

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In re Application No. B-079273 of)	DOCKET NO. TS-040650
)	
AQUA EXPRESS, LLC)	ORDER NO. 02
)	
For a Certificate of Public)	ORDER GRANTING IN PART
Convenience and Necessity to)	MOTION TO STRIKE PROTEST
Provide Commercial Ferry Service)	OF INLANDBOATMEN’S
)	UNION OF THE PACIFIC;
)	LIMITING PROTEST OF
)	INLANDBOATMEN’S UNION
)	OF THE PACIFIC
.....)	

1 **NATURE OF PROCEEDING.** Docket No. TS-040650 involves an application by Aqua Express, LLC for a certificate of public convenience and necessity to operate a commercial ferry between Kingston and Seattle, Washington.

2 **PROCEDURAL HISTORY.** On April 8, 2004, Aqua Express, LLC (Aqua Express or Applicant), a partnership of Clipper Navigation, Inc., Nichols Boat Builders, Inc., Argosy, L.P. and TMT Corp., d/b/a Four Seasons Marine Services, Corp., filed an application for a commercial ferry certificate to provide passenger-only service between Kingston and Seattle. On May 6, 2004, the Inlandboatmen’s Union of the Pacific (IBU) filed the only protest to the application.

3 On May 18, 2004, Aqua Express filed with the Commission a motion to strike the protest filed by the IBU, arguing that the IBU lacks standing to intervene in the proceeding as a protestant. On May 20, 2004, the IBU and Commission Staff filed responses to the motion with the Commission.

4 The Commission heard oral argument on the motion during a prehearing conference on May 21, 2004. Following oral argument, the IBU and Aqua Express were given the opportunity to submit additional pleadings on the motion. On May 28, 2004, the IBU filed a supplemental response to the Applicant's motion and response to Staff's response. On June 2, 2004, Aqua Express filed a reply to the IBU's supplemental response.

5 **THE PROTEST.** The IBU is the union representing the deckhands, ticket-takers, ticket-sellers, and terminal personnel working for the Washington State Ferries (WSF), as well as certain snack bar and concessionaire workers who are employed by private companies doing business with the WSF. *IBU Protest at 2.* The IBU asserts its interest in the application as the exclusive bargaining representative of WSF workers as a "Ferry employee organization" under RCW 47.46.011(6), and on behalf of IBU workers who are residents of the Puget Sound Region who are "negatively impacted by operations which cause deterioration in the air and water quality of the area." *Id.* The IBU asserts that RCW 81.84.020(4) requires the Commission to "consider and give substantial weight to the effect of its decisions on public agencies operating, or eligible to operate, passenger-only ferries." *Id.*

6 The IBU raises the following issues in its protest:

- 1) Whether there is a demonstrated need for the service to be provided by Aqua Express LLC;
- 2) Whether the service proposed by Aqua Express would adversely affect the Washington State Ferries;
- 3) Whether the service proposed by Aqua Express would adversely affect the IBU-represented WSF employees;
- 4) Whether the service proposed by Aqua Express would adversely affect the IBU-represented employees of WSF concessionaires;

- 5) Whether the service proposed by Aqua Express would adversely and needlessly affect the air and water quality of the region; and
- 6) Whether Aqua Express LLC has the financial resources to operate the proposed service for at least 12 months as required by RCW 81.84.020(2).

PARTIES' POSITIONS ON THE MOTION TO STRIKE.

- 7 **Aqua Express.** Aqua Express argues that in order to have standing to intervene in the proceeding, the IBU must meet the conditions set forth in *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 829, 25 L.Ed.2d 184 (1970), in particular, the second condition that a “person’s asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged.” *Motion to Strike*, at 2. Aqua Express asserts that this condition, referred to as the “zone of interest” test, is designed to address the concern that injury-in-fact may not be enough to confer standing. *Id.* at 3, citing *St. Joseph Hosp. and Health Care Ctr. v. Dept. of Health*, 125 Wn.2d 733, 739, 887 P.2d 891 (1995).
- 8 Aqua Express argues that the IBU, as a representative of employees working for or in association with the WSF, does not fall within the “zone of interest” protected by the Commission. *Id.* at 3. Aqua Express argues that the IBU lacks an articulable interest under Chapter 81.84 RCW, as the IBU is not a current or prospective commercial ferry company regulated under Chapter 81.84 RCW, nor a public agency “operating or eligible to operate, passenger-only ferry service” under RCW 81.84.020(4). *Id.* at 3-4. Aqua Express asserted during oral argument and in its Reply, that the Commission’s decision in *In re Application CHA-221 of Brown’s Limousine Crew Car, Inc.*, Order M.V.C. No. 950 (July 1983), as well as an administrative law judge’s decision in the Third Supplemental Order, *Stevens, et al. v. Rosario Utilities LLC*, Docket No. UW-011320 (July 2002) applied the “zone of interests” test to the issue of standing to participate in Commission proceedings. *Aqua Express Reply* at 2.

- 9 Aqua Express argues that the Commission has previously excluded unregulated interests from participating in Commission proceedings. Aqua Express cites to *Cole v. Washington Utilities and Transportation Commission*, 79 Wn.2d 302, 485 P.2d 71 (1971), in which the Commission denied intervention to the Oil Heat Institute, an industry trade association that sought to intervene to demonstrate the adverse effect of a gas company's promotional practices on its fuel dealers. *Motion to Strike at 4*. Aqua Express argues that *Cole* stands for the proposition that the Commission has no jurisdiction to consider the economic effects of the practices of a regulated public service utility upon unregulated competitors, and that the Commission should reject intervention based upon an expansive reading of the Commission's statutory obligation to regulate in the public interest. *Id.*; see also *Aqua Express Reply at 5*.
- 10 Aqua Express asserts that the Commission does not routinely allow collective bargaining units to participate in Commission proceedings. Aqua Express refers to an administrative law judge's decision in the merger proceeding of Puget Sound Power & Light Company and Washington Natural Gas Company, in which the Commission granted limited intervention to several unions to address the effect of a merger of two energy companies on service reliability and safety, but not the effect of the merger on wages, benefits or job protection. *Motion to Strike at 6*, citing *Second Supplemental Order on Prehearing Conference, In the Matter of the Proposal by Puget Sound Power & Light Company, Docket Nos. UE-951270, UE-960195 (May 1996) (PSP&L Decision)*. Aqua Express also recognizes that the IBU was granted intervenor status in a prior commercial ferry application proceeding, but notes that no party objected to the IBU's participation. *Id. at 6-7*, citing *Prehearing Conference Order, In re Application of Horluck Transportation Company, Inc., d/b/a Cross Sound Flyer and in re San Juan Express, Inc., Hearing B-78487 and B-78511 (July 1996)*.
- 11

- 12 In its Reply, Aqua Express repeats its argument that the provisions of RCW 81.84.020(4) allow only the WSF (or other public agency) standing to address the effect of the Commission's decisions on such public agencies. *Aqua Express Reply at 2*. Aqua Express argues that the IBU lacks authority or apparent authority to speak for the WSF, and has no agency relationship or privity with the WSF. *Id. at 2-3*. Aqua Express also argues, like Staff, that the IBU does not meet the requirements for third-party standing. *Id. at 4*. Finally, Aqua Express urges the Commission to reject the IBU's reliance on the "public importance doctrine" arguing that granting the application will not "directly and immediately affect a substantial percentage of the statewide population." *Id., n. 2*.
- 13 **Commission Staff.** Commission Staff first argues that the IBU's protest should be stricken, asserting the IBU has not shown that it is authorized to represent its members in a Commission proceeding of this nature.¹ Staff also argues that the IBU lacks standing to address the issues raised in its protest, and urges the Commission to dismiss the protest.
- 14 Staff argues that there is no basis under Title 81 RCW, or Chapter 81.84 RCW, for the Commission to "consider the effect of a grant of a commercial ferry certificate on the employment status of union employees employed by unregulated entities such as the WSF or private concessionaires." *Staff Response at 5*. Citing to *Cole* and the *PSP&L Decision*, Staff argues that the Commission may not consider the impact of its actions on the activities of competing businesses the Commission does not regulate, and may not consider issues of wages, benefits or job protection for union members. *Id. at 5-6*.
- 15 Staff also argues that the Commission has no statutory authority to consider air and water quality issues in this proceeding. *Id. at 6*. Although the "ten-mile

¹ After the IBU addressed this issue in oral argument, Staff appeared to concede the issue. In addition, the IBU addresses the Staff's concerns in its Supplemental Response. *IBU Supplemental Response at 6-7*.

rule,” RCW 47.60.120(3), requires the Commission to consider “air quality improvement” when considering an application subject to a waiver of the ten-mile rule, Staff asserts that the ten-mile rule does not apply to this application. *Id. at 6-7.*

- 16 Staff argues that the IBU does not have standing to address effects on the state ferry system, adding that RCW 81.84.020(4) does not even apply to the Department of Transportation, which runs the WSF. *Id. at 7.* Staff notes that RCW 47.60.120(3) requires the Commission to consider the effect of granting an application on the state ferry system, but that passenger-only ferries are exempt from this consideration under RCW 47.60.120(5). Staff attempts to harmonize RCW 47.60.120 with the legislature’s intent in amending RCW 81.84.020(4). To be consistent, Staff argues the requirements of RCW 81.84.020(4) should not apply if the exemptions in RCW 47.60.120 (the 10-mile and passenger only criteria) do apply. Thus, Staff argues that the Commission need not consider the effect of the present application on the WSF under RCW 81.84.020(4). *Id. at 7-8.*
- 17 Staff further argues that even if the Commission does not reach this interpretation, the IBU lacks standing to represent the WSF’s interests under the principles of third-party standing. *Id. at 8-9, citing Mearns v. Sharbach, 103 Wn.App. 498, 512, 12 P.3d 1048 (2000).* Staff further argues that the Department of Transportation has filed a letter with the Commission stating that it has no objection to the application. *Id. at 9.*
- 18 Staff asserts that the IBU has no cognizable interest under Title 81 RCW to contest issues of financial fitness or public need for the proposed service, or any particular expertise in addressing these issues that satisfies the public interest test for participation. *Id. at 9-10.*
- 19 Finally, Staff concurs in Aqua Express’ arguments concerning prior Commission orders addressing participation by unions, noting that the IBU’s participation in

the Horluck proceeding does not create a precedent, as no party objected to the IBU's participation. *Id. at 11.*

20 **IBU.** In its initial response, the IBU first argues that Aqua Express improperly captions its motion as a motion to strike rather than a motion to dismiss.² *IBU Response at 1-2.* In addressing the merits of the motion, the IBU asserts that it has standing to address the issues in RCW 81.84.020(4). The IBU argues that it has a "substantial interest in the subject of the hearing" because it is a "Ferry employee organization" under RCW 47.64.011(6), and because "the IBU serves a vital role in the operations of the WSF" on the basis of statements of public policy in RCW 47.64.006. *Id. at 3-4.* The IBU argues that one of its interests is "protecting the WSF from injurious competition as contemplated by RCW 81.84.020(4)." *Id. at 4; see also IBU Supplemental Response at 6.*

21 The IBU argues that *Cole* is distinguishable because it is based on a different statutory framework. *IBU Response at 4.* IBU also distinguishes the Commission's *Brown's Limousine* decision, as well as the Rosario Utilities decision, arguing that whether a person falls within the zone of interest the Commission must protect depends on the particular statutory scheme. *IBU*

22 *Supplemental Response at 2-4.* The IBU asserts that because RCW 81.84.020(4) *requires* the Commission to consider the effect of its decision on public agencies that operate or are eligible to operate passenger-only ferries, the IBU's interest in the effect of the Commission's decisions on the WSF, and in protecting the WSF, is within the zone of interests the statute is designed to protect. *Id. at 4-5.*

² Regardless of whether the motion is considered a dispositive motion under WAC 480-07-375(a) or a motion under WAC 480-07-375 (4), the presiding officer has discretion to establish different response times than those set forth in the procedural rules. Given this discretion and the fact that all parties have had an opportunity to address the issues orally and in writing before the Commission, the Commission sees no procedural defect in the Applicant's pleading.

- 23 The IBU further argues that the Commission’s rules concerning commercial ferries allow interested persons to file protests to applications for certificates. *IBU Response at 4, citing WAC 480-50-040(1)*. The IBU asserts that the appropriate standard for determining standing before the Commission is whether the IBU has a substantial interest in the proceeding, not whether the IBU is within the “zone of interests” created by the legislature. *Id. at 4-5*. Should the Commission apply a “zone of interests” test, the IBU asserts that its interests are within those the Commission must consider under RCW 81.84.020(4), as the WSF is expressly within that zone of interest and “Title 47.60 places both WSF and the IBU within the zone of interests.” *Id. at 6-7*. The IBU further argues that the statute does not limit the parties who may address the issue of the effect of a Commission decision on its operations. *IBU Supplemental Response at 5*.
- 24 The IBU notes that the Commission has allowed unions to intervene in Commission proceedings, citing to the *PSP&L Decision*, the *Horluck* order, and the Commission’s decision to allow a union to address issues in the PacifiCorp-Scottish Power merger proceeding. *Id. at 5-6; n. 3*.
- 25 Finally, the IBU argues that the Commission should allow it to participate in the proceeding based upon the “public importance doctrine.” *Id. at 7, citing Washington Natural Gas Company v. Public Utility District No. 1 of Snohomish County, 77 Wn.2d 94, 459 P.2d 633 (1969); Grant County Fire Protection Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791, 83 P.3d 419 (2004)*. The IBU argues that the
- 26 Commission has discretion whether to grant or deny a petition to intervene, and urges the Commission to deny the motion to strike. *Id. at 8-9*.
- 27 **DISCUSSION AND DECISION.** The primary issue in dispute is whether the IBU has standing to protest, and what standard the Commission should use to determine standing.

- 28 Aqua Express asserts that the “zone of interest” test, as applied by the Commission in the *Brown’s Limousine* and *Rosario Utilities* cases, provides the proper standard for determining whether the IBU has standing in this proceeding. Staff argues that the substantial interest standard, as interpreted by *Cole*, should apply in this proceeding. Although Aqua Express has denominated its motion as a motion to strike, it is more in the nature of a motion to dismiss an intervenor under WAC 480-07-355(4). Under that rule, the Commission must determine whether the intervenor has a substantial interest in the proceeding or whether the public interest would be served by the intervenor’s participation. The Commission has applied the “zone of interest” test in other proceedings to determine standing, and has interpreted the “zone of interest” test to address whether the interest sought to be protected is within the “zone of interest” protected by the statute. *See Brown’s Limousine at 3, citing to Cole, 79 Wn.2d 302.*
- 29 The issue in *Cole* was whether the Oil Heat Institute had a substantial interest in rates charged to customers of a competitor regulated by the Commission. Finding that “an administrative agency must be strictly limited in its operation to those granted by the legislature,” the court determined that the Commission had no authority under Title 80 RCW “to consider the effect of a regulated utility upon an unregulated business.” *79 Wn.2d at 300.* The court’s decision rested on whether the Commission had express or implied statutory authority to address the Oil Heat Institute’s contentions. *Id.*
- 30 Applying the analysis in *Cole* to the IBU’s protest, the Commission has no statutory authority to consider the effect of Aqua Express’ proposed service on the air and water quality of the region. Nothing in Title 81 RCW or Chapter 81.84 RCW expressly authorizes the Commission to consider the effect of granting an application on the water quality of the region. Similarly, there is no express statutory authorization for the Commission to consider the effect of granting Aqua Express’ application on air quality in the region. As Staff explains in its thorough analysis of the issue, the requirements of RCW 47.60.120(3) – the

ten-mile rule – do not apply to this proceeding. The Commission grants the Applicant’s motion to strike or dismiss the fifth issue raised by the IBU in its protest.

31 Unlike the statutes at issue in *Cole*, the Commission *is* obligated under RCW 81.84.020(4) to address the effect of its decisions on unregulated (potentially competing) entities, in particular, “public agencies operating, or eligible to operate, passenger-only ferries.” The statutory schemes at issue in the *Cole*, *Brown’s Limousine*, and other cases cited by the parties are different from what governs us here. Given the specific requirements of RCW 81.84.020(4), the general rule in *Cole* that the Commission has no authority to consider the effect of a regulated utility upon an unregulated business does not apply in this proceeding.

32 Applying this analysis to the IBU’s protest, the Commission grants the Applicant’s motion to strike or dismiss the third and fourth issues in the IBU’s protest. These issues concern the impact of Aqua Express’ proposed application on IBU-represented WSF employees and IBU-represented employees of WSF concessionaires. The statute at issue, RCW 81.84.020(4), requires the Commission to consider the effect of its decisions on public agencies, not the employees of the public agencies. This decision is consistent with our decisions in prior cases to allow union participation in proceedings, but to preclude the unions from addressing issues of “wages, benefits or job protection for union members.” *See PSP&L Decision at 3.*

33 Aqua Express and Staff also urge the Commission to strike or dismiss the second issue the IBU raises in its protest, the effect of the Aqua Express’ proposed service on the WSF. Staff interprets RCW 47.60.120 and RCW 81.84.020(4) together to assert that RCW 81.84.020(4) does not refer to the WSF, and that therefore, the IBU cannot state a substantial interest in the application. Aqua Express and Staff also assert that only the WSF or affected public agencies have

standing to address their interests under RCW 81.84.020(4). They assert that the IBU cannot meet the standards for third-party standing to assert the interests of the WSF, noting that the WSF has notified the Commission that it has no objection to Aqua Express' application.

34 Without further analysis of the legislative history of the recent amendments of the two statutes, we find that the reference to "public agencies" in RCW 81.84.020(4) can reasonably be read to include the state ferry system. Further, we find that the IBU does not meet the requirements for third-party standing to assert the interests of the WSF. *See Singleton v. Wulff*, 428 U.S. 106, 113-116, 96 S. Ct. 2868, 49 L.Ed.2d 826 (1976); *Powers v. Ohio*, 499 U.S. 400, 410-11, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); *Mearns v. Sharbach*, 103 Wn.App. 498, 512, 12 P.3d 1048 (2000). The IBU states that its interest in the application is to protect the WSF from injurious competition, as well as to represent the interests of the general public in ensuring the long-term viability of the state ferry system. *IBU Response at 4, 6*. The IBU cannot stand in the shoes of the WSF to assert its interests, nor represent the general public, but must assert its own interests in the proceeding. Given our finding, below, that it is in the public interest to allow the IBU to intervene in the proceeding, we do not reach the issue of whether the IBU has demonstrated a substantial interest in the issue of the effect of the decision on the state ferry system.

35 The Commission has discretion under RCW 34.05.443 and WAC 480-07-355(3) to determine whether to allow a person to intervene in a proceeding, and may allow a person to *intervene* if the person's participation would contribute to the Commission's ability to make a decision in the public interest. *See Cole*, 79 Wn.2d at 306-7. In this proceeding, given the legislature's direction that the Commission consider the effect of its decisions on public agencies operating or eligible to operate passenger only-ferries, and the fact that the IBU is the only party who has sought to intervene to address the requirement in RCW 81.84.020(4), we find

that it is in the public interest to allow the IBU to protest the application and intervene in the proceeding.

36 Under RCW 34.05.443(2)(a) and WAC 480-07-355(3), the Commission may limit the participation of an intervenor. Based upon the findings we have made above, the IBU may participate in this proceeding to address only the issue of the effect of the proposed service on the state ferry system (without asserting the ferry system's own interest), and the issue of the need for the proposed service and the applicant's financial fitness. The IBU may not broaden the issues in the proceeding, and the Commission may subsequently limit the IBU's participation further pursuant to RCW 34.05.443(2) to allow the matter to proceed in an orderly and prompt manner.

37 We do not find that the issues raised by the IBU merit a grant of standing under the "public importance doctrine." While the application for passenger-only service from Kingston to Seattle does raise matters of public importance, it will not "immediately affect[] substantial segments of the population and its outcome will [not] have a direct *bearing* on the commerce, finance, labor, industry, or agriculture, generally." See *Washington Nat. Gas Co. v. Public Util. Dist. No. 1 of Snohomish Cy.*, 777 Wn.2d 94, 96 (1969).

THE COMMISSION ORDERS:

38 (1) Aqua Express, LLC's Motion to Strike Protest of Inlandboatmen's Union of the Pacific is granted, in part, and denied in part.

39 (2) The Inlandboatmen's Union of the Pacific may participate as a protestant in this proceeding to address only the issues of the impact of the proposed service on the state ferry system, the need for the proposed service, and the applicant's financial fitness.

Dated at Olympia, Washington, and effective this 7th day of June, 2004.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

NOTICE TO PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to WAC 480-07-810(3).