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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
PROTESTANT INLANDBOATMEN'S
UNION OF THE PACIFIC'S
SUPPLEMENTAL RESPONSE TO
MOTION TO STRIKE AND RESPONSE
TO COMMISSION STAFF RESPONSE**

I. INTRODUCTION

COMES NOW the Inlandboatmen's Union of the Pacific ("IBU"), 1711 W. Nickerson St. Ste. D., Seattle, WA 98119, by and through its attorneys Schwerin Campbell Barnard LLP, Dmitri Iglitzin and Judith Krebs, and for a supplemental response to Aqua Express LLC's motion to strike and for response to the Washington Utilities and Transportation Commission Staff ("Staff")'s response to Aqua Express' motion to strike.

II. APPLICABLE STATUTES AND RULES

The applicable statutes and rules discussed in Protestant IBU's Initial Response and Supplemental Response are:

1 RCW 34.05.070, RCW 34.05.443(3), RCW 34.05.530, Chapter RCW 47.64 (specifically RCW
2 47.64.006 and RCW 47.64.011(6)), RCW 81.84.010, RCW 81.84.020, WAC § 480-07-355, WAC §
3 480-07-375, WAC § 480-07-380, WAC § 480-09-430(3), WAC § 480-51-040.

4 III. FACTS

5 The facts are outlined in the Protestant's protest and its initial response to Aqua Express' motion
6 to strike.

7 IV. ARGUMENT AND AUTHORITY

8 A. The IBU is Within the Zone of Interests Protected by the Legislature and Has a 9 Substantial Interest Subject to the Commission's Jurisdiction.

10 1. Because Title RCW 81.84.020(4) requires the commission to consider and give substantial
11 weight to the effect of its decisions on public agencies operating, or eligible to operate, passenger-only
12 ferry service" the IBU is both within the zone of interests the legislature intended to protect and among
13 the interests subject to WUTC's jurisdiction.

14 2. In support of its views that the IBU is not within the zone of interests of Title RCW 81.84 and
15 does not have an interest recognized by the Commission, Aqua Express cites two WUTC cases, *Rosario*
16 *Utilities* and *Brown's Limousine*. UW-011320, *In re Stevens et al v Rosario Utilities, LLC* (July 18,
17 2002) (applying a zone of interest analysis at p. 19); MVCH No. 950, *In re Brown's Limousine Crew*
18 *Car, Inc.* (July 20, 1983) (applying a zone of interest analysis at pp. 3-4). Indeed, *Rosario Utilities* and
19 *Brown's Limousine* offer an excellent framework for analyzing the standing issue in this case.

20 3. In *Rosario Utilities*, twenty-one property owners within the water utility's service area
21 complained that the utility had wrongfully given water connections to Rosario Resort when they should
22 have been given to the Complainants. The utility challenged their standing, arguing that only customers
23 could complain about the utility's sale of water connections. *Id.* at p. 16. Since none were customers

1 (and could not become customers because they were not sold connections) they were not within the
2 “zone of interests” to be protected. *Id.* The Commission disagreed.

3 4. According to the Commission, “[i]n order to determine whether a Complainant has standing to
4 bring a Complaint, we must look at the nature of the Complaint.”¹ Thus, the Commission tells us, the
5 first step is to determine what is being complained about to the Commission. In that case, the
6 Complainants were challenging the utility’s award of new water connections to Rosario Resorts as
7 preferential and discriminatory. They were also challenging the utility’s failure to make an affiliated
8 transaction filing with the Commission. The reason they were complaining, however, was that they had
9 applied for and were denied water certificates even though they were next on the list to receive a water
10 connections. In other words, the utility allowed Rosario Resort to jump the list.

11 5. The second step in the Commission’s analysis was to look at the statute governing its jurisdiction
12 in the matter. The Commission looked to the statutory framework to determine whether the statutes
13 governing those matters protected the Complainants’ interests. In other words, were they within the
14 zone of interests the Legislature intended to protect and under the Commission’s jurisdiction? The
15 Commission found that, as applicants for water certificates, the Complainants had standing because the
16 utility owed them a duty under RCW 80.28.110 to provide available water to them. Therefore, the
17 statute itself created a duty that gave rise to the Complainants standing.

18 6. In *Brown’s Limousine*, the Commission decided against the Complainants having standing. In
19 that case, the issue was whether an unregulated taxicab company could have standing to challenge an
20 application for service by a regulated passenger motor carrier. Specifically, Brown Limousine
21 (“Brown”) applied to provide passenger motor carrier service between various Burlington Northern
22

23 ¹ This can also be stated as looking at the “interest” that is asserted by the Complainant

1 Railroad facilities. One Hundred Seventeen Taxi, Inc. ("117 Taxi"), an unregulated taxicab company
2 sought to challenge the application.

3 7. 117 Taxi protested as one of Brown's competitors. However, the statute at issue said very
4 clearly, "Provisions of this chapter do not apply to...Persons or their lessees, receivers or trustees insofar
5 as they own, control, operate or manage taxicabs...when operated as such. *Brown Limousine*, p. 3
6 (emphasis added). Reading this provision of the statute, the Commission said:

7 8. There is thus a legislative statement that taxicabs are to be totally excluded from the
8 provisions of the chapter, not just from the regulation, which we interpret to be evidence
9 of legislative intent that taxicab companies were held by the legislature to provide
sufficiently different a service that they should not participate, as such, in the proceedings
under the chapter.

10 9. *Brown Limousine*, p. 3. Because the statute clearly prohibited the Commission jurisdiction over
11 taxicab companies in any way, the Commission held that it had no jurisdiction whatsoever to protect 117
12 Taxi's interests. In other words, the legislature expressly said that taxicabs are not within the zone of
13 interests it intended to the WUTC to protect with the statute.

14 10. In the instant case, a review of the Complaint shows that, essentially, the IBU is complaining that
15 granting Aqua Express a certificate will hurt the Washington State Ferries ("WSF") by skimming off
16 customers from WSF's lucrative car-ferry routes and preventing WSF from getting back into the
17 passenger-ferry only business.

18 11. Looking to the statutory framework, the effect of the Commission's decisions on the WSF is
19 central to the Commission's regulation of commercial ferries and therefore, indisputably the legislature
20 intended to protect that interest. See, RCW 81.84.020(4) (before the Commission issues a certificate to
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1 operate as a commercial ferry, “the commission shall consider and give substantial weight to the effect
2 of its decisions on public agencies operating, or eligible to operate, passenger-only ferry service.”²

3 12. Aqua Express (and to some extent the Staff) concede that the impact on WSF is within the zone
4 of interests the legislature intended the WUTC to protect, but that only the WSF (or the Department of
5 Transportation) as an entity can protect this interest and thus, only the WSF has standing. Here, Aqua
6 Express and Staff misread RCW 81.84.020(4). That statute requires the Commission to consider the
7 effect of an application for a ferry-certificate on public agencies. It does not say the Commission shall
8 only “consider and give substantial weight to the effect of its decisions” when WSF asks it to do so.
9 Rather, the WUTC is charged with *sua sponte* raising the question of the application’s effect on WSF
10 and answering that question before granting a certificate. Indeed, it is duty-bound by the statute to do
11 so. Failure to consider the effect on WSF would thus constitute reversible error on appeal. See RCW
12 34.05.070(3)(f), “The court shall grant relief from an agency order in an adjudicative proceeding only if
13 it determines that... The agency has not decided all issues requiring resolution by the agency...” Thus
14 the Commission’s obligation to consider the effect on WSF, like the duty to provide water service in
15 *Rosario Utilities*, gives rise to standing for a party with an interest in protecting the WSF.

16 13. WSF’s failure to participate in the case actually makes the argument for the IBU’s participation
17 stronger. Without a party in the proceeding prepared to litigate the effect on WSF, the Commission will
18 have an inadequate record on which to make a decision.³ Without substantial evidence, the decision will
19 be legally lacking and subject to attack. See RCW 34.05.570(3)(e), “The court shall grant relief from an
20 agency order in an adjudicative proceeding only if it determines that... The order is not supported by

21 ² Staff’s argument that the Commission need not consider the impact on WSF is without merit. Staff Response, p. 6. RCW
22 81.84.020(4) was passed in 2003 as part of a number of statutory changes intended to provide “incentives to increase
23 transportation revenues by reforming laws limiting the provision of passenger-only ferry service” Final Bill Report, EHB
1388 (attached)

³ Certainly, the Staff is in no position to put on such evidence given its lack of knowledge and interest in the subject matter.

1 evidence that is substantial when viewed in light of the whole record before the court, which includes
2 the agency record for judicial review, supplemented by any additional evidence received by the court
3 under this chapter.”

4 14. Unfortunately, Aqua Express and Staff’s Counsel confuse the analysis by articulating a very
5 narrow basis for the IBU’s protest against Aqua Express’ application. They say IBU’s protest is based
6 on protecting jobs and the environment and because jobs and the environment are not within the zone of
7 interests the Legislature intended to protect with Title RCW 81.84 and are not interests cognizable by
8 the Commission, the IBU lacks standing. This is argument is without any merit. To the contrary, the
9 IBU is interest in this proceeding is to protect WSF from ruinous competition.⁴ That its interest in
10 protecting WSF arises because it is interested in preserving jobs does not take it outside of the zone of
11 interests the Legislature intended to protect or the interests cognizable by the Commission’s jurisdiction.

12 **B. The IBU Has The Right To Represent Its Members Before the Commission.**

13 15. The Staff raises the question whether the IBU has the right to represent its members in this
14 proceeding. WSF employees become members of the IBU voluntarily and the IBU Constitution governs
15 the members’ relationship with the Union. That Constitution clearly empowers the Union to act on their
16 behalf in the instant matter.

17 16. According to the Constitution, the IBU was “...formed for the purpose of securing improvements
18 not only in the wages, hours and working conditions of its members, but also for the purpose of
19 participating in those movements that tend to improve the lives of working people.” Constitution, p. 2
20 (attached). Moreover, the “...object of the Union shall be to unite its members in solidarity, to take
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22 ⁴ A third-party standing analysis is not necessary since the IBU is not asserting a third party’s interests in this proceeding; it is
23 asserting its own interests in protecting WSF.

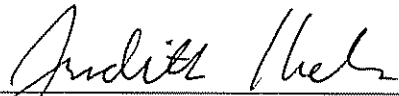
1 steps as shall improve their living conditions through such means as fostering legislation favoring
2 working people and *opposing that which would do them harm...*” *Id.* (emphasis added).

3 17. There is no authority, nor does Staff cite any, for the proposition that organizations coming
4 before the WUTC must make an offer of proof that they are indeed representing their members. Such a
5 rule, if adopted, would require, for example, the American Association of Retired Persons (“AARP”) to
6 engage in a membership referendum every time it wanted to intervene in a telephone rate case. The
7 Commission has never required such a showing because it assumes that the leadership of the AARP is
8 speaking on its members behalf. Nor does it want to get into the business of determining which
9 organizations truly represent their members, which is definitely beyond the scope of the Commission’s
10 expertise.

11 **V. CONCLUSION**

12 For the foregoing reasons, the IBU should be allowed to proceed with its protest and the
13 “motion to strike” should be denied.

14 DATED this 28th day of May, 2004.

15 
16 _____
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CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2004 I caused to be served the original and nine copies of the foregoing document to the following address via first class mail, postage prepaid to:

Carole Washburn, WUTC Executive Secretary
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I certify that 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:

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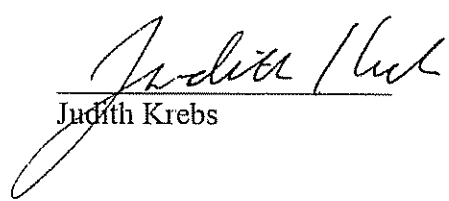
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Dated this 28th day of May 2004.


Judith Krebs

FINAL BILL REPORT

EHB 1388

C 373 L 03

Synopsis as Enacted

Brief Description: Providing incentives to increase transportation revenues by reforming laws limiting the provision of passenger-only ferry service.

Sponsors: By Representatives Woods, Ericksen, Ahern, Schindler, Jarrett, Bush, Shabro, Anderson, Bailey, Talcott, Clements, Chandler, Mielke, Boldt, Newhouse, Schoesler, Nixon, Pearson, Pflug and McMahan.

House Committee on Transportation

Senate Committee on Highways & Transportation

Background:

Ferries not operated by the Washington State Ferries (WSF) are prohibited from operating within 10 miles of established WSF routes unless granted a waiver from the Washington Utilities and Transportation Commission (UTC). The waiver may be granted based upon written petition by a commercial ferry operator to the UTC.

In addition, any party assuming the operation and maintenance of any ferry or ferry system by rent, lease, or charter from the Washington State Department of Transportation (WSDOT) is bound by the WSDOT's contractual obligations, including existing labor contracts.

Summary:

Operators of passenger-only ferry service are exempt from the 10-mile rule and no longer required to apply for a 10-mile rule waiver from the UTC to provide service. In addition, these operators would be allowed to use the WSDOT terminal, dock, and pier space if the space does not limit operation of the auto ferry service provided by the WSF system. Charges for equipment and space must be fair market value, taking into account public benefit from the passenger-only ferry service.

The UTC is to take into account public agencies operating or eligible to operate passenger-only ferry services when granting certificates of public convenience and necessity for private ferry operators. The UTC is prohibited, until March 1, 2005, from granting new passenger-only certificates to private ferry operators where Public Transportation Benefit Areas (PTBAs) or county ferry districts are authorized to operate passenger-only ferry service. Affected PTBAs may waive that prohibition in which case the

UTC may grant certificates. The UTC may revoke a certificate if the private operator has not initiated service within 20 months after being granted the certificate.

Votes on Final Passage:

House 94 2

Senate 46 2

Effective: July 27, 2003

Longshore & Warehouse Union on October 31, 1980. Both the tugboat and the ferry industries have undergone major changes particularly in the 1950's and 1960's. There have been substantial increases in the size and capability of equipment used and the amount of interstate and oceangoing commerce; consequently the need for a more common and united front in the development of the Union is called for, in order to keep pace with the organization of management on the other side and to achieve uniformity in the wages, hours and working conditions of those men employed in the industry. Therefore, the Constitution was adopted in 1971, saving as much of the old as was useful and valuable and changing the Union as needed to meet new conditions.

As almost every improvement in the condition of the working people has been accomplished by the efforts of organized labor, and as the welfare of workers can best be protected and advanced by their united action, the Inlandboatmen's Union of the Pacific has been formed for the purpose of securing improvements not only in the wages, hours and working conditions of its members, but also for the purpose of participating in those movements tending to improve the lives of working people. This Constitution is adopted for the Inlandboatmen's Union of the Pacific to further these goals.

ARTICLE 1 - NAME, OBJECT AND JURISDICTION

Section A This Union shall be known as the Inlandboatmen's Union of the Pacific. The Union is a single entity, national in scope. The Union's geographical jurisdiction requires that the membership be served and represented in various regions of the United States. These regions are described by geographical boundaries in this Constitution for administrative convenience only. The use of the words "Region" or "Regional" are not to be considered to detract from or impair the national integrity of the Union, or to create autonomous organizations within the national structure. The use of the term "National" or "National Union" as used in this Constitution are descriptive terms only to avoid confusion with those provisions applicable to geographical Regions.

Section B The object of the Union shall be to unite its members in solidarity, to take steps as shall improve their living conditions through such means as fostering legislation favoring working people and opposing that which would do them harm, promote health and welfare and pension programs and plans, and to deal for and represent, as the collective bargaining agency, those employees in the industry over which it has

jurisdiction; and when it has jurisdiction, and when it may determine necessary, to render succor to its needy, sick and distressed members. It is also the object of the Union to educate the membership of the organization in the history of the American Labor Movement and in present day labor problems and tactics, and to secure legislation in the interest of labor and to oppose anti-labor legislation. A principal objective of the Union is to promote the unity of all working people against attempts to divide them along lines of nationality, race, language, region, sex, age, and religious or political beliefs.

Section C The Inlandboatmen's Union of the Pacific shall exercise jurisdiction over all such work as now and heretofore has been performed by its members. It shall take particular care to organize all employees licensed or unlicensed, employed in the towing industry, operation of ferries, tugboats, freight boats, passenger or other craft, and industries related thereto such as environmental clean-up and other shore-side support industries.

ARTICLE 2 - BILL OF RIGHTS

Section A No member shall be deprived of any of the rights or privileges guaranteed him or her under the Constitution of the Union.

Section B Every qualified member shall have the right to nominate himself or herself or any other qualified member for, and if elected or appointed, to hold office in this Union.

Section C No member shall be deprived of his or her membership without due process of the law of this Union. No member shall be compelled to be a witness against himself or herself in the trial or any proceeding in which he or she may be charged with failure to observe the law of the Union. Every official and employee of the Union shall be bound to uphold and protect the rights of every member in accordance with the principles set forth in the Constitution of the Union.

Section D Every member shall have the right to be confronted by his or her accuser whenever he or she is charged with violating the law of this Union. In all such cases, the accused shall be guaranteed a fair and speedy trial by an impartial committee of his or her brother and sister Union members.