



Christine O. Gregoire

# ATTORNEY GENERAL OF WASHINGTON

Utilities and Transportation Division

1400 S Evergreen Park Drive SW • PO Box 40128 • Olympia WA 98504-0128 • (360) 664-1183

May 20, 2004

Carole J. Washburn, Secretary  
Washington Utilities and Transportation Commission  
1300 S. Evergreen Park Dr. SW  
P. O. Box 47250  
Olympia, Washington 98504-7250

Re: *Aqua Express*  
Docket No. TS-040650

RECEIVED  
RECEIVED  
94 MAY 20 PM 3:58  
OFFICE OF THE ATTORNEY GENERAL  
WASHINGTON STATE

Dear Ms. Washburn:

Enclosed for filing in the above-referenced docket are the original and 13 copies of the Response On Behalf Of Commission Staff To The Motion Of Aqua Express To Strike Protest Of Inlandboatmen's Union Of The Pacific, and Certificate of Service.

Very truly yours,

DONALD T. TROTTER  
Senior Counsel

DTT:kl  
Enclosures  
cc: Parties



RECEIVED  
MAY 20 11 35 08  
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In re Application No. B-079273 of  
  
AQUA EXPRESS, LLC  
  
For a Certificate of Public Convenience  
and Necessity to Provide Commercial  
Ferry Service

DOCKET NO. TS-040650  
  
RESPONSE ON BEHALF OF  
COMMISSION STAFF TO  
THE MOTION OF AQUA  
EXPRESS TO STRIKE PROTEST  
OF INLANDBOATMEN'S  
UNION OF THE PACIFIC

**I. OVERVIEW**

1           The Staff of the Washington Utilities and Transportation Commission (Staff) supports the relief sought by the Applicant, Aqua Express, LLC (Aqua Express) in its Motion to Strike the Protest of the Inlandboatmen's Union of the Pacific (IBU). While Staff's analysis differs in some respects from the analysis of Aqua Express, the conclusion is the same.

2           The Commission's commercial ferry rules specify how a third party may participate in a commercial ferry application proceeding. A protest is required,

stating “the specific grounds for opposing the application and contain a concise statement of the interest of the protestant in the proceeding.” WAC 480-51-040.

3           The Commission’s commercial ferry rules do not speak further to the issue of how the Commission analyzes such protests for sufficiency. However, the Commission generally requires persons seeking to participate in a hearing to have a “substantial interest in the subject matter of the hearing,” or to show “the public interest” justifies their participation. WAC 480-07-355(3)(Intervention).

4           Applying these standards to the Protest filed by the IBU justifies the relief sought by Aqua Express. The Protest should be stricken.

## II.     **APPLICABLE STATUTES AND RULES**

5           RCW 47.60.120, RCW 81.01.010 (by reference to RCW 80.01.040(2)), RCW 81.84.020, RCW 47.01.031, RCW 47.60.015, WAC 480-51-040, and WAC 480-07-355(3).

## III.    **FACTS**

### A.     **IBU’s Asserted Interests, and the Issues It Seeks to Litigate**

6           In its Protest, IBU states it is acting in support of three distinct interests in this case: 1) the interests of deckhands, ticket-sellers and certain other terminal personnel

working for the Washington State Ferries,<sup>1</sup> as their “exclusive bargaining representative;” 2) the interests of certain “snack bar and concessionaire workers who are employed by private companies doing business on the Washington State Ferries,” as their “exclusive bargaining representative;” and 3) the interests of its union members in their status as residents of Puget Sound, and who are alleged to be “negatively impacted by operations which cause deterioration in the air and water quality of this area.” Protest at page 2, ¶ 4, 5-10.

7           Based on these interests, the issues the IBU wishes to address are set forth in the Protest at pages 2-4, ¶¶ 4-5:

1.       Whether there is a demonstrated need for the service sought to be provided by Aqua Express LLC
2.       Whether the service sought to be provided by Aqua Express LLC would adversely affect the Washington State Ferries
3.       Whether the service sought to be provided by Aqua Express LLC would adversely affect IBU-represented Washington State Ferries employees
4.       Whether the service sought to be provided by Aqua Express LLC would adversely affect IBU-represented employees of Washington State Ferries concessionaires

---

<sup>1</sup> IBU’s Protest refers to the Washington State Ferries, or “WSF” for short. “Washington State Ferries” is the name the Legislature authorizes the Department of Transportation to use to refer to the state ferry system the Department manages and operates. RCW 47.01.031; RCW 47.60.015.

5. Whether the service sought to be provided by Aqua Express LLC would adversely and needlessly affect the air and water quality of this region
6. Whether Aqua Express LLC has the financial resources to operate the proposed service for at least twelve months, as required by RCW 81.84.020(2).

#### IV. ARGUMENT

##### **A. IBU's Protest Does Not Demonstrate that the IBU is Authorized to Represent Its Members in a Commission Proceeding of this Nature**

8 A threshold issue is whether IBU has shown that it has the right to represent ferry and concessionaire employees in this case. As summarized above, IBU has identified only that it is the "exclusive bargaining representative" of such employees. This docket is not a collective bargaining proceeding.

9 Indeed, there is no indication IBU is authorized to represent these employees in proceedings other than collective bargaining or other labor-related proceedings. Nor is there anything in IBU's Protest demonstrating that the IBU members/employees at issue have authorized the IBU to represent them in their roles as citizens of this state, with respect to the regional air and water quality issues IBU identifies.

10           Consequently, IBU's Protest should be stricken for IBU's failure to  
demonstrate it is authorized to participate in this case as a representative of the  
persons and interests it purports to represent.

**B.     In Any Event, the IBU Lacks Standing to Raise the Issues it Wants the  
Commission to Resolve**

11           Even if the IBU union members authorized IBU to represent them in this case  
as both union members and as citizens residing in the Puget Sound area, the Protest  
should still be denied.

**1.     Three of the Issues IBU Seeks to Address Are Beyond the  
Commission's Authority to Resolve – Issues 3, 4 and 5**

12           The Commission has a duty to regulate "in the public interest, as provided by  
the public service laws ...". See RCW 81.01.010, by reference to RCW 80.01.040(2).

13           There is nothing in Title 81 that even remotely suggests the Commission can  
consider the impact of a grant of a commercial ferry certificate on the employment  
status of union employees employed by unregulated entities such as the WSF or  
private concessionaires.

14           In general, the public service laws do not grant the Commission authority to  
consider the impacts of its actions on the activities of competing businesses the  
Commission does not regulate. *Cole v. Utilities & Transp. Comm'n*, 79 Wn.2d 302, 306,

485 P.2d 71 (1971) (court upheld Commission denial of intervention to unregulated oil heat dealers allegedly harmed by the pricing of a regulated natural gas company service).

15           The Commission denied broad intervention by the International Brotherhood of Electrical Workers in *In re Puget Sound Power & Light Co.*, Docket No. UE-8512270 and UE-960195 (Second Supp. Order at 3)(May 23, 1996), stating: “The Commission will not consider issues of wages, benefits or job protection for union members.”

16           Accordingly, the impacts on IBU members alleged by the IBU in Issues 3 and 4 of its Protest are beyond the Commission’s authority to address.

17           Similarly, the Commission has no statutory authority to address air and water quality issues in this proceeding. No statute empowers the Commission to consider water quality issues. One statute, RCW 47.60.120 (the “ten-mile rule”) gives the Commission limited authority to consider the impact of a waiver of the ten-mile rule on “air quality improvement.” RCW 47.60.120(3). However, that section applies only to proposed crossings within ten miles of any state ferry crossing,

RCW 47.60.10(1), and the proposed service of Aqua Express does not meet that condition.<sup>2</sup> In any event, passenger-only ferry service is exempt. RCW 47.60.120(5).

18           Consequently, like Issues 3 and 4, the IBU has not justified intervention based on Issue 5.

**2.     The IBU Does Not Have Standing To Address Impacts on the State Ferry System – Issue 2**

19           The IBU’s Issue 2 seeks to address the impact of the Aqua Express application on the state ferry system, which is operated and managed by the Department of Transportation (Department). In its Protest, the IBU refers to RCW 81.84.020(4), which states:

In granting a certificate for passenger-only ferries and determining what conditions to place on the certificate, the commission shall consider and give substantial weight to the effect of its decisions on public agencies operating, or eligible to operate, passenger-only ferry service.

20           RCW 81.84.020(4) does not apply to the Department in this case. RCW 47.60.120(3) contains a requirement that the Commission consider “the overall

---

<sup>2</sup> Application of the ten-mile rule involves comparing the termini of the proposed crossing with the termini of each existing state ferry crossing. Each crossing is evaluated separately. Only if each set of comparable termini are within ten miles of each other does the general prohibition in RCW 47.60.120(1) apply. AGO 1990 No. 16 (November 27, 1990). There are two state ferry crossings to consider: Winslow to Seattle and Kingston to Edmonds. The proposed ferry crossing is Kingston to Seattle. Kingston is more than ten miles from Winslow, and Edmonds is more than ten miles from Seattle. Accordingly, RCW 47.60.120 is inapplicable. Note: The undersigned drafted the foregoing Attorney General’s Opinion.



impact on the state ferry system.” But as Staff explained in Part IV.B.1 above, that requirement applies only when a proposed crossing satisfies the ten-mile rule, and when a passenger-only ferry is not involved. Neither condition applies here. It is doubtful the Legislature would resurrect that requirement by way of RCW 81.84.020(4). Harmonizing the two statutes leads to the conclusion that the Commission need not consider the impact of the instant application on the state ferry system.

21           In any event, the Commission need not reach that interpretive issue, for there is nothing in the IBU’s Protest to suggest the Department has authorized the IBU to represent the Department or its interests.

22           Note that under RCW 81.84.020(4), the specific impact to be analyzed is the impact “on public agencies operating, or eligible to operate, passenger-only ferry service.” In other words, the relevant issue is the impact *on the Department, not the impact on the IBU or its members*. The Department has standing to assert and defend impacts on the state ferry system it operates (assuming there can be any relevant impacts given the exemption in RCW 47.60.120 (5)). However, the IBU does not have standing to do so.

23           Moreover, the Department has spoken: In Appendix A to this Response is a  
May 17, 2004 letter from the Department to the Commission stating, in pertinent part:

Washington State Ferries' staff has reviewed Aqua Express' application to begin passenger and freight service between Seattle and Kingston. Although the 10-mile rule no longer applies to the movement of passengers across Puget Sound, Washington State Ferries does not object to this application for the movement of both passengers and freight.

24           Therefore, there is no reason to permit the IBU to litigate the issue of the impact on the Washington State Ferries, when the Washington State Ferries has already reviewed the Aqua Express application and has determined to raise no objection to the grant of the certificate.<sup>3</sup>

**3.       The Remaining Issues Identified by the IBU Do Not Require IBU's Participation - Issues 1 and 6**

25           For many of the same reasons discussed above, the IBU has no apparent interest cognizable by the Commission under Title 81 to justify allowing the IBU to

---

<sup>3</sup> Even if the Department had not stated this position, the IBU still could not contest the impact on the Department issue. In some circumstances, it is acceptable for third parties to assert the interests of others. Accordingly, the IBU is entitled to participate on Issue 2 if: (1) The IBU has suffered an injury-in-fact; 2) The IBU has a close relationship to the Department; and (3) There exists some hindrance to the Department's ability to protect its own interests. *E.g., Mearns v. Scharbach*, 103 Wn. App. 498, 512, 12 P.3d 1048 (2000).

The IBU fails this test. For one thing, the IBU has not demonstrated any hindrance whatsoever that restricts the Department's ability to protect its own interests, again, assuming there are any relevant interests to protect. Accordingly, the IBU's Protest fails to demonstrate IBU has standing to assert impacts on the Department. Because the IBU so clearly fails part 3) of the test for third party participation, Staff does not address parts 1) and 2).

contest issues of financial fitness or public need for the proposed service (IBU's Issues 1 and 6). In any event, IBU has not stated any particular expertise on these issues that would be useful to the Commission.

26           The result is that the IBU has not demonstrated it has a substantial interest in this proceeding that is cognizable by the Commission. Nor has the IBU established it has specialized expertise that satisfies the public interest test for participation.

#### V. SPECIFIC RESPONSE TO THE ARGUMENTS OF AQUA EXPRESS IN ITS MOTION TO STRIKE

27           Staff generally agrees with the arguments made in the Motion by Aqua Express.<sup>4</sup> However, Staff does not believe Aqua Express is correct that the requirements for standing to seek judicial review are co-extensive with the requirements for intervention.<sup>5</sup> See Aqua Express Motion to Strike at page 2, line 16 to page 3, line 17.

28           It is not necessary to decide this issue. As Aqua Express goes on to explain, the court in the *Cole* case agreed that a prospective intervener must demonstrate a "substantial interest" in the proceeding, and that "interest" had to be one cognizable

---

<sup>4</sup> Staff makes an additional argument: That as a threshold matter, the IBU Protest is insufficient because it does not demonstrate IBU has been authorized to represent its members in matters such as these. See Part IV.A., *supra*.

<sup>5</sup> Indeed, a party justifying intervention might not be "aggrieved" by the final agency decision, and therefore that party would not have standing to seek judicial review. The key issue is whether the party's interest is one the agency is empowered to protect. That is where the IBU Protest fails.

by the Commission. *Id.* at page 3, line 17 to page 6, line 2; WAC 480-07-355. Staff agrees with Aqua Express that the IBU Protest fails to demonstrate compliance with that test.

29 Staff also agrees with Aqua Express that prior Commission orders regarding intervention support striking IBU's protest. *Id.* at page 6, line 5 to page 7, line 7. The Commission order regarding the intervention of the International Brotherhood of Electrical Workers union in *In re Puget Sound Power & Light Co.*, Docket No. UE-8512270 and UE-960195 (Second Supp. Order at 3)(May 23, 1996) is discussed above at page 6.

30 While the IBU was granted party status without apparent qualification in the "Order on Prehearing Conference" in *In re Application of Horluck Transp. Co., Inc., and San Juan Express, Inc.*, Hearing No. B-78487 and B-78511 (July 16, 1996), there was no opposition to the IBU's participation in that case. Consequently, that order is not precedential.

//

//

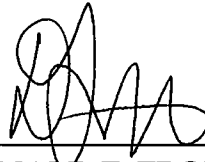
//

**VI. CONCLUSIONS**

31 For the reasons stated above, the Commission should grant the Motion of Aqua Express to Strike the Protest of Inlandboatmen's Union of the Pacific.

DATED this 20<sup>th</sup> day of May 2004.

CHRISTINE O. GREGOIRE  
Attorney General



---

DONALD T. TROTTER  
Senior Counsel  
Counsel for Washington Utilities and  
Transportation Commission Staff

# **APPENDIX A**



**Washington State  
Department of Transportation**

Douglas B. MacDonald  
Secretary of Transportation

**Washington State Ferries**  
2911 2nd Avenue  
Seattle, WA 98121-1081

206-515-3400  
TTY: 1-800-833-6388  
www.wsdot.wa.gov/ferries

**Michael G. Thorne**  
Director and CEO

May 17, 2004

Ms. Carol J. Washburn  
Secretary  
Washington State Utilities and Transportation Commission  
P.O. Box 47250  
Olympia, WA 98504-7250

RE: Docket # TS040650

Dear Ms. Washburn,

Washington State Ferries' staff has reviewed Aqua Express' application to begin passenger and freight service between Seattle and Kingston. Although the 10-mile rule no longer applies to the movement of passengers across Puget Sound, Washington State Ferries does not object to this application for the movement of both passengers and freight.

Please contact us if you would like to discuss further; if requested staff would also be able to attend the hearing on the matter.

Sincerely,

A handwritten signature in cursive script that reads "Sam Kuntz".

Sam Kuntz  
Chief Financial Officer

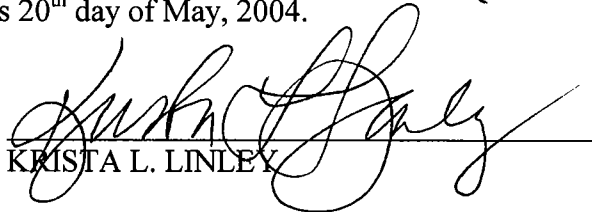
Cc: Bonny Allen  
Rusty Fallis



Docket No. TS-040650  
CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the persons and entities listed on the Service List below by depositing a copy of said document in the United States mail, addressed as shown on said Service List, with first class postage prepaid.

DATED at Olympia, Washington this 20<sup>th</sup> day of May, 2004.

  
KRISTA L. LINLEY

*For Applicant Aqua Express:*

David W. Wiley  
Williams, Kastner & Gibbs  
601 Union Street, Suite 4100  
Seattle, WA 98101-2380  
Fax:  
E-mail:

*For Protestant Inlandboatmen's Union:*

Dmitri Iglitzin  
Schwerin Campbell Barnard  
18 West Mercer Street, Suite 400  
Seattle, WA 98119-3971  
Fax:  
E-mail: