

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Application of
AQUA EXPRESS LLC
For Certificate of Public Convenience and
Necessity to Operate Commercial Ferry Service

DOCKET NO. TS-040650
APPLICATION NO. B-079273

PREHEARING BRIEF OF
APPLICANT

1 Pursuant to Prehearing Conference Order No. 01 in this matter, Applicant Aqua
Express files the below memorandum in abbreviated summary of the legal and factual issues
presented to the Commission.

I. OVERVIEW

2 On April 8, 2004, Aqua Express LLC filed an application for commercial ferry
passenger-only service between Kingston and Seattle to which the Inland Boatmen's Union
filed the only protest on May 5, 2004. Following a Motion to Strike Protest and service of
Order No. 02 in this matter limiting the participation of the IBU to very specific issues, the
matter was set for hearing on a revised schedule. Notably, the underlying regulated service
proposal was preceded by 2003 changes to the Commercial Ferry Statute by the Washington
legislature in EHB 1388, encouraging the creation and development of private commercial
ferry operations in conjunction with other public transportation system options. This
commercial passenger-only ferry application is thus the first to be heard before the

Commission in the aftermath of the 2003 legislative changes to the commercial ferry certificate laws.

II. STATEMENT OF ISSUES

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1. Is applicant “fit, willing and able” to conduct operations on the proposed commercial passenger-only ferry route between Seattle and Kingston?
 2. Is its financial showing sufficient under the statute, specifically RCW 81.84.020, to be granted the requested certificate?
 3. What is the impact of this application on “public agencies operating, or eligible to operate, passenger-only ferry service,” i.e. the Washington State Department of Transportation¹ and Kitsap Transit agencies?
 4. Is the application required by the public convenience and necessity and otherwise consistent with the public interest?

III. DISCUSSION

4 As noted, the pending application presents some novel legal and factual issues for the Commission’s review in the annals of commercial ferry regulation. As the 2003 legislative history to HB 1388 suggests, the legislature found that previous law “impose[d] barriers to entities other than the state operating passenger-only ferries,” Chapter 373, Laws of 2003, Sec. 1, and sought to foster the improvement in this form of service, even including the provision of state facilities at market cost to facilitate the service. The Aqua Express application does not at this juncture propose the use of any ferry system property, but instead represents a more conventional private enterprise with support of two key public agencies, the Washington

¹ Inclusion and discussion of this issue is offered in the alternative, i.e. in the event that the Staff’s Motion for Interlocutory Review of Order No. 2 is denied or otherwise unresolved by the time of the examination of the Applicant’s witnesses on June 21 and 22, 2004. By its recitation and discussion of this issue, however, Applicant does not intend to controvert its support for the Staff’s Petition served June 15, 2004.

Department of Transportation and the local transportation benefit agency, Kitsap Transit, in the inauguration of passenger-only commercial ferry service in the aftermath of the 2003 law.

5 As noted above, in addition to the more conventional “fitness, willingness and ability” tests under RCW 81.84.020, and the financial proof standards addressing operational and ridership projections, the law now requires an impact analysis on the public agency which operates or is eligible to operate passenger-only service. This new analysis is to be considered in addition to the ultimate evaluation of whether the public convenience and necessity requires the grant of the application.

A. Financial Evidence

6 By its operating and financial witnesses, applicant will proffer testimony demonstrating the lengthy experience of its principals in the operation of commercial passenger vessels in the Puget Sound and throughout the Northwest, and the depth of its financial and operational commitment to the viability of this enterprise. While admittedly a startup venture with a relatively modest balance sheet, the applicant will prove that it has a very viable business plan with assets and financial resources sufficient to operate the proposed service far in excess of the statutory twelve month interval, indeed, a pro forma that looks out over a five-year time span that envisions a self-supporting and profitable operation well before the end of that interval.

7 Moreover, whether or not the applicant initially sustains net operating losses on the proposed regulated service, the evidence will show the financial resources and commitment of its owners to the success of its operations analogous to the financial commitments of the applicant’s parent in Order MVG No. 1452, *In re American Environmental Management Corp.* App. GA-874 (Nov. 1990), at 5, which should dispel any hint of inadequacy of financial resources sufficient to sustain a finding of financial fitness for this applicant.

B. Impact Upon Public Agencies “Eligible to Operate or Operating” Commercial Passenger Ferries

8 Testimony will also be elicited from two public agencies which are eligible to operate passenger-only ferries: Kitsap Transit and the Washington Department of Transportation.² The witnesses representing these public agencies will address the impact of new passenger-only ferry service on their agencies. While the Washington Department of Transportation operates the State Ferry system under RCW 47.60.010, Kitsap Transit is also a public transportation authority under RCW 81.100.020 and 81.104.005, with the power to regulate use of local transportation facilities and connect it with other agencies, corporations and private parties under RCW 36.57.040(3) and (5)(a). It is expected the Washington Department of Transportation witness will offer testimony that any resulting negative economic impact on their capacity to operate as a public agency will be *de minimis* in terms of their overall budget and in relation to the numerous benefits that other need witnesses will demonstrate flow from the establishment of this passenger-only ferry service. A representative of the Kitsap Transit Agency will provide background to his agency’s involvement in and coordination of plans to provide passenger-only ferry service between Kitsap County and Seattle as an integral link in a region-wide program of public and private providers to connect various corridors across the Puget Sound region. The goal of that integration is to provide an economically and environmentally suitable option that reduces the need for additional highway and bridge construction, and in part mitigates reliance upon passenger automobiles as the predominate form of transportation in the region. Finally, testimony will be offered to demonstrate that the creation of passenger-only ferry service between Kitsap County and Seattle may relieve both public agencies from having to devote a significant amount of time and money in implementing alternative means of transportation from new termini points.

² Again, as noted above, the proffer of testimony and brief argument on the impact upon the Washington Department of Transportation is in the alternative, i.e., if the Commission’s interpretation of RCW 81.84.020(4) in its Orders 2 and 3, is not reconsidered or reviewed by the start of hearing on June 21, 2004.

C. Need for the Service/Public Convenience and Necessity

9 The final evidentiary issue for analysis at the hearing is the evaluation of public need for service under RCW 81.84.020. In addition to public witnesses which Applicant anticipates will appear in the time periods specified by the Commission's hearing notice, Applicant intends to produce a number of prospective ferry riders derived from a number of user groups supporting the service. Aqua Express intends to present commuters from the Kingston area who work in Seattle, business people whose livelihoods will be benefited by direct water linkage, government workers, recreational users and other professionals who actively support the provision of commercial passenger ferry service directly linking Kingston and downtown Seattle. Their testimony in the aggregate should demonstrate to the Commission that there is a vital public need for the proposed service and that the proposed service is fully consistent with recent changes in state law whose legislative history directive is again to "lift . . . barriers to allow entities other than the state to provide passenger-only ferry service." Chapter 373, Laws of 2003, Sec. 1.

10 While Applicant anticipates that the Protestant will seek to cloud the hearing record and underlying statutory analysis with allegations, proposed testimony and intimations of diminution in wages, dire economic circumstances, and other alleged adverse affects on its employer, the Commission's ruling in this matter has made clear (See, Prehearing Conference Order No. 2, ¶ 34 at 10) that those issues are not relevant to a consideration of the impact of this Application on the "public agencies operating or eligible to operate passenger-only ferries" or, more importantly, on the overall assessment of need for the proposed service.

IV. CONCLUSION

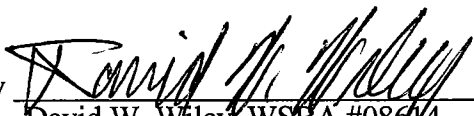
11 After considering all of the evidence, exhibits and testimony to be produced in this record, Applicant prays that the Commission grant Application B-079273, finding the Application fully consistent with the underlying statute, RCW 81.84.020, and with the public

interest in providing an innovative and responsive transportation alternative in concert with the growing need for diversification and augmentation of available transportation options in the Puget Sound area.

DATED this 14 day of June, 2004.

Respectfully submitted,

WILLIAMS, KASTNER & GIBBS PLLC

By 
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Attorneys for Plaintiff Applicant

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2004, I caused to be served the original and thirteen copies of the foregoing document to the following address via first class mail, postage prepaid to:

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I certify I have also provided to the Washington Utilities and Transportation Commission's Secretary an official electronic file containing the foregoing document via email to: records@wutc.wa.gov

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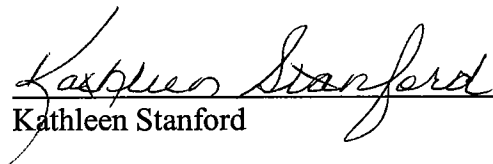
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Dated this 16th day of June, 2004.


Kathleen Stanford