

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

In re Application No. B-079273 of)	
)	DOCKET NO. TS-040650
AQUA EXPRESS, LLC)	
)	ORDER NO. 04
For a Certificate of Public)	
Convenience and Necessity to)	ORDER ACCEPTING STAFF'S
Provide Commercial Ferry Service)	PETITION FOR
)	INTERLOCUTORY REVIEW OF
)	ORDER NO. 02; DENYING
.....)	RELIEF REQUESTED

1 **SYNOPSIS.** *This Order upholds the Commission’s earlier decision in Order No. 02 in this proceeding that defines the scope of intervention of the Inlandboatmen’s Union of the Pacific. The Commission denies review, finding that the term “public agencies” in RCW 81.84.020(4) includes the Department of Transportation and the Washington State Ferries, which operates the state ferry system.*

2 **NATURE OF PROCEEDING.** Docket No. TS-040650 involves an application by Aqua Express, LLC for a certificate of public convenience and necessity to operate a commercial ferry between Kingston and Seattle, Washington.

3 **PROCEDURAL HISTORY.** On April 8, 2004, Aqua Express, LLC (Aqua Express or Applicant), a partnership of Clipper Navigation, Inc., Nichols Boat Builders, Inc., Argosy, L.P. and TMT Corp., d/b/a Four Seasons Marine Services, Corp., filed an application for a commercial ferry certificate to provide passenger-only service between Kingston and Seattle. On May 6, 2004, the Inlandboatmen’s Union of the Pacific (IBU) filed the only protest to the application.

4 On May 18, 2004, Aqua Express filed a motion to strike the protest filed by the IBU. Following written responses filed by the IBU and Commission Staff, a reply filed by Aqua Express, and oral argument on the motion, the Commission

entered Order No. 02 granting in part Aqua Express' motion and limiting the IBU's protest. In paragraph 36 of Order No. 02, the Commission limited the IBU's participation in the proceeding to addressing the issues of the need for the proposed service, the applicant's financial fitness, and the effect of the Commission's decision on the Washington State Ferries, or WSF. The Commission allowed the IBU to address the effect on the WSF, finding that the term "public agencies" in RCW 81.84.020(4) can reasonably be read to include the state ferry system. *Order No. 02, ¶ 34.*

5 At a prehearing conference held on June 8, 2004, Staff requested clarification that the term "public agencies" in RCW 81.84.020(4) includes the Department of Transportation (Department), not the WSF, which is the part of the Department that operates ferries in Washington State. In the prehearing conference and in Order No. 03, the Commission clarified that the IBU's participation is appropriately limited to addressing the effect of the Commission's decision on public agencies, "recognizing that the state ferry system is a part of the public agency that operates the state ferries." *Order No. 03, ¶ 5.*

6 On June 16, 2004, Staff filed a motion seeking interlocutory review of Order No. 02 pursuant to WAC 480-07-810. In particular, Staff requests review of the Commission's determination in paragraph 34 of the Order that, "Without further analysis of the legislative history of the recent amendments of the two statutes, we find that the reference to "public agencies" in RCW 81.84.020(4) can reasonably be read to include the state ferry system." Aqua Express and the IBU filed answers to Staff's petition on June 25, 2004.

7 **INTERLOCUTORY REVIEW.** The Commission has discretion whether to allow interlocutory review of its decisions. *See WAC 480-07-810(2).* Pursuant to WAC 480-07-810(2), the Commission may accept review of interlocutory orders if it finds that:

- (a) The ruling terminates a party's participation in the proceeding and the party's inability to participate thereafter could cause it substantial and irreparable harm;
- (b) A review is necessary to prevent substantial prejudice to a party that would not be remediable by post-hearing review; or
- (c) A review could save the commission and the parties substantial effort or expense or some other factor is present that outweighs the costs in time and delay of exercising review.

8 Staff requests interlocutory review, asserting that post-hearing review of the legal issue is not available, as the Commission's decision in Order No. 02 remains the law of the case unless changed. Staff also asserts that a "unique 'other factor'" is present, namely that "a key issue of law is presented." *Staff Petition at 5*. Aqua Express asserts that interlocutory review is appropriate under WAC 480-07-810(2)(c), as a ruling on Staff's petition would assist the parties in developing the record in this proceeding, and may reduce the issues parties must address in the proceeding. *Aqua Express Answer at 2-3*.

9 The IBU argues that Staff's petition does not meet the requirements under WAC 480-07-810(2) for the Commission to accept interlocutory review. *IBU Answer at 7*. The IBU notes that any party can appeal the Commission's decision after it reaches a decision on the application. The IBU also asserts that the unique factor cited by Staff does not outweigh the cost in time and delay of the Commission exercising review. *Id.*

10 **Discussion and Decision.** The Commission accepts Staff's petition for interlocutory review, finding under WAC 480-07-810(2)(c) that "some other factor is present that outweighs the costs in time and delay of exercising review." The issue presented, *i.e.*, interpretation of the term "public agencies" in RCW

81.84.020(4), is one of first impression for the Commission. In Order No. 02, the Commission made its decision without the full benefit of the legislative history of the 2003 amendments to RCW 81.84.020 and RCW 47.60.120. Given these factors, the Commission finds it appropriate to clarify the issue for all parties before the case proceeds further. The cost of time and delay in exercising review are minimal, as the parties' responses and the Commission's review occur during a break in the proceeding.

11 **THE MEANING OF "PUBLIC AGENCIES" IN RCW 81.84.020(4).** In Order No. 02 in this proceeding, the Commission determined that recent amendments to RCW 81.84.020 require the Commission, in granting certificates for passenger-only ferry service, to "consider and give substantial weight to the effect of its decisions on public agencies operating, or eligible to operate, passenger-only ferry service." The Commission also concluded that "[w]ithout further analysis of the legislative history of the recent amendments of the two statutes, we find that the reference to "public agencies" in RCW 81.84.020(4) can reasonably be read to include the state ferry system." *Order No. 02*, ¶ 34. Having reached this conclusion, the Commission allowed the IBU to address in this proceeding the effect of Aqua Express' proposed service on the Department and the WSF, which is a part of the Department. *Order No. 02*, ¶ 39; *Order No. 03*, ¶ 5.

12 Staff requests review of the Commission's decision, asserting that the Department is not a public agency for purposes of RCW 81.84.020(4) when passenger-only ferries are involved. Staff also requests the Commission further limit the IBU's participation in the proceeding to addressing only the applicant's financial fitness and the need for the proposed service. *Staff Petition at 2, 6.*

13 Staff argues that the Commission must harmonize recent amendments to RCW 81.84.020 and RCW 47.60.120 to interpret the meaning of the term "public agencies" in RCW 81.84.020(4). Staff invites the Commission to consider the legislative history for these amendments, attaching to its petition copies of the

session law, Chapter 373, Laws of 2003, as well as the House Bill Report, Senate Bill Report and Final Bill Report for Engrossed House Bill 1388, the legislation enacted as Chapter 373, Laws of 2003.

- 14 Staff asserts that the purpose of the legislation was to remove barriers to entry and allow entities other than the state to provide passenger-only ferry service. *Staff Petition at 4, see also Section 1, Chapter 373, Laws of 2003.* Staff asserts that the Legislature, in amending RCW 47.60.120, exempted passenger-only ferry service from the requirements of the ten-mile rule, such that the Commission need not consider the “the overall impact on the state ferry system” when determining whether to grant an application for passenger-only commercial ferry service. *Staff Petition at 3.*
- 15 Staff argues that it would be anomalous to interpret the term “public agencies” in RCW 81.84.020(4) to require the Commission to consider the effect of its decisions on the WSF, or the Department as a whole, as “the Commission would be doing what RCW 47.60.120(5) says it need not do.” *Id.* Staff argues that RCW 47.60.120(5) and RCW 81.84.020(4) should be harmonized, and read together with the legislative policy to eliminate entry barriers for passenger-only ferries operated by entities other than the state. Staff argues that interpreting “public agencies” to include the Department would impose a new barrier to entry, contrary to the Legislature’s intent.
- 16 Aqua Express concurs in and adopts the arguments in Staff’s petition, asserting that the public agencies to which RCW 81.84.020(4) refers are likely public transportation benefit areas or county transportation authorities such as Kitsap Transit. *Aqua Express Answer at 2.*
- 17 The IBU first argues that the Commission must follow the rules of statutory interpretation to determine the meaning of the term “public agencies” in RCW 81.84.020(4). *IBU Answer at 3.* The Commission must assume in such a review

that the Legislature meant what it said. *Id.*, citing *King Cy v. Taxpayers of King Cy*, 104 Wn.2d 1, 5, 700 P.2d 1143 (1985). The IBU argues that if a word or term is not defined within the statute, the term is given its ordinary meaning. *Id.* at 4, citing *Washington State Coalition for the Homeless v. Department of Soc. & Health Servs.*, 133 Wn.2d 894, 905, 949 P.2d 1291 (1997). The IBU argues that words or terms that are capable of being understood by their natural sense and meaning are plain and unambiguous. *Id.* at 3. The IBU argues that there is no inherent ambiguity in the term “public agencies” that would require the Commission to resort to legislative history or to refer to another statute in order to interpret the term. *Id.* at 4-5.

- 18 The IBU next argues that the term “public agencies” should be read to include the Department and the WSF even if the Commission attempts to harmonize RCW 81.84.020 and RCW 47.60.120 or resorts to legislative history. The IBU recognizes that the rules of statutory interpretation require that “related statutory provisions must be interpreted in relation to each other and all provisions harmonized.” *Id.* at 5, citing *CJC v. Corp. of Catholic Bishops*, 138 Wn.2d 699, 708, 985 P.2d 262 (1999).
- 19 The IBU objects to Staff’s harmonization of the two statutes and interpretation of legislative history. The IBU notes that until 1993, the ten-mile rule, RCW 47.60.120, was an absolute bar to granting a ferry certificate on routes within 10 miles of the terminus of a WSF route. In 1993, the statute was amended to allow the Commission to grant a waiver to the ten-mile rule under certain conditions.
- 20 The IBU asserts that the 2003 amendment exempting passenger-only ferries from the ten-mile rule statute “removed the Commission’s broad jurisdiction to determine whether the proposed service was in the public interest and specifically the impact on transportation, air quality and WSF.” *IBU Answer at 6.* The IBU asserts that the Legislature replaced the more onerous waiver requirements with a softer requirement that the Commission merely consider the

effect of its decisions on public agencies, consistent with its role of considering the public convenience and necessity. *Id.*

- 21 **Discussion and Decision.** At issue in this proceeding and in Staff’s petition is whether the term “public agencies” in RCW 81.84.020(4) includes the state Department of Transportation, and more specifically, whether the term should be interpreted to include the WSF, or the Department as a whole.
- 22 During the 2003 legislative session, RCW 47.60.120 and RCW 81.84.020 were both amended in Engrossed House Bill 1388 to address concerns over barriers to entry to entities other than the state seeking to provide passenger-only ferry service. *See Sec. 1, Chapter 373, Laws of 2003.* RCW 47.60.120 was amended to add a new section exempting application of the statute to operators of passenger-only ferry service. *See RCW 47.60.120(5).* RCW 81.84.020 was amended to add a section requiring the Commission to “consider and give substantial weight to the effect of its decisions on public agencies operating, or eligible to operate, passenger only ferry service.” *See RCW 81.84.020(4).*
- 23 The rules of statutory interpretation guide the Commission’s determination of the meaning of the term “public agencies” in RCW 81.84.020(4). As the Legislature did not provide a definition of the term “public agencies” in RCW 81.84.020 or Chapter 81.84 RCW, we will consider the ordinary, well-accepted, meaning of the term and may look to the dictionary for such meaning. *See Coalition for the Homeless, 133 Wn.2d at 905-6.* If the term is capable of being understood using this plain and ordinary meaning, the term is not ambiguous. *Id. at 906.*
- 24 Black’s Law Dictionary defines “public agency” as “a government body with the authority to implement and administer particular legislation.” *Black’s Law Dictionary 63, 1242 (7th Ed. 1999); see also IBU Answer at 4.* The term “public agency” can be clearly understood by applying the definition in Black’s Law

Dictionary. As a government body with the authority to implement and administer passenger-only ferry service, the Department is a public agency within the meaning of the term “public agencies” as used in RCW 81.84.020(4). As illuminated by the testimony of Ray Deardorf, Director of Planning for the WSF, the Department, through its subdivision the WSF, is a public agency “operating, or eligible to operate, passenger-only ferry service.”

25 Finally, there is no evident reason the Legislature would want us to consider effects on a local public agency but would not want us to consider effects on a state agency. If that were the Legislature’s intent, it could easily have used the word “local” to modify the more general term “public agency.” It did not.

26 As to the distinction between the Department and the WSF, we find it is a distinction without a difference, for purposes of this case. The WSF is the division of the Department charged by statute with operating the ferry system. An effect on the WSF is an effect on the Department.

27 We reject Staff’s argument that RCW 81.84.020(4) must be read together with RCW 47.60.120, so as to preclude the Commission from considering the effect of its decisions on the Department. The legislative history presented by Staff does not provide any guide to the Legislature’s intended meaning of the term “public agencies.” The Commission may not change the meaning of a statute “even if we believe the Legislature intended something else but failed to express it adequately.” *Coalition for the Homeless*, 133 Wn.2d at 904, citing *Geschwind v. Flanagan*, 121 Wn.2d 833, 841, 854 P.2d 1061(1993).

28 After considering the legislative history of the 2003 amendments to the two statutes, we find the IBU’s analysis of the effect of the amendments the better reasoned interpretation. The Legislature further relaxed its requirements (removed a barrier to entry) for passenger-only ferries by removing the need for a waiver of the ten-mile rule, and imposing a softer requirement that the

Commission consider the effect of its decisions on public agencies operating, or eligible to operate, passenger-only ferry service, which includes the Department and the WSF. Thus, applications for private car ferries remain under the "old" provisions, requiring waiver of the ten-mile rule, when applicable; while private passenger-only ferries fall under the more relaxed provisions.

ORDER

THE COMMISSION ORDERS:

- 29 (1) Commission Staff's Petition for Interlocutory Review of Order No. 02 is denied.
- 30 (2) The Department of Transportation and the Washington State Ferries are "public agencies operating, or eligible to operate, passenger-only ferry service," under RCW 81.84.020(4).

Dated at Olympia, Washington, and effective this 30th day of June, 2004.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK OSHIE, Commissioner