

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

In the Matter of Cancellation of	)	DOCKET TS-080087
Certificates of	)	
	)	
DUTCHMAN MARINE, LLC (BC-	)	ORDER 01
126), SEATTLE HARBOR TOURS	)	
LIMITED PARTNERSHIP (BC-124),	)	
AND SEATTLE FERRY SERVICE,	)	INITIAL ORDER CANCELING
LLC (BC-123)	)	CERTIFICATES
.....	)	

**MEMORANDUM**

- 1 **Intent to Cancel Certificates.** On January 16, 2008, the Washington Utilities and Transportation Commission (Commission) notified Dutchman Marine, LLC (Dutchman Marine), Seattle Harbor Tours Limited Partnership (Seattle Harbor Tours), and Seattle Ferry Service, LLC (Seattle Ferry Service) that it intended to cancel their certificates of public convenience and necessity.
  
- 2 The Commission stated it was taking these actions due to one or more failures to comply with RCW 81.84.010 and WAC 480-51-120, which require certificated commercial ferry services to initiate service within five years and to file progress reports every six months, and/or RCW 81.84.060 and WAC 480-51-150, which permit cancellation of a commercial ferry service’s certificate on any of the following grounds, among others: failure to initiate service within five years, failure to file an annual report, or filing of an annual report which shows no revenue in the previous twelve-month period after service has been initiated.
  
- 3 **Hearing Request and Jurisdiction.** On February 8 and 12, 2008, Seattle Ferry Service and Dutchman Marine, respectively, responded and timely requested a hearing on the matter. Seattle Harbor Tours failed to respond to the Notice, acceding to the cancellation.
  
- 4 **Brief Adjudicative Proceeding.** RCW 34.05.482 and WAC 480-07-610 allow the use of a brief adjudicative proceeding (BAP) to determine whether to cancel a certificate for failure to file required documents. The Commission scheduled and,

upon proper notice to the parties, commenced a BAP on March 25, 2008, in Olympia, Washington. Commission Staff, Seattle Ferry Service, and Dutchman Marine appeared and were afforded the opportunity to present oral statements regarding their positions on the proposed cancellations.

- 5 **Commission Staff.** Commission Staff stated that RCW 81.84 sets out a limited period of time for a certificated commercial ferry service to initiate service because the certificate is a valuable property right. Competitors are excluded by the certificate and public entities wishing to provide service along the same route must condemn or otherwise compensate the certificate holder. *See RCW 81.84.010(1)*. Commission Staff classifies Dutchman Marine's certificate as "dormant" because nearly seven years have elapsed since its issuance in October 2001 and no service has ever been initiated.
- 6 Commission Staff also reviewed the grounds for cancellation set out in both statute and regulation, including failure to initiate service within five years, failure to file an annual report, and filing an annual report showing no revenue in the previous twelve-month period after service has been initiated. *See RCW 81.84.060(1), (3), and (4)*; see also *WAC 480-51-150(1)(b), (c), and (d)*. Commission Staff also noted that failure to notify the Commission of a certificate holder's intent to discontinue service could also serve as grounds for canceling a ferry certificate. *See WAC 480-51-130*; see also *RCW 81.84.060(5) and WAC 480-51-130(e)*.
- 7 **Seattle Ferry Service.** Seattle Ferry Service stipulated that its South Lake Union to Port Quendall run should be canceled because it had never initiated service on this route. However, Seattle Ferry Service contended that its certificate, which also permits a South Lake Union to Fremont run, should not be canceled in its entirety.
- 8 Seattle Ferry Service explained that it had initiated its service on its South Lake Union to Fremont run by annually providing service between these points during the several days of the Wooden Boat Festival in 2002, 2003, 2004, and 2005. However, Seattle Ferry Service conceded that it never sought the Commission's permission to discontinue service as required by WAC 480-51-130.

- 9 Seattle Ferry Service agreed that its 2006 Annual Report showed no revenue; further, it stated that its 2007 Annual Report would also show no revenue. Finally, Seattle Ferry Service acknowledged that it has no firm plans to resume service in 2008.
- 10 **Dutchman Marine.** Dutchman Marine acknowledged its failure to initiate service in the five years between October 2001 and October 2006 and acknowledged that it still has not initiated service. Dutchman Marine characterized its failure to seek an extension of time to initiate service as an “oversight” and noted that it could be ready to begin service, at the earliest, by August 2008, but only if granted a subsidy. Dutchman Marine also conceded that it had only intermittently filed the required semi-annual progress reports.
- 11 Dutchman Marine contended that recent developments in multijurisdictional cooperation may provide progress on the intermodal connections necessary to support private commercial ferry operations. Further, Dutchman Marine argued that canceling its certificate would waste the approximately \$150,000 already spent since 2001 on this endeavor. Finally, Dutchman Marine explained that it did not believe retention of its certificate would be a deterrent to potential competitors.
- 12 **Failure to Rebut Factual Allegations.** None of the certificate holders rebutted any of the factual allegations made in paragraphs 11-19 of the Notice of Intent to Cancel Certificates. Therefore, those factual allegations are adopted as verities for purposes of this brief adjudication and incorporated by reference.
- 13 **Law – Initiation of Service.** RCW 81.84.010(2) states (emphasis added) that:
- the holder of a certificate of public convenience and necessity granted under this chapter *must* initiate service within five years of obtaining the certificate, except that the holder of a certificate of public convenience and necessity for passenger-only ferry service in Puget Sound must initiate service within twenty months of obtaining the certificate. The certificate holder *shall* report to the commission every six months after the certificate is granted on the progress of the certificated route. The reports shall include, but not be limited to, the progress of environmental impact, parking, local government land use, docking, and financing considerations.

Except in the case of passenger-only ferry service in Puget Sound, if service has not been initiated within five years of obtaining the certificate, the commission may extend the certificate on a twelve-month basis for up to three years if the six-month progress reports indicate there is significant advancement toward initiating service.

WAC 480-51-120 reflects the statute's requirements.

14 **Law – Grounds for Canceling Certificate.** RCW 81.84.060 sets out various grounds for cancellation, revocation, suspension, alteration, or amendment of certificates issued under RCW 81.84. In accordance with that law, the Commission may exercise its discretion to cancel a certificate for:

- (1) Failure of the certificate holder to initiate service by the conclusion of the fifth year after the certificate has been granted or by the conclusion of an extension granted under RCW 81.84.010(2), if the commission has considered the progress report information required under RCW 81.84.010(2);
- (2) [omitted as irrelevant to this matter]
- (3) Failure of the certificate holder to file an annual report;
- (4) The filing by a certificate holder of an annual report that shows no revenue in the previous twelve-month period after service has been initiated;
- (5) The violation of any provision of this chapter;
- (6) through (9) [omitted as irrelevant to this matter]

WAC 480-51-150 reiterates the statute's listing of grounds to cancel a certificate.

15 **Legislative History of RCW 81.84.** The Washington State Legislature has been regulating private ferry service since 1927. For many years, the Legislature's key

concern was keeping private ferries separate and apart from state ferry routes. In the last decade of the twentieth century, that approach began to change.

- 16 In 1993, Substitute House Bill (SHB) 1931 became law and, among other things, implemented a five year time limitation for holders of commercial ferry certificates to initiate service on their route(s), requiring the filing of semi-annual progress reports until service commenced, and allowing the Commission to grant a limited number of extensions to the stated five year period. SHB 1931 also established conditions when the Commission would act to cancel, revoke, suspend, alter or amend a certificate.
- 17 During legislative proceedings leading up to the adoption of SHB 1931, the following exchange took place on the Senate floor in the form of a point of inquiry:

Senator Jesernig: “Senator Vognild, does this bill give any protection to current certificate holders?”

Senator Vognild: “Yes, Senator, it does. It effectively gives them five years to put their service in place, plus a two-year extension, plus, if they can qualify, another year extension up to a maximum of three. Under the bill, the current certificate holders are well-protected, but the one thing they must do is show that they are making some kind of progress toward initiating service and not simply holding the paper and trying to put value on the paper.”<sup>1</sup>

Following additional debate, the Senate passed the bill, with various amendments.

- 18 The Legislature next took up commercial ferry service a decade later. In 2003, Engrossed House Bill (EHB) 1388 and Engrossed Substitute House Bill (ESHB) 1853 addressed the need to eliminate barriers to entities other than the state providing passenger-only ferry (POF) service. EHB 1388 exempted POF operators from the “10 mile rule” that otherwise prohibited direct competition with the Washington State Ferries (WSF) and allowed for private use of Washington State Department of Transportation (WSDOT) terminal, dock and pier space. ESHB 1853 allowed

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<sup>1</sup> Journal of the Senate, Ninety-Fourth Day, April 14, 1993, page 1353.

creation of Public Transit Benefit Areas (PTBAs) by counties and/or municipalities to provide POF service after meeting a variety of preconditions.

- 19 Even as this 2003 legislation removed barriers, EHB 1388 put in place a two year moratorium on the Commission's ability to consider new POF certificates to private operators where PTBAs or county ferry districts were authorized to operate POF service. Further, EHB 1388 established a shortened 20 month time limitation for holders of private POF certificates to initiate service on their route(s) in Puget Sound.
- 20 In 2005, Engrossed Substitute Senate Bill (ESSB) 6091 extended the moratorium on the Commission's ability to accept or consider new POF certificates through to July 1, 2006. In 2006, ESSB 6787 repeated this action, extending the moratorium for another year, through to July 1, 2007.<sup>2</sup>
- 21 This legislative history provides guidance to the Commission in exercising its discretion to cancel ferry certificates. It is clear that the Legislature views certificates of public convenience and necessity as valuable property rights that grant the holder an exclusive right to commence a business operation. The Legislature, in 1993, expressly limited this property right to five years, with extensions permitted for up to another three years for those making slower than expected progress toward initiating ferry service. A decade later, the Legislature imposed much stricter time limitations on would-be passenger-only ferry operators seeking a certificate.
- 22 Additionally, the 1993 legislation demonstrates that commencing service alone would not be sufficient to sustain ownership of a certificate of public convenience and necessity. To the contrary, the SHB 1931 established a set of financial benchmarks for evaluating a certificate holder's ability to provide and sustain ferry service. Filing of an annual report showing no revenue, a clear sign of financial distress or of an unviable business, was expressly included among the reasons for canceling or revoking a certificate.
- 23 The legislative history demonstrates an understanding of how long it might take to commence a new commercial ferry service. The required pre-initiation progress reports list several challenging factors that lay beyond the control of a certificate

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<sup>2</sup> This now-expired moratorium is reflected in the current version of the statute. *See* RCW 81.84.020(4).

holder. Nevertheless, the Legislature put limits on how many years could go by without significant advancement toward initiating service. The Legislature made no allowance for certificates of public convenience and necessity to lay dormant.

24 **Commission Decision – Seattle Ferry Service.** Six and one-half years have elapsed since Seattle Ferry Service received its certificate. The Commission need not reach today the question whether the brief services the company provided in connection with an annual festival constitutes initiation of service during that period as required by law. The key salient consideration today is that Seattle Ferry Service filed an Annual Report for 2006 showing no revenue. Its next annual report will show that it had no revenue in 2007 and the certificate holder concedes that there are no firm plans to generate revenue in 2008. The Commission concludes that this filing of an annual report showing no revenue for 2006 provides legally sufficient grounds under RCW 81.84.060(4) and WAC 480-51-150(1)(d) to cancel Certificate BC-123 of Seattle Ferry Service. Considering also that the company will show no revenue in 2007 and the absence of firm plans for 2008, the Commission concludes that Seattle Ferry Service’s certificate should be cancelled.

25 **Commission Decision – Dutchman Marine.** Six and one-half years have elapsed since Dutchman Marine received its certificate and it has never initiated service or applied for any extension of time to do so. There is no dispute that Dutchman Marine also failed to file all required semi-annual reports on its progress toward initiating service. In fact, Dutchman Marine has not filed a progress report since April 2004. The Commission concludes that these failures provide legally sufficient grounds under RCW 81.84.060(1) and (5) as well as WAC 480-51-150(1)(b) and (e) to cancel Certificate BC-126 of Dutchman Marine. Considering the entirety of the circumstances, the Commission concludes that Dutchman Marine’s certificate should be canceled.

**ORDER**

26 THE COMMISSION ORDERS THAT the following commercial ferry certificates are cancelled:

- |   |                        |
|---|------------------------|
| 1. Seattle Ferry Service, LLC               | Certificate No. BC-123 |
| 2. Seattle Harbor Tours Limited Partnership | Certificate No. BC-124 |
| 3. Dutchman Marine, LLC                     | Certificate No. BC-126 |

DATED at Olympia, Washington, and effective April 2, 2008.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

ADAM E. TOREM  
Administrative Law Judge



### NOTICE TO THE PARTIES

This is an Initial Order. The action proposed in this Initial Order is not yet effective. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this Initial Order, and you would like the Order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-610(7) provides that any party to this proceeding has twenty-one (21) days after service of this Initial Order to file a *Petition for Review*. What must be included in any *Petition* and other requirements for a *Petition* are stated in WAC 480-07-610(7)(b). WAC 480-07-610(7)(c) states that any party may file a *Response* to a *Petition for Review* within seven (7) days after service of the *Petition*.

RCW 80.01.060(3) and WAC 480-07-610(9) provide that an Initial Order will become final without further Commission action if no party seeks administrative review of the Initial Order and if the Commission does not exercise administrative review on its own motion. You will be notified if this order becomes final.

One copy of any *Petition* or *Response* filed must be served on each party of record with proof of service as required by WAC 480-07-150(8) and (9). An original and six (6) copies of any *Petition* or *Response* must be filed by mail delivery to:

Attn: Carole J. Washburn, Executive Secretary  
Washington Utilities and Transportation Commission  
P.O. Box 47250  
Olympia, Washington 98504-7250