheduled service during the balance of the year.
- Reductions in scheduled service during the shoulder and winter seasons would have major negative impacts on the communities on Catalina.

Looking specifically at the time period 2003-2005, Mr. Duncan found the following seasonal pattern of profit and loss in Express' operations:

	High Season Profits	Off-Season Losses	Net Income
2003	\$2,810,075	(\$2,385,125)	\$424,950
2004	\$3,358,856	(\$3,047,152)	\$311,704
2005	\$2,256,673	(\$3,227,310)	(\$970,637) ²¹

Mr. Duncan then estimated what Express' net income would have been in each of those three years if Harbor Breeze had been operating an on-call service competing with Express. To make this estimate, he assumed that Express would have lost 2.5% of its high season business and 1% of its off-season business to Harbor Breeze. On those assumptions, Express's net income for the three years would have been (\$118,105) in 2003; (\$271,311) in 2004; and (\$1,535,153) in 2005. He concluded that Express would either reduce service or raise prices to make up these deficiencies. Reducing service, particularly in the winter months, is the quickest and most effective way to cut costs because each such trip loses a substantial amount of money as shown by the above chart. On the other hand, raising prices requires a Commission decision that would take at least six months to obtain²² and there is no certainty that we would grant an application for a further price increase.

²¹ In December 2006, we granted Express fare increases between 10% and 15.3% to enable it to recoup the increased fuel and other costs that led to the 2005 loss. 2006 WL 3780421 (Cal. P.U.C.).

²² The application to raise prices that we granted in December 2006 was filed in June 2006.

Mr. Duncan's testimony was premised on the explicit assumption that adding another on-call VCC to the market would not result in any increase in demand for trips to Catalina:

And I want to make it clear that the assumption model here is that it's vying for that same service. It's not adding new on-call passengers. It's duplicating runs that are out there providing an alternative, but not creating a new market.²³

2.3. Is the Applicant Qualified to Provide the Requested Service?

Harbor Breeze has ferried passengers to and from Catalina on 12 to 16 occasions over the past three years without obtaining a VCC license. Express, through its president, Greg Bombard, complained about these activities to the Commission in April 2006. The Commission's Consumer Protection and Safety Division (CPSD) then notified Harbor Breeze that it had instituted an investigation of the allegations of unlicensed service. On May 9, 2006, Harbor Breeze filed its application to become a licensed VCC. On May 17, 2006, CPSD issued a cease-and-desist letter to Harbor Breeze. Following receipt of the cease-and-desist letter, Harbor Breeze cancelled its future Catalina business. On February 26, 2007, Harbor Breeze and CPSD entered into a written settlement agreement that was approved in a resolution adopted by the Commission on March 15, 2007. The settlement finds that Harbor Breeze had made four unlicensed trips to Catalina; that the so-called "continuous loop" exception to the VCC licensing requirement did not apply to Harbor Breeze; and that Harbor

²³ TR Vol. 2, p. 281.

Breeze should pay a fine of \$5,000 for making those unlicensed trips. The settlement also contains the following statement:

CPSD does not object to the Commission granting Respondent's application (A.06-05-011) as part of approval of this settlement, and **nothing agreed to herein should be used as a basis for the application (A.06-05-011) being denied.** (Emphasis supplied.)

Harbor Breeze contends that the highlighted language in the settlement bars use of Harbor Breeze's past practice of providing unlicensed ferry service between Catalina and Long Beach as a reason for denying the present application. Protestors contend that the settlement only deals with four specific unlicensed trips and that the quoted language does not bar using the other trips admittedly made by Mr. Salas without a license as evidence of his lack of fitness to receive a license.

The protestors' case against Mr. Salas based on his past conduct comes down to the allegation that by ferrying a small number of passengers to Catalina over a period of years, he has sufficiently violated the letter and spirit of the VCC licensing law that we should not reward his bad behavior by granting him a license. Harbor Breeze responds that Salas acted in good faith in providing ferry service on an occasional basis when other carriers were unable for mechanical failure or other reasons to fulfill contracts; that he relied on misinformation given him by a Commission staffer who allegedly told him that he did not require a license for the type of business he was conducting; that he promptly ceased ferrying passengers to Catalina when ordered to do so, went to the trouble and expense of filing a contested application for a VCC license and cooperated fully with CPSD in its investigation.

The protestors do not contend that Mr. Salas and his crews are unskilled or that his vessels are unsafe or that they lack required insurance or Coast Guard

certification. They argue that having shown a willingness to violate the law in the past he has forfeited his right to receive a license. We disagree. The purpose of our licensing regime is not to exclude competitors from a marketplace but to insure that on a going-forward basis, each licensed operator will operate its vessels in accordance with our requirements. As part of the settlement with CPSD, Harbor Breeze and Mr. Salas “take full responsibility for past violations of laws, rules and regulations governing vessel common carriers and agree to be in full compliance with these regulations, and all other applicable rules in the future.”²⁴ Having paid a fine for past violations, filed this application, and bound itself to obey all our rules and regulations in the future, Harbor Breeze has cured its past misconduct. We find that Harbor Breeze’s past conduct does not disqualify it from becoming a licensed VCC.

2.4. Is it in the Public Interest to Grant the Application?

Having determined that there is a modest amount of unmet demand for on-call service between Long Beach and Catalina and that Harbor Breeze is not disqualified from holding a VCC license by its past conduct, the question we now address is whether admitting this additional competitor into the cross-channel market would be in the public interest. To make this determination we need to evaluate the expert testimony regarding the economic effects on existing service of permitting Harbor Breeze to provide its proposed on-call service.

²⁴ Settlement Agreement among the Consumer Protection and Safety Division of the PUC, Harbor Breeze Corp., a California corporation and Ralph Daniel Salas, dated as of February 27, 2007, p. 3.

Express' expert testified that Harbor Breeze would divert 500 one-way trips from Express to Harbor Breeze during the high season.²⁵ But is this a realistic conclusion? The high season is approximately 100 days long (Memorial Day to Labor Day). To generate 500 one-way trips, Harbor Breeze would have to average five one-way trips a day during the high season (500 trips divided by 100 days).²⁶ During three years of operation as an unlicensed on-call carrier, Harbor Breeze made a total of 24-36 one-way trips between Long Beach and Catalina.²⁷ While it is probable that operating as a licensed carrier Harbor Breeze can generate additional on-call business, we find it highly unlikely that Harbor Breeze can go from two to three one-way trips a month to five one-way trips a day.

Express' Exhibit E-2 shows that Express vessels made a total of 1,450 one-way trips in August 2005, an average of 47 trips a day. Assuming that the August volume is a good proxy for the balance of the high season, we can infer that Express makes approximately 4,700 one-way trips during the high season. It follows that if, as Express' expert testified, the market is not growing, then for Harbor Breeze to make 500 one-way trips during the high season, it would have to capture more than 10% of Express's cross-channel high-season business. The

²⁵ Protestor's Exhibit E-2, p. 27. Strictly speaking, the exhibit says that Express would make 500 fewer one-way trips during the high season; it does not say that all of that traffic would be carried by Harbor Breeze. The clear implication of the testimony is that most, if not all, of those trips would be made by Harbor Breeze.

²⁶ Mr. Salas testified that he would use one vessel, the *Christopher*, to provide on-call Catalina service because it is his newest and fastest boat with a top speed of 22 knots. TR Vol. 1, p. 13.

²⁷ See cross-examination of Salas, TR Vol.1, pp. 88 ff.

bulk of Express' business is scheduled service, with 19 round-trips a day leaving for Catalina from three ports during the high season, or approximately 3,800 scheduled one-way trips,²⁸ leaving a remainder of 700-900 non-scheduled trips. Since Harbor Breeze seeks a license for on-call chartering only, Harbor Breeze would have to capture more than half of Express's total on-call business -- and an even greater percentage of its Long Beach-originated on-call business -- in order to reach the 500 one-way trips testified to by Mr. Duncan. We simply do not believe this is possible.

Mr. Salas repeatedly testified that he is interested only in being able to serve the occasional charter to Catalina that comes to him when the customer can't get convenient service from one of the other licensed VCCs. He testified that he is and intends to remain primarily a tour boat operator but that he does not want to turn away charter business that seeks him out because he lacks the necessary license. He testified that he would use only one 149-passenger vessel to provide occasional on-call charter service to Catalina. Under the circumstances, we find that granting the requested VCC license to Harbor Breeze will not have a significant negative impact on Express.

We conclude that (a) Express has failed to show that it will suffer significant harm from the granting of the requested license to Harbor Breeze and (b) permitting Harbor Breeze to serve the modest amount of unmet demand for cross-channel on-call service is in the public interest.

²⁸ See www.catalinaexpress.com/scheduleFares.php.

3. Categorization and Need for Hearings

In Resolution ALJ 176-3173 dated May 25, 2006, the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that hearings were not necessary. Ultimately hearings were necessary on this matter.

4. Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and Rule 14.2(a) of the Commission's Rules of Practice and Procedure. No comments were filed.

5. Assignment of Proceeding

John A. Bohn is the assigned Commissioner and Karl J. Bemesderfer is the assigned Administrative Law Judge.

Findings of Fact

1. Harbor Breeze provides whale watching and other tour boat services from its berth in Long Beach Harbor.
2. Harbor Breeze owns and operates four vessels with passenger-carrying capacities of 138, 149, 149 and 150 persons, respectively.
3. The market for ferry service between Long Beach and Catalina is highly seasonal.
4. Express is the only licensed carrier that provides scheduled service between the mainland and Catalina 365 days a year.
5. Express is profitable during the high season and loses money during the balance of the year.
6. Overall demand for ferry service between the mainland and Catalina is static.

7. Between 2003 and 2006, Harbor Breeze made 12-16 unlicensed round trips between Long Beach and Catalina.

8. Harbor Breeze has entered a settlement agreement with the Commission, paid a fine of \$5000 for operating as an unlicensed vessel common carrier and pledged to obey all applicable laws and Commission regulations in the future.

9. There is a modest amount of unmet demand for on-call vessel common carrier service between Long Beach and Catalina Island, primarily during the high season, Memorial Day to Labor Day.

10. Granting a license to Harbor Breeze will have a small negative effect on the operations and profitability of Express.

11. Harbor Breeze's application for a license to operate a water taxi service in and between Long Beach Harbor and San Pedro Harbor was unopposed.

12. Harbor Breeze's application for a Zone of Rate Freedom of 20% above and below fares proposed in the application was unopposed.

Conclusions of Law

1. Harbor Breeze is not disqualified from providing licensed service between Long Beach and Catalina by virtue of its history of providing occasional unlicensed service.

2. Granting Harbor Breeze Corporation a certificate of public convenience and necessity as a vessel common carrier providing on-call service between Long Beach and Catalina Island is in the public interest.

3. Granting Harbor Breeze a certificate of public convenience and necessity as a vessel common carrier providing water taxi service in and between Long Beach Harbor and San Pedro Harbor is in the public interest.

4. Granting Harbor Breeze a Zone of Rate Freedom of 20% above and below fares proposed in the application is in the public interest.

O R D E R

Therefore, **IT IS ORDERED** that:

1. The application of Harbor Breeze Corporation for authority to (a) operate as a vessel common carrier in nonscheduled/on-call passenger ferry service between Long Beach, California and all points and places on Santa Catalina Island; (b) operate as a vessel common carrier in nonscheduled/on-call passenger ferry service between all points and places at and between Long Beach and San Pedro, California; and (c) establish a Zone of Rate Freedom of 20% above and below prices listed in the application is granted.
2. Hearings were necessary in this proceeding.
3. Application 06-05-011 is closed.

This order is effective today.

Dated June 21, 2007, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners

APPENDIX A

***** SERVICE LIST A0605011*****

Last Update on 09-APR-2007 by: CPL

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