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**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  
INLANDBOATMEN'S UNION OF  
THE PACIFIC' RESPONSE TO  
MOTION TO STRIKE PROTEST**

**I. INTRODUCTION**

This is the Inlandboatmen's Union of the Pacific ("IBU" or "Protestant")'s response to Aqua Express LLC's motion to strike.

Without explanation, Aqua Express LLC ("Aqua Express" or "Applicant") denominates its motion as a motion to strike rather than a motion to dismiss. Since the motion, if granted, would terminate the participation of the IBU as a party, the motion is more appropriately designated as one to dismiss under WAC § 480-07-375(a), rather than a motion to strike, which is defined by WAC 480-07-375(d) as a motion related to evidence.

Inlandboatmen's Union of the Pacific's Response to  
Aqua Express' Motion to Strike - 1

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**ORIGINAL**

1 Proper characterization of Aqua Express' motion would allow the IBU twenty, not five, days to  
2 respond to that motion, *compare* WAC 480-07-380(2)(c) (parties have twenty days to respond to motion  
3 for summary determination of an issue) *with* WAC 480-07-375(4) (parties have five business days to  
4 respond to non-dispositive motions). Proper characterization would also allow the IBU to seek  
5 interlocutory review by the Commission of the administrative law judge's decision on the motion,  
6 should the seeking of such review be deemed necessary or appropriate by the IBU. *See* WAC 480-07-  
7 355(5).

8 Aqua Express presents four contentions as to why the IBU lacks standing to intervene in this  
9 matter.

10 First, Aqua Express argues that the IBU lacks standing under RCW 81.84.020(4) because only  
11 the Washington State Ferries ("WSF") may protest applications for certificates of service under that  
12 statute unless WSF somehow delegates its protest authority to another entity.

13 Second, Aqua Express argues that the IBU generally lacks standing under Title RCW 81.84  
14 because it is not an existing or prospective commercial ferry.

15 Third, Aqua Express argues that IBU lacks standing under RCW 34.05.530 because it is not  
16 within the zone of interests the legislature intended to protect when it enacted Title RCW 81.84.

17 Fourth, Aqua Express argues that the IBU lacks standing under WAC 480-07-355 because the  
18 WUTC would be exceeding its authority if it used its discretion to allow the IBU's participation.

19 For the reasons outlined below, each of Aqua Express' arguments is unpersuasive. Therefore,  
20 Aqua Express' "motion to strike" should be denied and the IBU should be allowed to proceed with its  
21 protest in this matter.

1 **II. ARGUMENT AND AUTHORITY**

2 **A. The IBU Possesses The Right to Protest Aqua Express' Application By Nature of Its**  
3 **Unique Statutory Role Within the Washington State Ferry System.**

- 4 1. The effect of the Commission's decisions on the Washington State Ferries is central  
5 to the Commission's regulation of commercial ferries.

6 RCW 81.84.020(4) requires that before the Commission issues a certificate to operate as a  
7 commercial ferry, "the commission shall consider and give substantial weight to the effect of its  
8 decisions on public agencies operating, or eligible to operate, passenger-only ferry service."<sup>1</sup> Indeed,  
9 because of this provision, Aqua Express concedes that the Washington State Ferries would have  
10 standing to protest its application. *See* Motion, p. 2.

11 The IBU represents deckhands, ticket-takers, ticket-sellers and terminal personnel working for  
12 WSF. The IBU also represents snack bar and concessionaire workers who are employed by private  
13 companies doing business on the Washington State Ferries. Thus, the IBU is a "Ferry employee  
14 organization" under RCW 47.64.011(6).

15 In 1983, the Washington State Legislature established the Marine Employees' Commission  
16 (MEC) under Chapter 47.64 RCW. In adopting Chapter 47.64 the Legislature declared that it is the  
17 public policy of this state to:

- 18 (1) Provide continuous operation of the Washington state ferry system at reasonable cost  
19 to users; (2) efficiently provide levels of ferry service consistent with trends and forecasts  
20 of ferry usage; (3) promote harmonious and cooperative relationships between the ferry  
21 system and its employees by permitting ferry employees to organize and bargain  
22 collectively; (4) protect the citizens of this state by assuring effective and orderly  
23 operation of the ferry system in providing for their health, safety, and welfare; (5)  
prohibit and prevent all strikes or work stoppages by ferry employees; (6) protect the

<sup>1</sup> *See* RCW 81.84.020(4) ("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.*") (Emphasis added).

1 rights of ferry employees with respect to employee organizations; and (7) promote just  
2 and fair compensation, benefits, and working conditions for ferry system employees...

3 RCW 47.64.006. Thus under state law, the IBU serves a vital role in the operations of the WSF.  
4 Therefore, the IBU has a substantial interest in the subject of the hearing, including protecting WSF  
5 from injurious competition as contemplated by RCW 81.84.020(4).

- 6 2. Because the effect on WSF is central to the Commission's regulation of  
7 commercial ferries, the Applicant's statement that the IBU may not protest its  
8 application because the IBU is not an existing or prospective commercial ferry  
9 service provider is without merit.

10 The WUTC should specifically reject Aqua Express' argument that the IBU lacks the ability to  
11 protest under Title RCW 81.84 because it is not an existing or prospective commercial ferry. The  
12 Applicant's argument appears to rest on *Cole v. Washington Utilities and Transportation Commission*,  
13 79 Wn.2d 302, 485 P.2d 71 (1971) in which the Commission held that only gas customers could make a  
14 rate complaint to the Commission and therefore, an industry representative of the oil industry could not  
15 make a complaint. *Cole* is clearly distinguishable since it was decided under a completely different  
16 statutory framework from the one governing this case.

17 Indeed, here, Aqua Express conveniently ignores the substantive law governing the  
18 IBU's participation in this case. Under WAC 480-51-040(1), "*Interested persons may file a*  
19 *protest with the commission within thirty days after service of the notice [of an application for a*  
20 *certificate]. The protest shall state the specific grounds for opposing the application and contain*  
21 *a concise statement of the interest of the protestant in the proceeding.*" (Emphasis added).  
22 Therefore, the question under WAC 480-51-040 is whether the IBU has a substantial interest in  
23 the proceeding. For the reasons outlined above, and as set forth in the Protest, it clearly does.

1           **B.     The Zone of Interests Test is Inapplicable Here Where the Question is Not One of**  
2           **Judicial Review But Rather Participation in Agency Adjudication.**

- 3           1. Since the IBU has presented a compelling and substantial interest in the subject  
4           matter of the hearing and has demonstrated that its participation is in the public  
5           interest, its protest against Aqua Express should not be dismissed.

6           In advocating a “zone of interests” test, Aqua Express appears to confuse standing to seek  
7           judicial review of an agency action in RCW 34.05.530 with standing to participate in agency  
8           adjudication. Thus, the question is not whether the IBU is in the “zone of interests” the legislature  
9           intended to protect under Title RCW 81.84 but rather whether the IBU has a “substantial interest in the  
10          subject matter of the hearing” or the IBU’s participation is in the “public interest” under WAC 480-07-  
11          355.<sup>2</sup> Again, for the reasons discussed above, the IBU meets this standard.

12          In fact, labor unions have long been accorded intervention into the Commission’s adjudicative  
13          hearings under the substantial/public interest standard. For instance, in 1999, the Commission granted  
14          the International Union of Operating Engineers Local 612 and the International Brotherhood of  
15          Electrical Workers Local 125 intervention into a case involving the proposed sale of certain utility  
16          assets. *UE-991255, UE-991262, UE-991409; In re: Puget Sound Energy, Inc. and PacificCorp*, (Nov.  
17          23, 1999), Pre-Hearing Conference Order, at 2.

18          After Commission staff objected to intervention by the unions, the Commission allowed  
19          intervention. Specifically, the Commission allowed the unions to intervene to raise concerns they shared

20  
21          <sup>2</sup> See WAC 480-07-355(3), “...If the petition discloses a substantial interest in the subject matter of the hearing or if the  
22          petitioner's participation is in the public interest, the presiding officer may orally grant the petition at a hearing or prehearing  
23          conference, or in writing at any time.”

1 with “the greater public.” In that case, those concerns included the “cost and quality of service to  
2 consumers and the long-term viability of the plant in connection with the transaction.” *Id.*<sup>3</sup>

3 Indeed, the Commission has allowed the IBU to protest an application for a ferry certificate  
4 even before Title 81.84.020(4) was enacted (in 2003), mandating that the Commission “give substantial  
5 weight to the effect of its decisions on public agencies operating, or eligible to operate, passenger-only  
6 ferry service.” See S.B.C Order No. 533, *In re Horluck Transportation Company, Inc. d/b/a Cross*  
7 *Sound Flyer*, Hearing No. B-78487; *In re San Juan Express, Inc.*, Hearing No. B-78511 (March 1997),  
8 Hearing No. B-78487; *In re San Juan Express, Inc.*, Hearing No. B-78511 (February 1997).<sup>4</sup>

9 Here, the IBU’s concern is that by operating only during peak times and at slightly lower prices,  
10 Aqua Express will skim the cream off WSF’s business. Should this occur, it would put the ferry system  
11 in even worse financial straits, potentially leading to the canceling of WSF runs. Thus, IBU’s concerns  
12 are the same as the greater public who are interested in ensuring the long-term viability of WSF,  
13 including the long-term viability of passenger-only ferries.

14 2. Even if the WUTC applies the “zone of interest” test, the IBU is within the zone of  
15 interests the legislature intended to protect when it enacted Title RCW 81.84.

16 Should the Commission apply the zone of interest test under RCW 34.05.530 to determine  
17 whether the IBU has standing, the IBU is still clearly among the interests the Legislature sought to  
18 protect by Title RCW 81.84. This is why the “zone of interest” cases cited by the Applicant are not  
19 persuasive. In those cases, the Legislature, in the statutes at issue, did not clearly place the entity

20 <sup>3</sup> See also, *UE-981627; In re: Pacificorp and Scottish Power PLC*, (April 2, 1999), Third Supplemental Order on Prehearing  
21 Conference, p. 4 (allowing Local 612 to offer input on issues “regarding safety and the adequacy of the merger plan to meet  
22 customers’ need”); *UE-951270, UE-960195; In re: Puget Sound Power & Light Company*, (May 23, 1996), Second  
23 Supplemental Order On Prehearing Conference, p. 3 (allowing five local unions to intervene on safety and the adequacy of  
the merger plan to meet customer needs).

<sup>4</sup> The Applicant’s effort to diminish the meaning of the *Horluck Transportation* decision is predicated on the fact that the Pre-  
Trial Order was not appealed to the full Commission. However, the Commission rendered a final order in the matter itself.

1 seeking standing within the zone of interests it sought to protect. Here, for the reasons discussed above,  
2 Title RCW 81.84 expressly places WSF, and Title RCW 47.64 expressly places both WSF and the IBU,  
3 within the zone of interests the legislature intended to protect.

4 **C. Even If The Commission Determines That The IBU Is Not Within The “Zone of**  
5 **Interests” The Legislature Intended To Protect in Title RCW 81.84, The IBU**  
6 **Should Be Allowed to Participate Based on the “Public Importance Doctrine.”**

7 Should the Commission apply the zone of interests test and determine that the IBU is not  
8 properly within the zone, it may grant the IBU standing under the “Public Importance Doctrine.”  
9 *Washington Natural Gas Company v. Public Utility District No. 1 of Snohomish County*, 77 Wn.2d 94,  
10 459 P.2d 633 (1969). There, the Washington Supreme Court held that where “a controversy is of  
11 serious public importance and immediately affects substantial segments of the population and its  
12 outcome will have a direct bearing on the commerce, finance, labor, industry or agriculture generally,  
13 questions of standing to maintain an action should be given less rigid and more liberal answer.” *Id.* at  
14 96.

15 In *Washington Natural Gas*, the court granted standing to the gas company to challenge a PUD  
16 plan to provide financing to customers for underground electric service conversion, even though it  
17 lacked standing on other more traditional theories. The court stated:

18 ... we are of the opinion that the status of the gas company, solely as a customer of the  
19 PUD and one unlikely to receive the inducements it hopes to enjoin, did not give it an  
20 adequate basis upon which to claim standing. Its injuries suffered simply as a customer  
21 of the PUD would, we think, be too uncertain and nebulous to accord them justiciability.  
22 But overriding this doubtful position of mere customer and combining with it to warrant a  
23 conclusion in favor of the gas company's standing, however, is the admitted public  
importance of this action. Affecting as it does a substantial percentage of the population,  
the case is one of statewide importance. It directly involves the generation, sale and  
distribution of electrical energy within the state and will immediately affect the  
management and operation of public utility districts and other municipal corporations in  
this state. Additionally, a resolution of the issue here will have an indirect but,

1 nevertheless, important consequence to agricultural, industrial, financial, commercial and  
2 labor-management activities throughout the state.

3 *Id.* at 96. See also, *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 83  
4 P.3d 419 (2004) (“...we have applied this liberal approach to standing only in cases where the plaintiff  
5 whose standing was challenged was the only plaintiff in the case and the liberal approach was necessary  
6 to ensure that the important public issues raised did not escape review.”).

7 Here, the IBU is the only party to challenge Aqua Express’ application. In addition, whether  
8 Aqua Express should be allowed to operate a ferry, which could potentially harm the WSF, is of serious  
9 public importance. Moreover, the Commission’s decision on this matter will directly affect substantial  
10 segments of the population and the outcome will have a direct bearing on the commerce, finance, labor,  
11 industry or agriculture generally. Therefore, under the Public Importance Doctrine, the IBU should be  
12 allowed to proceed with its protest.

13 **D. The Commission Would Not Be Acting In Excess Of Its Authority If It Allowed The  
14 IBU to Proceed.**

15 The Applicant cites *Cole* in support of its position that concerns raised by the IBU may not be  
16 considered by the Commission and that, if it were to do so, it would be acting in excess of its statutory  
17 authority. Nothing can be further from the truth.<sup>5</sup> *Cole* itself stands for the proposition that “[i]t is  
18 entirely within the Commission’s discretion whether to grant or deny a petition to intervene.” *Cole v.*  
19 *Washington Utilities & Transp. Comm’n.*, 79 Wn.2d 302, 305-07, 485 P.2d 71 (1971) (Emphasizing the  
20 word “may” in the administrative code governing intervention in that case.) See also, *UE-951270*, *UE-*  
21 *960195*; *In re: Puget Sound Power & Light Company*, (Oct. 25, 1996), Tenth Supplemental Order,

22 <sup>5</sup> If the Applicant’s concern is that the IBU will raise issues over which the Commission lacks jurisdiction, the Commission  
23 may of course limit the scope of the issues the IBU may raise in the protest. See RCW 34.05.443(2); WAC 480-07-355(3).




1 citing RCW 34.05.443(3); WAC 480-09-430(3) and *Cole*. Therefore, in the instant case, the question is  
2 how the Commission should exercise its discretion. For the reasons outlined above, the Commission  
3 should allow the IBU's protest to go forward.

4 **III. CONCLUSION**

5 For the foregoing reasons, the IBU should be allowed to proceed with its protest and the  
6 "motion to strike" should be denied.

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

8   
9 \_\_\_\_\_  
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17 *Union of the Pacific*

1 CERTIFICATE OF SERVICE

2 I hereby certify that on May 20, 2004 I caused to be served the original and twelve copies of the  
3 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  
6 1300 S. Evergreen Park Drive SW  
7 P.O. Box 47250  
8 Olympia, WA 98504-7250

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.gov

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

13 Donald Trotter  
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24 Dated this 20<sup>th</sup> day of May 2004.

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