

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Application of	)	DOCKET TS-121253 (<i>Consolidated</i>)
)	
MCNAMARA, SEAN d/b/a	)	ORDER 04
BELLINGHAM WATER TAXI)	
	)	FINAL ORDER DENYING
For Extension of Authority Under	)	PETITION FOR ADMINISTRATIVE
Certificate BC-64619	)	REVIEW
.....)	
In the Matter of the Application of	)	DOCKET TS-121395 (<i>Consolidated</i>)
)	
PACIFIC CRUISES NORTHWEST,	)	ORDER 04
INC. d/b/a SAN JUAN CRUISES)	
	)	FINAL ORDER DENYING
For a Certificate of Public Convenience	)	PETITION FOR ADMINISTRATIVE
and Necessity to Operate Vessels in	)	REVIEW
Furnishing Passenger Ferry Service)	
.....)	

I. INTRODUCTION

1 **Nature of Proceedings.** These consolidated proceedings address overlapping applications to provide private commercial ferry service between Bellingham and Friday Harbor. Docket TS-121253 involves an application by Sean McNamara d/b/a Bellingham Water Taxi (Bellingham Water Taxi) to extend its authority, held under Certificate BC-64619, to include passenger and freight service between Bellingham and Friday Harbor, with flag stops at Vendovi Island and Cypress Island. Docket TS-121395 involves an application by Pacific Cruises Northwest, Inc. d/b/a San Juan Cruises (San Juan Cruises) to re-obtain authority to provide passenger-only service between Bellingham and Friday Harbor. Island Mariner Cruises protested both applications, objecting to the Commission issuing any additional certificates authorizing commercial ferry service between Bellingham and Friday Harbor.

2 **Appearances.** Sean McNamara, *pro se*, Bellingham, WA, represents Bellingham Water Taxi. David Wiley, Williams Kastner, Seattle, WA, represents San Juan Cruises. Terry Buzzard, *pro se*, Bellingham, WA, represents Island Mariner Cruises.

Michael Fassio, Assistant Attorney General, Olympia, WA, represents the Commission's regulatory staff (Staff).¹

3 **Initial Order.** Order 03, Initial Order Granting Applications With Conditions (Initial Order), entered on March 26, 2013, granted the applications of Bellingham Water Taxi and San Juan Cruises to the extent that the proposed commercial ferry services do not overlap with the services Island Mariner Cruises is authorized to provide. The Initial Order recognized the seasonal nature of commercial ferry operations in the San Juan Islands and distinguished peak summer season (Memorial Day weekend through Labor Day weekend) from non-peak season (the Tuesday after Labor Day weekend through to the Thursday prior to Memorial Day weekend). The Initial Order also differentiated direct non-stop "express" service between Bellingham and Friday Harbor from a "commuter" service that makes multiple stops at additional islands or ports along the route. The Initial Order thus granted San Juan Cruises' application to provide express service to Friday Harbor, but only during peak season.²

4 **Petition for Administrative Review.** On April 15, 2013, Island Mariner Cruises filed a petition for administrative review of the Initial Order. Island Mariner Cruises objects to distinguishing between express and commuter routes and also questions the sufficiency of the Initial Order's conditions imposed on San Juan Cruises' express service. Island Mariner Cruises asks the Commission to reverse the Initial Order and deny San Juan Cruises' application because it overlaps with Island Mariner Cruises' existing certificate and extends into Island Mariner Cruises' existing territory.³

¹ In formal proceedings, such as this, the Commission's regulatory staff participates like any other party, while the presiding administrative law judge (ALJ) or the Commissioners make the decision. To assure fairness, the Commissioners, the presiding ALJ, and the Commissioners' advisors do not discuss the merits of this proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. *See* RCW 34.05.455.

² The Initial Order also granted Bellingham Water Taxi's application to extend its authority to serve Vendovi Island year-round and to provide a commuter service to Cypress Island and Friday Harbor, but only during non-peak season.

³ Island Mariner Cruises does not challenge the Initial Order's findings or conclusions with regard to the required public convenience and necessity for additional service between Bellingham and Friday Harbor. Nor does Island Mariner Cruises challenge either applicant's financial or operational fitness to hold a certificate. We do not expand the scope of review of the Initial Order on our own motion and therefore limit our review to those issues raised by Island Mariner Cruises.

5 **Commission Decision.** The Commission adopts the Initial Order, including its findings and conclusions, as the Commission’s own order and denies Island Mariner Cruises’ petition for administrative review. The Commission has previously concluded that more than one certificate holder can serve a territory when their routes are sufficiently different and finds no reason to depart from that position. Nor do the other issues raised in the petition provide a sufficient basis to deny or further condition San Juan Cruises’ authority to provide the service it proposes.

II. PETITION AND RESPONSES

6 *Petition for Review.* Island Mariner Cruises objects to the Commission’s use of the term “express boat” and asserts that the issue of distinguishing between express and commuter routes was not raised at hearing, preventing Island Mariner Cruises from fully presenting relevant evidence and argument on that issue.

7 Island Mariner Cruises further argues that the Initial Order fails to sufficiently condition San Juan Cruises’ express service authority in three ways:

- the proposed route to Friday Harbor should be non-stop with no deviations permitted for whale watching en route
- the company should be required to operate its vessel at a speed of 18 knots
- if the company intends to combine its whale watching excursions on the same vessel with its ferry service, the company should be required to set aside 20-30 seats for ferry passengers

8 Finally, Island Mariner Cruises contends that the Initial Order errs by failing to deny San Juan Cruises’ application as overlapping with territory already served by Island Mariner Cruises’ existing certificate, in violation of RCW 81.84.020.

9 *Staff Response.* On May 1, 2013, Staff responded, asserting the petition to be deficient because of its vagueness and its improper attempt to introduce new evidence after the close of the record. Staff supports the Initial Order’s division of the territory by type of service and by season. Further, Staff argues that the Initial Order correctly concludes that direct “express” service between Bellingham and Friday Harbor is not territory already served by Island Mariner Cruises’ multi-stop service between the same two termini. Finally, Staff cautions against the Commission setting specific speed requirements for ferry travel, pointing out that RCW 81.28.020 already requires commercial ferry operators to expedite traffic for their regulated service.

10 *Applicant Response*.⁴ Also on May 1, 2013, San Juan Cruises responded, contending that the Commission should disregard the “subjective, anecdotal and hearsay observations” contained in Island Mariner Cruises’ petition. San Juan Cruises argues that the Commission should not regulate commercial ferry service by setting “sustained cruising speeds or other attributes of vessel configuration.” San Juan Cruises asks the Commission to deny Island Mariner Cruises’ petition and uphold the Initial Order.

III. DISCUSSION AND DECISION

A. “Express” Service as a Topic at Hearing

11 Island Mariner Cruises asserts that it was unable to address the issue of comparing express service to “commuter” service at the hearing. During the evidentiary hearings, however, Terry Buzzard of Island Mariner Cruises questioned witness Darrell Bryan of Clipper Navigation, Inc., about the distinction between a nonstop route to Friday Harbor and service that includes stops at other islands. Mr. Bryan used the term “express” to refer to nonstop service, and Mr. Buzzard had every opportunity to further explore the meaning of that term.⁵

12 In addition, Captain Drew Schmidt testified on behalf of San Juan Cruises that his company’s prior certificate (BC-10) authorized two routes: “a sightseeing route between north and south Bellingham and the other is a Friday Harbor express route with no flag stops.”⁶ Again, Island Mariner Cruises could have questioned the witness on the meaning of “express route” and presented its own evidence on that subject.

⁴ Bellingham Water Taxi filed a response on May 1, 2013, criticizing the Initial Order’s grant of a certificate to San Juan Cruises and criticizing San Juan Cruises’ prior service offerings in the territory. Liberally construed, Bellingham Water Taxi’s response could be interpreted as a separate petition for administrative review. However, it was not timely filed to be so considered. Further, Bellingham Water Taxi’s filing essentially supports the issues presented in Island Mariner Cruises’ petition and does not raise any distinct concerns.

⁵ Bryan, TR. 259:10 – 260:18.

⁶ Schmidt, TR. 278:12-20.

13 Island Mariner Cruises' claim of never having heard of "express" service is without merit. Island Mariner Cruises elicited that term at the hearings and had ample opportunity to further define its meaning if it was at all unclear. Nor do we find that "express boat" is a term that is inherently technical or subject to multiple meanings. Rather, it simply is a short-hand means of identifying the service San Juan Cruises applied for authority to provide.

B. Territory Already Served

14 Island Mariner Cruises holds certificate of public convenience and necessity BC-95 for provision of passenger ferry service between Bellingham and Friday Harbor via a series of stops at smaller islands and harbors in the San Juan Islands.⁷ Island Mariner Cruises contends that the nonstop service between Bellingham and Friday Harbor the Initial Order authorizes San Juan Cruises to provide unlawfully overlaps with Island Mariner Cruises' authority.

15 We disagree. RCW 81.84.020 does not prohibit entry of a competing certificate holder to a territory already served where the nature of the new service proposed is sufficiently different from the incumbent's offerings. Here, Island Mariner Cruises holds a certificate requiring it to provide passenger ferry service from Bellingham to 20 different destinations in the San Juan Islands. San Juan Cruises applied to provide scheduled passenger-only ferry service directly between Bellingham and Friday Harbor. We agree with the Initial Order that these are two different services.⁸

16 The Commission previously evaluated the need for more than one certificate holder in the San Juan Islands to provide passenger ferry service between Bellingham and Friday Harbor.⁹ In 2005, the Commission distinguished a direct point-to-point route between these two ports from a service that made multiple scheduled and flag stops along the way and determined that there was sufficient unmet demand to justify adding a direct route, authorizing its establishment despite the existence of two other

⁷ Order 03, ¶ 10, nn.6-7. As specified in the Initial Order, Island Mariner Cruise's certificate includes stops at 19 different sites in the San Juan Islands, plus Bellingham and Friday Harbor.

⁸ See Order 03, ¶ 16.

⁹ Order 03, ¶ 15, *citing* In re Pacific Cruises Northwest, Inc., d/b/a/ Victoria San Juan Cruises, Docket TS-031996, Order 04, ¶¶ 13-20 and 60-61 (Feb. 11, 2005).

certificate holders in the territory.¹⁰ These dockets present similar circumstances and our determination is the same.¹¹

17 After reviewing the record in these dockets, we find that a nonstop, passenger-only ferry route between Bellingham and Friday Harbor provides a distinct alternative service to Island Mariner Cruises' "commuter" service with multiple stops. We therefore conclude that San Juan Cruises does not, within the meaning of RCW 81.84.020, propose to operate in the same territory already served by Island Mariner Cruises.

C. Sufficiency of Conditions on San Juan Cruises' Certificate.

18 Island Mariner Cruises asks that we consider more precise conditions on San Juan Cruises' routing, speed, and passenger capacity. We do not find any of these proposed conditions to be necessary or appropriate.

19 First, Island Mariner Cruises claims that San Juan Cruises will not properly operate a direct "express" route ferry service. Such concerns are speculative at best. RCW 81.28.020 requires all common carriers, including commercial ferry operators, to "promptly and expeditiously receive, transport, and deliver all persons or property offered to or received by it for transportation." The Commission is satisfied that this statute, coupled with the discussion in the Initial Order, already provides sufficient guidance to San Juan Cruises on how it must conduct its passenger ferry operations.

¹⁰ In re Pacific Cruises Northwest, Inc., d/b/a/ Victoria San Juan Cruises, Docket TS-031996, Order 04, ¶¶ 21-26 (Feb. 11, 2005).

¹¹ Historically, ferry service to Friday Harbor has not been a natural monopoly. This will not be the first time that the Commission has authorized multiple certificates for the Bellingham to Friday Harbor route. See Order 03, ¶ 15. Moreover, the Washington State Ferry provides regular service to Friday Harbor from Anacortes and there are additional ferries operating from Seattle, Port Townsend, or even from Canada. At times there have been no commercial passenger ferries operating between Bellingham and Friday Harbor, including over the past year, when we granted Island Mariner Cruises a year-long discontinuance of its service. See Docket TS-120418. The facts and circumstances in this case, therefore distinguish the Bellingham to Friday Harbor route from other situations, such as Lake Chelan, in which there is a natural monopoly. See In re James Courtney d/b/a Stehekin Boat Service, Hearing No. B-78659, S.B.C. Order No. 549, *Commission Decision and Order Denying Review; Affirming and Adopting Initial Order* (Aug 4, 1998) and Report to the Legislature Pursuant to ESB 5894, *Appropriateness of Rate and Service Regulation of Commercial Ferries Operating on Lake Chelan*, at 11 (Jan 11, 2010).

- 20 Second, Island Mariner Cruises suggests that we require San Juan Cruises to operate the Victoria Star at a speed of 18 knots. As Staff points out in its response, the Commission does not typically set specific speeds for travel. Island Mariner Cruises does not cite to any authority by which we should now consider including such exact provisions in a transportation company's certificate.
- 21 We consider it unwise to dictate a required speed of travel to a sea captain who must set a safe course based on a variety of conditions that will vary from season to season, if not voyage to voyage. Although we require ferry companies to file and adhere to a time schedule, the Commission will not attempt to manage the day-to-day business decisions of a regulated company. As noted above, San Juan Cruises is already required to "promptly and expeditiously" deliver its passengers. We decline to impose further conditions on its certificate with regard to speed of passage.
- 22 Finally, Island Mariner Cruises asks that the Commission require San Juan Cruises to set aside a certain number of seats on its vessel for ferry passengers, precluding a full boat of tourists seeking a whale watching excursion. We note that the record in this proceeding already addresses the situation of whale watching demand potentially eclipsing the company's ability to simultaneously serve ferry passengers with a single vessel.¹² Captain Drew Schmidt explained that San Juan Cruises will increase capacity, if necessary, to ensure that it can carry ferry passengers as required under its certificate.¹³
- 23 Given this testimony, we are satisfied that San Juan Cruises has adequate resources to satisfactorily serve both populations of passengers. We decline to impose a condition mandating San Juan Cruises to reserve capacity for regulated passengers. As noted above, we are confident that the governing statutes, coupled with the terms and conditions to be contained in San Juan Cruises' certificate of public convenience and necessity, provide sufficient guidance to the company on how to provide service between Bellingham and Friday Harbor.

¹² See, e.g., Schmidt, TR. 306:1-6, 308:10 – 309:12, 335:9-13, and 339:12 – 341:17.

¹³ Schmidt, TR. 340:1-10.

ORDER

THE COMMISSION ORDERS That

- 24 (1) Island Mariner Cruises' petition for administrative review of Order 03 is denied.
- 25 (2) The applications of Pacific Cruises Northwest, Inc. d/b/a San Juan Cruises and Sean McNamara d/b/a Bellingham Water Taxi are granted as provided in Order 03.

Dated at Olympia, Washington, and effective July 17, 2013.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DAVID W. DANNER, Chairman

PHILIP B. JONES, Commissioner

JEFFREY D. GOLTZ, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.