

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Application of
KITSAP FERRY COMPANY, LLC
d/b/a KITSAP FERRY CO

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

DOCKET NO. TS-040794

WRITTEN STATEMENTS ON
BEHALF OF COMMISSION
STAFF

1 Pursuant to notice served on June 17, 2004, Commission Staff submits the
following written statement.

I. APPLICABLE STATUTES AND RULES

2 Statutes and rules applicable to this proceeding are RCW 81.84.070; RCW
80.01.040(2); RCW 81.01.010; WAC 480-51-060; WAC 480-07-640; WAC 480-07-355.

II. OVERVIEW

3 Kitsap Ferry Company, LLC, filed an application for a temporary certificate to
operate passenger-only ferry service between Bremerton and Seattle, Washington.
The Commission granted the temporary certificate and provided notice as required

by WAC 480-51-060(5). The Inlandboatmen’s Union of the Pacific (IBU) filed a protest to the temporary certificate. At issue is whether IBU has standing to bring such a protest, and if so, what the proper scope of the protest should be.

4 The Commission’s commercial ferry rules specify how a third party may participate in a temporary commercial ferry application proceeding. The third party must file a protest stating “the specific grounds for opposing the application and [containing] a concise statement of the interest of the protestant in the proceeding.” WAC 480-51-060(5).¹

5 The Commission’s commercial ferry rules do not address further how the Commission is to analyze protests for sufficiency. However, the Commission generally requires persons seeking participation in a hearing to have a “substantial interest in the subject matter of the hearing,” or to show the public interest justifies their participation. WAC 480-07-355(3).

6 In addition, the Commission recently addressed a similar standing issue in *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 (Aqua Express). While the issues in *Aqua Express* are similar to those presented in this docket, *Aqua Express* is not dispositive of the issues in this case.

¹The language regarding third party participation in commercial ferry proceedings in WAC 480-51-060(5) is identical to that found in WAC 480-51-040(1), which addresses applications for permanent certificates to operate commercial ferry service.

III. DISCUSSION

A. IBU's Standing to Protest

7 IBU states it is acting on behalf of two interests in this case: 1) the interests of deckhands, ticket-takers, ticket-sellers, and terminal personnel working for the Washington State Ferries² and 2) the interests of snack bar and concessionaire workers employed by the Washington State Ferries. *Protest at 2.*

8 The Commission recently ruled on IBU's standing to bring a similar protest in *Aqua Express*. In *Aqua Express*, the Commission stated that under WAC 480-07-355(4), it is required to determine whether the intervenor has a substantial interest in the proceeding or whether the public interest would be served by the intervenor's participation. *Order No. 02 at ¶ 28.* The Commission noted that it has applied the "zone of interest" test to determine standing. *Id.*

9 The Commission did not identify which IBU interest fell within the zone of interest to establish standing. The Commission instead exercised its discretion under RCW 34.05.443 and WAC 480-07-355(3) to determine whether to allow intervention and whether intervention would contribute to the Commission's ability to make a decision in the public interest. *Id. at ¶ 35.* Because the legislature has directed the Commission to consider the effect of its decision on public agencies operating or

² Washington State Ferries is the name the Legislature authorizes the Department of Transportation (DOT) to refer to the state ferry system managed and operated by DOT. *RCW 47.01.031; RCW 47.60.015.*

eligible to operate passenger-only ferries under RCW 81.84.020(4), and because IBU was the only party seeking to intervene to address that requirement, the Commission found that it was in the public interest to allow IBU to intervene in *Aqua Express*. *Id.*

10 The company in *Aqua Express* is seeking a permanent certificate. This case is distinguishable from *Aqua Express* because Kitsap Ferry is seeking a temporary certificate. The scope of inquiry for a temporary certificate is different than the scope of inquiry for a permanent certificate.

11 Evaluating an application for a permanent certificate requires a hearing. RCW 81.84.020(1). The standard is public convenience and necessity. RCW 81.84.010(1). Commission is required to consider the applicant's financial fitness (including a review of pro forma financial statements), the effect of its decision on public agencies operating or eligible to operate passenger-only ferry service, and whether the public transportation benefit area authority agrees to the application. RCW 81.84.020(2), (4) and, (5).

12 Evaluating an application for a temporary certificate, however, does not require a hearing. RCW 81.84.070. The standard is immediate and urgent need and otherwise consistent with the public interest. *Id.* The Commission considers whether the route requested is subject to an existing certificate or application by another commercial ferry operator. *Id.* The Commission also considers the general fitness of

the applicant and requires a statement from the United States Coast Guard regarding the seaworthiness of the vessel and proof of insurance. *WAC 480-51-060*.

13 In this case, IBU does not express an interest that falls within the zone of interests. In addition, IBU does not raise issues properly before the Commission that are not addressed by the other parties. In its application, Kitsap Ferry addresses whether an immediate and urgent need exists. The Company presents letters of support with its application to demonstrate the need. *See Application*. Also, Commission Staff briefed the Commissioners regarding Kitsap Ferry's application. *Attachment A, Declaration of Eugene K. Eckhardt at ¶ 6*. During that briefing, Staff and the Commissioners discussed whether immediate and urgent need exists and whether the granting the application would otherwise be in the public interest. *Id. at ¶ 7*. IBU has not established standing in this proceeding.

B. Assuming IBU's Protest is Valid, the Proper Scope is Narrower Than That Found in *Aqua Express*.

14 IBU raises the following issues as set forth in its Protest at pages 2-6:

1. Whether immediate and urgent need for passenger-only ferry service between Bremerton and Seattle, Washington has been demonstrated.
2. Whether the service sought by Kitsap Ferry would adversely affect IBU-represented Washington State Ferry employees.
3. Whether the service sought by Kitsap Ferry would adversely affect IBU-represented Washington State Ferry concessionaires.

4. Whether the service sought by Kitsap Ferry would adversely affect Washington State Ferry.
5. Whether the service sought by Kitsap Ferry would adversely affect the air and water quality in this region.
6. Whether the service sought by Kitsap Ferry would adversely affect beach erosion in this region.
7. Whether Kitsap Ferry has demonstrated sufficient financial resources to operate the proposed service.

15 In *Aqua Express*, IBU raised similar issues. See *Order No. 02 at ¶ 6*. The Commission limited IBU's participation to addressing issues regarding the effect of the proposed service on Washington State Ferry (but without asserting the ferry system's own interests), the need for the proposed service, and the applicant's financial fitness. If IBU is allowed to intervene in this proceeding, the scope of the intervention should be narrower than the intervention allowed in *Aqua Express*. The scope of IBU's intervention should be limited to addressing whether immediate and urgent need for the proposed service exists.

1. **Issues similar to those dismissed in *Aqua Express* should also be dismissed in this case.**

16 In *Aqua Express*, the Commission dismissed issues regarding the effect the proposed service would have on IBU-represented Washington State Ferry employees and IBU-represented Washington State Ferry concessionaires. *Order No. 02 at ¶ 32*.

The Commission noted that its decision was consistent with its decision in prior cases allowing unions to participate in proceedings, but precluding the unions from addressing issues of wages, benefits, or job protection for union members. *Id.* (quotation omitted; internal quotations omitted). Issues addressing the effect on IBU-represented individuals, Issue 2 and Issue 3, should similarly be dismissed here.

17 The Commission dismissed issues relating to air and water quality in *Aqua Express* because the Commission generally has no statutory authority to consider the effect of proposed service on air and water quality of the region.³ *Id.* at ¶ 30. The Commission should similarly dismiss Issue 5 in this case relating to air and water quality. Furthermore, the Commission should dismiss Issue 6 in this case relating to beach erosion because the Commission has no statutory authority to consider the effect of Kitsap Ferry’s proposed service on beach erosion.

2. The Commission should dismiss issues relating to the effect Kitsap Ferry’s proposed service may have on Washington State Ferry.

18 In *Aqua Express*, the Commission allowed IBU’s intervention in part to address the effects Aqua Express’s proposed service will have on Washington State Ferry.⁴ *Id.* at ¶¶ 33-36. The Commission should not allow intervention to address that issue

³ Although the Commission may consider the effect the proposed service has on air quality in the region if RCW 47.60.120(3) (the “ten-mile rule”) applies, that section only applies to the proposed crossings within ten miles of any state ferry crossing. Because passenger-only ferries are exempt from the ten-mile rule, the rule did not apply in *Aqua Express*, and it does not apply in this case.

⁴ This decision is subject to a Petition for Interlocutory Review brought by Staff. Docket No. TS-040650, Petition on Behalf of Commission Staff for Interlocutory Review of Order No. 2.

in this case because the scope of inquiry regarding a temporary certificate for commercial ferry service does not address the effect on public agencies operating or eligible to operate passenger-only ferry service. In addition, Washington State Ferries is not a “public agency” for purposes of RCW 81.84.020(4).

- a. **The Commission need not consider the effect of the proposed service on public agencies operating or eligible to operate passenger-only ferries in evaluating an application for a temporary certificate.**

19 RCW 81.84.070 and WAC 480-51-060 govern applications for temporary commercial ferry certificates and the Commission’s decision to grant or deny such applications. Neither the statute nor the rule require the Commission to consider the effect of Kitsap Ferry’s proposed service on public agencies operating or eligible to operate passenger-only ferries.

20 The Commission is required to consider the effect on public agencies operating or eligible to operate passenger-only ferries in determining whether to grant or deny applications for *permanent* commercial ferry certificates. RCW 81.84.020 was amended in 2003 to include this requirement. The Legislature did not amend RCW 81.84.070 to impose a similar requirement, indicating intent for different inquiries regarding temporary and permanent certificates.

21 In addition, temporary certificates expire after 180 days. *RCW 81.84.070*. Under WAC 480-51-060(8), if the applicant applies for a permanent certificate within

30 days after the grant of temporary authority, the temporary certificate continues in force until the Commission grants or denies the permanent authority. Because a temporary certificate expires either after the expiration of 180 days or the disposition of an application for permanent authority (which includes an evaluation of the effect on public agencies operating or eligible to operate passenger-only ferry service), it is not necessary for the Commission to consider the effect on Washington State Ferries.

22 In addition, even if the Commission is required to consider the effect of Kitsap Ferry's proposed service on public agencies operating or eligible to operate passenger-only ferry service, Washington State Ferries is not a "public agency" for purposes of RCW 81.84.020(4).

b. Washington State Ferries is not a "public agency" for purposes of RCW 81.84.020(4).

23 Two statutes purport to require the Commission consider the impact of a proposed commercial ferry on the state. First, RCW 81.84.020(4) requires the Commission to consider "the effect of its decisions on public agencies operating, or eligible to operate, passenger-only ferry service," before granting a commercial ferry certificate. Second, RCW 47.06.120(1), the so-called ten-mile rule, requires the Commission to consider, *inter alia*, "the overall impact on the state ferry system" before granting a waiver of the ten-mile rule. Absent a waiver, the Commission cannot issue a commercial ferry certificate for a route that violates the ten-mile rule.

24 However, the Legislature exempted “passenger-only ferry service” from the ten-mile rule. RCW 47.60.120(5). Accordingly, the Commission does not consider “the overall impact on the ferry system” under that statute, when passenger-only ferry service is involved. If the Commission uses RCW 81.84.020(4) to consider the impact of the proposed passenger-only ferry service on Washington State Ferries (or the Department of Transportation as a whole), the Commission would be doing what RCW 47.60.120(5) says it need not do.

25 Harmonizing the two statutes leads to the conclusion that the Commission need not consider the impact of the instant application on the state ferry system. Legislative history supports this conclusion.

26 RCW 81.84.020 and RCW 47.60.120(5) were enacted in the same legislation: Chapter 373, Laws of 2003. In Section 1 of that Chapter, the Legislature stated its policy for advancing passenger-only ferry service by entities other than the state, by removing entry barriers:

The legislature finds that the Washington state department of transportation should focus on its core ferry mission of moving automobiles on Washington state's marine highways. The 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.* The legislature finds that the provision of this service and the improvement in the mobility of the citizens of Washington state is legally adequate consideration for the use of state facilities in conjunction with the provision of the service, and the legislature finds that allowing the operators of passenger-only ferries to use state facilities on the

basis of legally adequate consideration does not evince donative intent on the part of the legislature.

Emphasis supplied.

27 The Legislature also sought to promote passenger ferries not operated by the state by requiring the DOT to allow access to its ferry dock terminals, docks and pier space at market rates (so long as the Department's operation of car ferries is not thereby limited). *Id. and Chapter 373, Laws of 2003, Sec. 3(2).*

28 In that same Chapter, the Legislature also amended existing statutes to add RCW 81.84.020(4) and RCW 47.60.120(5). *Id., Sec. 5(4) and Sec. 2(5), respectively.* These sections should be read as consonant with the foregoing legislative policies underlying the legislation. They should not be read to erect new entry barriers for passenger-only ferries operated by entities other than the state.⁵

29 Indeed, it would be anomalous to read RCW 81.84.020(4) to *impose a new barrier to entry* for passenger-only ferries run by entities other than the state, when the Legislature clearly stated its intent to not only *remove barriers to entry*, but to require the DOT to permit the use of its terminal and dock facilities to facilitate development of passenger-only ferries by such entities.

⁵ The bill reports, committee reports and bill digests underlying Chapter 373, Laws of 2003, likewise indicate intent not to create any additional barriers to entry. The Final Bill Report (July 27, 2003); House Bill Report; and Senate Bill Report (April 7, 2003) are attached as Attachment C. (The bill was Engrossed house Bill 1388).

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Thus, because the Commission is not required to consider the effect the proposed service has on public agencies operating or eligible to operate passenger-only ferry service, and because Washington State Ferries are not a public agency for purposes of RCW 81.84.020(4), the Commission should dismiss Issue 4.

3. The Commission should dismiss issues relating to Kitsap Ferry's financial fitness.

31

In evaluating applications for temporary commercial ferry certificates, the Commission will consider the general fitness of the applicant. *WAC 480-51-060*. A detailed evaluation of the applicant's financial fitness is not required. *Compare* RCW 81.84.020(2)(requiring pro forma financial statements from applicant for permanent authority).

32

Evaluating Kitsap Ferry's financial fitness is more appropriately done in response to an application for permanent authority under RCW 81.84.020.⁶ Thus, the Commission should dismiss Issue 7 regarding Kitsap Ferry's financial fitness.

C. The Commission Properly Granted Kitsap Ferry's Application for a Temporary Certificate.

33

IBU asserts that Kitsap Ferry failed to make an adequate showing that its services are immediately and urgently needed, and urges the Commission to reverse its decision to issue a temporary certificate. *Protest at 4*. IBU also notes that the

⁶ Kitsap Ferry has applied for a permanent commercial ferry certificate in Docket No. TS-041007.

Commission's order granting Kitsap Ferry a temporary certificate does not specifically address immediate and urgent need.

34 As previously stated, Kitsap Ferry addressed the requirement of immediate and urgent need in its application. Kitsap Ferry described the passenger-only service offered by Washington State Ferries between 1986 and 2003. *Application at ¶ 13.* Washington State Ferries carried approximately 3,231 persons per day during that time. *Id.* The service was discontinued due to funding issues, not due to lack of need. *Id.* Although efforts have not been successful in establishing a publicly funded passenger-only ferry between Bremerton and Seattle, there is no evidence that the need for a passenger-only ferry has diminished.

35 In addition to Kitsap Ferry's application, the Commissioners were briefed on Staff's investigation and recommendation. *Attachment A, Declaration of Eugene K. Eckhardt; see also Attachment B, Declaration of Bonnie L. Allen.* During the briefing, Staff included a discussion of immediate and urgent need. *Attachment A, Declaration of Eugene K. Eckhardt.* Order No. 01 granting Kitsap Ferry's temporary certificate notes the Commission considered Kitsap Ferry's application and was fully advised of the premises.

36 In addition, the lack of specific findings does not render Order No. 01 invalid. For example, when findings of fact are not explicitly delineated, an appellate court

has the authority to determine what facts were actually found if an agency's order is challenged. *Tapper v. Employment Security Dep't.*, 122 Wn.2d 397, , 858 P.2d 494 (1993). Because the record in this case supports a finding of immediate and urgent need, the Commission properly granted Kitsap Ferry's application for a temporary commercial ferry certificate.

D. Public Comment

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Since IBU filed its protest, the Commission has received several letters from members of the public. As of June 23, 2004, the Commission has received approximately 90 letters from the public. *Attachment B, Declaration of Bonnie L. Allen at ¶ 8.* The Commission should receive the letters into the record as a bench exhibit pursuant to WAC 480-07-498.

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IV. CONCLUSION

38 IBU has not established that it has standing to bring a protest in this case. However, if the Commission finds that IBU does have standing, the intervention should be limited to addressing the issue of immediate and urgent need.

DATED this 24th day of June 2004.

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