

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Application of
PACIFIC CRUISES NORTHWEST, INC. d/b/a
VICTORIA SAN JUAN CRUISES

For Certificate of Public Convenience and
Necessity to Operate Commercial Ferry Service

DOCKET NO. TS-031996
APPLICATION NO. B-709240

POST HEARING BRIEF OF
APPLICANT

1 Comes now Applicant by and through its counsel Williams, Kastner & Gibbs PLLC
and David W. Wiley and in post-hearing analysis of the legal issues raised by the applicable
statute and rules, files the following:

I. NATURE OF PROCEEDING

2 Application B-709240, Docket No. TS-031996, is an application by Pacific Cruises
Northwest, Inc., d/b/a Victoria San Juan Cruises, 355 Harris Avenue, Suite 104, Bellingham,
WA 98225 (“PCNW” or “applicant”) for an extension of its certificate of public convenience
and necessity BC-10 to provide passenger-only commercial ferry express service between
Bellingham and Friday Harbor, San Juan Island, Washington. After withdrawal of the sole
protest in this matter on August 23, 2004, the matter proceeded to hearing November 4, 2004
in Seattle where the testimony of the applicant-principal, Drew Schmidt was presented, along
with various other evidentiary exhibits for inclusion in the record. At the close of the
proceeding, Administrative Law Judge Karen Cailé suggested that post-hearing briefing

POST HEARING BRIEF OF APPLICANT - 1

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addressing the underlying statutes and rules in the commercial ferry arena might be useful, hence the below discussion:

II. STATUTES AND RULES IMPLICATED

3 The statute and rules raised by this proceeding are RCW 81.84.020; WAC 480-51-010, 020, 030, 040, RCW 47.60.120 and Chapter 373 of the 2003 Washington session laws.

III. ISSUES PRESENTED

4 (1) Does Application B-079240 constitute an application for overlapping service such that the Commission may only grant a new certificate or extension to the certificate “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 certificates for or tariffs after the time period allowed to initiate service has elapsed?”

5 (2) Are the existing certificate holders providing service to the full extent of their authority under RCW 81.84.020?

6 (3) Is this application consistent with the public interest as reflected by recent revisions to the commercial ferry certificate statutes in EHB 1388 in the 2003 legislative session?

IV. DISCUSSION AND ANALYSIS

A. Application B-709240 for Express Service Between Bellingham and Friday Harbor Is Neither Factually nor Legally An Application for Overlapping Service.

7 While it is indisputable that there are two existing certificates which contain Bellingham and Friday Harbor as termini points (i.e., Ex. 15, BC-120) issued to San Juan Islands Shuttle Express, Inc. (“SJISE”) and BC-95, (Ex. 6) issued to Island Mariner, Inc. (Island Mariner), there is no existing certificate authorizing express, non-stop service between Bellingham and Friday Harbor. The certificate of Island Mariner on its face requires the service to be provided “via Eliza, Sinclair, Cypress, Blakely, Decatur, Crane, Jones, Spieden,

Johns, Stuart, Waldron, Sucia and Matia Islands with an additional stop at Roche Harbor on San Juan Island, Rosario Resort, Olga and Doe Bay on Orcas Island, Lopez and Shaw Island.” This litany of stopping points along the route clearly contrasts the service offered by Island Mariner with that proposed by Pacific Cruises Northwest, Inc. Indeed, the Commission Staff indicated in a letter from 1988 (Ex. 7), regarding Island Mariner’s authority that “. . . [t]he service authorized is not directly from Bellingham to Friday Harbor but must include the additional stops as named on the certificate or issued by the Commission.”

8 While Ex. 15 reflects far fewer intermediate points than BC-95, it does include the qualification that any service involves “the carrying vessel touching at Obstruction Pass on voyages to and from Friday Harbor.” Applicant thus contends that neither of the existing certificates is completely overlapping and/or duplicating of the proposed certificate service.

B. Even Assuming There Were One or More Existing Certificates in Identical Service Between Bellingham and Friday Harbor, Existing Law Still Authorizes, and Indeed, Mandates Issuance of an Additional Certificate to Serve Between Bellingham and Friday Harbor.

9 In two former regulated launch certificate applications under RCW 81.84, the Commission ruled that despite its “inclination” to agree that RCW 81.84.020 “seems to contemplate an exclusive grant of authority,” it could issue overlapping certificates between two anchorage zone areas. Order S.B.C. No. 467, *In Re Jack Rood and Jack L. Harmon, Jr. d/b/a Arrow Launch Service*, Application B-308 (May 1990), and Order S.B.C. No. 468, *In Re Belairco, Inc.*, Application No. B-313 (May 1990). While noting in those decisions the inherent nature of the statute on its face, the Commission nevertheless found in that record a level of need for service to allow it to issue duplicating permits to both applicants. In both its Orders authorizing service between Bellingham and Vendovi Island, the Commission interpreted the evidence as follows:

10 The level of need can be great at times, with shippers requiring launch service at least every four hours to U.S. Ships at anchor and with no one carrier having adequate

equipment and personnel to handle the demand, especially if they are to continue to serve their other territories and customers. Finally, there are several anchorage zones in the area **for which more than one certificated carrier has authority**. [Emphasis added]. S.B.C. No. 467 at 7, S.B.C. No. 468 at 8.

11 There is no present express service authorized to or offered by any certificate holder between Bellingham and Friday Harbor. As noted, the other two certificates in this record require either flag-stop “hop scotching” to and from Bellingham and Friday Harbor, or routing that requires an intermediate touch stop at a minimum. Neither such permit restriction is of benefit and convenience to shippers/passengers seeking *non-stop* service such as those indicating a need for same in Ex. 9.

12 Finally, even assuming one or both of those certificates constituted “overlapping service” under RCW 81.84.020, the Commission has in past orders authorized more than one certificated carrier in a commercial ferry lane, expressly finding in the *Arrow Launch* and *Belairco* cases that it can issue more than a single certificate for the same route under the applicable commercial ferry statute, RCW 81.84.020.

C. There Is Absolutely No Evidence That Any Existing Certificate Holder Has Previously Provided the Type and Kind of Service, or that Certificate BC-120 Has Been Exercised in the Pertinent Review Period for Evaluating New Entry Applications Under Applicable Entry Standards.

13 Aside from the testimony about the flagstop, non-express service rendered by Island Mariner, Inc., BC-95 (Ex. 15), that may or may not ultimately reach Friday Harbor during any particular voyage, there was no evidence of any operations by San Juan Island Shuttle Express, Inc. in this record for the past three years. Applicant principal, Drew Schmidt, in fact testified to that effect and to the apparent prolonged cessation of operations by the withdrawn protestant. Moreover, any activity since the filing of the instant application on December 2, 2003 would be irrelevant, either for reviewing a complaint, or for an application record.

14 “The Commission’s review of a complaint, like its review of an application will be based on the factual situation extant at the time the complaint is filed. [Emphasis added].” Order S.B.C. No. 490, *Clipper Navigation, Inc. v. Puget Sound Express, Inc.*, Docket No. TS-900977 (Feb. 1992) at 7, citing Order M.V.G. No. 1403, *Mason County Garbage Co. v. Harold LeMay Enterprises, Inc.*, Docket No. TG-2163 (Aug. 1989).

15 That test period of an interval prior to the filing of an application has been well established. Post-filing improvements, even assuming there were a showing of any service resumption on this record, are not entitled to any weight in the evaluation of service sufficiency. “To hold otherwise would mean that no new carrier could ever be authorized to provide steam boat carriage, thus reducing the law, and the hearing it provides for, to empty words.” *Clipper Navigation, et al.* at 7.

16 As concerns the related authority in *San Juan Island Shuttle Express, Inc.* containing the Bellingham and Friday Harbor termini points, as noted, there is no evidence of holding out to provide service in this record for a number of years prior to the filing of this application. There is thus no existing, ripened property right vis-à-vis SJISE under *Lee Eastes v. Public Service Commission*, 52 Wn.2d 701, 328 P.2d 700 (1958), to consider as to any affect on protestants of the applicant’s proposed operations.

D. The Auto Transportation Regulatory Statute Also Provides Guidance In Determining Whether This Territory Is “Already Served.”

17 Under an analogous entry provision for auto transportation, RCW 81.68.040, the Commission is authorized to issue 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 entity will not provide service to the satisfaction of the Commission. . . .” The WUTC has previously had opportunity under this provision to evaluate the extent of the certificate held by protestants/intervenors to determine whether the territory

contained in those third-parties' certificates constituted "territory already served" within the meaning of the statute. In Order M.V.C. No. 1809, *In Re San Juan Airlines, Inc. d/b/a Shuttle Express*, Application D-2566 (April 1989), the Commission alluded to two Washington Supreme Court cases, *Suburban Transportation System v. Furse, et al.*, 13 Wn.2d 345, 125 P.2d 266 (1942), and a commercial ferry case *Puget Sound Navigation Co. v. Dept. of Public Works*, 152 Wn. 417, 278 P 189, 191 (1931), which had concluded that the issue of "territory already served" is an issue of fact to be determined from a consideration of economic as well as legal principles. In quoting the *Puget Sound Navigation Co.* case in *Shuttle Express, Inc.*, the Commission noted the following economic considerations it must make, including:

18 a consideration of the kinds, means, and methods of travel; the question of population warranting additional facilities for transportation, or the possibilities of the additional means of transportation increasing the population so as to ultimately make the venture a success. In addition to those factors it often becomes necessary . . . to consider the topography, character and condition of the country into which the services to be introduced, and its relation to the nearest territory through which transportation service is already supplied.

19 The Commission went on to note in *Shuttle Express* three additional qualitative factors to find "territory already served": first, the extent of the authority of the protestant/intervenor; second, whether or not the protestant/intervenor is serving to the extent of that authority; and third, whether the type of service provided reasonably serves the market.

20 As noted repeatedly above, the authority of the existing certificate holders in this record is not the same as that sought by the applicant, nor has SJISE held out to perform regulated service for a number of years prior to this application. Non-stop express service between Bellingham and Friday Harbor is not "territory already served," and such a finding is inarguable on this record.

E. The Evidence of Shipper Need Expressed in the Record Supports Additional Authorized Service.

21 Finally, the letters filed in support of this application support a direct service link between Bellingham and Friday Harbor, and indicate a level of demand for expeditious, non-stop service between the two termini that presently is not being met. *Shuttle Express* is precedent to guide the Administrative Law Judge in evaluating the evidence in this regard. Moreover, *Shuttle Express* also includes relevant discussion about another factor: the benefit for passengers that increased competition may entail. In citing to the positive effects of competition as articulated in *Blackball Freight Service, Inc. v. Washington Utilities and Transportation Commission*, 74 Wn. 2d 871, 447 P.2d 597 (1969), the Commission in *Shuttle Express* noted that there was evidence on the record that competition had resulted in an increase in service levels to the public. Clearly, the provision of non-stop service between Bellingham and Friday Harbor constitutes just that additional layer of service not currently provided by any certificate holder in this territory, and underscores an unquestionably positive effect of grant of the instant commercial ferry application.

F. It Is Fully Consistent With the Public Interest, and With Recent Revisions to the Commercial Ferry Statutes, for the Underlying Application to Be Granted.

22 As noted, the Commission in application cases has previously acknowledged the benefits of competition in enhancing or improving levels of service to the traveling public when needs and demands of shippers/passengers evolve. Commercial ferry service is indisputably a mode of transportation receiving increasing public and political scrutiny in the Puget Sound area. Indeed, the 2003 State Legislature, on at least two separate occasions, enacted legislation to increase alternatives to the State ferry system and to promote private passenger-only ferry expansion in Puget Sound. In amending RCW 47.60.120 (the “Ten Mile Rule”), RCW 81.84.020 and other pertinent sections, the 2003 Legislature noted in its introduction to Engrossed House Bill 1388, “[t]he Legislature finds that current statutes impose

barriers to entities other than the state operating passenger-only ferries. The Legislature intends to lift those barriers to allow entities other than the state to provide passenger-only ferry service. . .” 2003 Wash. Laws ch. 373, sec. 1.

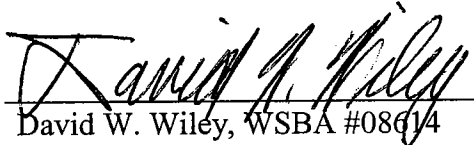
23 Applicant submits that the evidence adduced in the record in Docket No. TS-031996 not only fully satisfies the entry standards of RCW 81.84.020, but also represents an opportunity to augment passenger-only commercial ferry service by providing additional service levels and options fully consistent with the evolving public interest standard as addressed in EHB 1388.

VI. CONCLUSION

24 For all of the above reasons, Pacific Cruises Northwest, Inc. d/b/a Victoria San Juan Cruises urges the Administrative Law Judge to find that the testimony and exhibits submitted into this record fully satisfy the requirements of RCW 81.84.020, and that certificate BC-10 should be extended to provide for express commercial ferry service between Bellingham and Friday Harbor.

RESPECTFULLY SUBMITTED this 18 day of November, 2004.

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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2004, I caused to be served the original and eight copies of the foregoing document to the following address via first class mail, postage prepaid to:

Carole Washburn, WUTC Executive Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive SW
P.O. Box 47250
Olympia, WA 98504-7250


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

and an electronic copy via email and first class mail, postage prepaid, to:

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Dated this 18th day of November, 2004.


LESLIE LIBERMAN (printed name)