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7 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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9 In the Matter of the Application of  
10 AQUA EXPRESS LLC  
11 For Certificate of Public Convenience and  
12 Necessity to Operate Commercial Ferry Service  
13

APPLICATION NO. B-079273  
  
APPLICANT AQUA EXPRESS'S  
REPLY TO SUPPLEMENTAL  
RESPONSE OF THE IBU

14 I. INTRODUCTION

15 COMES NOW applicant Aqua Express LLC by and through Williams, Kastner &  
16 Gibbs PLLC and David W. Wiley, and for reply to the supplemental response of the  
17 Inlandboatmen's Union ("IBU") on May 28, 2004 and files the following:

18 II. APPLICABLE STATUTES AND RULES

19 RCW 34.05.443, RCW 47.60.120; WAC 480-07-375, 380; WAC 480-51-030, 040;  
20 WAC 480-070-340, 355; RCW 81.84.010; and RCW 81.84.020.

21 III. FACTS

22 Applicant incorporates by reference herein the facts as stated in its initial application  
23 and its Motion to Strike Protest of May 18, 2004.  
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APPLICANT AQUA EXPRESS'S REPLY TO SUPPLEMENTAL  
RESPONSE OF THE IBU - 1

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IV. STATEMENT OF ISSUES

Should the protest of May 5, 2004 filed by the IBU and its participation in the record of this proceeding seeking the Commission's consideration of various evidence proffered by it on behalf of the Washington State Ferry System ("WSF") be stricken or otherwise disallowed by this Commission?

V. ARGUMENT AND AUTHORITY IN OPPOSITION TO PROTEST  
AND IN SUPPORT OF MOTION TO STRIKE

A. The Protestant Misapplies the "Zone of Interest" and Standing Case Law Cited by Applicant in an Erroneous Construction of RCW 81.04.020(4).

1. In its filing, the Protestant seeks to bootstrap the previously-argued "zone of interest test" standing tests as articulated by the administrative law judge in her Third Supplemental Order in UW-011320, Stevens et al. v. Rosario Utilities LLC (July 2002), and the Commission in Order M.V.C. No. 950, In re Application CHA-221 of Brown's Limousine Crew Car, Inc. (July 1983), into an overarching rendition of RCW 81.84.020 to provide access to the collective bargaining representative of an unrelated employer for entrée into this proceeding. Under the Protestant's rationale, because RCW 81.84.020 provides for considerations of the effect of a certification decision "on public agencies operating, or eligible to operate, passenger-only ferry service," this means that the Commission must consider evidence adduced by collective bargaining units of *some* of the employees of a "public agency" tending to show the "ruinous competition" (IBU Supplemental Reply at 6) and the "prevent[ative]" impact on WSF, (IBU Reply at 4), grant of this application would mean. Yet in order to raise these effects, the IBU must first establish that it has either the *apparent authority* to speak for the WSF here, or demonstrate that for the purposes of raising the issues it seeks to have this record evaluate, that it has an *agency relationship* or other such privity with the WSF.

1 B. The IBU is Not the Agent of the Washington State Ferry System Here Nor Does it  
2 Have Apparent Authority or Third Party Rights to Represent the WSF.

3 2. Agency is a legal concept which depends upon the existence of the following  
4 factual elements: 1) the manifestation by the principal that the agent shall act for him; 2) the  
5 agent's acceptance of the undertaking and the understanding of the parties that the principal is  
6 to be in control of the undertaking. Restatement 2d of Agency, § 1; Skagit State Bank v.  
7 Rasmussen, 109 Wn.2d 377, 388, 745 P.2d 37 (1987); Moss v. Vadman, 77 Wn.2d 396,  
8 402-03, 463 P.2d 159 (1969). Consent and control are the essential elements for the  
9 establishment of an agency relationship. Skagit State Bank, 109 Wn.2d at 388. Where the  
10 record is utterly devoid of evidence of consent and control, an agency relationship does not  
11 exist. Id. Additionally, the burden of establishing agency rests upon the one who asserts it.  
12 State v. Bryant, 146 Wn.2d 90, 102, 104, 42 P.3d 1278 (2002). The WSF has taken no action  
13 that would manifest a belief that the IBU should be permitted to act for it in this proceeding nor  
14 has the IBU demonstrated it properly inherited the WSF's "mantle" herein.

15 3. Absent the establishment of an agency relationship, an agent will be permitted  
16 to act on behalf of the principal only if the principal has manifested that the agent has apparent  
17 authority. In order for apparent authority to exist, the principal must use words or conduct that  
18 a third party may reasonably interpret as conferring authority upon the agent. Apparent  
19 authority of an agent can be inferred only from the acts and conduct of the principal; the extent  
20 of an agent's authority cannot be established by his own acts and declarations. Id. at 103-04.  
21 Only where it can be logically inferred that the principal has conferred authority upon the  
22 agent, will apparent authority be granted. See Schoonover v. Carpet World, Inc., 91 Wn.2d  
23 173, 178-79, 588 P.2d 729 (1978). Again, there is no indication that the WSF has in any way  
24 taken actions that could reasonably be interpreted as conferring authority upon the IBU.<sup>1</sup>

25 <sup>1</sup> Indeed, it has manifested a position inconsistent with the IBU here (See, Appendix A to Response of the  
Commission Staff to Motion to Strike, May 20, 2004).

1           4.       The Staff of the Commission pointed out in its Response to the Motion to Strike  
2 that by in effect claiming a “proxy” status here, there was no valid attribution of third party  
3 standing interests established by IBU in this proceeding (see WUTC Staff Response and  
4 analysis at 9, fn. 3). The IBU, in its supplemental response, completely ignores this premise by  
5 announcing that, rather than asserting a third party’s interest here, “. . . it is asserting its own  
6 interests in protecting WSF.” (IBU Supplemental Response at 6, fn. 5).

7       C.       IBU’s Self-Annointed “Protector” Role is not Synonymous with Approved Standing  
8               Doctrines.

9           5.       This novel claim that, in acting as the WSF’s self-appointed *protector*, the IBU  
10 here can supercede and obfuscate fundamental standing, agency and privity considerations  
11 through an effective “über” interpretation of the interests to be considered by the Commission  
12 under RCW 81.84.020(4), is unprecedented. According to the IBU’s unlimited standing  
13 interpretation doctrine, apparently any individual or collectively represented employee of a  
14 public agency should be allowed to participate in the record of an unrelated employer-applicant  
15 for a certificated route not currently served by any entity when negative economic impacts are  
16 asserted on behalf of that employee’s “public agency” employer. Further, that employer’s lack  
17 of opposition to the proposed certificated route should have no limitation on or bearing upon  
18 the employee or employee representative’s right to participate because the latter is “protecting”  
19 the former from its own apparent misjudgment and/or neglect in failing to block the application  
20 in its own right.

21       D.       The IBU’s Rationale for Participating in this Record is Circuitous, Overbroad and  
22               Ultimately Unconvincing.

23           6.       The IBU here seeks to protect a public agency from a laundry list of perceived  
24 dire consequences which neither the agency, in assessing the passenger ferry application, nor  
25 the legislature, in enacting EHB 1388, acknowledged. As noted, in “protecting the WSF from  
itself” the IBU must first establish it has standing to raise the claims it seeks to have the

1 Commission consider, and has not cited to a single commission or judicial precedent where a  
2 collective bargaining representative of some employee group of a public agency has been  
3 granted standing to assert alleged negative economic impacts posed by a prospective certificate  
4 application upon the unrepresented third party public entity<sup>2</sup>.

5 7. Considering the claims sought to be raised here would also run afoul of the  
6 admonitions of the Washington Supreme Court in Cole v. WUTC, 79 Wn.2d 302, 485 P.2d 71  
7 (1971), and the Commission's pronouncement of the public interest in the Brown's Limousine  
8 Crew Car case, above:

9 Public interest cannot be served if the elements of public convenience and  
10 necessity require consideration of activities over which the Commission has no  
11 power to control, to supervise, or to regulate in any fashion. The Commission  
has no power to protect the interests of businesses which it does not regulate.

12 Order M.V.C. No. 950 at 5.

13 8. Nothing in Chapter 81.84 RCW, specifically RCW 81.84.020(4), nor the  
14 legislative history of EHB 1388 authorize the overbroad reasoning of the IBU here to permit its  
15 wholly unsubstantiated intrusion into this proceeding, and granting it standing to raise the

16 <sup>2</sup> The protestant's alternate fallback theory of the public importance standing doctrine is wholly  
17 inapplicable here as this is a regulated passenger ferry application between two termini on Puget Sound not  
18 currently operated by any provider. The present issues are clearly not tantamount to the issues raised in the very  
19 limited cases where the public importance doctrine has been applied. For example, in Washington Natural Gas  
20 Co. v. PUD, the Court held that the public importance of the issues involved had both direct and immediate affects  
on a substantial percentage of the population statewide. Washington Natural Gas Co., v. PUD, 77 Wn.2d 94, 96,  
459 P.2d 633, (1969). The IBU has failed to articulate any such issues which directly and immediately affect a  
substantial percentage of the statewide population.

21 A further limit on the applicability of the public importance doctrine is also relevant to the present case.  
22 The doctrine will only be applied where the plaintiff whose standing was challenged is the only plaintiff in the  
23 case and where the liberal approach to standing is necessary to ensure that important public issues raised do not  
24 escape review. Yakima County Fire Prot. Dist. No. 12 v. City of Yakima, 122 Wn.2d 371, 380, 858 P.2d 245  
(1993). See also, Grant County Fire Protection Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791, 83 P.3d 419  
(2004). Here, the Commission staff will be an active participant in the case and the applicant, after hearing, will  
25 be required to make a prima facie showing of fitness, willingness and ability and specific financial evidence as  
specified by RCW 81.84.020(2), and demonstrate that the application is required by the public convenience and  
necessity. All such statutory and regulatory criteria will be examined on the public record as required by  
RCW 81.84.020 before any determination is made on the application.

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1 claims it asserts would be wholly inconsistent with the public interest. The protest of IBU  
2 should therefore be stricken and its participation in the record of this proceeding denied.

3 DATED this 1 day of June, 2004.

4 Respectfully submitted,

5 WILLIAMS, KASTNER & GIBBS PLLC

6  
7 By   
8 David W. Wiley, WSBA #08614  
9 Attorneys for Plaintiff Applicant

10 **CERTIFICATE OF SERVICE**

11 I hereby certify that on June 1, 2004, I caused to be served the original and nine copies  
12 of the foregoing document to the following address via first class mail, postage prepaid to:

13 Carole Washburn, WUTC Executive Secretary  
14 Washington Utilities and Transportation Commission  
15 1300 S. Evergreen Park Drive SW  
16 P.O. Box 47250  
Olympia, WA 98504-7250

17 I certify I have also provided to the Washington Utilities and Transportation Commission's  
18 Secretary an official electronic file containing the foregoing document via email to:  
records@wutc.wa.gov

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

20 Ann E. Rendahl  
21 Administrative Law Judge  
22 Washington Utilities and Transportation Commission  
23 1300 S. Evergreen Park Dr. SW  
24 P.O. Box 47250  
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APPLICANT AQUA EXPRESS'S REPLY TO SUPPLEMENTAL  
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1 and a copy sent via first class mail, postage prepaid, to:

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8 and a copy sent via first class mail, postage prepaid, to:

9 Judith Krebs, Attorney  
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12 18 West Mercer Street, Suite #400  
13 Seattle, WA 98119  
14 Attorneys for Inlandboatmen's Union of the Pacific

15 Dated this 1st day of June, 2004.

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DANNA HUTCHINGS