

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of)	
)	DOCKET TS-070889
AQUA EXPRESS, LLP,)	
)	ORDER 03
Petitioner,)	
)	INITIAL ORDER ACCEPTING
For Commission Permission to)	SETTLEMENT AGREEMENT
Temporarily Discontinue Commercial)	AND AUTHORIZING
Ferry Service)	DISCONTINUANCE OF
)	COMMERCIAL FERRY SERVICE
)	FOR ONE YEAR
.....)	

1 **SYNOPSIS.** *This is an Administrative Law Judge’s Initial Order that is not effective unless approved by the Commission or allowed to become effective pursuant to the notice at the end of this Order. If this Initial Order becomes final, the Commission accepts the parties’ settlement agreement and grants the petition of Aqua Express, LLP, to temporarily discontinue commercial ferry service for a period of one year (June 4, 2007, through June 4, 2008), consistent with the terms of the settlement agreement.*

SUMMARY OF PROCEEDING

2 **NATURE OF PROCEEDING.** Docket TS-070889 involves a petition by Aqua Express, LLP, (Aqua Express) to temporarily discontinue passenger-only commercial ferry service on its Kingston to Seattle, Washington route from June 4, 2007, through June 4, 2009, pursuant to WAC 480-51-130.

3 **PROCEDURAL HISTORY.** On May 7, 2007, Aqua Express filed a petition with the Washington Utilities and Transportation Commission (Commission) requesting permission to temporarily discontinue service for two years pursuant to WAC 480-51-130.

- 4 On May 23, Aqua Express' petition was brought before the Commission at its regularly scheduled open meeting. The Commission ordered the matter set for hearing. *See Order 01.*
- 5 At a prehearing conference held on June 14, before Administrative Law Judge (ALJ) Adam E. Torem, Kitsap Transit sought permission to intervene in the case in support of the petitioner. Neither Aqua Express nor Commission Staff objected and Kitsap Transit was granted intervenor status. The parties jointly requested additional time to hold settlement negotiations. *See Order 02.*
- 6 On June 29, Aqua Express filed a petition for exception to WAC 480-51-130, seeking to justify a 24 month discontinuance of service rather than the 12 month extension permitted under WAC 480-51-130(3).
- 7 On July 17, the parties jointly filed a Settlement Agreement (Settlement), together with a Narrative supporting Settlement Agreement and, as a supporting exhibit, the final draft of the Kitsap Transit Passenger-Only Ferry Investment Plan. The Settlement is attached to this Initial Order as an appendix, and incorporated by reference in the decision.
- 8 On due and proper notice, the Commission convened a hearing on July 18, in Olympia, Washington, before ALJ Torem. Commission Staff presented the terms of the Settlement reached by the parties, including a reduction of the period of discontinuance to one year, a requirement that Aqua Express file a progress report with the Commission in January 2008, and an agreement by Aqua Express that it will not object to any potential competitor's application for a commercial ferry certificate on the Kingston to Seattle, Washington, route if one is filed prior to Aqua Express resuming service or the end of the one-year discontinuance on June 4, 2008, whichever comes first. Aqua Express explained its support for the terms of the Settlement and willingness to hold its petition for exception to WAC 480-51-130 in abeyance pending approval of the Settlement. Kitsap Transit explained its intention to seek passage of relevant legislation in the 2008 Legislature and then take steps to support resumption of commercial ferry service between Kingston and Seattle, Washington, in spring 2009.

9 **PARTY REPRESENTATIVES.** David W. Wiley, Williams, Kastner & Gibbs, PLLC, Seattle, Washington, represents Aqua Express. Ronald C. Templeton, Silverdale, Washington, represents Kitsap Transit. Donald T. Trotter, Assistant Attorney General, Olympia, Washington, represents Commission Staff.

10 **INITIAL ORDER.** Finding that the parties have satisfied the criteria for accepting settlement agreements under WAC 480-07-740 and that the Petitioner has met the criteria for temporarily discontinuing service under WAC 480-51-130, this Order recommends the Commission accept the parties' Settlement and grant the petition of Aqua Express to extend its discontinuance of passenger-only ferry service from June 4, 2007, to June 4, 2008. In accordance with the terms of the Settlement, Aqua Express (a) must not object to the Commission issuing a competing commercial ferry certificate to another entity for service between Kingston and Seattle, Washington, if any application for such certificate is filed prior to the earlier of June 4, 2008, or the date on which Aqua Express resumes passenger-only ferry service and (b) must file a report with the Commission in the first week of January 2008 detailing its progress toward resuming service.

MEMORANDUM

I. Governing Law

11 The Commission regulates commercial ferries under RCW 81.84 and WAC 480-51. The statute does not address discontinuance of service.

12 The Commission's regulation addressing "indefinite discontinuance of service" explains that certificate holders are prohibited from discontinuing the service authorized under their certificate without giving the Commission and the public advance notice and securing the Commission's permission. *WAC 480-51-130.*

13 The same regulation also states that "the Commission shall not grant permission for discontinuance of service for periods exceeding twelve months." *WAC 480-51-130.*

II. Background History

- 14 Aqua Express holds commercial ferry Certificate of Public Convenience and Necessity No. BC-129, authorizing it to provide commercial passenger-only ferry service between Kingston and Seattle, Washington. *See Docket TS-040650.*
- 15 In September 2005, in Docket TS-051318, Aqua Express requested its first temporary discontinuance of service authorized under its Certificate for the period of October 1, 2005, to June 30, 2006, a period of nine months. The Commission granted this request.
- 16 In June 2006, in Docket TS-060903, Aqua Express requested its second temporary discontinuance of service, this time for the period of July 1, 2006, to December 31, 2006, a period of six months. The Commission granted this request.
- 17 In December 2006, in Docket TS-061812, Aqua Express requested its third temporary discontinuance of service, this time for the period of January 1, 2007, to July 1, 2007, a period of six months.
- 18 Kingston Express Association, a non-profit association, had previously contacted Commission Staff expressing an interest in filing an application for authority to provide passenger-only ferry service for the Kingston to Seattle, Washington, route. In order to address Commission Staff's concern that extending Aqua Express's discontinuance of service through July 1, 2007, might create an unintended barrier to a new certificate application, Aqua Express amended its petition to end the service discontinuance on June 4, 2007. The Commission granted this amended request.
- 19 In a February 2007 special election, voters failed to approve increased sales and use taxes to fund passenger-only ferry service.
- 20 In May 2007, Aqua Express filed its current request for a fourth temporary discontinuance of service, this time for the period of June 4, 2006, to June 4, 2008, a period of 24 months. The Commission considered the matter at its regularly scheduled May 23, 2007, open public meeting and set the matter for hearing.

21 By letter dated July 8, 2007, Kingston Express Association expressed its opposition to Aqua Express's current petition for discontinuance but declined to seek to intervene in the proceeding.

III. Settlement Agreement

22 On July 17, 2007, the parties filed the Settlement, along with the Final Draft of the Kitsap Transit Passenger-Only Ferry Investment Plan. In essence, the parties agreed that the Commission should grant Aqua Express's request for permission to discontinue service, but only through June 4, 2008, a period of 12 months.

23 In the Settlement, Aqua Express agrees to "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." *Settlement*, ¶ 17.

24 Aqua Express also agrees to "file a progress report describing in detail the progress that has been made toward resuming service." This report is to be filed during the first week of January 2008 and Aqua Express agrees to respond to reasonable requests from any other party to supplement its report. *Settlement*, ¶ 18.

25 The parties note in the Settlement that Aqua Express will likely seek permission for at least one additional discontinuance of service because of the belief that it may require more than one additional legislative session to achieve its economic goals. The Settlement does not obligate the parties to any particular position on any such future request. *Settlement*, ¶ 19.

26 On July 18, 2007, the parties appeared at a hearing on this matter and confirmed the terms of the Settlement and agreed that the parties had reached a full settlement in accordance with WAC 480-07-730(1).

- 27 Commission Staff explained that its concerns regarding potential barriers to competition had been resolved. Commission Staff also noted that the public interest was served by allowing Aqua Express to retain its certificate and retain its existing infrastructure (i.e., dock facilities) while the company worked with Kitsap Transit to identify appropriate sources of public funding to support provision of passenger-only ferry service. Aqua Express reiterated its intent to resume service as soon as financially possible.
- 28 Aqua Express requested that its petition for exception to WAC 480-51-130 be held in abeyance while the Commission considered the Settlement. Upon approval, Aqua Express asked that its petition for exception be stricken as moot.
- 29 **Decision.** Aqua Express has successfully resolved all of Commission Staff's concerns in this matter. The Settlement filed on July 17 and jointly presented on July 18 meets the requirements of the Commission's rules on settlements. *WAC 480-07-740(2)*.
- 30 The Commission supports parties' efforts to resolve disputes without the need for contested hearings when doing so is lawful and consistent with the public interest. *WAC 40-07-700*. Further, the Commission approves settlements when lawful, when the terms of the settlement are supported by an appropriate record, and when the result is consistent with the public interest in light of all the information available to the Commission. *WAC 480-07-750(1)*.
- 31 Here, the complete resolution of all issues permits the Commission to accept the settlement agreement and proceed to consideration of the requested extension of discontinuance of passenger-only ferry service under WAC 480-51-130. The narrative supporting settlement agreement supports the terms of the settlement agreement. In addition, the amendment of the original petition for discontinuance to a period of 12 months brings the term of discontinuance squarely within the requirements of the rule, without need for any exceptions. Finally, acceptance of this full settlement is consistent with the public interest because no entity potentially wishing to compete with Aqua Express in providing passenger-only ferry service from Kingston to Seattle, Washington, is prejudiced or otherwise disadvantaged by the 12-month discontinuance and the required progress report will ensure that the

Commission remains informed of Aqua Express' ability and intention to resume service in the future.

32 Upon consideration of the Settlement and the entire record in this matter, the Commission, in accordance with WAC 480-07-750(2), accepts the proposed settlement agreement without conditions.

FINDINGS OF FACT

33 Having discussed above in detail the evidence received in this proceeding concerning all matters material, and having stated findings and conclusions upon issues in dispute among the parties and the reasons therefore, the Commission now makes and enters the following summary of those facts, incorporating by reference pertinent portions of the preceding detailed findings:

34 (1) The Washington Utilities and Transportation Commission is an agency of the state of Washington, vested by statute with authority to regulate rates, rules, regulations, practices, and accounts of public service companies, including commercial ferry companies.

35 (2) On May 7, 2007, Aqua Express, LLP, filed a petition seeking a further discontinuance of its passenger-only ferry service from June 4, 2007, through June 4, 2009.

36 (3) On July 17, 2007, Aqua Express entered into a settlement agreement to compromise its request and seek discontinuance only from June 4, 2007, through June 4, 2008.

37 (4) There remains a strong need for passenger-only ferry service between Kingston and Seattle.

38 (5) Aqua Express has agreed not to object to any potential competitor's filing for a certificate to provide passenger-only ferry service between Kingston and Seattle during the pendency of the requested period of discontinuance.

- 39 (6) Aqua Express has agreed to keep the Commission informed of its progress toward resuming passenger-only ferry service between Kingston and Seattle.

CONCLUSIONS OF LAW

40 Having discussed above all matters material to our decision, and having stated detailed findings and conclusions, and the reasons therefore, the Commission now makes the following summary conclusions of law, incorporating by reference pertinent portions of the preceding detailed conclusions:

- 41 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and parties to, these proceedings. *Title 81 RCW.*
- 42 (2) The settlement agreement filed in this matter is supported by the evidence of record, consistent with state laws and rules and is in the public interest. *WAC 480-07-750.*
- 43 (3) Aqua Express, LLP, has met all requirements for the Commission to authorize a further twelve month extension of its temporarily discontinued passenger-only ferry service. *WAC 480-51-130.*
- 44 (4) The Commission should retain jurisdiction to effectuate the terms of this Order. *Title 81 RCW.*

ORDER

THE COMMISSION ORDERS:

- 45 (1) The settlement agreement entered into between petitioner Aqua Express, LLP, intervenor Kitsap Transit, and Commission Staff, attached as an appendix to and incorporated by reference in this Order, is accepted without conditions.
- 46 (2) The petition of Aqua Express, LLP, seeking further temporary discontinuance of its passenger-only ferry service between Kingston and Seattle, Washington,

is granted in part, for a period of 12 months, from June 4, 2007, to June 4, 2008, subject to the terms of the settlement agreement.

- 47 (3) Petitioner Aqua Express shall file a progress report with the Commission in the first week of January 2008, describing its efforts to resume passenger-only ferry service between Kingston and Seattle, Washington.
- 48 (4) Petitioner Aqua Express's petition for exception to WAC 480-51-130 is stricken as moot.

Dated at Olympia, Washington, and effective August 10, 2007.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

ADAM E. TOREM
Administrative Law Judge

NOTICE TO THE PARTIES

This is an Initial Order. The action proposed in this Initial Order is not yet effective. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this Initial Order, and you would like the Order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this Initial Order to file a *Petition for Administrative Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-825(3). WAC 480-07-825(4) states that any party may file an *Answer* to a Petition for review within (10) days after service of the Petition.

WAC 480-07-830 provides that before entry of a Final Order any party may file a Petition To Reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. No Answer to a Petition to Reopen will be accepted for filing absent express notice by the Commission calling for such answer.

RCW 80.01.060(3) provides that an Initial Order will become final without further Commission action if no party seeks administrative review of the Initial Order and if the Commission does not exercise administrative review on its own motion. You will be notified if this order becomes final.

One copy of any Petition or Answer filed must be served on each party of record with proof of service as required by WAC 480-07-150(8) and (9). An original and eight copies of any Petition or Answer must be filed by mail delivery to:

Attn: Carole J. Washburn, Executive Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
Olympia, Washington 98504-7250

APPENDIX