

Agenda Date: May 23, 2007
Item Number: B4

Docket: TS-070889
Company Name: Aqua Express, LLC (Certificate BC-129)

Staff: Dan Kermode, Regulatory Analyst
David Gomez, Deputy Director Water and Transportation

Recommendation

Staff recommends the commission set Aqua Express's petition to discontinue commercial ferry service between Kingston and Seattle for hearing.

Background

In July 2004, the commission granted Aqua Express, LLC, (Aqua Express or company) authority to provide commercial passenger-only ferry service between Kingston and Seattle. Aqua Express provided ferry service for 15 months (through September 30, 2005). The company then requested, and the commission granted, permission to discontinue service for nine months starting October 1, 2005. The company filed, and the commission granted, two additional requests to extend the discontinuance of service.

The table below shows the history of Aqua Express's requests to discontinue passenger-only ferry service:

Docket	Discontinuance Period	Start date	End Date
TS-051318	Nine Months	October 1, 2005	June 30, 2006
TS-060903	Six Months	July 1, 2006	December 31, 2006
TS-061812	Five Months	January 1, 2007	June 4, 2007

The company's prior petitions cited high operating costs, lack of access to additional funds and low ridership as reasons to discontinue service. Prior petitions also discussed the company's strategies for resuming service such as: waiting for fuel price stabilization, changes in the Washington State Ferries fares, legislative action and referendum results.

In the company's first filing in September 2005, the company stated that the temporary discontinuance would provide time to allow fuel prices to stabilize and for the company to consider ferry-rider habits. In addition, the company stated that within the discontinuance period the Legislature would complete a study that would assist the company on its future operations.¹

In its second filing in June 2006, Aqua Express stated that it was working with Kitsap Transit, the regional Public Transportation Benefit Authority, to resume ferry service and needed more time to develop a viable business model.²

¹ Re Aqua Express, Docket TS-051318, Petition for Order (September 28, 2005), Order No. 1 at ¶5.

² Re Aqua Express, Docket TS-060903, Petition for Order (June 28, 2006), Order No. 1 at ¶4.

Six months later, Aqua Express filed its third petition to extend its discontinuation period through July 1, 2007. The company stated it was finalizing its agreement with Kitsap Transit to resume passenger-only ferry service.³ Kingston Express Association (Kingston Express), a non-profit association, had previously contacted staff and expressed interest in filing an application for authority to provide passenger-only ferry service for the same route. However, RCW 81-81-020(5) prohibits the commission from considering new applications for authority on this route until after July 1, 2007. Staff was concerned that extending Aqua Express's discontinuance of service through July 1, 2007, might create unintended barriers to any new certificate applications. The company amended its petition to resume service by June 4, 2007. The commission granted the amended petition.

A critical component for Aqua Express to resume service by June 4, 2007, was voter approval of increased sales taxes to fund passenger-only ferry operations in a special election to be held on February 6, 2007. A simple majority was required to pass the measure. Voters rejected the proposed sales and use tax by a margin of 5,881 votes (just under 9% of all votes cast).

Result	Vote Count	Percent
Yes	29,855	45.52%
No	35,736	54.48%
Total	65,591	100.00%

Table 1: Kitsap Transit Proposition Number 1, results from special election of February 6, 2007⁴

Discussion

On May 7, 2007, Aqua Express filed a new petition requesting permission to extend its discontinuance of passenger-only ferry service for an additional 24 months, from June 4, 2007, to June 4, 2009. The company states it is continuing to work with Kitsap Transit in exploring different options for resuming service. Aqua Express states the intent of the current petition is to preserve the financial investments made by the company that include costs of permits and improvements to the Kingston Pier used to board passengers while a public/private partnership between Aqua Express and Kitsap Transit is developed and funded.

Aqua Express's petition requests a 24-month extension of its authority to discontinue service. However, WAC 480-51-130 limits discontinuance of service to twelve months. To comply with the commission's rules, the company should have asked for a twelve-month extension to June 4, 2008, or asked the commission for exemption of WAC 480-51-130.

Based on staff's discussions with the company and Kitsap Transit, it is clear that resuming service and the continued viability of Aqua Express depends on a substantial operating subsidy from Kitsap Transit. Kitsap County voters twice rejected ballot measures increasing sales taxes to support ferry service. Aqua Express managing partner John Blackman stated that the company and Kitsap Transit are working on several plans, but it could be several years before these come

³ Re Aqua Express, Docket TS-061812, Petition for Order (December 27, 2006), Order No. 1 at ¶5.

⁴ Kitsap County Auditor, 2007 Election Results

to fruition. Staff believes that given the previous experience with efforts to obtain public funding of passenger-only ferry service, there is no guarantee the plans will produce the desired funds. Kitsap Transit confirmed that there are no expectations for resuming service within the next few years.

Kitsap Transit Board of Commissioner's Resolution

On May 15, the Board of Commissioners of Kitsap Transit adopted a resolution entitled "*Resolution Authorizing Kitsap Transit Staff to Negotiate and Execute a second Supplement to Kitsap Transit's Kingston Joint Development Agreement with Aqua Express.*"⁵ The resolution specifically addresses Aqua Express, the effects of the ferry's discontinued operations and its future relationship with Kitsap Transit.

According to the resolution, it is the opinion of the Kitsap Transit commissioners that it is not currently feasible for a private-sector operator to provide passenger-only ferry service without a public subsidy. Kitsap Transit is not in a position to subsidize passenger-only ferry service in any material or substantial manner.⁶ Also, they believe that future legislation may be enacted that would provide viable alternatives for publicly subsidized passenger-only ferry service between Kingston and Seattle.⁷

In addition, the resolution discusses possible adverse results if the commission fails to grant the request. If the commission cancels Aqua Express's Certificate, according to the resolution, Nichols Brothers, Inc., and Clipper Navigation LP, "might" remove a contributed barge and gangway to the Port of Kingston pier.⁸ If the barge and gangway are removed, it says, the Port of Kingston "might attempt to compel the removal of some or all of the pier improvements."

Staff has received no direct information from the parties referred to in the resolution.. In addition, further investigation may be required of the statement in the resolution that Aqua Express expended approximately \$750,000 improving the Kingston Fishing Pier (pier) to facilitate passenger-only ferry service. Staff is of the opinion that the \$750,000 investment is a question that staff could confirm in an audit.

In summary of the Kitsap Transit resolution, it is the opinion of the Kitsap Transit's Board of Commissioners that it is in the best interests of the residents of Kitsap County to preserve the status quo in general and the pier improvements in particular to avoid future start up cost if and when passenger-only ferry service between Kingston and Seattle would resume.⁹

Kingston Express

Kingston Express is a non-profit association, comprised primarily of former Aqua Express ferry riders. Kingston Express contacted staff and expressed interest in providing passenger-only ferry service between Kingston and Seattle and filing an application with the commission when the moratorium expires. Staff understands that Kingston Express's primary purpose is to provide

⁵ Kitsap Transit Board of Commissioners Resolution No. 07-22

⁶ *Id* at 101

⁷ *Id* at 102

⁸ Nichols Brothers, Inc., and Clipper Navigation LP, are both 25% owners of Aqua Express.

⁹ Kitsap Transit Board of Commissioners Resolution No. 07-22 at 102

ferry service to its members and it hopes to sell tickets to the general public to help pay operating expenses. Staff advised Kingston Express, by letter dated January 9, 2007, that commission regulation of commercial ferry service includes both operating authority and fares charged to the public. Staff cautioned Kingston Express that its conceptual organizational model and fare structure might not be appropriate for a regulated commercial ferry operation

Public Comments

When Aqua Express filed its petition, it did not issue any further notice of its request to extend its discontinuation of passenger-only service. However, the North Kitsap Herald published a front page story centered on the extension request.¹⁰

Kingston Express submitted the only comment received by the commission. Kingston Express stated that it does not support the request for extension stating “there are better alternatives... than waiting two more years, at least, for a county or regional ferry system.”

Although the commission has not received any comments from Kitsap Transit at this time, the resolution authorizes Kitsap Transit staff to support Aqua Express’s request for a two-year discontinue service through at least June, 2009.¹¹

Summary

The complete record in this case is comprised of Aqua Express’s one-page, two-sentence petition and Kingston Express’s letter opposing the petition. Staff gathered additional information through telephone calls and researching various internet resources including Kitsap Transit’s Web Site. Staff believes additional information from Aqua Express, Kitsap Transit, Kingston Express and the Kingston Port may be relevant to the commission’s decision in this matter.

The commission should consider whether Aqua Express should continue to hold the certificate to provide service to the Kingston area if there is little or no likelihood that it will be in a position to provide service in the near future. The current petition is distinct from the prior petitions in that it does not provide a clear plan or strategy for resuming service in the near term. Among the number of difficulties that emerge with a long-term discontinuation of service, the most obvious is the creation of an artificial barrier to entry of another qualified carrier.

The commission is prohibited from issuing a temporary certificate, even if the applicant demonstrates an urgent and immediate need for the proposed service while another certificate is issued. Although WAC 480-519-060 states the commission may issue a temporary authority, it can not on a route for which a certificate has already been issued. However, if the current holder “failed or refused to furnish reasonable and adequate service, has failed to provide the service described in its certificate or tariffs after the time period allowed to initiate service has elapsed, or has not objected to the issuance of the certificate,”¹² the commission could issue a new permanent certificate for a route under these circumstances. The prospect of a hearing may deter a prospective operator from filing an application for a certificate.

¹⁰ North Kitsap Herald, May 12, 2007.

¹¹ Kitsap Transit Board of Commissioners Resolution No. 07-22 at 102.

¹² RCW 81.84.020(4)

Assuming for discussion, the commission does not approve this request for extension, and further assuming Aqua Express fails to resume service June 4, 2007; the company will be in violation of the commission's order. The commission then, after a hearing, could suspend, cancel or revoke the company's certificate.¹³ Another possibility is the commission could, after hearing, find that the company has failed or refused to furnish reasonable and adequate service. Again, the commission could then cancel or revoke the Aqua Express's certificate.

The commission could, after hearing, issue a permanent certificate to a new applicant if (1) Aqua Express does not object to the issuance of the new certificate, (2) the commission concludes that Aqua Express is not serving the route or (3) the commission concludes the existing certificate holder has failed or refused to furnish reasonable and adequate service.

Staff believes that an applicant that is prepared to initiate service should not be prevented from doing so because an existing certificate holder, that is not providing service, currently holds a valid certificate.

Conclusion

The commission has already approved Aqua Express's requests to discontinue service for a total of 20 months; in contrast, a company that obtains a new operating authority must initiate service within 20 months.¹⁴ Aqua Express now asks the commission to extend the discontinuance of service for an additional 24 months, or a total of 44 months. The record in this docket does not support the many statements and conclusions received by staff as it performed its due diligences review on the petition. The company has not justified why the commission should grant its petition. Aqua Express has not demonstrated a clear plan or strategy for resuming service in a reasonable period of time.

Staff recommends the commission set Aqua Express' petition to discontinue commercial ferry service between Kingston and Seattle for hearing.

¹³ WAC 480-51-150 (h)

¹⁴ RCW 81.84.010(2)