

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

In the Matter of the Petition of)	DOCKET TS-090424
)	
SAN JUAN EXPRESS, INC.,)	
)	ORDER 03
Petitioner,)	
)	
Relating to Discontinuance of)	FINAL ORDER AUTHORIZING
Commercial Ferry Service Authorized)	TEMPORARY DISCONTINUANCE
by Certificate of Convenience and)	OF SERVICE SUBJECT TO
Necessity No. BC-117)	CONDITION
)	
.....)	

Synopsis: The Commission determines that San Juan Express is not providing reasonable and adequate service pursuant to its certificate of public convenience and necessity (Permit No. BC-117) and its Tariff 42 due to circumstances within the control of its parent corporation, Clipper Navigation. The Commission nevertheless exercises its discretion to grant San Juan Express’s request for authority to temporarily discontinue service, subject to condition.

SUMMARY

1 **PROCEEDINGS:** On March 23, 2009, San Juan Express, Inc. (San Juan Express), filed with the Washington Utilities and Transportation Commission (Commission) a petition requesting authority to temporarily discontinue commercial ferry service between Friday Harbor and Seattle, Washington, beginning May 22, 2009, returning to service on May 21, 2010.

2 This matter came before the Commission at its open meeting on May 14, 2009. On May 15, 2009, the Commission entered Order 01—Order Granting Temporary Discontinuance of Service; Setting Matter for Hearing. The Commission specifically authorized a temporary discontinuance of service from May 22, 2009, for a 30-day period ending June 22, 2009.

3 The Commission convened a hearing in this matter on June 9, 2009, took evidence,
and provided an opportunity for interested members of the public to comment.

4 **PARTY REPRESENTATIVES:** David W. Wiley, Williams, Kastner & Gibbs
PLLC, Seattle, Washington represented Petitioner San Juan Express. Jonathan
Thompson, Assistant Attorney General, Olympia, Washington, represented the
Commission's regulatory staff (Commission Staff or Staff).¹

5 **COMMISSION DETERMINATIONS:** Considering the totality of the
circumstances and subject to certain conditions set forth in the body of this Order, the
Commission determines it should grant San Juan Express's request for authority to
discontinue service through May 20, 2009.

MEMORANDUM

I. Background and Procedural History

6 San Juan Express is a wholly owned subsidiary of Clipper Navigation, Inc. (Clipper
Navigation). San Juan Express has held a Commission-approved motor carrier
certificate of public convenience and necessity (*i.e.*, Permit No. BC-117) since 1991
that authorizes and requires the company to provide passenger ferry service between
Seattle and Friday Harbor and other destinations. The service is seasonal, operating
from May through September, and is based on tourism and recreation in the San Juan
Islands.

7 San Juan Express provided service, in accordance with its permit and tariff, through
the 2008 season. On February 4, 2009, the company filed revisions to its tariff,
offering Tariff and Time Schedule No. 42 for the Commission's consideration. The
only change to the schedule was to update it to reflect 2009 calendar dates, showing
the periods when various rates would be in effect for Spring Service (May 22, 2009 –
June 30, 2009), Summer Service (July 1, 2009 – September 7, 2009) and Fall Service
(September 8, 2009 – September 27, 2009). The proposed tariff revisions came
before the Commission at its open meeting on February 26, 2009, on the "no action"

¹ In formal proceedings, such as this, the Commission's regulatory staff functions as an independent party with the same rights, privileges, and responsibilities as other parties to the proceeding. There is an "*ex parte* wall" separating the Commissioners, the presiding Administrative Law Judge, and the Commissioners' policy and accounting advisors from all parties, including regulatory staff. *RCW 34.05.455*.

agenda and the revised schedules were allowed to become effective in accordance with their terms on March 9, 2009.

8 During the same period that San Juan Express's tariff filing was pending, its parent corporation, Clipper Navigation, was discussing with C-Port Marine Services, L.L.C. (C-Port Marine), the possibility of leasing to C-Port Marine the "Clipper III," the ferry historically used by San Juan Express to furnish service between Seattle and Friday Harbor. C-Port Marine, at the time, was negotiating with the United States Navy to provide boats on a bareboat charter basis to facilitate the transportation of crews between secure Navy facilities located in Everett and Bremerton.

9 On March 18, 2009, Clipper Navigation entered into a Standing Bareboat Charter with C-Port Marine by which it obligated itself to deliver the Clipper III to C-Port Marine for use on a bareboat charter basis on specific terms to be memorialized by a subsequent Bareboat Charter Certificate. Clipper Navigation and C-Port Marine executed the Bareboat Charter Certificate on March 30, 2009. The certificate called for delivery of the Clipper III on or about April 16, 2009, for a primary term through October 16, 2009, when the charter will expire unless extended at C-Port Marine's option.

10 Thus, as of March 18, 2009, the Clipper III became unavailable for use by San Juan Express during the 2009 season. On March 23, 2009, San Juan Express filed its petition requesting the Commission grant a temporary discontinuance pursuant to WAC 480-51-130, which provides:

No certificate holder shall discontinue the service authorized under its certificate and set forth in its filed time schedule without first having given to the commission and to the public, at least fifteen days' notice, in writing, of its intention to discontinue such service, and without having secured the commission's permission. The commission shall not grant permission for discontinuance of service for periods exceeding twelve months.

This rule reflects the important public service obligation that all commercial ferry operators assume when the Commission grants a certificate of public convenience and necessity.

11 The Commission, at its open meeting on May 14, 2009, determined it should grant a temporary discontinuance for 30 days to provide an opportunity for a hearing at

which it would consider whether and, if so, on what terms, to grant a one-year discontinuance, as requested.² The Commission specifically authorized a temporary discontinuance of service from May 22, 2009, until June 22, 2009.

- 12 The Commission convened a hearing in this matter on June 9, 2009, took evidence, and provided an opportunity for interested members of the public to comment. Mr. Darrell Bryan, President and CEO of both San Juan Express and Clipper Navigation testified for the company. The Commission received eight written comments from members of the public, all supportive of San Juan's petition.

II. Discussion and Decisions

- 13 Certificates of public convenience and necessity confer upon those who hold them valuable economic rights. Although the Commission does not establish exclusive service territories and may legally authorize service by additional carriers on a route currently having certificated service, this rarely occurs as a practical matter. Once a route is certificated it effectively establishes a monopoly for the certificate holder.
- 14 Conferring a certificate on an applicant thus gives rise to what is sometimes referred to as a "regulatory compact." The certificate holder is allowed to provide a remunerative service without competition in the relevant market and, in exchange, assumes a public interest obligation to provide service in accordance with the terms of the certificate and a Commission approved tariff.
- 15 In this case, San Juan Express has broken the regulatory compact. Without first seeking permission from the Commission,³ San Juan Express's parent corporation took steps it knew, or should have known, would make it impossible for San Juan Express to provide passenger ferry service between Seattle and Friday Harbor during the 2009 season. Such service, in fact, will not occur during the 2009 season. Given this, it follows as night the day that San Juan Express is not providing reasonable and adequate service under Permit No. BC-117.
- 16 The result of San Juan Express's failure to provide reasonable and adequate service in accordance with its certificate and tariff is that thousands of members of the public

² Order 01—Order Granting Temporary Discontinuance of Service; Setting Matter for Hearing.

³ We acknowledge that San Juan Express followed the letter of our rules, providing notice to the Commission and the public of its intention to discontinue service more than 15 days prior to the date of cessation as required under WAC 480-51-130.

who wish to travel between Seattle and Friday Harbor will be inconvenienced.⁴ In addition, it appears from some of the letters received in connection with this matter from business leaders and owners that San Juan's parent corporation's decision to improve its financial bottom line at the expense of the public convenience and necessity will have a negative impact on the broader economy in the San Juan Islands. For example, Ms. Deborah Hopkins, Executive/Marketing Director for the San Juan Islands Visitor's Bureau, although supporting San Juan Express's request for temporary discontinuance with an eye to resumption of service in 2010, commented on "the positive economic impact of 18,000+ passengers docking at the Port of Friday Harbor and enjoying some free time in Friday Harbor to shop and eat."⁵ Mr. Brian Goodremont, owner of San Juan Outfitters, similarly supports San Juan Express's request for discontinuance in the hope this will facilitate resumption of service during 2010. He stated, however, that the "San Juan Express service from Seattle to Friday Harbor has a positive impact on my business, as well as other businesses within the community." These positive impacts, no matter how measured, will be absent this year. Several more of the letters from members of the public filed in this docket support San Juan Express's request, but do so based on "our understanding this suspension of service will enable San Juan Express to be even stronger in 2010," as Mr. Tom Norwalk of the Seattle Convention and Visitor's Bureau expresses it.

17 It undoubtedly is true that Clipper Navigation's decision to contract away its ability to meet its public service obligation will improve the company's bottom line. Mr. Bryan testified that the decision to lease the Clipper III to C-Port Marine will add approximately \$1,000,000 to the company's bottom line whereas using the boat to meet San Juan Express's obligation under its certificate actually resulted in a financial loss on operations on an accounting basis during 2008, according to the company's unaudited books.

18 Clipper Navigation's business decision, viewed on a short term basis, promotes the company's private interest at the expense of the public interest. Viewed on a longer term basis, the decision may or may not promote the public interest by facilitating a resumption of service during 2010. We frankly have our doubts. The company's decision for the 2009 season, made without first consulting the Commission, is a

⁴ San Juan Express provided evidence that it transported more than 17,000 passengers during the 2008 season for a total of more than 34,000 one-way trips over the route between Seattle and Friday Harbor. Exhibit B-5 (Correspondence dated June 15, 2009 from Mr. Wiley correcting testimony re 2008 ridership).

⁵ Exhibit B-4.

concrete example of its placement of private gain over its public service obligation. While business leaders and owners in the affected communities apparently have been led to believe our granting San Juan Express's request for a temporary discontinuance means they "will be able to count on the service again in 2010," this is far from certain. Clipper Navigation, given the opportunity, might again elect to enter into an arrangement for use of the Clipper III that promises to be more lucrative than making it available for passenger ferry service on the route between Seattle and Friday Harbor. Indeed, the current contract with C-Port Marine may itself be extended into 2010 and Clipper Navigation will have no legal recourse but to fulfill its contractual obligation. Mr. Bryan testified that the company would be inclined to voluntarily relinquish its certificate under such circumstances. Alternatively, the Commission might revoke San Juan Express's certificate for any continuing failure to provide reasonable and adequate service beyond the period of temporary discontinuance we authorize here.⁶

19 Indeed, the grounds upon which the Commission could revoke San Juan Express's certificate are established on the current record. The company is not providing reasonable and adequate service. It is not providing any service at all. We exercise our discretion, however, to authorize the company to retain its certificate while discontinuing service because we are not aware of any potential applicant who might come forward offering to provide service during 2009. In addition, we expect, and share the affected communities' hope, that San Juan Express will resume service during 2010.

20 However, our grant of authority for temporary discontinuance is conditional. It will not continue beyond the earlier of May 21, 2010, or the date upon which an applicant comes forward and demonstrates it is fit, willing and able to provide this service on a continuing basis. In other words, our authorization of a temporary discontinuance does not preclude us from exercising our discretion to revoke San Juan Express's certificate while awarding one to an applicant who is ready to provide reasonable and adequate service.

FINDINGS OF FACT

⁶ See RCW 81.84.060 (9) and WAC 480-51-150 (1)(f) and (h).

21 Having discussed above the evidence received in this proceeding concerning all
material matters, the Commission now makes and enters the following summary of
facts, incorporating by reference pertinent portions of the preceding detailed findings:

22 (1) The Washington Utilities and Transportation Commission is an agency of the
State of Washington, vested by statute with authority to regulate rates, rules,
regulations, practices, and accounts of public service companies, including
commercial ferry companies.

23 (2) San Juan Express is authorized to provide commercial ferry service between
Seattle and Friday Harbor pursuant to its certificate of public convenience and
necessity, permit No. BC-117 and its Tariff No. 42.

24 (3) By contract entered into on March 18, 2009, with C-Port Marine, San Juan
Express's parent corporation, Clipper Navigation, leased the only available
passenger ferry capable of providing reasonable and adequate service
pursuant to permit No. BC 117 and Tariff No. 42, thus ensuring that San Juan
Express would be incapable of providing service to meet its public service
obligation at least during the 2009 season.

25 (4) San Juan Express, in fact, is not providing any passenger ferry service
between Seattle and Friday Harbor at this time and service is not expected to
resume before May 2010, at the soonest..

CONCLUSIONS OF LAW

26 Having discussed above all matters material to this decision, and having stated
detailed findings, conclusions, and the reasons therefore, the Commission now makes
the following summary conclusions of law, incorporating by reference pertinent
portions of the preceding detailed conclusions:

27 (1) The Washington Utilities and Transportation Commission has jurisdiction
over the subject matter of, and parties to, this proceeding.

28 (2) Although San Juan Express is not providing reasonable and adequate service
under permit No. BC-117 and its Tariff 42 due to conditions within its ability
to control, the Commission should exercise its discretion to authorize a

temporary discontinuance of service until the earlier of May 21, 2010, or until an applicant for certificate authority to operate this route meets all criteria for approval and satisfies the Commission that it is fit, ready, willing and able to provide the relevant service.

ORDER

THE COMMISSION ORDERS THAT:

- 29 (1) San Juan Express's request for authority to temporarily discontinue service under permit No. BC-117 and its Tariff 42 is granted until the earlier of May 21, 2010, or the date on which the Commission enters an order granting an applicant certificate authority to operate this route, at which time the Commission will revoke permit No. BC-117 if the Commission determines San Juan Express continues to not provide reasonable and adequate service.
- 30 (2) The Commission retains jurisdiction to effectuate the terms of this Order.

Dated at Olympia, Washington, and effective June 22, 2009.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

JEFFREY D. GOLTZ, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

NOTICE TO PARTIES: This is a Commission Final Order. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 and WAC 480-07-870.