

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

SETTLEMENT AGREEMENT

**I. NATURE OF THE AGREEMENT.**

1        This Settlement Agreement (Agreement) is entered into between Petitioner Aqua Express, LLP (Aqua Express or the Company), Intervenor Kitsap Transit, and the Staff of the Washington Utilities and Transportation Commission (Staff), for the purpose of resolving the issues in this docket. This is an agreement by all parties on all issues, so it is a “full settlement” as that term is defined in WAC 480-07-730(1). This Agreement is expressly subject to approval by the Washington Utilities and Transportation Commission (the Commission), and it is not effective before such approval.

2        As described in more detail elsewhere in this Agreement, the Parties agree that the Commission should grant Aqua Express permission to discontinue service through June 4, 2008, subject to the following conditions: 1) 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 (see Part VI.B. below); and 2) Aqua Express agrees to file with the Commission a report the first week of January 2008, describing the progress the Company has made toward resuming service (see Part VI.C. below). This paragraph is intended to supply an overview of the key elements of the Agreement. It is not intended to limit the scope of the Agreement. To the extent there is any ambiguity created by this paragraph, the language in other Parts of this Agreement will control.

## **II. EFFECTIVE DATE.**

3           The effective date of the Agreement is the date of the Commission's order approving the Agreement.

## **III. PARTIES.**

4           The parties to this Agreement are all of the parties of record in this docket: Aqua Express, Kitsap Transit and Staff (collectively, "Parties"; individually, a "Party"). No other persons have sought party status in this case.

## **IV. BACKGROUND.**

5           Aqua Express is a "commercial ferry" as that term is defined in RCW 81.04.010. Aqua Express holds Certificate BC-129 issued by the Commission under RCW 81.84. Certificate BC-129 authorizes Aqua Express to provide passenger-only ferry service between Kingston and Seattle, Washington.

6           The Commission issued Certificate BC-129 in July 2004.<sup>1</sup> Aqua Express initiated service under that certificate on January 18, 2005, and continued to operate through September 30, 2005.

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<sup>1</sup> *In re Aqua Express, LLC*, Docket TS-040650, Order 05, Final Order Granting Application for Public Convenience and Necessity (July 9, 2004).

7 To date, the Commission has granted the Company permission to discontinue service  
for a period totaling 20 months, from October 1, 2005, to June 4, 2007, as described below:

8 **Docket TS-051318.** On September 1, 2005, Aqua Express filed its first request for  
Commission permission to suspend ferry service for nine months: from October 1, 2005, to  
June 30, 2006. The Company stated that this temporary discontinuance was necessary  
because of unanticipated low ridership, fuel prices, and uncertainty due to a pending  
legislative study on passenger-only ferry service. The Company stated that a temporary  
discontinuance would provide time to allow fuel prices to stabilize, and allow the Company  
to consider ferry-rider habits and the impacts of the legislative study.<sup>2</sup> The Commission  
granted the request.

9 **Docket TS-060903.** On June 1, 2006, Aqua Express filed a request for permission to  
discontinue service for six more months: from July 1, 2006, to December 31, 2006. The  
Company justified its request by stating it was working with Kitsap Transit (the regional  
Public Transportation Benefit Authority) to resume ferry service, and the Company needed  
more time to develop a viable business model.<sup>3</sup> The Commission granted the Company's  
request.

10 **Docket TS-061812.** On December 7, 2006, Aqua Express filed its third request for  
discontinuance. The Company requested permission to discontinue service for another six  
months: from January 1, 2006, through July 1, 2007. The Company stated it was finalizing  
its agreement with Kitsap Transit to resume passenger-only ferry service.<sup>4</sup>

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<sup>2</sup> *Re Aqua Express*, Docket TS-051318, Order 01, Order Granting Temporary Discontinuance of Service at ¶¶ 4-5 (September 28, 2005).

<sup>3</sup> *Re Aqua Express*, Docket TS-060903, Order 01, Order Granting Temporary Discontinuance of Service at ¶ 4 (June 28, 2006).

<sup>4</sup> *Re Aqua Express*, Docket TS-061812, Order 01, Order Granting Temporary Discontinuance of Service at ¶ 5 (December 27, 2006).

11 Kingston Express Association (Kingston Express), a non-profit association, had previously contacted Staff and expressed interest in filing an application for authority to provide passenger-only ferry service for the same route. Staff was concerned that extending Aqua Express's discontinuance of service through July 1, 2007, might create unintended barriers to any new certificate applications. Consequently, the Company amended its petition to end the service discontinuance on June 4, 2007.<sup>5</sup> The Commission granted the amended petition.

12 In order to resume service by June 4, 2007, a critical requirement cited by Aqua Express in Docket TS-061812 was voter approval of increased sales and use taxes to fund passenger-only ferry service in a special election to be held on February 6, 2007.<sup>6</sup> Voters did not approve the proposed taxes.

13 **Docket TS-070889.** Aqua Express initiated the instant docket on May 7, 2007, the date when the Commission received a letter from Aqua Express requesting Commission permission to discontinue service for two years: from June 4, 2007 to June 4, 2009. The Commission considered the matter at its May 23, 2007, open public meeting and decided to set the matter for hearing.<sup>7</sup> The Commission convened a prehearing conference on June 14, 2007. On June 28, 2007, Aqua Express sent to the Commission a petition in this docket requesting an exception to the twelve month limit for service discontinuances in WAC 480-51-130.

## V. DOCUMENTS.

14 To the extent necessary for the Commission's decision in this matter, the Parties stipulate that the Commission may take official notice of the documents cited in this

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<sup>5</sup> Staff memo to the Commission (December 27, 2006).

<sup>6</sup> *Id.*

Agreement. In addition, the Parties provide for the Commission's consideration a document entitled "Kitsap transit – Passenger-Only Ferry Investment Plan" (November 2006, with December update), prepared by Kitsap Transit.

## **VI. AGREEMENT.**

15           The Parties have reached agreement on the issues raised in this docket and present their agreement for adoption by the Commission. The Parties voluntarily enter this Agreement without hearing or adjudication of any issues of fact or law to resolve the matters in dispute between them in what each Party believes is an appropriate manner, in light of the circumstances and the risks associated with litigation.

### **A. Commission Decision Requested by the Parties.**

16           The Parties agree the Commission should grant the request of Aqua Express for permission to discontinue service through June 4, 2008, based on the conditions stated in this Agreement.

### **B. Conditions Regarding Competitive Applications for Commercial Ferry Service.**

17           RCW 81.84.020 permits the Commission to issue a competing commercial ferry certificate, if among other reasons, the existing certificate holder "has not objected to the issuance of the certificate as prayed for." Aqua Express agrees it will not object to the Commission issuing a certificate under RCW 81.84 to any applicant seeking a certificate to provide commercial ferry service (which includes passenger only ferry service) between points in 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. This Agreement has no effect on whatever rights Aqua Express may have to contest any other application under RCW 81.84, and it has no effect on whatever rights any

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<sup>7</sup> *Re Aqua Express*, Docket TS-070889, Order 01, Order Setting Matter for Hearing at ¶5 (December 27, 2006).

other entity may have to challenge Aqua Express' right to contest any other application under RCW 81.84.

**C. Conditions Regarding a Progress Report.**

18 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. The Company agrees to respond to reasonable requests from any other Party to supplement any such report. If there is a dispute about whether Aqua Express needs to supplement any such report, the dispute will be referred to the Commission for resolution.

**D. Future Requests by Aqua Express for Permission to Discontinue Service.**

19 The Parties understand that Aqua Express initially requested permission to discontinue service for two years, through July 4, 2009. This Agreement, in compromise, calls for the Commission to approve a one-year service discontinuance: through June 4, 2008. The Parties understand it is likely Aqua Express will file a further request for permission to discontinue service in the future, because it is Aqua Express' position that legislative action is a prerequisite for its passenger-only ferry service to become economically viable and it is anticipated that will require more than one future legislative session. Nothing in this Agreement adversely affects the right of Aqua Express to seek Commission permission in the future for service discontinuance, or the Commission's ability to grant or deny relief in such a future filing.

## **VII. GENERAL CONDITIONS.**

### **A. Nature of the Agreement.**

20           The Parties agree that this Agreement is an appropriate resolution of all contested issues between them in this docket, given the unique facts and circumstances surrounding this matter and the risks of litigation. The Parties understand that this Agreement is subject to Commission approval and it is not effective unless and until it is approved by the Commission.

21           The Parties recognize that this Agreement represents a compromise of each Party's positions. As such, conduct, statements, and documents disclosed during negotiations of this Agreement shall not be admissible as evidence in this or any other proceeding, except in any proceeding to enforce the terms of this Agreement or any Commission Order fully adopting those terms. This Agreement shall not be construed against any Party because it was a drafter of this Agreement.

22           Each Party agrees to provide all other Parties the right to review in advance of publication any and all announcements or news releases that any other Party intends to make about the Agreement (with the right of review to include a reasonable opportunity to request changes to the text of such announcements). Each Party also agrees to include in any news release or announcement a statement to the effect that the Commission Staff's recommendation to approve the Agreement is not binding on the Commission itself.

### **B. Integrated Terms of Settlement.**

23           The Parties have negotiated this Agreement as an integrated document to be filed with the Commission only upon execution. Once the Agreement is executed, the Parties

agree to support the Agreement in its entirety. The Agreement supersedes any prior oral or written agreements on issues addressed herein, if any.

**C. Manner of Execution.**

24        This Agreement is considered executed when all Parties sign the Agreement. A designated and authorized representative may sign the Agreement on a Party's behalf. The Parties may execute this Agreement in counterparts. Parties may also authorize a party to sign on its behalf. If the Agreement is executed in counterparts, all counterparts shall constitute one agreement. An Agreement signed in counterpart and sent by facsimile or email is as effective as an original document. A faxed or emailed signature page containing the signature of a Party is acceptable as an original signature page signed by that Party. Each Party shall indicate the date of its signature on the Agreement. The date of execution of the Agreement will be the latest date indicated on the signatures.

**D. Procedure.**

25        Once this Agreement is executed, the Parties agree to cooperate in promptly filing this Agreement with the Commission for approval. The Parties agree to support approval of this Agreement in proceedings before the Commission. However, if there is a Commission order, rule or policy statement issued after the date this Agreement is executed but before it is approved, and that order, rule or policy statement, changes the posture of the Agreement in any Party's view, comments may be made to the Commission as to how the Agreement should be viewed in light of that order, rule or policy statement. The Parties have agreed to request from the Commission a suspension of the existing remaining procedural schedule in these dockets. The Parties understand that the Commission will decide the appropriate procedures for presentation and consideration of the Agreement.



In the event the Commission rejects all or any portion of this Agreement, each Party reserves the right to withdraw from this Agreement by written notice to the other Parties and the Commission. Written notice must be served within 10 business days of the date of the Commission order rejecting all or any portion of this Agreement. In such event, no Party will be bound or prejudiced by the terms of this Agreement. The Parties will jointly request a prehearing conference for purposes of establishing a procedural schedule to complete the case.

**D. No Precedent.**

No Party shall be deemed to have agreed that this Agreement is precedent for resolving any issues in any other existing or future proceeding, other than a proceeding for enforcement of this Agreement.

For Commission Staff:

ROBERT M. McKENNA  
Attorney General

Donald T. Trotter  
Assistant Attorney General

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Date signed:

For Aqua Express, LLC:

David W. Wiley  
Attorney for Aqua Express, LLC

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Date signed:

For Kitsap Transit:

Ronald C. Templeton  
Attorney for Kitsap Transit

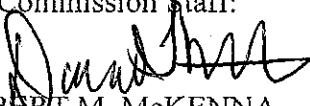
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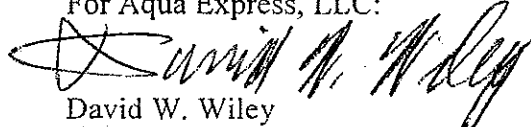
For Commission Staff:

  
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

7-17-07  
Date signed:

For Kitsap Transit:

Ronald C. Templeton  
Attorney for Kitsap Transit

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For Commission Staff:

For Aqua Express, LLC:

ROBERT M. McKENNA  
Attorney General

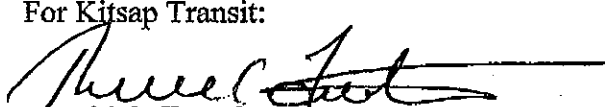
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Attorney for Aqua Express, LLC

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Ronald C. Templeton  
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