

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In re Application No. B-079273 of

AQUA EXPRESS, LLC

For a Certificate of Public Convenience
and Necessity to Provide Commercial
Ferry Service

DOCKET NO. TS-040650

PETITION ON BEHALF OF
COMMISSION STAFF FOR
INTERLOCUTORY REVIEW OF
ORDER NO. 2

1 This Petition is filed on behalf of Commission Staff. Staff seeks interlocutory review of the Commission’s conclusion that “the reference to ‘public agencies’ in RCW 81.84.020(4) can reasonably be read to include the state ferry system.”¹ *Order Granting in Part Motion to Strike Protest of Inlandboatmen’s Union of the Pacific; Limiting Protest of Inlandboatmen’s Union of the Pacific* (June 7, 2004)(“Order No. 2”) at 11, ¶ 34.

¹ At the June 8, 2004, pre-hearing conference, ALJ Rendahl clarified that in the context of RCW 81.84.020(4), the Commission’s use of the term “the state ferry system” in Order No. 2, should not necessarily be considered to be limited to the ferry system. The statute uses the term “public agency.” Accordingly, whether the statute refers to impacts on the Department of Transportation as a whole, or the Department’s ferry operations alone, is a legal issue to be addressed by the parties. Because of this clarification, Commission Staff does not seek interlocutory review of Order No. 2 to the extent it refers to the impact on the state ferry system, as opposed to “public agencies.”

2 If that legal conclusion is not valid, then the Commission’s ordering ¶ 2
(Order No. 2 at 12, ¶ 29) is also not valid, to the extent it permits IBU to participate
on the issue of the “impact of the proposed service on the state ferry system.”²

3 For the reasons stated below, Staff concludes that as a matter of law, the
Department of Transportation is not a “public agency” for purposes of RCW
81.85.020(4), when passenger-only ferries are involved. Accordingly, Staff requests
the Commission to review and reverse its contrary conclusion, and amend Order
No. 2 accordingly.

4 Copies of the relevant statutes, session laws and other legislative documents
are attached.

I. ARGUMENT

A. **The Commission Should Not Interpret “Public Agencies” in RCW 81.84.020(4) to Include the Department of Transportation, in Passenger-Only Commercial Ferry Applications Before the Commission**

5 The issue here is legal in nature. As Staff noted in its earlier pleading,³ there
are two statutes that purport to require that the Commission consider the impact of
a proposed commercial ferry on the state. First, RCW 81.84.020(4) requires the
Commission to consider “the effect of its decisions on public agencies operating, or
eligible to operate, passenger-only ferry service,” before granting a commercial ferry

² Commission Staff does not seek review of that part of Order No. 2 that permits IBU participation on the issues of the need for the proposed service and the applicant’s financial fitness.

³ See Response on Behalf of Commission Staff to the Motion of Aqua Express to Strike Protest of Inlandboatmen’s Union of the Pacific (May 20, 2004) at 7-8, ¶¶ 19-20.

certificate. Second, RCW 47.06.120(1), the so-called “ten-mile” rule, requires the Commission to consider, *inter alia*, “the overall impact on the state ferry system” before granting a waiver of the ten-mile rule. Absent a waiver, the Commission cannot issue a commercial ferry certificate for a route that violates the ten-mile rule.

6 However, the Legislature exempted “passenger-only ferry service” from the ten-mile rule. RCW 47.60.120(5). Accordingly, the Commission does not consider “the overall impact on the ferry system” under that statute, when passenger-only ferry service is involved. If the Commission uses RCW 81.84.020(4) to consider the impact of the proposed passenger-only ferry service on the ferry system (or the Department of Transportation as a whole), the Commission would be doing what RCW 47.60.120(5) says it need not do.

7 This anomalous application of the two statutes led Staff to argue that “[h]armonizing the two statutes leads to the conclusion that the Commission need not consider the impact of the instant application on the state ferry system.”⁴

8 In its Order No. 2 at page 11, ¶ 34, the Commission did not accept that interpretation, though the Commission observed that its interpretation of RCW 81.84.020(4) was “without further analysis of the legislative history of the recent amendments of the two statutes ...”.

⁴ Response on Behalf of Commission Staff to the Motion of Aqua Express to Strike Protest of Inlandboatmen’s Union of the Pacific (May 20, 2004) at 8, ¶ 20.

9 Commission Staff invites the Commission to consider that legislative history.

10 RCW 81.84.020 and RCW 47.60.120(5) were enacted in the same legislation:

Chapter 373, Laws of 2003. In Section 1 of that Chapter, the Legislature stated its policy for advancing passenger-only ferry service by entities other than the state, by removing entry barriers:

The legislature finds that the Washington state department of transportation should focus on its core ferry mission of moving automobiles on Washington state's marine highways. The legislature finds that current statutes impose barriers to entities other than the state operating passenger-only ferries. *The legislature intends to lift those barriers to allow entities other than the state to provide passenger-only ferry service.* The legislature finds that the provision of this service and the improvement in the mobility of the citizens of Washington state is legally adequate consideration for the use of state facilities in conjunction with the provision of the service, and the legislature finds that allowing the operators of passenger-only ferries to use state facilities on the basis of legally adequate consideration does not evince donative intent on the part of the legislature.

Emphasis supplied.

11 The Legislature also sought to promote passenger ferries not operated by the state by requiring the Department of Transportation to allow access to its ferry dock terminals, docks and pier space at market rates (so long as the Department's operation of car ferries is not thereby limited). *Id. and Chapter 373, Laws of 2003, Sec. 3(2).*

12 In that same Chapter, the Legislature also amended existing statutes to add RCW 81.84.020(4) and RCW 47.60.120(5), discussed previously. *Id., Sec. 5(4) and Sec.*

2(5), respectively. Obviously, these sections should be read as consonant with the foregoing legislative policies underlying the legislation. They should not be read to erect new entry barriers for passenger-only ferries operated by entities other than the state.⁵

13 Indeed, it would be anomalous to read RCW 81.84.020(4) to *impose a new barrier to entry* for passenger-only ferries run by entities other than the state, when the Legislature was stating quite clearly its intent to not only *remove barriers to entry*, but to require the Department of Transportation to permit the use of its terminal and dock facilities to facilitate development of passenger-only ferries by such entities.

B. Interlocutory Review is Justified On this Legal Issue

14 Interlocutory review is appropriate, *inter alia*, “to prevent substantial prejudice to a party that would not be remediable by post-hearing review” or when “some other factor is present that outweighs the costs in time and delay of exercising review.” WAC 480-07-810(2)(b), (c).

15 These conditions apply because post-hearing review of the legal issue presented here is unavailable because Order No. 2 is probably “the law of the case,” unless it is changed. In addition, the unique “other factor” present here is that a key issue of law is presented.

⁵ The bill reports, committee reports and bill digests underlying Chapter 373, Laws of 2003, likewise indicate intent not to create any additional barriers to entry. The Final Bill Report (July 27, 2003); House Bill Report; and Senate Bill Report (April 7, 2003) are attached. (The bill was Engrossed house Bill 1388).

16 Given the applicant's need to resolve this case expeditiously, Staff does not
propose a delay in the established hearing schedule while the Commission resolves
this Petition. One consequence is that evidence regarding the impact on the
Department of Transportation will come in at the hearings next week (Staff will
request a continuing objection to preserve its legal position).

17 What is important for all concerned is that this legal issue be resolved
correctly.

II. CONCLUSIONS

18 For the reasons stated above, the Commission should grant interlocutory
review of its Order No. 2 in this docket. The Commission should conclude that
RCW 81.84.020(4) does not require the Commission to consider the impacts of the
proposed passenger ferry service on the Department of Transportation. Ordering
Paragraph No. 2 should also be amended to exclude reference to "the impact of the
proposed service on the state ferry system."

DATED this ___ day of June, 2004.

CHRISTINE O. GREGOIRE
Attorney General

DONALD T. TROTTER
Senior Counsel
Counsel for Washington Utilities and
Transportation Commission Staff