BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Application of AQUA EXPRESS LLC For Certificate of Public Convenience and Necessity to Operate Commercial Ferry Service	DOCKET NO. TS-040650 APPLICATION NO. B-079273 MOTION TO STRIKE PROTEST OF INLANDBOATMEN'S UNION OF THE PACIFIC

COMES NOW Aqua Express LLC, by and through its attorneys Williams, Kastner & Gibbs PLLC and David W. Wiley, and for response to the protest served on May 5, 2004 in the above-captioned proceeding, answers and alleges as follows:

I. INTRODUCTION AND RELIEF REQUESTED

Applicant, Aqua Express LLC (hereinafter "Applicant or Aqua Express"), pursuant to WAC 480-07-375, brings the instant motion seeking to strike the above protest filed by the Inlandboatmen's Union of the Pacific, (hereinafter "IBU") for the reasons asserted below. This issue will presumably be one of the more pertinent ones to be addressed and disposed of at the prehearing conference in this matter now scheduled for Friday, May 21, 2004 in Olympia.

By its protest, particularly at Section 4, page 2, the IBU alleges that it "is the exclusive bargaining representative of deckhands, ticket-takers, ticket-sellers and certain other terminal

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

personnel working for the Washington State Ferries ("WSF")." In so doing, it also argues amongst other points, that no need is shown for the applied for passenger-only service between Seattle and Kingston and that the application will have a deleterious impact on the ferry system . . . in that " . . . it will put the Ferry System in even worse financial straits, potentially leading to the canceling of WSF runs and loss of jobs. Among the jobs which would be lost, as a result of this occurrence, would be the jobs currently held by IBU-represented WSF employees."

The various contentions of IBU are problematic for a number of reasons both factually and legally. IBU purports to be concerned about the impact on its membership raised by any peripherally-competitive ferry service application, yet is obviously not the representative of the Washington State Ferry System under Title 47.46 et seq. Additionally, while IBU attempts to raise questions about negative economic impacts on the Washington State Ferry System, it clearly is not the real party in interest to raise those issues, nor has it demonstrated it has been delegated, *de facto* or *de jure,* the right to advance any interest of the Washington State Ferry System in this proceeding.

II. DISCUSSION

A. A Party May Protest or Intervene Only Where Its Interests Are Among Those The WUTC Is Required To Consider.

In order to have standing to intervene in and challenge agency action, a person must satisfy the following three conditions as articulated by the U.S. Supreme Court in Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153, 90 S.Ct. 827, 829, 25 L.Ed.2d 184 (1970):

(1) The agency action has prejudiced or is likely to prejudice that person;

(2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and

(3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

See St. Joseph Hosp. and Health Care Ctr. v. Dept. of Health, 125 Wn.2d 733, 739, 887 P.2d 891(1995).[1]

The second requirement, known as the "zone of interest" test, "addresses the concern that mere injury-in-fact is not necessarily enough to confer standing because so many persons are potentially 'aggrieved' by agency action." St. Joseph 125 Wn.2d at 139, citing William R. Andersen, The 1988 Washington Administrative Procedure Act--An Introduction, 64 Wash.L.Rev. 781, 824 (1989).

The rationale for this requirement, as articulated by the federal courts and later adopted by the Washington Supreme Court,[2] is to limit intervention to only those parties whose interests the particular agency was established to protect:

> Legislation and subsequent administrative actions inevitably affect a multitude of groups and individuals in our complex and highly integrated society. This is perhaps especially significant where, as here, legislation alters the structure of the marketplace. A test requiring only injury in fact--the constitutional minimum--would necessarily obstruct and undermine legislative control and guidance over essentially political issues by conferring standing to litigate on a host of parties whose interests Congress failed to protect.

Id. at 740, quoting Branch Bank & Trust Co. v. National Credit Union Admin. Bd., 786 F.2d 621, 624 (4th Cir.1986), cert. denied, 479 U.S. 1063, 107 S.Ct. 948, 93 L.Ed.2d 997 (1987).

B. The IBU Does Not Fall Within the "Zone of Interest" Protected by the WUTC.

IBU is a collective bargaining representative for various classifications of employees working on or in association with the Washington State Ferry System. It is not an existing or prospective commercial ferry company regulated under Title RCW 81.84, nor is it a public

---

[1] While Association of Data Processing Serv. and St. Joseph Hosp. raise issues of standing in the context of a judicial challenge to agency action, the concept of administrative standing should be treated no differently where a party seeks to intervene in an agency action. For once the WUTC has made its decision here, IBU would have to satisfy the three part requirement articulated in Association of Data Processing Serv. in order to bring any judicial challenge.

[2] Indeed, the WUTC has applied the zone of interest test in prior proceedings to determine intervention status. See, UW-011320, In re Stevens et al. v. Rosario Utilities, LLC (July 2002).

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

agency "operating or eligible to operate, passenger-only ferry service" under RCW 81.84.020(4). As such, it lacks an articulable interest coming within the statutory purview of Title 81.84 RCW under which the Commission is here charged to regulate.

The Washington Supreme Court has had previous occasion to address the exclusion of an unregulated interest from participation in a Commission adjudicative proceeding. In Cole v. Washington Utilities and Transportation Commission, 79 Wn.2d 302, 485 P.2d 71 (1971), the Oil Heat Institute, an oil industry trade association, had sought to intervene in a rate complaint proceeding in order to demonstrate the adverse impact of the gas company's promotional practices on its fuel dealers. The Commission denied intervention in the hearing, determining that under existing law a rate complainant challenging the actions of an investor-owned gas service provider had to be a gas customer and that the Oil Heat Institute therefore lacked standing to intervene. The Commission also held that it had no jurisdiction to examine the economic effects of practices of a regulated public service utility upon nonregulated competitors.

In upholding the Commission's denial of intervention, the Washington Supreme Court not only concurred that the Oil Heat Institute lacked standing to raise objections to the regulated utility's practices, but also rejected the same type of expansive public interest statutory reading for qualification to participate in the proceeding that ostensibly IBU proffers:

> Under the facts before us, it is doubtful whether the institute can prove a "substantial interest" in rates charged to customers of a competitor who is regulated by different laws and who provides an entirely different type of fuel service. Secondly, it is clear that the institute's objections are beyond the concern of the Commission under a reasonable interpretation of the term "public interest." (Emphasis added).

79 Wn.2d 302, 305-306.

The court went on to find that neither the express nor implied statutory authority of the Commission extended to an examination of the Oil Heat Institute's contentions in the

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

proceeding, and that the Commission had correctly determined that it had no authority to consider the effect of a regulated activity upon a nonregulated business.

C. IBU's Protest Also Fails to Advance any Compelling or Substantial Interest in the Subject Matter of the Hearing or Demonstrate that its Participation is in the Public Interest.

While the Commission has discretion to grant intervention status to a party under WAC 480-07-355, Cole suggests the regulation and statute require that the administrative agency be limited in its operations consistent with statutory jurisdiction conferred by the Legislature citing, State ex rel Pub. Util. Dist. No. 1 of Douglas County v. Public Service Commission, 21 Wn.2d 201, 150 P.2d 709 (1944).

Again, IBU here, through its putative protest, has failed to articulate any basis to find that it should be granted participation status in this proceeding. The IBU is not a "public agenc[y], operating or eligible to operate, passenger only ferry service," nor is it an authorized agent for the WSF itself, nor an existing or proposed commercial service provider regulated by Title 81.84 RCW.

IBU's position is strikingly similar to that of the Oil Heat Institute in Cole, as revealed by the statement of its interest at pages 2-4 of its Protest. Essentially, the IBU seeks to interject itself into the development of the adjudicative hearing record to examine issues it lacks standing to raise, (i.e. impact of proposed service on the Washington State Ferries and environmental issues purportedly posed by the application), all ultimately regarding competitive impacts of regulated providers on unregulated entities over which the Commission lacks authority to control.

While there are theoretically a myriad of interest groups arguably impacted by grant or denial of Commission-regulated entry applications, the Legislature, the judiciary and the agency itself have traditionally and prudently limited participation in Commission proceedings to parties that demonstrate "cognizable" and/or substantial interests reflected in the public

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

service laws which the IBU's putative protest/attempted intervention here ultimately fails to implicate.

D. Prior Commission Decisions Do Not Routinely Authorize Collective Bargaining Unit Participation in Application Proceedings.

Applicant has identified two related decisions where collective bargaining representatives were allowed to participate in Commission adjudicative proceedings. UE-951270, UE-960195; In re: Puget Sound Power & Light Company, (Feb. 1997), was a consolidated rate case and merger application where the International Brotherhood of Electrical Workers ("IBEW") Local 77 and other affected unions were allowed the limited right to intervene to address the impact of the merger of Puget Power and Washington Natural Gas on service reliability and safety in relation to prior reduction in staff levels at Puget Power. That intervention grant specifically excluded consideration of "wages, benefits or job protection for union members."[3] The impact on existing employees of a merger of two investor-owned utilities and resultant service reliability issues would appear to be effects directly within the Commission's jurisdiction in regulating pursuant to public service laws under RCW 80.01.040(3).

The other identifiable authority on the issue raised by the attempted protest/intervention of the IBU here is a Prehearing Conference Order, In re Application of Horluck Transportation Company, Inc. d/b/a Cross Sound Flyer and in re San Juan Express, Inc., Hearing B-78487 and B-78511 (July, 1996). In that case, the IBU was granted intervenor status in the joint application case by an order specifically noting an absence of objection to its participation.[4] In Horluck, one of the routes requested by one applicant was between Bremerton and Seattle,

[3] UE-951270 and UE-960195, In re: Puget Sound Power & Light Company, Second Supplemental Order on Prehearing Conference at 3.

[4] It is indisputable, moreover, that unappealed orders on prehearing conferences fail to rise to the level of a final order of the Commission, let alone create any judicial precedent in guiding the procedure in this proceeding.

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

identical to an existing Washington State passenger ferry route which was directly opposed by the WSF in that application. The WSF, in addition to operating that route, was also actively planning to expand service in passenger ferry provision at the time. Today, as opposed to eight years ago, that situation has changed markedly with a curtailment and/or elimination of passenger-only ferry service by WSF, and with the advent of legislation in 2003 which, under EHB 1853, encouraged the development of passenger-only ferry service by public/private partnerships and with active state and local service sponsorship assistance.

The present application has the active approval of the local public transit benefit agency (Kitsap Transit) and is not proposing to operate a passenger-only ferry service between two termini on an existing route served by the WSF. The present applicant is strongly opposed to protest/intervention of the IBU on both factual and legal grounds, in sharp contrast to the prior unopposed IBU participation in Horluck.

III. CONCLUSION

The IBU's protest/intervention in this application proceeding is inappropriate. It fundamentally lacks standing to participate under basic administrative law and Washington judicial and regulatory precedent. The IBU here cannot implicate a cognizable public interest claim to render its participation consistent either with statutory jurisdiction or sound regulatory policy of this Commission. The protestant also seeks to raise issues of competitive impact outside the ambit of regulated public service company operations the Commission cannot address through grant or denial of a commercial ferry service application. The IBU's participation in this hearing record will also unquestionably broaden the subject matter, protract the time, and increase the expense to the applicant in this proceeding, undoubtedly some of the putative protestant's objectives in seeking participation here. The Commission, in weighing relative "substantial interests in the subject matter" and in developing a record consistent with the public interest, should be guided by appropriate doctrines of standing as

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

well as recognized objectives of regulation of public service companies in refusing to allow the participation of the Inlandboatmen's Union of the Pacific in this application proceeding under RCW 81.84.020.

DATED this 17 day of May, 2004.

WILLIAMS, KASTNER & GIBBS PLLC

By _____
David W. Wiley, WSBA #08614
dwiley@wkg.com
Attorneys for Applicant

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2004, I caused to be served the original and twelve copies of the foregoing document to the following address via first class mail, postage prepaid to:

Carole Washburn, WUTC Executive Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive SW
P.O. Box 47250
Olympia, WA 98504-7250

I certify I have also provided to the Washington Utilities and Transportation Commission's Secretary an official electronic file containing the foregoing document via email to: records@wutc.wa.gov

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

Donald Trotter
Assistant Attorney General
1400 S. Evergreen Park Drive S.W.
P.O. Box 40128
Olympia, WA 98504-0128
dtrotter@wutc.wa.gov

and a copy sent via legal messenger to:

Judith Krebs, Attorney
Dmitri Iglitzin, Attorney
Schwerin Campbell Barnard LLP
18 West Mercer Street, Suite #400
Seattle, WA 98119
Attorneys for Inlandboatmen's Union of the Pacific

Dated this 17th day of May, 2004.

SYLVIA LOUISE ROLLINS

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600