

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition)	
of)	DOCKET NO. TS-940956
SAN JUAN EXPRESS, INC.,)	FOURTH SUPPLEMENTAL ORDER
for a Cease and Desist Order)	STATEMENT AND INITIAL ORDER
.....)	DISMISSING COMPLAINT
.....)	

NATURE OF PROCEEDING: This is a complaint¹ by San Juan Express, Inc., against YachtShip Cruiseline, Inc., and Glacier Bay Lodge, Inc.,² alleging that the respondents are operating without authority in the provision of service that requires authority.

PROCEDURAL STATUS: The Commission determined that it has jurisdiction over the complaint by means of a 1994 amendment to RCW 81.04.110.³ Because the parties requested an expedited review, because the proceeding was filed to comply with consent to referral by the Superior Court, and because the Commission did not anticipate extensive disputes of fact,⁴ the Commission and the parties agreed to resolve the issues via a brief adjudicative proceeding. Among themselves the parties discussed potential witnesses and evidence and the issues presented to the Commission; the brief adjudication was held; the parties presented memoranda; this initial order resolves the issues.

INITIAL ORDER: This order finds that the activities complained of are bona fide excursion services. It concludes that the law does not give the Commission regulatory authority over excursion travel.

¹The matter was filed and continues to be captioned as a petition. The Commission determined that it constituted a complaint rather than a petition, and it is referred to in this order as a complaint.

²Another respondent, Mosquito Fleet Enterprises, Inc., was dismissed from the complaint at the request of the complainant.

³Chapter 37, laws of 1994.

⁴The parties ultimately failed to agree either to the issues or to the facts in the proceeding, and a record was made of the comments of several persons. The relevant issues are simple. The facts necessary for this decision are minimal, are clear, and are not disputed.

APPEARANCES: Attorneys Michael Helgren and John Ebel, Seattle, represent complainant; Attorneys Kenneth Hobbs and Romney R. Brain represent respondents; David W. Wiley, attorney, Bellevue, represents intervenor Harmon; Capt. Mark Goodman, Bellingham, represents intervenor San Juan Island Shuttle Express; Ann Rendahl, assistant attorney general, Olympia, represents the Commission Staff.

MEMORANDUM

In March 1994, San Juan Express, Inc. filed a complaint in King County Superior Court seeking an injunction against Mosquito Fleet Enterprises, Inc., Glacier Bay Lodge, Inc., and YachtShip Cruiseline Inc., d/b/a San Juan Islands Cruises and Tours. On July 12, 1994, the court allowed the parties to refer the matter to the Commission for a determination of "whether any or all of the parties are currently operating in a manner which would require a Certificate of Public Convenience and Necessity under RCW 81.84.010."

On July 15, 1994, San Juan filed with the Commission a petition requesting a cease and desist order against Mosquito Fleet, Glacier Bay, and YachtShip under RCW 81.04.510.⁵ In an order entered July 20, 1994, the Commission determined the petition to be a formal complaint under RCW 81.04.110 and set it for processing in a brief adjudication.

This proceeding is a complaint. It is limited in scope to the matters raised in the complaint, first to determine whether the facts occurred as alleged, and then to determine whether they require authority from the Commission. Some latitude was allowed parties at the hearing to inquire into the histories of operations and the witnesses' mental states as an aid to determining witness credibility and to assure that the full nature of respondents' operations was known.

⁵Complainant asked that the complaint be dismissed against respondent Mosquito Fleet. The Commission granted the request by Order dated October 19, 1994, making clear that its order was procedural only and did not directly or by implication address the merits of the complaint. Glacier Bay and YachtShip will be referred to collectively as "respondents."

A. Relevant facts: Complainant San Juan is a wholly-owned subsidiary of Clipper Navigation, Inc. Clipper operates a ferry service between Seattle and Victoria, B.C., and provides a number of advertised one-day excursions to locations within Washington State. San Juan holds Permit No. BC-117 issued by the Commission for passenger and freight service between: Seattle, Port Ludlow, Port Townsend, Orcas Island, Friday Harbor and Victoria, B.C., restricted to passengers with original departure or final destination points of Seattle or Victoria. No ticket sales for service solely between intermediate points. Stopovers will be permitted as part of properly ticketed service.

San Juan currently sells tickets between Seattle and Friday Harbor, offering one-way passage in either direction. It estimates that 95 percent of its passengers travel to Friday Harbor and return to Seattle on the same day. The remaining five percent of its passengers travel only one way or receive round-trip service (two one-way passages), staying in Friday Harbor for one or more nights. San Juan's vessel departs from Seattle at 7:30 a.m., arrives at Friday Harbor at approximately noon, departs from Friday Harbor at 3:00 p.m., and arrives at Seattle approximately at 6:45 p.m.

YachtShip, Glacier Bay, and a third company, Alaska Tour and Marketing Services, Inc., are related companies under the common ownership and direction of Robert Giersdorf and his family. Neither YachtShip nor Glacier Bay have permits issued by the Commission.

The Commission issued Permit No. SBC-103 to Alaska Tour and Marketing, d/b/a Exploration Cruise Lines, on February 4, 1982. However, that corporation was dissolved in 1986. A new corporation, Alaska Tour and Marketing, was incorporated in the state of Washington in April 1994. This corporation has not been issued a permit by the Commission. On April 6, 1994, YachtShip filed an application to acquire by transfer Permit No. SBC-103, held in the name of Alaska Tour and Marketing. Tariffs pertaining to this transfer were suspended by the Commission at its April 27, 1994 open meeting, and the application is still pending.

During 1993 and 1994, Mr. Giersdorf and his wife leased vessels from third parties and then subleased the vessels to either Glacier Bay (in 1993) or YachtShip (in 1994). From Spring through Fall, 1993, Glacier Bay advertised and provided tours departing from the Shilshole Marina in Seattle, stopping at Friday Harbor and Roche Harbor, and returning to Seattle.

Glacier Bay allowed passengers to make overnight stays in both Roche Harbor and Friday Harbor. Approximately five percent of Glacier Bay's passengers took advantage of the overnight option. During 1993, Glacier Bay transported approximately 12,000 passengers, and received gross receipts of \$732,922, for its tours to the San Juan Islands.

From Spring through Fall, 1994, YachtShip provided almost daily service from Seattle to Roche Harbor and back to Seattle.⁶ Yachtship departed from Shilshole Marina at 7:30 a.m., arrived in Roche Harbor at approximately 12:30 p.m. to 1:00 p.m., departed Roche Harbor at 3:30 p.m., returning to Shilshole Marina at approximately 7:30 p.m. No passenger was authorized to terminate a voyage at Roche Harbor. Respondents take reasonable efforts to assure that no passenger is allowed to board the boat who did not board it originally at the outset of the voyage that day.

YachtShip's advertisements from the 1994 season state that "our captain chooses the day's route by the time of day you are most likely to see Sea Lions hauled out, or Orcas feeding, due to the changing time of tides and currents each day". The excerpts from Yachtship's logs, and Mr. Giersdorf's testimony, indicate that YachtShip vessels generally went north on the east side of Whidbey Island, and then to Roche Harbor either through the Swinomish Channel or through Deception Pass. YachtShip vessels follow a variety of specific routes from Seattle to Roche Harbor and back, depending on the tides and sea life present in the area, but consistently follow the same general route.

The operations of the parties are very similar. They are functionally identical except in one regard: complainant allows one-way and round-trip passage in addition to excursion travel. Respondents did allow one-way and round-trip passage during the 1993 season through Glacier Bay's operations, but not during the 1994 season through Yachtship's operations. Complainant views this difference as inconsequential and of form rather than substance; respondents now view it as the central and distinguishing fact in determining whether they are subject to Commission regulation.

B. Statement of Issues.

1. Do the provisions of chapter 81.84 RCW apply to sightseeing or excursion operations?

⁶YachtShip had maintenance problems with its vessels during the summer of 1994 and did not provide service during short periods.

2. Are the respondents currently operating, or have the respondents operated, a vessel "between fixed termini or over a regular route" within the meaning of RCW 81.84.010 and subject to regulation by the Commission?

3. May the Commission, in this proceeding, order the respondents to cease and desist from operations if those operations are subject to regulation?

C. Does the Commercial Ferry law apply to Excursions?

The commercial ferry law, Chapter 81.84 RCW, appears within Title 81 RCW, regulating transportation of persons or property from point to point within the State. The title recognizes the public interest in regulating the transportation of persons or property from point to point as an element in commerce. Commerce, i.e., point-to-point transportation of goods and property, is essential to the public interest. The chapter acquires its public interest nature from that transportation service.

A statute must be read as a whole, and its language construed in light of the statute's overall objective and purpose. Washburn v. Beatt Equipment Co., 120 Wn. 2d 246, 293, 840 P.2d 860 (1992). While the starting point in statutory interpretation is always the statutory language, phrases must be construed in light of the preface and structure of the statutory "scheme". In re Mitchell, 977 F.2d 1318, 1320 (9th Cir. 1992). When each provision of the Steamboat Companies Act is read in relation to the other provisions, it is clear that the Legislature intended to control the provision of ferry services, but not the provision of sightseeing excursions.

The law reads in part as follows:

No commercial ferry may hereafter operate any vessel or ferry for the public use for hire between fixed termini or over a regular route upon the waters within this state, including the rivers and lakes and Puget Sound, without first applying for and obtaining from the commission a certificate declaring that public convenience and necessity require such operation. (Emphasis added.)

Several terms are essential to understanding the law. First is the term "commercial ferry". The state has an interest in regulating commercial ferry operations due to the public reliance upon those operations for transportation to places that may be impossible or impractical to reach by road, rail, or air. In Puget Sound Nav. Co. v. United States, 107 F.2d 73, 74 (9th

Cir. 1939), cert. denied, 309 U.S. 668 (1940), the court quoted with approval the lower court's language describing a ferry as "a link in the highway system of the country," "a franchise created for the use and convenience of the traveling public," and "a substitute for a bridge where a bridge is impractical." see also, United States v. King County, Washington, 281 Fed. 686 (9th Cir. 1922).⁷

Entry into the ferry business, not the business of providing sightseeing excursions, is what the Legislature intended to regulate in Ch. 81.84 RCW.

Public use; for hire service. The second statutory term to look at is "for the public use for hire". In the public utility sense, "for the public use" means offered as a public conveyance, rather than for charter or contract use. "For hire" means for consideration as opposed to without consideration.

Financial stability. Under the law, the Commission is concerned with the financial stability of a commercial ferry operator, and the operator's financial ability to fund operations for a period of at least twelve months. Financial stability of a sightseeing excursion operation, running seasonal excursions, does not have the same public interest aspect. Failure of a sightseeing business would disappoint only sightseers. The termination of a ferry service, however, could have drastic consequences for people dependent on ferry transportation for transportation to jobs, homes, businesses, necessary services and the State's commerce.

Rate regulation. The Commission has the power to regulate the rates of commercial ferries certified under RCW 81.84.010. Commuters who rely on ferries for transportation may have no realistic alternatives if the rate increases. Sightseers and excursion customers, however, have many other opportunities for amusement if they believe the rates charged by excursion operators to be too high for their patronage. Ferry passengers without viable options may have a right to expect service at rates that does not extract monopoly rents, in exchange for the grant of an operating franchise. There is no identifiable public interest in regulating rates of sightseeing or other excursions.

⁷"A ferry is a continuation of a public highway from one side of a body of water, over which it passes, to the other. It serves as a bridge and is part of the highway system."

Protection from competition. Operators providing a commercial ferry transportation function and who are required to maintain published rates have a right under the commercial ferry law and its public policy to protection from competition by other operators providing similar service. This is granted in exchange for the public's right to rely on service provided regularly, safely and without interruption by a financially stable operator. By contrast, the sightseeing public has no need for the stability provided by regulated entry and rates but instead would benefit from free competition to guide the market as to whether, when, and where to operate excursion service.

Public Safety. The Commission has no safety jurisdiction over commercial ferry operations. One of the public policy factors that could support regulation of bus excursion services, therefore, is absent. The United States Coast Guard regulates commercial vessels operating in Puget Sound and ensures that operators comply with pertinent federal standards. The same Coast Guard standards apply alike to regulated commercial ferry and to unregulated excursion service vessels.

Consumer Protection. No public policy exists to support Commission regulation of excursion operators to assure that the public is treated fairly. Other provisions of law, such as the Washington Consumer Protection Act, exist to govern the standards of businesses generally.

Conclusion. In short, there is no indicator in these provisions of the Commercial Ferries law, nor in the policies underlying the law, that it is intended to govern excursion activities. The purpose of the law is clearly to regulate point-to-point transportation, to assure that passage is available to persons who require it for the transportation of goods or persons from one point to another. Sightseeing and other excursions are not within the purpose of the law. In analyzing the terms of the law, its purpose must be considered.

D. Statutory terms "fixed termini" and "regular route".

Principles of interpretation. In State v. Yakima County Commissioners, 123 Wn.2d 451, 457-58, 869 P.2d 56 (1994), the Washington State Supreme Court sets forth standards governing statutory interpretation:

In construing a statute, the court's paramount duty is to ascertain and give expression to the intent of the Legislature. To determine the intent of the Legislature, the court must look first to the language of the statute. Where statutory language is plain and unambiguous, a statute's meaning must be derived from the wording of the statute itself.

When, as here, the legislature does not define a statutory term, "a term is to be given its plain and ordinary meaning." Bellevue v. International Association of Firefighters, 119 Wn.2d 373, 380, 831 P.2d 738 (1992).

The operative terms in the statute are that the Commission regulates commercial ferries operating vessels between fixed termini or over a regular route. In interpreting this grant of jurisdiction, the Commission looks first to the context and the purpose of the statute -- here, to regulate the movement of goods and passengers from one point to another. In that context, it makes the following observations and rulings.

2. **Fixed termini.** The term "fixed termini" is not defined in either chapter 81.84 RCW or chapter 480-50 WAC. If a statute does not define a term, we look first to dictionary definitions to determine the plain meaning of the term. Webster's Third International Dictionary (1966) defines "terminus",⁸ the singular of "termini," as the end of something; the final point. Webster's New World Dictionary (1970) defines "terminus" as an end; final point; extremity or goal.

Respondent YachtShip's passengers' voyages do not begin or end ("terminate") at any point other than the initial point of departure. Its stops at Roche Harbor are brief and temporary, consistent with the purpose of the excursion.

In the context of the law, a fixed terminus is a regular stopping point at which a passenger or freight begins or concludes a voyage. "Termini" are by etymology and by definition "ends". Intermediate pauses at which no passenger or freight is allowed to begin or end a passage are thus not termini within the meaning of the term. This is the common meaning of the term, and there is no policy reason to conclude otherwise.

⁸Contrary to San Juan's assertion, "termini" is the plural of "terminus" rather than the plural of "terminal." Webster's New World Dictionary at 1468 (1970); The American Heritage Dictionary at 1254 (1985).

Regular route. "Route" is defined as a "line or direction of travel; . . . an established itinerary; a selected or regularly traversed passage, esp. between two distant points." Webster's Third International Dictionary at 1981 (1966). This dictionary also defines "regular" as "steady or uniform in course, practice or occurrence; not subject to unexplained or irrational variation." Id. at 1913. A regular route is, then, a uniform or unvaried course of travel.

Using this definition, the respondents' operations from Seattle to Roche Harbor and back to Seattle appear to follow the same "regular route". The respondents' advertisements show a line on a map indicating the route of travel and describe certain sights which passengers may expect to see along this route. The exhibits and testimony do indicate some variation, as the captain may change the boat's route from day to day depending on the tides and opportunities for viewing sea life. All vessels are subject to tidal variations; the variations for sightseeing purposes appear to be relatively slight.

The term "regular route" is ambiguous within the context of this law. Without reference to its context, defining as regular route the operation of any vessel on a reasonably consistent sailing pattern from day to day, the respondent's vessels appear to fall within the definition, as the assistant attorney general notes.

Applying this definition to respondent's operations, however, is inconsistent with the meaning and purpose of the law. As we have seen in the discussion above, the purpose of the law is to regulate a public utility that is vital to island dwellers and persons who must get from one point to another across a body of water. Sightseeing and excursion vessels are not affected with that public interest. Because the term "regular route" in its ordinary meaning would be inconsistent with the statutory purpose, the term is ambiguous within the context of the law, and we must look for a definition that fits.

In the context of this statute, the term "regular route" has the same meaning that it has in other transportation statutes: an identified route, which the carrier uses on a scheduled or non-scheduled basis, along which the carrier may stop at any point or a number of points for passengers or freight to begin or end a journey.⁹ That definition makes sense for a bus or truck that may follow a known route and may stop at intermediate points along the route. It makes sense also for a

⁹See, WAC 480-12-090, 480-12-095, and 480-130-060. The regular route is important only so the intermediate points being served may be identified.

commercial ferry company that begins a voyage at one point and has "flag" stops to accept or leave passengers or freight at piers along the way. In the context of the law and its origins, it makes no sense to use the term to apply to sightseeing vessels that, although they may travel essentially the same direction at approximately the same time every day, do not accept or leave passengers or freight at any point other than the original point of departure.

The reading urged by complainant would draw the regulatory line around services that the parties appear to agree are obviously outside its intention. The "regular route" language would include occasional excursions and water-only tours. Only by adopting the "regulated transportation" definition of regular route does the statute and its application make sense.

Here, the service provider does follow essentially the same route each voyage. However, it does not accept or leave passengers or freight at any point other than the point of original departure. Thus it does not follow a regular route as the term is properly defined for purposes of the statute.

E. Other Potential Factors in Decision.

Prior Commission Bus Cases. Complainant states that the Commission has declared that bus regulatory statutes, analogous to the commercial ferry statutes, apply to excursion bus operations. It cites Order M.V.C. No. 1369, In Re Emerald City Excursions, Inc., Application D-2432 (1982). It argues that the decision is precedential for application of commercial ferry legislation to excursion boats.

In that case, the Commission was asked to issue a Certificate for passenger sightseeing service beginning and ending in Seattle. The initial order proposed denying the application because the applicant had not "demonstrated the necessity of the proposed service." The Commission reversed, finding need for the service. In reviewing this order, however, it appears that the question was not whether the Commission had jurisdiction over the service, but whether the particular service differed sufficiently from that of protestant Gray Line that it should be granted. The participants all assumed that the activity was jurisdictional; given that assumption, the service was shown appropriate for a grant of authority.

Commission interpretation of a bus statute is not binding precedent for application of a commercial ferry statute.¹⁰ The statutory plan differs substantially. Under RCW 81.70.040 as amended by Laws 1969, Chapter 132, sec. 2, the Commission was required to make a finding of public convenience and necessity before issuing a certificate to a charter party carrier, broadly defined as any bus operator offering service to the public. There is no comparable law for charter boat operators. Under RCW 81.68.040, the Commission was required to make a finding of public convenience and necessity before issuing a certificate to an auto transportation company -- *i.e.*, a bus company offering regular route, between-terminal transportation. Under either law, it appears that the Commission was required to find public convenience and necessity before issuing a certificate; that threshold question appears to have been mandated until L. 1984, c. 166, sec. 5, became effective, authorizing grants of excursion service on a finding that the applicant is fit, willing, and able to perform the service and that the service is consistent with the public interest.

There are other differences, as well. The statutes are different and the regulated transportation is different. The period in which the present decision is made, and the nature of regulation in society, are different from prior settings. The legislature enacted specific laws for bus excursion operators. The Commission provides safety regulation of intrastate bus operations, and in its absence there is no safety regulation. As to commercial ferry and excursion boat operations, however, the U. S. Coast Guard provides exclusive safety regulation. Finally, the cited cases do not analyze policy factors underlying the law, but merely assume jurisdiction. More recent cases arise under specific law. We conclude that the Commission is not bound by prior cases involving bus regulation to rule that waterborne excursion service falls within commercial ferry regulation.

Prior Commission Steamboat cases. Both complainant and respondent cite Order S.B.C. No. 499, In re Gray Line Cruises and Tours, Inc., Application B-77004 (Dec. 1993) in support of their positions. That applicant sought authority to provide "sightseeing cruises" between North Bellingham and South Bellingham, with a flag stop at Boulevard Park. The presiding officer noted clearly in the initial order that the carrier intended to allow passengers to begin or end the voyage at any

¹⁰Even within the same statutory area, a prior administrative decision is not binding precedent in the same sense as an appellate decision. It is a guide as to how the agency will approach a future case, but the agency may change its approach for sound reasons.

stop, and that therefore authority would be required. The "sightseeing" language of the application remained in the initial order. The decision was not contested to the Commission, which approved it without considering this issue, and retained the "sightseeing" language in the grant of authority.

The text of Judge Anderl's initial order in that proceeding stated correctly both the common sense and the law relating to commercial ferry operations: authority is required only for services that involve point-to-point transportation of persons or property, and not for sightseeing operations beginning and ending at a single point. Inclusion of the "sightseeing" term in the final order and certificate was an oversight not based on a reasoned Commission decision that excursion operations are regulated.

Complainant cites Order SBC No. 454, In re Gray Line Water Sightseeing of Seattle, Inc., Application No. B-304, (1989), as precedent for the proposition that the Commission actively regulates sightseeing excursions. There, the applicant sought to extend a Certificate to provide passenger service between the south end of Lake Union and a dock in Kirkland. It proposed that passengers travel in either direction by boat and return to the point of origin by bus.

The order is not precedent for the principle cited, for two principal reasons. First, this application was not contested and neither the applicant nor any other party raised the issue of Commission jurisdiction. The Commission thus did not there consider the issue considered in this proceeding, and it did not rule on that specific issue. In effect, it acknowledged in that order that the applicant appeared to have presented a prima facie case. Second, the travel there, although part of a multimodal excursion, was indeed one-way. Each passenger travelled only one way, from point to point, on either boat or bus. It is thus not clear that the result would be different under the analysis of this order.

Judicial precedent. Complainant cites a Superior Court decision, Belairco v. Gray Line, No. 92-2-00246-5 (Sup. Ct., Whatcom County, 1992), in which the court determined in an assertedly analogous situation that authority is required for any voyage involving temporary disembarkation.

The decision should not govern the result of this proceeding for three principal reasons. First, Superior Court decisions are not published and are not binding except as to the parties in the proceeding. Second, the court is not charged with working regularly with this law, nor with implementing it, may not be so familiar with its policies or its operation, and may

not have the time to explore those aspects of the litigation. Perhaps in recognition of those aspects, the legislature has granted the Commission the responsibility of making the factual determination of whether authority is needed for providing a given transportation service.¹¹ Finally, this proceeding is in essence a referral from the Superior Court to learn how the Commission itself would interpret the law. If the Commission were bound to accept the Superior Court decision, there would be no need for the referral.

The present context of transportation law. There has been a shift in recent years in both state and federal regulation of transportation services. More and more, it is acknowledged that institutional economic regulation is suspect. Economic regulation of intrastate motor carriers has been largely preempted by the federal government. State economic regulation of railroads and buses has been limited. Interstate regulation of trucks, railroads, and buses has been easing for some time. It makes no sense to find policies supporting the regulation of waterborne sightseeing excursions when comparable state provisions under federal law can no longer support the regulation of point-to-point transportation of goods.

Amendment to Steamboat law. The legislature in 1993 modified the steamboat law to clarify that it applies to commercial ferries. Arguments that may have held more credence under the prior generic term "steamboat" have little or none in the context of a statute governing "commercial ferries"; a commercial ferry clearly is in business to transport persons or freight from one point to another.

Parade of Horribles. Complainant has brought forth a parade of horrors, urging that the commission must grant the complaint or face the horrors. The Commission disagrees.¹² This ruling, for example, does not allow a provider to offer "excursion" commuter or overnight service. Daily morning/evening service constitutes ferry service in which the purpose of the transportation is to move passengers from point to point so they can go to work. It is not an excursion service in which the voyage and any activities at the destination are for a single purpose. The Commission has made analogous distinctions in many other instances and is capable of preventing abuse. Although the Commission may continue to clarify issues in individual decisions, rulemaking could be a vehicle for making delineations.

¹¹RCW 81.04.510 reads in part, "Whether or not any person or corporation is conducting business requiring operating authority, or has performed or is performing any act requiring approval of the commission without securing such approval, shall be a question of fact to be determined by the commission."

Combined operations. There appears no barrier preventing a certificated carrier from conducting regulated operations in the same vessel in which it operates unregulated excursion service, subject to proper accounting of costs and revenues. A regulated carrier may choose to offer excursion or loop¹² service at the same rate that it offers regulated round trip travel. It may also adjust the unregulated fares, provided that the regulated fares provide no subsidy to the unregulated operations. There are efficiencies and mutual benefits from combining operations.

Unregulated operations interfering with regulated service. Might the Commission gain jurisdiction over unregulated operations if those operations interfered with the regulated industry? Here, complainant contends that the respondents' operations have siphoned off traffic that would permit it to conduct better regulated operations.

The answer to the question is "no." Any number of unregulated factors may affect the viability of regulated transportation. That does not give the Commission jurisdiction over those factors. It is a benefit to complainant's Seattle-San Juan Island passengers that the vessel's sightseeing operations allow it to travel daily during the summer and weekends spring and fall, when without those operations the direct service might not be financially viable. But the existence of other sightseeing operations, even if they do reduce sightseeing traffic on the regulated vessel, does not give the Commission jurisdiction over them.¹³

Legislative correction. It goes without saying that, whatever the ultimate result of the parties' litigation, the legislature may alter the nature and extent of Commission regulation, as it has regarding the bus excursion business, to accomplish the policies it believes are appropriate.

¹²The term "round trip" was sometimes used to describe the service; that term appears to be incorrect. The service is a one-way excursion loop that does not terminate the initial leg of the voyage for any passenger and cannot in any reasonable sense be termed a round trip.

¹³Complainant indicated that it has adjusted to the competition and expects this year to be profitable. This is not a situation where the existence of competition in unregulated areas destroys the regulated carrier's ability to provide essential services.

E. Permissible remedy.

If respondents' activities were found to violate the law, the question arises as to the remedy permitted. As an administrative agency, the Commission should not consider this issue moot if it finds no violation, because judicial reversal could then make the issue relevant.

The Commission may only enter a cease and desist order following a classification proceeding as set out in RCW 81.04.510. This is not such a proceeding. The 1994 legislation did not empower the Commission to enter such an order upon private complaint. The Commission would thus be limited to the remedies provided in RCW 81.04.110.

F. Evidentiary rulings.

Complainant offered three written statements in lieu of oral presentations. Respondents objected to parts of the statements. The parties agreed to a post-adjudication determination of whether portions of the statements should be excluded.

This proceeding is a brief adjudication, and while some of its aspects did resemble a full adjudication in order to expedite the process, a brief adjudication is still intended to minimize formality. Consistent with that, I believe that it is inappropriate to segment the statements into acceptable or admissible parts and unacceptable or inadmissible parts. On balance, the statements present information that is relevant to the proceeding. They appear to inject no prejudice if thoughtfully and evenly considered. In context of the existing record they do not appear to require additional responsive materials.

Therefore, respondent's objections are denied and the statements will be considered part of the record.

FINDINGS OF FACT

1. On [date] San Juan Express, Inc., filed a petition against Glacier Bay Lodge, Inc., and YachtShip Cruiseline, Inc. The parties are engaged in litigation in Superior Court involving the issue presented to the Commission. The Court granted a limited time to pursue the issue with the Commission. The petition was designed as a vehicle to secure a Commission decision on the issue. The Commission determined that the petition should be treated as a complaint and, with the consent of the parties, set it for brief adjudication to afford the most expedited review possible.

2. Respondent YachtShip Cruiselines at the time this complaint was filed conducted excursion sightseeing service beginning at Shilshole Bay, Seattle, following a consistent route, reaching Roche Harbor on San Juan Island and allowing passengers a brief period on shore, then returning all passengers on the same day and in the same vessel via a consistent route to the point of departure. YachtShip did not knowingly permit any passenger to terminate his or her excursion at any stop other than the point of departure nor to board the vessel at any stop on a continuing excursion unless the passenger boarded the vessel that morning at the point of initial departure.

3. The operations conducted by respondent YachtShip during the 1994 spring/summer/fall season do not require authority from the Commission.

CONCLUSIONS OF LAW

1. The Washington Utilities and Transportation Commission has jurisdiction over this proceeding and the parties thereto under RCW 181.04.110.

2. A brief adjudication is appropriate to resolve the issues in this proceeding with the agreement of the parties under RCW 34.05.482 and WAC 480-09-500.

3. The activities of YachtShip against which San Juan Express has complained constitute sightseeing excursions and are not within the Commission's jurisdiction under chapter RCW 81.84 RCW.

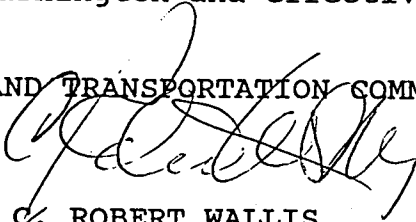
4. The complaint should be dismissed.

ORDER

IT IS ORDERED That the complaint of San Juan Express in this proceeding is dismissed.

DATED at Olympia, Washington and effective this 4th day of November 1994.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION


C. ROBERT WALLIS
Review Judge

Notice to parties: Administrative review of brief adjudications are governed by RCW 34.05.488 and .491 and by WAC 480-09-500(6) through (9). Any party may request review of an initial order in a brief adjudication by stating the request to the Commission within 21 days after service of the initial order. A request for review shall contain an explanation of the party's view of the matter, with a statement of reasons why the initial order is incorrect, and a certificate of service on all parties. Responses may be filed within ten days after service of a request for review.