

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Application of)
DUTCHMAN MARINE, LLC d/b/a LAKE) DOCKET NO. TS-001774
WASHINGTON FERRY SERVICE,)
For Authority to Provide Commercial)
Ferry Service)
_____)

In the Matter of the Application of)
SEATTLE HARBOR TOURS LIMITED) DOCKET NO. TS-002055
PARTNERSHIP)
For Authority to Provide Commercial) SEATTLE HARBOR TOURS
Ferry Service) POST-HEARING BRIEF
_____)

Applicant Seattle Harbor Tours Limited Partnership (“Seattle Harbor Tours”) provides the following Post-Hearing Brief in the above-captioned proceeding.

I. INTRODUCTION

Seattle Harbor Tours intends to provide commercial ferry service across Lake Washington between the University of Washington (“UW”) and the communities of Kirkland, Renton, Kenmore, and Bellevue. Dutchman Marine, LLC (“Dutchman Marine”) intends to provide commercial ferry service between either Leschi or UW and the same east side communities. Both companies have applied for a Certificate of Public Convenience and Necessity (“Certificate”) from the Commission to provide their proposed service. The market, not the Commission, should decide whether, and the extent to which, these companies provide commercial ferry service. The legislature, however, has decided otherwise. Accordingly, the Commission is in the unusual and unenviable position of determining whether either or both of the Applicants should be granted an exclusive right to serve commercial ferry routes on Lake Washington for at least the next five to eight years.

Unfortunately, providing commercial ferry service across a lake in the middle of the state's largest urban area is not as simple as obtaining a Certificate from the Commission. Indeed, obtaining the Certificate is perhaps the most simple and straightforward step a company needs to take prior to initiating service. Myriad other issues remain to be resolved, including obtaining docking rights, working with affected communities to maximize benefits and minimize any negative impacts, and coordinating with local governments to ensure compliance with their regulations and requirements. Argosy has been attempting to resolve these issues without success for at least the last five years in order to initiate service under its Certificate to provide commercial ferry service between Kirkland and Seattle. Tr. at 856-67 (Blackman).

The Commission, therefore, should carefully consider these and other market circumstances, as well as the applicable legal requirements, in evaluating the Applications. The first issue the Commission should resolve is whether the routes each company proposes to serve actually overlap. Seattle Harbor Tours proposes to provide service between UW and Kirkland and Renton, while Dutchman Marine proposes routes between Leschi and Kirkland and Renton. The record evidence demonstrates that these routes are distinct, and neither company should be precluded from serving their proposed routes because of any authority granted to the other company. The Commission should then consider the likelihood that either Applicant will be able to initiate service on the proposed routes within the statutory time frame. The record evidence demonstrates that neither company will initiate service on routes between UW and Bellevue or Kenmore, and the Commission should decline to grant a Certificate for either route until a company can demonstrate that it can and will initiate service on that route within five years.

Resolution of these issues as Seattle Harbor Tours recommends would resolve the disputes in

this proceeding. Seattle Harbor Tours could be authorized to serve its Kirkland-UW and Renton-UW routes, the Commission could grant a Certificate to Dutchman Marine for its Kirkland-Leschi and Renton-Leschi routes, and neither company would be authorized to serve Bellevue-UW or Kenmore-UW at this time. The only issues remaining for Commission resolution would be whether each Applicant has the financial resources and experience to serve its proposed routes. Seattle Harbor Tours easily satisfies that requirement. However, if the Commission determines that the proposed Kirkland or Renton routes overlap or that it will grant a Certificate for the proposed Bellevue or Kenmore routes, the Commission will need to determine which of the two Applicants has the superior financial resources and experience to serve the competing route(s). The record evidence overwhelming demonstrates that Seattle Harbor Tours is the best, if not the only, qualified company to provide commercial ferry service on any such route.

The Commission, therefore, should authorize Seattle Harbor Tours to provide commercial ferry service between UW and Kirkland and Renton, as well as Kenmore and Bellevue to the extent the Commission grants a Certificate for either of those routes.

II. DISCUSSION

A. **The Commission Should Find That the Proposed Kirkland and Renton Routes to Seattle Locations Do Not Overlap But Should Deny Both Applications for the Proposed Bellevue and Kenmore Routes.**

The Commission needs to consider the Applications of Seattle Harbor Tours and Dutchman Marine in the context of the legal limitations and requirements of both RCW 81.84 and the Washington Constitution. The legislature, pursuant to its constitutional authority, has authorized the Commission to grant a Certificate for commercial ferry service only to a single company for any particular route. RCW 81.84.020(1); *see* Wash. Const., art. XII, Section 13. The Constitution, however, also establishes this state's "abhorrence of monopolies." *In re Consolidated Cases*, 123 Wn.2d 530, 538, 869 P.2d 1045 (1994); Wash. Const. art. XII, Section 22. The Commission thus should balance the constitutional concerns and legislative requirements by ensuring that any grant of exclusive authority to serve a particular commercial ferry route is construed narrowly to confer no broader authority than absolutely necessary.

Dutchman Marine has applied for Certificates to provide commercial ferry service between Kirkland and Seattle and between Renton and Seattle but intends to serve routes between Leschi and Kirkland and Renton. Seattle Harbor Tours, on the other hand, seeks authority to serve commercial ferry service routes between Kirkland and UW and between Renton and UW. Consistent with a narrow construction of RCW 81.84.020 in light of public policy against monopolies, the Commission should refuse to grant the broad exclusive authority that Dutchman Marine has requested and should grant authority only to the extent necessary to serve the west side communities each company proposes to serve. For Seattle Harbor Tours, that community is UW, and Dutchman Marine's application should not be construed to preclude Seattle Harbor Tours from serving that community from points in Kirkland

and Renton.

Both companies also propose routes between Bellevue and UW and between Kenmore and UW, precluding any grant of authority to both carriers to serve those communities. The legislature, however, has required that “[t]he holder of a certificate of public convenience and necessity granted under this chapter must initiate service within five years of obtaining the certificate,” which may be extended for an additional three years. RCW 81.84.010(2). Neither company is likely to initiate service on the Bellevue or Kenmore routes within the statutory time frame. Accordingly, the Commission should refuse to grant either applicant a Certificate for those routes until an applicant can demonstrate that it can and will initiate service within five years from the grant of authority.

1. The Commission Should Construe Seattle Harbor Tours’ Application to Include a Request for Authority to Serve a Kirkland to UW Route.

Seattle Harbor Tours in its Application requested “a new certificate for service from Kenmore, Bellevue, and Renton to University of Washington,” explaining that it currently has a certificate for service between Kirkland and Seattle. Ex. 201 (Seattle Harbor Tours Application) at 2 (response to Question 5). Seattle Harbor Tours subsequently clarified that its general partner, Argosy, “currently holds the certificate to provide commercial ferry service between Kirkland and Seattle.” Ex. 202 (Supplemental Responses) at 1. Seattle Harbor Tours’ Application also includes information about its plans for commercial ferry service between Kirkland and UW. Ex. 201 (Application) at 9-11 (response to Questions 9 and 10). The Kirkland information was provided “to be more specific in terms of where [Seattle Harbor Tours’] interest was, and that was Kirkland to the University of Washington.” Tr. at 844 (Blackman). Seattle Harbor Tours’ intent was to ensure – either through recognition of Argosy’s current certificate or through the grant of authority to Seattle Harbor Tours –

that Seattle Harbor Tours has authority to serve a commercial ferry route between Kirkland and UW.

Id.

Unfortunately, statutory ambiguity and unique circumstances have complicated Seattle Harbor Tours' ability to protect and pursue its interests. The current Certificate was granted to Argosy in December 1995, and the initial statutory five-year period for initiating service ended in December 2000.

Although the statute requires service initiation within five years (or eight years, if extended), RCW 81.84.060 provides:

The commission, upon complaint by an interested party, or upon its own motion after notice and opportunity for hearing, may cancel, revoke, suspend, alter, or amend a certificate issued under this chapter on any of the following grounds:

(1) Failure of the certificate holder to initiate service by the conclusion of the fifth year after the certificate has been granted or by the conclusion of an extension granted under RCW 81.84.010(2) or (3), if the commission has considered the progress report information required under RCW 81.84.010(2) or (3)

The legislature thus contemplated that additional Commission action is required at the end of the five (or eight) year period to cancel, alter, or otherwise invalidate the Certificate. No party has filed a complaint against Argosy, nor has the Commission brought any motion against Argosy seeking to alter its current Certificate. That Certificate, therefore, should remain valid and enforceable, and the lack of an express request for authority to serve a Kirkland to UW route in Seattle Harbor Tours' Application reflects this interpretation of the statute and respect for Argosy's Certificate.

The circumstances of this case further complicate the issues. Dutchman Marine filed its Application in November 2000, approximately one month before the expiration of the five-year initiation of service period, and Seattle Harbor Tours filed its Application in December. The Commission provided notice of both of these Applications, which informed the public and potentially interested

parties that one or more companies is seeking authority to provide commercial ferry service between Kirkland and Seattle. *See* Tr. at 940-43 (Allen). Seattle Harbor Tours believed that the Applications could be reconciled, along with the Application of Seattle Ferry Service, much as Seattle Harbor Tours, Seattle Ferry Service, and the City of Seattle reached a stipulation for ferry service across Lake Union. *See* In re Applications of Seattle Ferry Service and Seattle Harbor Tours, Consolidated Docket Nos. B-78811 & 78822. Seattle Harbor Tours and Argosy believed that the parties' efforts and limited resources were best devoted to attempts to resolve the issues informally, rather than making further filings with the Commission, and the parties continued to attempt to reach a global settlement until shortly before the hearings in this proceeding began.¹ As a result, Argosy did not file for an extension of its current Certificate, nor did Seattle Harbor Tours request to amend its Application to expressly request authority for a Kirkland-UW route.

The public and potentially interested parties, as well as the Parties to this proceeding, nevertheless were given notice that commercial ferry service between Kirkland and Seattle is at issue before the Commission. Commission rules require that the Commission "send a notice of each application for certificated commercial ferry service . . . with a description of the terms of that application" to all interested and potentially interested persons. WAC 480-51-040(1). The Commission distributed notices for Dutchman Marine's Application and for Seattle Harbor Tours' Application, specifying only the authority each company expressly requested. While such notices generally may describe the "terms" of the application, the notice of Seattle Harbor Tours' Application

¹ Dutchman Marine apparently agreed, as demonstrated by the fact that many of the documents Dutchman Marine introduced in support of its Application were dated the week before the hearings began. *E.g.*, Ex. 116 (Bareboat Charter Contract dated June 7, 2001); Ex. 119 (revised financial statement dated June 7, 2001); Exs. 143-45 (redacted loan agreements with execution dates in June

did not include Seattle Harbor Tours' express contention that it (or more accurately Argosy) already has authority and intends to provide commercial ferry service between Kirkland and UW. Commission staff's witness agreed, however, that there is no *practical* distinction between a notice that Dutchman Marine is seeking authority to provide ferry service between Kirkland and Seattle and a notice that Seattle Harbor Tours seeks such authority. Tr. at 943 (Allen). As a practical matter, therefore, the fact that the *notice* of Seattle Harbor Tours' Application did not include the issue of Kirkland-Seattle commercial ferry service should not preclude Seattle Harbor Tours from protecting the interests expressed in its Application by seeking such authority in this proceeding.

Using the Commission's notice to preclude Seattle Harbor Tours from seeking authority to provide commercial ferry service between Kirkland and UW in this proceeding would be inconsistent with the public interest. In addition to the circumstances described above, undisputed evidence presented in this proceeding demonstrates that Argosy, Seattle Harbor Tours' general partner, has made diligent and substantial (if unsuccessful) efforts to overcome governmental and community obstacles and to initiate commercial ferry service between Kirkland and UW. Tr. at 856-67 (Blackman); Exs. 203-10. Argosy fully intends to continue to work to overcome these obstacles and hopes to be able to participate in commercial ferry service between Kirkland and UW some time in 2003. Tr. at 866-67. Even if the Commission extended Argosy's current Certificate for the maximum three years authorized in the statute, however, all government, community, or private property issues may not be resolved before the end of 2003. Under those circumstances, the statutory period would expire before Argosy could initiate service, despite the time, resources, and considerable effort Argosy has expended to make commercial ferry service a reality on Lake Washington.

2001).

Accordingly, Seattle Harbor Tours proposes that the Commission establish the following procedures to recognize the intent of Seattle Harbor Tours' Application and to further the public interest. The Commission should construe Seattle Harbor Tours' Application to include a request for authority to serve a route between Kirkland and UW and should permit Seattle Harbor Tours to amend its Application to provide any additional information necessary to support an express request for such authority. If the Commission permits such an amendment, Argosy would stipulate to cancellation of its current certificate to provide commercial ferry service between Kirkland and Seattle effective on a grant of a Certificate to Seattle Harbor Tours to serve a Kirkland-UW route. The Commission could then provide notice of the amended request for authority to serve a Kirkland-UW commercial ferry route and allow any interested party other than the Parties in this docket to provide any comment. If the Commission receives no such comments, the Commission should grant a Certificate to Seattle Harbor Tours authorizing it to provide commercial ferry service between Kirkland and UW based on the amended Application and the record in this proceeding. In the unlikely event that the Commission receives comments on the amended application from other parties, the Commission could reopen this proceeding or take whatever additional procedural steps may be necessary to receive and consider those comments.

These proposed procedures would recognize Seattle Harbor Tours' intent and the efforts that Argosy (and Seattle Harbor Tours) have made over the last five years to initiate commercial ferry service between Kirkland and UW. The proposal would also ensure strict compliance with the Commission's notice requirements, would not prejudice Dutchman Marine or any other party – particularly if, as discussed in more detail below, the Commission concludes that a Kirkland-UW route does not substantially overlap with a Kirkland-Leschi route – and would avoid additional proceedings

with respect to Argosy's current certificate. Seattle Harbor Tours, therefore, recommends that the Commission adopt this proposal.

2. Seattle Harbor Tours' Proposed Kirkland-UW and Renton-UW Routes Do Not Substantially Overlap or Duplicate Dutchman Marine's Proposed Kirkland-Leschi and Renton-Leschi Routes.

The legislature has authorized the Commission to grant Certificates for commercial ferry service but has not authorized the Commission to grant multiple Certificates for overlapping or duplicative service. *See* RCW 81.84.020(1). Seattle Harbor Tours proposes to provide commercial ferry service between Kirkland and UW and between Renton and UW. Dutchman Marine applied for authority to provide service between Kirkland and Seattle and between Renton and Seattle but proposes actually to provide service only between Kirkland and Leschi and between Renton and Leschi. The actual routes each Applicant proposes to serve do not substantially overlap or duplicate each other. The Commission, therefore, should not preclude either Applicant from serving its proposed routes by granting overbroad authority to the other Applicant.

The primary purpose of the routes Seattle Harbor Tours has proposed between Kirkland and UW and between Renton and UW is to establish commercial ferry service between the communities on the east side of Lake Washington and UW. Tr. at 841-42 & 844-46 (Blackman). Dutchman Marine has proposed routes that primarily seek to connect the communities of Kirkland and Renton with the Seattle downtown core. *E.g.*, Tr. at 569-70 (Daniel Dolson). Based on the Applicants' respective business plans, the potential overlap of their respective routes is "minimal" for their proposed Renton routes and "less than 20%" for the Kirkland routes. Tr. at 842 & 844-45 (Blackman).

Dutchman Marine disagrees, contending that routes from Kirkland or Renton to UW could be used to access the same Seattle central business district that Dutchman Marine proposes to target. *E.g.*

Tr. at 575-79 (Daniel Dolson). Dutchman Marine's own witness failed to support that contention, testifying that there is "a good bit of difference" between the proposed routes and that "if somebody is going to take a ferry to the University of Washington, its likely that they're going to the University of Washington area." Tr. at 577 (Daniel Dolson). With respect to the Renton routes in particular, Mr. Dolson conceded that a person headed from Renton to downtown Seattle who is given a choice between taking a ferry to UW or to Leschi "would probably choose to go through the Leschi terminal" because "it takes less time to get to downtown Seattle through the Leschi terminal than it would through the University of Washington." *Id.* at 576.

Mr. Dolson also gave conflicting testimony on this issue. Mr. Dolson was unconcerned with the possibility that Seattle Ferry Services' proposed route from Port Quendall to South Lake Union would overlap with Dutchman Marine's Renton route if Renton bus service were expanded to include Port Quendall. Mr. Dolson testified that "[i]t's very conceivable that new bus routes could be put in, but I'm not going to try to project out what Metro is going to do." *Id.* at 559. In sharp contrast, Mr. Dolson was very concerned that "if a light rail station were put in at the University of Washington . . . it could significantly impact, I mean make the Kirkland to Leschi route impractical or uneconomically feasible because of the excellent connection to downtown Seattle," even though Mr. Dolson acknowledged, "It's many years away until there's light rail, if it happens, who knows how it's going to develop." *Id.* at 594. If Mr. Dolson is not concerned about "very conceivable" future Metro bus routes, he should have no concern with future construction of a light rail station when light rail is "many years away . . . if it happens" at all.

Not only is Mr. Dolson inconsistent in evaluating the likelihood and impact of future transportation developments, but his market evaluation conflicts with his prior testimony about

Dutchman Marine's proposed ferry service. Mr. Dolson testified that the major benefit of private ferries over other forms of transit is being on the water, comfortable, and out of rush hour traffic. *E.g., id.* at 128. Mr. Dolson also testified that Dutchman Marine's proposed service is not another form of mass transit but a "premium alternative" form of transportation with amenities for which its targeted customers are willing to pay a higher price. *E.g., id.* at 264 & 267-70. Yet Mr. Dolson claims to fear that too many people would prefer to take a 28 minute ferry ride from Kirkland to UW and a long Metro bus ride to downtown Seattle, rather than take a 23 minute ferry ride from Kirkland to Leschi and a short ("11 minutes . . . or less") Metro or Dutchman Marine shuttle to downtown Seattle. *See Tr.* at 455-56 (Fuller); Dutchman Marine Vessel Travel Time Distance Table. Particularly when Dutchman Marine proposes a faster, "premium service" rather than "mass transit," as Mr. Dolson testified, it cannot plausibly claim that its target market for such premium service would prefer an alternative that takes longer and incorporates a greater component of mass transit.

Dutchman Marine's genuine concern appears to be that it would have no alternative docking point if it were unable to obtain rights at Leschi and Seattle Harbor Tours were authorized to provide commercial ferry service to and from UW. *See Tr.* at 782-84 (Daniel Dolson). Dutchman Marine thus effectively requests a grant of authority to serve four distinct routes (Kirkland-Leschi, Kirkland-UW, Renton-Leschi, and Renton-UW), even though it plans to serve only two of those routes. Such a broad grant of authority is not in the public interest, particularly if another applicant seeks to serve the two routes that Dutchman Marine does not intend to serve. Dutchman Marine has determined that it is more likely to obtain rights to dock in Leschi than at UW and has developed its business plan around providing service using that dock. *E.g., Tr.* at 578 (Daniel Dolson); Ex. 116 (Bareboat Charter Contract) (requiring docking in Leschi). Seattle Harbor Tours has made a similar decision with respect

to providing commercial ferry service to and from UW, which is the focus of Seattle Harbor Tours' business plan. *E.g.* Tr. at 840-46 (Blackman). Any provision of commercial ferry service by Dutchman Marine between Kirkland or Renton and UW would be fundamentally inconsistent with Dutchman Marine's business plans and the record evidence it introduced to support its proposed routes. Moreover, because neither company has obtained docking rights in either location, both companies risk the possibility that they will not be able to obtain those rights. Dutchman Marine is not entitled to hedge its risk by obtaining authority to dock at UW just in case it is not able to dock at Leschi, when the effect of granting such authority would be to deny commercial ferry service to the UW community and to preclude Seattle Harbor Tours from providing that service.

Routes from Kirkland and Renton to Leschi and from Kirkland and Renton to UW serve distinct markets on the west side of Lake Washington. Seattle Harbor Tours has requested authority to serve the UW routes. Dutchman Marine seeks authority to serve the entire west side of the lake while intending to serve only the Leschi routes. The legislature has delegated the power to the Commission "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.*" RCW 81.84.020 (emphasis added). The Parties have already agreed in the partial Settlement Agreement that the route Seattle Ferry Service proposes to serve between Port Quendall and South Lake Union does not overlap with the Renton-UW and Renton-Leschi routes. Consistent with that Agreement, the Commission should grant Seattle Harbor Tours authority to serve the UW routes and should not grant Dutchman Marine any greater authority than to serve the Leschi routes.

3. The Commission Should Refuse to Grant Authority at This Time to Either Applicant for Routes Between Bellevue and Seattle and Between Kenmore and Seattle.

In contrast to the Kirkland and Renton routes, both Seattle Harbor Tours and Dutchman Marine have proposed routes between Bellevue and UW and between Kenmore and UW. These routes completely overlap, precluding a grant of authority to both Applicants. Rather than grant Certificates to one Applicant or the other, however, Seattle Harbor Tours recommends that the Commission refuse to grant any authority to serve these proposed routes at this time.

Both Seattle Harbor Tours and Dutchman Marine do not anticipate providing service between Bellevue and UW before 2005 or 2006 – almost five years after the date of any Certificate the Commission could grant. Even those dates, however, are overly optimistic in light of the testimony of the Bellevue witnesses detailing the substantial and lengthy processes required before any commercial ferry could operate in Bellevue. Tr. at 798-826 (Paine & Peterson); Tr. at 843 (Blackman). In addition, the timing and ability of Dutchman Marine to serve the proposed Bellevue to UW route would depend on the success of Dutchman Marine's operations on its other proposed routes, *see, e.g.*, Tr. at 185 & 209-12 (Dolson), which as discussed in more detail below, is subject to considerable uncertainty. The same is true of the proposed Kenmore to UW route, which again neither Applicant anticipates serving before 2004 and where potential development, including docking facilities, have yet to be established. Tr. at 185 (Daniel Dolson); Tr. at 218-24 (Hamilton); Tr. at 842 (Blackman).

The record evidence thus supports the conclusion that commercial ferry service is unlikely between Kenmore and UW, and cannot be initiated between Bellevue and UW, within the statutory five-year period, and may not be possible even within the eight year maximum permitted under RCW

81.84.010(2). Rather than grant either Application for these routes under these circumstances, the Commission should deny both Applications until such time as an applicant can demonstrate with reasonable certainty that it can and will initiate commercial ferry service on those routes within the statutory time period.

B. The Commission Should Grant the Application of Seattle Harbor Tours and, to the Extent Necessary, Should Deny the Application of Dutchman Marine.

1. Seattle Harbor Tours Has the Financial Resources and Experience to Provide Its Proposed Commercial Ferry Service.

The legislature has established the following criteria for the Commission to consider when evaluating applications for commercial ferry service:

Before issuing a certificate, the commission shall determine that the applicant has the financial resources to operate the proposed service for at least twelve months, based upon the submission by the applicant of a pro forma financial statement of operations. Issuance of a certificate shall be determined upon, but not limited to, the following factors: Ridership and revenue forecasts; the cost of service for the proposed operation; an estimate of the cost of the assets to be used in providing the service; a statement of the total assets on hand of the applicant that will be expended on the proposed operation; and a statement of prior experience, if any, in such field by the applicant.

RCW 81.84.020(2). The legislature essentially has directed the Commission to review and evaluate an applicant's financial resources and experience to determine whether the applicant will be able to provide financially viable commercial ferry service consistent with the public interest, convenience, and necessity.

Seattle Harbor Tours has presented more than adequate evidence to demonstrate that it has the financial resources and experience necessary to provide the commercial ferry service it has proposed. Seattle Harbor Tours and Argosy, its general partner, have been in operation since 1949, providing water tours, cruises, charters, and dinner boat excursions in the waters in and around Seattle, including Lake Washington. Tr. at 832-36 (Blackman). Argosy operates and maintains 12 vessels, three of

which are leased from Seattle Harbor Tours; employs up to 400 people; serves roughly 500,000 passengers per year; and generates over \$10 million in annual revenues with assets approaching \$20 million. *Id.* at 837-38 & 898. In addition, Argosy is very active in the greater Seattle area and other communities that border Lake Washington, participating on numerous boards and receiving prestigious awards and other recognition for its service to these communities. *Id.* at 838-40. Argosy is committed to providing sufficient funding, operational and administrative support, and other resources to enable Seattle Harbor Tours to initiate and provide the proposed commercial ferry service. *E.g., id.* at 852-53, 920-21 & 933. In addition, Seattle Harbor Tours provided specific financial information in its Application, including ridership and revenue forecasts, the value of the assets currently owned by the company, and the estimated costs of providing the proposed service. Exs. 201-02 (Application and Supplemental Responses); Tr. at 848-53 (Blackman).

Seattle Harbor Tours also has substantial experience in maritime operations in general and commercial ferry operations in particular. In addition to access to Argosy's vast experience, Seattle Harbor Tours has operated a commercial ferry service on Elliott Bay in Seattle during four of the last five summers as a demonstration project with King County and the City of Seattle. Tr. at 853-54 & 910-12 (Blackman). Not only has Seattle Harbor Tours obtained temporary Certificates from the Commission for this route but King County selected Seattle Harbor Tours from among three competing companies to provide the service this year. *Id.* at 855. The Commission has also granted Seattle Harbor Tours a Certificate to provide commercial ferry service between UW and South Lake Union. *See, e.g., id.* at 845.

Finally, the record evidence demonstrates the public interest, convenience, and necessity of the proposed routes, as well as the propriety of waiver of the 10-mile restriction on commercial ferry

operations. The evidence is uncontested that commercial ferry service on Lake Washington would provide a needed alternative to vehicle traffic, would improve air quality, and would benefit the communities on both sides of the lake that Seattle Harbor Tours proposes to serve. *E.g., id.* at 846-47; Tr. at 222-24 (Hamilton); Tr. at 347-49 (Underwood); Tr. at 361 (Allen); Tr. at 374-75 (Waithe); Tr. at 393-95 (Layzer); Exs. 204-07. The Washington State Ferry System (“WSF”) has also stated that Seattle Harbor Tours’ proposed commercial ferry service will not have a significant impact on WSF and that it has no objection to waiver of the 10-mile restriction. Ex. 127 (WSF letter).

Seattle Harbor Tours has the demonstrated financial ability and experience to provide the commercial ferry service it has proposed, and the record evidence fully supports the conclusion that the service is consistent with the public interest, convenience, and necessity. The Commission, therefore, should grant Seattle Harbor Tours’ Application, including issuing Certificates to Seattle Harbor Tours for Kirkland-UW and Renton-UW routes as discussed above and, as discussed below, for Kenmore-UW and Bellevue-UW routes if the Commission grants any authority to provide service on those routes at this time, along with waiver of the 10-mile restriction for these routes.

2. Seattle Harbor Tours Possesses Superior Financial Resources and Experience and Is Better Able to Provide Commercial Ferry Service on Any Overlapping Routes.

Seattle Harbor Tours takes no position on whether the Commission should grant a Certificate to Dutchman Marine for any route that does not overlap with, or preclude Seattle Harbor Tours from serving, a route that Seattle Harbor Tours has proposed to serve. If the Commission decides to grant a Certificate for any route that both companies propose to serve, however, the Commission should grant that Certificate to Seattle Harbor Tours. Seattle Harbor Tours’ financial resources and experience are vastly superior to those of Dutchman Marine, and Seattle Harbor Tours is far better positioned than

Dutchman Marine to provide commercial ferry service on the proposed routes.

In sharp contrast with the proven track record of Seattle Harbor Tours and its general partner Argosy, Dutchman Marine is a start-up company, and it and its single member Daniel Dolson have no experience with commercial ferry operations or with operating a maritime passenger services company. Tr. at 108 (Daniel Dolson). Indeed, Mr. Dolson's only experience in starting and running any business was his involvement in a "relatively simple" radio station operation under an FCC educational license while he was in college. *Id.* at 242-43. Mr. Dolson has retained the services of others who have experience in the *technical* design and operation of private commercial ferries, but the participation of those individuals does not assure the *financial* success or viability of Dutchman Marine's proposed ferry service or the company itself. Similarly, Dutchman Marine's financial expert has no experience with commercial ferry operations and relied exclusively on ridership and revenue information provided by Mr. Dolson and market research data that has no basis in actual experience in commercial ferry business operations. Tr. at 698-700 & 709-10 (Hibma); Tr. at 201 (Daniel Dolson); *see* Tr. at 449-51 (Fuller) (reviewed but was not involved in ridership calculation methodology).

The source and nature of capital and operating funding is critical to evaluating a start-up company application to provide commercial ferry service. Dutchman Marine proposes to rely on loans totaling up to \$1.2 million from three individuals who are Daniel Dolson's friends or family members. Tr. at 119-20 & 247 (Daniel Dolson); Exs. 143-45 (redacted loan agreements). A bank loan, however, would be considerably less expensive and would be the more normal means of financing Dutchman Marine's proposed operations. Tr. at 870 (Blackman). Dutchman Marine's decision to rely on more costly private individual financing demonstrates either a lack of financial acumen or the inability to obtain bank financing. At best, the result is a record devoid of any evidence that an independent and

experienced financial entity reviewed Dutchman Marine's business plan and is willing to risk its own funds to finance that plan.

Nor would \$1.2 million be sufficient to fund Dutchman Marine's business plan. Tr. at 871 (Blackman). Dutchman Marine's revenue assumptions and figures are simply unrealistic. Dutchman Marine projects that its ridership and revenues will increase almost 1,000% in the first year of operation. Ex. 149 (revised pro forma financial statement). The company characterized such growth as "conservative" based on market research, but Dutchman Marine produced no evidence that *any* start-up business, much less a commercial ferry operation, has achieved or could reasonably expect to achieve anything close to that level of growth in its first year of operation. To the contrary, the record evidence reflects that commercial ferry revenues during initial operations have been, or are anticipated to be, much less than far more conservative estimates. Ex. 208 (Trans-Lake Washington Ferry Project Advisory Committee Report); Ex. 108 (JJMA White Paper) at 10-17 (forecasting annual revenues for trans-Lake Washington ferry service of \$188,056); Ex. 110 (City of Seattle Transportation Strategic Plan) at 40 (discussing Elliott Bay Water Taxi experience); Tr. at 527-29 (Daniel Dolson) (same). Even tripling the revenues forecast in the JJMA White Paper to account for the higher fare and concession revenue Dutchman Marine anticipates, the resulting revenue forecast of \$564,168 would be less than 32% of the \$1,773,517 that Dutchman Marine has projected. That difference alone would exceed the \$1.2 million loan commitments, resulting in losses that Dutchman Marine does not have the financial resources to cover.

Dutchman Marine also proposes to rely on revenues from concessions and from chartering its vessel on weekends. Exs. 149 & 146 (revised pro forma and consolidated financial model summary); Tr. at 216-17 (Daniel Dolson); Tr. at 690-91 (Hibma). Indeed, Mr. Dolson testified that concession

sales are “what make this system viable.” Tr. at 217. Again, however, Dutchman Marine’s revenue projections are vastly overstated. Dutchman Marine projects that it will realize \$1.65 per passenger in concession sales, which “would be unheard of on a 30 minute [commercial ferry] route” in this area. Tr. at 888 (Blackman). Dutchman Marine’s estimate is overstated “by a factor of at least \$1” based on the Seattle area-specific experience of Argosy, for which passenger vessel concession sales are an “extremely important part of [its]business,” and adjusting that assumption would result in a revenue reduction “in excess of \$200,000.” *Id.* at 868. Dutchman Marine also projects annual revenues from charter services of approximately \$380,000, Ex. 147 & Tr. at 696 & 713 (Hibma), or \$7,300 per weekend, which is wholly unrealistic for the vessel Dutchman Marine intends to use. Tr. at 871-72. “The Victoria Clipper operates catamarans of that kind, and they don’t even try to charter them, because they’re not desirable from a customer standpoint to charter.” *Id.* Revising Dutchman Marine’s first year revenue projections to account for more realistic concession and charter revenues, as well as the more reasonable farebox revenues discussed above, would result in a total loss of over \$1.7 million during the first year – over \$500,000 more than the \$1.2 million loan commitments.

Dutchman Marine not only overstates its potential revenues but it fails to properly account for all of its costs. The revised Consolidated Financial Model (Ex. 149) excludes the costs for Metro bus service, even though the \$5 fare includes that service and the Metro bus service costs would be included in the financial model of an unregulated company. Tr. at 690-92 & 705-08 (Hibma). The Consolidated Financial Model Summary (Ex. 147) includes \$395,000 in Metro bus service costs, but Dutchman Marine offsets these costs with the overstated charter revenues discussed above. *Id.* at 692-97. Dutchman Marine also fails to include any loan payments during the first eighteen months of operation, even though Dutchman Marine will need to borrow at least \$450,000 in loans prior to

beginning operations and the loan agreements require annual repayment installments. The result is an underestimate of costs during the first year of \$137,000 in loan payments. *Id.* at 710-12. The addition of these loan payments during the first year would increase Dutchman Marine's total loss to almost \$1.9 million – over \$650,000 more than the \$1.2 million loan commitments, Dutchman Marine's sole source of financing.

Accordingly, Dutchman Marine has failed to demonstrate that it “has the financial resources to operate the proposed ferry service for at least twelve months” with respect to its initial planned service between Kirkland and Leschi. RCW 81.84.020(2). Dutchman Marine's ability to provide service on its other proposed routes depends on generating sufficient revenues from its initial Kirkland-Leschi route. *E.g.* Ex. 147 & 149; Tr. at 209-12 (Daniel Dolson). Dutchman Marine obviously cannot fund additional routes if it does not generate revenues in excess of costs from its proposed Kirkland-Leschi route. Dutchman Marine thus has failed to demonstrate that it has the financial ability and experience to provide commercial ferry service on any of the routes in its Application.

Seattle Harbor Tours, in sharp contrast, is a well-established company with the demonstrated financial ability and experience to provide the commercial ferry service it has proposed to provide on Lake Washington. Even if the Commission were to determine that Dutchman Marine meets the minimum statutory threshold for financial fitness under the statute, Dutchman Marine's qualifications cannot compare to Seattle Harbor Tours. Seattle Harbor Tours, therefore, should be granted the Certificate for any proposed commercial ferry route on Lake Washington that the Commission decides to award at this time to only one of the two Applicants in this proceeding.

III. CONCLUSION

Accordingly, the Commission should authorize Seattle Harbor Tours to provide commercial

ferry service between Kirkland and UW and between Renton and UW and should waive the 10-mile restriction on those routes. The Commission, however, should refuse to grant a Certificate to either Applicant for routes between Bellevue and UW and between Kenmore and UW. If the Commission determines that the Applicants' proposed Kirkland or Renton routes overlap or that it will grant a Certificate for the proposed Bellevue or Kenmore routes, the Commission should find either that Dutchman Marine has failed to demonstrate sufficient financial fitness and experience to serve the proposed routes or that Seattle Harbor Tours has superior financial fitness and experience, and the Commission should grant Seattle Harbor Tours' Application to serve those routes.

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By _____
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