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WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

PREHEARING BRIEF ON
BEHALF OF COMMISSION
STAFF

I. OVERVIEW

1 In this brief, Commission Staff explains the proof required of the applicant, Aqua Express, LLC (Aqua Express). Commission Staff also explains it intends to present a witness on the issue whether Aqua Express has satisfied the financial fitness criteria of RCW 81.84.020(2). However, Staff cannot provide its analysis of that issue now, because Staff has not yet seen Aqua Express' direct case.

II. COMMISSION AUTHORITY

2 Aqua Express has filed an application for a commercial ferry certificate authorizing passenger-only ferry service "between Kingston and Seattle." See *Application of Aqua Express, Item 5*. Because Aqua Express proposes to offer a for-hire

passenger-only ferry service between fixed termini, a Commission-issued certificate is a pre-condition of providing commercial ferry service. RCW 81.84.010.

3 The Commission regulates commercial ferry services under Chapter 81.84 RCW. The Commission has broad authority to issue, refuse to issue, or place conditions on a commercial ferry certificate:

... The commission shall have power after hearing, to issue the certificate as prayed for, or to refuse to issue it, or to issue it for the partial exercise only of the privilege sought, and may attach to the exercise of the rights granted by said certificate such terms and conditions as in its judgment the public convenience and necessity may require ...

*RCW 81.84.020(1).*¹

¹ RCW 81.84.020(1) also states: "...but the commission shall not have power to grant a certificate to operate between districts and/or into any territory prohibited by RCW 47.60.120 or already served by an existing certificate holder, unless such existing certificate holder has failed or refused to furnish reasonable and adequate service or has failed to provide the service described in its certificate or tariffs after the time period allowed to initiate service has elapsed ..."

This language does not apply in this case because there is no existing certificate holder, and the territory at issue is not prohibited by RCW 47.60.120, for two reasons. First, that section exempts passenger-only ferries. RCW 47.60.120(5). Second, the proposed crossing does not violate the "ten-mile" rule in RCW 47.60.120 in any event.

Application of the ten-mile rule involves comparing the termini of the proposed crossing with the termini of each existing comparable state ferry crossing. Each crossing is evaluated separately. Only if each set of comparable termini is within ten miles of each other does the general prohibition in RCW 47.60.120(1) apply. AGO 1990 No. 16 (November 27, 1990). There are two state ferry crossings to consider: Winslow to Seattle and Kingston to Edmonds. The proposed ferry crossing is Kingston to Seattle. Kingston is more than ten miles from Winslow, and Edmonds is more than ten miles from Seattle. Accordingly, RCW 47.60.120 is inapplicable. (Caveat: The undersigned drafted the foregoing Attorney General's Opinion).

III. PROOF REQUIRED TO OBTAIN A COMMERCIAL FERRY CERTIFICATE

4 Aqua Express must prove public need for the proposed service, and its fitness
to provide that service. *RCW 81.84.010, .020 and WAC 480-51-030*. As the applicant,
Aqua Express has the burden of proving the proposed certificate should be issued.

A. "Public convenience and necessity"

5 Any person seeking to offer commercial ferry service must have a certificate
"declaring that public convenience and necessity require such operation." *RCW*
81.84.010. Public convenience and necessity is established, *inter alia*, through
testimony from people who will use the proposed service if it is available.² Evidence
of public need from an applicant's personnel alone is insufficient, but it can be used
to corroborate other testimony, such as testimony of would-be passengers.³

6 Commission Staff assumes Aqua Express will produce testimony from people
who will actually use the service if it is offered, along with other evidence of public
need, such as ridership surveys, *etc.*

B. Fitness

7 Under *RCW 81.84.020(2)*, the Commission also needs to consider whether the
applicant "has the financial resources to operate the proposed ferry service for at

² *In re Dutchman Marine, LLC et al., Docket Nos. TS-001774 and 002055, Initial Order (September 2001), adopted by Commission Final Order (October 2001), and citing Order S.B.C. No. 524, In re Pacific Cruises Northwest, Inc., App. No. B-78450 (May 1996).*

³ *See In re Richard & Helen Asche, Bremerton-Kitsap Airporter, Inc., d/b/a Bremerton-Kitsap Airporter, Inc., Kitsap-Sea-Tac Airporter, Inc., The Sound Connection, Order M. V. C. No. 1444 (May 1984).*

least twelve months ...". In particular, Aqua Express must prove it "has the financial resources to operate the proposed service for at least twelve months, based upon the submission by the applicant of a pro forma financial statement of operations." *Id.* The Commission is to consider: "Ridership and revenue forecasts; the cost of service for the proposed operation; an estimate of the cost of the assets to be used in providing the service; a statement of the total assets on hand of the applicant that will be expended on the proposed operation; and a statement of prior experience, if any, in such field by the applicant." *Id. and WAC 480-51-030(1)*.⁴

8 Commission Staff assumes Aqua Express will produce the evidence necessary to prove its financial and operational fitness to carry out the proposed service.⁵ The other requirements of RCW 81.84 have either been resolved, or do not apply in this case.⁶

⁴ RCW 81.84.020(2) requires the "documentation required of the applicant under this section shall comply with the provisions of RCW 9A.72.085." RCW 9A.72.085 requires the information be provided under oath or affidavit. Staff assumes Aqua Express will provide the necessary documentation through a witness, under oath, with testimonial knowledge as to the veracity of the information. Accordingly, RCW 9A.72.085 will be satisfied.

⁵ The requirement in RCW 81.84.020(2) that the applicant state its "prior experience, if any," is sufficient to establish a requirement of operational fitness, though it is not stated as clearly as in some other Commission statutes. *Cf. RCW 81.80.070(2), requiring an applicant to be "fit, willing and able" to perform the requested service.*

In any event, an operational fitness requirement necessarily would be implied. For example, the Commission can cancel a certificate if the certificate holder has violated any provision of RCW 81.84, or any condition of its certificate. RCW 81.84.060(5), (6). It follows that if the applicant cannot prove it is capable of operating in compliance with applicable laws in the first place, the Commission should have the power to deny the application.

⁶ RCW 81.84.020(3) states: "Subsection (2) of this section does not apply to an application for a certificate that is pending as of July 25, 1993." That condition does not apply in this case.

RCW 81.84.020(5) states: "Until March 1, 2005, the commission shall not consider an application for passenger-only ferry service serving any county in Puget Sound, unless the public

C. "Effect on public agencies"

9 In addition to proving public convenience and necessity and fitness, Aqua Express must also provide evidence of the effect the grant of the proposed certificate would have on certain "public agencies:"

In granting a certificate for passenger-only ferries and determining what conditions to place on the certificate, the commission shall consider and give substantial weight to the effect of its decisions on public agencies operating, or eligible to operate, passenger-only ferry service.

RCW 81.84.020(4).

10 The Commission noted in Order No. 2 (June 7, 2004) in this docket, as clarified by ALJ Rendahl during the June 8, 2004, pre-hearing conference, that the impact to consider is the impact on the "public agency." There is an issue whether this means the impact on the Department of Transportation, the agency that operates the state ferry system, or the impact only on the Department's ferry operations. ALJ Rendahl noted at the same prehearing conference that this is an issue for argument by the parties.⁷

transportation benefit area authority or ferry district serving that county, by resolution, agrees to the application." Kitsap Transit issued the resolution. Aqua Express included a copy in its Application.

⁷ In addition, and apparently in spite of RCW 47.01.031 (which authorizes the Department of Transportation to use the term "Washington State Ferries" to describe the state ferry system the Department manages and operates), IBU stated at the June 8, 2004, pre-hearing conference that it may contend the Washington State Ferries is a "public agency."

Note also that on June 15, 2004, Commission Staff filed a petition for interlocutory review of Order no. 2.

IV. COMMISSION STAFF'S EXPECTED PARTICIPATION AT HEARING

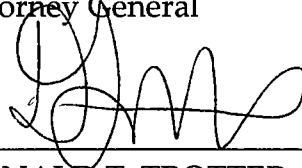
11 At this time, Commission Staff expects to participate through cross-
examination of witnesses for Aqua Express and other parties, to assure that the
record on all relevant evidentiary issues is as complete as it reasonably can be.

12 Staff also expects to offer testimony of Ms. Nicki L. Johnson, a Regulatory
Analyst employed by the Commission, to address the applicant's evidence of
financial fitness. Staff anticipates that she will testify as to whether Aqua Express's
evidence on financial fitness satisfies RCW 81.84.020, and if not, what Aqua Express
needs to do to assure those requirements are satisfied.

13 Staff needs to await Aqua Express' direct testimony on that issue, plus cross-
examination, in order to develop that testimony. Consequently, Staff cannot
provide a specific analysis of that issue in exhibit form prior to hearing. Staff can
offer an exhibit containing Ms. Johnson's qualifications. It is Exhibit No. ___ (NLJ-
1), attached.

DATED this 16th day of June, 2004.

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