

Decision 08-10-003 October 2, 2008

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the matter of Pacific Adventure Cruises, Incorporated, a California Corporation, for authority to expand the scope of its existing Certificate of Public Convenience and Necessity as a vessel common carrier to include "on-call" and scheduled service on an individual fare basis.

Application 07-04-020
(Filed April 20, 2007)

DECISION GRANTING APPLICATION OF PACIFIC ADVENTURE CRUISES INCORPORATED, TO EXPAND ITS EXISTING CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY AS A VESSEL COMMON CARRIER TO INCLUDE ON-CALL AND SCHEDULED SERVICE ON AN INDIVIDUAL FARE BASIS

1. Summary

This decision grants the application of Pacific Adventure Cruises, Incorporated (Pacific) to expand its existing service to include "on-call" and scheduled service on an individual fare basis between Marina Del Rey and Santa Catalina Island. This decision also grants Pacific's and Sea Planes Incorporated's (Sea Planes) motions to late-file briefs and grants Pacific's motion to strike portions of Sea Planes opening brief. Finally, this decision denies Sea Planes' motion to set aside submission of the case and reopen the record. This proceeding is closed.

2. Background

On April 20, 2007, Pacific filed an application to expand its existing authority to provide "on-call" and scheduled service on an individual fare basis

between Marina Del Rey and Santa Catalina Island (Catalina). The application was protested by Sea Planes, the only carrier currently serving the Marina Del Rey to Catalina market.

A prehearing conference (PHC) was noticed and held in San Francisco on December 18, 2007, in the Commission Courtroom, State Office Building, 505 Van Ness Ave., San Francisco, California. Both Sea Planes and Pacific appeared through counsel.

At the PHC, the following factual issues were identified:

1. Is there sufficient demand for the service proposed by Pacific?
2. What impact will the entry of Pacific have on existing carriers? Parties were requested to provide evidence regarding the size and composition and seasonality of the existing market, profitability, and any cross-subsidy existing between on-call and scheduled service.
3. Is Pacific fit to provide the requested service? In its protest, Sea Planes alleges that Pacific was already providing service without proper authority. Sea Planes also raised questions regarding ownership and reliability of the vessel(s) proposed for this service.

On January 9, 2008, assigned Commissioner Timothy Alan Simon issued his Scoping Memo which included the three factual issues identified at the PHC. Three days of evidentiary hearings were scheduled for April 21-23, in Los Angeles, CA. On the first day of hearings, the parties agreed to forego cross examination of witnesses and submit the case on the pre-served testimony. The Administrative Law Judge (ALJ) briefly questioned the parties on the impact of increased fuel costs on the Marina Del Rey to Catalina ferry market and moved the testimony into evidence before closing the hearing.

The case was to be submitted upon parties' concurrent filing of reply briefs on May 19, 2008. On July 15, 2008, the ALJ discovered that although the parties

had served their opening and reply briefs on the service list, they had not filed them with the Commission's Docket Office. Parties were instructed to file motions to late-file their opening and reply briefs, along with the opening and reply briefs. The motions were filed and are granted here.

On September 25, 2008, after the Proposed Decision was issued, Sea Planes filed a motion to set aside submission and reopen the record. Via email, the ALJ asked Pacific to respond to the motion and answer several other questions within three days. The ALJ waived the reply comment period. Pacific's response was timely. Because the information sought to be introduced by Sea Planes' does not alter the underlying basis for our decision, we deny Sea Planes' motion to set aside submission and reopen the record.

3. Discussion

When an application to serve an existing market is reviewed, the primary concern is whether or not it is in the public interest to add another carrier to that market. The Commission considers specific facts regarding the existing market and the applicant in determining whether to grant the application. With that in mind, the scoping memo directed parties to provide information regarding the existing Marina Del Rey to Catalina cross-channel ferry market and Pacific's fitness to serve that market.

3.1. Is There Sufficient Demand for the Service Proposed by Pacific?

Sea Planes is the only carrier currently offering cross channel ferry service from Marina Del Rey to Catalina. Sea Planes was granted authority to start serving this market in 2001, pursuant to Decision 01-09-042, and operates two 149-passenger vessels, the Marina Flyer and the Two Harbors Express. Its first full year of operations was 2004. According to the testimony of Ron Hoffman,

President and Chief Executive Officer of Sea Planes, high season is April through October, with the peak occurring during July and August.¹ In the summer months, Sea Planes operates on a daily basis with multiple runs per day. During the off-season, November through March, most runs are on Friday, Saturday and Sunday. The rest of the week, Monday through Thursday, the vessels are idle due to lack of demand.² Hoffman’s testimony includes a calculation of the percentage of capacity utilized during the five “seasons” of 2007.³ The calculation is based on the number of actual runs per day and the number of passengers divided by the number of seats available. The table below illustrates Hoffman’s testimony.

Sea Plane’s 2007 Percentage of Capacity Used

JAN - MAR	APR - JUN	JUL - AUG	SEP - OCT	NOV - DEC	Average
22.7%	29.2%	51.2%	33.3%	21.1%	34.3%

Both Pacific and Sea Planes offered the testimony of Wayne Griffin, the President and Chief Executive Officer of the Catalina Island Chamber of Commerce. Griffin’s testimony includes the results of a survey of passenger traffic to Catalina conducted by the Catalina Island Chamber of Commerce. The information was not compiled for this proceeding, but is generated in the regular course of the Chamber of Commerce’s business to determine its success or failure in the marketplace. The survey demonstrated that the volume of passenger

¹ Exhibit 16, Tab 14.

² *Id.* p. 5.

³ Hoffman’s testimony divides the year into five seasons based on demand.

traffic to Catalina from the mainland has been relatively flat since 1981, with slight increases or decreases from time to time. However, since 2000, traffic has declined from 739,334 visitors in 2000 to approximately 545,102 in 2007; down by 26%. Griffin's data also noted that several carriers ceased operations or were temporarily out of service during this same time frame and that a cruise ship had been redeployed to Europe in 2002.⁴ It is hard to draw specific inferences from this information since it is based on the total number of visitors to Catalina with no breakdown by specific operator or point of embarkation.⁵ However, because the decline in visitors tracks the exit from the market of some carriers, it is possible that demand has remained fairly constant for the carriers still serving the market.

Sea Planes testimony regarding the percentage of vessel capacity utilized and Griffin's passenger counts demonstrate that sufficient capacity exists to serve the number of passengers seeking cross-channel transport between Marina Del Rey and Catalina. On the other hand, the number of available seats or overall visitors is not the only measure of demand in a particular market.

Pacific presented the testimony of witnesses who support its application for entrance into the Marina Del Rey to Catalina market. The witnesses and their testimony were:

- Maggie Maki, owner of Catalina Meeting Specialists, who testified that there is no company providing scheduled service in Marina Del Rey that she considers dependable. She feels there is a need for a dependable and well-run company to provide this type of service for her customers. She is familiar

⁴ Exhibit 1, p. 5.

⁵ The figures exclude visitors arriving by air or private boat.

with Pacific's charter service and asks the Commission to consider Pacific's application to provide scheduled service.⁶

- Captain Gary Thornton, the former Assistant Harbormaster of Marina Del Rey and the holder of a 100-ton United State Coast Guard license, testified that there is a pressing need for a reliable vessel common carrier to operate out of Marina Del Rey. Captain Thornton stated that in his capacity as the former Assistant Harbormaster he has personal and professional knowledge of Pacific's operation and highly recommends Pacific for its safe and professionally run operation.⁷
- Linda Lansdowne-Hicks, the Catering Manager for the Marina Del Rey Hotel, testified that the service applied for is an added attraction for tourists, the arrival and departure area is convenient, the vessel being proposed is new and contemporary and the previous experience with Pacific has been satisfactory.⁸
- Lidia Krasowski testified that a reputable carrier with a consistent schedule is needed; one that is dependable and on time.⁹
- Mary Beth Tarrant is the Business Manager for Naturalists at Large, a company providing outdoor educational experiences. Tarrant has used Pacific almost exclusively for the past ten years to transport her clients to Catalina on a charter basis. Tarrant states that Pacific is the only service that continually adheres to its promised schedule; she has been stranded in the past when other carriers were used. Tarrant states that Pacific operates in a professional, customer-friendly and safe manner

⁶ Exhibit 2, p. 2.

⁷ Exhibit 4, p. 2.

⁸ Exhibit 5, p. 2.

⁹ Exhibit 6, p. 2.

and feels the public will be well served by Pacific's operations.¹⁰

- Judith and Brian Pierce, the Emerald Bay Registrar and Facilities Director at Camp Emerald Bay on Catalina, states that during their 10+ years with the camp, Pacific's charter services have been used and Pacific has proven to be honest, reliable and punctual.¹¹

Sea Planes provided explanations for the witnesses' statements regarding cancelled trips or inconvenient schedules and provided the results of its customer surveys that show only 6% of surveyed customers were dissatisfied with the schedule.¹²

Excess vessel capacity and unmet demand are not mutually exclusive conditions. As indicated, Sea Planes has more than sufficient capacity on their vessels to serve all the existing requests for transport from Marina Del Rey to Catalina. However, adequate capacity from existing carriers is insufficient reason to exclude a new carrier from the market. If that were the case, new entrants would only be approved when there are more passengers than the existing carriers can accommodate. That, however, is not the threshold requirement for allowing new entrants into an existing market.

Demand must be assessed in terms other than merely asking how many seats are currently available. Demand can be established in the calls for particular services, better scheduling or more acceptable fares. Witnesses in support of Pacific's application testified that a need exists for a carrier who will

¹⁰ Exhibit 7.

¹¹ Exhibit 8.

¹² Exhibit 16, p. 10.

provide reliable service on a convenient schedule. Most of the witnesses are current customers of Pacific's charter service or are customers considering using Pacific if the application is granted.

Pacific's witnesses expressed a desire for a choice of carriers and, therefore, we find there is some demand for additional scheduled service in the Marina Del Rey to Catalina market.

3.2. What Impact Will the Entry of Pacific Have on Existing Carriers?

Sea Planes, as the only carrier currently providing service in this market, testifies that the addition of another carrier will skim passengers and revenue away from its barely-profitable operations, and will in fact result in worse service to the public.¹³ Sea Planes currently cross-subsidizes its scheduled service through an off-season contract with Mountain and Sea Educational Adventures to provide transportation to Catalina. Sea Planes testified that the contract makes little if any profit, but helps to amortize overhead expenses in the off-season. Sea Planes also testifies that it constantly assesses the needs in the scheduled, on-call, charter and additional on-demand markets and deploys its two vessels accordingly.¹⁴

Pacific offers little in the way of testimony regarding the effect of its entry on existing carriers. However, the entrance of a competitor into a market currently served by only one carrier may inevitably result in the loss of some of its existing customers/revenue. Since it has already been determined that Sea

¹³ Exhibit 16, p. 8.

¹⁴ *Id.*, p. 10.

Planes has excess capacity for the current demands of this market, we can conclude that it will lose some business, and therefore revenue to Pacific.

At the evidentiary hearing, the ALJ asked the parties how increased fuel costs would affect business. The parties had very different responses. Hoffman stated that the cost of fuel has risen by 350% in the 5 years Sea Planes has been in operation. The effect of the fuel price increases on its marginal operating cost breakeven point has been to increase the number of passengers needed on each leg from 24 passengers to 53 passengers. The true break even point, considering all fixed costs and overhead items, rises from 54 passengers to 83 passengers needed on each leg. Hoffman also stated that increasing the fares to cover increased fuel would cause a further decline in passenger counts.¹⁵

Steven Kofahl, the President of Pacific Adventure Cruises, was asked the same question. Kofahl's response was that increased fuel costs could be offset by increased fares. Kofahl also testified that when times are hard people tend to vacation closer to home, taking a trip to the San Diego Zoo rather than New York City or to Catalina rather than Hawaii. Kofahl suggests that the effect of higher fuel prices might actually be an increase in cross channel traffic.¹⁶

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

Pacific currently provides on-call, water taxi, and charter services. It seeks to expand its service to include scheduled and on-call service on an individual fare basis. Pacific's utilizes six vessels in its current operations under Continuing Charter Agreements with various entities. Pacific proposes to provide the

¹⁵ Reporter's Transcript (RT), pp. 7-8.

¹⁶ *Id.*, pp. 3-4.

service that is the subject of its application with two vessels; the Miss Christie and Catalina Adventure. The Miss Christie is capable of seating 54 passengers and is chartered from Miss Christie, Incorporated, pursuant to a Continuing Charter Agreement. Pacific currently constitutes 90% of Miss Christie's charter service. The Catalina Adventure is chartered from Marina Del Rey Water Bus, Inc. and is authorized to carry 149 passengers. Pacific constitutes 90% of the charter service provided by Catalina Adventure. Both vessels are certified by the U.S. Coast Guard and insured. The Electric Lady, Miss Havasupi II, Miss Havasupi III and Yellow Fin are utilized in Pacific's water taxi service and are also chartered from Marina Del Rey Water Bus, Inc. pursuant to a Continuing Charter Agreement.¹⁷

Sea Planes does not contend that Pacific's crews are unskilled or that the vessels are unsafe or lacking the required insurance or U.S. Coast Guard certification. Much of Sea Planes argument in protest to this application is that Pacific has been advertising and providing scheduled service, a service for which it does not currently have authority. A Cease and Desist order was issued by the Commission's Consumer Protection and Safety Division (CPSD) on the basis of a complaint from Sea Planes.

Pacific states that it responded to the Cease and Desist order by rewording any potentially misleading advertising, but asserts that its service falls within the loop exemption and, therefore, is not in violation of Commission regulations.¹⁸

¹⁷ Exhibit 3, pp. 2-3.

¹⁸ The loop exemption refers to trips that begin and end at the same point - "loops." Because the Commission regulates point to point transportation, loops are exempt from its regulatory jurisdiction.

CPSD has taken no further action against Pacific. However, even if Pacific's actions were in violation of Commission regulations, the Commission would not deny the application on that basis alone. The purpose of our licensing process is not to exclude new entrants from the market, but to protect consumers by ensuring that all carriers operate in full compliance with our regulations. Pacific's response to the Cease and Desist order was to contact CPSD staff for information and to take remedial action. We find Pacific's actions satisfactorily demonstrate its willingness to comply fully with all Commission rules and regulations in the future and are sufficient to address our concerns over its fitness.

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

Concluding that there is some consumer demand for a choice among providers of scheduled service between Marina Del Rey and Catalina and that Sea Planes is likely to lose some business to Pacific if it is granted authority to provide scheduled service, the next issue to address is whether admitting a competitor into the cross-channel market would be in the public interest. Contrary to the testimony of Sea Planes, when the Commission granted Sea Planes the authority to provide service, it was not given a monopoly in the market or a guarantee of no competition until such time as Sea Planes becomes profitable. Indeed, in *Pacific Towboat and Salvage* (1982) 9 CPUC2d 484, the Commission stated that protection from limited competition is contrary to the public interest. Competition is an incentive to carriers to provide efficient, high quality service that meets their customers' needs. Ruinous competition would occur if allowing another carrier into the market would likely cause both businesses to fail, leaving passengers stranded on both sides of the channel.

Such is not the case here. While Sea Planes is the only carrier operating out of Marina Del Rey, multiple carriers operate cross channel ferry service out of San Pedro and Long Beach, providing passengers with alternatives.

Weighing heavily in favor of granting Pacific's application is the availability of the smaller vessel, the Miss Christie. The Miss Christie's capacity is 54 passengers, creating a lower break-even point than that of vessels with a 149 passenger capacity such as the Catalina Adventure, Marina Flyer and Two Harbors Express. With increased fuel prices raising the break even point, the likelihood that scheduled trips will be cancelled due to failing to meet the minimum passengers required also increases. A carrier's ability to deploy a smaller vessel in this market decreases the likelihood of cancelled trips - especially in the off-season. Fewer cancelled trips between Marina Del Rey and Catalina responds to consumer demand for more reliable cross-channel transport in this market.

With that in mind, permitting Pacific to serve the small amount of unmet demand for a choice of cross-channel scheduled and on-call service on an individual fare basis in the Marina Del Rey to Catalina market is in the public interest.

4. Categorization and Need for Hearings

In Resolution ALJ 176-3191, dated May 3, 2007, the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that hearings were not necessary. The Scoping Memo and Ruling of the Assigned Commissioner and ALJ scheduled hearings for this proceeding. Rule 7.5 of the Rules of Practice and Procedure requires Commission approval of assigned Commissioner's rulings that change the preliminary determination of category or need for hearing. The Commission has reviewed the Scoping Memo

in A.07-04-020, establishing a hearing schedule, and approves the assigned Commissioner's ruling changing the determination of need for hearing from "No Hearing Needed" to "Hearing Needed," consistent with the definitions of Rule 1.3 and the requirements of Article 7 of its Rules.

5. 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 comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. No comments were filed.

6. Assignment of Proceeding

Timothy Alan Simon is the assigned Commissioner and Linda A. Rochester is the assigned ALJ.

Findings of Fact

1. Pacific currently provides on-call services on a per diem or hourly rate basis, pursuant to certificate VCC-78 granted by the Commission in 1993.

2. Sea Planes is the only licensed carrier currently providing scheduled service between Marina Del Rey and Catalina.

3. The market for ferry service between Marina Del Rey and Catalina is highly seasonal, with high-season revenue and off-season charter contracts subsidizing Sea Planes' off-season overhead.

4. Overall since 1981, demand for ferry service between the mainland and Catalina has been flat, but between 2000 and 2007 there has been a 26% decline.

5. During the period of decline, several carriers exited the mainland to Catalina market or temporarily suspended service, which means it is possible that demand remains the same for carriers still serving the Marina Del Rey to Catalina market.

6. Consumers' requests for more reliable service in the Marina Del Rey to Catalina market demonstrate unmet demand.

7. Granting authority to Pacific will have some negative impact on the operations and profitability of Sea Planes.

Conclusions of Law

1. Granting Pacific Adventure Cruises, Incorporated, an expanded certificate of public convenience and necessity as a vessel common carrier to provide on-call and scheduled service on an individual fare basis between Marina Del Rey and Santa Catalina Island is in the public interest.

O R D E R

Therefore, **IT IS ORDERED** that:

1. The application of Pacific Adventure Cruises, Incorporated for expanded authority to operate as a vessel common carrier providing on-call and scheduled passenger ferry service on an individual fare basis between Marina Del Rey and Santa Catalina Island is granted.

2. Hearings were necessary in this proceeding.

3. Motions to late-file briefs are granted.

4. The September 25, 2008, motion filed by Sea Planes, Incorporated to set aside submission and reopen the record is denied.

5. Application 07-04-020 is closed.

This order is effective today.

Dated October 2, 2008, at San Francisco, California.

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