

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of Application No. B-079240 of

PACIFIC CRUISES NORTHWEST, INC.
d/b/a VICTORIA SAN JUAN CRUISES

DOCKET NO. TS-031996

COMMISSION STAFF'S
POST-HEARING BRIEF

1 Commission Staff submits this post-hearing brief on two issues. First, Staff argues that the Commission may issue a certificate to Pacific Cruises Northwest, Inc. for commercial ferry service between Bellingham and Friday Harbor despite the fact that similar authority is held under existing certificates by two other companies. Second, Staff urges the Commission to condition its approval of this application on Pacific Cruises surrendering those routes on its certificate that it admittedly does not serve.

1. Existing Certificates

2 Under RCW 81.84.020 the Commission is without authority to grant a certificate “to operate between districts and/or into any territory . . . already served

by an existing certificate holder, unless such existing certificate holder has failed or refused to furnish reasonable and adequate service.”

3 In its application, Pacific Cruises seeks authority to provide commercial ferry service between Bellingham and Friday Harbor with no intervening stops. Two other companies, San Juan Island Shuttle Express, Inc. (SJISE) and Island Mariner, already hold certificates for service between Friday Harbor and Bellingham.

4 For the reasons set forth below, granting the present application is not barred by the prohibition in RCW 81.84.020 against granting a certificate to operate between districts and/or into territory already served by an existing certificate holder.

A. San Juan Island Shuttle Express

5 Certificate BC-120 grants authority to provide passenger and freight service:

Between Friday Harbor and Bellingham, and Between Obstruction Pass and Bellingham, with the carrying vessel touching at Obstruction Pass on voyages to and from Friday Harbor. . . . In conjunction with the above authority, flag stops at Eliza Island, Sinclair Island, Blakely Island, and Lopez Island.

At least as to its fixed termini, Friday Harbor and Bellingham, SJISE’s authority is between the same districts or territories for which Pacific Cruises seeks authority.

The endpoints of the proposed route and the route described on the certificate of the incumbent are the same, although SJISE’s authority includes a “touch” and four

“flag stops” at various points between Bellingham and Friday Harbor while the applicants proposed route does not include any intermediate stops.

6 San Juan Island Shuttle Express had filed a protest to this application which it withdrew on August 23, 2004, prior to the hearing.

7 Pacific Cruises owner, Mr. Schmidt testified on behalf of the Applicant that SJISE is not operating and is out of business.

8 The Commission’s records show that SJISE petitioned for and received three consecutive one-year orders allowing it to discontinue the service authorized under its certificate from April 2002 to May 2005. In its petitions, SJISE indicated that it operates seasonally from April through October using leased vessels and that it had been unable to negotiate agreements for lease of vessels for the 2002, 2003, and 2004 sailing seasons. In each case, the Commission granted the permission to discontinue on the condition that the company resume service should an immediate need arise for commercial ferry service:

San Juan Island Shuttle Express, Inc., BC-120 must be prepared to resume service to meet those needs. If San Juan Island Shuttle Express, Inc., BC-120 cannot, or will not, resume service the Commission will consider that the company has waived interest in its commercial ferry certificate. The Commission will then institute proceedings to cancel the company's certificate and to grant authority

to another carrier who is prepared to meet the needs of the traveling public.¹

In its third petition (covering the 2004 sailing season), SJISE represented that a temporary suspension would not adversely affect the public since parallel service is offered by Island Mariner, Inc., under Certificate BC-95.²

9 On September 21, 2004, approximately one month after withdrawing its protest in the present case, SJISE petitioned for authorization on less than statutory notice for resumption of service and approval of a revised time schedule. The Commission authorized the revised time schedule to go into effect on less than statutory notice by an order of September 29, 2004. SJISE's revised time schedule states "(3) service to Friday Harbor, Orcas Island and all flag stops will be daily by 48 hour advance reservation only. (4) Schedule may vary due to whether and docking conditions." The new schedule was to become effective October 1, 2004.

10 There is no evidence in the record that SJISE is actually providing service. Again, Mr. Schmidt's testimony on November 4, 2004, was that SJISE was not operating. Based on the record that is before it in this case, the Commission may find that San Juan Island Shuttle Express is not providing reasonable and adequate service. Under RCW 80.84.020, the Commission may "grant a certificate to operate

¹ In the Matter of San Juan Island Shuttle Express, BC-120, Docket No. TS-040758, Order Granting Temporary Discontinuance of Service, pp. 3-4 (May 12, 2004).

² *Id.* ¶ 5.

between districts and/or into any territory . . . already served by an existing certificate holder” if “such existing certificate holder has failed or refused to furnish reasonable and adequate service.” As the Commission has previously held:

This order also finds that, insofar as the particular service of this particular applicant is concerned, Island Mariner is not providing reasonable and adequate service. The failure of the existing certificate holder to protest this application and present evidence results in the lack of a record as to its actual service, if any, under its certificate. The testimony presented on behalf of the applicant is that insofar as the applicant and its supporting witnesses are aware, the existing certificate holder is not providing any service to the points this applicant seeks authority to serve. In this circumstance, the Commission may find the ultimate facts against the existing certificate holder on the issue of whether it is providing reasonable and adequate service.³

The Commission may make a similar finding with respect to SJISE in this case.

B. Island Mariner

11 Certificate B-95 grants Island Mariner, Inc. authority to provide passenger and freight service (excluding motor vehicles):

BETWEEN: Bellingham, Washington, and Friday Harbor (San Juan Island), via Elisa, Sinclair, Cypress, Blakely, Decatur, Crane, Jones, Spieden, Johns, Stuart, Waldron, Sucia and Martia Islands with an additional stop at Roche Harbor on San Juan Island, Rosario Resort, Olga and Doe Bay on Orcas Island, Lopez and Shaw Islands.

³ In re Application of Pacific Cruises Northwest, Inc., Order S.B.C. No. 526, Hearing No. B-78450, Commission Decision and Order Affirming Initial Order with Modification; Granting Amended Application, page 2 (July 10, 1996)

As with SJISE's authority, Island Mariner's authority is between the same districts or territories for which Pacific Cruises seeks authority—at least as to the fixed termini of Bellingham and Friday Harbor.

12 Unlike with SJISE, however, there is record evidence that Island Mariner is serving its certificated route. Mr. Schmidt testified that Pacific Cruises and Island Mariner jointly own a vessel that they lease to Island Mariner for the purpose of serving the Bellingham to Friday Harbor route. Pacific Cruises currently handles ticketing for Island Mariner's "Island Commuter" service, which provides the service described in certificate B-95 (Pacific Cruises currently operates an international route from Bellingham to Victoria, B.C.).

13 Island Mariner's owner and president, Mr. Terry Buzzard, filed a letter to the Commission in this docket on March 19, 2004, stating:

As the only other operating certificate holder on the route proposed in the above referenced application I hereby notify the Commission that I **do not oppose** this application.

This particular operator is capable of offering additional capacity on this route without adversely impacting our operation.

It is my desire that this application be approved.

14 Pacific Cruises may argue that because it is proposing a direct route between Bellingham and Friday Harbor and Island Mariner's route includes a number of

intermediate flag stops that the services are, for that reason, between different districts or territories.⁴ Staff would discourage a finding that the territory is not already served by Island Mariner on the narrow basis that Pacific Cruises proposes a direct route while Island Mariner's route includes flag stops. Such a finding could represent too great an expansion of the "different territory" analysis.

15

In previous commercial ferry application cases that involved a dispute between an incumbent certificate holder and an applicant as to whether a particular territory was already served, the Commission has analyzed whether different termini could be regarded as different "territories."⁵ The reasoning of those cases do not appear to be applicable in this case, however, because it appears that Island Mariner and Pacific Cruises would share the same docking locations at Friday Harbor and Bellingham. Moreover, in a previous case involving the same entities whose certificates are at issue here, the initial order rejected arguments that sought to differentiate the "territories" served by the two companies based on differences

⁴ At hearing, Pacific Cruises offered a June 15, 1988 letter from Commission Secretary Paul Curl to the attorney for Belairco, Inc. that Pacific Cruises may argue supports this proposition. The letter does not state that Belairco's authority is between different district or territories than that of Island Mariner, but merely that, under its certificate, Island Mariner must make additional stops between Bellingham and Friday Harbor.

⁵ See *In re Application B-78450 of Pacific Cruises Northwest, Inc.*, Order S.B.C. No. 511, App. No. B-78201 (July 1995) (finding that Friday Harbor and Roche Harbor, at opposite ends of San Juan Island represent different territories); *Puget Sound Navigation Co. v. Dept. of Public Works*, 152 Wash. 417 (1929).

in flag stops and final destinations, even though both companies proposed to provide service between many of the same locations:

[T]o accept the argument would invite applications which add an intermediate island or a different destination to a proposed route solely for the purpose of establishing a different “territory.” That would undermine the intent of the statutory restriction. There are similar problems with the argument that the overlapping routes only involve flag stops and therefore are of no consequence. A carrier could get around the statutory restriction and add service to a major destination that is already served by a certificate holder, by making it a flag stop between to nearby scheduled stops.⁶

16 Thus, a finding that a direct route and another route that includes intermediate stops are, on that basis alone, “between different territories” would be bad precedent.

17 Also inapposite are those cases in which the Commission has granted *contemporaneous* competing applications to serve overlapping routes.⁷ While the rationale of those cases may be instructive in this case (i.e., addressing whether two services in the same territory may be compatible or complementary rather than mutually exclusive), the legal theory does not apply. Those cases rely on the fact that RCW 81.84.020 only prohibits issuance of a certificate when the territory is “*already served*” under an existing certificate. Thus, where there are

⁶ In re Application B-78450 of Pacific Cruises Northwest, Inc., Order S.B.C. No. 524, Hearing No. B-78450, p. 12 (May 23, 1996).

⁷ E.g. In Re Belairco, Inc., App. No. B-313, Order S.B.C. 468 (May 1990); In re Jack L. Harmon Jr., d/b/a Arrow Launch Service, App. No. B-308 (May 1990).

contemporaneous applications for service on a previously unserved route, the prohibition does not apply. In this case, Island Mariner already serves the Bellingham to Friday Harbor route.

18 This is not to say that a certificate should not be granted in this case, but the Commission should not grant it solely on the basis that Island Mariner's route includes flag stops while Pacific Cruises proposed route does not. Neither should the Commission rely on the cases that concern contemporaneous applications for a new route. Instead, the Commission should rely on another line of authority.

19 Under the auto transportation (bus/airporter) certification statute, which is similar to the commercial ferry statute in terms of favoring exclusive territories,⁸ the Commission has recognized that a territory may not be "already served" because the existing certificate holder is not serving it with respect to a particular type of service.

When the existing certificate holder directs its service at certain market niches within its territory which differ substantially from the markets the applicant seeks to serve, and there is a demonstrated need for the services the applicant proposes, the Commission has held that

⁸RCW 81.68.040 states "The commission shall have power, after hearing, when the applicant requests a certificate to operate in a territory already served by a certificate holder under this chapter, only when the existing auto transportation company or companies serving such territory will not provide the same to the satisfaction of the commission."

the statutory restriction will not be read to prevent entrepreneurs from developing and serving new markets within a territory.⁹

20

As the Commission set out in *In the Matter of the Application of San Juan Airlines, Inc., d/b/a Shuttle Express*, Order M.V.C. No. 1809, Hearing No. D-2566, Commission Decision and Order Granting Application as Amended in Part, page 16 (April 21, 1989):

The Commission must consider whether the territory at issue is “territory already served” within the meaning of the statute. . . . One factor to be considered is the extent of the authority of the intervenors. Another is whether or not they are serving to the extent of that authority. A third is whether the type of service provided reasonably serves the market.

These factors favor granting the authority applied for by Pacific Cruises. The “extent” of Island Mariner’s authority is different than that proposed by the Applicant. As previously noted, Island Mariner’s service between Bellingham and Friday Harbor requires flag stops at various points. Mr. Schmidt testified that Island Mariner does, in fact, make flag stops every day. Island Mariner does not offer a direct service. Additionally, there is evidence that there is unmet demand for direct service between Bellingham and Friday Harbor. Island Mariner has not protested this application, and that company’s owner, Terry Buzzard, sent a letter

⁹ In re Application B-78450 of Pacific Cruises Northwest, Inc., Order S.B.C. No. 524, Hearing No. B-78450, at p. 8 (May 23, 1996)(citing a number of bus and airporter cases).

to the Commission Secretary containing the admission that Pacific Cruises “is capable of offering additional capacity on this route without adversely impacting our operation.” Mr. Schmidt testified that there is additional need for a direct service from Bellingham to Friday Harbor. There are passenger support letters in the record to the same effect. Mr. Schmidt testified that Island Mariner’s service is more of a commuter service while Pacific Cruises service would primarily cater to tourists. A comparison of the time schedules of Island Mariner and Pacific Cruises shows that the two companies would in fact offer travelers different sailing times and that Pacific Cruises would offer shorter transit time to Friday Harbor. All of this is evidence that Island Mariner is not, by itself, reasonably serving the market for transportation between Bellingham and Friday Harbor. Based on this evidence, the Commission should issue the certificate under the factors set out in *San Juan Airlines, Inc., d/b/a Shuttle Express, supra*.

2. Conditions on the Certificate

21 RCW 81.84.020 states that “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.”

22 Staff recommends that the Commission condition the issuance of the certificate on Pacific Cruises surrendering its authority (1) between Blaine and Roche Harbor and (2) between Bellingham and the San Juan Islands, with regular stops at Roche Harbor and flag stops at Blakely, Orcas, and Lopez Islands.

23 It is apparent from Mr. Schmidt's testimony that Pacific Cruises is not presently operating on either the Blaine to Roche Harbor route or the Bellingham to Roche Harbor route described on its certificate, nor does the company have any intention of doing so in the near future. It is apparent that the company has not operated either of these routes for many years because Commission records indicate it has not reported any regulated intrastate revenues in its annual reports since 1997. Although Mr. Schmidt stated, at hearing, a desire to retain, if possible, the flag stops listed along the Bellingham to Roche Harbor route, there are two reasons why Pacific Cruises should not be permitted to retain those flag stops: (1) the company has, in this case, applied only for authority between Bellingham and Friday Harbor without any intermediate stops in conjunction with that service, and (2) flag stop authority cannot exist independent of the fixed termini, regular route service¹⁰ with which it is associated.¹¹ Mr. Schmidt indicated that Pacific Cruises

¹⁰ RCW 81.84.010 states "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,

does not, and has no intention of serving Roche Harbor—one of the fixed termini of the route with which those flag stops are associated.

24

Pacific Cruises applied for and received on October 9, 1996, permission to discontinue service for one year on its intrastate routes. However, it did not seek an extension of that permission at the end of the effective date of the 1996 order. Pacific Cruises is therefore out of compliance with WAC 480-51-30 (indefinite discontinuance of service)¹², and WAC 480-51-140 (temporary interruptions of service)¹³ at least as to the Blaine/Roche Harbor and Bellingham/Roche Harbor routes. An applicant's history of non-compliance with commission rules may go to the issue of the applicant's fitness to serve the route for which it has applied.

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.”

¹¹ See In re Application B-78433 of San Juan Island Shuttle Express, Inc., Order S.B.C. No. 527, Hearing No. B-78433, Initial Order Modifying Initial Order S.B.C. No. 523, pp. 3-4 (July 12, 1996).

¹² **WAC 480-51-130 Indefinite discontinuance of service.** No certificate holder shall discontinue the service authorized under its certificate and set forth in its filed time schedule without first having given to the commission and to the public, at least fifteen days' notice, in writing, of its intention to discontinue such service, and without having secured the commission's permission. The commission shall not grant permission for discontinuance of service for periods exceeding twelve months.

¹³ **WAC 480-51-140 Temporary interruptions of service -- Suspension of service.** (1) Certificate holders shall report promptly in writing to the commission, and to the public along the route, all interruptions of regular service, where such interruptions are likely to continue for more than twenty-four hours. Said report to include a full statement of the cause of such interruption and its probable duration.

(2) Discontinuance or suspension of service by a certificate holder for a period of five consecutive days without notice to the commission shall be deemed a forfeiture of all right secured under and by virtue of any order or permission to operate, issued by the commission: Provided, however, That the commission may permit the resumption of operation after such five-day discontinuance or suspension, on proper showing that the certificate holder was not responsible for the failure to give service or notice.

Although certificates may only be revoked or suspended after a hearing under WAC 480-51-150, it is not unreasonable for the Commission to condition the issuance of new authority on this applicant accepting amendment of its certificate to eliminate authority that it has not exercised. Staff proposes conditioning the issuance of the new authority under certificate No. B-10 on the elimination of the following language from that certificate:

PASSENGER AND FREIGHT SERVICE

Between: Blaine and Roche Harbor, Washington

Restrictions: Freight limited to 200 pounds per package.

* * *

PASSENGER AND FREIGHT SERVICE

Between: Bellingham and the San Juan Islands, with regular stops at Roche Harbor, San Juan Island, and flag stops at Blakely Island; Rosario and Deer Harbor on Orcas Island; and Lopez Island (excluding freight service between Rosario – Lopez Island and Deer Harbor – Lopez Island).

Restrictions: Freight limited to 200 pounds per package.

RESPECTFULLY SUBMITTED this 19th day of November, 2004.

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