

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Application of

MCNAMARA, SEAN d/b/a
BELLINGHAM WATER TAXI

For Extension of Authority Under Certificate
BC-64619

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In the Matter of the Application of

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

For a Certificate of Public Convenience and
Necessity to Operate Vessels in Furnishing
Passenger Ferry Service

DOCKET TS-121253 and
DOCKET TS-121395 (*Consolidated*)

COMMISSION STAFF POST-
HEARING SUMMATION

1 Commission Staff (Staff) submits the following summation, touching upon statutory requirements for issuing a commercial ferry certificate with a focus on its evaluation of the financial fitness of Sean McNamara d/b/a Bellingham Water Taxi (BWT) and Pacific Cruises Northwest, Inc. d/b/a San Juan Cruises (PCNW) (together, the Applicants).

A. Public Convenience and Necessity

2 The Commission evaluates whether “public convenience and necessity” require a certificate, under RCW 81.84.010, by considering whether there is a present or future need for the proposed service. This is generally established by the testimony of witnesses who would use the service if it were available, as well as those familiar with the public’s transportation needs over the routes in question.¹ Several witnesses testified regarding their transportation needs over the routes at issue. The evidence taken as whole indicates a need for the services proposed and is not more favorable to one applicant than the other.

¹ *In re Application of Aqua Express, LLC*, Docket No. TS-040650, Order 05, at ¶ 13 (July 2004); SBC Order No. 563, *In re Seattle Ferry Service*, App. No. B-78811 (2000); *In re Dutchman Marine, LLC, et al.*, Docket Nos. TS-001774 and TS-002055, First Supplemental Order, Initial Order Granting Applications at ¶ 34 (September 2001), adopted in Second Supplemental Order (October 2001).

B. Existing Certificate

3 The Commission must also consider whether the “territory already served” language under RCW 81.84.020(1) is a bar to granting either or both applications. In prior cases, the Commission has drawn from the similar transportation certification statute, RCW 81.68.040 to determine whether a territory is “already served.” A territory may not be “already served” because the existing certificate holder is not serving it with respect to a particular type of service.² The Commission has also stated that “one factor to be considered is the extent of the authority of the interveners. 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.”³ The Commission may grant overlapping certificates.⁴ Reflecting a policy favoring effective competition, the Commission expressed in a commercial ferry case that it is not in the business of granting exclusive service territories and may grant overlapping authority absent a showing that competition would be “ruinous.”⁵

4 Island Mariner, an existing certificate holder (BC-95) and protestant, has temporarily discontinued service pursuant to a Commission order until May 2013. Historically and based on the time schedule on file with the Commission, it has provided summer-only service. Staff expects the Applicants to argue that there is public need for the proposed type of service that is unmet by the certificate holder, even if it resumes service as required. The

² “When the existing certificate holder directs its service at certain market niches within its territory which differ substantially from the markets the applicant proposes, the Commission has held that the statutory restriction will not be read to prevent entrepreneurs from developing and serving new markets within a territory.” *In re Application B-78450 of Pacific Cruises Northwest, Inc.*, Order S.B.C. No. 524, at p. 8 (May 23, 1996) (citing a number of bus and airporter cases).

³ *In re 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 at p. 17 (April 21, 1989).

⁴ See, i.e., Order S.B.C. No. 468, *In re Belairco, Inc.*, App. No. B-313 (May 1990); Order S.B. C. No. 467, *In re Jack Rood and Jack L. Harmon, Jr., d/b/a Arrow Launch Service*, App. No. B-308 (May 1990). See also *In re Application of Pacific Cruises Northwest*, Docket TS-031996, Order 04 (February 2005).

⁵ See *In re Application of Waste Management of Washington*, Docket TG-12033, Order 07, Initial Order Granting Application, TG-120033, ¶ 11, citing to *In re the Applications of Dutchman Marine, LLC d/b/a Lake Washington Ferry Service; and Seattle Harbor Tours Limited Partnership*, Dockets TS-001774 & TS-002055, Second Supplemental Order – Commission Decision and Order Affirming Initial Order Granting Application with Conditions (October 19, 2001).

Commission may find that each offers a distinct type of service. For example, PCNW's nonstop service between Friday Harbor and Bellingham may be a need unmet by Island Mariner, which must make required stops.⁶ Also, the Commission may find that BWT's proposed year-round extension of service, which would link Friday Harbor, a scheduled stop, with its other scheduled stop and flag stops is a public need unmet by Island Mariner's summer-only service.⁷ The record does not appear to support a finding that granting both certificates would result in "ruinous" competition.

C. Financial Fitness

5 An applicant for authority to provide commercial ferry service must show that it has the financial resources to operate the service it proposes for at least 12 months. RCW 81.84.020(2). That determination is based, in part, on the applicant's pro forma statement of operations, as well as several factors set out in RCW 81.84.020(2) and WAC 480-51-030(1). The Applicants must be able to provide the service after they commence operations for at least 12 months.

6 Staff is unable to conclude that BWT has met its burden under RCW 81.84.020(2). Although, in Docket TS-120466, Order 01, the Commission found that BWT met financial fitness for its existing authority under the same statute, that review did not include the extension and was based upon substantially different financial data provided by BWT.⁸ Staff notes that BWT must initiate service within 20 months of the date of that order, or January 31, 2014, and file progress reports. The Commission need not revisit the prior order, but should separately evaluate BWT's financial fitness for the *extension of authority* based on the updated record in this case as presented by BWT. Regarding its current

⁶In fact, the Commission made a similar finding in *In re Application of Pacific Cruises Northwest, Inc.*, Docket TS-031996, Order 04 (February 2005).

⁷Island Mariner did not protest the application that resulted in BWT's existing authority in Docket TS-120446.

⁸ See *In re Joint Application to Transfer Certificate from PCNW to BWT*, Docket TS-120446, Order 01 (May 31, 2012). The Joint Application is on file in that docket. For example, different revenue and cost projections, and a description of cash and stock assets to be used for the business totaling \$103,000.

application, BWT has made reasonable efforts to estimate its revenue and expenses. BWT stated that it is a start-up and developed a business plan deriving its current revenue and cost projections. BWT admitted that those projections are best estimates, but may be low.⁹ BWT has not obtained but is seeking a suitable vessel to operate its proposed route. Based on BWT's revenue and cost projections, it expects its entire operations, including the extension, to be profitable in its first year. Even so, the extension would operate at a loss and be supported by revenue from its existing authority, but those revenues are unknown at this time. The financial statement BWT presented at hearing shows less overall profitability in the first year than the statement it submitted with its original filing.¹⁰ If BWT's entire operations are not profitable, such as because of lower ridership or higher costs, it must be able to continue operations of its extension. BWT's revised documentation shows \$33,000 in current assets, cash and publically traded stock that could be used to support operations for 12 months. BWT acknowledged a substantial decline in these available assets over the last few months since filing its application;¹¹ apparently the result of stock sales and use of savings for personal expenses unrelated to the business. The limited and also declining liquid assets and lack of evidence of other income while the Company is still in search of a vessel is concerning. BWT described additional assets, a vehicle and real estate owned free and clear; however, Staff is unable to conclude from the record that this property could, or would, be used to continue operations, BWT has no other significant sources of income, and the extent of additional financial support is unclear. It is for these reasons that Staff is unable to conclude that BWT has made the required showing that it has the financial

⁹ For example, BWT apparently calculated ted ridership based on five weekly sailings in the summer, and two in winter, but its proposed time schedule shows more sailings. Exh. SCM-12, p. 13. Also, the Company admitted that its docking estimates do not take into account the unknown possibility of "per-passenger" fees. Tr. McNamara, 118-119.

¹⁰ See Exh. SCM-11. See Exh. SCM-12, p. 11.

¹¹ Exh. SCM-14; Exh. SCM-12, p. 3. Exh. SCM-14 contains the date "1/24/2012." Based on the testimony that Exh. SCM-14 is recently updated, Staff assumed the "2012" is a typo. See also, Tr. McNamara, at 59-60, and at 98-100.

resources necessary operate the extension of its authority, so cannot recommend approval.

7 Staff concludes that PCNW has met the requirements under RCW 81.84.020(2). PCNW has made reasonable efforts to estimate its revenues and costs under the proposed operations. It appears these estimates are based on PCNW's prior experience as a certificate holder over the same route and its understanding of its non-regulated service. It presented evidence of three owned vessels available to provide service and support customers as need arises. Cost projections are based on its own allocation between regulated and non-regulated operations. If PCNW's projections are correct, it will be profitable in its first year. If it sustains losses during its first year, PCNW described assets of at least \$52,000 in cash, a note receivable, and inventory,¹² which could be used to continue regulated operations for 12 months. Additionally, it appears PCNW may use its existing charter operations to support its proposed service. Although it did not provide specific figures for a full evaluation of this claim, PCNW testified that its (unregulated) operations are profitable, and that "it is the unregulated revenue that is making the regulated service viable."¹³ It appears that PCNW has shown it has the financial resources to operate the service it proposes for at least 12 months. Staff is limited by the record from making other conclusions regarding the overall financial health of the Company.¹⁴

D. Response to PCNW's Request for Alternative Relief at Hearing

8 Staff anticipates PCNW will briefly reiterate a request made orally a hearing that, as a form of alternative relief, the Commission exercise discretion to rehear the matter made final in an earlier docket. Briefly Staff does not support this alternative relief in this docket. The basis appears to be disputed facts involving informal communications, including an

¹² Exh. DMS-4.

¹³ Tr. Schmidt, 305:6-13. Tr. Schmidt, 301:10-15.

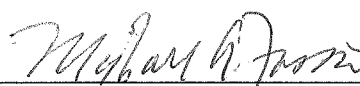
¹⁴ For example, PCNW did not detail its method of allocating expenses or asset resources between non-regulated and proposed regulated service, and did not provide an income statement that includes or shows those other operations.

email, between staff persons and PCNW before its pending application, when it was a regulated company. PCNW was not entitled to rely upon a staff person's informal interpretations of a rule as legal advice, binding upon the Commission, or not subject to change, as the express, bold-face language on a communication makes clear.¹⁵ Any such reliance does not justify rehearing the closed matter. PCNW's representative expressed having "second thoughts" about his decision to relinquish authority, but evidently did not seek the advice of legal counsel at the time, nor request Commission review of the order pursuant to notice in that order. The Commission should limit its decision in this case to whether or not PCNW's and BWT's pending applications should be granted.

DATED this 25th day of February 2013.

Respectfully submitted,

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¹⁵ Exh. DMS-12: "This e-mail states the informal opinions of commission staff, offered as technical assistance, and are not intended as legal advice. We reserve the right to amend these opinions should circumstances change or additional information be brought to our attention. Staff's opinions are not binding on the commission."