

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Application of  
  
MCNAMARA, SEAN d/b/a  
BELLINGHAM WATER TAXI  
  
For Extension of Authority Under Certificate  
BC-64619  
.....

DOCKET TS-121253 and  
DOCKET TS-121395 (*Consolidated*)

COMMISSION STAFF RESPONSE  
TO BELLINGHAM WATER  
TAXI'S MOTION TO DISMISS  
APPLICATION TS-121395

In the Matter of the Application of  
  
PACIFIC CRUISES NORTHWEST, INC.  
d/b/a SAN JUAN CRUISES  
  
For a Certificate of Public Convenience and  
Necessity to Operate Vessels in Furnishing  
Passenger Ferry Service

1 Pursuant to WAC 480-07-380(c), Commission Staff submits the following response to Sean McNamara d/b/a Bellingham Water Taxi's ("Bellingham Water Taxi") Motion to Dismiss Application TS-121395, filed on December 11, 2012.

2 Bellingham Water Taxi asserts the application filed Pacific Cruises Northwest, Inc., d/b/a San Juan Cruises ("San Juan Cruises" or "Applicant") should be dismissed because the Applicant failed to include a shipper support statement with the application, or "within 30 days allowed from initial service." Commission Staff disagrees.

3 Under RCW 81.80.020(1), the Commission has the authority to grant, or refuse to grant, a certificate of public convenience and necessity for ferry service after notice and

opportunity for hearing. The Prehearing Conference Order, Order 01, controls this consolidated proceeding and met with no objection. The agreed-upon procedural schedule sets forth the submission of proposed witness lists and exhibits, and an evidentiary hearing in January, 2013. Bellingham Water Taxi seeks dismissal of San Juan Cruises' application because it did not provide certain materials when it filed its application. Because the Applicant has yet to present evidence in support of his application (including evidence of need) at the hearing, and that evidence has yet to be admitted into the record, the motion is, at best, untimely.

4           Even if it were timely brought, the motion lacks support on the merits. Bellingham Water Taxi essentially argues that the Commission requires "shipper support statements," and the Commission should dismiss the commercial ferry service application that fails to include them. WAC 480-51-030(1) sets out what shall be included with a commercial ferry certificate application. However, that rule does not expressly require that shipper support statements be included with the application, nor does the rule require the Commission receive any before notice is given pursuant to WAC 480-51-040, or within a thirty-day period. Nevertheless, an application that includes the items required by the rule still must meet all statutory requirements to be approved. Pertinent to the issue of "support statements," the Commission may grant a certificate to operate commercial ferry service when public convenience and necessity require such a service. RCW 81.84.010(1).

5           The Commission evaluates the public convenience and necessity of the application by considering whether there is a present or future need for the proposed service. The Commission generally determines public need for the proposed service through the testimony of witnesses who would use the service if it were available, as well as the

testimony of the applicant's personnel. *In re Application of Aqua Express, LLC*, Docket No. TS-040650, Order 05, Final Order Granting Application for Certificate of Public Convenience and Necessity at ¶ 13 (July 2004); *In re Pacific Cruises Northwest, Inc.*, App. No. B-78450, Order S.B.C. No. 525 (May 1996). Persuasive testimony also may be presented by witnesses who are familiar with transportation needs over the routes in question and persons whose employment or business activities gives them special insight into the transportation needs of the public. Finally, members of the public may appear and offer testimony that bears on the question whether the public convenience and necessity require the proposed service. *In re Dutchman Marine, LLC, et al.*, Docket Nos. TS-001774 and TS-002055, First Supplemental Order, Initial Order Granting Applications at ¶ 34 (September 2001), adopted in Second Supplemental Order (October 2001). In the case of unopposed applications, the issue of public convenience and necessity may be resolved on a paper record including shipper support statements. (Emphasis added). *In re Seattle Ferry Service*, Docket No. TS-002054, First Supplemental Order, Initial Order Approving Settlement Agreement; Granting Application, at ¶ 16 (September 2001), adopted in Second Supplemental Order (October 2001).

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As the above cases show, public convenience and necessity (“need”) may be established with witness testimony. And, in certain cases, such as where an application is unopposed, and where a hearing has not been scheduled, written “shipper support statements” submitted by an applicant may substitute for live witness testimony. This is reflected in the Commission’s directions attached to the blank shipper support statement form provided on its web site, which are excerpted, in part, by Bellingham Water Taxi in its motion. That sentence, which is guidance and does not have the force of law, reads, in full:

“Even though your application is unopposed, you need one or more shipper support statements from persons proving that services are needed, otherwise your application will be denied.” (emphasis added). Even in that case, an applicant has the option to request a hearing for witnesses to appear in support of the application, in lieu of providing written statements in the form provided.

7 Here, in this case, because Commission rules do not expressly require it, and because San Juan Cruises’ application has been set for hearing, the lack of any *written* shipper support statements at the time of application is a moot issue and should not be dispositive. The Commission’s decision whether or not to approve the applications at issue should be made at the conclusion of the proceeding, based on the full evidentiary record. To dismiss San Juan Cruises’ application on the narrow grounds set forth in Bellingham Water Taxi’s motion would be contrary to law. For these reasons, the Commission should deny the motion.

DATED this 14th day of December 2012.

Respectfully submitted,

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