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May 1, 2013

Steven V. King, Acting Executive Director and Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Dr. SW
P.O. Box 47250
Olympia, Washington 98504-7250

RE: *Sean McNamara d/b/a Bellingham Water Taxi – Application and
Pacific Cruises NW, Inc. d/b/a San Juan Cruises - Application*
Dockets TS-121253/TS-121395 (consolidated)

Dear Mr. King:

Enclosed for filing in the above-referenced docket are the original and six copies of Staff's Answer to Island Mariner's Petition for Administrative Review, and Certificate of Service.

Sincerely,

MICHAEL A. FASSIO
Assistant Attorney General

MAF/emd
Enclosures
cc: Parties w/enc.

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Application of

MCNAMARA, SEAN d/b/a
BELLINGHAM WATER TAXI

For Extension of Authority Under Certificate
BC-64619

.....
In the Matter of the Application of

PACIFIC CRUISES NORTHWEST, INC.
d/b/a SAN JUAN CRUISES

For a Certificate of Public Convenience and
Necessity to Operate Vessels in Furnishing
Passenger Ferry Service

DOCKET TS-121253 and
DOCKET TS-121395 (*Consolidated*)

COMMISSION STAFF ANSWER IN
RESPONSE TO ISLAND MARINER
CRUISES, INC'S PETITION FOR
ADMINISTRATIVE REVIEW

1 Pursuant to WAC 480-07-825(4) Commission Staff (Staff) submits this Answer in response to Island Mariner Cruises, Inc.'s (Island Mariner Cruises) Petition for Administrative Review of Order 03, Initial Order Granting the Applications of Bellingham Water Taxi and San Juan Cruises, with Conditions. Staff supports the Initial Order. Staff does not challenge the Initial Order in this Answer.

A. Island Mariner Cruises' Petition is Deficient

2 In many respects, Island Mariner Cruises' Petition is unclear and not specific with respect to the nature of its challenge, nor does it properly cite to portions of the record or the Initial Order, in keeping with the requirements in WAC 480-07-825(3). At the outset of its Petition, Island Mariner Cruises indicates it is providing "information" but does not explain why it was unable to present the information at hearing.¹ Island Mariner Cruises takes issue with the Initial Order's use of the word "express", although it is unclear how this merits

¹ The record is closed, and Island Mariner Cruises did not move to reopen the record pursuant to WAC 480-07-830. A Petition for Administrative Review is not the appropriate forum to introduce new evidence.

review.² Notwithstanding this, Staff addresses what appears to be Island Marine Cruises' challenge to a legal conclusion in the Initial Order, as follows.

B. The Initial Order correctly found that San Juan Cruises' application met the requirements of RCW 81.84.020 because it does not propose to operate in territory already served by an existing certificate.

3 Island Mariner Cruises asserts that the administrative law judge erred in concluding that San Juan Cruises does not propose to operate in the same territory as Island Mariner within the meaning of RCW 81.84.020. Island Mariner Cruises asserts that the Commission should find that the application overlaps with its existing authority and so the Commission should be barred from granting the application.³ The Initial Order's conclusion was proper.

4 The Initial Order correctly describes the competing applications and that they are generally distinguishable from the existing certificate holder, Island Mariner Cruises.⁴ The record is clear that, while all would share the same scheduled stop (Friday Harbor), their routes are distinct:⁵ (1) San Juan Cruises' certificate would provide a nonstop commercial ferry route between Bellingham and Friday Harbor; (2) Bellingham Water Taxi's application would extend its existing route to Friday Harbor but would thereupon include an additional scheduled stop and flag stops between Friday Harbor and Bellingham; (3) Island Mariner Cruises' existing ferry certificate is a multiple-stop route between Bellingham and Friday Harbor via Elisa, Sinclair, Cypress, Blakely, Decatur, Crane, Jones, Spieden, Johns, Stuart, Waldron, Sucia and Matia islands with an additional stop at Roche Harbor on San Juan

² Contrary to Island Mariner Cruises' claim, "express boat" is not found in the Initial Order. Moreover, although the terms "express" appears in discussion, it is not incorporated into findings of fact or conclusions of law related to the current applications. "Express" is not defined in commercial ferry statutes and rules. It is reasonable, based on the record to interpret the term within the confines and context of the Initial Order to describe nonstop route/service as distinguished from a multi-stop or flag-stop route/service. This would also be consistent with the few instances in which it appears in hearing testimony, i.e.: (1) Witness Darrell Bryan, responding to questions from Mr. Buzzard used "express" in reference to a nonstop service, Tr. Bryan 259:22, 260:6 and 260:18; (2) Witness Drew Schmidt referred to his company's prior certificate as "Friday Harbor express route with no flag stops," Tr. Schmidt 278:19-20.

³ See Petition for Administrative Review of Island Mariner Cruises, page 3.

⁴ Order 03, ¶¶ 2-3, ¶¶ 10-12, ¶¶ 16-17.

⁵ Order 03, ¶ 39.

Island, Rosario Resort, Olga and Doe Bay on Orcas Island, Lopez and Shaw islands, but the company does not provide a direct route.⁶ The Initial Order grants both new applications, but restricts Bellingham Water Taxi's extension to Friday Harbor to non-peak seasons provided that Island Mariner Cruises initiates peak-season service in 2013.⁷

5 The Initial Order's analysis and conclusion that San Juan Cruises territory does not overlap for purposes of RCW 81.84.020⁸ is consistent with a prior order of the Commission, in Docket TS-031996.⁹ There, the Commission found that a proposed direct service between Bellingham and Friday Harbor with no stops sufficiently differed from an existing service that required flag stops along the way, such that the proposed service was not "territory already served."¹⁰ The analysis in TS-031996 was similar to that employed by the Commission under the auto transportation statute, RCW 81.68, which is similar to the commercial ferry statute in terms of favoring exclusive territories.¹¹ A territory may not be "already served" because the existing certificate holder is not serving it with respect to a particular type of service.¹² As the Commission noted:

"When the existing certificate holder directs its service at certain market niches within its territory which differ substantially from the markets the applicant proposes, the Commission has held that the statutory restrictions will not be read to prevent entrepreneurs from developing and serving new markets within a territory."¹³

⁶ Order 03, ¶¶ 2-3, 10-12

⁷ Order 03, ¶ 17, ¶ 43

⁸ See Order 03, ¶¶ 13-17, ¶ 61.

⁹ See *In re Pacific Cruises Northwest, Inc. d/b/a Victoria San Juan Cruises*, Docket TS-031996, Order 04, (February 11, 2005), affirmed by Order 05 (March 10, 2005). That case compared a similar application, by San Juan Cruises, with the then-existing certificate holder, which was Island Mariner Cruises.

¹⁰ *Id.*, ¶ 22.

¹¹ *Id.*, ¶¶ 22-26. RCW 81.68.040 provides: "The commission shall have power, after hearing, when the applicant requests a certificate to operate in a territory already served by a certificate holder under this chapter, only when the existing auto transportation company or companies serving such territory will not provide the same to the satisfaction of the commission."

¹² *Id.*, ¶ 22.

¹³ *Id.* ¶ 22, citing to *In re Application B-78450 of Pacific Cruises Northwest, Inc.*, Order S.B.C. No. 524, Hearing No. B-78450, at p. 8 (May 23, 1996) (citing a number of bus and airporter cases).

6

In Docket TS-031996, Order 04, the Commission also explained:

“The Commission must consider whether the territory at issue is “territory already served” within the meaning of the statute.... One factor to be considered is the extent of the authority of the intervenors. Another is whether or not they are serving to the extent of that authority. A third is whether the type of service provided reasonably serves the market.¹⁴

7

The Commission may distinguish between different types of service when offered between the same two points. The Commission has also previously determined, when reviewing competing applications, that it could grant more than one application for commercial ferry service if the nature of the service, the level of need, and the applicants’ ability to fully meet shippers’ needs were consistent with a grant of authority to more than one carrier.¹⁵ Here, as in Docket TS-031996, although they may share a common destination, the applicant San Juan Cruises proposes a type of service (a nonstop route) that is not offered by the existing certificate holder. The Initial Order correctly cites to evidence in the record supporting need for the proposed nonstop service.¹⁶ The administrative law judge correctly applied RCW 81.84.020 consistent with precedent, in holding that San Juan Cruises does not propose to operate in the same territory as Island Mariner.

8

In its Petition, apparently in the alternative, Island Mariner also suggests that San Juan Cruises should be required by the Commission to operate its vessels at a particular speed.¹⁷ Staff disagrees. The Commission should not be setting the specific speeds of travel, there is no authority cited in support of this proposition, and it would not make sense to do so. In any event, commercial ferry operators, as common carriers, have a duty under

¹⁴ *Id.*, ¶ 23, citing to *In the Matter of the Application of San Juan Airlines, Inc., d/b/a Shuttle Express*, Order M.V.C. No. 1809, Hearing No. D-2566, Commission Decision and Order Granting Application as Amended in Part, page 17 (April 21, 1989).

¹⁵ *In re Dutchman Marine, LLC and Seattle Harbor Tours*, Dockets TS-01774 and TS-002055, First Supplemental Order, ¶ 63 (Sept. 2001) citing *In re Jack Rood and Jack L. Harmon Jr., d/b/a Arrow Launch Service*, Order S.B.C. No. 467; Order S.B.C. No. 468, *In re Belairco, Inc.* (May 1990).

¹⁶ See Order 03, ¶¶ 18-22.

¹⁷ See Island Mariner Cruises’ Petition for Administrative Review, page 2.

RCW 81.28.020 to expedite traffic for their regulated service. The record does not support imposing additional conditions on the proposed scheduled service regarding speed.

9 The Initial Order was proper, and the Commission should deny Island Mariner's Petition for Administrative Review.

DATED this 1st day of May, 2013.

Respectfully submitted,

ROBERT W. FERGUSON
Attorney General



MICHAEL A. FASSIO
Assistant Attorney General
Counsel for Washington Utilities and
Transportation Commission Staff

Dockets TS-121253/TS-121395
CERTIFICATE OF SERVICE

I hereby certify that I have this day served the attached Answer to Petition for Administrative Review upon the persons and entities listed on the Service List below via e-mail and by depositing a copy of said document in the United States mail, addressed as shown on said Service List, with first class postage prepaid.

DATED at Olympia, Washington this 1st day of May, 2013.



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