

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of

AQUA EXPRESS, LLP,

Petitioner,

For Commission Permission to Temporarily
Discontinue Commercial Ferry Service

DOCKET TS-070889

NARRATIVE SUPPORTING
SETTLEMENT AGREEMENT

1 Per WAC 480-07-740(2)(a), this Narrative is filed as documentation supporting the Settlement Agreement (Agreement) filed July 17, 2007. Because all parties of record are signatories, and the Agreement resolves all issues in this docket, the Agreement is a “full settlement,” pursuant to WAC 480-07-730(1). The Agreement is subject to Commission approval. *Agreement at 1, ¶ 1.*

2 In Part IV below (¶¶ 9-28), each Party supplies a statement in support of the Agreement.

I. PARTIES.

3 The Parties to the Agreement are all of the parties of record in this docket: Aqua
Express, LLC (Aqua Express), Kitsap Transit and Commission Staff (Staff) (collectively,
“Parties”; individually, a “Party”). *Agreement at 1-2, ¶ 2 & 4.*

II. INTRODUCTION AND BACKGROUND.

4 Aqua Express holds Certificate BC-129, authorizing passenger-only ferry service
between Kingston and Seattle, Washington. *Agreement at 2, ¶ 5.* WAC 480-51-130
requires Aqua Express to obtain Commission approval before Aqua Express may
discontinue service. In three previous dockets, the Commission has granted permission for
Aqua Express to discontinue service. These prior dockets are described in Paragraphs 8-12
of the Agreement.

5 This docket involves a request by Aqua Express to extend its current service
discontinuance for two years, from June 5, 2006 to June 4, 2008.

III. NATURE OF THE AGREEMENT.

6 The Parties agree that the Commission should conditionally grant Aqua Express’s
request for permission to discontinue service from June 5, 2006, through June 4, 2007, based
on the conditions contained in the Agreement.

7 There are two principal conditions in the settlement. First, “Aqua Express agrees it
will not object to the Commission issuing a competing certificate under RCW 81.84 to any
applicant seeking a certificate to provide commercial ferry service between the points of
Kingston and Seattle, Washington, provided that the application for such a certificate is filed
before the date Aqua Express resumes service or June 4, 2008, whichever comes first.”
Agreement at 5-6, ¶ 17.

8 Second, "Aqua Express will file a progress report describing in detail the progress that has been made toward resuming service. The Company will file such a report during the first week of January 2008." *Agreement at 6, ¶ 18.* The Agreement does not adversely affect the right of Aqua Express to seek further permission for another service discontinuance past June 4, 2008, nor does it affect the Commission's ability to grant or deny relief in such a future filing. *Agreement at 6, ¶ 19.*

IV. PARTIES' STATEMENTS IN SUPPORT OF THE AGREEMENT.

A. Staff's Statement in Support of the Second Settlement Agreement.

9 Staff supports this Agreement because there is sufficient reason for the Commission to grant permission to discontinue service from June 5, 2006, through June 4, 2008, and the conditions contained in the Agreement go a long way toward protecting the public interest.

1. The Commission Should Grant Aqua Express Permission to Discontinue Service from June 5, 2006 Through June 4, 2008.

10 It is Staff's belief that Aqua Express cannot serve the Kingston Seattle route on an economic basis without significant public subsidies that do not currently exist. A vote for a special sales tax designed to afford such additional subsidies failed earlier this year.

Agreement at 4, ¶ 12.

11 Staff understands Kitsap Transit plans to seek state legislation that will better enable the county to provide such subsidies. Given this situation, it is not clear if or when Aqua Express will be able to resume service.

12 RCW 81.84.020 restricts the Commission from granting competing ferry certificates. However, that restriction does not apply if the existing certificate holder "has not objected to the issuance of the certificate as prayed for." In the Agreement, "Aqua Express agrees it will not object to the Commission issuing a competing commercial ferry certificate to

another entity for service between Kingston and Seattle, Washington, provided that an application for such a certificate is filed before the date Aqua Express resumes service or June 4, 2008, whichever comes first.” *Agreement at 5-6, ¶ 16*. This means that if during the period of discontinuance, someone applies for such a certificate, the Commission may grant that certificate after hearing without considering the interests of Aqua Express. This protects the public interest because if there is a public need for Kingston-Seattle service that is not being met by Aqua Express due to the service discontinuance, the Commission can meet that need by granting an additional certificate.

13

However, the Commission should recognize that this condition does not apply to a temporary certificate for commercial ferry service between Kingston and Seattle, because as pertinent here, RCW 81.84.070 prohibits the Commission from issuing a temporary certificate “to operate on a route for which a certificate has been issued ...” In other words, under RCW 81.84.020, Aqua Express’ agreement not to contest an application for ferry authority over the Kingston-Seattle route allows the Commission to issue a *permanent* ferry certificate for such authority to another person, but under RCW 81.84.070, the Commission simply lacks authority to issue a *temporary* ferry certificate over that route to another person, because of the existence of the Aqua Express certificate.

14

The Agreement does not constitute a waiver by Aqua Express of any right it may have to object to an application for ferry service between points other than Kingston and Seattle. By the same token, the Agreement does not grant Aqua Express any additional rights in that regard. *Agreement at 6, ¶ 17*. If, during the discontinuance period an application under RCW 81.84 is filed for service between other points, and Aqua Express objects to it, the Commission would have to address Aqua Express’ right to do so in that

docket. The Agreement does not purport to decide that issue, or even impact the Commission's resolution of that issue. *Id.*

2. Other Issues.

15 Other legal issues presented in this docket are: 1) What standard should the Commission apply when evaluating Aqua Express' request for permission to discontinue service?; and 2) Does the 12 months described in WAC 480-51-130 mean the Commission will grant permission to discontinue service for no more than twelve months in total, or no more than 12 months at a time?

16 On the first issue, Staff notes that WAC 480-51-130 addresses the issue of permission for service discontinuance,¹ but that rule does not set forth a standard for the Commission to apply. Consequently, Staff proposes a general "public interest" standard. As explained earlier in Staff's statement of support for the settlement, Staff believes Aqua Express has met that standard.

17 On the second issue, WAC 480-51-130 does not purport to set a twelve month limit for all service discontinuances for one company. That rule uses the plural "periods" in the phrase "periods [not] exceeding twelve months" and thus it appears to contemplate more than one period of discontinuance of twelve months or less.

B. Aqua Express' Statement in Support of the Second Settlement Agreement.

18 Aqua Express was formed in 2004 after the State Ferry Service announced it was discontinuing passenger-only ferry service. Based upon independent surveys by Washington State Ferries, Kitsap Transit and Victoria Clipper, Aqua Express estimated it would carry 600 passengers daily Monday through Friday between Kingston and Seattle.

¹ RCW 81.84.010 addresses the issue of a certificate holder's delay in initiating service. However, that section does not apply because Aqua Express initiated service January 18, 2005. *Agreement at 2, ¶ 6.*

Aqua Express would be marginally profitable carrying 600 passengers. Service was launched in January 2005. Two factors caused Aqua Express to incur an operating loss of \$901,267.00 between its initial service interval of January 2005 and October 2005. The first was fuel prices increased dramatically during this period. Fuel was a major expense for this operation. The second was the number of passengers carried daily was actually approximately 300, compared to Aqua Express' original estimate of 600. Aqua Express always believed that the value of time saved by riders (2 to 3 hours a day) would offset the lower fares charged by Washington State Ferries. Unfortunately this proved to be a mistaken assumption.

19 Therefore, the conclusion that a public partner would be necessary to continue service was reached relatively quickly. Since that time, Aqua Express has been and continues to work with Kitsap Transit to resume service between Kingston and Seattle. Because of its significant investment in starting this service (approximately \$1.8 million to date), Aqua Express has asked the UTC to continue the underlying service suspension until June 2009 and allow the preservation of the goodwill and property rights of the company through the additional service suspension interval.

20 However, a one year suspension (through June 4, 2008) is requested on a settlement basis. Practically speaking, Kitsap Transit will likely need additional time to approach the legislature to redraw applicable transportation benefit district boundaries and better tie the legislative area to be served with the taxpayers who would be affected. The Agreement acknowledges that Aqua Express will likely ask for another service discontinuance.

21 During the one-year service discontinuance, Aqua Express agrees to file with the Commission a report during the first week of January 2008 formally updating the

Commission on legislative and political initiatives impacting service resumption over the extended suspension period.

C. Kitsap Transit's Statement in Support of the Second Settlement Agreement.

22 In accordance with Chapter 36.57A, Kitsap Transit previously adopted a Passenger-Only Ferry Investment Plan (provided in this docket) for tax-payer approved capital support and operating subsidies of approximately 40% for passenger-only ferry service to be operated by private operators such as Aqua Express.

23 Kitsap Transit believes passenger-only ferry service is not feasible in the absence of public capital and operating subsidies.

24 Kitsap Transit's review of Aqua Express' eight months of service experience is that it absolutely bears out the requirement for a substantial operating subsidy. In fact, Kitsap Transit commends Aqua Express for its efforts to establish an appropriately capitalized service and to sustain operations for several months after it became clear the service was not sustainable.

25 Further support for the premise that an operating subsidy is required comes from the experience of Kitsap Ferry Company (KFC) on the Bremerton-Seattle POF run. In spite of good ridership, KFC was unable to sustain operations without a full provision with capital resources and operating subsidies of approximately 40%.

26 This general arrangement and level of subsidy are both clearly supported by the experience of public-private partnerships or municipal contract operations in the San Francisco Bay Area, particularly the City of Vallejo's arrangement with its contract operator, which is one of our models.

This discussion leads to the reason for the delay. In this public-private partnership process, it is now KT's responsibility to develop a new way to secure sufficient public funding to support the program. The course being pursued by KT, with the help of its partners, is amendments to key state legislation to allow for either the creation for a second Public Transportation Benefit Area Authority (PTBA) of a smaller scale than current PTBAs or a separate district under some other name or set of statutes that would be able to pass an election to secure the necessary public funding. Support from key state legislators has been promised and KT believes that in either the 2008 or 2009 state Legislative Session, such legislation will be enacted, with the prospect of a positive election outcome in early to mid 2009.

KT respects that this is not a customary reason for requesting an extension of the suspension of a franchise, but we respectfully suggest that it is an indication of the more complicated world in which private operators and public agencies now must work together if they are going to succeed in providing service.

DATED: July 17, 2007.

For Commission Staff:

ROBERT M. McKENNA
Attorney General

Donald T. Trotter
Assistant Attorney General

7/17/07
Date signed:

For Aqua Express, LLC:

David W. Wiley
Attorney for Aqua Express, LLC

Date signed:

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