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

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9 **In the Matter of the Application of**  
10 **AQUA EXPRESS LLC**  
11 **For Certificate of Public Convenience and**  
12 **Necessity to Operate Commercial Ferry Service**

**DOCKET NO. TS-040650**  
**APPLICATION NO. B-079273**

**IBU'S ANSWER TO PETITION ON**  
**BEHALF OF COMMISSION**  
**STAFF FOR INTERLOCUTORY**  
**REVIEW OF ORDER NO. 2**

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14 **I. OVERVIEW**

15 1 On June 15, 2004, Commission Staff filed a petition seeking interlocutory review of the  
16 Commission's conclusion that "the reference to 'public agencies' in RCW 81.84.020(4) can reasonably  
17 be read to include the state ferry system." *Order Granting in Part Motion to Strike Protest of*  
18 *Inlandboatmen's Union of the Pacific; Limiting Protest of Inlandboatmen's Union of the Pacific* (June  
19 7, 2004)("Order No. 2") at p. 11, ¶ 34. On June 18, 2004, Administrative Law Judge Ann E. Rendahl  
20 set a deadline of June 25, 2004 for the parties to respond to Staff's petition. This is the Inlandboatmen's  
21 Union of the Pacific ("IBU")'s response to Staff's petition for review.

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Inlandboatmen's Union of the Pacific's Response to  
Staff's Petition for Interlocutory Review - 1

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1           2           Staff takes the position that the Department of Transportation (“DOT”) is not a “public  
2 agency” for the purposes of RCW 81.84.020(4) when passenger-only ferries are involved. According to  
3 the Staff, if the term “public agencies” does include the DOT or the state ferry system (“WSF”), then the  
4 Commission’s order allowing the IBU to intervene in the above captioned matter in order to address the  
5 impact on these entities must be modified.<sup>1</sup>

## 6                                       II.     STATUTES AND REGULATIONS

### 7           A.     Interlocutory Review.

8           “Interlocutory review is discretionary with the commission.” WAC 480-07-810(2). The  
9 commission may accept review of interlocutory orders in adjudicative proceedings if it finds that:

10           (a) The ruling terminates a party's participation in the proceeding and the party's  
11 inability to participate thereafter could cause it substantial and irreparable harm;

12           (b) A review is necessary to prevent substantial prejudice to a party that would not be  
remediable by post-hearing review; or

13           (c) A review could save the commission and the parties substantial effort or expense,  
14 or some other factor is present that outweighs the costs in time and delay of exercising  
review.

15 *Id*

### 16           B.     “Effect on Public Agencies”

17           “In granting a certificate for passenger-only ferries and determining what conditions to place on  
18 the certificate, the commission shall consider and give substantial weight to the effect of its decisions on  
19 public agencies operating, or eligible to operate, passenger-only ferry service.” RCW 81.84.020(4).

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22 <sup>1</sup> Staff does not object to the IBU’s participation on the issues of the need for the proposed service and the applicant’s  
financial fitness. See Staff Petition, at p. 1, fn. 2.

1           **C. “The Overall Impact On The State Ferry System”**

2           RCW 47.06.120(1), the “ten-mile” rule, requires the Commission to consider “the overall impact  
3 on the state ferry system” before granting a waiver of the ten-mile rule. Absent a waiver, the  
4 Commission cannot issue a commercial ferry certificate for a route that violates the ten-mile rule. In  
5 2003, the Legislature exempted “passenger-only ferry service” from the ten-mile rule. RCW  
6 47.60.120(5).<sup>2</sup>

7                                   **III. LEGAL ARGUMENT**

8           3       Staff argues that interpreting the term “public agencies operating, or eligible to operate,  
9 passenger-only ferry service” in RCW 81.84.020(4) to include the Department of Transportation is at  
10 odds with the Legislature removing the requirement in the ten-mile rule, RCW 47.60.120, that the  
11 commission determine “the overall impact on the Washington state ferry system” by those seeking to  
12 operate passenger-only ferries. Staff’s argument is without merit.

13           **A. Since RCW 81.84.020(4) is Unambiguous, the Commission, Staff’s Appeal to**  
14           **Look Beyond the Plain Language of the Statute is Without Merit.**

15           4       In interpreting a statute, it should be assumed that the Legislature meant exactly what it  
16 said. *King Cy. v. Taxpayers of King Cy.*, 104 Wn.2d 1, 5, 700 P.2d 1143 (1985). If a statute is  
17 unambiguous then its meaning is derived from its language alone. *Cherry v. Seattle*, 116 Wn.2d 794,  
18 799, 808 P.2d 746 (1991). Language in a statute that is capable of being understood by its “natural and  
19 ordinary sense and meaning,” is plain and unambiguous. *State v. Bourne*, 90 Wn.App. 963, 969, 954  
20 P.2d 366 (1998). An unambiguous statute is not subject to judicial or agency construction, and courts  
21 and agencies may not add language to a clear statute even if they believe the Legislature intended

22           <sup>2</sup> The IBU concedes this point for the purposes of this brief. Indeed, the Code Reviser lists two statutes in the official code.  
23           One exempts all passenger-only ferries from the ten-mile rule. The other exempts only passenger-only ferries operated by  
                transportation benefit areas and/or ferry districts. See Chapter 83 § 204 (2003), also codified as RCW 47.60.120(5).

1 something else but failed to express it adequately. *Geschwind v. Flanagan*, 121 Wn.2d 833, 841, 854  
2 P.2d 1061 (1993).

3           5       Whether the term “public agencies” in RCW 81.84.020(4) is ambiguous must stand or  
4 fall on the terms of the statute itself. In other words, if the term “public agencies” is capable of being  
5 understood in its “natural and ordinary sense and meaning,” it is unambiguous. Clearly, the term  
6 “public agencies operating, or eligible to operate, passenger-only ferry service” is unambiguous on its  
7 face. Therefore, Staff’s argument, that the Commission must look beyond the plain language of the  
8 statute is without merit and should be rejected. Indeed, Staff points to no inherent ambiguity in RCW  
9 81.84.020(4) and may not reference another statute (RCW 47.60.120) in order to create an ambiguity.

10           6       Where, as here, there is an absence of a specific statutory definition, the words used are  
11 given their ordinary meaning. *Washington State Coalition for the Homeless v Department of Soc. &*  
12 *Health Servs.*, 133 Wn.2d 894, 905, 949 P.2d 1291 (1997). This is because when the Legislature fails to  
13 provide a specific definition it is assumed to have used the term in its ordinary sense. Indeed, a  
14 nontechnical word may be given its dictionary meaning. *Id.* BLACK’S LAW DICTIONARY defines “public  
15 agency” as “a governmental body with the authority to implement and administer particular legislation.”  
16 BLACK’S LAW DICTIONARY 63 (7<sup>th</sup> Ed. 1999).<sup>3</sup> In this case then the definition would be a  
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18 <sup>3</sup> Some Washington statutes define “public agency” or “public agencies.” For example, RCW 39.34.020(1) says that public  
19 agency “means any agency, political subdivision, or unit of local government of this state including, but not limited to,  
20 municipal corporations, quasi municipal corporations, special purpose districts, and local service districts; any agency of the  
21 state government; any agency of the United States; any Indian tribe recognized as such by the federal government; and any  
22 political subdivision of another state.” RCW 4.24.470(2)(a) says public agency “means any state agency, board, commission,  
23 department, institution of higher education, school district, political subdivision, or unit of local government of this state  
including but not limited to municipal corporations, quasi-municipal corporations, special purpose districts, and local service  
districts.” RCW 53.34.170 references public agencies as “any city, county, or other political subdivision of the state, with the  
state and any department of the government of the state.” RCW 53.34.180 specifically references the department of  
transportation as a public agency under RCW 53.54.170. RCW 47.76.250, another transportation statute, refers to rail lines  
and rights of way “used by county rail districts, port districts, state agencies, or other *public agencies*.” (Emphasis added).

1 “governmental body with the authority to implement and administer” passenger-only ferry service.  
2 Therefore, the DOT and WSF are clearly public agencies under RCW 81.84.020(4).

3 **B. Even if the Commission Looks to the Legislative History of the Statute, “Public**  
4 **Agencies” in RCW 81.84.020(4) Clearly Includes the Department of**  
5 **Transportation and the Washington State Ferries.**

6 7 Staff’s argument rests on the assumption that the Commission’s duties under RCW  
7 47.60.120(1) and RCW 81.84.020(4) are the the same. Therefore, it argues, if the Commission  
8 considers the effect of new passenger-only service on the DOT and WSF under RCW 81.84.020(4), “it  
9 would be doing what RCW 47.60.120(5) says it need not do.” Staff Petition, at p. 3. Based on this  
10 assumption, Staff concludes that ALJ Rendahl’s failure to “harmonize” the two statutes in Order No. 2  
11 leads to an anomalous result that it now seeks to correct. This argument is also without merit.

12 8 It is true that “related statutory provisions are interpreted in relation to each other and all  
13 provisions harmonized.” *C J C. v Corp. of Catholic Bishop*, 138 Wn.2d 699, 708, 985 P.2d 262 (1999).  
14 However, the ALJ’s reading of the two statutes is actually quite harmonious. Indeed, the Staff’s reading  
15 of RCW 81.84.020(4) violates the well-established rule of statutory construction that statutes are  
16 construed as a whole, giving effect to all the language used. *Id.*

17 9 The ten-mile rule has existed for many years. Up until 1993, it was an absolute bar to  
18 receiving a ferry certificate. In 1993, the Legislature amended the statute and allowed the Commission  
19 to waive the ten-mile rule under certain conditions. *See* Chapter 427 § 1 (1993), amending RCW  
20 47.60.120. Specifically, the “waiver must not be detrimental to the public interest” and the Commission  
21 is required to consider, but is not limited to considering, “the impact of the waiver on transportation

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22 Other statutes use the term without defining it. *See e.g.*, RCW 18.51.250; RCW 28B 50.875; RCW 43.19.663; RCW  
23 46.37.195; RCW 50.65.030; RCW 72.09.100; and RCW 76.09.260.

1 congestion mitigation, air quality improvement, and the overall impact on the Washington state ferry  
2 system.” RCW 47.60.120(3).<sup>4</sup>

3       10       When the Legislature enacted Chapter 373 § 2 (2003), amending RCW 47.60.120, it  
4 removed application of the ten-mile limit to those seeking to provide passenger-only ferries. Thus, those  
5 seeking a ferry certificate for passenger-only service no longer need to seek a waiver from the  
6 Commission if they intend to cross within ten miles of WSF routes.

7       11       By removing the waiver requirement, the Legislature removed the Commission’s broad  
8 jurisdiction to determine generally whether the proposed service was in the public interest and  
9 specifically the impact on transportation, air quality and WSF. Instead, Chapter 373 § 5 (2003),  
10 amending RCW 81.84.020, put in place a more limited review by the Commission. Instead of having a  
11 broad mandate to consider the public interest, the Commission is now empowered (in addition to its  
12 traditional role of ensuring “public convenience and necessity”) to “consider and give substantial weight  
13 to the effect of its decisions on public agencies operating, or eligible to operate, passenger-only ferry  
14 service.” Clearly, the new mandate is narrower than the old one but it is a mandate nonetheless.

15       12       Staff argues that its reading of the statute is supported by the legislative history.  
16 Specifically, it cites the Legislature’s intent to “lift those barriers to allow entities other than the state to  
17 provide passenger-only ferry service.” Chapter 373, § 1 (2003). It is Staff’s argument that the  
18 Legislature would not add a barrier to those seeking to provide passenger-only ferry service if its intent  
19 was to remove a barrier to providing those service. As discussed above, the Legislature did remove a  
20 barrier to providing service by removing the broad investigation required by the ten-mile rule and  
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22 <sup>4</sup> By rule, WAC 488-51-050, the Commission adopted a process for adjudicating waivers of the ten-mile rule. General Order  
R-435, Docket No. TS-941485.

1 instead requiring a much narrower investigation into the services effect on public agencies operating or  
2 eligible to operate passenger-only ferry service. Therefore, the ALJ's interpretation of the statute is  
3 consistent with the legislative intent cited by Staff.

4 **C. Staff Does Not Meet the Standards for Obtaining Interlocutory Review.**

5 13 The Commission has the discretion whether to allow interlocutory review. WAC 480-07-  
6 810(2). The commission may accept review if (1) the ALJ terminated a party's participation in the  
7 proceeding and it would cause substantial and irreparable harm to the party, or (2) a review is necessary  
8 to prevent substantial prejudice that could not be remedied by a post-hearing review, or (3) a review  
9 could save the commission and the parties substantial effort or expense, or (4) some other factor is  
10 present that outweighs the costs in time and delay of exercising review.

11 14 Staff argues that the second condition applies because a post-hearing review of the legal  
12 issue presented here is unavailable. Why post-hearing review is unavailable is less than clear. Staff  
13 argues only "since Order No. 2 is probably 'the law of the case' unless it is changed review is not  
14 available." Staff Petition, at p. 5.

15 15 Staff's argument makes no sense. If the ALJ considers the effect on the DOT and grants  
16 the certificate, this legal issue is mooted unless the IBU appeals the decision. If the IBU appeals the  
17 decision, the Staff and the Applicant may cross appeal on this legal question. If the ALJ considers the  
18 effect on the DOT and denies the certificate *for that reason* then the Staff and the Applicant may appeal  
19 and seek review of the ALJ's legal conclusion.


20 16 Finally, the other "unique factor" Staff cites (that this is a key issue of law) does not  
21 outweigh the costs in time and delay of the Commission exercising interlocutory review.

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IV. CONCLUSION

For the foregoing reasons, the Staff's Motion for Interlocutory Review should be denied.

DATED this 25<sup>th</sup> day of June, 2004.

  
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1 CERTIFICATE OF SERVICE

2 I hereby certify that on June 25, 2004, I caused to be served the original and thirteen copies of  
3 the foregoing document to the following address via first class mail, postage prepaid to:

4 Carole Washburn, WUTC Executive Secretary  
5 Washington Utilities and Transportation Commission  
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9 I certify that I have also provided to the Washington Utilities and Transportation Commission's  
10 Secretary an official electronic file containing the foregoing document via email to:

11 [records@wutc.wa.gov](mailto:records@wutc.wa.gov)

12 And an electronic copy via email and first class mail, postage prepaid to:

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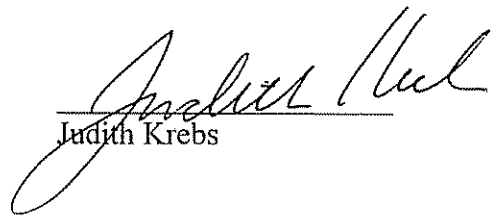
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Dated this 25<sup>th</sup> day of June 2004.

  
Judith Krebs