SERVICE DATE

DEC 20 1994

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

NATURE OF PROCEEDING: This is a complaint[1] asking the Commission to determine that excursion services offered by respondents require commercial ferry authority from the Commission under chapter 81.84 RCW. It has been heard as a brief adjudication.

INITIAL ORDER: Review Judge C. Robert Wallis entered an initial order on brief adjudication on November 4, 1994, proposing that the sightseeing excursion services provided by the respondents be found not to require authority from the Commission, and that the complaint be dismissed.

OBJECTIONS: Complainant San Juan Express, Inc., and Intervenors Belairco, Inc., San Juan Island Shuttle Express, Inc., state objections to the Initial Order.[2] Petitioners contend that the initial order erred in finding that respondent's operations are exempt from regulation. Respondents YachtsShip Cruiselines, Inc., and Glacier Bay Lodge, Inc., and the Commission Staff, answer the petitions in support of the initial order.

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

---

[1]Filed as a petition for a cease and desist order, the Commission treated it as a complaint.

[2]Intervenor Harmon, Arrow Launch Service, also filed a pleading supporting the complainant's objections. Collectively they will be termed "objectors."

MEMORANDUM

I. Legal and factual background

In March 1994, San Juan Express, Inc. (San Juan or complainant) 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.[3] In an order entered July 20, 1994, the Commission determined the petition to be a formal complaint under RCW 81.04.110.

This is a complaint. In it, a certificated commercial ferry company challenges two companies under common ownership, contending that their operations require authority from the Commission. Following the brief adjudication,[4] the presiding officer entered an initial order finding that the respondents' operations did not require authority. Complainants and intervenors state objections to the initial order, contending that it erred and that respondents' services do require authority. Respondents and the Commission Staff answer, supporting the initial order.[5]

---

[3]Complainant 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."

[4]Because the parties requested an expedited review as 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, the Commission and the parties agreed to resolve the issues via a brief adjudicative proceeding.

[5]Commission Staff has altered its position on review, and now supports the result of the initial order.

There are no challenges to the underlying facts, which the initial order characterizes as "minimal . . . clear, and . . . not disputed." During the 1994 spring/summer/fall tourist season, respondent YachtShip offered excursion services to the public. Its vessel left Seattle at about 7:30 a.m., reaching San Juan Island and docking there, allowing passengers about two hours ashore, and returning to Seattle the same evening. The excursions follow the same general route each day, its timing and parameters dictated in part by the distance to be covered and sights to be seen. It does not knowingly permit passengers to leave the cruise at San Juan Island or to board its vessel at San Juan Island unless the passenger boarded at Seattle the same day.

Complainant offers a similar service, appearing to be operationally indistinguishable from respondent's. Operating under regulation, it sells one way and round trip tickets instead of excursion tickets, and allows passengers to board or leave the voyage at its stop, consistent with tickets they have purchased. About five per cent of complainant's passengers do not take a same-day Seattle/San Juan Island round-trip passage. Complainant contends that its provision of point-to-point transportation is no different from respondent's excursion service.

The issue is whether the law requires the issuance of certificates for sightseeing and excursion operations, or only for companies providing point-to-point transportation services.

II. Preliminary observations

The Legislature has given the Commission the statutory authority to determine as a finding of fact whether any transportation operations require authority from the Commission.[6] The law thus grants the Commission discretion in such decisions.

Objectors contend that the precedent of Commission and court decisions require us to reverse the initial order. We have found no case in which the Commission has rejected respondents' contention -- that the commercial ferry law does not apply to sightseeing excursions -- or in which the Commission has adopted after discussion the objectors' position -- that the law requires the Commission to regulate such excursions. Similarly, we find

---

[6]RCW 81.04.510 states, in relevant 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.

no appellate judicial decisions in which the issue is decided. We are therefore deciding a matter of first impression. We will consider thoughtfully and in light of our regulatory expertise, all of the facts and the Commission's and the courts' actions in other settings. We will reach an independent decision, as we are charged by law with doing.

III. Pertinent statutes

The pattern of the definitions is somewhat arcane. The term "commercial ferry" is first broadly defined. Then activities which require authority are drawn more narrowly than the definition. A commercial ferry is any person or company owning or operating a "vessel" on waters of the state;[7] a "vessel" is a boat or ship (with some exceptions) operated for hire, for the public use, in the transportation of persons or property.[8]

Regulation is imposed on commercial ferry services by RCW 81.84.010. That statute provides,

---

[7]A "commercial ferry" is defined in RCW 81.04.010 as

> [E]very corporation, company, association, joint stock association, partnership, and person, their lessees, trustees, or receivers, appointed by any court whatsoever, owning, controlling, leasing, operating, or managing any vessel over and upon the waters of this state.

[8]A vessel is defined (RCW 81.04.010) to include:

> Every species of watercraft, by whatsoever power operated, <u>for public use</u> in the <u>conveyance of persons or property for hire</u> over and upon the waters within this state, excepting all towboats, tugs, scows, barges, and lighters, and excepting rowboats and sailing boats under twenty gross tons burden, open steam launches of five tons gross and under, and vessels under five tons gross propelled by gas, fluid, naphtha, or electric motors. [Emphasis added.]

> 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.]

None of the underlined terms is defined in the statute.

In addition, WAC 480-50-020(2) provides:

> No "passenger and ferry steamboat company" shall hereafter operate, establish, or begin operation of a line or route or any extension of an existing line or route without first having obtained from the Commission a certificate declaring that public convenience and necessity require, or will require, the establishment and operation of such line or route.

The initial order found that the terms in the statute should be defined with regard to their context; objectors contend that the terms should be defined, without regard to the context, by dictionary definitions of the words. Objectors' interpretation would have us regulate waterborne excursion and sightseeing traffic; the initial order's interpretation would not. We accept the result of the initial order, and believe that its interpretation of the law is accurate.

IV. Specific contentions

The Initial Order relies on the rule of statutory construction that a statute must be read as a whole, and that language in a statute must be interpreted in light of the entire statutory scheme. See Washburn v. Beatt Equipment Co., 120 Wn. 2d 246, 293, 840 P.2d 860 (1992); In re Mitchell, 977 F.2d 1318, 1320 (9th Cir. 1992). The Complainant argues that in interpreting a statute, one must first look to the language of the statute. See State v. Yakima County Commissioners, 123 Wn. 2d 451, 457-58, 869 P.2d 56 (1994). However, where a literal interpretation of a statute leads to a strained or absurd result, a statute should be construed to effect its purpose. State v. McDougal, 120 Wn. 2d 334, 350, 841 P.2d 1232 (1992).

Complainant would not take the second step. We believe that it is essential to study the language in its context to determine its meaning.

We agree with the initial order that "regular route", in context, means a route along which a commercial ferry stops at one or more places to pick up or leave passengers or freight. That is the interpretation that WAC 480-50-060[9] assumes in requiring carriers with regular routes to list the points at which it will stop.

We disagree with the initial order, however, in its definition of "terminus" as a point at which a commercial ferry allows a passenger or freight to begin or leave a voyage; terminus, in our view, means either end point of a voyage, where passengers or freight terminate passage. That also is illustrated in WAC 480-50-060.

Complainant contends that respondent is offering a "same-day round-trip," and that making distinctions between that service and its own one-way and round-trip service elevate form over substance. We disagree with the concept that respondents offer a round-trip at all. A round-trip is a combination of two one-way passages. Respondent's service is a single sightseeing excursion passage from its point of origin to its point of origin, that happens to stop temporarily at a point along the way.

Complainant contends that the Commission will be unable to distinguish between passengers who sightsee and those who use the two-hour stop to conduct business meetings. The answer is that the classification of the voyage is determined by the characteristics and purpose of the voyage, not the subjective intention of any single passenger.

Complainant contends that "commuter excursions" will deprive existing carriers, including the Washington State Ferries, of business. We disagree; a commuter voyage beginning at Bremerton terminates at Seattle and a new, reverse voyage

---

[9]The regulation requires time schedules to bear the following information:

(2) * * * * *

3rd. The termini or points between which the time schedule applies, briefly stated.

4th. A definite statement of the route or routes traversed including the names and locations of all docks and landings used. [Emphasis added.]

* * * *

(4) Time schedules must show:

1st. The time of **Arrival** and **Departure** at and from all **Termini.**

2nd. The time of **Departure** from intermediate points between **Termini.**

would return the passengers. Unlike a sightseeing cruise in which each aspect furthers a single purpose, i.e., sightseeing, the purpose of the commuter service is point-to-point round-trip transportation, and the vessel terminates its voyage at each end.

Complainant contends that the statute declares transportation for hire to be the regulated service, irrespective of the method of payment or purpose of the trip or the length of stay. We agree entirely. It does not matter whether a passenger pays via cash or credit card, whether the trip is for business or pleasure, or -- within limits of the passage -- whether the passenger stays ashore a long time or a short time. What complainant does not say, but what is important to determining whether a service is or is not subject to regulation, is whether the service travels between fixed termini or along a regular route.

Complainant contends that the Commission drew a distinction in the "Gray Line" case, App. B-77004 of Gray Line Cruises and Tours, Inc., Order S.B.C. No..499, 1993 Wash. UTC Lexis 124 (December 1993). It argues that passenger debarkation is the test for regulable service: if a passenger leaves the vessel, the trip is subject to regulation. We disagree. In Gray Line, the applied test for regulation was clearly whether a passenger completed a journey, not merely whether it left the boat even momentarily. The initial order, adopted there by the Commission, read in part as follows:

> Applicant wants to offer "one way" passage also, allowing passengers to travel between the north and south terminals in one direction only. This one-way travel requires Commission approval.

Order S. B. C. No. 497, In Re Application of Gray Line Cruises & Tours, d/b/a/ Bellingham Bay Tours, at 1 (November 1993) (emphasis added) This order is not inconsistent with that case or the holding of its order.

Moreover, we can find no rational basis for using temporary debarkation from the vessel as the test for regulation. A stop does not make a terminal, and does not make a route any less "regular" under the statute.

Complainant cites several auto transportation cases in support of its view. The Commission disagrees that those cases are pertinent. Although the statutes are similar, an interpretation of one, in one context, does not require the same interpretation of the other, in another context. We find no similar line of cases regarding the regulation of water service. In none of the bus cases was there a studied consideration of whether the pertinent legislation governed charter services -- only the assumption that it did -- and the legislature did change the law to lessen that assumed level of regulation.

Complainant argues that the legislative change to provide specifically for charter bus service demonstrates that the legislature wanted ferry statutes to govern excursion service. We disagree with the conclusion. The action occurred at a time when there was no parallel regulation of waterborne excursion service, and we find more persuasive the explanation for legislative inaction that the legislature determined the auto transportation statute to be broken and in need of fixing, but the boat statute not to be broken and thus needful of no repair.

Complainant contends that the Commission's action in this case is an improper exercise of its rulemaking authority. We disagree. The decision applies only to the respondent. It arises from a dispute between private parties in which the Commission is required to adjudicate the issue. It would be appropriate, we believe, to explore a possible rulemaking with affected stakeholders in light of the APA's encouragement in RCW 34.05.220(4) to make rules expressing principles derived from individual adjudications.

Complainant contends that the initial order ignores the statutory definition of commercial ferry and vessel, and that it particularly ignores the statute when it looks to a definition of ferry. We disagree. The order cites the pertinent statutory definitions and carefully traces its rationale for interpreting them. Its citation of the definition of "ferry" was not to substitute a new definition for commercial ferry, but instead to assist in understanding the 1993 legislative change in terminology from "steamboat" to "commercial ferry".

Complainant argues that the Commission, the courts, and the Legislature have all confirmed that RCW 81.84.010 and its certification requirements should apply when — as here — a vessel operator permits passengers to disembark, no matter how briefly. We disagree. No case that we have been able to find requires that result. Nor is it the natural extension of any principle that is found in the cited cases. Instead, the cases are silent. The initial order does not rewrite the statute, but gives it a meaning that is sensible.

Intervenors Belairco and San Juan Shuttle Express, Inc., argue that the matter is determined by Horluck Transportation Co. v. Eckright, 56 Wn.2d 218, 352 P.2d 205 (1960). There, the court found that a bus operated by its passengers to take them to and from work was required to secure auto transportation authority. We find the decision inapposite. A commuter service provides two, one-way segments for its passengers and the purpose of the passage is the point-to-point transportation they need to get to work. That is unlike a sightseeing excursion, where no point-to-point transportation is provided, the transportation is incidental to the trip's purpose, and a brief stop furthers the purpose.

Intervenors contend that round-trip tickets, as opposed to one-way, are identical with a sightseeing excursion ticket; that a stop makes a terminal; and that the initial order constitutes a rulemaking. As noted above, we disagree.

Intervenors contend that the ruling would constitute a taking of their property rights. Again we disagree; the result of this order will not permit unregulated companies to perform regulated services. It does not alter the law relating to the issue in question, but establishes upon thoughtful consideration a Commission ruling as a matter of first impression that is consistent with prior practice.

V. Cease and Desist Order

The Initial Order stated: "The Commission may only enter a cease and desist order following a classification proceeding as set out in RCW 81.04.510." The complainant contends that the ruling is incorrect and that the Commission has the authority to enter a cease and desist order against the respondent in this proceeding. We again disagree with complainant's contention.

First, the Complainant argues that the Commission could have proceeded under RCW 81.04.510. The Complainant's argument disregards the rules of statutory construction upon which the Complainant relies in its objections. The statute, RCW 81.04.510, allows only the Commission, not a private party, to institute an action, or "special proceeding," to classify the operations of a person or corporation. The Commission may enter a cease and desist order under that provision only when the Commission itself has initiated the proceeding. The Complainant initiated this proceeding, not the Commission. The Commission properly set the matter for hearing as a complaint under RCW 81.04.110, not as a classification proceeding under RCW 81.04.510.

Second, the Complainant argues that a form complaint which appears in the Annotated Revised Code of Washington following the text of RCW 81.04.110 infers that the Commission may enter cease and desist orders in complaint proceedings. However, the Complainant concedes that "there is no specific reference to cease and desist powers in that statute." The form appears to be included for illustrative purposes by the publishers, and cannot be seen to represent the intent of the Legislature in drafting the statute.

RCW 81.04.110 does not authorize the Commission to enter a cease and desist order against any party. When a statute provides a specific remedy, but does not include a different remedy such as the authority to enter cease and desist orders, the alternate remedy is excluded. General Tel. Co. v. Util. and Transp. Commission, 104 Wn.2d 460, 470, 706 P.2d 625 (1985). Thus, the Commission lacks the authority to enter a cease and desist order in this proceeding. The conclusion in the Initial Order is correct and should not be modified.

Complainant's objections are denied. The Commission affirms the result of the initial order and adopts it, with the modification and supplementation in this order.

FINDINGS OF FACT

1. On July 15, 1994, 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 81.84 RCW.

4. The initial order should be affirmed and adopted herein as a part of this order.

5. The complaint should be dismissed.

ORDER

THE COMMISSION ORDERS That the Initial Order is affirmed and adopted as modified herein for purposes of this proceeding. In so doing,

THE COMMISSION FURTHER ORDERS That the complaint of San Juan Express, Inc. is dismissed.

DATED at Olympia, Washington and effective this 19th day of December 1994.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

Sharon L. Nelson
SHARON L. NELSON, Chairman

Richard Hemstad
RICHARD HEMSTAD, Commissioner

Wm. R. Gillis
WILLIAM R. GILLIS, Commissioner

NOTICE TO PARTIES:

This is a final order of the Commission. 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 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).